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LAW AND LIBERTY: A TUG OF WAR

*Abhinav Mishra**

Law and liberty always conflict with each other. Laws restrict liberty of an individual and absolute liberty demands absence of laws. However, absolute liberty leads to anarchy and disorder and therefore, absolute liberty is termed as 'negative liberty.' Hence, an individual must surrender some liberty to the State for the benefit of the society. Thus, with reference to liberty, law can be termed as a "necessary evil."

India follows a system of separation of powers between the three wings- Executive, Legislature and Judiciary. The three wings are on an equal footing and none is superior or inferior to the other. They are independent and each wing is expected not to interfere in the working of the other wing. However, recent years have witnessed judicial activism in which judiciary has transgressed its boundaries and interfered with the working of legislature as well as the executive. There are several instances to support this view. For example, in the case of Vishakha v. State of Rajasthan, Supreme Court has given guidelines for the prevention of sexual harassment of women at workplace as there was no existing law in this regard. These guidelines were to be followed throughout the country until the Legislature came up with suitable legislation. Thus, judiciary went beyond its boundaries.

Judicial activism is criticized on the ground that it is nothing but interference in the spheres of the executive and the legislature. However, it may be seen as a tool to fill the vacuum created due to the inability of the legislature and the executive. Thus, judicial activism may also be termed as a "necessary evil" which is required when the legislature and the executive are unable to perform their functions properly. The scope of this paper shall be limited to a brief study of judicial and executive overreach in India and its merits and demerits in the present society. The object of this

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research paper is to analyze the development of the concept of 'Judicial Activism' in India in the light of development of Public Interest Litigations (PIL).

1.1 Law and Liberty

According to Black's Law Dictionary, liberty is an exemption from extraneous control. Liberty can be broadly classified into two types- positive liberty and negative liberty. Positive liberty is liberty with restraints whereas negative liberty is liberty without restraints. Negative liberty is also termed as absolute liberty. Liberty without restraints is dangerous and can lead to serious consequences whereas liberty with restraints is necessary for the overall development of an individual. Law puts some restrictions on one's liberty. Law is a tool which turns negative liberty into positive liberty. A typical example would be Article 21 of the Indian Constitution which states that no person shall be deprived of his life and liberty except according to the procedure established by law. It must also be noted that law not only curtails our liberty but also safeguards them. Thus, with respect to liberty, law is a necessary evil.

2.1 Separation of Powers

There is no liberty where judicial power is not separated from both legislative and executive power. If judicial and legislative powers are not separated, power over the life and liberty of citizens would be arbitrary, because the judge would also be a legislator. If it were not separated from executive power, the judge would have the strength of an oppressor.

~ Montesquieu

It has been rightly said that “*Power corrupts and absolute power corrupts absolutely*”. To curb accumulation of power in one governmental organ, India has a system of separation of powers among its three wings: Legislature, Executive and Judiciary. All the three wings, in theory, are independent. Each wing works independently of the others and is expected to work within its boundaries. All wings ought not to transgress their boundaries and interfere with the working of the other wing. However, even though the functions of all organs have been sufficiently differentiated, separation of powers is not rigid. In the words of Shri. K. Hanumanthaiya, a member of Constituent Assembly:

*“Instead of having a conflicting trinity, it is better to have a harmonious government structure. If we completely separate the executive, judiciary and the legislature, conflicts are bound to arise between these three departments of Government. In any country or in any government, conflicts are suicidal to the peace and progress of the country. Therefore, in a governmental structure, it is necessary to have what is called “harmony” and not this three-fold conflict.”*¹

The provisions for relationship between Parliament and the Supreme Court, the basic pattern of the Court, its composition, powers, jurisdiction, etc., have been mentioned in detail in the Constitution which cannot be touched by ordinary legislative process. But within the constitutional framework, the Parliament has some powers *vis-à-vis* the Court. The minimum number of Judges has been fixed by the Constitution but the Parliament has the authority to increase the number of Judges even though it cannot decrease this number. The Constitution confers a security of tenure on the Judges subject to the Parliament moving a motion for the removal of a Judge. The power thus vested in Parliament cannot be misused owing to several safeguards, viz., charges of misbehaviour and incapacity against the Judge concerned have to be enquired into and proved, and special majority is required in the two Houses for the motion to be carried. The salaries of Judges have been fixed by the Parliament by law but it cannot be reduced during the tenure of a Judge. Parliament may prescribe the privileges and allowances of a Judge, subject to the condition that it cannot be varied during the tenure of a Judge. The salaries and allowances of the Judges of the High Courts and the Supreme Court are charged upon the Consolidated Fund of India, which means that this item is not subject to vote in the Parliament every year (in the budget) although a discussion on it is not ruled out. Therefore, it is not possible for the Parliament to starve it of funds, unless extraordinary circumstances exist.² Thus, it is evident that Parliament can expand the powers and jurisdiction of the Supreme Court in several aspects over and above what the Constitution confers on it. On the other hand, the judiciary under the process of judicial review examines the laws passed by the Legislature and can declare it unconstitutional if it is violative of Constitutional provisions. The Constitution of India operates in happy harmony with the instrumentalities of the executive and the legislature. But to be truly great, the judiciary exercising

