GIVING SUBSTANCE TO POSITIVE RIGHTS: INTERPLAY OF LAW, ECONOMICS AND POLITICS

Thesis submitted to Jawaharlal Nehru University
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DOCTOR OF PHILOSOPHY

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DECLARATION

I, Naimitya Sharma, do hereby declare that this thesis entitled, **"Giving Substance to Positive Rights: Interplay of Law, Economics and Politics"** is the result of the research work undertaken by me and is being submitted in partial fulfillment of the requirements for the award of the degree of **Doctor of Philosophy (Ph.D)** of Jawaharlal Nehru University, New Delhi under the guidance and supervision of Prof. Jaivir Singh & Prof Niraja Gopal Jayal. This is my original work. I further declare that this Thesis has not been submitted either in partial or in whole for any other degree or diploma of this University or of any other University or Institution.

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This thesis titled **"Giving Substance to Positive Rights: Interplay of Law, Economics and Politics"** submitted by Naimitya Sharma, Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi, for the award of the degree of Doctor of Philosophy, is an original work and has not been submitted so far in part or full, for any other degree, diploma of any university or institution.

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Chapter 1

Introduction

Positive Rights are hosts of aspirational aspect of governance. These rights can also be thought of as responding to helplessness. A pure positive moral right, in an abstract world, can be imagined as a case of pure helplessness on part of the claimant, which in turn generates equal amount of pure empathy in all bystanders and thus is supplied with the duty of aid seamlessly by anyone and everyone. But in reality pure positive rights might not exist. In reality even if a pure positive moral right exists, it might not get delivered by a duty of aid as there are complex situational variables working on the ground. Many a times one hears from the media sources that a person bled to death when onlookers filmed the event in their phone cameras. The working of empathy even in an interpersonal space is very complex. The treatment meted out to children, by their own parents indicate at times that in fact, empathy might be the most scarce commodity (value). Moving from the interpersonal to the social and political space, makes positive claims/rights even more complex. The coming into force of utilitarian calculations of political capital, economic growth rates, legal precedent, logics of moral philosophy, the common good and other such concepts make positive claims/rights of people reeling under economic depravity, unemployment, illiteracy and rampant environmental externalities even more complicated. The desire to save governance structures from the 'inefficiencies' caused by 'subsidies' on goods like education, health, agricultural infrastructure and other public goods makes positive claims/rights qualify as demands for freebies under a populist and paternalistic relationship between the government and citizens. While considering positive claims as freebies can be one of the objections put to positive rights, there are many more grounds to reject positive rights. Its nature itself is one of the most important grounds to reject positive rights. These rights are attached to scarce resources like taxes, and property rights and any claim at redistribution is going to generate the natural questions of distributional efficiency and justice concerns related to the act of 'taking from one and giving to another'. Moreover, who is the point of duty is always a point of contention. But even with these objections and

rejections, positive claims/rights remain present in the public sphere of the modern world.

This thesis is an attempt to look into the working of positive rights coming into force in India, especially in the millennial decades of 1990-2000 and 2000-2010. These two decades, witnessed the legislation of right to education, forest rights of forest dwellers, right to information, right to work (MGNREGA) and partial fulfilment of the right to food. Not all these rights are discussed in detail and the focus is not just on the millennial decades. This thesis attempts to find out the links between the rights declarations in millennial years with the developments which seem to have led to these declarations. The link backwards becomes visible when one gets into the details of these declarations. For example a right to education came into existence with a law specifying the duties of state and parents in the year 2010, but the backward linkage of this right goes back to judicial declaration of the right to education in 1993 and further back to the inclusion of the right to education with a deadline of 10 years in the constitution as a directive principle of state policy. A probe little further by scholars has reported that the right to education was an important constituent of the imagination of *swaraj* during the freedom struggle. Such linkages of a right are not uncommon as rights and especially positive/socio-economic rights are ever evolving. When one traces the rights story backwards in the governance of India, even more interesting lessons emerge. One of which is that the judiciary which seems to be a votary of positive/socio-economic rights in recent/contemporary times has not held a similar position always. In the pre-emergency era judiciary was reading directive principles and fundamental rights in a strict rival-concepts sense. It is only later that the judiciary started to see and express the complementarity and supplementarity between these two categories. This again makes for an interesting site of observation. The change in judicial position on interpretation on rights is an important focus of this thesis. The declarations of rights in the later period are seen as the implication of this change in judicial position. Tracing the linkages backwards one finds that the planning process in the initial two three decades or the pre-emergency period in India utilised directive principles as the purported aim of the entire planning process. The 'socialist way of life' was the clarion call and the directives were imagined as the goals to be achieved. Such centrality of seemingly positive claims/rights in the pre-emergency era in the governance of the nation was also not successful in giving

substance to a right like the right to education. This is another important site of observation. This thesis is thus more of an analytical work on what leads to the positive rights coming into prominence in the millennial years, then being a work on the how these rights are legislated in the millennial years.

This thesis is divided into seven chapters. The first chapter is the introduction to the thesis. The second chapter deals with the conception, imagination and problems related with positive rights in general. Theoretical objections, and rejections to the idea of positive rights are collated in this chapter and with the help of the site of human rights and socio-economic rights, an attempt is made to show the complexities inherent in the conception of positive rights and the complexity associated with applying these rights into a structure which is prominently based in negative liberty conception. This chapter also identifies the different phases in which the development of positive rights takes place in India. There are three phases identified. These phases are further discussed in detail in the next three chapters. The first phase (chapter 3) is the one related with pre-independence invocations of rights to help people imagine an alternative to the colonial government and the institutionalisation of these imagined rights into the constitution of the country in the post-independence scenario. This phase deals with what happens to positive rights in this twin process of imagination and relegation and how the promises made in the pre-independence scenario were made subject to the economic and technocratic development of the country. Positive rights as directive principles were utilised heavily to garner legitimacy for the centralised planning process. The problems of the planning process with respect to positive rights are discussed and it is argued that the phase provided restricted grounds of interplay. The second phase (chapter 4) imagined is the one where positive rights inherent in the Directive Principles of State Policy come in conflict with the Fundamental (negative) Rights. This conflict of the idea of rights is an institutional conflict as on one side is the Executive/Legislature was trying to enforce the desires inherent in positive rights and one the other hand Judiciary, was trying to protect fundamental right to private property. This phase is traced till the point emergency is introduced by the executive and the judiciary at the end of this conflict takes the control over the amending power of the parliament and in the process appears to have taken defining control of the positive rights. Judiciary and Executive/legislature seem

to have undergone an institutional bargain at the close of this institutional conflict where the judiciary gained the 'custody' of the constitution through the enunciation of the 'basic structure doctrine' and the executive/legislature succeeded in removing the right to private property as a fundamental right. The third phase (chapter 5) is the one where positive rights are declared by the judiciary most of the times under the PIL jurisdiction and with the help of or on the basis of the wider reading of the right to life (Article 21). This phase is observed to have been functioning on the tripartite force of non-rival reading of directive principles and fundamental rights, the wider reading of right to life, and the invention of the public interest litigation (PIL) by the judiciary. In this phase judicial interpretation of two rights are discussed, Right to Education and Right to Food to try and observe the process of these rights getting declared by the judiciary.

The purpose of segregating developments over positive rights into three phases is to express the developments in a clearer manner and also to show that there has been an institutional development of these concepts. With changes in institutional interpretations of these rights affecting the journey of these rights and the development in the idea of these rights impacting institutional structures (even if ever so slightly). The learning from the theoretical and conceptual underpinnings of positive rights reveal that as these rights do not naturally inhabit the world of negative liberty based legal, political and policy infrastructure and as these rights are a force unto themselves (being useful for rulers and the ruled alike), there coming into force can neither be natural nor it can be avoided, which ensures that when these ideas do get taken onboard, there will be interplays, or that these ideas can be taken onboard only through interplays. Thus focussing on interplays is important to be able to analytically interpret these phases. This is attempted in Chapter 6, where the interplays between various players in the process of imagining-relegating, promoting-blocking, declaring-substantiating are identified and analysed. These interplays are observed to exist in the realm of law, economics and politics and are seen as the method through which positive rights, which do not sit in naturally in a negative liberty space of India, are given substance to. The interplays are identified as restricted in the first phase, institutional and protectionist in the second phase and multiplayer in the third phase.

Chapter 7 concludes the thesis with some critical observations about the process of interplays and the impact thereof on institutions of governance.

Chapter 2

Introduction to Positive Rights

Positive Rights have been thought about by different scholars in very different and interesting ways. While, some of them have argued that the classification of rights as positive and negative is not a useful categorisation. Others have argued that all rights are positive rights. Some scholars have looked at positive rights practically and given more importance to their instrumentality in the wholesome enjoyment of negative rights. Some scholars have tried to see rights as a wholesome category containing all kinds of duties, positive as well as negative and some others have gone in the direction of creating an intellectual category of a single wholesome right (right to development) that tries to capture the myriad hues of what is possibly imaginable under different rights. There is also the ubiquitous line of thought around human rights, which subsumes under it many conceptions of rights including positive and negative rights, and somewhere tries to develop the practical aspect of rights over and above the conceptual quagmire. There are, as indicated in this short paragraph, different ways of thinking prevailing on positive rights. In this chapter, I attempt to grasp some of these approaches, in terms of the concept of positive rights. The aim is to provide a fair picture and an overview of the literature on positive rights. Another attempt of this chapter is to grasp the conception of positive rights as it exists, with the aim of analytically indicating the implications of positive rights. In this exercise, the nature and types of positive rights/claims possible is an important question to be dealt with, along with the different conflicts that these rights can fall into with the negative liberty based economic and legal infrastructure of modern, democratic, constitutional systems of the State.

2.1 Positive Rights, Socio-economic Rights and Human Rights

Positive rights at the level of state are to an extent similar to second generation rights, which includes within its sphere, socio-economic claims of right to healthcare, housing, education, employment and adequate standard of living. All second generation rights might not be positive rights, as there could be a situation where the assertion of socio-economic rights means that the state does not interfere in the already established sphere of subsistence of people of a particular area or community.

Socio-economic claims that translate into State intervention for fulfilment of the concerned right can be thought of as positive rights. The first generation rights, which are negative rights, and have corresponding duties that demand omission of action are thought at times to be more important compared to positive rights, which are thought of as expensive and demanding. But in general, if the point of a right is to ensure that a certain choice can be exercised, then actually facilitating the exercise may sometimes be as important as not obstructing it.[1]

To begin with, one can try and see the similarity or distinction, if any, between positive rights and social economic and human rights. Many positive rights scholars prefer to use the terminology of 'socio-economic rights' or 'human rights'. The right to water, which can be thought of as a positive right, as it requires the issue of provision, can also be thought and expressed in the language of human rights. The right to work, which, might be a clear positive right (as it requires a duty of someone to provide work and employment opportunities), might also be expressed as a socio economic right, since it deals with the social and economic condition of the claimants. These intermingling of nomenclature can be thought of as efforts to ward off the theoretical, intellectual and ideological confusion over positive rights. Increasingly, positive rights are being replaced with social and economic and human rights, which are used to express positive claims. However, there does not appear to be sufficient evidence in support of this argument, but one can analytically observe if there are any similarities and differences in these nomenclatures.

First, it appears that social and economic rights and human rights are inclusive of positive as well as negative claims to rights. However, there is a tendency to associate social and economic rights with positive rights and human rights with negative rights. This is probably so because of the genealogical categorisation of rights into three generations of civil-political rights, social and economic rights, and cultural rights. In this genealogical categorisation, human rights are associated with civil and political rights, and social and economic rights with something over and above civil and political rights or negative rights. But this does not mean that social economic rights cannot include negative rights and human rights cannot include positive rights.

[1] Jeremy Waldron, 'Rights' in Robert E. Goodwin, Philip Petit and Thomas Pogge (eds.), *A Companion to Political Philosophy,* Oxford, 2007, p. 749.

> "While socio-economic rights are usually treated as "positive" rights, and as identifying "programmatic" goals for the government, such characterization is not quite accurate. The distinction between policy guidelines and rights *sensu stricto*, does not correspond to a distinction between socio-economic rights and civil-political rights (because the rights which apply to a socio-economic sphere may have a determinate content which imposes clear limits upon state action). Nor does it correspond to a distinction between "positive" and "negative" rights ("positive" rights may impose determinate limits upon state action, with the result that the failure to act may be unconstitutional). The positive/negative distinction, in turn, does not correspond to a distinction between socio-economic and civil-political rights (some civil and political rights may require positive state action; some socio-economic rights may demand state non-interference with individual action). It is therefore important to keep these three distinctions (determinate rights v. policy guidelines, socio-economic v. civil-political rights, and positive v. negative rights) separate."[2]

Sadurski's argument above indicates that as socio economic rights may demand non-interference from the state, and therefore, it would not be correct to consider them only as positive rights. However, there are many instances where socio-economic rights are expressed as the opposite of or something over and above negative rights. One such instance is reported below,

> "The classical liberal paradigm of statist protection of the so-called 'negative' rights, and market promotion of welfare, has now been overtaken by the legal protection of economic and social rights and the development of various institutional methods for their interpretation, enforcement, and measurement. Liberal markets and liberal democracies now coexist with economic and social rights."[3]

Here it is clearly expressed that "classical liberal paradigm of statist protection of the so-called negative rights" has..."been overtaken by legal protection of economic and social rights..." Thus the confusion is natural to exist. However, one can close the discussion by saying that social and economic rights consist of negative and positive claims and so is the case with human rights.

The relationship between human rights and social rights is also peculiar. It is a relationship which gets decided by the status of social (socio-economic) rights. These

2 Wojciech Sadurski, Social and Economic Rights, EUI Working Paper Law, No. 2002/14
3 Katharine G., Young, *Constituting Economic and Social Rights*, OUP, Oxford, 2012, p. 1.

"social rights are often alleged to be statements of desirable goals but not really rights".[4]

> "When the United Nations began the process of putting the rights of the Universal Declaration into international law, it followed the model of the European system by treating economic and social standards in a treaty separate from the one dealing with civil and political rights. This treaty, the International Covenant of Economic, Social, and Cultural Rights...treated these standards as rights – albeit rights to be progressively realized".[5]

One can observe here that the acceptance of anything positive, even in the form of social rights, gets incorporated in a separate instrument at the United Nations level and the realization of these rights are thought to be progressively feasible. They, in other words do not become rights by just declaration of being a right in an international rights instrument, which is followed by and agreed upon by hundreds of nations. Instead, these rights are often thought to be better left as declarations till they get 'realized progressively' or in other words, are able to create their place in the current order of things, since they do not fit naturally into the mainstream ideals of negative liberty. This status of social rights as some standards which need to be given access to through instruments other than the existing ones (negative human rights) and as some standards which are not to be realized immediately, but progressively, seems to be most likely, courtesy the nature of the these rights having resemblance to positive rights.

A similar distinction of negative fundamental rights and positive directive principles of state policy was undertaken by the constitution makers in India, where they created a non- justiciable category to house concerns of similar types. This differential status given to positive rights or rights resembling positive rights (such as socio-economic rights) indicates a distinction between negative and positive rights, a difference between negative rights and socio economic rights, the unease of positive rights sitting on to the negative liberty infrastructure and the possibilities of conflict and interplay in application of these rights. There is also an indication here that socio-

[4] Nickel, James, "Human Rights", in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Spring 2017 Edition), p. x

[5] *Ibid*., p. x.

economic rights, if not a complete conceptual substitute to positive rights, are at least used to host some positive rights.

With respect to human rights, a similar pattern can be observed. The ideals of human rights as incorporated in the International Human Rights Law "(a)t its formative stages...(were) concerned primarily with protecting individuals against the state's unchecked power".[6] This initial focus of the human rights paradigm was a function of the historical development of these ideals. The human rights ideals progressively gathered momentum on the basis of the infringements of the State of negative rights of individuals and communities alike.

> "The political origins of modern human rights law can be traced back to perceived oppression by the British Empire (the American Revolution) and the French monarchy (the 1789 Revolution), and more immediately to atrocities committed by Germany and Japan during the Second World War, and the Soviet Union during Stalin's reign. In each case, it was the state's injustice and depravity that inspired the need for legally protected human rights".[7]

Human Rights ideals, in the initial time period of their imagination and operations, were not concerned with social and economic deprivations, which are now an important part of human rights.

> "Private oppression, however widespread, and the more generalized horrors of poverty and deprivation did not generate equivalent momentum for complex reasons. Negative rights thus dominated early international legal instruments, and many of what are considered the core modern treaty based human rights are accordingly framed as negative."[8]

This slow and steady incorporation of positive rights in the human rights ideals is testimony to the closely intermingled journey of socio economic rights, positive rights and human rights. While positive claims/ rights are now hosted by human rights instruments, there aren't any distinctions or declarations of inclusion made. It is only by close scrutiny of the contents of these rights and corresponding duties that one can deduce their nature. "International human rights treaties do not explicitly dichotomize

6 Aaron Xavier Fellmeth, Paradigms of International Human Rights Law, 2016, p. 237.
7 *Ibid.*, pp. 237-238.
8 *Ibid*., p. 238.

rights into negative and positive categories, but the distinction is commonly inferred from the phrasing of most rights".[9]

Based on the analysis above, the category of human rights from the time of their conception might have comprised predominantly of negative rights, but progressively, it also included some positive flavoured rights, ideas and claims.

2.2 Positive, Negative Rights: Theoretical Contours

The distinction between negative and positive rights is inherent in the different types of duties associated within these two categories. With negative rights, duties embody characteristics of non-interference, and with respect to positive rights, that of interference. According to Charles Fried,

> "A positive right is a claim to something, a share of material goods, or some particular good like the attention of a lawyer or a doctor or perhaps the claim to a result like health or enlightenment- while a negative right is a right that something not be done to one, that some particular imposition be withheld."[10]

Fried is of the opinion that positive rights are "asserted to scarce goods and consequently scarcity implies a limit to the claim", whereas negative rights for him do not hold any limitation and the mechanism of non-interference and its simplicity makes it possible for having many negative rights without any one contradicting the other. On the other hand, positive rights face difficulty in practice because of the scarcity limitation. While Fried seems to be concerned about the nature of positive rights, there are some thinkers who are of the opinion that this categorisation of positive and negative rights is not very robust. Drawing out distinctions between the negative and positive rights is prevalent among the normative theorists adhering to libertarianism.[11] This desire for distinction between positive and negative rights of the libertarian theorists is probably because they have rejected the idea of positive rights and the kind of ideals or implications that positive rights represent. Apart from these rejections, there are different kinds of treatment meted out to the idea of positive rights. From clear cut rejection of the libertarians, to complicated (at times

[9] *Ibid*., p. 234.
[10] Fried, Charles, "Right and Wrong", HUP 1978
[11] Wenar, Leif, "Rights", in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Fall, 2015 Edition), p. x.

accommodative and at times oppositional) objections of legal and rights theorists and economists and finally to the efforts of guarded acceptance or at times 'sterilization' of the idea of positive rights by liberal theorists, the gamut of responses to positive rights is very wide and interesting. For these rejections, objections and sterilization, the site of these acts, it appears is also varied. At times the question about positive rights is situated in the site of human rights and at other times clarity around positive rights is sought in the sphere of constitutional rights and judicial review. The acceptance of positive rights, it appears, is not always for the intrinsic value of positive rights. The acceptance of these rights is at times in the service of negative rights, as these rights are thought to be necessary by some in proper enjoyment of negative rights and liberties. There is also a niche segment of scholars who have tried to see the relationship between separation of powers and positive rights without passing normative judgements about positive or negative rights.

Stephen Holmes and Cass Sunstein, (amongst the ones who object) argue that all rights are positive in nature as it takes effort on the part of state to enforce negative rights. More specifically, they argue that "(t)he financing of basic rights through tax revenues helps us see clearly that rights are public goods: taxpayer-funded and government-managed social services designed to improve collective and individual well-being. All rights are positive rights".[12] For Holmes and Sunstein, both positive and negative rights are public goods which require expenditure for maintenance or creation of institutions that protect or promote these rights and in that sense both these rights are actually positive as there is 'interference' of the State required in the form of expenditure.

At a different level, Henry Shue argues that all rights have three duties in common, which are protection, avoidance and aid. Shue further says that the distinction between positive and negative is not clear.

> "The common notion that rights can be divided into rights to forbearance (so called negative rights), as if some rights have correlative duties only to avoid depriving, and rights to aid (so called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided…it is duties and not rights that can be divided among avoidance, aid and protection. And this is what matters – every basic right entails duties of all three types…the very most 'negative'-seeming right to liberty, for example, requires positive

[12] Holmes, S., Sunstein C., *The Cost of Rights: Why Liberty depends on Taxes,* W. W. Norton & Company, New York, 2000, p. 48.

> action by the society to protect it and positive action by the society to restore when avoidance and protection both fail."[13]

Shue's argument, as mentioned above, is based on the understanding that it is duties that can be of different nature and not rights. He is of the opinion that the duties can be of avoidance, protection and aid. Shue addresses two kinds of basic rights, namely security and subsistence; and both these rights are thought of as having three kinds of duties associated with them. Sandra Fredman also enumerates three kinds of duties associated with both socio-economic and civil rights.

> "As recent analysis has shown, both civil rights and socio-economic rights give rise to a cluster of obligations: the primary duty whereby the state should not interfere with individual activity; the secondary duty whereby the state should protect individuals against other individuals; and the tertiary duty to facilitate or provide for individuals. Known as duties to respect, protect and fulfil, these duties are now expressly enshrined in the new South African constitution, and the International Covenant of Economic, Social and Cultural rights (ICESCR)."[14]

Fredman on the front of duties moves a step further up from Henry Shue to argue that there are three kinds of duties called primary, secondary and tertiary, which are respectively linked to acts of respect, protection and fulfilment, which match up to Shue's categorisation of avoidance, protection and aid, respectively. There are obvious benefits of keeping this flexible approach to understanding rights and especially the distinction of rights into negative and positive rights. One such benefit is pointed out by Aaron Xavier Fellmeth, where he argues that a nuanced usage of negative and positive paradigms can be instrumental in advancement of human rights based goals. His thesis is:

> "...the division of rights into negative and positive paradigms, if defined properly, offers a good deal of conceptual traction, but international human rights instruments and their authoritative interpreters do not always approach the distinction with a coherent theory of public welfare. Many decision-makers and scholars alike have succumbed to the lure of oversimplification, advocating the negative or positive paradigm as the exclusive ideal, when a more nuanced approach that uses sometimes one, sometimes the other, sometimes the two of them complementarily, can most effectively advance

[13] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, Princeton, 1980, p. 53.
[14] Sandra Fredman, 'Human Rights Transformed: Positive Rights and Positive Duties' in *Oxford Legal Studies Research Paper*, no. 38, August 2006, p. 3.

> the goals of the human rights system. Henry Shue's work has been justifiably influential on this score...".[15]

Fellmeth accepts that the there is some virtue in going after the distinction between the negative and positive paradigm and that it makes sense to root these distinctions in a theory of public welfare. Here he points towards the instrumentality of rights in general and positive rights in particular, in achieving egalitarian goals. However, he is of the opinion that flexibility and nuance in the usage of positive and negative paradigm is important and should not be given up for the supremacy of any one paradigm. To my mind the exercise of finding grounds of distinction between negative and positive is important to ensure that both the rights traditions can be understood in a better way and the complexities and virtues associated with each are not lost. In a legal, philosophic, economic and political milieu where negative liberty and negative rights are already placed in abundance and almost hegemonically, countering positive claims of people through application of non-interference, it becomes all the more important to seek clarity on the distinction of these two rights to enable oneself with the intellectual tools which can help in analysing the process and impact of giving substance to positive rights.

In the following section, I argue that the distinction between negative and positive rights is not robust, can possibly be off the mark. There are instances (as imagined also by Shue and Fredman) of rights where correlative duties have components of both negative and positive character. For Shue all rights have these duties, for Fredman all rights have these duties but duty of non-interference is primary and that of interference is secondary and tertiary (this hierarchical arrangement of duties is important and points towards the desire to 'sanitise and 'sterilize' positive claims before incorporating them into a format of rights which is generally based in negative liberty space). For Holmes and Sunstein all duties and thus rights are positive. The following pages look at this categorisation of duties into positive and negative, and, then into primary and secondary.

One can enter this debate by thinking about a right with the help of Shue's understanding, which is largely within the ambit of negative liberty. According to Shue, a moral right provides, a) rational basis for a justified demand, b) that the actual

[15] Aaron Xavier Fellmeth, *Op. Cit.*, 2016, p. 317

enjoyment of a substance be, c) socially guaranteed against standard threats.[16] To ascertain the kind of duties associated with rights and thus their nature, one needs to look at the source of the moral rights, which lies in the standard threats. Standard threats could be of two types; one, where the source of threat is clear (This is the case when these standard threats can be located either in the society or in the state); two, where the standard threats have multiple origins or are systemic. The first kind of standard threats which are inflicted by people around the claimant or the government and the source of origin of these threats is clear, gives rise to need of a duty where everyone around the claimant is expected to not interfere in the pursuits of the right holder. As the source of the threat can be pin pointed, the duty of non-interference can be effective in curbing any infringement. With the second kind of threats, which have multiple sources of origin or are systemic in nature, duty of positive action is required to ensure that the right holder gets his share of justified demands if the right is to be respected. The duty of positive action would come into place as the source of threat is not clear and thus its mitigation is not possible, or would not be complete in the sphere of the non-interference character of negative liberty. When the source of the threat is systemic, created invisibly by present regimes of laws, rules or social arrangements, any positive action which works either as arising from the duty of non-interference or works within the present regime of negative liberty would not be the appropriate response to the threat. A similar attempt at categorisation is observed by Fellemeth in the work of ECOSOC (The United Nations Committee on Economic, Social and Cultural Rights)

> "A critical analysis of ECOSOC's scheme reveals that what defines a right as negative or positive is not the necessity of action for the right's enforcement. Instead, it is the nature and source of the threat that the state must counteract that determines the type of right...if the state's duty is limited to restraining itself and its agents, then the duty is negative. But if the duty is to protect the right against exogenous threats, such as private actors or impersonal social or environmental forces, then the duty is positive. On this basis, negative and positive paradigms may be distinguished meaningfully".[17]

In this observation negative duty emerges where the government has to restrain itself or its agents, and positive duty emerges where the duty is against private actors or

[16] Henry Shue, *Op. Cit.*, p. 13.

[17] Aaron Xavier Fellmeth, *Op. Cit.*, p. 247

impersonal social or environmental forces. This is the same argument given by Sunstein and Holmes that even negative rights have positive duties. The protection against private actors can fall into negative rights, even when it has a positive duty of enforcing the non-interference. When standard threats are inflicted by known sources or people around the right holder the duty of non-interference can be thought of as having two components,

a) non-interference/avoidance in the pursuits of the right holder

b) non-interference generated protection/aid

Non-interference generated protection/aid could be any positive action that tries to work within the purview of negative liberty and thus tries to either contain interference or provide aid after interference. The idea is that the duty of non-interference gets transformed into a duty of protection/aid. This point is further explained with the help of Waldron's analysis of Homelessness below.

In his analysis of homelessness[18], Waldron argues that to do anything one wish to do, a place to do that work is required. Given the private property rule, if one is not free to be at a place, one is not free to do anything at that place. A homeless who is not free to be at any place is not free to do anything.

> "For the most part the homeless are excluded from all the places governed by private property rule… (and) increasingly in the way we organize common property" with rules that ensure limited access to these common property, "we have done all we can to prevent people from taking care of these elementary needs (such as need to use toilet) themselves, quietly, with dignity, as ordinary human beings"[19]

The remedy suggested by Waldron in this case is the creation of public toilets. He says "the generous provision of public lavatories would make an immense difference…and it would be a difference to freedom and dignity, (and) not just a matter of welfare…the homeless have freedom in our society only to the extent that our society is communist (common property wise)"[20]. I raise this issue here to see if the right to access to common property is a negative claim or a positive claim. The issue of homelessness also raises the claim for a place to live. I also raise this issue to

[18] Jeremy Waldron, 'Homelessness and the Issue of Freedom' in *UCLA L. Rev.*, vol. 39, 1991-1992.
[19] *Ibid*., pp. 302-21.
[20] *Ibid*., pp. 302-21.

see if a claim to access to common property by the homeless is the same as the claim to a place to live. Both these claims arise out of a) the need of the homeless to have a place to do what they want to do and b) the working of property rule which ensures 'a'.

The duty component in case of the homeless can be,

1) Positive/Protective action in the form of creation of common property like toilets and shelters
2) Aid for house or aid to enable the homeless to buy/rent a house.
3) Non-interference in pursuit of a private house.

It is clear that alone '3' does not ensure a house for the homeless. '1' would ensure access to toilets in the vicinity of where the homeless goes, shelter to sleep in the night and protection against vagaries of weather. However, freedom to be at a place at any time and to do as one wish to would not be ensured by '1'. What '1' provides is protection against the interference created by our property rule. '1' represents a protective duty generated out of the non-interference duty (against systemic forces that ensure homelessness) that should have been met. '1' is located in the space of negative liberty, and provides a charitable aid, a consol for the homeless for his state of affairs. If the pursuit of the positive liberty/freedom of the homeless is to be respected, the primary duty of aid which ensures positive liberty is not '1', although '1' is also a positive action. The primary duty of aid is represented by '2'. Even if we ensure '1', the need of '2' would still remain. This distinction between these two positive actions helps in understanding the nature of positive claims. '1' is a positive action, but it is primarily a negative duty. '2' is what ensures positive liberty and thus is the appropriate positive duty, if the positive right of the homeless to have a home is to be respected. This analysis helps in understanding that there could be two different kinds of positive duty/actions/interferences in a particular situation, and both might have different effects on the positive liberty of the individual. The duty to provide community toilets and shelter here does not promote positive liberty of the homeless and thus is not the ideal duty. This indicates the multiplicity of positive duties and also towards a possibility that a particular positive action might not be promoting positive liberty. The positive action that promotes positive liberty is the one that can be thought of as the most desirable.

When standard threat has an unknown source or the origin is systemic and thus the helplessness that is caused or would be caused will require positive action, the duty would again have two components,

a) Aid at the point of helplessness
b) Protection to ward-off helplessness in the future

c) To see how this distinction would help us in understanding particular rights, let us try and work out the nature of right to food, which, according to Shue would be a subsistence right. The right to food would have three components of duties,

a) Aid in the form of food or aid to enable a person to get food
b) Protection against falling into a situation where there is not enough food
c) Non-interference/avoidance in anybody's quest for food

It is evident that there are both positive and negative components in the right to food scenario. One could agree with Shue that the distinction between negative and positive is not well founded. But, a look at the primary duties, with respect to right to food, would make it clear that the distinction might very well have some basis to it. The primary duty in right to food is positive in nature, as without performing the duty 'a': Aid in the form of food or aid to enable a person to get food, all right to food claims cannot be met. The negative part of duty namely 'c' is not specific to right to food, but is an overarching duty related with negative liberty, which can possibly exist in the desire of rule of law. Since performing only 'c' would not feed the right claimants, 'a' and 'b' can be thought of as primary duties. As these are positive in nature, the right to food can be termed as being positive in nature. One could argue that performing 'a' alone does not ensure food to the claimant, as interference in the quest of food is still open. Although, in response it can be argued that without 'a', 'c' alone, cannot ensure the right to food. Moreover, it should be understood that the matter of access to food lies within the space of negative liberty, based on the performance of 'c'. The inability of a large number of people to not have the resources to access food takes the right to food claim into the positive liberty space. It is, therefore the right, which is location and context specific. The need of 'c' is now contingent upon performance of 'a', i.e. the need of non-interference would arise, when after aid claimants have food to access.

While we have some basis to look beyond Shue's claim that there is no distinction between positive and negative rights, one can further strengthen the argument by pointing out the pure cases of positive rights to ensure a further build up. Right to food had some negative duties as well. The space of negative liberty is quite overarching and a lot of positive rights would have one component of negative duties in them. However, there are instances where negative duties are completely absent. There are cases where, the standard threats are either systemic or natural. These could be instances of natural disasters, medical emergencies etc. In case of an earthquake, the primary duty is that of aid, so is the case with an accident victim's claim to emergency medical care.