¹ Constituent Assembly Debates Book No. 2, Volume VII, 2nd ed. 1989, p. 962.

² M.P. Jain, Indian Constitutional Law, Lexis Nexis, Fifth Edition, 2009, Nagpur.

democratic power must enjoy independence of a high order. Alternatively, independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability: without these, the robes may prove arrogant.³ The Supreme Court observed in the Golak Nath case:-

*“The constitution creates Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them”*⁴

An independent judiciary is the *sine qua non* for a democratic system of government. Independence of judiciary is necessary so that justice can be delivered without fear or favour. It must be free from any kind of political pressure. Judicial independence is necessary for Rule of Law to prevail. The concept of “separation of powers” and “judicial independence” have now been “elevated to the level of basic structure of the Constitution and are the very heart of constitutional scheme”.⁵ Late Chief Justice Ismail Mohamed of South Africa said:

“The independence of judiciary and the legitimacy of its claim to credibility and esteem must in the last instance rest on the integrity and the judicial temper of the judges, the intellectual and emotional equipment they bring to bear upon the process of adjudication, the personal qualities of character they project, and the parameters they seek to identify on the exercise of judicial power. Judicial power is potentially no more immune from vulnerability to abuse than legislative or executive power but the difference is this: the abuse of legislative or executive power can be policed by an independent judiciary but there is no effective constitutional mechanism to police the abuse of judicial power. It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial power is matched by the real depth of judicial responsibility. Judicial responsibility becomes all the more

³ www.thehindu.com/opinion/lead/article3785898.ece (last accessed on June 27, 2015).

⁴ *L. C. Golak Nath & Ors. v. State of Punjab & Anr.*, AIR 1967 SC 1643.

⁵ *State of Bihar v. Bal Mukund Sah*, AIR 2000 SC 1296, 1317 : (2000) 4 SCC 640.

onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs.”

In *Supreme Court Bar Association v. Union of India*,⁶ a Constitution Bench of the Supreme Court held:

“Indeed this Court is not a court of restricted jurisdiction of only dispute- settling. It is well recognized and established that this court has always been a law maker and its role travels beyond merely dispute settling. It is a problem solver in the nebulous provisions dealing with the subject matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject.”

3.1 Judicial Activism

According to Black’s Law Dictionary, judicial activism is a “philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.” Judicial activism can also be defined as when a Court takes some legislative power away from legislators. Judicial Activism to define broadly, is the assumption of an active role on the part of the judiciary.⁷ For example, giving a judgement that gay marriage is a constitutional right in India would be “judicial activism.”

Judicial activism means going beyond normal constraints of the judiciary. According to Justice J.S. Verma, judicial activism is an “*active process of implementation of the rule of law, essential for the preservation of a functional democracy*”. However, in a vibrant democratic system, it can also been seen as a phenomenon to curb executive tyranny and legislative misuse of power. The judicial activism in India can he witnessed with reference to the review power of the Supreme

⁶ AIR 1998 SC 1895.

⁷ Chaterjee Susanta, “For Public Administration’ Is judicial activism really deterrent to legislative anarchy and executive tyranny?”, *The Administrator*, Vol. XLII, April-June 1997, p. 9.

Court under Article 32 and Article 226 of the Constitution particularly in Public Interest Litigation. Jurists opine differently over the issue of judicial activism. Few of them are in support of judicial activism while others are against it.

A few case laws can emphasize over the concept of judicial activism. For example, in the *Golak Nath* case⁸, the Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process. The power of parliament to amend any provision in Part-III of the Constitution was taken away.⁹ In the *Kesavananda Bharati* case¹⁰, a majority of seven against six, held that under Article 368 of the Constitution, Parliament has amending powers. But the amendatory power does not extend to alter the basic structure or framework of the Constitution. The 13-judge Constitutional bench of the Supreme Court deliberated upon the limitations, if any, of the powers of the elected representatives of the people and the nature of fundamental rights of an individual. The court held that while the Parliament has wide powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution.¹¹

The Supreme Court may exercise its powers in an appropriate way for enforcement of a Fundamental Right. In the case of *Bandhua Mukti Morcha v. Union of India*¹², Supreme Court observed:-

“It is not only the high prerogative writs of mandamus, habeas corpus, prohibition, quo warranto and certiorari which can be issued by the Supreme Court but also writs in the nature of these high prerogative writs and therefore even if the conditions for issue of any of these high prerogative writs are not fulfilled, the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ including a writ in the nature of any high prerogative writ. This provision conferring on the Supreme Court power to enforce the fundamental

⁸ 1967 AIR 1643, 1967 SCR (2) 762.

⁹ DR. BHURE LAL, “Judicial Activism and Accountability”, Siddharth Publications, ISBN : 81-7220-158-3,p38-39

¹⁰ His Holiness Kesavananda Bharati Sripadagalvaru and Ors. V. State of Kerala and Anr., (1973) 4 SCC 225

¹¹ "Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April, 1973". Indian Kanoon. para. 787.

Retrieved 2012-06-24.

¹² AIR 1984 SC 802.

rights in the widest possible terms shows the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. The Constitution makers clearly intended that the Supreme Court should have the amplest power to issue whatever direction, order or writ may be appropriate in a given case for enforcement of a fundamental right.”

In its activist line, the Supreme Court has also imparted a new vigour to the process of constitutional interpretation. In *Vishaka & Ors. v. State of Rajasthan & Ors.*, the Supreme Court held:

“In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution.”¹³

3.1.1 The Basic Structure Doctrine

Besides creating procedural devices, the Supreme Court's activism has enriched jurisprudence with novel and seminal concepts such as the basic structure doctrine. According to this doctrine, any amendment that alters the basic structure of the constitution is unconstitutional. The genesis of the doctrine may be traced back to the case of *Sajjan Singh v. State of Rajasthan*, in which Justice Mudholkar pondered thus:

“It is also a matter for consideration whether making a change in a basis feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution and if the latter, would it be within the purview of Art. 368?”¹⁴

¹³ AIR 1997 SC 3011.

¹⁴ AIR 1965 SC 845.

As if it were answering Justice Mudholkar's query, in *Kesavananda Bharati v. State of Kerala*, the Supreme Court held, that the power to amend the Constitution, enshrined in the constitution, did not comprehend the possibility of amending the most fundamental and essential features of the constitution; according to the majority, the fundamental features of the constitution are rule of law, secularism, federalism, equality, and democracy. The basic structure of the constitution cannot not be altered by any amendment. The Supreme Court further added: "It does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity."¹⁵

3.1.2 History of Judicial Activism in India

As can be the case in the United States of America and the United Kingdom, ideological confrontation based on the genuine concern for the welfare of the people arose between the executive and legislature on the one hand and the judiciary on the other. A conservative executive and a progressive judiciary, or a progressive Parliament and a conservative judiciary coexisting at the same point of time, form the basis of judicial activism or judicial overreach, as opposed to executive excesses or executive enthusiasm beyond the bounds of law. The evolution of the theory of judicial activism in India can be traced back to the late 1960s or early 1970s during the time when Mrs Indira Gandhi was the Prime Minister of India and an eminent lawyer and legal luminary, Mohan Kumaramangalam, was the Union Minister. When the late Mrs Gandhi attempted to introduce progressive socialistic measures in order to implement her favourite slogan "*garibi hatao*" by abolishing Privy Purses and privileges given to the erstwhile rajas and princes of the princely states of pre-independent India, and nationalizing the 14 major banks so as to serve the cause of the poorer sections of the society in a more meaningful manner, a conservative judiciary did not take it kindly and struck down the relevant legislation as unconstitutional. What happened to President Franklin Roosevelt during the period of the great depression and to his new deal legislation happened in India to Mrs Gandhi. The judgment of the Supreme Court of India in the Privy Purse Abolition and Bank Nationalisation cases was considered by Mrs Gandhi to be judicial overreach, and the reaction was at once strong and unequivocal. It is believed that on the advice of Mr Kumaramangalam the conservative and most senior judges of the Supreme Court who participated in the majority judgment in the above cases were passed over for appointment to