It is not just the case that positive rights only have a negative duty component in them. Even when the space of negative liberty is quite pervasive, we have instances of negative rights where a component of the duty is positive in nature. To clarify this, let us look at the example of right of expression. The components of correlative duty could be,

a) Avoidance/non-interference in expression or pursuit of expression

b) Non-interference generated protection/aid against any interference

c) Pure aid against any disability to express oneself

Here performance of 'c' alone cannot ensure right of expression as even when a person is given aid to be able to express one self, he/she could be interfered upon.

With respect to 'b', it seems that it is a secondary positive component of a primary negative duty as it arises out of the duty of non-interference. Onora O'Neil calls it a second order obligation which has to be allocated to some institution of law enforcement to ensure that the right is enforced.[21]

It can be ascertained that 'a' and 'b' with a primarily negative nature of duty, make the right of expression primarily a negative right. Moreover, any positive action, which is to protect a negative right and is seen as important for enforcement of the negative right, might not actually be related with positive rights. It is actually a second order duty which exhibits itself as a positive act. The difference between positive duty

[21] Onora O'Neil, 'Dark side of Human rights' in *International Affairs*, vol. 81. no. 2, London, 2005, p. 428

of a positive right and positive duty related with a negative right is that the former is for ensuring positive liberty and the latter for negative liberty, marked by non-interference. The positive action in the form of law enforcement is to ensure that the negative liberty of the individual is not tampered with. The positive duty related with a negative right, which O'Neil has referred to as a second order obligation, has resonance with the duty of protection, in the three duty set presented by Henry Shue and Sandra Fredman. This positive duty related with a negative right, also resonates with the positive actions held responsible, by Sunstein and Holmes, for all rights to be positive rights.

I further take up two more examples where one has a component of negative duty and other is purely positive. These are rights to healthcare and rights to medical care in cases of emergency. The right to healthcare could have following components of duty,

a) Protection against externalities that diminish stock of health

b) Aid in the form of healthcare facilities or for enabling access to healthcare facilities

Here ‘a’ represents the negative duty and ‘b’ represents a positive component. Even if ‘a’ is ensured, ‘b’ might be required, as protection against externalities that diminish stock of health is not foolproof, and there are other sources, which create instances where health care is required. It is clear that ‘b’ is the primary duty and thus the right to healthcare is primarily a positive right.

With respect to right to medical care in cases of an emergency, the duty set might look like,

a) Aid in the form of medical care instantly

b) Protective duty to diminish instances of medical emergencies

Again, ‘b’ alone would not ensure that ‘a’ is not required. Aid in the form of medical care is the primary duty and thus right to medical care is a positive right.

If we extend the same analysis to a claim of well-functioning traffic signals, we see that this claim generates a primary duty of aid and not of non-interference. Everybody driving on the road seeks some mechanism through which they can be ensured that at a crossing of roads, the traffic is smooth. The primary issue here for a third party is not to sit back within the space of non-interference with regards to the traffic

movement, instead it is to intervene and ensure its smooth operation. This primary aid duty is visible when there is a traffic jam in a hilly area or in a city. Authorities primarily have to aid and guide the traffic flow to ensure it operates smoothly. Following this logic, the primary duty of aid is to ensure that helplessness in the form of traffic congestions are averted, and the traffic management or smooth functioning traffic lights are a positive claim.

The discussion above, adheres to Shue's distinction between subsistence and security rights, and the claim that there is no a clear distinction between positive and negative rights. One needs to see that positive actions in the case of security rights arise out of the primary duty of non-interference. To ensure that no body interferes with a person's security, the state provides aid. The primary duty here is not aid, but non-interference. Thus there is a clear space of negative rights, within this context.

There are subsistence rights, on the other hand with three kinds of duties that Shue enumerates, namely aid, protection and avoidance, work to ensure that a particular person doesn't reach a situation where they might not have the means of subsistence. If that person reaches that situation, the duty then would be of aid - of enabling. The duty of avoidance, of protection is carried out to ward off this situation; these duties arise from the primary duty of interference or of aid. If helplessness is present, it is met with aid; if it is prospective it is warded off through protection and/or avoidance. It is important to mention here that all the examples used herein, are not meant to establish a claim as a positive right. These examples are only to show that in an ideal or abstract world, if these claims are to be decided on the grounds of rights, there is then a possibility to distinguish these claims into positive and negative claims related with positive and negative rights and even to positive and negative liberty.

To establish that there are distinct positive and negative rights is important, so as to ensure that the negative rights, which were largely founded to keep the state at a distance, retain their place and positive rights make their place as an instrument to pull out claimants from situations of helplessness, which might not be resolvable anymore in the negative liberty space with the help of non-interference or non-interference generated positive claims, and whose resolution might be important for ensuring the positive liberty of the claimant.

There are two more important lessons that need to be recalled. First, the example of the negative right to expression reveals that there is difference in a positive action which is for enforcement of law that protects a negative right and a positive action, which is for promotion of positive liberty. The positive duty undertaken by the state for protection of negative liberty is distinct from positive duty, such as providing food articles for the hungry. This difference indicates the linkages between positive rights and positive liberty and negative rights and negative liberty. Second, is that two kinds of positive actions might bring a different kind of impact on the liberty of an individual. The provision of toilets and shelter for the homeless gives them a limited liberty space, while the provision of a house might widen this space. A particular positive action might be more desirable compared to the other in a positive liberty space. These two outcomes highlight that there is a strong link between positive rights and positive liberty. Thus it can be argued that positive rights are not just instrumental in better utilisation of negative rights but are possibly also a source of positive liberty themselves, and therefore have intrinsic value.

The discussions point towards a clear category of negative rights, and there is a clear distinction between the positive duty within the negative liberty space and a positive duty pertaining to a positive liberty space. On the basis of these findings one can possibly look beyond the claims that all rights are positive or all rights have both positive and negative duties.

The purpose of the discussions above is not to challenge the arguments of Fredman, Shue and Holmes & Sunstein alone, in order to establish the category of positive rights. Instead, it is to highlight the possibility that if these issues are to be dealt in the sphere of rights, it might be the case that the positive appearing duty of 'protection' is actually a second order obligation arising from the negative liberty nature of the said right. Thus a particular right might have both positive and negative duties, but whether it proves that all rights are thus positive or that the distinction between positive and negative is not robust doesn't necessarily flow from this. The right might have both positive and negative duties, but it might also have a particular 'primary' duty without which the right does not gain substance.

The another intention of this exercise which emerges as a by-product, is the important distinction between a positive duty associated with the idea of 'protection' of a negative right and a positive duty of 'aid' associated with the idea of positive right.

The positive 'protective' duty, which beckons for action or interference as opposed to omission of action or non-interference associated with a right (according to analysis here a negative right) has the potential to 'sterilise' a claim of a right as a positive right, since it maintains the link of rights with the moral and normative world. One can keep the focus on this seemingly positive duty and claim that positive obligations have been met through this duty. In reality this is enforcement of negative rights thereby, keeping the issue within the negative liberty space and peddling primarily negative rights as positive rights, keeping positive rights out of the ambit of enforcement. On the other hand, the positive duty of 'aid' gives a right the character of a positive right, by taking it into the realm of pure interference or commission of action in the form of delivery of a service or good.

With respect to positive rights one of the responses that are possible are acceptance of positive rights and this will require the duty of 'aid' to kick in. At another level one can out rightly reject positive rights which will require saying that the duty to 'aid' does not exist, is not universally applicable or is not feasible. At another level one can object to positive rights and one of the ways to do that is to object on basis of the quagmire of these duties of aid, protection and avoidance. It is time to have a look at some representative response to positive rights. In a way we have already dealt with the objections in the form of analysing arguments of Shue, Fredman and Holmes & Sunstein. To look at acceptance and rejection we will have to turn to others.

The site of infusion of positive rights is the legal world. Rights come into force when they are declared as rights bound by some law. This legal backing to a right can arise in a constitution, or in the international legal instruments. While constitutional law is considered to be real law and international law as soft law, it does not make any difference at this stage to see the rejections and acceptances of positive rights. The world of international law incorporates rights into human rights instruments. With respect to human rights as positive rights, Hayek and Nozick have out rightly rejected that positive rights are a possibility. For Hayek, positive claims are indeterminate as universal claims since “there is no rational principle (or universal rule) that can prescribe the particular actions that particular obligation holders should undertake in specific situations”.[22] With the intention to critique the enumeration of economic and

[22] Polly Vizard, The Contribution of Professor Amartya Sen in the Field of Human Rights, CASE

social rights in the Universal Declaration of Human Rights, he argues that "these 'rights' represent positive claims to 'particular things' to which every human being is entitled but for which no distinct agent is responsible; and that claims of this type cannot be universalised within the framework of a free society".[23] For Hayek positive rights are possible only in the realm of voluntary agreements or special relationships. The libertarian understanding of rights has its focus on 'universalization' which means that duties related with a right must be such that all duty holders can perform those duties without exception. For example, it appears to be logically possible for "a person to refrain from undertaking a certain action...in respect of all others". With respect to positive duty it might not be possible for an individual to undertake a certain positive action with respect to all others, like one person cannot possibly feed all the people having the right to food. Nozick argues that all individual rights that satisfy these conditions of universalization are negative rights with duties of omission and restraint.

> "Negative conceptions of the human rights to 'freedom from severe poverty' and to 'freedom from hunger and starvation' that focus on no-interference with the 'means of life' (e.g. with the person or property) are admissible in this framework. However, fundamental freedoms and human rights that are limited by resources and/or other feasibility constraints (such as the human rights to an adequate standard of living, food and health) are viewed as generating 'conflicting positive obligations' and are ruled out by the model."[24]

Thus the crux of the libertarian rejection of having positive rights as part of human rights emerges from the lack of ability of positive rights to satisfy the condition of 'universlization' with respect to the correlative duty.

The acceptance of positive rights into the sites of enforcement, like human rights law and constitutional law has taken different forms. With respect to international human rights law, many legal instruments have adopted these rights, like UDHR, ICESCR, ECOCOS. At the domestic constitutional level, the acceptance is in the form of general policy directions like the DPSP scheme of India or direct infusion like the inclusion of socio-economic rights in the constitution of South Africa.

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paper 91, January 2005, CASE, LSE, London, p.6

[23] *Ibid*., p.7

[24] *Ibid*., p.9

However, acceptance of positive rights, it seems is always not for the intrinsic values of positive rights. The instrumentality of positive rights at times is more decisive in their acceptance. One such example is the argument presented by Jeremy Waldron. Commenting on the complications related with thinking around first generation rights (negative rights) and second generation rights (positive rights), Waldron says,

> "…the argument from first generation rights to second generation rights was never supposed to be a matter of conceptual analysis. It was rather this: if one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty. Why on earth would it be worth fighting for this person's liberty (say, his ability to choose between A and B) if he were left in a situation in which the choice between A and B meant nothing to him, or in which his choosing one rather than the other would have no impact on his life?"[25]

For Waldron, if the commitment for civil and political liberty is important then the conditions of a life of a person, in which that person is situated, must also be important as these conditions enable or disable that person to utilise or enjoy the civil and political liberties entrusted by negative rights. Here it is clearly visible that Waldron sees the instrumentality of something, which can ensure better life conditions in the enjoyment of negative rights. These instruments that can ensure better life conditions are usually imagined as socio-economic or positive rights.

While Waldron's thesis on instrumentality of something akin to positive rights is in the space of theory, another scholar Prabhat Patnaik tries to explain how the rights agenda and in that socio-economic rights can be useful for a more practical project, which is left politics in India.

Prabhat Patnaik's analysis of rights is based on the desire to think about rights from the perspective of left politics in the country. His analysis is directed towards creating intellectual grounds for the left to smoothly acquire the rights based thinking in its political strategy. This exercise can be said to be a *post facto* exercise as rights have already become politically relevant. Thus, Prabhat Patnaik's intellectual effort is for a

[25] Jeremy Waldron, 'Two Sides of a Coin' in *Liberal Rights: Collected Paper 1981-1991,* New York, 1993, pp. 5.

smooth transition for the left political strategy to incorporate a rights agenda within their political strategies.

His analysis is based on the delinking of rights from the moral world and then the linking of rights to the political world undertaken by Hannah Arendt.

> "More than half a century ago Hannah Arendt had argued that 'rights' were political construct; they did not derive from 'human nature'. The problem she was concerned with was the 'rights' of refugees and others reduced to 'worldlessness' who did not enjoy 'citizenship' of a particular nation-state. What, she asked, was their 'right to have rights'? The only 'human rights' she recognised was the 'right to have rights' and the basis for this according to her was not 'human nature' but 'human dignity' whose roots lay in the Aristotelian notion of man being a 'political animal'. Arendt in other words had already shifted the basis of rights' from the moral to political universe"[26]

Patnaik sees a direct instrumentality for the politics of the Left in promotion and acceptance of rights of positive flavour. For him, "[T]he acquisition of 'rights' on the part of the people, including 'rights' to minimum bundles of goods, services and security, amounts therefore to winning crucial battles in the class war for transcendence of capitalism".[27]

He tries and counters the traditional criticism of the Left with respect to rights, namely that the talk of rights is a means to 'retreat into abstract humanism' by saying that rights based development can counter the capitalist conception of need based development and thus rights can be critical in subverting the 'logic of capital'. He says that,

> "The left's putting on its agenda a struggle for people's 'rights', adopting a 'rights-based approach' to development as opposed to the 'means-based approach' of the bourgeois formations, constitutes therefore not a retreat into abstract humanism but an integral part of the dialectics of subversion of the logic of capital."[28]

Patnaik also links the importance of rights based development (which imagines an extended role of social and economic rights) for consolidating the participation of people in the processes of democracy. He says that,

[26] Prabhat Patnaik, A Left Approach to Development, EPW, Vol. 45, No. 30, July 24-30, 2010, p. 37

[27] *Ibid.*, p. 37.

[28] *Ibid.*, p. 37.

> "While the concept of 'rights' is perceived here as being part of the dialectics of subversion of the logic of capital, its justification is seen to lie not in any abstract human nature but in its necessity for democracy, as constituting a minimum condition for the people, insulated through the exercise of such 'rights' against hunger, insecurity and ignorance, to participate meaningfully in the democratic process."[29]

Patnaik highlights the desire to get away from the claim of positive liberty being authoritarian and the empirics generated by the experiment of central planning. Further, one can see that it is imperative for left politics to pursue the rights agenda, as it provides them the toll to fight the hegemony of international finance capital, one of the core areas of focus for left politics in contemporary times.

> "The adoption of a rights-based approach on the part of the left will not only burry once for all the fears of authoritarianism associated with it (because of the one Party dictatorship that had characterised former socialist regimes for historical reasons), but also put it in a vantage position to struggle against the hegemony of international finance capital in the context of the current profound capitalist crisis."[30]

Amartya Sen's work on Justice has tried to incorporate ideas of positive and negative rights into human rights. His attempt is to think from the point of view of perfect and imperfect duties. He offers that "(a) negative rights not be assaulted, gives rise not only to a perfect duty on part of the attacker to not attack, but also an imperfect duty on the observers. This imperfect duty is described as... (considering) seriously what one can reasonably do to help the realization of another person's freedom..."[31]

One of Sen's important contributions is to argue that a human right can have an imperfect duty also as its correlative duty. This creates the space within the liberal theoretical world for inclusion of something akin to positive rights as the correlative duty aspect is always imagined on the basis of a perfect duty, like the duty of non-interference, which has the characteristics of universalisation. Sen's effort is to imagine a similar universalisable character of an imperfect duty.

> "In sum, an imperfect duty may be correlative to a human right in Sen's view. It is a duty not to ignore the important freedom of others with respect to something in deciding what to do; other's freedom with respect to that

[29] *Ibid.*, p. 37.
[30] *Ibid*., p. 37.
[31] F. M. Kamm, Sen on Justice and Rights: A Review Essay, Philosophy & Public Affairs, Vol. 39, No 1 (Winter 2011), p. 90.

> thing is a consideration that must be added to all the other considerations, obligatory or not, that one attends to in deciding what to do".[32]

However, this process of inclusion of imperfect duty as a correlative to human rights seems to cause some loss of the positive flavour of these duties. Kamm argues that,

> "Similarly, traditionally the duty correlative to a positive right to something is the duty to provide something, not merely a duty to take seriously the recipient's need for that thing and to weigh it in the balance with other things. I may have to fulfil my duty to repay a debt even if doing so interferes with my funding my child's education. But the Senian *human right* to have lifesaving aid has a much weaker content: The need for aid itself is not the correlative duty. The giving of aid is only a consideration one has a duty to take account of, along with other factors..."[33]

It appears that the focus of Sen in this analysis of imperfect duties having correlation with human rights is on negative rights. It is the freedoms that exist in the current system, which are to be considered important and which will generate an imperfect duty of consideration to give aid in protection of those freedoms. The status quo of freedoms has preponderance of negative freedoms. Thus it appears that Sen's incorporation of imperfect obligations or duties into human rights, while is very innovative and important, does not go beyond the duty to protect in the positive sense of the term. His approach is embedded in the theoretical requirements of negative liberty space. His consideration that a duty of positive nature might not actually be a duty of aid but that of considering the situation with other factors as well, points towards the embeddedness of negative liberty philosophy in theorising rights. It is these influences that create the grounds for interplay. If positive rights were naturally adoptable into the negative liberty based moral and normative philosophical setup, then their enforcement would have been just a matter of creating an ideal law. The way rights are imagined in the theoretical sense reveals that for the libertarians, positive rights can only be rejected. For the liberals and left theorists they are includable for their instrumentality for enhancement of negative rights or for better achievement of ideals like 'equality' and participation in democracy. Within this sphere of instrumentality, people like Jayal, Patnaik and Waldron accept positive rights as they are. However, Sen theoretically shows a much more nuanced instrumentality of rights by exhibiting a condition where even a negative liberty laced duty of 'protection' associated with a freedom that a person values, generates a duty

32 *Ibid.*, p. 91.
[33] *Ibid*., p. 93.

not to interfere, but to consider interference along with other factors in the mix. Whether the interference takes place or not is contingent on a sort of cost benefit analysis of a situation where a freedom the person values is under attack. The duty to 'protect' which is claimed repeatedly by a lot of scholars (as traced in earlier pages) to be actually a positive duty, Sen refers to it as a duty to consider if a person has a duty. It is at this juncture where one can say that a proper delineation between negative and positive rights is important to ensure that this sophistication of 'sterilising' positive rights can be escaped. At the same time, it appears that it is this flexibility which enables a nuance of 'duty to consider' to get incorporated into the dry lands of negative liberty conceptions. If not for such theoretical innovations, it might be not possible to create grounds of infusion of some positive liberty into the liberal philosophic tradition.

What Sen has to offer in the field of philosophy of rights Jayal matches in the field of the practicality of political science. For Jayal the instrumental value of social and economic rights, (which she argues, are difficult but, should be delivered in a universal manner and on the background of consensus and social solidarity) lies in their ability to address the malfunction of civil and political rights, which is that these rights are not able to guarantee substantive equality in the society. Thus Jayal focuses on the instrumentality of social and economic rights to infuse substantive equality in the society. But her focus on the conditions of inclusion of these rights gives some indication to the practicality aspect of inclusion of these rights. Since these rights do not command 'perfect duties', her pointing out that their delivery should be universal and is to be achieved through consensus and social solidarity, reflects that these rights are political projects whose duties will get entrenched in the society with time and with cooperation, interaction and discourse towards consensus and social solidarity. This line of thought again indicates the possibilities of interplay with respect to bringing in of positive rights into the *status quo* of negative liberty. It appears that there is a constant intellectual link from Kant's first enunciation of 'imperfect obligations', which was something new for his time, to the current times, witnessing attempts to incorporate positive rights into the theory and practicality of human arrangements. From Kant to Shue to Sen to Jayal, one can argue that positive rights might be easy to declare on the basis of their instrumentality, but their actual constitution is subject to interactions of different kinds of forces within the society.

Therefore, it is only within a democratic, rule based setup that one can imagine the prevalence of conditions conducive to this kind of interaction. Thus even when a negative liberty based setup does not allow incorporation of positive rights directly, it allows for the rule of law, like essential conditions for imagining the constitution of positive rights within a democracy.

2.3 Nature of Positive Claims

As the main concern of this work is positive rights, it would make sense at this juncture to analytically imagine the different kinds of positive claims. Earlier we discussed the possibility of a distinction between negative and positive rights on the basis of the duty of 'protection' lying in the sphere of negative rights and liberty. The second possibility, which can possibly give some basis to the distinction between negative and positive rights, is the need for institutions in a world filled by externalities. Externality is the effect on a third party from the interaction of two parties in the sphere of economic transactions. Externalities are both positive and negative. If a third party benefits from the transaction between two individuals or an economic activity in which the third party did not take part, then that would be an example of a positive externality. On the other hand, if a third party has to bear some costs out of the interaction of the two parties then that would be the example of a negative externality. The externalities that can be traced can be thought of as interferences, and rules can be made to ensure their internalisation by the source of that externality. Principles like ‘polluter pays’ is an example of this sort of internalisation. If this becomes a right it would be a negative right. Moreover, there are plenty of externalities, which cannot be internalised by the source of the externality. Pollution by the burning of fossil fuels possibly cannot be internalised by the source itself. In such cases the role of the government becomes important. The State regulates the level of pollution by regulating the technology used, as is done in the case of regulation by Bharat Stage norms of pollution in India. What would be the category of such a claim, which seems to demand governance by the state of externality? This could be a positive claim, as the interference in the form of the externality cannot be easily traced and neutralised, and therefore, demands regulation.

The third reasoning for the possibility of distinction between negative and positive rights is the need of collective action to supply goods having public or club goodish nature. These goods benefit almost all of the people and hence it is very difficult to put a price on them. An example of this kind of a good is a street light. The light emerging from a street light can be utilised by plenty of people at the same time. Exclusion from the utilisation of per unit light is not possible. This generates the problem of free riding in the supply of public goods. As exclusion is difficult, people can use the public good without paying for it. The other problem with public goods is that of pricing, which is tied to the impossibility of impossibility of exclusion. If at all these goods, which are also infrastructural in nature, are thought of as rights, what kind of rights would they be? These could be seen as positive rights, as the primary duty for these claims would be their supply, which can be ensured only by action/interference.

The purpose of spending these many words to seek possibilities of distinction between negative and positive rights is that it makes it simple to understand the right better and analyse it further in the realm of either negative liberty or positive liberty, as may be the case. Negative liberty is the liberty enjoyed by a person till the time he/she is not interfered by any one. Positive liberty on the other hand is the liberty to be what you want to be, and in its pursuit one might experience cooperation/interferences of others. Since positive liberty is understood through Rousseau's functioning of perfect rational laws, obedience to which amounts to a state of freedom, as they are so perfect that all will think that they were made by them personally, it makes it important to delink the two categories of rights. This could help in seeing the intrinsic and instrumental value of the right in question in a better way.

First, could be the claim for interference against systemic interferences that either escaped the net of negative liberty or have traces in political or social arrangements. These can also be expressed as the claims arising from the presence of an externality which is not traceable. To elucidate this kind of a claim, the example of a homeless person is beneficial. In his analysis of homelessness, Jeremy Waldron argues that a homeless person is not free to do anything as freedom to do what one wants to do is

possible only when one has a place to do the desired activity. If the libertarian fantasy of converting every property into private property is realised then a homeless person would be rendered completely un-free. In the present context where there is a presence of common property, a homeless person has freedom in our society to the extent that our society has some communal property, which is not governed by private property rule or any other such rule of exclusion (use based exclusion for parks etc). Our political, economic arrangements work as a systemic interference for the homeless, and thus the claim of a person to have a house or aid for a house is the example of a positive claim. Another example could be that of a claim for an employment allowance or a job as unemployment might have occurred because of untraceable interferences of the market in the lives of people, of governments in the working of the market or of the society in the working of government and/or market.

Second, could be the claim arising from the need of collective action. For example, the claim of farmers in a region for creation of irrigation facilities where the ground water-table (irrigation was ground water based) has decreased considerably, and where individual actions in the form of efficient use of water through sprinklers is not going to create any significant difference on the ability of farmers to have proper supply for irrigation. This claim requires that large scale efforts, involving large swaths of land, water bodies and the willingness of people, to recharge ground water are undertaken. Till all tube wells are not recharged, along with creation of check dams, the water table, cannot not reach a sustainable level. An individual recharging his tube well alone cannot create any impact.

Third could be the claim for interference against natural interferences like floods, famines etc. Natural interferences do not follow the logics of negative liberty based non-interferences and these render people under their influence totally helpless at times. Entire communities are destabilised or destroyed along with their property and belongings. Professions, especially traditional ones like farming are destroyed for months and years at times. In a modern, democratic society these positive claims are responded to with humanitarianism based political, community, national and international action. Immediate attention is usually given to fulfil the immediate needs of victims like food supplies, medical care and long term reconstruction and rehabilitation is undertaken. Even these claims have been found to be misgoverned by the state, with late action, corruption and neglect. Laws establishing standard

operating procedures, creating dedicated disaster response teams had to be brought in place. Moreover, many scholars have argued that pre disaster management is probably more critical to ensure that minimum damages occur. Jayal and Mathur have argued in the case of famines, structural management is more important than post-disaster mitigation. Many a times damages are acute as laws governing construction of buildings were not enforced and followed properly. Even here governance lapses (emerging from escaping the net of negative liberty) might be important. But in an overall sense natural calamities and disasters create positive claims of aid, rehabilitation, medical care and attention for the victims. These claims can be thought of as pure positive claims as helplessness is acute and it generates total empathy.

Fourth could be the claim arising from natural or other disabilities of individuals which keep them in a situation of non-participation in our created human arrangements. These could be a claim of a disabled person for disable friendly infrastructure or the claim of children for school education or a claim of a person lying on the road to be taken to a hospital. These claims will surely include disability rights. Disabilities render individuals permanently unable to take part in human arrangements in some way or the other (depending upon the kind of disability). Mechanisms to ensure that these inabilities to participate can be mitigated, require positive, proactive, empathy and political and economic equality based action in a modern, democratic state. In India, disability rights movement and development of these rights is taking place with vigour. Temporary disabilities like disease and accidents can also be thought of as part of these kinds of claims. However, how much duty the state and society are ready to bear for countering temporary disabilities is a big political question in many countries. Even in temporary disabilities, one can pick out more urgent categories like emergency medical care and child and mother heath care. In India, the supreme court has tried to provide some dialogue and guidance on emergency medical care and the right to food and education has provided some semblance of development over child and mother health care.

While these four categories are indicative of the varied nature of positive claims, it is pertinent to say that the complexity of positive claims has more dimensions then the dimension represented by types of positive claims. The inherent complexity of positive claims also gets reflected in the question of whose duty it is to cater to these positive claims. In a social psychology based understanding this question about point

of duty can be seen as the manifestation of the 'bystander effect' marked by diffusion of duty. The bystander effect is the problem of no one coming to help a distressed person lying on the road. It talks about the possibility that everyone possibly thinks that someone would go and help the person in need of aid. This thought of everyone that someone would help represents the diffusion of duty. With a negative claim/right, this complexity does not arise even when the duty of non-interference is for everyone, as it does not seek action, rather the omission of action, which is easily realized. To extend this argument further, when political philosophy is brought into picture, the point of duty complexity can be seen as the extension of the debate around the role of state in this kind of a scenario. While many of the positive claims are simple governance and administrative problems, they more often than not are related to the distribution of resources, property, gainful employment, supply of public goods, etc. These resources required for a decent life, cannot be taken from one person to be given to another person. This limit is ensured upon the state by the framework of negative liberty. But the state does engage itself in activities which are touted, by the state, as promoting common good, or in the present context as promoting development. Plenty of positive claims arise from these partisan and non-principled infringements of the negative liberty framework by the state to promote common good and development. Whether the state is a point of duty or not, can be seen from the state versus market debate, where increasingly the state is seen as a provider of negative rights. The market is propounded as the place where one seeks the answer to the positive liberty question of what one wants to be. Riding on the inability of state to centrally plan social and economic life, market is seen as the place which widens the choices for all.

Even if for an instance one puts the duty with respect to positive claims on the shoulders of the state, another complexity surfaces. This complexity is about the question of what is the duty. The example of homelessness would again be handy to elucidate this complexity. The duty set in the situation of homelessness can comprise of three duties. First one can be positive action in the form of creation of common property like toilets and shelter homes. Second can be aid in the form of house, or aid to enable the homeless to buy/rent a house. Third could be non-interference in the pursuit of a private house by the homeless. The first two duties are positive in nature but are different in degree. The amount of liberty associated with owning a house

seems to be more as compared to communal property and the right of access. This reflects the complexity of deciding what the duty is. In another case, which is that of right to food, the desirable duty could be in the form of right to work.

2.4 Positive Rights in India

In India positive rights these days, are often confused with the idea of populism. However, from the start of the project of making of India, positive rights or claims of transformation have been a critical aspect of the processes of governance and politics. Positive rights seem to be incorporated in the constitution as well in the Directive Principles of State Policy (part IV) chapter.

> "The Indian Constitution is an admixture of positive and negative rights. One can think of the Fundamental Rights as being the negative component and the Directive Principles as the positive component".[34]

However, the inclusion of positive rights in the Constitution as the Directive Principles is not the first utterances of its kind in India. These rights were, along with negative rights utilised to imagine the nature and type of governance in free India during the freedom struggle itself. The imagination of '*swaraj'* was an imagination of self-rule based on fundamental rights which also included positive rights.

> "In India, the next major documentary moment in the evolution of a rights regime was the presentation, to the Karachi session of the Congress in 1931, of The Resolution on Fundamental Rights and Economic Changes. Its twenty points listed the fundamental rights that should be provided in a constitution for a *Swaraj* government. These included the standard civil rights—personal liberty and freedom of speech, association, conscience; equal rights for all citizens; the protection of minority cultures; and the right to bear arms. It also demanded adult suffrage, state neutrality toward religion, and free primary education. The social vision of the Resolution included an end to bonded labor, the elimination of child labor, the protection of women workers, the right of workers to form unions and, for industrial workers, a living wage . . . limited hours of labour, healthy conditions of work, protection against the economic consequences of old age, sickness and unemployment".[35]

[34] Jaivir Singh, '(Un)Constituting Property: The Deconstruction of the 'Right to Property' in India' in *CSLG Working Paper Series, Jawaharlal Nehru University*, August 2004, p. 7.

[35] Niraja Jayal, Citizenship and its Discontents, Harvard University Press, London, England, 2013, pp. 139-140.

While these rights imagined in the Karachi Session of the congress were inclusive of both negative and positive rights, during the formation of the Constitution the negative rights were separated from positive rights as shown earlier in Prof Singh's comment.

> "For the first three decades after independence, the apex judiciary had largely defended… (the) basic distinction, (between justiciable fundamental rights and non-justiciable Directive Principles of State Policy, DPSP), in a conservative manner. Following the emergency, however, it began to change. Substantively, the court expanded its remit by interpreting various socioeconomic needs as integral to article 21 of the constitution, which recognized the fundamental right to life."[36] In the period right after independence, the judiciary was following the traditional negative liberty based role entrusted to it and guarding fundamental rights against the state's moves to implement policy which was claimed to be motivated from the spirit of DPSP. After the emergency, courts have seen a new found complementarily between the fundamental rights and the DPSP. "It is only quite recently that the fundamental rights and directive principles have settled in to a relationship of complementarily. A spate of judgments, sometimes citing judgments …from US supreme court, has generated a substantial body of case law reading several rights – to privacy and legal aid, health care and housing, clean air and water, and so forth- into the right-to-life provision…courts have even emphasized the complementarily between these two parts of the constitution saying that they 'are not supposed to be exclusionary of each other'".[37]

Even after being proactive the court has made conscience attempts to remain within its constitutional limits and has intervened where the government and the system was found lax in the partaking of constitutional or legal obligations.

> "The court has...stressed that its intervention is warranted only where it finds that there has been a failure by those charged with performing their statutory and constitutional functions to address the problem. It is in this context that the court intervened to direct the governments at the centre and the states to make available food grains, overflowing in state godowns, to be made available on a priority basis to those living below the poverty line."[38]

These words reflect that the court has been working within the limits created for it by the constitution, but is not shying away from creating legally bound obligations for the state functionaries where the need arises, and where there is legal space for the court to do so. In another statement Justice Muralidhar, indicates towards the court's reading of the right to life as constitutionally backing its attempts to give content to social and economic rights. He says that,

[36] Ruparelia, *Op. Cit.*, p. 573.
[37] Jayal, *Op. Cit.*, p.161.
[38] Muralidhar, *Op. Cit.*, p. 6

> "...aware of the need to remain within the limits of justiciability, the court has been careful to explain the legal basis for its intervention in the different areas concerning ESC [economic, social and cultural] rights. Thus the right to education was explained as forming an integral part of the right to life, as was the right to environment and to health."[39]

This shift in the role of judiciary has been marked by two innovations. The first of these innovations is the creation of the institution of PIL, which is, "…a tool to achieve social objectives by enabling easy access to courts for those disadvantaged socially and economically. A conscious attempt was made to relax the rules of standing and procedure and free litigants from the stranglehold of formal law and lawyering."[40] The other innovation the court made was the broader reading of the right to life, which created a larger role for itself, over and above the role envisaged in the constitution of judicial review within the purview of negative liberty. Justice Muralidhar, says that "(t)he expanded notion of the right to life enabled the court, in its PIL jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of ESC rights."[41]

These two innovations enabled the court to have greater access to social issues and more legal space to be able to be express views in a grounded manner. However, the judiciary was still not able to and still not attempting to take a high handed approach and intervene in the policy space of the government. When it came to the nature of duty with respect to the rights declared, the judiciary, as pointed out in the right to food case was of the opinion that it was a matter of policy which is best left to the government.

To get involved with the judiciary's actions and understand better what it actually did in some of the famous cases declaring an array of rights, I turn to the work of Madhav Khosla.[42] Responding to the analysis of different scholars who have claimed that the judiciary in India has constituted social and economic rights, Madhav Khosla argues that the judiciary has mostly created 'conditional social rights' and not 'systemic social rights'. Khosla's argument is that the judiciary has created obligations on the

[39] *Ibid*., p. 6.
[40] *Ibid*., p. 3.
[41] *Ibid*.
[42] Khosla, Madhav, 'Making social rights conditional: Lessons from India', *International Journal of Constitutional Law, vol* 8, no. 4, 2010, pp. 739-765.

state, only when there were pre-existing schemes or other kinds of state intervention present, and which were not being implemented properly. In a scenario where the Indian courts are seen as champions of social and economic rights all over the world, Khosla argues that the judiciary has refrained from creating any systemic rights which follow either the minimum core requirements or reasonableness requirement. The courts have not, for example, in the famous right to education case, created a right to education for all. All it has done is ensured that capitation fees cannot be charged. To resolve the question of capitation fees, the courts had delved further into the question of whether there is a right to education or not guaranteed in the constitution of India. This does not create a right to education (only on the basis of the court judgment) which can be enforced in the court in future as there is no minimum core guaranteeing any minimum set of obligations on the state, nor is there any reasonable standard set which calls for review of the state policy.

Khosla and Justice Murlidhar's observations are reflective of the fact that the courts are playing an indirect role. It seems that the courts are working within the confines of the traditional negative liberty setup, reviewing the state policy, creating legal foundations around obligations where there is already some government intervention to ensure the proper implementation of the government's policy, and remaining well within the realm of enforceability. However, the courts have increased their influence in two spheres. The first one is where the courts are declaring rights via the route of the broader reading of the right to life along with the directive principles, which ensures that the net of legality is increased. Second, is of course the PIL, through which the courts have increased the number of issues presented before them.

Judicial intervention is often seen as an undemocratic intervention. However, when there is scope for legislative action to follow, which gives democratic credence to such issues, does it then become acceptable? Michel man, as cited in Sarbani Sen, asserts that "the ideal of positive freedom, that is, of the people giving the law to themselves, could be exemplified through a 'jurisgenerative' model of open, empathetic, dominated dialogue within legislature and courts, with the formal participants conceiving themselves as parties to a broader dialogue representing the citizenry as a whole."[43] Judicial intervention seems to fit the jurisgenerative model as

[43] Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformation,*

it sparks off a democratic deliberation in the public sphere through the media and the parliament. Judicial intervention finds "space for an issue that would have otherwise not had invited sufficient attention. The decision in *Vishakha*, for instance, has brought into public discourse the issue of sexual harassment of women in workplace, which was otherwise ignored by the executive and the legislature."[44] Judicial intervention also seems to bring situations of acute helplessness into the sphere of social policy and law. This gets reflected in the case of right to food, which led to coercing the state to take action in the situation of wide spread hunger and the *pashchim banga case* which led to "the identification of emergency medical care as a core right"[45]. Judicial Intervention has impacted law and policy in matters of social issues as was witnessed in the case of right to education. Many such critical impacts of judicial intervention are visible in India after the judiciary took a pro rights turn and some have argued that "social rights litigation in the Supreme Court has been radical, where the Court has recognized new rights and designed interesting new remedies for their enforcement...they have been made enforceable despite them not being included as justiciable fundamental rights in the constitution."[46] However, it can be said that judiciary has not always worked in the fashion that it does when it declares these rights.

One also has to remember the effect of declaring rights on the interplay of civil society and the state. When, backed by the DPSP or the broader understanding of right to life, the court declares some rights, such as right to livelihood, right to environment, right to health, even when it is not capable of creating any binding obligations for the state, the court provides the citizens and the civil society with necessary beneficial advantages to contest for these rights with the state in the realm of politics or public opinion. This seems to be the indirect mechanism at the centre of which is the judiciary. This is something similar to what Mark Tushnet[47] called the weak form of enforceability of declaratory rights. Rights are declared but there are no

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OUP, 2010, pp. 7-8.

44 Muralidhar Shir., 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights', Langford, Malcolm, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press, 2008, pp. 117.

45 *Ibid*., p. 115.

46 Jayana Kothari, 'Social Rights and the Indian Constitution', in Law, Social Justice & Global Development Journal, 2004 (2), p. 4.

47 Mark, Tushnet, 'Social Welfare Rights and the Forms of Judicial Review', in *Tex. L. Rev.* 82, 2003, p. 1895.

remedies presented to back the rights. Review of the government policy is done without enforcing any of these 'declared' positive rights.

Taking from this understanding of the indirect role played by the court, one possible argument can be that courts in India work within the confine of the traditional negative liberty based liberal legal infrastructure in general, but are sensitive to the specific cause of socio-economic rights and play an active role to initiate dialogue around social and economic rights by declaring these rights backed by the contents of the directive principles and a wider reading of the right to life. In doing so courts attempt 'jurisgenesis' and 'declares' rights' which if not necessarily based in the positive liberty conceptions., are also not based in negative liberty conception.

The declaratory rights might not necessarily translate into the state acting upon them. Political action is essential to give substance to these rights as the courts are not pointing out the nature of duty in clear terms with respect to all the rights that it declares. It seems that the court's understanding is that the aspect of duty is to be decided by government policy processes. "The relationship between judicial activism and political action is quite complex. Political action may use judicial intervention for legitimizing its claims and judicial discourse may spur political action for securing certain claims. Each one catalyses and also complements the other."[48] The ability of the Indian judiciary to catalyse political action through judicial activism is limited for at least two reasons. One, the Indian state enjoys a large degree of freedom in the field of policy, especially economic policy. This is the sphere which decides the nature of duty of rights which are declared by the judiciary. Thus when the judiciary declares some rights and maybe hopes that these declaratory rights would impact the public sphere and induce contestation between civil society and the state, the reality is that state still has the freedom to choose the content of those rights. The case of the limited right to work under MGNREGA (Mahatma Gandhi National Rural Employment Guarantee Act) legislation shows that the state doesn't easily accept whatever is demanded from it by the civil society . Since the making of law and policy is the domain of state, the contestation over demarcating the nature of the duty around a declaratory right involves intense work. This phenomenon points towards the limitation of the judicial review of state policy. This review in the present context is

[48] S. P., Sathe, *Judicial activism in India*, Oxford University Press, USA, 2002, p. 120.

possible only in matters of rights. It could be possible that this limitation over the judicial review which ensures that no judicial intervention can be made in questions related to policy of the state, may have prompted the judiciary to talk about these concerns in terms of rights grounded in the positive liberty based reading of the right to life. Maybe the judiciary hopes to be able to review the state's actions/inactions in the realm of these rights once these rights get substance in the form of duty which is an outcome of a democratic deliberation/contestation. Moreover, in the constitutional setup, review is possible only in case of rights.

2.5 Conclusion

In the world of economics and policy, positive liberty and positive rights are countered by the idea of pareto optimality. The core of this idea is that any intervention/policy which improves the welfare of some and reduces the welfare of others does not represent allocative efficiency. In the social choice theoretical tradition, the idea of positive liberty based central planning and its core endeavour of creating a social welfare function that can cater to the needs of all in the society is countered by Arrow's impossibility theorem, which propounds that creating a perfect social welfare function is an impossibility without a dictatorial input, thus indicating that a desire to central planning might be in opposition to the ethos of democracy.

In the world of law, positive liberty and positive rights are countered by the idea of rule of law. Under this strand of thought any set of law that infringes already existing laws are bound to be inherently counterproductive for the idea of rule of law. If in the enforcement of positive rights, negative rights are infringed then that is not considered a just outcome. The point of enactment of this idea is the judiciary, which through its method of judicial review, protects the negative rights of citizens from the overreach of the state. Thus the state is bound in the legal sphere, by the idea of rule of law and negative rights, and has restricted space to enforce positive rights directly.

In the world of political science/philosophy, the idea of positive liberty, specifically, is countered by the argument that any attempts to work on the lines of positive liberty might lead to the development of a authoritarian state. This argument is famous and is attributable to Isiah Berlin's famous paper titled "Two concepts of liberty". With respect to positive rights, however there is complete rejection presented only by libertarians in modern times. Some amount of acceptability of the idea of positive

rights in political philosophy and political science seems to exist and it appears that it is because of the fact that it is here in the realms of political theory that the idea of positive liberty/rights takes initial shape. Rousseau's exposition on perfect laws in the service of positive liberty and Kant's acceptance of some kind of an imperfect duty (which is thought of as the equivalent of positive duty), probably kept political theory open to the idea of positive liberty and rights. Thus while positive rights appear to be a political question because these are attached to scarce goods and resources, it can also be thought of as a political question because it has its roots in political philosophy and theory and its seepage in economics and law is through the corresponding line of political thought. For the votary of liberal state, positive rights in the realm of economics and law are naturally not very attractive. For the votary of ideals of creating a perfect society, where freedom lies in obedience to perfect, rational laws (Rousseau), the idea of positive liberty/rights might be acceptable.

One can intuitively as well as objectively feel that the dominance of negative liberty based ideas in the human arrangements of modern times, which are represented by the category of the modern liberal state, presents a great deal of resistance to the idea of positive rights/liberty. However, at the same time one also observes that the desire of the common people to have their positive claims met, somehow have kept the idea of positive rights/liberty in the running. Coupled with this desire is the instrumentality of positive rights/liberty/claims in galvanizing power and legitimacy for the state. This instrumental ability of positive rights/liberty/claims ensures that they are not just in the running, but are actively attempting to be utilised by the state even after the resistance at the level of ideas and theory from negative liberty based understanding. This twin combination of resistance to and instrumentality of positive rights creates the grounds for interplay between theory as well as empirics, not so much in the field of economics, which does not need to seek the legitimacy of the people directly, but to large extent in the legal world, where legitimacy is desired by institutions like the judiciary. One of the examples of this interplay in the theoretical world can be observed at the site of human rights and socio-economic rights, which are conceptual and politico-linguistic categories of rights, and were attempted to be infused with some amount of positive rights based ideas. This thereby provides some credence to the idea of the modern liberal state by theorists in changing times represented by the upsurge of transformational politics in Asia, through the idea of a developmental

state, and in response to the communist designs during the Cold War. The empirical world of modern liberal state is replete with such interplays, and this thesis aims at bringing out some of those from within the geographical jurisdiction of India.

In the achievement of the aforementioned goal, and picking up from the initial learning from this chapter the following three chapters try and collate the empirics around positive rights in India. It is evident to some extent from this chapter that positive rights do not sit naturally into a negative liberty based legal and policy infrastructure. In India positive claims/rights were first utilised in rallying the people against the colonial rule of the British Empire by imagining a rights based government under the conceptual category of '*swaraj'*. From this imagination to the realisation of certain positive rights are fundamental rights (right to education) in contemporary times, the governance of India through the working of law and politics and under the overall guidance of economics is marked by a continuous direct/indirect engagement with the ideas of the flavour of positive claims/rights/liberty. The transformative aspect of the constitution with centrality of egalitarian ideals like social justice, equality, liberty, fraternity enables an environment where the citizen of India sees the government/State as a benevolent enabler of better life. The reality might be different, but these imaginations are not unreal. In such a background, the empirics are ample. From the imagination of these rights to their relegation to a non-right status in the constitution, from the conflict in the desires of implementing land reforms rooted within the realm of positive liberty and the legalistic blocking of these moves by the court to uphold the negative right to private property, from the judiciary taking a pro-rights approach in the post-emergency era to the declaration and substantiation of some of the positive rights, the empirics are spread across the history of modern contemporary India. Drawing on the works of Prof Niraja Gopal Jayal, Granville Austin, Prof Upendra Baxi, Prof Sarbani Sen, and Prof Jaivir Singh, I have segregated the empirics into three phases. These three phases constitute the next three chapters. The method used to get these empirics in one place is interpretive study of relevant authors, interpretive and analytical study of relevant newspaper archives, government documents, and court judgements (especially related to right to education, right to food/work and right to livelihood).

Chapter 3
Positive Rights as Directive Principles, Directive Principles as Rhetoric

This chapter is an attempt to reflect on the first phase of positive rights in India's journey of constitutional development. The first phase of positive rights in particular, and rights in general in India, was that of the twin acts of 'imagination and relegation' as this phase was marked by two junctures. The first one was the imagination of the idea of *swaraj (*self rule) led by the Congress. And the second was the codification of the core of this imagination into a non justiciable category in the constitution called Directive Principles of State Policy (henceforth DPSP or Directives).

3.1 The Imagination of *swaraj* (self rule): Usage of positive rights

At first one needs to reflect on the first invocation of rights and the nature of that invocation at the Congress session at Karachi 1931. The resolution passed in this session had imagined the governance of the country in the hands of Indians on the basis of rights. This resolution was probably a clarion call to the people of country to get together against the colonial power by invoking 'rights' of different flavour to contrast them with the colonial rule. These rights were the building blocks of the imagined alternative form of governance to the colonial power. And in this instrumental usage of these rights is revealed one of the important nature of these rights, which is that they are an instrument to invoke the sense of positive liberty in the masses. A right to work, lets an unemployed labourer or youth imagine that in a country free of the colonial masters, in a country which is led by a government of domestic origin, there will be a chance for that person 'to be what they want to be'. The key term in the Karachi session of the Congress held in 1931 was '*swaraj'*. *Swaraj* translates seamlessly to the English language term of 'self rule', but it also at the same time corresponds at a personal level to a positive liberty based understanding of what 'self-rule' can be constituted of. And to give credence to that positive liberty based understanding, the resolution included promises like 'free and compulsory education', 'better conditions for workers, a living wage', 'adult sufferage' and similar such radical rights for the times, over and above the fundamental rights related with

negative liberty understanding of state, like freedom of expression and association. It is a different story that when India did achieve independence and the work of codifying the law of the land was undertaken, these '*swaraj'* based ideas were codified as directive principles which were to be non-justiciable.

3.2 Codifying Rights, Relegating positive rights

The DPSP contained the positive rights. DPSP are part of the Indian constitution and are non-judiciable. DPSP are sought to work as directions to the government of the day. Social and economic rights were relegated to this category on account of the criticism of conservative lawyers in the constituent assembly, who thought (maybe rightly) that these rights were not practical and were not enforceable. The practicality and enforceability argument represented the scarcity problem and complexity of duty respectively, associated with positive rights. It is to be noted that there are no legal obligations on the state to achieve any of the goals mentioned in the DPSP, except for the right to education of children, which was to be achieved within a timeframe, to which no respect was shown by the Indian state; the right to education could come into force only after repeated declarations by the Judiciary.

These positive rights are rendered non justiciable by article 37 of the constitution, which declares that, while DPSP are fundamental in the governance of the country and the state is duty-bound to implement them, they shall not be enforced in any court.[49] The general understanding with regard to DPSP has been that they are "to be implemented by the executive and legislative branches of the Indian state, and are not to be the subject matter of intervention by the court."[50] The importance of DPSP is reflected by what Ambedkar thought about these instruments. For Ambedkar the Constitution was a tool for a revolution without any bloodshed. It was the primary objective of directive principles to link political democracy with economic and social democracy.[51] "...Directive Principles of the Constitution or the 'strivings' of the

49 Vijayshri, Sripati, et al, 'India: Constitutional Amendment Making the Right to Education a Fundamental Right', in *International Journal of Constitutional Law*, 2004, p. 149.
50 Ibid.
51 Jean Dreze, 'Democracy and Right to Food in India', in *Economic and Political Weekly*, 2004, p. 1723.

state...include a fulsome engagement with matters of health, education, individual and communal safety, equality, and prosperity."[52] If nothing else, this detailed agenda can be seen as an attempt to set the political and social goals for future governments. This vision is also "seen as implying an activist and capacious state, responsible for the eradication of poverty, undoing the stigmas of casteism, improving public health and education, building large industry, facilitating communication, fostering national unity, and, most broadly, creating conditions for the exercising of freedom."[53]

The manner in which these positive claims are dealt with in the Indian Constitution seems to be motivated by the kind of complexity associated with positive rights which was discussed in the previous section. While one of the questions, i.e., about the point of duty has been resolved by putting these claims in the form of directives to be followed by the government of the day, the other question about the type of the duty, has been resolved by keeping the duty open ended on one hand and on the other hand by giving guidelines for formulation of the policy. Article 41 under the DPSP reads that "(t)he State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want." This article declares that people do have a right to work, education and other social security rights and the duty to 'secure' these rights lies with the state, but at the same time there is no mention of the nature or content of the duty. At another level, the constitution in article 39 of the DPSP reveals something about the nature of the duty of state with respect to these rights. Article 39 says that "the state shall, in particular, *direct its policy towards securing*. a) That the citizens, men and women equally, have the right to an adequate means of livelihood; b) That the ownership and control of the material resources of the community are so distributed as best to subserve the common good…" This article indicates that the duty entrusted to state with respect to DPSP is to be sorted out in the realm of 'policy'. And in this realm of policy, law is added by article 37 which demands that the state follow these principles while making law. However this same article i.e. 37 also ensures that the

52 Uday Mehta, 'Constitutionalism' in, N. J. Jayal & P.B. Mehta, eds., *The Oxford Companion to Politics in India*, OUP, New Delhi, 2010, p. 21.
53 *Ibid.*

application of these principles cannot be enforced through any court of law. This limiting feature ensures that matters of policy and law cannot be reviewed in the court on the basis of DPSP. Thus the sole authority applying these principles is the state which comprises of the legislature and the executive. Suhas Palshikar notes this arrangement in very interesting words as follows,

> "In any case this arrangement is curious and awkward. Curious, because the state is handed down a mandate which is optional as far as its implementation goes; and awkward because, in the ultimate analysis, this arrangement provides a legitimating ideology to the state on the one hand and on the other a space for curtailing individual rights in the name of welfare policies, something that happened during the mid -1970s. The state could get away with delegitimation of these rights without bringing about substantive welfare."[54]

While DPSP in practice were used as an instrument of legitimizing state actions by the state, there is a possibility that their 'awkward and curious' design had some logic at the time of formulation. Ambedkar's words on DPSP reflect the possible motivation for choosing this kind of a design,

> "…while the constitution should contain a vision of economic democracy, it cannot privilege one particular mechanism for accomplishing it. Some people, he said, believed that economic democracy could be brought about through individualism; others through socialism and still others through communism. These differences justified the directive principles remaining open ended, rather than fixed or rigid, in respect of mechanisms by which economic democracy may be realized within the framework of parliamentary democracy."[55]

These lines make 'economic democracy' and 'parliamentary democracy' the key concepts in this design. The achievement of economic democracy is possible through following different kinds of economic systems within the parliamentary democracy dictated political system. To ensure that the future generations have the option of

54 Suhas Palshikar, "The Indian State" in Rajeev, Bhargava ed., Politics *and Ethics of the Indian Constitution*, 2009, pp. 151-152.

55 Quoted in Niraja Jayal, *Citizenship and its Discontents: An Indian History*, Harvard University Press, 2013, p. 158.

flexibility in choosing economic systems, it could be possible that these rights were expressed in the form of open ended, non justiciable guidelines. Thus there could be at least two reasons as to why these rights were expressed in the form of DPSP, one is the nature of these rights which makes it difficult to ascertain the content of duty and the other could be the desire of the constituent assembly to ensure that there is some amount of freedom in the realm of economic policy. It seems that it is these design implication inherent in positive rights that lead to the relegation of these rights into a sphere of being non-justiciable.

Charting the course of the debates and formulation of the constitution of India in the constituent assembly, Granville Austin notes about the directive principles by saying that "most members believed that the type of 'socialism' India should have was not theirs to decide (nor is the issue yet settled), but it was clear to them that 'the utility of a state has to be judged from its effect on the common man's welfare, and that the constitution must establish the state's obligations beyond doubt. This was the purpose of the Directive principles of State Policy".[56] The emphasis on the economic angle inherent in the scheme of DPSP also had a historic background according to Austin. For him "the content of the Directive Principles was also to some extent a product of the anti-colonial revolution...the Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, that the Indian people (through the democratic institutions of the Constitution) had assumed economic as well as political control of the country, and that Indian capitalists should not inherit the empire of British colonialists".[57] The mistrust towards private capital and profit interest in the post independence era's public sphere probably had this anti-colonial mindset as the possible reason. Also the desires of economic stability and progression and the centrality of the state in achievement of those desires created a centralized polity and decision making process.

56 Austin, Granville, *The Indian Constitution: Cornerstone of a Nation*, Oxford, 1966, p. 76
57 *Ibid.*, p. 77.

While the reasons of this choice are important to be ascertained, the more critical need is to analyze the design possibility of this choice. The DPSP based design makes these rights achievable only in the realm of policy and law and that too by the state. "By establishing these positive obligations of the state, the members of the constituent assembly made it the responsibility of future Indian governments to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate the powers of all men equally for contributions to the common good".[58]

It also reflects on the prominence of negative liberty based framework of governance in the country. The courts could only be accessed by the citizens if their fundamental negative rights were encroached upon by the state or other citizens. One has to remember that the creation of these two categories, fundamental rights and DPSP, was necessarily a liberal constitutional design marked by the preeminence of negative liberty rights which were the content of the fundamental rights chapter. The State in India was bestowed with the traditional negative liberty based legal infrastructure which saw the achievement of second generation claims as a function of the proper functioning of first generation rights. The Indian state voted for a similar delineation of rights based on the generational genealogy at the international level at the time of the incorporation of the human rights charter.

> "As the Human Rights Commission debated the issue of whether there should be one all-encompassing convention for all rights or two conventions (one on political and other on social, economic, and cultural rights), India championed the cause of two conventions, arguing for the primacy of political rights, affirming their superior justiciability and presenting the improvement of social, economic, and cultural conditions as goals to be obtained through the exercise of the more precisely definable civil and political rights. In a memorandum to the commission in 1951, it expressed its unyielding opposition to including economic, social and cultural rights in the convention on the grounds that 'financially weak countries where these rights are not justiciable will not be in a position to implement them."[59]

58 *Ibid.*, p. 66.
59 Niraja Jayal, *Op. Cit.*, p. 147.

How can the negative liberty based rights i.e., civil and political rights be exercised to achieve improvement of social, economic and cultural conditions, when the state is the force which would decide the direction of economic policy? The realm of law and policy can only be influenced by the representatives elected by the citizens. And this makes elections the most important sphere to influence policy through which improvement in social and economic conditions of the citizens can be achieved. Civil and political rights are important for citizens to express their opinion about policy. The sphere of public opinion becomes very important for the section of citizens who would want to affect policy formulation. This sphere of public opinion also becomes very important for the state, because it is in this sphere that the state fishes for legitimacy through the tool of DPSP.

This arrangement which was marked by a strengthening of liberal democratic dimension of the state and showed some ambiguity on the front of socio-economic claims/welfare provisions included in the DPSP, "…implied that liberal democracy would be the legal basis of the state, while welfare would supply the 'non-justiciable' politico-ideological basis for the state. The state was allowed to and enabled to take 'positive action' but it was left to the state itself to define the scope of such positive action. It was believed that no one could ignore the directive principles because the electorate would insist on their implementation. This belief indicates that the constitution wanted the state to be sensitive to public opinion."[60] But the record of the Indian state on this front has not been satisfactory.

> "Despite the remarkable historical achievement of consolidating a constitutional representative democracy in a poor agrarian society and the persistence of a vibrant parliamentary left, however, India's national politics has proven relatively unresponsive to local popular demands for greater material equality. Social movements seeking to defend such interests have more often pressed their claims vis-a-vis the bureaucracy and judiciary. Their respective struggles have rarely penetrated the national electoral arena, a domain that has been dominated by the politics of identity, especially since 1989.[61]

60 Palshikar, *Op. Cit.*, p. 149.
61 Ruparelia, Sanjay, 'India's New Rights Agenda: Genesis, Promises, Risks', in *Pacific Affairs* 86, no. 3, 2013, p. 571.

The design that the DPSP kind of system creates is marked by the importance of public sphere or public opinion in achievement of inclusion of these concerns into the policy of the state. During the formulation of the constitution the inclusion of adult suffrage was given great importance by the constituent assembly. There was great deal of hope of rejuvenating the public sphere through this measure. “Direct election was to be the pillar of the social revolution, for, as Nehru wrote, 'an assembly so elected (would) represent the people as a whole and (would) be far more interested in the economic and social problems of the masses than in the petty communal issues which affect small groups”.[62] Thus it was believed that through the institution of direct election, a unity in the already fragmented public sphere could be achieved. “Adult suffrage gave a voice, indeed power, to millions who had previously to depend on the whim of others for even a vague representation of their interests. Direct elections brought – or could bring – national life and consciousness to individuals in the village. This new awareness through a new channel of communication made possible new allegiances, national instead of local, thus creating an alternative to the caste and other purely local loyalties that impeded national unity...”.[63] This kind of thinking though had implications for the imagined public sphere and thus as a result on the efficacy of directive principles. It was to be assumed that the working of the electoral mechanism was going to create a unified field of demand driven public sphere. And it was also to be assumed that, if the state did not respond to the legitimate directive principle based demands, the electoral mechanism was to oust the ones in power. But the centrality of the state in the whole scheme and the amount of power it had to create rhetoric was not factored in. The primacy of state in choosing what it does and how it does in these matters has probably led to a paternalistic, need based welfare regime in India in the second half of twentieth century.[64] Welfare in this kind of system becomes a tool for ensuring electoral victory and thus gets converted into freebies. Welfare takes the form of managing sections of the voters by giving out doles to them in the form of subsidies. The level of welfare is to such an

62 Austin 1966, *Op. Cit.*, p. 58.
63 Austin, *Op. Cit.*, pp. 58-59.
64 Jayal, *Op. Cit.*

extent that an electoral victory can take place. This also makes welfare policies take the route of managing communities.

India's experience of dealing with DPSP's has been a bit more complicated. And expectedly the complication does not arise as much from the theoretical underpinnings of these rights as from the manner in which they were attempted to be implemented. First of all these rights were not thought of as rights in the post independence era. They were thought of as a byproduct of the process of economic development undertaken by the new Republic with central planning as the method of achievement of this economic development. Every aspiration was being expressed through the category of directive principles and every aspiration was subject to economic development and industrialization. It is important to underscore the prominence of economic development in the way the governance of the country was undertaken because, even something as simple and urgent like land reform was in the service of increasing agrarian efficiency and creating land pool for the needs of economic development and the needed institutions. Education for all had to wait till Indians could reach a certain level of economic affluence. It is this one-dimensional focus of the executive (executive was driving the legislature) which, probably led to the situation where the fundamental rights of the citizens were put in conflict with the directive principles. The choice of central planning was probably the reason why fundamental rights were thought of as less important than directive principles. In fact the story of governance in the period right after independence to the invoking of emergency is centered on this conflict.

The Principal Finance Secretary, Mr. H. M. Patel speaking on the topic 'Expanding Government of India', at the IIPA, New Delhi in the year 1956 stated how the government understood the directive principles. He said that 'the responsibility of the State to promote economic development became a firmly established tenet of the State policy. This new directive, which was enshrined in the Directive Principles of the constitution and the Industrial Policy Resolution of 1948, received further recognition

with the establishment of the planning commission in 1950's.[65] Interestingly on the same platform the home minister of the country asked the people to be vigilant and said that unless people were vigilant it was dangerous to entrust all functions to the government. The focus of the government of the day was economic development and that was supposedly done in promotion of directive principles. Time and again it was stated by the government functionaries that the basis of economic policy was the industrial policy resolution of 1948 and the DPSP, along with the assertion that the days of *laissez faire* were over.[66] In a way the directive principles were being used by the government to provide legitimacy for the economic policy that it was undertaking, because directive principles enjoyed a great deal of legitimacy amongst the people of the country as they had a direct linkage with the idea of *swaraj*. From the first plan to the second plan, the focus had become more precise and mere economic development was not the goal anymore; it was now the setting up of a socialist order, which was being pursued by the policy makers.

3.3 Planning and the Directive Principles

The formulation of the planning commission was with the stated agenda of giving shape to the desires expressed in the directive principles. But it seems that, it's most important work was assigned as planning for economic growth and development. The technocratic bent of mind is visible from the start. However, it can be argued that many of the DPSPs were more political than technocratic.

The initial survey entrusted to the planning commission includes assessment of the resources and ways in which those can be best utilised, finding out the nitty-gritty's of the plan process and stages of the implementation of plans, indicate the factors which tend to retard economic development and conditions which can foster successful

65 The Times of India, "Dangerous To Entrust All Functions To Govt: Pandit Pant asks People to be Vigilant, Aug 14, 1957

66 The Times of India, "Full Employment in Ten Years is Goal: Mr Deshmukh on Economic Policy", Dec 21, 1954, p. 1.

completion of the plan, nature of machinery required for each stage of plan, and plan appraisal amongst other things.[67]

Taking initial steps towards the formation of the most important policy institution of that time the Congress working committee passed a resolution for recommending the establishment of the Planning commission by the government. The resolution said "the aims of the plan were broadly laid down as achievement of the Congress objective's resolution and the directive principles of the new constitution – establishment of a just social order – through expansion of production, fullest utilisation of resources and self-sufficiency compatible with an adequate standard of living".[68]

It can be seen that no direct infusion of any of the directive principles takes place at the formative stage of such an important institution as the planning commission. It is only in the goals of the commission that it has to make policy in accordance with the DPSP. The DPSP's were taken as policy goals to be achieved rather than goals which were to inform the policy process. The policy process has been pinned to achieve expansion of production and this expansion of production is to lead to the achievement of the directive principles. Theoretically the nature of the directive principles is such that it requires a more decentralised approach than what was chosen for the Indian planning process. As discussed earlier, positive rights have diffused duty so the point of duty is usually not ascertained or the same. Moreover, the nature of the right is such that the duty is widespread and can take several kinds of dimensions. So a right to food might generate a duty of right to work for the state and that in turn might generate the duty of providing education to the people concerned. All of these inherent theoretical complexities and the requirement of individual differences make it difficult to think about positive rights and directive principles in

67 The Times of India, "Balanced Utilisation of Resources: Planning Body's Terms of Reference", March 16, 1950, p.1.

68 The Times of India, "Statutory Body for Planning: Congress Desires Early Appointment", January 20, 1950, p. 1.

one sweeping theoretical way. It is important to keep the options open and seek solutions from the bottom up.