¹⁵ AIR 1973 SC 1461.

the post of Chief Justice of India. The dissenting judge, Mr A N Ray, who was fourth in the line of seniority, was appointed, and this resulted in the resignation of the three senior judges (Justices Hegde, Shelat and Grover). This marked the starting point of the theory of judicial activism that actually resulted from the stand-off between the executive and the judiciary.¹⁶

4.1 Public Interest Litigation

The concept of *locus standi* has assumed much wider dimensions with the evolution of Public Interest Litigation (PIL). When there is a question of public interest then a writ petition may be filed by someone even though he may not be directly involved in that matter. Thus, the expression Public Interest Litigation means a legal action initiated in a court of law for enforcement of public interest.

PIL is not a product of any constitutional provision but it is a product of time and circumstances. It evolved as a need to redress the public grievances. PIL has played a crucial role in the Indian judicial system by achieving those objectives which had not been achieved through the practice of conventional private litigation. PIL, for instance, offers a ladder to justice to disadvantaged sections of society, provides an avenue to enforce diffused or collective rights, and enables civil society to not only spread awareness about human rights but also allows them to participate in government decision making. PIL could also contribute to good governance by keeping the government accountable. In general, these are the cases where Parliament or a State legislature has failed to address problems affecting the quality of life of the community or certain identifiable segments of society, or the executive is alleged to have been guilty of non-use or misuse of its powers touching the fundamental rights of individuals.

4.1.1 Origin of the PIL

Two judges of the Indian Supreme Court (Bhagwati and Iyer JJ.)¹⁷ laid down the groundwork in the period from mid-1970s to early 1980s, for the birth of PIL in India. This included modifying the traditional requirements of *locus standi*, liberalizing the procedure to file writ petitions,

¹⁶ R Shunmugasundaram, "Judicial activism and overreach in India", *Amicus Curiae*, Issue 72, Winter 2007.

¹⁷ These two judges headed various committees on legal aid and access of justice during 1970s, which provided a backdrop to their involvement in the PIL project. See Jeremy Cooper, "Poverty and Constitutional Justice: The Indian Experience" (1993) 44 *Mercer Law Review* 611, 614–615.

creating or expanding fundamental rights, overcoming evidentiary problems, and evolving innovative remedies.¹⁸ Modification of the traditional requirement of standing was the *sine qua non* for the evolution of PIL and any public participation in justice administration. The need was more pressing in a country like India where a great majority of people were either ignorant of their rights or were too poor to approach the court. Realizing this need, the Court held that any member of public acting bona fide and having sufficient interest has a right to approach the court for redressal of a legal wrong, especially when the actual plaintiff suffers from some disability or the violation of collective diffused rights is at stake. Later on, merging representative standing and citizen standing, the Supreme Court in *Judges Transfer* case held¹⁹:

“Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.”

There are several instances when a PIL has resulted in a judgement which could not have been possible otherwise. In *Vineet Narain (I) v. Union of India*²⁰ the Court monitored the investigation of corruption cases revealed through the seizure of the Jain diaries as the CBI and the revenue authorities had failed to investigate. In *Vineet Narain (II) v. Union of India*,²¹ the petitioner obtained directions from the Supreme Court to make the CBI an independent agency so that it may function more effectively and investigate crimes and corruption at high places in public life. Both the cases were brought before the Court through Public Interest Litigations. The Court held that

¹⁸ “Poverty and Constitutional Justice” (1993) 44 *Mercer Law Review* 611, 616–632; See Shah, “Illuminating the Possible in the Developing World” (1999) 32 *Vanderbilt Journal of Transnational Law* 435, 467–473; Vijayashri Sripathi, “Human Rights in India Fifty Years after Independence” (1997) *Denver Journal of International Law and Policy* 93, 118–125.

¹⁹ *Gupta v Union of India* (1981) Supp S.C.C. 87, 210.