The political usages of these initial steps were also going hand in hand with their initiation. Following comments on a resolution passed by the Congress working committee in the 1950's is indicative of these political usages.

> "Steering clear, as it does, of all 'isms' and expressing no views on government's present economic policy, the resolution is stated to strike a mean between the realities of the existing economic situation and Congress pledges on the one hand and promises of the past and hopes for the future on the other. In some Congress circles, it is suggested that the resolution is in the nature of an economic programme on which the next general election would be fought."[69]

Two strands of thought are evident from the paragraph quoted above; firstly that the level of rhetoric has encompassed the past promises and future hopes and has promised to create a balance of these with existing economic situation, and secondly the eagerness of using these ideas as instrumental in the public sphere for political purposes. These strands also point to the nature of DPSPs as being ideal for political rhetoric. The nature of these promised goods and goals is such that they are going to take a lot of time for getting delivered and thus can be used for elongated periods for political rhetoric. The planning process and its history in the country are a ready reckoner of this fact.

This resolution by the Congress working committee had also envisaged the duty of the planning commission. Interestingly none of the duties included any mechanisms or methods to infuse directive principles directly in the policy process. The entire gamut of duties imagined was technocratic in nature. The duties imagined by the Congress working committee for the planning commission were, one, "to make a full

69 The Times of India, "Statutory Body for Planning: Congress Desires Early Appointment", January 20, 1950, p. 1.

assessment of the resources and the requirements of the nation"[70], two, to determine priorities, to work out a proper allocation and distribution of the resources and their constant adjustment to the changing requirements with a view to obtaining the speediest and the maximum realisation of the objectives of the plan"[71], three "to lay down the various stages, each covering a defined period, for the development of the country's economy and to undertake the necessary preparatory work in connection with each stage"[72], and four "to secure full and all round co-ordination in the process of planning and in the execution of the plan"[73]. It is very much evident from these imagined duties that the direction at the level of duty was very technocratic concerning the processes of economic development. Nowhere do any of the DPSPs get a direct implant in the proposed duties of the commission. For an example nowhere was it expressed that the planning commission will take up the project of planning as to how wages in the economy between males and females can be equalised, what is the role of policy in achievement of such a social and equality oriented goal, what the international experience is in this regard. Every other DPSP was made a subject to the achievement of economic development. It is understandable that economic development was the need of the hour, but it is also very clear that the DPSP's were being used only as statements for ascertaining the overall goals of the governance process. There was no effort to infuse these principles into the most important policy process. There were social goals which could have formed a second part of the desired/imagined/actual duties of the commission, but the message was loud and clear, the government had to take DPSP into consideration, the planning commission thus had them as its lofty ideals, but achieving these was subject to economic development. After getting relegated in the constitution, DPSP were again relegated in the policy sphere to lofty ideals. Reporting the first five year plan Times of India wrote that,

> "The Plan derives its essential character from the Directive Principles of State policy written into the constitution which stipulates an economic and

70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 *Ibid.*

> social order based on equality of opportunity, social justice, the right to work, the right to an adequate wage and a measure of social security for all citizens. The approach to this objective is democratic rather than totalitarian and entails a voluntary and co-operative acceptance of present sacrifices for future benefit".[74]

The rhetoric was loud and clear.

> The report on the first five year plan was basically a technical document which was probably far away from the understanding of the common masses. The report says that, "The first part contains an analysis of the process of development in an under-developed economy and indicates the long-term goals towards which national effort is to be directed. The objectives, priorities and techniques of planning are set out at some length and an assessment is made about the resources which have to be mobilised in order to carry out the Plan".[75]

Further up, the report talks about the importance of public cooperation in the project of nation building.

> "The second part of the report is concerned with administration and public co-operation. Several suggestions are offered for the reform of public administration. On the question of administration of development programmes at the district level, where vital nation-building work is undertaken and the participation of the people is all-important, a number of proposals are offered for consideration and action on the part of State Governments and other authorities. This portion of the report closes with the consideration of the problems of public co-operation in national development, a theme which, because of its high importance and urgency, recurs throughout the report".[76]

If the planning process was democratic and was inclusive of the concerns of the people with their inputs in place why was there a need to call for public cooperation in the plan document itself? These efforts at calling public cooperation were basically directed towards making people give up the demand side of the governance process. People were expected to wait till the fruits of development could ripen. This again points towards the centrality of the question of economic development. The social

74 The Times of India, "Five Year Plan to Cost...", July 10, 1951,
75 Government of India, Planning Commission, *"First Five Year Plan"*, 1951.
76 *Ibid.*

revolution promised at the time of independence struggle got transformed into the directive principles at the time of constitution making and later after the constitution was enforced and policy was being enacted, the directive principles further got transformed into the desire of technocratic economic development. People were expected to cooperate with this design. They were also expected to commit to sacrifices so that the plan could become a success.

> "The fulfilment of the Five Year Plan calls for nation-wide co-operation in the tasks of development between the Central Government and the States, the States and the local authorities, with voluntary social service agencies engaged in constructive work, between the administration and the people as well as among the people themselves. Although several programmes included in the Plan are already under way, it is important that, through sacrifice borne equally by all citizens, the effort and resources of the entire nation should be mobilised in support of the Plan so that, during the coming years, the tempo of development can be greatly increased and the Plan becomes a focus of intense activity and a field of common endeavour throughout the country".[77]

An order of priorities has been laid down. "First, the completion of programmes already underway- including the rehabilitation of displaced persons. Next the increased production of food and agriculture largely through increased irrigation and then the enlargement of employment opportunities and the development of welfare services".[78] Questions of welfare and employment were later in priority than increasing food production. And food production was again made a function of large irrigation projects.

The industrial policy of 1948 which was largely based on the Bombay plan developed by the industrialists under the aegis of FICCI was one of the bedrocks of the planning process. The emphasis on infrastructural goods such as electricity, irrigation, agriculture was of great importance to the development of the private sector enterprises, which is exactly what was witnessed later in the historical development of Indian economy. Although private capital and profit interest were perceived with doubt in the public sphere in those times, directive principles as the goal could garner

77 *Ibid.*
78 The Times of India, "Five Year Plan to Cost...", July 10, 1951

much needed legitimacy for the purported infrastructural development of the country. In a way an almost one sided planning effort without much focus on basic human development requirements as education and health was passed through the public muster with the help of Directive Principles as its purported goals. “The Commission has also indicated the frame-work within which the Plan is to be accomplished – a centrally directed economy in which the State plays an active role and there is close co-ordination between the public and private sectors”.[79]

The centrally planned economy was also to plan and direct the democratic rights of the workers. It was reported that “...any upward movement in wages which would be reflected in the cost of production should be avoided in the present circumstances. The Commission opines that in any economy 'organised for planned production and distribution, aiming at the realisation of social justice and welfare of the masses, strikes and lock-outs have no place”.[80]

One of the key institutions of democratic governance was the National Development Council which was set up in the year 1952. But here also the Planning Commission was the key decision maker and the key idea for the National Development Council was cooperation rather than dialogue or deliberation between the Centre and States.

> “Important questions of policy relating, for instance, to the land problem, the food problem, provision of finance for agriculture, common production programmes for small-scale and large-scale industries, selection of irrigation and power schemes and conservation of mineral resources have been under close examination in the Planning Commission. In making its recommendations, the Commission is conscious that the framing of social and economic policies in different fields is a continuous process and that, within the framework of priorities and objectives now formulated, such changes as may be necessary in the interest of national development will be made as further experience is gained and ideas are tested in practice. In the field of policy the Central and State Governments have to act in close co-operation with one another. Such co-operation will be greatly facilitated as a result of the setting up in August, 1952 of the National Development-

79 *Ibid.*
80 *Ibid.*

> Council which includes the Prime Minister of India and the Chief Ministers of all States"[81]

At the time of acceptance of the first five year plan by the National Development Council, it is visible as to how democratic and inclusive the entire process was. Speaking at the event Morarji Desai proudly exclaims that the 'states would always be prepared to subordinate their interests to those of the country as a whole'.

> "A resolution moved by the Uttar Pradesh Chief Minister, Pandit Govind Ballabh Pant, expressing 'general approval and acceptance of the objectives, priorities and programmes embodied in the Five- Year plan,' was adopted unanimously by the National Development Council this evening at the conclusion of its two-day session here. Bombay's chief minister Mr. Morarji Desai, congratulated the planning commission, which, he said, 'had succeeded, to a very large extent, in reconciling divergent views,' and proceeded to give an assurance that the States would always be prepared to subordinate their interests to those of the country as a whole".[82]

Further, the states were happy about the fact that the process of plan making and implementation was going to be heuristic and changes could be made later after learning from the process as some of them were not very happy with the way financial resources were shared between the states and the centre.

> "Although general approval was given to the Plan by the Chief Ministers of States, they return with the hope that necessary adjustments will be made in the final draft of the plan to meet the difficulties and aspiration of individual states as far as practicable. The Prime Minister's assurance that adjustments in the Plan could be possible in the light of experience gained after working it for some time, has heartened certain states which were disappointed to some extent with the provision made in the Plan for financial assistance from the Centre".[83]

The path onwards to the formulation of second five year plan reveals some more points about the design of the planning process. It was essentially a top down process,

81 Government of India, First Five Year Plan, *Op. Cit*.
82 The Times of India, Five Year Plan approved by Development Council..., Nov 10, 1952, p. 1
83 The Times of India, Five Year Plan approved by Development Council..., Nov 10, 1952, p. 1

and so much so that the preparation of district and village level plans were reported as something which needs to be fitted into the larger plans of the state and the centre rather than a reverse option of the village and district plans leading to the national and state level plans. Here again, the question of public participation and voluntary effort (in other words cooperation) is talked about. So, it seems that the exercise of inclusion (or something similar to inclusion) of the village and district level plans into the larger planning process was an exercise to involve and 'nudge' people at the local level to cooperate, participate and put in voluntary efforts to make the plan successful. If the government was undertaking something that the people demanded through the directive principles why was there any need to 'nudge' people into action and that too at such a revolutionary moment of nation building? This line of thought again points towards the possibility of rhetoric when it came to directive principles.

> "Work on the Second Five Year Plan has been in progress for about two years. In April 1954, the Planning Commission requested State Governments to arrange for the preparation of district and village plans, especially in relation to agricultural production, rural industries and co-operation. The preparation of such plans was undertaken as it was felt that in sectors which bear closely on the welfare of large numbers of people, local planning is an essential .means for securing the maximum public participation and voluntary effort. While plans for districts and villages and for national extension and community project areas have to be fitted within the framework of State plans which, in turn, take cognizance of plans prepared from the point of view of the economy of the country as a whole, the district is still the pivot of the whole structure of planning. At this point plans from different sectors come intimately into the life of the people".[84]

Also the lofty and technical plans were probably too much for the normal and common people to understand. The planning process by now, i.e. formulation of second plan had taken a draconian technical form. It was totally under the aegis of the economists and statisticians at the ISI and the impossible was being attempted by the technocrats. The frameworks were apparently tentative, but were centrally deciding what was to happen in the society and economy. Even by now, no heed was given to the need of social goals like education for all and the question of food was seen from the perspective of national ability to produce food. Employment was an outcome to be achieved through planning, and so was food production.

84 Government of India, Planning Commission, *Second Five Year Plan*, 1956

> The study of wider aspects of national planning also commenced during 1954. Towards the end of the year the assistance of the Indian Statistical Institute was obtained for the study of technical and statistical problems relating to national planning, and a number of working papers were prepared at the Institute. In March 1955, the results of these and other studies were brought together in Professor P. C. Mahalanobis's 'Draft Recommendations for the Formulation of the Second Five Year Plan' (referred to as the 'plan-frame') and in a 'Tentative Framework for the Second Five Year Plan' which was prepared by the Economic Divisions of the Ministry of Finance and the Planning Commission. These documents were considered in April 1955 by the Planning Commission's Panel of Economists, which drew up a 'Memorandum on Basic Considerations Relating to the Plan-Frame'. Members of the Panel also prepared a number of studies on individual aspects".[85]

With the advent of the second five year plan, the real utility of the DPSP's were coming to fore. It was made amply clear by the National Development Council that the movement towards a socialist pattern of the society should be concretised through the policy suggestions put forth by the plan document. Any efforts to hide the desires of creating a socialist pattern of society in the guise of directive principles were now given up by the political class. It needs to be pointed out here that the desire of having a socialist pattern was very much a public desire as it was probably experienced by the people of the country (in the backdrop of initial few years of governance) that the kind of desires which were expressed first in the form of demand for social revolution and later institutionalised in the form of directive principles, were probably best attainable through socialism. The socialist pattern of society was also in demand for its design implications of subjugating individual rights in the service of common good. The fine balance that was supposedly created by the constituent assembly in the constitution around the need of collective action or collective good and individual rights was soon subject to severe scrutiny in the public sphere. This state was also brought in by the initial direction taken of central planning. According to the plan document:

> "The 'plan-frame'...(was) considered by the National Development Council early in May 1955. The National Development Council generally agreed with the basic approach of the draft 'plan-frame' and 'tentative framework'

85 *Ibid.*

> and with the policy considerations relating to it, which were put forward in the Memorandum of the Panel of Economists. The Council also agreed that the Second Five Year Plan should be drawn up so as to be capable of leading to an increase in national income of about 25 per cent over a period of five years and of providing employment opportunities to 10 to 12 million persons. Further, the Council directed that the Second Five Year Plan should be drawn up so as to give concrete expression to policy decisions relating to the socialist pattern of society".[86]

The federal structure was also subjected to planned development. While the state's had enough powers to deal with local issues, everything was now centralised. The state officials and chief ministers were coming to planning commission to discuss their individual state plans and their state level proposals were being scrutinised by the planning commission and officials from the ministries.

> "Between July and December 1955, the Planning Commission held discussions with Central Ministries and with State Governments. Discussions with each State afforded an opportunity to review the broader aspect of individual State plans in consultation with Chief Ministers. Detailed examination of the proposals of States took place in working groups in which senior officials from the Central Ministries, State Governments and the Planning Commission collaborated".[87]

Efforts were also being made to derive legitimacy for the planning process by calling in suggestions on the draft plan. A semblance of democratic policy making was being created by this exercise.

> "During January 1956, a Draft Memorandum embodying the proposals which emerged from these discussions was considered by the National Development Council and the Consultative Committee of the Members of Parliament. In the light of these discussions and other comments, a Draft Outline was published in February 1956 for general information and for eliciting comments and suggestions. Suggestions received on the Draft Outline were taken into consideration in the preparation of the Draft Second Five Year Plan".[88]

Was there any need or space to seek comments on a draft that had a technical background? Would the plan makers consider incorporating some suggestion which was say a bit irreconcilable in their theoretical model; was it even possible to include

86 *Ibid.*
87 *Ibid.*
88 *Ibid.*

comments in a draft that was based on statistical and economic technicalities? This exercise then can be nothing but an effort to create a kind of legitimacy for the plan. Pointing out the problem of focus with respect to the planning process and the problem of not involving alternative methods and plans, Richard S. Eckaus argues that,

> "The political process which leads to the formulation of the final document is undoubtedly an impressive manifestation of the working of an open society. By its very nature it generates many problems from the point of view of mapping an optimal strategy for economic development. Though there has been a considerable amount of debate over the plans, there has been relatively little explicit attention given to alternative strategies or paths of economic growth and development (*is the process really democratic then?*). In fact the political discussions have been only tangentially concerned with questions of alternative compositions of national targets and much more with the capacity for saving and taxation, problems of direct controls and price stability. The latter are, of course, directly related to the setting of social-economic goals and to the mapping of the paths leading towards them. However, the relationships have not been spelled out, and the significance of the plan targets for current and future welfare has been left implicit."[89] (Emphasis added)

It is clear from the comment above that the probable reason for missing out on the inclusion of alternatives and thus questions of welfare (of present and future) related to socio-economic goals was probably a function of making these aims, goals or agendas an indirect by-product of mastering technical concepts like 'savings rate', 'taxation', and 'price stability'. The technocratic bent of the planning mind had made the goals of '*swaraj'* implicit in the process of its technical moorings. The failure to choose alternatives was probably not so much because of intent of the people involved in planning as these people were trying their best and India's planning effort was considered to be one of the best in the world. It was more of a failure emerging from the design of things which ensured that the necessarily wherewithal to plan alternatively, was only not present.

> "Although participation in the debates which accompany the preparation of the plans is widespread, unfortunately it has not been well informed either on the welfare implications of the plan goals or on many other plan implications. Planning efforts have been absorbed in attempting to make a

89 S. Richard, Eckaus, 'Planning in India', in Max F. Millikan (ed.), *National Economic Planning*, NBER,1967, p. 306.

> single plan whose goals, resource requirements, and resource availabilities were consistent. Alternative policies have received only limited consideration in part because the alternative plans are difficult to prepare, and the enormous amount of information needed for their formulation is not readily available to individuals and organizations outside the central government. Hence, in order for a range of alternatives to be available for consideration, the Planning Commission and the concerned ministries would have had to prepare them, and this has not been done. The preparation of alternative plans and the comparison of their implication is not advocated as a service to potential critics. It is an essential part of the planning process, for only in this way can the full implications of any single plan can be appreciated."[90]

It was perhaps due to this lack of alternative plans and strategies that the issue of planning became really a mammoth task which had to be scrutinised at each step and flexibility was needed in the form of annual plans to smoothen out rough outcomes.

> "In the course of the past year certain considerations have impressed themselves upon the minds of those concerned with the formulation of the Second Five Year Plan. A Plan for a period of five years has to be viewed in the social and economic perspective of a longer period. It has to be worked in a flexible manner so that, through annual plans, adjustments are effected in the light of economic and financial trends, increase in production in agriculture and industry, and progress in different sectors of the Plan. Close coordination has to be arranged in the related fields of industry, transport, minerals and power, so that the expenditure incurred on each group of connected projects yields the maximum return. As the National Development Council recognised, to offset inflationary pressures associated with a period of rapid development, it is imperative that the targets of agricultural production proposed in the Plan should be further improved upon. At each stage adequate supplies of food and cloth and of essential consumer goods will have to be provided at reasonable prices and a careful watch on the working of the national economy maintained."[91]

In what was an exercise of planning for generating conditions for the working of directive principles, the end result was sadly coming out to be overconcentration on the issue of economic development. It can be argued that the choice made in the form of centralised planning was the right thing to do at that point in time. But when one is reminded of the lofty ideals of directive principles, one is suddenly forced to think as to what went wrong with the choice the administration of the country made in terms

90 *Ibid.*
91 Government of India, 1956, *Op. Cit.*

of the method of implementation of the directives. Perhaps the intent was never to focus on the directives and the directives were being used to garner political mileage. The rhetoric with respect to the directives is very obvious, because it took no time for the government and elites of the country to give up the social revolution based desires in the pursuit of modernity based on the western experience. The desire to industrialise for better living standards was definitely an indirect method to achieve the directives. The method of the commission of centralised economic planning had inherent flaws. Overemphasis on the outcomes in the form of economic indicators rather than clear focus on desired social policy goals of DPSP's were visible from the start. In the first two decades after independence it was observed that "the experience in many developing countries... (had) clearly shown that concentration on economic growth objectives – maximization of per capita GNP – does not subserve desirable social aims such as...provision of productive employment opportunities for all those seeking work,...elimination of abject poverty...narrowing of income disparities and... reduction of concentration of wealth and power".[92] The rhetoric is not just visible because an indirect method was adopted wherein directives were going to be an outcome or by-product of industrialisation or economic development, it is also visible as there were no parallel alternative strategies or methods adopted to give any substance to the desires expressed in the directives. The use of directives was perhaps limited in garnering public and popular support for the government policies. And soon enough from the first plan to second plan, the expression of the desire seemed to have got a new language in terms of 'socialist pattern of society'.

The rhetoric is also visible at the level of the administrative setup. There were hardly any efforts made to institutionalise duty of the state for such urgent rights as the right to education, which if implemented could have gone a long way in creating literate and capable human capital for the country. The state was rather more interested in putting the people through 'sacrifice' and 'voluntary effort' to make the plans work so that the process of national building could be taken up with faster pace. "The full purpose...either of the preamble or of the directive principles is not, in actual fact,

92 K. R. Ranadive, Growth and Social Justice: Political Economy of 'Garibi Hatao', in EPW, vol. 8, no. 18, May 5, 1973, p. 835.

realised only by the passage of legislative measures. The whole organisation and process of government have to be so designed as to ensure that the purposes intended to be realised are, in fact, so realised".[93]

The entire administrative setup was engaged in the process of creating a top down plan and thus a top down administration. Infusion of democratic credentials was limited to the constitutional design of parliament. The executive in the form of Jawaharlal Nehru held on to the democratic values, but the methods and designs in the form of centrally planned economy were going to give birth to a not-so democratic administration. "It is usual with students and observers of the Constitution to limit their interest to the design of the three well-known parts of the superstructure of government – the executive, the legislature and the judiciary. While it is true that a democratic government cannot be said to exist unless its constitutional basis and form in these three respects conform to the requirements of popular control, it must be emphasised that the effective working of the democratic constitution would depend at least as much on having a democratic pattern of administration as on having an approved democratic pattern of the Constitution".[94] Thus even at the level of the kind of administrative values getting created; directives were being relegated to rhetoric. So the rhetorical nature of usage of the directives by the Indian state is evident at three levels, first the choice of indirect method of industrialisation and centrality of the idea of economic development, second the lack of any parallel and alternative methods to deal with these desires and third at the level of values and design that the chosen larger design created in the form of administrative setup. The story of positive rights in India thus starts with the desires of a social revolution which were expressed by the Congress in the pre-independence era in the format of economic and social rights. These desires were converted into non justiciable directive principles of state policy in the constituent assembly and found space in the part IV of the Constitution and with the choice of a centralised planned economy directed at rapid industrialisation and economic development, these directives were used in a rhetorical sense to give credence and garner public support and later were slowly getting transformed into a desire for a 'socialist pattern of society'. By the second plan the demand for socialist pattern of society was setting in. This demand was also going to culminate in to a

93 D. G., Karve, Pattern of Administration in Republican India, Times of India, Jan 26, 1951
94 *Ibid.*

conflict of sorts between the judiciary and executive/legislature in the rest of the time till the emergency. The question of land reforms was central to this conflict. The next chapter tries to trace this conflict as this leads us further on to the story of positive rights in India.

3.4 Restricted Interplay in the First Phase

One can keep discussing the empirics around DPSP and the planning process as these were the mainstream ideas at the start of the journey of independent India. To make any head way with respect to understanding positive rights and its linkage with DPSP and pick up patterns in what was happening at that time one needs to put in usage some sort of analytical device. In this thesis, I have identified 'interplays' as such an analytical device. What were the interplays, if any, in this first phase? The imagination of rights as important instruments for the delivery of the idea of *swaraj* was a political expression that got widespread traction in the masses. One can call this an interplay as the political expression was accepted by the people and people rallied behind the idea. Later on the Constituent Assembly witnessed an interplay where legal and economic constraints were expressed by some members and these rights were converted into directives. Further, the delegation of the directives as the central goals of planning and the imagination of the delivery of these directives in an indirect format, subject to economic development is another layer of interplay. Here also legitimacy of government's chosen policy format, i.e., planning is getting derived from the directives as the goals of planning. It is interplay in a political sphere between the ruler and the ruled. But this kind of interplay is observed to be a restricted interplay and it indicates the extent of monopoly that the state had over policy processes.

The interplays are observed to be restricted in the sense that there were very few leaders of higher echelons of the Congress party or elected representatives in the constituent assembly who were involved in the processes of thinking over these rights. These leaders can be thought of as trustees of the people at large and they were involved in creation of the imagination of a government that could replace the colonial power and later in the creation of the basic rules which were to guide this government in detail. Interplay in the first phase was mostly a compromise.

The most important interplay in this phase is the one that took place within the Constituent Assembly where the rights with positive flavour were relegated to the sphere of non-justiciablity. This interplay was in the form of debates between the members of the constituent assembly. It is widely reported that conservative lawyers were unable to deal with these clauses. Ambedkar, however tried later to bring forth the importance of directives even after being non-justiciable.

The imagination of the planning commission and the planning process also involves a wider interplay. In this interplay, the planning process is promised on the face of it to deliver on the directive principles. Everywhere in government documents and in statements given by the functionaries of the state, directive principles are presented as the desired goals to be achieved through the process of planning. There is some progress made in terms of some laws like the minimum wages law etc, but the fact remains that it was not until the fifth plan document that calculations on unemployment data and poverty figures were included. The direct utilisation of directive principles to garner legitimacy for the planning process was not reflected in the design of the planning process's indirect method to deliver on directive principles. Planning was to consolidate industrialization and spark economic development which in turn would generate the desired goals of work, education, health and other social and economic goods for all. This was almost like a one sided interplay, where a promise was made and people bought it. It cannot be called technically interplay if consent of the people to the idea is not considered as in input to the process, which would be a mistake.

These interplays, which are observed in the first phase, are restricted in terms of the involvement of different kinds of institutions and the citizenry at large in the policy formulation process. Centralised planning was closely overlooked by the Congress party, but any wider consultation was not undertaken by either the Congress party or the government and in any case the design of central planning was such that it gave a lot of centralised authority to the executive branch of the government and in that too, largely to the prime minister. One can argue that in such a scenario saying that interplays were at all present can be a bit too naive. However, as the government of

the day was elected government and was representing the positive claims arising from a freedom struggle, and was seeking legitimacy from the people thorough policy communication and through seeking 'support' and 'compromises' from the people, one can argue that there was a invisible or hidden interplay at work. It was more of a one sided interplay in terms of decision making, but it took a two sided form as and when legitimacy was sought from the people.

The restricted ambit of this phase's interplay was also a function of 'newness' of forming a modern, democratic and republican state for the country. The government was in the initial days more of a trustee of people's faith in the idea of India and the transformative designs imagined in the constitution. The entire design was heavily tilted towards the legitimacy game between the ruled and the ruler.

This kind of a restricted ambit of interplays over positive rights/claims had implications in the later phase. It was not possible for the executive to keep treading the path of centralised authority in a constitutional design that had imagined strong negative rights and a strong and independent judicial branch of governance. A conflict over positive and negative rights took place in the second phase and generated wider interplays with some of the citizens invoking their positive rights through the judicial branch. Although the state in the first phase had not shown any interest in direct implementation of the positive rights, it was seeking to work on positive claims indirectly through economic and technocratic development. In the second phase, the executive presses for a long standing demand of *zamindari* abolition and land reforms, again wrapping up the move in the envelope of promotion of directive principles.

Chapter 4

Positive Rights: Institutional Conflict and Adaptation

This chapter is guided towards tracing the conflict which ensued between the judiciary on the one hand and the executive led legislature on the other. This conflict was mainly restricted to the question of fundamental rights like 'right to property'. An attempt is being made in the following pages to show how this conflict became severe with the passage of time and that this conflict was centred on the attempt of the executive to make directive principles or parts thereof, tools of creating the 'socialist pattern of society'. The intentions of the state (executive and legislature), in this exercise, are not being investigated as that question is a very wide question. This chapter only deals with the outline of the conflict and the way it was resolved (or left hanging) and the impact of this conflict on the question of positive rights as well as the impact and role of positive rights in this conflict. Austin, has argued that this conflict between the executive and the legislature on the one hand and the judiciary on the other hand was mainly a fight to take the custody of the constitution. In outlining this conflict, this chapter attempts to study the implication of this fight to take custody of the constitution.

4.1 The Background to the Conflict

With respect to DPSP one has to remember that these desires were thought of as rights when they were first uttered and subsequently during the last phases of the freedom struggle they remained in the form of rights, rights which were to be fulfilled once the Indian state became free from the clutches of foreign rule. But they were expressed in form of desires by the Constituent Assembly. That probably did not deter from DPSP's being the core of governance in the initial phase of the post independence period. The negative liberty based legal infrastructure was not sure about how to deal with it and continued on a very legalistic framework without any innovations. These desires were in fact in conflict with fundamental rights. Neither the state nor the judiciary could come up with any innovative ways of dealing with this conflict and the conflict played out in the open, and in a direct fashion, when the

DPSP based land reforms were blocked by the court on the invocation of the landed elites.

> "The broad political impulse after Indian independence was for the ruling Congress Party to eliminate *zamindars*—rural intermediaries, who under colonial rule had gained rights over vast tracts of land in many parts of the country—preferably without compensation, and to put into effect a 'socialist' Industrial Policy that gave the State a major role in controlling both private and public industry, control that was exercised through the 'planning' process and by state takeover of certain concerns. These moves were challenged invoking the fundamental right to property in a series of cases with the courts holding the steps to be unconstitutional because they violated the right to property".[95]

The fallouts of making social and political goals a function of economic goals were many. One of the few examples that can be taken to reflect on this is that of land reforms. Land reforms were an important positive claim of the people, as under colonial rule the country's land resources had become concentrated in the hands of the few and the system of management of land adopted and promoted by the British was very exploitative. Concepts like *zamindari* system had created conditions similar to slavery for many of the citizens involved in the agricultural activity. The cry for abolition of *zamindari* was almost unanimous. This was the direct utility of land reforms. Land reforms also had the indirect utility of enabling people to have some basis of coming out of poverty and enjoying the benefits of positive liberty as land resource is critical for being self dependent in a country where the overwhelming majority was involved in agriculture. Many a desire expressed in directive principles, like equitable distribution of resources, removal of poverty were imagined to be linked with land reforms. In that sense one can imagine land reforms to ensure land holding for all as one of the most critical and central positive rights. Francine Frankel has argued in her book that agrarian reforms were and remain central for India to climb out of poverty and feudalism. However, analysis of economic planning for the time period of the first two decades after independence reveals that "the aim of Government policy has not been to abolish landlordism; on the contrary it has led to

95 Jaivir Singh, Separation of Power and the Erosion of 'Right to Property' in India, Constit Polit Econ, 2006, p. 306.

transformation of feudal landlords into semi-feudal and capitalist landlords and created a stratum of rich peasants with the hope that they would rally around the ruling class."[96]

Even the planning commission report asserts that India has failed miserably in the sphere of land reforms. V. C. Koshy points out that "this makes it evident that in contrast to the declared objectives, the ruling Congress governments had only made use of these reform measures to preserve and protect their vested class interest on one hand and to adopt progressive postures on the other, in an attempt to cultivate a popular image among the masses".[97]

Thus it is evident that the need of land reform, seen in the light of positive liberty, to generate ownership and thus the basis of a social revolution promised from the pre-independence era was probably not the guiding force behind the executive led clamour for land reforms. Probably the concerns were guided towards inducing efficiency in the agricultural system to increase overall productivity and attain self sufficiency in food production or perhaps the driving desire was to ensure large swaths of land were available for the project of economic development led by industrialization as designed by the technocratic disposition of the times.

While many have argued and will keep arguing that there is nothing wrong *per se* in focusing on the economic development of the country and trying to increase the size of the economic pie, the problem of this kind of focus is expressed in a letter written to the editor of Times of India dated August 5, 1958. The reader points out a statement given on the floor of the house by the finance minister of the country at that time. The letter quotes the finance minister as saying,

> "I knew that the man (to whom I gave licenses) was going to do black marketing. I knew huge profits were being made because we gave quantitative protection of a blanket nature. I knew we were bleeding the consumer in the country white by allowing these enterprises to charge what the market would bear...I must tell my friend that we have served this country well. In doing so we have served the poor man ill because we have served the vested interests exceedingly well. Why? Because we wanted the wealth of the country to grow".[98]

96 Koshy, V. C., Land Reforms in India under the Plans, Social Scientist, Vol. 2, No., 12, July 1974, p. 45.
97 *Ibid.*
98 Gorwala A.D., Big Business: To the Editor, "The Times of India", The Times of India, August 8, 1958, p. 6.

In this statement the kind of governance and nation imagined in the constitution is not visible to the reader of the newspaper. He further expresses the frustration that was probably shared by a lot of people in those times by saying that,

> "...the declared ends of the Constitution as stated in the preamble and directive principles were completely disregarded. The government's conception of what constitutes the country, emerging from the finance minister's statement sheds a very clear light on the extent and power of the corrupting influence; for serving 'the country well' and wanting 'the wealth of the country to grow' means here favoring especially the black-marketers, the tax evaders, the makers of extortionate profits, the vested interests of industry and commerce at the cost of the mass of consumers and the poor".

These sentiments points towards a very important way of thinking prevalent in India, just after the independence was attained. There was a great deal of distrust for the idea of making profits and private ownership of resources. It is in this backdrop that one needs to understand the relationship directive principles had with the politics of the day. The stated objectives of the government were economic development and directive principles, but the desire of the people were in directive principles, and economic development was the process chosen by the government for the attainment of these goals. And further the process of economic development was to be based in central planning and socialism. With the advent of the second plan, the public sphere was replete with talk of a complete shift into a socialist society. Directive principles were the instrument of the creation of public will. These principles were the light houses (or a guiding force) which were to be reached. The importance of fundamental rights were probably not as dear to Indian people as they had just got political freedom from an outside force and were now looking for a change in their social and economic life. In the form of Nehru they had accepted a stalwart who could probably deliver these promises better than anybody else. But the contradictions in these desires and the methods chosen for their attainment were also out in the open. The conflict in the implementation of the policies emerging from centralized decision making, and being legitimized by directive principles, and the status of fundamental rights were emerging by the day.

4.2 Nehru Era and Conflict over Property Rights

While the desires or goals expressed in the directive principles were in contradiction with the methods chosen by the government, another more important contradiction was implicit in the design of the constitution. "As Nehru and his government began

working with the new constitution, it became clear to them that reconciling judicial independence and Parliament's custody of Constitution, when legislating for social revolution, would not be easy".[99] In the Indian constitutional scheme, the judiciary was given the final say on the fundamental rights. It could undertake a judicial review of legislation and declare legislation *ultra vires* if it found that it was not in tune with fundamental rights. Varied types of writs were imagined for the citizen to invoke their fundamental rights. The strength of the judiciary was however not a measure of its independence. At the outset all institutions including the judiciary had to create their institutional space with the passage of time and with mutual interactions. Within a short span of time after the inauguration of the Indian constitution, the judiciary led by Supreme Court and the Parliament led by the Prime Minister, Jawaharlal Nehru underwent a 'struggle over custody' of the constitution.

> "These first struggles over interpretation especially concerned pursuit of the social revolution as embodied in the Directive Principles of State Policy, in the fundamental rights, and in the provisions for special consideration for minorities and the disadvantaged members of the society".[100]

Initially the question of amending property rights in the country was taken up by the state legislatures with the help of 'state land reform laws'. "This process of change of property relations also involved the state High courts as a primary source of dissent..."[101] This conflict over the interpretation of property rights got extended to the central government when Jawaharlal Nehru initiated the First Amendment of the Constitution to overcome the initial obstacles by the High Courts.

The Times of India reported about the debate in parliament on the first amendment bill by saying that the first amendment bill "seeks to amend Article 15, to allow the State to make special provision 'for the economic and social advancement of any

99 Granville Austin, 'The Supreme Court and the Struggle for the Custody of the Constitution', in B. N. Kirpal (ed.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, 2004, p.1.

100 *Ibid.*

101 Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformation*, OUP, USA, p. 168.

backward class; Article 19, to empower the State to legislate on matters relating to public order, incitement to an offence and affecting friendly relation with foreign countries; and Article 31, by the addition of a new proviso (Article 31A) validating all measures of land reform, notwithstanding anything else contained in the constitution".[102] In effect the first amendment to the constitution sought to amend the Article 15, Article 19 and Article 31. Of these the relevant amendment for the property relations question was the article 31. "The amendment to Article 19 comprised three strands – fundamental rights could be 'restricted' to the extent that they were being misused to impair friendly relations with foreign States, in the interests of public order and to prevent incitement to an offence".[103]

Reflecting upon the institutional tussle over the custody of the Constitution, Nehru commented that "the bill was a 'simple enabling measure' that curbed no right nor restricted any liberty, but merely shed a bolder light on the 'authority of parliament'."[104] He further stressed about the importance of the directive principles when he stated that "[T]he purpose of the constitution could not be allowed to be defeated by any interpretation that denied its dynamic quality, as embodied in the directive principles of state policy, by stressing the more static fundamental rights enumerated therein. The amending bill was, therefore, necessary to cut away the barriers to forward movement".[105] These thoughts were going to set the tone of a long drawn battle between the court and the legislature at an institutional level, as the basic thought expressed here was that the fundamental rights were static and the directives on the other hand were dynamic and thus, probably it would serve the country better to overlook the fundamental rights in service of the directives. Emphasising further the importance of achieving the expression of the dynamic aspects of the constitution, Nehru said "[I]n a troubled and changing world nothing could be static or unchanging. '[T]he blank and rigid word' of the Constitution, that had been so interpreted, had, therefore, to be changed in order to discover its 'inner meaning', which judicial

102 Time of India, Proposed Changes in Constitution, Mr Nehru's Assurance in Parliament, May 17, 1951
103 *Ibid.*
104 *Ibid.*
105 *Ibid.*

decisions would have only achieved in time".[106] Nehru was being prophetic here as later on the judiciary did read fundamental rights and directives principles in a complementary manner; however, that reading was instrumental in making directive principles usable in the service of stronger fundamental rights and thereby a stronger judiciary.

This first battle of the custody of the constitution was being fought in a much lenient and democratic way. Jawaharlal Nehru was known for his adherence to independence of institutions and democratic demeanour. However, that was so for public consumption as at the level of governance and institutional interplays, he was leading an onslaught on the judicial interpretation by introducing the entire scheme of 'schedules' in the constitution. Representing such an outlook Nehru commented that,

> "[C]ertain judicial interpretations of the constitution had revealed some lacunae in the structure of the fundamental law. Government could not challenge the right of the judiciary to interpret the constitution, but it was the duty of Parliament to see that the purpose of the constitution was effected. For if the will of the community was to be set aside, then various difficulties would arise."[107]

He recognised the role of the parliament in the interpretation of the constitution, but was of the opinion that the time was not precisely suitable for waiting for the judiciary to create the right conventions. He said that,

> "[I]n written constitutions, as that of the United States, a long line of judicial decisions had created healthy conventions which has served to relax the rigidity of the written word. In India too this would happen in time, but there was need for present correction to maintain the dynamic nature of our constitution".[108]

Nehru was indicating to the judiciary in these statements for going in for 'present correction' in the interest of the 'dynamic' nature of the constitution. The conflict was clearly of the nature of finding institutional supremacy for both the parliament and

106 *Ibid.*
107 *Ibid.*
108 *Ibid.*

judiciary. Nehru the leader of the executive branch of the government was giving calls of 'cooperation' to the judiciary with regards to the implementation of the direction the parliament was taking, which was supposed to be the will of the people (or what the executive thought was the will of the people).

Commenting about the need of the interpretation and amendment of property relations and the importance of the 'will of the people' with respect to property relations in India, Nehru said that,

> "[H]is life-long connection with 'agricultural agitation'...had given him an 'emotional reaction' to the problem of agrarian reform 'with adequate and proper compensation'. The basic problem in Asia was the land problem and every delay in tackling this gave a further reprieve to exploitation, injustice and misery...The situation had to be met or how else were they to answer the query, 'For the last 10 or 20 years you have said we will do this (Zamindari abolition). Why have you not done it?' They could not obviously throw up their hands and surrender themselves to fate".[109]

It is evident from the statement above that for Nehru, altering property relations was a crucial political concern as he knew that the legitimacy of his leadership and his government could come under the scanner of the people if the promise on this front was not delivered. Moreover, he also had a grip over the importance of property relations for legitimising the direction of economic policy of that time. Further emphasising the crucial role of parliament in giving direction to the national building process Nehru said that "[A]ll these changes constituted nothing more than granting enabling powers to parliament to act whenever necessary. It extinguished no right or freedom. Parliament should have large powers even to make mistakes or go to pieces".[110]

However much be the stated good intentions of the parliament and the executive in bringing in the first amendment, the nature of the amendment was doubtful as it was directly or indirectly scuttling fundamental rights and the ability of the judiciary to

109 *Ibid.*
110 *Ibid.*

review laws created by parliament - a power vested in the judiciary by the Constitution. The amendment was also going to create hierarchy in the laws of an order which was not imagined in the constitution. Austin observed that,

> "Far more radically, the First amendment contained the Ninth Schedule... (W)ith the schedule, Nehru, the genuine democrat and firm supporter of judicial independence, had created a hierarchy of laws. Those included in the schedule were beyond, indeed above, the constitution because not subject to judicial review to determine whether or not they were constitutional. In the new hierarchy, the Constitution came next, followed by ordinary legislation. Moreover, Nehru's government was the first to place laws other than land laws in the schedule, contrary to the popular view that his daughter's government was the first to do this".[111]

The institutional opposition to the moves of the State and central level efforts to change property relations saw another level of intervention when the *zamindars* moved the Supreme Court. The case that ensued was famously called the *Shankari Prasad Case*[112]. At first it appeared that the Supreme Court had agreed with the proposition of land reforms as in the *Shankari Prasad case* the first amendment was upheld by the court, however soon high court at Patna took an opposite stand. Austin notes that,

> "When Chief Justice Patanjali Sastri in the Shankari Prasad case upheld the First amendment as constitutional, notably without excluding judicial review amendments, it seemed that the Court had ceded to parliament a significant degree of custody over the Constitution. But not necessarily. In Kameshwar Singh case the Patna High Court declared a law unconstitutional despite its having been placed in the Ninth Schedule, and the government lost in several major property cases, among them Bela Banerjee and Sholapur Mills".[113]

Nehru's scheme of 9th schedule had failed and the judiciary (in this case High Courts) walked over the ninth schedule scheme of things. Responding to these setbacks the

111 Granville Austin, 2004, *op. cit.* pp. 2-3.
112 AIR 1951SC 455
113 Granville Austin, 2004, *op. cit.*, p. 3.

Congress Working Committee established a sub-committee to reassess the Constitution in 1954.

> "In its report, the sub-committee bitterly attacked the judiciary's continuing custody of the Fundamental rights and recommended that the court's power to issue directions and prerogative writs for the enforcement of the Rights should be restricted to failures of justice and that the high courts should lose their authority to issue the writs 'for any other purpose' as provided for in Article 226".[114]

Nehru again proved his belief in the independence of institutions and "in the cabinet...successfully fought against the worst anti-judiciary sentiments, by saying that a socialist programme could be pursued without striking at the judiciary's roots".[115] But also asserted the power of the parliament to amend the constitution by stating that "(s)ocial revolutionary goals, and within them property relations, would continue to be the genuine or spurious justification for the most significant amendments to the Constitution".[116] The approach followed by Nehru led executive was that of asserting institutional power without circumventing the powers of the judiciary. It took the path of amending the constitution to bypass the judicial scrutiny. "While the Nehru government did not attack judicial authority, its amendment acts were specifically drafted to circumvent judicial decisions or to curtail judicial scrutiny of the government's reformist goals".[117] But the design of the constitution was such that a conflict could not be averted. Fundamental rights and directive principles were put in a direct conflict by the unrelenting desire of the executive to realise movement on land relations and land reforms. The fourth amendment was brought in.

> "...the Fourth amendment diminished the Supreme Court's custody over the Fundamental Rights by providing that a variety of government actions concerning property could not be challenged on the ground that they abridged the rights in Article 14, 19 and 31. The presence of the right to

114 *Ibid.,* p. 4.
115 *Ibid.,* p. 4.

116 *Ibid.,* p.1
117 Sarbani Sen, *Op. Cit.,* p. 172.

> property in the Rights would progressively attract broader attacks on the Rights as a whole".[118]

The Court was undergoing the threat of losing institutional integrity; if it was not able to protect a fundamental right, the entire category of fundamental rights, and thus the idea of judicial review itself, would have come under clouds. However benign the intentions of the Prime Minister in the form of being a votary of institutional independence, the court was increasingly seen as the roadblock to the achievement of social revolution in the form of implementation of the directive principles. The court as the guardian of the fundamental rights and in that process thwarting constitutional amendments was seen as blocking public will and the constituent power of the parliament and the sovereign, as expressed by the decisions being taken by the government of the day and the parliament. This can be argued with some force with the fact that "...clearly there was electoral support for the Nehru government's policies, and the required majority in both houses for its amendments".[119] This might have convinced the courts of the risk involved in such institutional conflict of losing institutional integrity. The result was that "when the seventeenth amendment was challenged before the supreme court in *Sajjan Singh*[120]" the court capitulated and said that the "power of amendment conferred by Article 368 included the power to take away fundamental rights guaranteed in part Three".[121]

4.3 Deepening of Conflict-The Indira Regime

With Indira Gandhi at the helm, the nature of the institutional conflict over the custody of the constitution changed drastically. She followed the desire of social revolution with a more vehement drive and the directives, as tools of creation of a socialist order, were now being planned to be made superior to the fundamental rights in legal standing. A more direct attack was thus underway. There was no presence of Nehru's assurance of judicial independence.

118 Granville Austin, 2004, *Op. Cit.*, p.4.
119 Sarbani Sen, *Op. Cit.*, p. 173.
120 1965 AIR 845
121 Sarbani Sen, *Op. Cit.*, p. 171-172.

> "The response – counter response pattern that developed between the Court and Parliament when Nehru was prime minister, which may be described as shared custody, would change greatly under his daughter. Her counter-response, as leader of parliament, consisted entirely of attacks on the judiciary: either to deny it judicial custody of the Constitution or to subvert its independence".[122]

The institutional conflict over the custody of the constitution took a more direct form under Indira Gandhi, both in terms of intensity of her attacks and counter-responses to judicial actions and in terms of the judiciary's quest for fundamental changes in the way the fundamental rights were given protection by the judiciary. This time the conflict was not limited only to a part of fundamental rights i.e. the right to property, it was a wider conflict and was around the extent of parliament's amending authority under article 368.[123]

The initiation of this conflict under Indira Gandhi, takes place when the court, in the *Golaknath* case,[124] articulated a new constitutional principle that the parliament's power to amend the constitution could not be used to take away fundamental rights.

> "In view of the earlier judgments, a bench of eleven judges was constituted to consider the power of parliament to amend the fundamental rights, and more specifically in relation to 1st, 4th, and 17th amendments. The amendments were effected by parliament acting under its amending power provided by article 368 of the constitution. There was article 13 which prevented the state from making any law that takes away or abridges the fundamental rights and which states that any law so made shall be void. In February 1967, by a majority of 6:5 the Court held that article 368 could not override the specific provision of article 13(2) and that parliament was not competent to amend the chapter on fundamental rights in the constitution so as to take away or abridge those rights".[125]

122 Granville Austin, 2004, *Op. Cit.*, p.1
123 Sarbani Sen, *Op. Cit.*, p. 174.
124 1967 AIR 1643
125 Gobind Das, 'The Supreme Court : An Overview', in B. N. Kirpal (ed.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, 2004, pp. 19-20.

The *Golaknath* judgment had with the help of article 13 made it clear that the parliament did not have the power to amend the fundamental rights promised in the constitution.

The institutional conflict had deepened and that the court would take such a stand was not surprising as there was apprehension that the attack on the fundamental rights, in the form of attack on right to property, in guise of giving meaning to desire of social revolution, could impact the entire category of fundamental rights as well. The legislature could go after fundamental rights in general. Reporting the possibility of this frontal attack on the entire category of fundamental rights, Sarbani Sen says that,

> "That the Supreme Court was pushed to take up the question of limits of parliament's amending powers was obvious fallout of its experience with the property amendments, which had nullified specific court decisions. This was evident when Justice Hidayatullah said in his opinion in the Golaknath case, '...that the erosion of the right to property may be practised against other fundamental rights...small inroads lead to larger inroads and become as habitual as before our freedom was won".[126]

The Golaknath decision was a landmark decision and was applied by the Court in a prospective manner as it might have created a lot of chaos in terms of effect on the decisions around the 1st, 4th and 17th amendments. The *Golaknath* decision also intensified the institutional conflict between the court and the legislature and executive and the struggle for custody got escalated into a decade long battle.

Immediately after the *Golaknath* decision a private member bill was initiated in the parliament to restore the parliament's unrestrained power of amendment, but the bill lapsed in next two years. *Golaknath* was further, followed by two important cases, the *Bank Nationalisation case*[127] and the *Privy Purse case*[128]. The Supreme Court blocked the efforts of the government to nationalise banks by flagging the mishandling of the right to compensation in the concerning act passed by the government. Sarbani Sen documents that,

126 Sarbani Sen, *Op. Cit.*, p. 174.
127 R. C. Cooper v. Union of India AIR 1970 SC 564
128 H. H. Maharajadhiraja Madhav Rao v. Union of India 1971 AIR 530

> "Congress passed the bank nationalisation act of 1970 whose validity was questioned before the supreme court...the court held (that the act) violated the guarantee of compensation under article 31(2)...the quantum had been determined...with principles that were not relevant in determination of compensation...therefore the amounts so arrived at could not be regarded as compensation...eventually in the bank nationalisation case, the Banking Compensation (Acquisition and transfer of Undertaking) Act, 1969 was declared unconstitutional".[129]

Similarly, in the *Privy Purse case*, the government earned a setback as the presidential order was held illegal by the court and the claim to receive Privy Purse was seen as right to property which could not be taken away. Right after the setback on the front of the Privy Purse agenda, "the prime minister advised the president to dissolve the Lok Sabha and to call for general elections in an effort to break the constitutional impasse. Thus institutional confrontation led to a move to obtain popular mandate, which helped to further focus and sharpen the issues involved in the existing institutional and public debate".[130]

The elections were a success for Indira Gandhi. She was victorious by a huge margin and ended up commanding a two thirds majority in the Lok Sabha. With a brute majority on her side she went ahead with making amendments which could ensure that the socialist order was established. The 24th, 25th, 26th and 29th amendment bills were important for that scheme and were brought in. The 24th amendment bill nullified the effect of the *Golaknath case* and "gave parliament full constituent power over the constitution for addition, variation or repeal".[131]

The 25th amendment bill targeted to nullify the bank nationalisation case and it "denied the courts, jurisdiction over government acquisition and requisition of property and compensation for it"[132], and gave the directive principles precedence over the fundamental rights in the section 14, 19 and 31. The 26th amendment act

129 Das, Gobind, 'The Supreme Court : An Overview', in B. N. Kirpal (ed.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, 2004, p. 20
130 Sarbani Sen, *Op. Cit.*, p. 176.
131 Granville Austin, 2004, *Op. Cit.*, p. 5.
132 *Ibid.*

abolished "privy purses and the privileges extended to the erstwhile rulers of the princely states, to nullify the judgement in the *Privy Purse case*".[133] The 29th amendment bill placed the Kerala Land Reforms Act in the Ninth Schedule of the Constitution.[134]

The Times of India covered the 25th amendment by writing that "[P]arliament today set its seal of approval to the Constitution (25th Amendment) Bill which, for the first time, gives primacy to certain directive principles over the fundamental rights guaranteed in the constitution to help build a more egalitarian society".[135]

The Law minister, Mr. H. R. Gokhale was reported to have replied in the parliament to address the apprehensions raised about the fundamental rights by saying that, "the measure embodied the Government's determination to give effect to aspirations of the people for a better life by removing obstacles for 'progressive legislation'. Parliament, representing the people's wishes, could not subdue itself to judicial interpretations in these matters".[136] The Congress party's election manifesto had included the promise of bringing in legislations to ensure that socialist order is created and progressive legislations like abolition of privy purses made feasible. At a certain level the abolition of privy purses was utilised by the government to cover up other amendments from the eyes of the public. The people were happy about the abolition of privy purses.

Mr. Gokhale said "democracy would have no meaning if it lacked social and economic content for the common man. He assured the House that the Bill did not in any way endanger the small man's property but it also saw to it that the monopolists did not use the shield of 'common man' for their self-interests. Ninety-nine per cent of

133 Gobind Das, 2004, *Op. Cit.*, p. 21.
134 *Ibid.*, p. 20.
135 Times of India, Constitution Bill Gets Parliament's Approval, December 9, 1971, p. 12.
136 *Ibid.*

the cases relating to the right to property before courts were those taken by big property-holders".[137]

With respect to the inclusion of the whole Article 19 in the Bill, Mr. Gokhale said that, "it was a matter of political decision so that the possibility of future striking by the court of certain laws under this Article was eliminated or minimised".[138] It needs to be noted here as an observation that the sixth Law Commission had recommended that the entire article 19 should not be taken into this amendment. The fears of many with respect to a larger attack on the entire category of fundamental rights in the guise of promotion of directive principles as tools to achieving socialist order were now real.

The Minister for Steel, Mr. Mohan Kumaramangalam, who intervened in the debate, tried to play down the concerns expressed by opponents about attack on the constitution by saying that,

> "[T]his most important legislation should be approached in a sober and realistic manner. The government did not pitch its claim too high. Therefore, the Opposition should not exaggerate its dangers. There was no reason to get excited and say that the Constitution was being destroyed. The only aim of the Bill was to empower Parliament to decide what should be the amount payable in the event of a person's property being acquired by the State and not the Courts. The word 'compensation' was the pivot of the arguments on which the Supreme Court gave its verdict. He said the Government did not want to keep the word 'compensation' which gave the meaning 'market value.' the word 'amount' denoted cash."[139]

Steps towards totalitarianism were finally taken. As expressed by Mr Chagla in the Parliament, "socialism can be achieved through democratic means rather than totalitarian methods".[140] But the vote had been cast, and the country had witnessed

137 *Ibid.*
138 *Ibid.*
139 *Ibid.*
140 Times of India, Constitution Bill Gets Parliament's Approval, December 9, 1971, p. 12

constitutional amendments which were purportedly going to create a socialist order. Positive liberty based ideas were being utilised to create situations of curtailment of basic freedoms. To some extent, Isaiah Berlin's apprehensions of positive liberty leading to totalitarianism were probably true.

These developments were followed by the *Kesavananda Bharti case*[141] and further followed by the Emergency and *Minerva Mills case*[142]. The Supreme Court, with the help of *Kesavananda Bharti case*, regained the custody of the constitution by enunciating the basic structure doctrine though during the Emergency, with the help of 44th amendment, the parliament was given absolute power of amendment and directive principles were again given precedence over fundamental rights. But after the nightmare of Emergency was over, the apex court reaffirmed the basic structure doctrine in the *Minerva Mills case* and read the directive principles and fundamental rights in a complementary manner, impressing the need to balance the rights and directives. After the enunciation of the 'basic structure doctrine' it was believed that the Parliament did not have unfettered power to amend the constitution. It could not amend what the court called the basic structure of the constitution, which included, among other things, primarily the fundamental rights and the court's role to enforce the fundamental rights.

However, even with the taking of control or custody of the constitution by having the last say on the extent to which the constitution could be amended (through the enunciation of basic structure doctrine), the court did not succeed in protecting the 'right to property' as a fundamental right. The long drawn conflict over the 'right to property' as a fundamental right was not made the explicit part of the basic structure doctrine in the turnpike case of *Kesavananda Bharati.*

> "It is impossible to go into the nuances of the basic structure doctrine as explicated in...*Kesavananda Bharti* judgment...(but) it needs to be noted that

[141] Kesavananda Bharti v. State of Kerala 1973 4 SCC 225
[142] Minerva Mills v. Union of India AIR 1980 SC 1789

> in relation to property the fact that it upheld all the property related Amendments, not only led to later judgments to maintain that the right to property did not pertain to the basic structure of the Constitution, but also legitimized the Janata Government, that followed the ouster of Mrs. Gandhi, plan to remove property as a Fundamental Right by the Forty Fourth Amendment and implant it as a statutory or constitutional right...".[143]

At a certain level it is baffling to learn that the court while taking so much pain to define the basic structure and thus putting an end to the game of amendment and thus the supremacy of the parliament over the constitution was giving away the 'right' that it kept upholding all this while. The Janata government, which replaced the Indira Gandhi led Congress government after the removal of Emergency, continued with Indira's agenda of removing 'right to property' from the list of fundamental rights and it could do so as the courts in Kesavananda Bharti case did not deem it to be part of the basic structure. Thus the forty fourth amendment did away with 'right to property' as a fundamental right and constituted it as a weaker legal/statutory right.

> "...the Forty Fourth Amendment Act 1978...having removed property as a fundamental right, located it as a much weaker statutory right in Article 300-A, where it now reads, as 'No person shall be deprived of his property save by authority of law'. The law minister...at the time, Shanti Bhusan, justified the removal of property as a Fundamental Right by saying in Parliament 'vast majority' of Indians did not own extensive property 'to equate the right to property to the more important rights ... [had resulted in curbing] ... the other fundamental rights'..."[144]

Post the removal of the right to property from the fundamental rights list, the court maintained a consistent approach of not taking the 'right to private property' as a part of the basic structure of the constitution.

> "The current position of the Supreme Court on property can be gleaned from one of the few direct judgments of the Supreme Court on property after the Forty Fourth Amendment—the Jilubhai case. The case dealt with mines taken by the State under legislated laws from erstwhile revenue farmers, and upheld the right of the State to do so under Article 300-A, not entertaining any discussion on adequacy of compensation. Among other things it is unequivocally held that the right to property under Article 300-A is not a

143 Jaivir Singh, 2006, *Op. Cit.*, p. 311.
144 *Ibid.*

> 'basic feature or structure of the Constitution'. Thus now the Constitution of India, ratified by the authority of the Supreme Court, categorically does not view the right to property as a fundamental right!"[145]

The observation that comes naturally to mind at this juncture is that the court lost the right to private property as a fundamental right in this institutional conflict. One can also say from the paragraphs quoted above that the court in a way, allowed the removal of right to property from the fundamental rights. What did the court gain in this institutional conflict? It appears that through the enunciation of the basic structure doctrine the court gained the last say in deciding which amendment of the constitution is valid and which is not. Thus the court gained or rather retained the power to decide the extent to which the constitution could be amended. And whatever it deemed to be part of the basic structure was out of the purview of constitutional amendment. The parliament gained the freedom to do as it wished within the constitutional limit with the new status of right to property. However, no large scale land reforms followed, and in later decades, the weakened right to property was utilised for land acquisition for projects undertaken by government and private sector alike.

While the judiciary in *Kesavananda Bharti* did not try and protect the right to property by including it specifically in basic structure of the constitution, it revealed its preference for the status of fundamental rights in contrast to directive principles.

> "This conflict can be viewed statically as interplay between the positive attempt of the State to engineer a certain economic, social and political configuration resulting in, as a consequence, the violation of negative liberties or rights. However, this process has had important dynamic consequences in at least two ways—first, by marking out the distribution of powers across the branches of the State and second...the impact it has had on the governance of property rights in relation to state takings..."[146]

"Since India follows a parliamentary system of democracy, it does not follow a strict separation of power across the branches of the State".[147]

145 *Ibid.*
146 *Ibid.*
147 *Ibid.*

Some of the important learning from this chapter and the tracing of the conflict between the legislature and judiciary is, one, the fact that the judiciary was the point of declaration of positive socio-economic rights in the post emergency era in India was probably not a matter of choice for the judiciary, it came as an offshoot of saving its own grounds of existence when it tried to save fundamental rights from the onslaught of the legislature by reading fundamental rights and directive principles as being complementary and supplementary to each other. Two, the desires for positive rights or positive claims are not new to India. They have been carried into the public sphere in one form or the other since the independence struggle. The spheres of focus for demanding these claims might have changed from the executive to legislature to judiciary, but they are not new. Three, these positive rights or directive principles or desires for a social revolution or socio economic claims or desire for good governance are, and have been a source of immense power and legitimacy and are more often than not being utilised by state and its different constituents for its own benefits and mostly as rhetoric. In this particular phase, the directive principle based ideals were utilised to promote the ideological position of 'socialist way of life' by the state. Different constituents of this 'socialist way of life' were linked to directive principles and the fundamental rights were shown as being in conflict with directive principles and thus in the achievement of the 'socialist way of life'. A seamless web of legitimacy was thus created around this ideological position. Then the judicial innovation of reading directives and fundamental rights in a non adversarial manner was probably meant to save the fundamental rights from the onslaught of the legislature and in the process the judiciary brought itself into a position where it was left with the custody of the directives too.

4.4 Preservationist Institutional Interplay

It is to be remembered that this constitutional politics takes place in the backdrop of efforts by the nation state to create legitimacy for its policies via the usage of the directive principles, and also that the Congress party was highly centralised in terms of power and decision making those times.

> "The Congress party's political dominance prevented institutional opposition and even a debate between the executive and legislative branches in the Union government, or between the Union and state government along federal lines. Instead, it was the courts that performed a preservationist function against the state legislatures' proposals for change, by invalidation of a number of state legislations in order to prevent any violation of the existing constitutional language of the property right".[148]

This comment quoted above of Sarbani, is although in context of property rights, but nonetheless is important with respect to the nature of the space for traditional politics with respect to the positive claims and its treatment by the nation state. In such a scenario the structures created by the Constituent Assembly of political order come in handy to create a constitutional politics. Thus one can say that the constitutional politics exhibited in this phase was a by-product of the interplays between balancing of the constitutional design (of judicial independence, of lack of separation of powers), the exercise of legitimising the nation state and economic ideology of 'socialist way of life' via directive principles and the lack of availability of space for traditional politics in the wake of a strong Congress system. The role of courts thus remains central to this constitutional politics or governance. Courts seem to have played a preservationist role in this scheme, preservation of its own institutional independence to the extent possible.

Something similar has been identified by Jaivir Singh with respect to the bargain that took place between the judiciary and the executive-legislature combine. For Singh this conflict between fundamental rights and directives was an inter branch bargain and this bargain was creating a unitary centre of power through the constitutional amendments to tide over judicial objections. Singh says that,

> "To take an overall perspective, the tale of the constitutional erosion of the right to property in India is above all a description of the 'bargain' between the legislature and the judiciary...In so much so as the judicial decisions that ruled in favor of paying just compensation were a reflection of the due process, they put a physical as well as financial brake on the takings of the executive–legislature combine—acting as an impediment to the land reform, industrial and other policies. The solution or the 'bargain' to this problem was not worked out within a framework that privileged the separation of

148 Sarbani Sen, *Op. Cit.*, p. 168.

> powers, rather the solution came from establishing a unitary center of power by progressively amending the Constitution of India—the Constitution itself became the site of the bargain".[149]

Singh identifies some social costs that might emerge from creation of a unitary centre of power with respect to acquisition of private property and argues that this leads to over production of 'public purpose'. The judiciary also emerged with some amount of independence in this bargain. It took control of the amendment of constitution and thus was successful in preserving some amount of institutional independence by safeguarding fundamental rights of citizens and its own power of judicial review.

Institutional independence leads to increased possibilities of interplay. In the absence of the court taking a stand, India would be left with a brute authoritarian political system. However, because of the judicial assertion of its role, we got some semblance of space for extended interplay in the next phase.

In the process of maintaining and preserving its judicial review power, the judiciary at the resolution of this conflict/bargain was successful in reading directives in a way that could be utilised for consolidating its power of judicial review. The next phase witnesses the extension of the understanding of the fundamental right to life through this same mechanism. Judiciary might have lost right to property, but it gained directive principles which have the potential to create many more rights.