²⁰ (1996) 2 SCC 199

²¹ (1998) 1 SCC 226: AIR 1998 SC 889

Vineet Narain had the *locus standi* to file a PIL to uphold the ‘rule of law’. On behalf of the Court, Chief Justice Verma observed that “none stands above the law.”²²

Ever-widening horizon of Art.21 is illustrated by the fact that the Court has read into it, *inter alia*, the right to health, livelihood, free and compulsory education up to the age of 14 years, unpolluted environment, shelter, clean drinking water, privacy, legal aid, speedy trial, and various rights of under-trials, convicts and prisoners. Article 21 reads: ‘*No person shall be deprived of his life or personal liberty except according to the procedure established by law*’. It has proved to be the most fertile provision to mean more than mere physical existence; it “includes right to live with human dignity and all that goes along with it”²³. It is important to note that in a majority of cases the judiciary relied upon Directive principles of State Policy for such extension. The judiciary has also invoked Art.21 to give directions to government on matters affecting lives of general public, or to invalidate state actions, or to grant compensation for violation of Fundamental rights. The final challenge before the Indian judiciary was to overcome evidentiary problems and find suitable remedies for the PIL plaintiffs. The Supreme Court responded by appointing fact-finding commissioners and amicus curiae.²⁴

In *Sheela Barse v. Union of India*,²⁵ the Court directed the Central Government to pay to Sheela Barse, a social worker, a sum of Rs. 10,000/- as expenses, which were incurred during her visit to different jails to gather information about the detention of children below 18 years. Similarly, in *Jivan Mal Kochar v. Union of India*,²⁶ the Court awarded the cost of litigation to the petitioner for highlighting the grievances faced by the passengers availing the services of the Indian Railways. The petitioner himself was a passenger who voiced his grievances on behalf of the other passengers availing the services of the Indian Railways. Again, in *D.C. Wadhwa v. State of Bihar*,²⁷ the Court directed the State of Bihar to pay Rs. 10,000/- to Dr. Wadhwa, a professor of political science. Dr. Wadhwa had done substantial research regarding the repressive practices

²² (1998) 1 SCC 226, p. 236

²³ *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746, 753.

²⁴ H. Desai and S. Muralidhar, “Public Interest Litigation: Potential and Problems” in Kirpal et al., *Supreme but not Infallible*, pp.159, 165–167. The Court also held that the power to appoint Commissioners is not constrained by the Code of Civil Procedure or the Supreme Court Rules.

²⁵ (1986) 3 SCC 596.

²⁶ (1984) 1 SCC 200.

²⁷ AIR 1987 SC 579

followed by the State of Bihar in repromulgating a number of ordinances without getting the approval of the legislature. Dr. Wadhwa was not a resident of Bihar. But the Court held that the petitioner as a member of the public has sufficient interest to espouse the cause on behalf of the people of Bihar.

Justice P.N. Bhagwati observed:

*“Whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such wrong or public injury.”*²⁸

Emphasizing the need of PIL, he further stated:

*“If public duties are to be enforced and social collective “diffused” rights and interests are to be protected, we have to utilize the initiative and zeal of public minded persons and organizations by allowing them to move the court and act for a general or group interest, even though, they may not be directly injured in their own rights”*²⁹

*“Judges have neither the power of sword nor of purse. Yet Judges have now become roaming knights—errant on white chargers tilting at windmills of injustice to defend the honour of the Dame of Justice.”*³⁰

4.1.2 History of Operation of the PIL

The history of public interest litigation is the history of the last four decades. It represents a sustained effort on the part of the judiciary in India to provide access to justice for the deprived and vulnerable sections of Indian humanity. With a legal architecture designed for a colonial situation and a jurisprudence structured around a free market economy, the Indian judiciary could not accomplish much in fulfilling the constitutional aspirations of the vast masses of poor and under privileged segments of the society during the first three decades of freedom. The last two

²⁸ S.P. Gupta v. Union of India, AIR 1982 SC 149: 1981 Supp SCC 190

²⁹ Ibid, at 194

³⁰ Justice B.N. Srikrishna, 8 SCC (J) 3 2005, p. 9

decades judicial activism has opened up a new dimension of the justice process and given new hope to the justice-starved millions of India. The seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in *Mumbai Kamgar Sabha vs. Abdul Thai*³¹ and was initiated in *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India*³², wherein an unregistered association of workers was permitted to institute a writ petition under Art.32 of the Constitution for the redressal of common grievances. Krishna Iyer J., enunciated the reasons for liberalization of the rule of Locus Standi in *Fertilizer Corporation Kamgar Union v. Union of India*³³ and the idea of 'Public Interest Litigation' blossomed in *S.P. Gupta and others vs. Union of India*³⁴.