149 Jaivir Singh, 2006, *Op. Cit.,* p. 317.

Chapter 5

Positive Rights in the 'custody' of Judiciary

In this chapter, the third phase of empirics on positive rights in India has been collated and will be discussed. This phase has direct implications from the second phase in the form of a judicial ‘custody’ of the constitution which was achieved by the judiciary through the *Kesavananda Bharati* judgement. The doctrine of 'basic structure' solidified judicial review to a great extent and any amendment to the constitution was now subject to judicial review which was itself informed by the basic structure doctrine. What this meant for the subject area of rights was that the judiciary was now empowered to veto any legislative moves that might attempt to eat into the ambit of negative fundamental rights. For the executive and the legislature it was a message that issues involving conflict with fundamental rights were out of the ambit of legislative action. With article 37 in place (which ensured judicial review free space for executive action), the route of policy was open for the executive to deliver on directive principles, if it so wished. The focus of successive governments on 'schemes' probably has its roots in this design. With these developments it appears that both the executive and judiciary have gained power at the cost of the legislature. The executive had reasons to not go for legislations and instead focus on 'schemes' and the judiciary had consolidated its powers of judicial review further.

The journey of positive rights which started from the Nehru Report in the 1930s has seen many mile stones. At the first such important juncture the positive rights were converted into the directive principles during the formation of the Indian Constitution. Later the directive principles were used as tools of rhetoric to legitimise a state agenda of state led economic growth and development and creation of 'a socialist pattern' of society. This phase was marked by a direct conflict between the directives and the fundamental rights. The courts protected the fundamental rights by reading that the directives and fundamental rights were complimentary to each other and by enunciating the basic structure of the constitution which could not be altered by the legislature. This stand of the court as explained in Minerva Mill case states that the

constitution is maintains a balanced stance between the fundamental rights and directives. That is, there is no question of one being supreme to the other.

In the post emergency era, the State shifted its rhetorical base from the goal post of directive principles based 'socialist way of life' to the new terminology of 'development'. And the judiciary shifted its stand from pointing out the conflict of fundamental right and directive principles to a complementary reading of fundamental rights and directive principles. Another major change introduced slowly by the judiciary was the wider and almost positive liberty based understanding of the article 21 which guaranteed the right to life. The right to life was given more and more meaning or substance by reading different directive principles into it resulting in 'new' rights being declared. In a way, one can say that the positive rights now resided in the right to life under the custody of the judiciary. Right to life became the wellspring of new rights.

Although it is not known as to how and why the court decided to allow this residence of positive rights under its own ambit, a fine guess could be that in the process to save its own turf by saving fundamental rights from the onslaught of the executive and legislature the court ended up with the custody of the directives and thus the positive rights too. In this process, reading a complementarity between fundamental rights and directive principles was a key development which let judiciary infuse many meanings from directives into the fundamental rights, particularly to the right to life. This infusion of a broader meaning into the right to life with the help of directive principles contributed to the right to life becoming a major host of positive rights or positive rights like ideals.

The mechanism of PIL was also instrumental in assisting the judiciary in consolidation of its powers and institutional space. PIL allowed the judiciary to cater to the imploding desires of people at large of justice and rule based governance. Whether it was procedurally correct for the judiciary to do so, however, remains a major question. Famous Indian jurist Upendra Baxi has argued that the Indian

phenomenon being termed as PIL is an incorrect way of representing what has actually transpired on that front. He argues that these should instead be called social action litigation (SAL) as they were more often than not utilized for social action by activists and common people and not lawyers of public interest law firms as happened in the USA from where the term PIL was borrowed. However, the PIL is terminology that became associated with these litigations which became possible because the Supreme Court mellowed down the standards of standing, technically known as *locus standi*, in legal language. Anyone could, with the help of even a post card, plead a case. Understandably, this had wider public interest ramifications.

The PIL jurisprudence relied on a wider reading of right to life to great extent. The PIL and wider reading of the right to life were almost co-integrated phenomenon, as both were feeding into one another. PIL was not possible without a wider reading of the right to life, and increasingly wider readings of right to life were achieved through PIL cases. These innovations and mechanisms enabled the judiciary to take 'custody' of positive rights. The aim of this chapter is to study this process of taking custody and the implications thereof.

From being wary of directive principles and blocking legislative movement for implementation of directive principles, the judiciary took quite a turn to its post emergency position of reading rights and directives (negative rights and positive claims/rights) in a complementary manner. Gautam Bhatia notes that,

> "Between 1950 and 2015, as far as the DPSPs go, the wheel has turned a full 180 degrees. When the Constitution was written, there was a clear separation between parts III and Part IV, between enforceable civil/political rights (classically understood), and non-enforceable socio-economic guarantees. But after sixty-five years of judicial interpretation, finding different ways to read the part IV guarantees into part III and blur that distinction, it has now become almost routine for the Supreme Court to invoke Part IV in its decisions – as routine as Article 14 and 21. With the increasing role of the

> DPSPs, the need for judicial discipline cannot be overstated. If the DPSPs are interpreted to mean everything, then they will end up meaning nothing".[150]

Gautam Bhatia indicates the 'utility' created by the judiciary for itself regarding directive principles. In his analysis, he has identified three different ways in which the judiciary utilises directive principles in its decisions and thinking over constitutional matters. He says,

> "The DPSPs... serve three distinct roles in judicial interpretation... there are three different ways in which fundamental rights (and other laws, for that matter) are interpreted 'in light of' the DPSPs. First, legislation enacted in service of the DPSPs meets the 'public interest' threshold in a fundamental rights challenge...(S)econdly, if legislation is intelligibly susceptible to more than one interpretation, then the meaning that corresponds more closely to the DPSPs is to be preferred over others...And thirdly, the DPSPs play a structuring role in selecting the specific conceptions that are the concrete manifestations of the abstract concepts embodied in the Fundamental Rights chapter. This is the best way to understand the court's dictum that fundamental rights 'ought to be interpreted in light of the DPSPs'. There is thus a clearly delineated role for the Directive Principles in constitutional analysis".[151]

The threefold role of the directives in judicial interpretation as elaborated by Gautam Bhatia above, however emerges in its entirety only after the judiciary's taking custody of the fundamental rights via the 'basic structure' doctrine and the reading of complementarity and supplementarity between the rights and directives repeatedly in the post emergency jurisprudential milieu. Especially the third role discussed by Bhatia above, which is to structure the conception of fundamental rights chapter based on an understanding of directive principles gets added to the list after the reversal of the judicial position on directive principles. It is probably this site where the right to life is slowly and steadily infused with positive rights by the judiciary.

150 Gautam Bhatia, "Directive Principles of State Policy", in Sujit Choudhry, et al., (eds.) *The Oxford Handbook of the Indian Constitution*, OUP, UK, 2016

151 Gautam Bhatia, *Op. Cit.*

While all these three ways, as pointed by Gautam Bhatia, in which the court has utilised the directive principles are evidence of the custody of the positive rights with the court, the more direct or the more positive way of the custody and of use, and, thus, of concern are the ways in which the court is utilising the directives to infuse meaning to conceptions of the fundamental rights. At an intuitive level, one can say that it is the right to life which is the site of positive rights and liberty. To find out more about this it becomes important to pursue the study of 'declaratory rights' created by the court with the help of the right to life. The right to education, the right to food, the right to shelter, the right to a healthy environment, etc. have all been declared by the court with the right to life, that is, the right to live with dignity, as the core argument. The preamble and the directives have been used in a manner that gives support to such logic. The first step on our journey of inquiry is to look at the way a wider meaning was given to the right to life by the court.

5.1 Right to Life – A Wider Understanding

The search query “right to life” in the Times of India archive hosted by ProQuest throws 737 items for the decade 1940-49 to 2000-9. Out of these seven decades, the maximum items are for the decade 1990-99 (272 items). For the first three decades of independent India (i.e. 1940-50, 1950-60 and 1960-70), the items are in total less than 30. In the decade 1970-79, the item count is 61 and in the next decade 1980-89 it is 115. One can see that there is a steady increase in the reported articles related to 'right to life' over these three decades.

For the decade 1970 to 79, which was the Emergency decade, in the year 1976 the news items start emerging significantly. In 1976 there are 13 news items, followed by 19 in 1977 and 12 and 9 in the consecutive two years. For the first five years of this decade, there are only 9 news items. Thus, one can possibly say that it is during and after the Emergency that the 'right to life' emerges as an important and often utilised legal category. Thus, the coverage of 'right to life' term increases correspondingly. This analysis is not conclusive and is only indicative of the possible fact that 'right to life' usage increased in the judicial and public life after emergency.

Initially the understanding of the court in the matter of right to life was restricted and the field was dominated by the textualist understanding developed in the *AK Gopalan case* of 1950. It is with the *Maneka Gandhi case* that the right to life was opened up.

> "The Court in Maneka Gandhi...made it clear that 'procedure established by law' for the purposes of the right to life did not only provide a guarantee of procedural due process, but also included a substantive component. It held that even a procedure provided for by way of primary legislation would need to be 'fair, just and reasonable, not fanciful, oppressive or arbitrary' and should be 'carefully designed to effectuate, not to subvert, the substantive right itself'. This was coupled with a wide reading of the phrase 'personal liberty', which opened the door to the inclusion of a wide range of unenumerated rights under Article 21. Article 21 was incrementally interpreted to include the rights to privacy, pollution-free air, reasonable accommodation, education, livelihood, health, speedy trial, and free legal aid. In many of these cases, non-justiciable Directive Principles were read into the right to life, paving the way for the Supreme Court to play an unprecedented role in the governance of the nation".[152]

The role played by *Maneka Gandhi case* is that it ensured that the Article 21 based freedoms were now subject to judicial review in the form of a stronger 'due process' like mechanism. It also ensured that a wider reading of the term 'personal liberty' meant the process of wider reading of the right to life as a whole got a precedent. This led to initiation of a process of wider reading of the right to life.

> "In Maneka Gandhi v. Union of India...reacting in 1978 to the trauma of the massive violations of human rights that had taken place during the 1975-77 emergency, the Supreme Court of India repudiated the narrow reading of the constitutional text espoused in Gopalan and embraced a broad, purposive approach to the enunciation and enforcement of fundamental constitutional rights that verges on natural law. Specifically, *Maneka Gandhi* recognized an implied substantive component to the term 'liberty' in article 21 that provided broad protection of individual freedom against unreasonable or arbitrary curtailment. This paved for a dramatic increase in constitutional protection of human rights in India under the mantle of Public Interest Litigation movement (PIL)".[153]

The impact of the grounds created in the *Maneka Gandhi case* are seen in later cases where the Supreme Court went on to enunciate a positive liberty based understanding of the right to life. In the *Francis Coralie Mullin case* the Court observed that "while arriving at the proper meaning and content of the right to life, the attempt of the court

152 Chintan Chandrachud, " Constitutional Interpretation", in Sujit Choudhry, et al., (eds.) *The Oxford Handbook of the Indian Constitution*, OUP, UK, 2016

153 Burt Neuborne, Supreme Court of India, *International Journal of Constitutional Law*, 2003, p. 480

should always be to expand the reach and ambit of the fundamental rights rather than to attenuate its meaning and content".[154] The court further observed that,

> "A constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems, and challenges".

Emphasising the importance of the principle of wide and liberal reading of constitutional provisions with respect to the fundamental rights the court observed that,

> "This principle applies with greater force in relation to a fundamental right enacted by the constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of human person".

> "The right to life enshrined in article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include the faculties of thinking and feeling. Now deprivation which is inhabited by article may be totally or partially neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover, it is every kind of deprivation that is hit by article 21, whether such deprivation be permanent or temporary and furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. Therefore any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of article 21".

The court's comments above makes it clear that the ambit of article 21 is largely grounded in negative liberty. But, this ambit has been widened to include any 'damages or injuries or interferes' with the use of 'any limb or faculty of a person either permanently or even temporarily'. This effort has given a wider ambit to the right to life but the legal infrastructure of its application remains 'protection' based and does not venture into any area related with action to implement the right to life in a

154 1981 AIR 746

pure positive sense. This resonates with the Sen's understanding of human rights as traced in chapter 2.

The court in this case also talks about human dignity and explains its ambit.

> "The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings".

The definition of the human dignity aspect seems to develop a sort of minimum core of aspects of which can be utilised to think about positive duty in a clearer way. At the first instance of reading this comment in part one may be inclined to conclude that the court has finally talked about a positive space and is probably moving towards expanding the right to life into a positive liberty space. But the court put a rider around the magnitude and content of this right immediately after these lines. The court says that

> "The magnitude and content of this right would depend upon the extent of the economic development of the country, but it must, in any view of matter, include the right to basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of human self".

Here one can observe that the court, even when linking the magnitude and content of the right to life to the level of the economic development in the country, creates a sort of minimum core for the right to life. This minimum core is made of 'minimum neccessities of life and ability to carry on such functions and activities as constitute the bare minimum expression of human self'. Any exposition or expansion of these minimum contents is not done by the court though. Positive obligation/duty is again witnessed here as the balance of the economics of the state and the interpretation of the court of human dignity.

> "In Francis Coralie Mullin, the Court used the extract from Munn to establish a dignity-based conception of the 'right to life'. Holding that the 'right to life' went beyond protection of limbs and faculties, the court included in it the 'right to live with human dignity'. Without providing any normative framework for the application of human dignity, the Court provided an

> inclusive list that comprised dignity – for example, adequate nutrition; clothing, shelter and facilities; expressing oneself; etc. This dignity-based conception was subsequently used in cases such as the Asiad case, Olga Tellis, Bandhua Mukti Morcha, and Mohini Jain"[155]

The Court has argued in *Olga Tellis* that the right to life has one aspect which stops the state from taking life and another which is related with life through 'right to livelihood'.

> "...the question that we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean, merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life, an equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood".[156]

The court however restricts this right to livelihood related positive duty on the state by saying that,

> "The state may not by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair procedure established by law can challenge the deprivation as offending the right to life conferred by the article 21".[157]

The court has read right to life widely to include the question of livelihood in the content of the right to life, but has neatly restrained from giving any word on the positive duty related to the said right. According to the court the State cannot be compelled to provide livelihood but it cannot take away livelihood too. So the court has remained within the negative liberty space in interpretation of the right to livelihood, but has at the same time declared a right to livelihood emerging from the right to life. The nature of this right to livelihood remains negative liberty based. It appears that the court is increasing the ambit of possibility regarding judicial review

155 Anup Surendranath, "Life and Personal Liberty", in Sujit Choudhry, et al., (eds.) *The Oxford Handbook of the Indian Constitution*, OUP, UK, 2016
156 (1985) 3 SCC 545
157 (1985) 3 SCC 545

by investing more and more content to the right to life. In a similar context the following comment is important,

> "The reinterpretation of Article 21 and Article 14 by the court after 1978 marks a watershed in the development of Indian constitutional law. The vast extent of public law and public interest litigation and the Court's routine intervention in administration which is seen in Indian courts today is the result of the reinterpretation of Article 21 and 14 which has introduced the concept of due process of law in the Indian Constitution. It has been aptly said that judicial review is always a function, so to speak, of the viable constitutional law of a particular period. The viable constitutional law of India since 1978 has been the concept of due process of law in the constitution".[158]

This indicates towards the continuity in the institutional adaptation attempted by the court in the wake of onslaught of the legislature on the fundamental rights in the pre-Emergency and Emergency era. The court seems to be consolidating its position as the custodian of the fundamental rights. In the process, it is creating a wider reading of right to life to increase the ambit of judicial review. Wider the right to life, wider will be the scope of the court to review policies and law of the land created by the executive and legislature. With respect to the positive rights the court is not moving in a direction that would promote their implementation. It has rather kept them under its custody safely and out of action.

There were probably few exceptions though. In the case of the right to education and right to food, some action is seen on the front of positive rights. One needs to remember from the *Francis Coralie* judgment that the court has commented about the 'magnitude and content' of right to life in relation to economic capacity of the state but has also clearly stated that the right to life must include the basic necessities of life. Thus, if not much action is seen on the front of positive rights, one might say that the court has only spoken in positive manner when there were matters related to basic necessities of life. Right to education and food qualify this condition.

> "There was a radical shift in the Court's jurisprudence from the early 1980s concerning the very nature of rights protected under Article 21 towards understanding Article 21 as also imposing positive obligations on the State. Therefore, for example, Article 21 does not just protect against the State proactively depriving persons of education, it also imposes an obligation on

158 T. R. Andhyarujina, "The Evolution of the Due Process of Law by the Supreme Court", in B. N. Kirpal (ed.), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, 2004, p. 211.

> the State to provide for education. However, this has led the Court into territory that has proven tricky for many apex courts around the world. Unfortunately, the SC has rarely acknowledged the normative difficulties of this task. We do not see fundamental discussions on the nature of socio-economic rights claims in terms of a minimum core or progressive realisation, precise content of the right, and their coverage in terms of beneficiaries. Developing a normative framework would ensure that the judiciary adjudicates all socio-economic rights claims within that framework and does not adopt an unpredictable and uncertain approach for recognition of these rights".[159]

Surendranath's comment above indicates that Indian judiciary was not undertaking a socio-economic rights jurisprudence as it was not engaging in a structured manner with the questions of rights coming in front of it. It was not undertaking the project of developing a 'normative framework' to adjudicate socio-economic rights. And in absence of such structured and replicable approach, giving wider meaning to right to life and declaration of a series of rights amount to nothing more than an 'unpredictable and uncertain' approach to recognising rights with positive flavour. The uncertain and unpredictable approach might also be indicative of an instrumental usage of positive rights. This approach of the court might also be to 'sterilise' positive rights and release 'curtailed' versions of positive rights in the public sphere.

To better understand how the court has dealt with positive rights, it makes sense to dwell into some cases where the court has declared rights. In the following sections, right to education and right to food cases are analysed and discussed. The judgments in these cases are dealt with to generate an understanding of the court's approach.

5.2 Right to Education

In any modern society education plays a very important and constructive role in the functioning of systems of governance and the larger societal interactions. In a modern constitutional democratic setup, the importance of education becomes equally or more critical. The fact that people elect their representatives and that laws are the guiding force of governance structures, requires a citizenry which can understand the nuances of law for it to be able to enjoy the sense of positive liberty in the fullest sense. Education and in that a basic education, enables people to understand systems, gives

159 Anup Surendranath, *Op. Cit.*

them the power to express their opinion and voice, and promotes critical understanding that is required to organize themselves in to a well functioning republic. Education is intrinsically important thus for political purposes over and above its utility as an enabler of employment. Any ideals of the flavour of social justice, equality, fraternity, secularism, multiculturalism, democratic thinking, scientific temperament, liberty, brotherhood require education as an intrinsic tool. Given this twin importance of as an enabler in the social, political world, and in the economic world, it is not surprising that education has been at the forefront of claims made from the people and from thinkers and reformers all over the world.

In India, for ages education was kept as a monopoly of a chosen few, with one birth into a specific social stratum as the qualifying criteria. Some amount of opening up of the education sector for all started to take place with the British in command of the country's governance structures. However, the freedom struggle was also the moment when education was promoted as one of the goals to be achieved in the scheme of the imagined free country. With such intentions the constitution was infused with the claim of education for all. Directive principles of state policy put a deadline of a decade on the subject of education. This particular deadline again exhibits the importance attached to education by the ruling elites. What happened with this claim later is symbolic of the story of Indian State and the directive principles.

With every passing decade, the goal remained unachieved. The masses reeled under the clouds of ignorance when the lofty goals of economic transformation were being attempted. There is a lot that the ideas of economic transformation achieved; a lot of what is happening today has its base in those attempts to give the basic infrastructure and minimum critical push to the country's economy. But one of the most important tools to transform the society and the economy was the most underutilised. India did make progress on the front of education, but it was somehow not in the way that was imagined by the constitution. By the 1990s, the literacy rate still lingered around 50 percent.

Pointing to the dismal state of affairs with respect to education and to the apathy of policy makers Myron Weiner says that,

> "By the early 1950s officials within the government of India concluded that the financial resources for the establishment of universal compulsory education by 1960 were not available as a consequence of the government's decision to undertake large development projects. The first five year plan noted that a program to provide education for all children in the six-fourteen age group would require an annual expenditure of 4 billion rupees, an additional 2 billion rupees for teacher training and another 2.72 billion rupees for the construction of buildings. But the plan only provided 1.56 billion rupees for education over the five-year period".[160]

While the estimates for operationalising a universal education programme were counted as close to 9 billion rupees, the provision made was of 1.56 billion rupees. This was when the matter of education was a state subject and the only responsibility at the level of central government was to provide adequate funds for the purpose as centralisation of decision making was the method under the planning commission based system. According to Weiner, "(t)here was little or no educational innovation by the state governments, which looked toward the center for resources and policy".[161] The constitution mandated a directive principle where the government had to work towards the goal of education for all but the actual mandate to work on these goals in terms of setting up and operationalising schools and systems was with the state government and moreover with the idea of central planning in place, finances were closely guarded by the planning commission. Weiner observes that, "(t)he authority to set policies, priorities, and programs in education moved from the states to the central government as the planning commission and the ministry of education set targets and proposed financial allocations".[162]

Thus one can speculate that the crux of the matter was not only non-availability of finances, it was also the administrative centralisation and lack of freedom on part of

160 Myron Weiner, *The Child and the State in India: Child Labor and Education Policy in Comparative Perspective,* Princeton University Press, 1991, p. 107.
161 *Ibid.*
162 *Ibid.*

local levels of governments which were probably responsible for the dismal performance on school education front. Weiner observes that "(E)ducation, initially listed in the constitution as a state subject, was subsequently transferred to the list of concurrent subjects. Though there were variations among the states in their expenditures on education, the major constraint on the expansion of elementary-school education was the limited budgetary allocations made by the central government".[163]

The initial deadline of 1960 of achieving universal school education was shifted to 1990, and then to 1992 and 1995 and subsequently under the National Policy of Education 1986 the deadline was shifted to the year 2000. The focus of the government was on higher education owing to it having adopted a productivist logic of economic development. He observes that,

> "The allocations for elementary education declined in successive five-year plans, even as the budget for higher education grew. Whatever the rhetoric, clearly the government regarded higher education as greater priority than the establishment of mass elementary education. Education, said each of the five year plans, is an 'investment in human resources,' essential to economic growth. Though the plan documents alluded to other benefits from education, the planners evidently saw education primarily in the context of a development strategy that emphasised large development projects and the training of skilled workers rather than mass education. Governing elites in many other countries have had a more positive and broader view of the purpose and importance of mass education than India's governing elites".[164]

At a later stage this logic was extended to school education also. There were attempts by the government to move away from a formal education system and focus its energies on alternative forms of education. Weiner looks at these attempts as the coming to surface of the real intentions of the Indian State with respect to governance. He observes that,

> "In 1986 and 1987 the government of India adopted a new set of policies toward working children, which for the first time reflected the privately held

163 *Ibid.*
164 *Ibid.* pp. 107-108.

> views of the officials in the ministries of labour and Education. The government would no longer ban child labour (with some exceptions) but would instead seek to ameliorate the conditions of working children. The government would also endeavor to provide voluntary part-time nonformal education for working children rather than press for compulsory universal primary education. The new policies won legitimacy from several international agencies in the form of quasi-official statements and grants for specific programs".[165]

While it was important to priorities the financial outlays at the start as the financial capabilities of the state were very limited, the reason why education for the masses while being a constitutional priority could not make the cut in terms of real policy interventions remains a mystery. For Weiner, the answer to this mystery lies in the way education was perceived by the governing elites of the country. "(G)overning elites in many other countries have had a more positive and broader view of the purpose and importance of mass education than India's governing elites".[166]

There is also a possibility that the lack of focus on the education for masses was an outcome of policy formulation getting affected by factors beyond the concern and empathy of the governing elites. The kind of economic policy that was formulated at the start was marked by a focus on technocratic resolution of problems being faced by the nation. Under such centralised policy thinking of any kind of empathy for specific causes does not have the space to emerge as a policy goal. The overall direction was purportedly being decided by economic modelling, input-output models and two-sector models being the flavour of the day. If these models could not prioritise basic education, then one can argue that these models were not looking towards solving the situation of illiteracy. The two-sector growth model imagines the economy as formed by a capitalist, organised, advanced sector and another feudal, backward, traditional sector. And in this model, the traditional sector supplies the surplus labour required to generate capitalist super normal profits.

165 *Ibid.*, p. 77.
166 *Ibid.*, p. 108.

Moreover, the focus being on basic industry for economic rejuvenation, technical knowhow and skill was more important and that got the focus also through the same setup of the State. Thus, one can argue that the growth of the basic education sector was assumed off as a derived activity like so many other activities directly related with the lives of the people in general. The 'trickle down' of technocratic, economic development was to flourish the lives of the people in the years to come. The constitutional mandates of education for all, health for all, nutrition and justice for all, were not in complete sync with the kind of methods chosen to speed up the process of nation building. It is easy to be harsh on the policy makers and leaders of that time, but one can argue that they were not wrong inasmuch as they were restricted in their vision and mechanisms of policy making. That restriction was a combined result of the design chosen of making policy and the already restricted inputs in the policy process because of restricted involvement of varied forces and the presence of a traditional apathy for causes like education.

The Judiciary had in the post emergency era taken some kind of control over the ability of the legislature to amend the constitution. It had also expanded the ambit of judicial review, by broadening the meaning of the right through the infusion of directive principles into the right to life.

There is the general tendency to see the actions of judiciary in a pre and post emergency era, with the pre emergency era being the judiciary's conflict with executive and legislature over the fundamental rights and the post emergency era being marked by judiciary's reading of the rights and directives in a complementary manner. However, one can also argue for another sub phase and era within this larger post emergency phase in the life of Indian judiciary where the judiciary undertakes the declaration of standalone rights.

Judiciary has been declaring socio economic rights in the post emergency phase, but these declarations were always fed into the right to life, giving a wider reading to the right to life. But it appears that there are at least a few instances in the era post-1990 where the judiciary is utilising all varied arguments to declare standalone rights

without feeding them into the right to life. The right to life argument is utilised but the standalone declaration is more pronounced. In one of the first such instances the Indian Supreme Court, declared that there is a right to education for all of the citizens in the famous *Mohini Jain case*. This case was related with the issue of higher medical education and capitation fees involved therein.

The court, however, utilised this instance to declare a broader right to education to resolve the question in front of it. This declaration of the right to education was however curtailed to a large extent by a larger bench in the *Unnikrishanan case*. One can see that there was interplay within the judiciary on the issue of this declaratory right. In the following section both these judgements are analysed in detail and the interplay is brought out in open. The judgements were not far apart in terms of time, so one can say that the interplay was instant.

The first case in the right to education movement was the *Mohini Jain case***.** It was a very broad reading of the Right to Education and later on the *Unnikrishnan case* curtailed the Right to Education to quite an extent and to make the declared right in resonance with the original scope of it in the directive principles.

In the *Mohini Jain case* there are two important aspects that the Court brings out which are as follows: First,

> "The right to education...is concomitant to the fundamental rights enshrined under part III of the constitution. The state is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society."[167] (para 1.04)

[167] 1992 AIR 1858

And, second,

> "Every citizen has a right to education under the constitution. The state is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through state-owned or state-recognized educational institutions. When the State government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the constitution. The students are given admission to educational institutions – whether state-owned or state-recognised in recognition of their 'right to education' under the constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the constitution."[168] (para 1.05)

In the first argument above, the Court is of the view that the right to education follows or is a natural extension of the fundamental rights enshrined under part III of the constitution. Along with that every citizen has a right to education and education cannot be confined to the richer section of the society. Moreover, the court believed that recognition granted by state governments to private players in education sector is a way of fulfilling its obligation under the constitution and the granting of admissions to students in education institutions- whether state owned or state recognised is in recognition of the student's right to education. This argument of the court leads to the conclusion that charging capitation fee is denial of right to education through the route of denying admission.

These arguments or declarations have three parts. Of those the first one is that right to education naturally comes from the fundamental rights. Second is that, it is a universal right and cannot be restricted to richer sections of the society. Third is that the state recognised institutions are also bearing a constitutional duty. And thus, capitation fees are violation of right to education. The most important and basic declaration or rather logic that needs to be probed further here is that the right to education is concomitant to fundamental rights in part III as that seems to be the source of the rest of the parts of the court's declarations.

[168] *Ibid.*

As a declaration it seems very direct and simple to say that the right to education follows naturally from the fundamental rights in the part III of the Constitution. The supreme court had by now, opened up the right to life to quite an extent as traced in the earlier sections of this chapter. But, before saying the seemingly obvious thing, a lot of ground has been prepared. A gamut of articles from of the DPSPs, the reading of the preamble and the instrumentality of education for enjoying fundamental rights is mixed together to come to this conclusion that the right to education is a natural extension of the fundamental rights.

Considering a petition filed under the Article 32 of the constitution by Ms. Mohini Jain, which challenged a notification of the Karnataka government permitting private medical colleges in the state of Karnataka to charge exorbitant tuition fees from students, the Court set out four questions to deal with the case. Out of these four questions one of the questions directly dealt with the right to education. The question that the Court sought to answer was "is there a 'right to education' guaranteed to the people of India under the Constitution? If so, does the concept of 'capitation fee' infract the same"? Most of what the Court says and argues about the Right to education in this case emerges as an answer to a question believed to be associated with the case by the Court. In other words one can argue that while the Court does declare a right to education, it is not out of the blue.

The question about the right to education logically emerges from the petition (or has been made to emerge from the petition). A citizen of the country is invoking the court to set right something which she believes does not belong to the constitutional sphere. In a similar vein the Court also looks at this matter in a constitutionally comprehensive manner and starts its investigation by saying that,

> "In order to appreciate the first point by us it is necessary to refer to various provisions of the constitution of India. The preamble promises to secure to all citizens of India, 'justice, social, economic and political', 'liberty of thought, expression, belief, faith and worship'. It further provides equality of status and of opportunity' and assures dignity of the individual."[169]

[169] *Ibid.*

The court starts with the preamble and highlights the ecosystem of normative values promised to the Indian citizen by the constitution. It seems as if the formation of the question whether right to education exists or not and whether a capitation fee infringes this right, emerges from the understanding of the preamble. It is 'justice' and 'equality' which creates the need of the right to education in the eyes of the Court. Further up the Court uses other articles in the directive principles and from other places in the constitution to substantiate the initial position of the preamble. These articles are Article 21, 38, 39(a) (f), 41 and 45.

Article 21 is related with right to life and personal liberty and is a fundamental right. Article 38, which is a DPSP, exhorts the state to 'secure a social order for promotion of welfare of the people by securing and protecting a social order in which justice, social, economic and political, shall inform all institutions of national life.' Article 39, again a DPSP, asks the state to direct its policy towards securing (a) adequate means of livelihood for men and women equally and (f) 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. Article 41, a DPSP, deals with right to work, to education and to public assistance in certain cases. Article 45 provisions for free and compulsory education for children.

After quoting these articles the judgement says that “It is no doubt correct that 'right to education' as such has not been guaranteed as fundamental right under part III of the constitution but reading the above quoted provisions cumulatively it becomes clear that the framers of the Constitution made it obligatory for the state to provide education for its citizens”. Thus the judgement is reading the preamble, the right to life and some specific directive principles dealing with just social order, right to work, right of protection and opportunity for children and right to education to come to the understanding that framers of the Constitution made it 'obligatory' for the State to provide education for its citizens. The fact that the directive principles hosted the right to education and with a ten year deadline was not enough to bring out this obligation.

In the following part of the judgement, a sense of value of the preamble, right to life and DPSP is exhibited. The interconnectedness of these basic principles of the Constitution is worked upon with reference to the right to education. With respect to the preamble the Court opines that "the preamble embodies the goal which the State has to achieve in order to establish social justice and to make the masses free in positive sense". This is one of the very few utterances of the idea of positive liberty by the court. Further up the court tries to secure a crucial direct link between the preamble and the DPSP by saying that "the securing of social justice has been specifically enjoined an object of the State under the Article 38 of the constitution.