In the early days of PIL, most of the cases were related to the rights of disadvantaged sections of society such as child labourers, bonded labourers, prisoners, mentally challenged, pavement dwellers, and women. The relief was sought against the action or non-action on the part of executive agencies which resulting in violations of FRs under the Constitution. The judiciary responded by recognizing the rights of these people and giving directions to the government to redress the alleged violations. PIL truly became an instrument of the type of social transformation/revolution that the founding fathers had expected to achieve through the Constitution.

During 1990's, NGOs and lawyers started bringing matters of public interest to the courts on a much regular basis. The range of issues which were raised in PIL also expanded tremendously—from the protection of environment to corruption-free administration, right to education, sexual harassment at the workplace, relocation of industries, rule of law, good governance, and the general accountability of the Government. The response of the judiciary became much bolder and unconventional. The courts did not hesitate to come up with detailed guidelines where there were legislative gaps. For example, in *Vishakha v. State of Rajasthan*, the Supreme Court gave detailed guidelines for sexual harassment at workplace. The courts took resort to judicial legislation when needed, did not hesitate to reach centres of government power, tried to extend the protection of

³¹ AIR 1976 SC 1455.

³² AIR 1981 SC 298.

³³ AIR 1981 SC 344.

³⁴ AIR 1982 SC 149.

FRs against non-state actors, moved to protect the interests of the middle class rather than poor populace, and sought means to control the misuse of PIL for ulterior purposes.³⁵

In the 21st century, anyone could file a PIL for almost anything. The way courts have reacted to PIL in India is nothing but a reflection of what people expected from the judiciary at any given point of time.

4.1.3 Problems of the PIL: Misuse and Overuse

It seems that the misuse of PIL in India, which started in the 1990s, has reached to such a stage where it has started undermining the very purpose for which PIL was introduced. In other words, the dark side is slowly moving to overshadow the bright side of the PIL project. This is highlighted below:

- (a) *Political benefit*: Generally, the opposition uses the PIL as a tool against the government in power. It uses PIL to instill dissatisfaction in the minds of people against the government.
- (b) *Personal Gain*: PIL is often known as Publicity Interest Litigation because of the fact that it is used by lawyers and NGO's for their personal gain and publicity. It is to be noted that-“PIL is being misused by people agitating for private grievances in the grab of public interest and seeking publicity rather than espousing public causes.”³⁶ It is critical that courts do not allow “public” in PIL to be substituted by “private” or “publicity” by doing more vigilant gate-keeping.
- (c) *Symbolic justice*: Another major problem with the PIL project in India is that PIL cases often do only symbolic justice. Two facets of this problem are the most prominent. *First*, judiciary is often unable to ensure that its guidelines or directions in PIL cases are complied with, for instance, regarding sexual harassment at workplace (*Vishaka case*³⁷) or the procedure of arrest by police (*D.K. Basu case*³⁸).

No doubt, more empirical research is needed to investigate the extent of compliance and the difference made by the Supreme Court's guidelines. But it seems that the judicial intervention

³⁵ Pritam Kumar Ghosh, JUDICIAL ACTIVISM AND PUBLIC INTEREST LITIGATION IN INDIA, Galgotias Journal of Legal Studies , 2013 GJLS Vol.1, No.1, ISSN. 2321-1997.

³⁶ Upadhyay Videh, Public Interest Litigation in India: Concepts, Cases, Concerns, LexisNexis Butterworths, New Delhi, 2007.

³⁷ *Vishaka v State of Rajasthan* AIR 1997 SC 3011

³⁸ *D.K..Basu v State of West Bengal* AIR 1997 SC 610

in these cases have made little progress in combating sexual harassment of women and in limiting police atrocities in matters of arrest and detention. The *second* instance of symbolic justice is provided by the futility of over conversion of DPSPs into FRs and thus making them justiciable. Not much is gained by recognizing rights which cannot be enforced or fulfilled. It is arguable that creating rights which cannot be enforced devalues the very notion of rights as trump. So, the PIL project might dupe disadvantaged sections of society in believing that justice has been done to them, but without making a real difference to their situation.

- (d) *Disturbing the constitutional balance of power:* Although the Indian Constitution does not follow any strict separation of powers, it still embodies the doctrine of checks and balances, which even the judiciary should respect. However, the judiciary on several occasions did not exercise self-restraint and moved on to legislate, settle policy questions, take over governance, or monitor executive agencies. Prof. M. P. Jain cautions against such tendency: “PIL is a weapon which must be used with great care and circumspection; the courts need to keep in view that under the guise of redressing a public grievance PIL does not encroach upon the sphere reserved by the Constitution to the executive and the legislature.”³⁹
- (e) *Overuse-* PIL is now being used for frivolous issues also. In order to remain effective, PIL should not be allowed to become a routine affair which is not taken seriously by the Bench, the Bar, and most importantly by the masses: “The overuse of PIL for every conceivable public interest might dilute the original commitment to use this remedy only for enforcing human rights of the victimized and the disadvantaged groups.”⁴⁰

4.1.4 Probable Solutions to Judicial Activism

Former Solicitor General of India, Mr Dipankar P Gupta, wrote:

“There is a real danger that the activism of the courts may aggravate the activism of the authorities. Today, inconvenient decisions are left by the executive for the courts to take. Extensive use of judicial powers in the administrative filed may well, in the long-run, blunt the judicial powers themselves. This is not a healthy situation.

³⁹ Prof. Jain M.P., Indian Constitutional Law, Volume 2, 6th edn., LexisNexis Butterworths Wadhwa, Nagpur, 2010.

⁴⁰ Prof. Sathe S.P., Judicial Activism in India: Transgressing Borders and Enforcing Limits, Oxford University Press, UK, 2003.

“What then is the solution? The task of the court should be to compel the authorities to act and to pass appropriate executive orders rather than substitute judicial orders for administrative ones. They must be told how their duties are to be properly discharged and then commanded to do so. For this, they must be held accountable to the court.”

The Supreme Court recently noted in **Indian Drugs & Pharmaceuticals Ltd v Workmen**⁴¹ that:

“the Supreme Court cannot arrogate to itself the powers of the executive or legislature... There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits”⁴²

The Supreme Court has on various occasions highlighted the importance of judicial restraint for the maintenance of the delicate balance of power of the different limbs in a democracy. Justice Markandey Katju observed in *Mattoo Priyadarshini*’s case has explained thus:

“Under the Constitution, the legislature, the executive and the judiciary have their own broad spheres of operation. It is, therefore, important that these three organs of the state do not encroach upon the domain of another and confine themselves to their own, otherwise the delicate balance in the Constitution will be upset... The judiciary must therefore exercise self-restraint and eschew the temptation to act as a super legislature. By exercising restraint, it will only enhance its own respect and prestige... Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the state. It accomplishes this in two ways. First it not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary... Second, it tends to protect the independence of the judiciary... If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. The touchstone of an independent judiciary has been its removal from the political and administrative process... Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers.”⁴³

⁴¹ (2007) 1 SCC 408.

⁴² Hindustan Times, June 15, 2007.

⁴³ 2005 (3) CTC 449.

In the case of *Raja Ram Pal v. Hon'ble Speaker (Lok Sabha, 2007)*, a constitution bench of the Supreme Court has acknowledged the power of the legislature to expel their members, that the legislature is supreme in its own sphere, and it is the sole authority to deal with and regulate its internal proceedings and other affairs. The Madras High Court has passed the following order in the course of dealing with a PIL case which assailed an executive order regarding the free distribution of colour television sets to eligible families in Tamil Nadu State. "The scheme is with the proven object of uplift of the poor, needy and under privileged to render social justice, to make them aware of the worldly happenings. A free hand should be given to the Government in spending public money for such purposes. Courts cannot poke their nose into each and every activity of the Government, particularly in the economic activities of the Government, under the garb of judicial review"⁴⁴

5.1. Conclusion

When Judges start thinking they can solve all the problems in society and start performing legislative and executive functions (because the legislature and executive have in their perception failed in their duties), all kinds of problems are bound to arise. Judges can no doubt intervene in some extreme cases, but otherwise they neither have the expertise nor resources to solve major problems in society.⁴⁵ When PIL was introduced in our country, it received a warm welcome from everyone. However, very soon it developed some vices. It also received its share of criticisms. It was criticized on the grounds that any person could file a PIL for his ulterior motives. The court was overburdened by hearing PIL's of every XYZ. Judges were also accused for encroaching upon the spheres of legislature and the executive. Moreover, there is no mechanism by which court can get its orders enforced.

However, the good that PILs (and judicial activism through PILs) have done by filling the vacuum created due to the inability of the legislature and the executive must not be forgotten. It is also used as a tool to fight for the underprivileged sections of the society. The Supreme Court, by pioneering

⁴⁴ The Hindu, June 26, 2007.