Can the objective which has been so prominently pronounced in the preamble and Article 38 of the Constitution be achieved without providing education to the large majority of citizens who are illiterate"? Evidently, it is the pursuit of 'social justice' that makes the preamble as well as DPSP the hosts of the right to education. The key word or concept here which is 'social justice' is again emerging from the preamble. The Court tries to link the idea of 'dignity' to right to education and hosts this concept in the fundamental rights and DPSP. The court notes that,

> "The objectives flowing from the preamble cannot be achieved and shall remain on paper unless the people in this country are educated. The three pronged justice promised by the preamble is only an illusion to the teeming-million who are illiterate. It is only education which equips a citizen to participate in achieving the objectives enshrined in the preamble. The preamble further assures the dignity of the individual. The constitution seeks to achieve this object by guaranteeing fundamental rights to each individual which he can enforce through court of law if necessary. The directive principles in part IV of the Constitution are also with the same objective. The dignity of man is inviolable. It is the duty of the State to respect and protect the same. It is primarily (the) education which brings-forth the dignity of a man. The framers of the Constitution were aware that more than seventy percent of the people, to whom they were giving the Constitution of India, were illiterate".[170]

[170] *Ibid.*

In the paragraph above, the Court says that preamble assures the dignity of the individual and the method chosen by the constitution to achieve this object is by guaranteeing the fundamental rights to each individual and putting rights and DPSP on the same plank the Court observes that the DPSP are also with the same objective. Through the desire of 'dignity' the court has logically linked up the preamble as the source of desire to the technology of supply i.e. fundamental rights and DPSPs. If there was anyone with some doubts still, Court for that person says that it is the duty of State to 'respect' and 'protect' the dignity of an individual and it is primarily education which brings forth the dignity of a man, so probably the court wants to say that State needs to 'respect' and 'protect' the desire for education.

Elucidating on the DPSP relating to education i.e. article 41 and 45, the court makes the point that 'although a citizen cannot enforce directive principles...but these were not intended to be mere pious declarations'. To put emphasise on this part of reasoning the Court quotes Ambedkar as saying that,

> 'In enacting this part of the Constitution, the assembly is giving certain direction to the future legislature and the future executive to show in what manner they are to exercise the legislature and the executive power they will have. Surely it is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country'.[171]

And thereafter, the Court again emphasises upon the linkage between the DPSPs and fundamental rights by saying that 'the directive principles which are fundamental in the governance of the country cannot be isolated from fundamental rights guaranteed under part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. With respect to the linking of fundamental rights to

[171] *Ibid.*

education, the logic followed by the court is that of instrumentality. Fundamental rights cannot be enjoyed fully without being educated. The court says that,

> "The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under part III could be enjoyed by all. Without making the 'right to education' under article 41 of the Constitution a reality the fundamental rights under chapter III shall remain beyond the reach of large majority which is illiterate."[172]

Honing the argument further the Court introduces the Article 21, dealing with right to life. Quoting parts of judgements from important 'right to life' cases such as *Francis Coralie* and *Bandhua Mukti Morcha*, the Court bases its argument on the wider reading of the right to life as including ideas like right to live with dignity and right to basic necessities of life, and opines that,

> "Right to life is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens".[173]

It is at such instances that one is beyond doubt about the residence of positive rights in the right to life under the custody of the judiciary. It must be noted that in the initial judgement opening up the space of dignity for the right to life (*Francis Coralie*) the court was talking within the negative liberty space, and had only hinted towards a right to basic necessities as emerging from a right to live with dignity. But here the court has taken a leap and entered the space of positive liberty by opining that the 'state government is under an obligation to make endeavour to provide educational facilities'. There is no logical consistency here with *Francis Coralie* except for the little space created there of 'basic necessities' and here it must be noted that the idea of

[172] *Ibid.*

[173] *Ibid.*

'basic necessities' has not been touched by the court. However, another difference is that here the court has said that the right to education flows from the right to life.

It is not just 'implicit' in right to life. The right to life and 'human dignity' cannot be fulfilled unless the right to education is there. This is creation of a standalone right, which is not read into the right to life, but rather is important for right to life's fulfilment. It is not a part of right to life, it is necessary of right to life. Further up, emphasizing again the instrumentality in the relationship between fundamental rights and right to education the court notes that "the fundamental rights...including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity".[174]

The declaration of the right to education was very widely undertaken by the court. It is declared to be 'naturally accompanying' the fundamental rights; it is to be provided under a constitutional obligation by the state; it is to be provided at all levels. The declaration reads,

> "The 'right to education', therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society."[175]

At the start of the section around DPSP in the judgement, the Court underlined the desire of the constitution makers by stating that 'they were also hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with that hope that Article 41 and 45 were brought in Chapter IV...'

[174] *Ibid.*

[175] *Ibid.*

Court could have just used this logic to declare the enforceability of right to education. The fact that the constitution makers meant the right to education to be delivered in ten years from the coming into force of the constitution could have been used as the ultimate legality. But it is not how the Court goes about declaring this right. It uses all that it can to create a legal ecosystem for sustenance of this right. From the Preamble, to DPSP, and Fundamental Rights and the inter-linkages of these three parts through the concepts of social justice, and dignity of an individual, every possible link is put together to build the case for right to education. Also the importance of the fundamental rights is stressed by the court when the logic of education as instrumental in enjoyment of fundamental rights is opined. However, the right to education is not read into the right to life, but is culled out from the right to life, as a necessary condition for enjoyment of the right to life.

> "Every citizen has a right to education under the constitution. The state is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through state-owned or state-recognized educational institutions. When the State government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the constitution. The students are given admission to educational institutions – whether state-owned or state-recognised in recognition of their 'right to education' under the constitution. Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the constitution."[176] (para 1.05)

Court held that permitting capitation fee through state action is arbitrary and violates the ideal of equality.

> "Capitation fee makes the availability of education beyond the reach of the poor. The State action in permitting capitation fee to be charged by the State-recognised educational institutions is wholly arbitrary and as such violative of article 14 of the constitution of India." (1.08)

[176] *Ibid.*

In this para the keyword seems to be 'permitting'. The sense coming out of this usage is that the state government is allowing a practice which makes the availability of education beyond the reach of the poor. With this observation it can be said that the court is operating in negative liberty space with respect to the right to education. It is looking to find actions or policy directions which are blocking the right to education. This analysis also points out that constitutional premises guarded by the right to equality adhere basically to the principle of negative liberty.

The point of contention thus is removal of interferences that cause inequality and not positive interference to infuse equality. (Further it can be seen that the court is of the will that because capitation fee puts poor out of the ambit of education it is not acceptable. This argument says that the positive liberty framework can think of overruling a person's right to trade if that makes others not enjoy their right to life.)

> "If the state government fixes Rs 2000 per annum as the tuition fee in government colleges and for 'government seats' in private medical colleges then it is the state responsibility to see that any private college which has been set up with government permission and is being run with government recognition is prohibited from charging more than Rs 2000 from any student who may be resident of any part of India. When the state government permits a private medical college to be set up and recognises its curriculum and degrees, then the said college is performing a function which under the constitution has been assigned to the state government." (3.02)

The court here attempts to ascertain the duty with respect to the facts of the case. The court attempts to find out the legality involved and make the government do things that it is supposed to do according to the law. The responsibility of private college flows from the recognition given by the state government. The state government by giving recognition is ensuring that the obligation put on to it by the constitution is being delivered through this medium.

The court seems to be also indicating the legal background in which it is comfortable working. There has to be some legality. There has to be some actionable premise within negative liberty space for the court to act, even when it is upholding positive liberty ideals, the action is limited to negative liberty space. Moreover, the court also

seems to be indicating of the possible use of *writ of mandamus*, which is applicable when a court or state functionary does not perform the public duty bestowed upon it. This is not being done directly here, but the way the court build up a case in terms of finding out the legality and thus the duty of the state indicates towards this particular writ being in the back of the mind of the judge.

This judgement declared the right to education based on the interpretation of the directive principles, fundamental rights and the preamble and has fixed the responsibility of the state to provide education as it is important and inherent in the design of the constitutional principles. Moreover, the court has also widened the ambit of the right by stating clearly that the state is responsible for education provided by institutions affiliated under the arrangements created by the state. Even private institutions are now under the ambit of a constitutional duty of the declared right to education in this judgement. This judgement is a wholesome reading of the constitutional design of the right to education and has critical implications for the economy and the society. However, this judgement did not remain in contention for long as it got replaced soon by a bigger bench in the *Unnikrishanan*[177] case.

The *Unnikrishnan* judgment comprises of a series of multipronged logics given by the court for the question: "Whether the Constitution of India guarantees a fundamental right to education to its citizens?" The primary argument expressed by the court is that a fundamental right is not only the one which has been expressed as one in the constitution. A fundamental right can also be derived from an already existing fundamental right. The court says in the judgement that "...this court has, however, not followed the rule that unless a right is expressly stated as fundamental right, it cannot be treated as one". The learned judge states the example of the freedom of press, which is not stated expressly in the list of fundamental rights, but has been thought of as a fundamental right by the court.

In *Express Newspapers V. Union of India*, it has been held that "the freedom of speech comprehends the freedom of press and the freedom of speech and press are

[177] 1993 AIR 2178

fundamental and personal rights of the citizens". Here, one can see the focus of the court is on fundamental rights. The judgment further stressed that from the article 21 which deals with the fundamental right to life, have sprung a lot of human rights such as, right to livelihood, right to clean environment etc. In a way the court is saying that comprehending rights from already existing fundamental rights is an established practice of the Supreme Court of India and especially so in the case of article 21. The logic given by the court is related with the interpretation of the language of article 21.

This logic focuses on the usage of the article 21 in both negative and positive sense by previous judgments, and is claimed that the usage of article 21 cannot be restricted only to negative terms. The court says that,

> "Article 21 declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. It is true that the Article is worded in negative term but now it is well-settled that Article 21 has both a negative and an affirmative dimension".[178]

Further elaboration of the right to life based deduction uses two strands of argument. One deals with the interpretation of the term 'personal liberty'. The other strand talks about the wider interpretation of the term/word 'life'. For the first strand (dealing with the term 'personal liberty') the court quotes from the judgment, *Singh v. State of UP and others* ([1964] 1 S.CR. 332)

> "We shall now proceed with the examination of the width, scope and content of the expression 'personal liberty' in article 21. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of article 19(1). In other words, while article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in article 21 takes in and comprises residue".

[178] *Ibid.*

The idea in this paragraph is that the reading of 'personal liberty' cannot be construed in a narrow sense. It is claimed that the expression personal liberty was not intended by the constituent body for a narrow reading only. For the resolution of this puzzle the court uses the article 19(1) which deals with particular sets or constitutes of personal liberty and argues that the residue not covered in article 19(1) should be comprised in the expression 'personal liberty' in the article 21. The court is reading more contents in the article 21 by infusing in article 21 all that which is not present in the article 19(1). This case was dealt by a constitution bench and the majority opinion as stated above was delivered by Justice Rajagopala Ayyangar.

In that case, “the learned Judge quoted the dissenting opinion of Field, J. (one of those dissenting opinions which have out-lived the majority pronouncements in *Munn v. Illinois*,) attributing a broader meaning to the word 'life' in the fifth and fourteenth amendments to the U.S. Constitution, which correspond inter alia to Article 21 of our Constitution. The learned Judge held that the word 'personal liberty' would include the privacy sanctity of a man's home as well as the dignity of the individual”. By invoking the *Munn vs Illinois* judgement, the court has included the idea of dignity into the expression personal liberty. So one can possibly argue that as a private individual whatever personal liberty means is residing in the article 19(1) and out of the private sphere 'personal liberty' is informed by the idea of dignity of the individual.

For the second strand (dealing with 'Life'):

With respect to the term 'life' the court opines that “(t)he word 'life' occurring in Article 21 too has received a broad and expansive interpretation., While it is not necessary to refer to all of them, reference must be made to the decision in *Olga Tellis v. Bombay Municipal Corporation*”, Chandrachud, CJ., speaking for a Constitution Bench of this court observed in that case:

> "The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of

> the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life viable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life..."

Further the court uses the contents of various directive principles to point out the importance of livelihood attached in the constitution.

> "Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The Principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life."[179]

Another strand (the right to life and DPSP):

The court points out that the right to life has been construed in the light of directive principles, and for this the court uses the *Bandhua Mukti Morcha case* and points out from that judgement that,

[179] *Ibid.*

> "This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities of children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity".

Inter-linkages between fundamental rights and directive principles were stressed upon with the complementarity and supplementarity as the focus in this judgment.

> "This Court has also been consistently adopting the approach that the fundamental rights and directive principles are supplementary and complementary to each other and that the provisions in Part III should be interpreted having regard to the Preamble and the directive principles of the State policy. The initial hesitation to recognise the profound significance of Part IV has been given up long ago".[180]

Court stressed upon the shift from earlier position of keeping fundamental right 'preeminent' with respect to directive principles.

> "It is true that in *The State of Madras v. Champakam Dorairajan*, fundamental rights were held preeminent vis-a-vis Directive Principles but since then there has been a perceptible shift in this Court's approach to the inter-play of Fundamental Rights and Directive Principles".[181]

> "It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that Fundamental Rights are but a means to achieve the goal indicated in Part IV. It is also held that the Fundamental Rights must be construed in the light of the Directive Principles".[182]

[180] *Ibid.*

[181] *Ibid.*

[182] *Ibid.*

Court here has taken the position that fundamental rights are a means to achieve directive principles and that the fundamental rights must be read in the light of directive principles. The Court seems to be infusing directive principles into fundamental rights. This is a site of legal interplay to avoid conflict of directives and fundamental rights.

The right to education and article 21:

Right to education is implicit in and flows from the right to life in article 21. Here, the court is not stopping at the right to education being implicit in the right to life, it is taking a step further and saying that the right to education flows from the right to life. The step further is from the position taken in *Bandhua Mukti Morcha*.

> "In Bandhua Mukti Morcha this court held that the right to life guaranteed by Article 21 does take in 'educational facilities'. Having regard to the fundamental significance of education to the life of an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions ...we hold, agreeing with the statement in Bandhua Mukti Morcha, that right to education is implicit in and flows from the right to life guaranteed by Article 21".

To be noted here is the fact that the court has declared right to education by agreeing to the reading in *Bandhua Mukti Morcha* case and has not utilised the reading in the *Mohini Jain* case. Basing reading on *Mohini Jain* would make the right to education much broader.

Countering one of the arguments against the right to education that the article 21 is negative in character and can be invoked only when someone is deprived of their right to education the court took a strange position. It said that,

> "This argument, in our opinion, is really born of confusion; at any rate, it is designed to confuse the issue. The first question is whether the right to life guaranteed by Article 21 does take in the right to education or not. It is then

> that the second question arises whether the State is taking away that right. The mere fact that the State is not taking away the right as at present does not mean that right to education is not included within the right to life. The content of the right is not determined by perception of threat. The content of right to life is not to be determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law".[183]

Here, when the court had already used earlier the position that right to life has both negative and positive connotation it made little sense to go back to the negative sense of right to life. Probably the court was confident of creating a clear content of the right to education that it emphasised the negative connotation of right to education that 'the state cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law'.

Next, the court uses the directive principles to create the content of the right to education. It stated that,

> "...it would not be correct to contend that Mohini Jain was wrong in so far as it declared that "the right to education flows directly from right to life.' But the question is what is the content of this right? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words, whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs? *Mohini Jain* seems to say, yes. With respect, we cannot agree with such a broad proposition".

Here, the court has respectfully rejected the broad 'right to education' created in the *Mohini Jain* case. The court does not agree that the right to education would mean that citizens can demand from the state colleges and facilities for education of their choice. Finding a way to restrict or rather to contain the right to life in constitutional way the court indicates towards the efficacy of directive principles for this purpose. It states that "the right to education which is implicit in the right to life and personal

[183] *Ibid.*

liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution". Elucidating the scheme further the court defines the limits of the content of the right to life in terms of directive principles.

> "Right to education understood in the context of Articles 45 and 41, means. (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14years, his right to education is circumscribed by the limits of the economic capacity of the State and its development We may deal with both these limbs separately. Right to free education for all children until they complete the age of fourteen years (45-A)".[184]

The court in the Unnikrishnan judgement thus circumscribed the open ended and wide right to education created by the *Mohini Jain* Judgment and limited the right to free education until the achievement of age of fourteen by intrinsic usage of the directive principles. Gautam Bhatia in his chapter on directive principles has talked about the usage of directive principles in this manner by the court. He has also identified other ways in which the court utilises directive principles. However, what is of import for this thesis is that the court seems to be infusing curtailed, controlled meaning of positive rights into the public, legal and political sphere by undertaking this exercise of mixing up fundamental rights, preamble and directive principles. It is creating a new curtailed fundamental right of education and moving beyond the quagmire of directive principles.

Treading a cautious line the court also expressed that because it has used some of the directive principles to give content to the right to life it does not mean that those directive principles in the part IV were being moved to part III of the constitution. And further the court nullified any chances of conversion of other directive principles into fundamental rights by saying that,

[184] *Ibid.*

> "We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right".[185]

This bit of reasoning is important to analyse. Here, the court is saying that it has held right to education to be implicit in the right to life because of its inherent importance and have used directive principles such as article 41, 45 and 46 'merely' to determine parameters of the said right. The court has stated that relying on directive principles does not mean that all the obligations in part IV of the constitution become the part of right to life. There are two ways to analyse this bit of court's judgment. One, the court is vary of directive principles and does not want to open the Pandora's Box it closed in the institutional adaptation of 1970s. Two, the court is shying away from giving out any concrete, principle based, and logical grounds of jurisprudence around positive rights.

Earlier in the same judgment the court had opined that fundamental rights were instruments of achieving the goals in the part IV and now it was saying that the directive principles were used to give content to the right to life because they were dealing with a fundamentally important concept of education. The court had actually made an instrumental usage of directive principles in this case to 'circumscribe' the open ended right to education created by *Mohini Jain* judgement, as the directive principles around education had the age limit attached to them. This appears to be an instance of judicial sterilisation of a positive right expressed by an earlier judicial opinion.

Differing with the Mohini Jain judgement in another sphere the court noted that,

[185] *Ibid.*

> "When the Government grants recognition to private educational institutions it does not create an agency to fulfil its obligations under the Constitution and there is no scope to import the concept of agency in such a situation...The principles laid down in Mohini Jain's case do require reconsideration...It would be unrealistic and unwise to discourage private initiative in providing educational facilities particularly for higher education...The private sector should be involved and indeed encouraged to augment the much needed resources in the field of education, thereby making as much progress as possible in achieving the Constitutional goals in this respect".[186]

In the *Mohini Jain* judgment it was declared that when recognition is granted to private institutions, they should be deemed to be the point of obligations of the state under the constitution regarding right to education. It seems that the court in *Unnikrishnan* has perceived this bit of *Mohini Jain* opinion as being discouraging for the private sector which seems to be laden with the constitutional obligations. The court corrected that situation and finally noted that "(A) citizen of this country may have a right to establish an educational institution but no citizen, person or institution has a right much less a fundamental right, to affiliation or recognition, or to grant-in-aid from the State".

Here, one can see that the Supreme Court itself recognised and realised the conflict in right arising from creation of a fundamental positive right by the declaration of the court. The conflict between right to profession and right to education created in *Mohini Jain* is averted in *Unnikrishanan*. The court by this judgment had allowed the private sector to flourish without making it a party to the obligations inherent in the right to education. This site is an interplay of the legal with economic through aversion of conflict between two rights, one newly minted positive right, and another a constitutional guarantee of right to have a profession.

5.3 Right to Food

[186] *Ibid.*

The Right to food case by the PUCL takes the form of a continuing mandamus writ petition which is still going on. The Court's role in enforcing positive duty in the case of right to food can be considered to be successful to some extent. While "India has a plethora of food distribution schemes, there was little impetus to implement them until the PUCL moved the Court to transform the right to food into a fundamental human right".[187]

> "The writ petition raised questions of law pertaining to whether the right to life under article 21 of the constitution of India includes the right to food and whether this right to food, as upheld by the Supreme Court in Francis Coralie Mullin, implies that the State has a duty to provide food to people who are affected by drought and are not in a position to purchase food. The petitioners argued that the State did have such a duty, that the right to life did include a right to food, and that the state and central governments were therefore duty-bound to start relief work and distribute grain".[188]

It is to be noted that the petitioners in the right to food case requested the court to issue a *writ of mandamus* or any other order for enforcement of famine code, release of food grains lying in storage of FCI for relief in the drought affected area and for creation of a fresh scheme of public distribution for scientific and reasonable distribution of grants. The court took the petition as a non-adversarial matter and as a matter which is in the public interest as is the nature of PIL. At the start itself it must be noted that the PUCL case of right to food seems like a strategic PIL. The petitioners were well prepared and had sought and won a writ of continuous mandamus.

In the first interim order issued the court clarified its concerns with respect to the need of food for the aged, infirm, disabled and destitute.

> "In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in

187 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, OUP, 2008 p. 130

188 p. 696

> danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems."[189]

It can be seen in this order that the court has identified a set of people who are in need of assistance for food. These people are either suffering from natural/personal disabilities or are with some disadvantage like age (children) or pregnant women. The court seems to be suggesting that an unsatisfactory mitigation of a famine, which is characterised by non-availability of food amidst plenty, might make famine a systemic interference. The question of a failure of governance leading to rights claims is coming on to fore in this understanding of the court. The nature of the PIL is also clarified as non-adversarial at the outset, and the concern rightly so is holistic, structural and public in nature.

In the second order, the court established initial grounds of work by saying that,

> "The anxiety of the court is to see that the poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the government whether central or the state. *How this is to be ensured would be a matter of policy* which is best left to the government. All that the court has to be satisfied and which it may have to ensure is that the foodgrains which are overflowing in the storage receptacles, especially of the food corporation, godowns, and which are in abundance should not be wasted by dumping into the sea or eaten by rats. *Mere schemes without any implementation are of no use*. What is important is that the food must reach the hungry."[190] (Emphasis added)

Here, the duty has been put by the court on the state and central government, but the nature of the duty and its details are thought of as a matter of policy. Focus has been

189 Supreme court order of July 23, 2001, PUCL vs Union of India

190 Supreme court order of August 20, 2001, PUCL vs Union of India

honed onto the implementation part rather than the schemes. The court has also in a way outlined its future course of action by saying that the court is interested in connecting the deprived with the surplus food grains in the government godowns.

In another interim order that followed the court has called into action the entire bureaucracy by creating a chain of command comprising the chief secretary to the cabinet secretary. The court says that,

> "The chief secretaries of all the states and the union territories are hereby directed to report to the cabinet secretary, with copy to AG, within three weeks from today with regard to the implementation of all or any of these schemes with or without any modifications and if all or any of schemes have not been implemented then reasons for the same.
>
> The central government shall collate all the facts and thereafter take necessary actions in order to ensure the implementation of the said schemes. A states report with regard thereto may be filed in court within five weeks. Before giving the states report, the central government will also ascertain with regard to the actual implementation of the various schemes. In the meantime, we direct all the state government to forthwith lift the outline allotment of foodgrains from the central government under various schemes and disburse the same in accordance with the schemes. The food for work programme in the scarcity areas should also be implemented by the various states to the extent possible."[191]

The court focused on the implementation part and called in the bureaucracy to report the level and status of implementation of different schemes related with food distribution and relief work in the country. The court also directed the state governments to lift their quota of foodgrains lying with the central government and disperse it. The court called in for the implementation of the food for work programme in scarcity areas of various states. In a series of orders that followed, the court directed a proper implementation of various schemes. These included,

> "The Public distribution system (PDS), which distributed food grain and other basic commodities at subsidized prices through 'fair price shops'; special food based assistance to destitute households (*Antyodaya*); and the Integrated Child Development Scheme (ICDS) which seeks to provide young children with an integrated package of services such as supplementary

191 SC order of September 17, 2001, PUCL vs Union of India

> nutrition, health care, and pre-school education, as well as covering adolescent girls, pregnant women, and lactating mothers. Possibly the most far-reaching is the scheme requiring mid-day meals at schools, which the court strengthened by requiring not just a supply of food, but a proper meal".[192]

One can see here the far reaching impact of the civil society's attempts to invoke judicial intervention in this matter. The Supreme Court opened up a gamut of government schemes for scrutiny and thus eventual proper implementation. This also indicates towards the wide ranging duty with respect to right to food. It involves, public distribution system, the government system for caring for young children, and vulnerable females, as well as the issue of mid-day meal scheme being organised in government schools. Court's action strengthens many schemes and touches varied parallel issues like right to education (through mid-day meal scheme). The court through its orders also made the state governments to create an orderly list to identify people living below the poverty line.

In an important interim order with respect to implementation of the schemes court created a line of accountability. The court gave power of social audits to *gram sabhas*, who could now monitor the implementation of various schemes related with food distribution being undertaken by the government in their respective villages. At the emergence of any grievance the *gram sabhas* were empowered by the court to report the matter to the district collector. The district collector were instructed to maintain registers for noting complaints received from the *gram sabhas* and were supposed to coordinate proper implementation with various departments. The district collectors were to ensure compliance of the court orders by various agencies and were supposed to report to the chief secretaries.

The responsibility for the implementation of the court's orders was with the district collector and the chief secretaries were to ensure compliance. The court also appointed two commissioners who were empowered to find out ways to address

192 Sandra Fredman, *Op. Cit.*, p.131

grievances when this mechanism was exhausted. With respect to the commissioners the court instructed that “On the Commissioner’s recommending a course of action to ensure compliance with this Court’s order, the State Government/UT administrations, shall forthwith act upon such recommendation and report compliance.”[193] Further, the court imparted the commissioners the liberty to involve 'individuals and reliable organizations' and instructed all officials to cooperate with people and organisations to ensure 'effective monitoring and implementation' of orders of the Supreme Court.

> “The Commissioners shall be at liberty to take the assistance of individuals and reliable organizations in the State and Union Territories. All officials are directed to fully cooperate with such persons/organizations, to bring about effective monitoring and implementation of the order of this Court”.[194]

It is evident from this order of the court that the nature of the creation of accountability taken up by the court was direct and was in the direction of acting against the power of the traditional bureaucratic modes of working. The gram sabhas were given the power of social audits instead of experts coming from state capital and national capitals who have already established nexus with local officials. The district officials were held responsible for implementation of the court's orders and were to be overlooked by the chief secretaries. And even if these measures were exhausted and no relief or compliance was achieved, the court appointed commissioners accountable directly to the court. Also the court gave powers to the local grassroots organisations to mobilise and provide assistance to the commissioners.

The need of appointing commissioners indicates towards the possible resistance in form of inaction expected by the court from the traditional bureaucracy. At a certain level, the right to food case in the PUCL version is basically a prolonged judicial order with mechanisms to ensure that the line of accountability was created and the implementation of various currently in force schemes are achieved. While the court has made a plethora of officials and state agencies party to the case, it is evident that it

193 Supreme Court order of May 8, 2002, PUCL vs Union of India
194 Supreme Court order of May 8, 2002, PUCL vs Union of India

a case which is attempting to create action at the front of the bureaucracy. The implementation of any scheme has to be carried forward by the local bureaucracy and this the court has tried to get done by creating lines of accountability by the creation of commissioners and giving power to the local grass roots organisations and the *gram sabhas*. In a way the power equation of demanding public services through government schemes by local residents and supplying or not supplying the same by bureaucrats was attempted to be turned upside down or maybe shaken substantially. *The key remains that the focus of the court was on implementation by creation of accountability at the level of bureaucracy.*

5.4 Conclusion: Multiplayer Interplay

In this chapter there are three phenomenons which are the guiding force for what happens with positive rights in this phase. These phenomenons are the non-rival reading of fundamental rights and directive principles in the post emergency era, the wider reading of the right to life and the innovation of the scheme of PIL by the Supreme Court. It is through these three ingredients that the new stance of court, which is of declaring rights in the seemingly positive sphere takes place. One can argue that without PIL the other two are of not much use, and similarly that without the non-rival reading the other two are of not much use and that without the wider reading of right to life the other two are of not much use. In this sense all three of these interpretations which became judicial phenomenon over time can be said to be cointegrated with each other, i.e. related to each other, but the causality is not clear.

With respect to the right to education and right to food discussion in the chapter, one can observe that all the main cases that are discussed here, namely *Mohini Jain, Unnikrishnan, and PUCL* are PIL cases. This drives in the importance of the PIL jurisdiction of the court. In one of the cases the petitioner is a civil liberties citizen organization, and in the other two the petitioner is aggrieved students. Without the court undertaking the PIL jurisdiction these three cases and thus the movement on these two rights might have turned out to be very different. It turns out that with the three cointegrated interpretational phenomenon, the courts in India have successfully hosted positive rights in their custody. However, these cases are also representative of

the problems of this custody. There is no clear logical jurisprudence that the court follows.

It appears that a lot depends on the judge involved and on the information presented in front of the court. In *Unnikrishnan,* it appears that the court curtailed in possible interplay by curtailing the right in question, which was in *Mohini Jain,* expressed in a way that the possible interplay might have been totally unstable. What can be achieved with a curtailed right in an interplay cannot be achieved by a sweeping, all-encompassing right, as that right might not generate an interplay, but rather a monopolistic imposition on other institutions. It might lead to delegitimisation of the judicial opinion. In *Kishen Pattnayak,* the court in a way overlooked the possibility of generating interplay, but in *PUCL,* it appears to be guiding the interplay in an active way.

The implication of judicial 'custody' of positive rights in the third phase is reflected in the coming into force of multiplayer interplay over positive rights. The first phase of restricted interplay, marked by the central planning technology of governance, was in a way responsible for the institutional interplay in the second phase which was marked by the institutional tussle between negative and positive rights. The third phase also appears to be a resultant of the interplay in the previous phase, i.e. the second phase's institutional interplay. The institutional interplay resulted in the judiciary undergoing a three pronged adjustment in its stand which constituted of non-rival interpretation of fundamental rights and directive principles, wider reading of right to life and the innovation of PIL. These adjustments appear to have made the judiciary the host of positive rights and judicial decisions in PIL cases, on the grounds of a wider reading of right to life and intermixing of directive principles, preamble and fundamental right (mainly right to life), led to declarations of rights like right to education and right to food.

The adjusted institutional position of the judiciary had two types of impacts. One the judiciary became the source of social activism. As witnessed in the right to food case,

judiciary could be actively utilised now to make the state deliver on the current stated official policy. Two, declarations of rights, like in the case of right to education, ensured that concerned and publically spirited individual citizens, civil society and other social groups could utilise the declarations to make dents in the policy stance of the government by either demanding rights legislation or by demanding policy change. Right to education case led to the legislative act of constitutional amendment and later formulation of the right to education act.

There are no doubts that there exist problems with the kind of laws formulated, but the players in the interplays over rights increased in this phase as compared to the last two phases. This multiplayer interplay is discussed in more details in the next chapter dedicated to the analysis of interplays.

Chapter 6

Identification and Analysis of Interplays

This chapter deals with the interplays observed or identified in the empirics chapter. These set of interplays are those instances where there has been either development of the idea of positive rights or relegation or stagnation of the idea of positive rights. These are identified as interplays as it is evident from the empirics that any movement on positive rights (whichever direction it takes) seems to be taking place with the help of back and forth at the level of policy and/or law formulation, either between or within institutions. There can be multiple interplays in a phase. In all three phases of empirics, one can see that it is collation of twin actions. In the first one it is imagination and then relegation of positive rights, in the second one it is contestation and bargain and in the third one it is declaration and substantiation. One general observation about the interplays is that with the passage of time the interplays have become wider and involve more institutions. For example, in the first phase the imagination of rights as the bedrock of governance based in the ideals of *swaraj* was undertaken by a handful of leaders of the congress party, and the relegation of these rights to directives were done within the constituent assembly, but on the other hand the interplays in later stages related to right to food and right to education involves, judiciary, executive, civil society and legislature along with non aligned public spirited individual citizens.

Interplays with respect to positive rights appear to be a normal phenomenon as it was identified in the theory chapter that the interaction of the negative liberty legal/philosophical/economic sphere with the positive liberty sphere is not a smooth amalgamation. The preponderance of the negative liberty thinking works almost like a gatekeeper for the positive claims, and at the same time positive claims have their own twin force of being sources of power and legitimacy for the ruling elites, and emancipation and participation for the citizenry, thus the intermingling of these two streams is also not avoidable. In such a scenario the bargain between these two forces is bound to take place. The most heartening observation is that this bargain between

negative and positive takes place in all spheres, theoretical, philosophical, and empiric in different forms.

In a setting of a modern, democratic, constitutional structure of governance, the way power (of decision making) is distributed between different segments or constituents of the government is bound to have an effect from and on this interaction between the positive and negative. This interaction of the negative and positive is observed to be generating the demarcation of the separation of power in the second phase of the empirics where an institutional bargain takes place between the judiciary and executive/legislature. In the first phase the interaction of the negative and positive was to be generated by the design of the structures of governance and within that the strategy of governance, through which power was centralised for the declared purpose of generating the positive (application of the directive principles). Thus one can say that the structure of the governance/government and thus Separation of power has a critical role in the interaction of the 'positive' with the established 'negative' and that while a separation of power can be imagined to give substance to the positive aspirations as was attempted in the first phase in India by concentrating power, the conflicting nature of the 'negative' and 'positive' can in turn have implications for separation of power itself, as happened in the case of institutional conflict between the executive-legislature and judiciary in the second phase. The institutional progression of this institutional conflict consolidated power in the hands of executive till the time a solution of sort was found in the form of a bargain where the judiciary lost the right to private property and gained custody over the amendments of the constitution.

6.1 Restricted Interplay in the First Phase

In the first phase the interplays are observed to be restricted in the sense that the imagination of positive rights based governance and later the relegation of these rights to a status of non-justiciable principles involved leaders only. These leaders can be thought of as trustees of the people at large and they were involved first in creation of the imagination of a government that could replace the colonial power and later in the creation of the basic rules which were to guide this government in detail. But even then, these processes of imagination and relegation were not broad based.

The most important interplay in this phase is the one that took place within the constituent assembly where the rights with positive flavour were relegated to the sphere of non-justiciablity. This interplay was in the form of debates between the members of the constituent assembly. It is widely reported that conservative lawyers were unable to deal with these clauses. Ambedkar, however tried later to bring forth the importance of directives even after being non-justiciable. He was of the opinion that these directives were going to play a central role in the governance of the country, as these directives will be the bedrock of electoral politics.

The imagination of the planning commission and the planning process also involves a wider interplay. In this interplay, the planning process is promised at the face of it to deliver on the directive principles. Everywhere in government documents and in statements given by the functionaries of the state, directive principles were presented as the desired goals to be achieved through the process of planning. There was some progress made in terms of some laws like the minimum wages law etc, but the fact remains that it was not until the fifth plan document that calculations on unemployment data and poverty figures were included. The direct utilisation of directive principles to garner legitimacy for the planning process was not in contradiction to the actual design of the planning process's indirect method to deliver on directive principles. Planning was to consolidate industrialization and spark economic development which in turn would generate the desired goals of work, education, health and other social and economic goods for all. This was almost like a one sided interplay, where a promise was made and people bought it.

The most respected positive claim/right in the country in the initial days of the formation of the nation and even today is the right of sovereignty and territorial integrity. When we think about what is the content of having a territorial sovereignty and how that has been achieved, we can see that the content is military strength and that has been achieved with the help of constant expenditure of substantial degree from the tax collections. The source of legitimacy, the source of power for any state is, I want to argue, based in positive liberty and this is specially so in the case of South Asia as the common imagination of the state in India was based on the imaginations of what self rule will be like or what *swaraj* will be like. For India that

positive liberty got concentrated in the conception of a liberal democratic state. For Pakistan that idea of positive liberty got concentrated into a theocracy. In both these imaginations the most crucial positive intervention and the source of power for both the states is the delivery of territorial integrity. Defence from the external force at the level of nation thus appears like a positive right.

One can see that this territorial integrity was the most sought after by the Indian state almost at par with economic integrity. These two together make the large chunk of the sovereignty of the Indian people in a collective. These two feed each other too. The third part of the idea of sovereignty and positive liberty is the desire of representation and living standard or well being. This third part is at times in a trade off with the other two put together. This kind of a trade-off can be said to have taken place in the initial founding years of the Indian nation, wherein the immediate positive claims of better standard of living were exchanged in the political sphere for economic and territorial integrity, which was going to lead to better and more sustained standard of living in the future. Even today the traditionalist political forces in the country try and trade direct positive claims of better standards of living and emancipation and human dignity with larger macro level claims of achieving economic superpower status and protection against terrorism and similar security threats. These sites are representative of a political market place where positive claims of different hues are getting traded with the help of the currency of votes and legitimacy.

When we say that the state needs to increase expenditure on the socio economic goods like education by reducing the expenditure or rationalising the expenditure on the defence front, we are talking about a conflict in these two positive claims/rights. Similarly when we talk about reducing corporate subsidies or tax break to increase expenditure on social policy, it represents a conflict between the source of economic stability and positive claims.

The question of positive rights to merit goods, public goods and club goods can arise only in a system that has some principled position in the system around these issues.

The question of positive liberty based positive rights will have different flavour in a theocracy. There the main question of liberty to be what one wants to be is dealt with theocracy. In an autocracy that question is a subject of the whims and fancies of the supreme boss. It is only in a democracy with the possibility of liberal and welfare state based principles guiding these questions that these questions have the chance to emerge in the flavour of a right to food or a right to education. But the movement from an almost invisible and restricted interplay under the aegis of a centralised authority to the interplays at the decentralised level or actual back and forth at the level of policy making within institutions requires independent institutions that can assert their powers. Institutional assertions (second phase) create scope for other players (civil society, citizens) to get involved in interplays (third phase).

6.2 Institutional Interplay in Second Phase

The interplays in the second phase identified are related with institutional actors. This is a much wider interplay as compared to the first set of interplays and these interplays are either caused by or at least informed by the specific interplays and/or general empirics of the first phase. These institutional interplays took place between the executive and executive led legislature on the one hand and the Supreme Court led judiciary on the other hand. These two players first contested within institutional realm over conflict over positive and negative rights and later underwent a bargain of sorts to resolve the contestation to some extent. Their roles were getting defined by the respective powers imagined in the constitution for these particular institutions. The centralised power enjoyed by the executive had a critical role to play in the way this interplay pans out. With executive's desire to implement directive principles in the pursuit of 'socialist way of life' at the centre of the conflict, the particular desire of implementing land reforms, was blocked by the judiciary with the help of the right to private property. The tracing of these events in chapter on second phase reveal that there was a slow but steady progression towards authoritarianism within the setup of democratic governance of the executive branch which finally led to the imposition of emergency. It can be argued that this authoritarianism was a result of pursuing positive liberty ideals. But one can also argue that the directive principles (positive liberty principles) were just a legitimising mechanism for the hegemonic economic policy thought process of centralised planned economy to gain economic integrity.

But with the judiciary holding its institutional ground even in the face of calls for a 'committed' judiciary, one could see that the institutional change in the executive was imposed by the judiciary with the help of the 'basic structure doctrine'. The executive after trying to run over all these institutional blockages created by judiciary, initially by democratic constitutional amendments and later with the help of emergency (44th amendment during the emergency), finally settled down into the new institutional space where the judiciary was to have the 'custody' of the constitution. Judiciary thus became an active participant in the governance of the country in later years. The executive gained the deletion of right to private property in the process and since then has been involved in 'takings' at a large scale for various infrastructural projects. The judiciary gained control over amendments to the constitution, thus was able to have a control over amendments to fundamental rights, which in turn makes the institutional space of judiciary safe, as the role of judicial review requires fundamental rights to exist. In the absence of any parliamentary opposition to the elected executive in pre-emergency era, it appears that it was judiciary which created the first dents in the consolidated and centralised power of the new found Indian executive branch of government. The 'custody' of the constitution with the judiciary, to some extent ensured that the judiciary became the source of access to positive rights for the citizens and civil society later on. The most interesting part in this interplay is that the driving force of this interplay is the quest of institutional independence of the judicial branch in the face of a powerful executive. One can imagine that if the judiciary had not undergone this self preservation, how different could the governance structure of the country be.

6.3 Multiplayer Interplays in third phase

The interplays in the third phase involve executive/legislature, judiciary and the citizen/civil society. This is the widest ambit of interplay achieved so far. Again it is observed that these set of interplays are either caused by or informed by the interplays or empirics in the earlier phase. The change with respect to the interplays can be observed in the following passage written by Ranabir Samaddar,

> "...rights no longer arise from the head of a liberal thinker, or a manifesto, a charter, or a text, they are originating from network/s and then taking shape as a right. Thus for instance one action of the People's Union for Civil Liberties (PUCL) in a court led to a series of actions and formation of organisations and forums working now in a network of public hearings – culminating in a single call for the right to food. These rights-network/s show plural and the dialogic basis of this new orientation in the rights movement, and the federal character of the politics of rights. The network narratives...provide the new discourse of rights – plural, dialogic, and hinging on alternative imaginations."[195]

The rights movement is finally having some democratization in its imagination and the direction it takes. From the one sided interplays of imagination and relegation by few leaders to the involvement of those people (however limited) for whom these rights are actually meant the delimitation of power of the ruling elites over rights of the people has taken quite some time. In this process, the judiciary's quest for savings its own institutional turf has played an instrumental role. Civil society has been agile enough to pick up the small openings that it has got and attempt creating a negotiation through utilizing the judicial declarations in direct contest with the bureaucracy or for creating social movements.

The role of civil society is evident from the history of the right to food case, where "prior to the big Right to Food petition filed by PUCL in 2001, the only other case concerning specifically the right to food, (which) went up to the Supreme Court in 1986 was the case of *Kishen Pattnayak vs State of Orissa*."[196] In this case the Supreme Court did not recognise the right to food of people who were faced with critical condition of starvation and directed the state government to ensure long term policy interventions of the sorts of creation of irrigation projects to improve the state of affairs. Whereas, in the more famous, PUCL case, "[t]he Supreme Court was much more receptive than it was in *Kishen Pattnayak* case to take immediate action for preventing hunger. The Supreme Court expressed serious concern about the increasing number of starvation deaths and food insecurity despite overflowing food in FCI storehouses across the country. The Bench comprising of Justices Kirpal and Balakrishnan, then even broadened the scope of

195 Ranabir, Samaddar, "Flags and Rights." *CRG Research Paper Series, Policies and Practices* 11, 2006, p. 45.
196 Kothari, *op. cit*., p. 4.

the petition from the initially mentioned six drought affected States, to include all the Indian States and Union Territories."[197] The difference in the response of the court can be attributed to the kind of information presented in front of the court. The kind of petitions brought before the court, the campaigns behind these petitions and the arguments of constitutional social rights that were raised seem to be of critical importance[198] and it is in this light that the role of civil society becomes very critical.

Technically as a force that picks and chooses the right strategy and also politically as a force that initiates the process of constitutional politics by reading the contents of rights of citizens, civil society can be very important in the way constitutional political economy is balanced.

> "why would a legislator take seriously a constitution's identification of nonjusticiable rights? One reason, of course, that legislators might do so because they take the constitution seriously. That is, they might feel a moral obligation, enforced through politics, to do what the constitution says. Additionally, independent of or perhaps causally related to legislators' desires to comply with the constitution, *civil society can read the constitution, conclude that it is being violated,, and place pressure on legislators to enact policies that comply with the constitution*. Gary Jacobsohn quotes a speaker in the debates on the adoption of the Directive principles in Ireland which makes the following point: 'They will be there as a constant headline, something by which the people as a whole can judge of their progress in a certain direction; something by which the representatives of the people can be judged as well as the people judge themselves as a whole".[199] (Emphasis added)

In a country like India where the roots of the civil society are not so strong as other developed country and when to some extent the capacity of the civil society is also linked with the capacity of the state and of society in general, the role of the court with respect to make patterns of rights visible to the civil society and give them an edge with their judicial declaration of these rights is critical.

> "Nonjusticialbe rights are enforced by civil society through political mobilizations and the like. Are merely declaratory rights meaningfully

197 *Ibid*., p. 5.
198 *Ibid*., p. 13.
199 Mark Tushnet, Social Welfare Rights and Forms of Judicial Review, *Tex. L. Rev*. 82, 2003, p. 1901.

> different? *To some degree perhaps, because civil society can rely not merely on the constitution (and on what civil society organizations say the constitution implies about existing government policies), but on a judicial declaration of a constitutional violation.* In the Irish cases, a judicial declaration of unconstitutionality might supplement the moral-political compulsion exerted by the Constitution itself if the public gives some distinctive weight to statements – not judgments – made by the courts. *Perhaps civil society institutions could make more headway with such declaration in hand than they could otherwise with only the Constitution's language to rely upon*. But perhaps not; it will depend on the weight civil society itself gives to judicial declarations, and that weight will pretty clearly vary from one nation to another".[200] (Emphasis added)

The ability of the civil society to rally declaratory rights and attempt their enforcement gives the scope of the court's judicial review to be detached from the question of providing remedies. This is something that has happened in India with respect to declaratory rights like right to shelter, right to livelihood, where the court has undertook standard review without giving any contents or remedies related with that right in question. The civil society thus, can make intrinsically valuable a right which was used instrumentally by the court to expand its ambit of judicial review.

> "using the term 'rights' to describe non-justiciable rights brings out something that a traditional Hohfeldian account might obscure – that we have a number of institutional mechanisms by which rights can be enforced, including, in the case of non-justiciable rights, enforcement by a mobilized civil society. *The question of the standard review can at least in principle be separated from questions about remedies*. Yet, the difficulty of doing so does suggest that the classification developed here may be defensible primarily as something that eases exposition rather than as an analytically precise scheme".[201] (emphasis added)

While the Civil Society might use the declarations of the court for a beneficial 'edge' in its pursuits, it might also initiate the court towards making such a declaration, or making the court provide remedies to questions of rights which are well settled. In India it is often wondered as to what was the actual cause of an active judicial branch. While I have argued that the conflict with legislature over fundamental rights led the court to adapt a more aggressive posture towards the custody of the constitution, there

200 *Ibid.*
201 *Ibid.*, p. 1909

has been views that the post emergency era made India a more 'rights' oriented society in general and that increased the invocation of rights by people through the judicial process. Thus it is argued that the interplay between the state and civil society in turn generates further rights by giving the court more chances of undertaking activism.

> "The court's activism arose not only as a response to state processes but also from the interplay between state and civil society. The 1980s saw an extraordinary burgeoning of nongovernmental voluntary organisations and social movements dedicated to a wide variety of goals and causes, from opposing environmental degradation and big dams (Narmada, Tehri) to exposures of child and bonded labor, Dalit (ex-untouchable) empowerment, and historical and cultural preservation. In the early 1990s there may have been between 50,000 and 100,000 NGOs at work in India. Together with an array of individual litigators, e.g., Goldman Environmental Prize winner M.C. Mehta and H.D. Shourie of Common Cause, NGOs used public interest litigation to advance their agendas. In the 1980s and even more in the 1990s a growing synergy linked the supreme and high court justices, a resurgent civil society and reform-minded members of the middle classes."[202]

> "In a country where large sections of the population continue to be denied access to survival rights and entitlements, the judiciary is very often called upon to intervene in exercise of its primary role as a protector and enforcer of basic rights. The experience of the Indian judiciary bolsters the vision of the Constitution as a dynamic and evolving document and not merely an expression of desired objectives in an open-ended time frame. By taking on board the citizen's concerns about an inactive or indifferent legislature or executive, the court provides the platform for the state and civil society to engage as active participants in the scheme for realization of ESC rights."[203]

It is reflected in the words quoted above of Justice Murlidhar that the court is not seen by him as the institution substantiating positive rights but as a provider of a "platform" for the state and civil society in the realization of these rights. This understanding of a judge is important as it reflects upon the role of the judiciary in this business of giving substance to positive rights and this understanding points towards an indirect role for the judiciary rather than a direct role of creating these rights. It seems that "…the judiciary is playing an important role by making government agents respond to queries and demands of non-government activists who

202 Rudolph and Rudolph, Redoing Constitutional Design : From an Interventionist to a Regulatory State, in Atul Kohli (ed.) *The Success of India's Democracy*, Cambridge University Press, 2001

203 Murlidhar, S., Paper presented in the first South Asian regional Judicial Colloquium, p. 8.

belong to civil society. The courts are thus strengthening the sense of public sphere, which is not yet firmly established in India."[204] Also this indirect method indicates that the residence of the positive rights is with the judiciary or it is an easy source of invocation of the positive rights. This also points out towards the role of positive rights as a outcome of interplay between the citizens (civil society) and the State in the public sphere. This is precisely the scheme that was imagined by the constituent assembly for the directive principles, but in reality under the restricted interplay regime it could not take off initially. And this has been achieved, if at all, at a certain level after the court took custody of the constitution which led to the dissolution of the centralization of thinking, imagining, policy making and action over positive claims/rights. There are many problems related with an overarching and ever growing judicial review and judicial power. There are may be some imbalances that get created by a proactive judiciary who is exerting its institutional independence, but if by doing so, if by undergoing that adaptation to save itself, the court also ended up creating grounds of interplay between the citizen (civil society) and thus made state more accessible to the citizen then that achievement would be a great one.

> "The independence and freedom of civil society is the basis for a democratic public sphere in which matters of policy can be openly and critically debated – not only in parliaments and legislative assemblies, but also in the media, academia, non-governmental organizations, clubs, neighborhood get together, marketplace and even bar room. Civil society is what arises once people begin to systematically make use of constitutionally guaranteed liberties."[205]

Thus what role the court plays in creating grounds of interplay between the citizen and the State is to be decided on the basis of two things. One, does the court influence in any way the independence and freedom of civil society. And two, does the court influence the ability of the people to systematically make use of constitutionally guaranteed liberties.

In another example the declaration of the right to education had led to a public discourse on the status of education in the 1990s. This debate or discourse witnessed the inclusion of the question of child labor into the question of right to education. International organizations like UNICEF and local organizations like CRY (Child Rights And You) got the logic rallying across the public sphere that if

204 Dembowski, *op. cit.*, p. 10.
205 Dembowski, *op. cit.*, p. 10, p. 12.

the child labor problem is to be solved the right to education is the most important tool that can be utilised. The question of right to education, which got public prominence after the judicial declaration in 1991, made people think about what the state was doing with respect to achieving the right to education. The right to food case opened up the contents of the right to food and were successful in driving home the point that work and food are interrelated, thus creating the grounds for the right to work legislation. The right to food case also created awareness about the importance of mid day meal scheme and nutrition for children.

While one can argue that the creation of more and more rights has basically led to increase in the ambit of the judicial review and thus the declaration of rights and the PIL movement were methods used by the judiciary to protect and further its institutional existence and power, but it appears that these institutional adaptation might have had some beneficial impact also. Baxi says that,

> "Adjudication emerges as a form of social conversation among the activist judicial and social/human rights movements...Social conversation on issues of law, rights and justice is no longer a matter of cultivated discourse by, of and for the professional managerial classes (planners, policymakers, judges, lawpersons, and related learned professionals). It now becomes a form of conversation among multitudinous narrative voices."[206]

It seems as if Baxi is suggesting that by creating grounds for these conversations, the institutional adaptation undertaken by the court has directly shared power with the legislature and executive to some extent and also has infused some dosage of that power for the normal people in form of a chance of involvement in the so called 'high law making' processes which were the prerogative of the people in power.

> "The notion of judicial conversation de-centres the judicial role itself, portraying litigation not as a transfer of hierarchical power to the court, but as *a trigger for democratic interaction between judges, government actors, and different social and political groups*. Groups without a voice in the political process are able to enter the conversation and shape its outcome. This in turn highlights the role of social groups themselves in setting the litigation agenda, and therefore shaping the pattern of judicial intervention,

206 Upendra Baxi, "The Avatars of Indian Judicial Activism", in S Verma and Kusum (eds.*), Fifty Years of Supreme Court of India: Its Grasp and Reach*, OUP 2000, New Delhi, as quoted in Sandra Fredman, 2008, *Op. Cit.*, p. 133.

> not just in terms of the issues that come to court, but also in terms of the perspective through which the judicial conversation is filtered".[207]

From a discourse centered around a conflict between positive rights and negative rights, there has been now a shift to a discourse which is marked by the increased presence of the citizens in the picture. The back and forth between the legislature and the judiciary has given way to a back and forth between citizen and judiciary and citizen and executive/legislature. The role of the judiciary in this change is that it tried to save its turf from an institutional crisis emerging from the aggressive stand taken by the state and in the process the judiciary consolidated its powers of judicial review and took the custody of the constitution. That has led to toning down of the potential instability elements inherent in positive rights.

The 'interests' of the State are not necessarily neutralised in multiplayer interplays. The state has the ability to follow its economic policy orientation even in the situation of interplay. The legislative act of bringing in the right to education is an example of the rationale followed by the State. Right to education got curtailed to primary schooling for the age group 6 to 14 years. This curtailment ensures that there is no universal right to education for children as the crucial category of 0-6 years is kept out of the purview. This exclusion might cause a lot of children inability to take part in the right to education. Moreover, the right to education holds only in government schools. These restrictive application of the right to education rob the right of its most critical and important character which is universality. In this sense, one can invoke Hayek here and claim that as this right is not universal in age group and in the sphere of duty, it is basically a special right between two parties, which in this case are children in the age group 6-14 attending government schools and the State. Thus the state has to an extent followed the libertarian conception of positive rights with respect to right to education, even when it has constitutionalised that right. One can point out speculatively here that till the time, the actual law making does not gets democratised by the proper functioning of the parliament, the hegemony of executive (and in that the interests of bureaucracy) are aligned in a way that even

207 Sandra Fredman, 2008, *Op. Cit.*, p. 133.

multi-player interplays can be utilised to 'sterilise' positive rights to a large extent by the state.

Chapter 7

Conclusion

At times the most important duty with respect to positive claims is that of providing governance by providing law. With the settlement of sorts of the direct conflict over the DPSP between the state and the judiciary, it seems that the space of the state to provide laws as an answer to demands of positive claims has got shrunk and the executive especially has undergone an adjustment in its functioning and has focused rather on 'schemes' related to development work. Also the language of the state has changed when talking about positive claims. The change has been from DPSP to economic growth and development, in Hindi the keyword has been '*vikaas'*.

With the custody of the constitution and thereby the custody of fundamental rights and directive principles lying with the court after the *Kesavananda Bharti* case, the mechanism of delivering or doing politics over the positive claims has got smoothened into a constitutional scheme. The executive responds with policy in the form of schemes, the content of which is out the purview of the review of the judiciary courtesy the article 37, so even when the court has the custody over the constitution, it is curtailed to go out of its way to respond to positive claims as the constitutional mechanism of article 37 restrains it to do so. The executive on the other hand can respond to positive claims in a manner that it does not run over fundamental rights in the process, and some form of balancing act is available in the form of judicial review in case of a conflict based in the 'legitimate' grounds of 'common good'.

From a different vantage point, one can say that the taking of custody by the judiciary of DPSPs has led to a decreased amount of usage of DPSP by the State and Executive. The usage of these concepts reduced and the usage of other concepts like '*vikas*' increased indicating again at the presence of rhetoric in the system.

In all of the ways that one can possibly look at what happens with positive rights in India, the most important observation seems to be the importance of independence of democratic and constitutional institutions. It is institutional independence which is critical in creating the grounds of interplay. The history of DPSP points out that conflict between DPSP and fundamental rights, that emerged from the desire of the people at that time, a constitutional conflict gets resolved by not management of the conflict or by assertion but by 'adaptation'. If the judiciary was not independent to the level it was, this adaptation probably was not possible. This juncture also exhibits the importance of the written constitution and its interpretation. The judiciary's position was kept as quite strong in the constitution and at quite young institutional age the judiciary successfully consolidated that position and without the transformative aspect ingrained in the constitution, positive claims might not have come into the public sphere to even the current limited seepage.

Later, the empty declaratory rights brought in by the judiciary might have been of no use if there was no independent Civil Society, which saw its interests in these positive rights and adapted its strategy accordingly.

Even the State and the Executive is visibly independent. If the judiciary became too adventurous and tried to move out of its sphere of legality and impose these rights in the later stage on the policy arena then Executive might not have remained independent to see its own interest (of efficiency) in the rights agenda.

Thus it is important that democratic institutions remain independent. Remaining so enables them to be able to fight for their own turf. It enables them to be able to adapt in a time of conflict. It is ultimately the desire of institutions to remain afloat which runs the cogs of governance. More independent institutions mean a more scope for interplays which in turn can translate to efficient and well performing system of governance.

Positive rights have the power of rhetoric attached to their nature. If the intrinsic is not followed positive rights will generate rhetoric.

The prevalence of rhetoric is visible in the initial years of the formation of the country and the utilisation of these positive claims instrumentally was blatant. But the courts will also be susceptible to use these positive rights in an instrumental manner probably for achieving institutional immunity through the process of creating legitimacy by the power of rhetoric. But fortunately the courts have shown some restraint. They have not gone beyond their constitutional calling with respect to positive rights. That is also probably because of the design of the institution that the court is. It does not have so much space for rhetoric say as the legislature has or the executive has. Are the positive rights best kept in the custody of the court? That is an important question. At least the custody with the court does not create a direct conflict between positive rights and fundamental rights. The rhetoric at the level of executive and legislature has got limited. The space available for the rhetoric based in instrumental usage of positive rights to the executive is in the form of state policy expressed through schemes only now, as any legislative effort is under review by the court. But is it possible that in the desire to make the state accountable for its 'schemes' the court might end up taking the path of 'socialist pattern' of society? We see that in the right to food case, the court has created an entire parallel executive system in the form of commissioners to the Supreme Court.

Positive rights are best left to emerge at the demand side in a micro level. They are best deliverable in the form of an outcome of decentralised governance where they are met at the juncture where their needs arise. If left unfulfilled for long they have the capability of becoming humongous. It is very evident by now that even after achieving some amount of economic success the basic desires expressed in the directives remain unfulfilled. That shows that the decision to focus only on economic development and keep the idea of instilling the positive rights in an indirect domain was not completely correct. Anyways in the name of application of the directives the executive and legislature were later finding themselves inhabiting undemocratic grounds. The desire for the socialist pattern through directives led to a conflict with some of the fundamental rights. One can argue that the question of positive rights is a question of politics and is best decided in the realm of democratic politics. But the experience of the country in that sphere has been bit too confrontationalist. With the

positive rights in the custody of the judiciary, it seems that the scope of misuse is limited as compared to monopoly custody of the legislature and the executive.

However, the instrumental use of positive rights is possible also from the side of the judiciary. When the judiciary resided the positive rights in the right to life or rather used right to life as a vehicle sometimes for carrying in positive rights into its opinions, more often than not the judiciary was basically using the expansion of right to life with more and more content for increasing the ambit of its judicial review. It was in a way increasing the sphere of influence of judicial review by adding more and more concepts as 'rights' into the right to life. So a right to livelihood without any positive content or obligations on state, well within the negative liberty space becomes one another fundamental right. And fundamental rights are the bedrock of judicial review. The right to education case in *Unnikrishnan* reveals this facet of the judiciary when it utilizes the directive principles for curtailing the right to education and later declares that it does not mean that all obligations in directives can be infused into right to life. With respect to obligations from directives the judiciary has made an clear attempt to restrain the expansion of right to life, but has been taking up the expansion of right to life with addition of 'declaratory rights' without obligation since the 1980s.

There seem to some pattern to the way the court has dealt with so called socio-economic rights or positive rights after the emergency era. One can think of at least three categories as of now. The first category is of rights which are purely declaratory in nature. Example of these could be right to livelihood, right to health and right to shelter. Declaration of these two rights has come with a rider that substance in terms of positive duty is a matter of state policy or the positive duty if any already in place has been enforced. The court has dealt with the negative duty of these rights and has used right to life to declare these rights. The court has expanded the ambit of its power of judicial review through this category. Second category of right/s is where the court has declared a right and has also infused some amount of positive duty in its judgements. The best example of this category is the right to education. Here as has been discussed before, the right is declared with the help of right to life, preamble, directive principles and the positive duty is chiselled with the help of directive principles or the court might have created a positive duty in the form of constitutional obligation. One need to remember that with right to education there were strong

constitutional grounds for positive duty as the right was listed in the directives with a deadline and with the claim to availability of road, a fundamental right in the form of freedom of movement was present. The third category of right/s is where the court has declared the right on the basis of right to life and has taken active part in enforcement of right. The positive duty might have been enforced within the ambit of current state policy (as is the case with right to food) or the court might have delivered upon the duty itself in the form of creation of law where none were present around the point in question (as is the case with sexual harassment case in Vishakha, where the court created guidelines in absence of any law regarding sexual harassment in workplace or with rights of people with HIV). Needless to say, the first category of rights, are of instrumental value to the court and are in a larger number. The last category is lesser in number.

The role of civil society in terms of presenting in front of the court the matters which might force the court to engage in a detailed meditation on positive rights is crucial. One has to remember that the right to food was nothing less than a strategic PIL.

Positive Rights emerge in stable form when they become focal point for multiple players, which mean that instrumentality of rights is not actually a problem. It appears that if something is not valued intrinsically then it is not valued at all. But at times the instrumentality is more crucial. Within the negative liberty setup, application of intrinsically valuable positive rights might not be feasible or practical. That does not close the door for positive rights, on the contrary it directs the claims to the door of instrumentality.

With the custody of highly unstable directive principles, the judiciary is at the risk of falling into the trap of rhetoric.

Judiciary's custody of positive rights is not a property right kind of custody. The point of access might be judiciary, and the point of check of legislature's actions might be judiciary, but as a source of policy the executive and the legislature are still free to comment and deliberate on positive rights. The judiciary is there to keep them in restrain from getting into conflict with negative rights. This is the natural process of judicial review. But in the Indian scenario with instruments like the PIL the judiciary at times also becomes the point of access to positive rights. As seen in the example of so many rights declarations like Right to education and food, the judiciary declares

and brings in a right into the public sphere. The question of positive rights is a political question, not just because they command scare resources, but also because they have imperfect duty attached. The desire of universalization is not inherently answered in the sphere of positive rights. Any effort to institutionalise positive rights requires social solidarity and consensus and that makes them a political question. Of course the scare resource line of thought also makes them political, but it is not the only reason.

The solidarity, cooperation, compromise, consensus aspect of positive rights makes them best suited for the parliament's functionality. But the lack of separation of powers between the parliament and the executive makes them potentially potent instruments of rhetoric and power in the hands of a rogue, and all powerful executive. The escape as witnessed in India, from this is the judicial custody. And it is probably a second best solution to a already second best question (rights instead of normal policy working to generate equality of status and positive liberty). The problem of judicial custody is that a question that requires deliberation, gets decided on the basis of reading of law by a few people. The impact of this can be on the society at large as well as judiciary. The society gets costs of different kinds one of which is through the impact on judiciary. The judiciary loses its grip on rule of law, when it creates innovations like the 'PIL' and wider positive reading of right to life. These innovations allow interplays to take place, but these interplays might not be the ideal ones. The judiciary allows positive rights to seep in through innovations that impact rule of law. One can turn the table around and say that because the judiciary wants to consolidate its power, it utilised positive rights instrumentally and in the process naturally loses some grip on rule of law (maintenance of negative liberty's sanctity) but the judiciary's power is sourced from this rule of law only. Thus if the judiciary thinks that it can utilise positive rights instrumentally to consolidate its power of judicial review, it is not thinking through it, because in that instrumental usage of positive rights the judiciary is losing some grip over rule of law. Positive rights might have had a better chance in the parliament through a much more detailed and rigorous deliberation and consensus building process. The source of this entire problem is the separation of power conundrum between the executive and legislation which apparently was kept vague to create a capacious transformative state, one which could impart some substance to positive desires. We seem to have come a full circle here. It

is indeed a curious design. However, curious the design, institutional independence of the sorts expressed and achieved by the judiciary in India is a source of institutional externalities which work through interplays of governance and generate decentralisation of decision making on even unstable concepts like positive rights.

The method of rights might be a second best method to legislate on issues of social and economic concerns, but it's value might lie in creating better laws in the future through empathy generation rather than solve these problems as is often thought and promoted by the political activist. So when the post modernists argue that rights are empty brakes which do not change anything and only give more power on the hand of the state, one can argue that rights probably are going to have an impact with a lag, as they are enablers of empathy, which can generate change in future.

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