⁴⁵ <http://www.grkarelawlibrary.yolasite.com/resources/FM-Jul14-LT-2-Jyoti.pdf> (last accessed on June 27, 2015).

Public Interest Litigation petitions (PILs), had made constitutional social rights to housing, education, food, health and livelihood indivisible from the fundamental rights to life, equality and religion.⁴⁶ As Justice Krishna Iyer has rightly observed, “Judicial activism gets its highest bonus when its order wipes some tears from some eyes.”⁴⁷

At the end, it can be concluded that although there are several drawbacks to judicial activism but the benefits can't be ignored. Judicial activism should be prevented from becoming judicial adventurism. Moreover, recent trends of judicial restraint has given a light of hope. Judicial activism is a necessary evil which has many side effects but still it is necessary for the people who may not be able to knock the doors of the court and justice continues to be distant moon for them.

⁴⁶ The Hindu, New Delhi, May 4, 2015.

⁴⁷ Azad Rickshaw Pullers Union v. State of Punjab, AIR 1981 SC 141.

LIBERTY VERSUS EQUALITY: PARTNERS OR COMPETITORS?

*Eishan Agnihotri**

*Tanisha Agarwal***

In a modern democratic setup of states, the constitution of any country plays a pivotal role in shaping the country's fate. It's the various elements of the constitution which simultaneously empower as well as abstain the State and its citizens from doing something. History has shown us that justice, equality, liberty etc. are more than mere fundamental values, they are perspectives. Meaning thereby, their interpretation might change for a society over time but none can disregard their importance. Both the Fundamental Rights (FRs) as well the Directive Principles of State Policy (DPSPs) enshrined in the constitution of India can be seen as an example of the above mentioned fact. The researchers intend to portray an analytical description of the changing trends in the Indian judiciary when it comes to a question of preference between FRs and DPSPs. Directive principles lay down the various tenets of a welfare state. Whenever friction has arisen between fundamental rights and directive principles, the judiciary's answer to this clash has varied from time to time depending upon the ever changing nature of the society. From strict non-enforceability, to putting DPSPs at par with FRs and most recently the onset of judicial activism which has not only adopted principles of harmonious construction and reconciliation but has also given precedence to directive principles at various instances.

The right to equality guarantees equality before law as well as equal protection of law to all the citizens of India except under some special circumstances. On the same hand, the right to freedom empowers an individual to enjoy life according to his own will subject to reasonable restrictions imposed by law. Looking at the Directive Principles, the principles like equal pay for equal work

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are a symbol of the same idea of equality that the constitution makers had but the State at all times is at liberty to not strictly adhere to these principles as they are mere guidelines. This is what makes them non-enforceable as well. Overall, both the FRs and DPSPs are a reminder of the various values embarked in the preamble of the Constitution like Justice, Liberty, Equality and Fraternity. Therefore, it is never a question of whether equality would triumph over liberty or vice versa but rather their mutual co-existence which leads to the welfare of a society. Although the ratio of their participation may change from time to time but none of them can be completely ignored or neglected. This might be one of the reasons why FRs and DPSPs are often collectively referred to as the “Conscience of the Constitution”. This is the driving force that has led the researchers to undertake this particular research paper and they wish to depict the same by analysing various judgments, legislations, judicial principles and the activist judicial trends prevalent in the recent times.

1.1 Liberty and Equality within the Indian Constitution

“Equality is the soul of liberty; there is, in fact, no liberty without it.”

~ Frances Wright

Since time immemorial, there have existed certain basic fundamental values which have been a part of every society. Though the understandings of these values have changed over the years, but what has not changed is the importance of these values. They are a reminder of the fact that values like justice, equality, liberty etc. are not just words but rather are perspectives and various societies, regimes and modern states in the contemporary times, over the years have evolved through the years on the ever evolving understandings of these same values. They can easily be identified in the basic structure of every modern day democracy.

If looked in the Indian context, these values can be easily and clearly identified in the *grund norm*¹ for every Indian law, i.e. the Constitution of India. The Preamble to the Constitution of India, as often referred to as “the key to opening the minds of the framers of the constitution”, reflects these values. The various articles and schedules of the Constitution are also based upon these principles

¹ Mridushi Swarup, *Kelsen’s Theory of Grundnorm*, available at: <http://manupatra.com/roundup/330/Articles/Article%201.pdf>.

per se. Be it the question of imparting equality amongst the citizens of status and of opportunity² or safeguarding their life and personal liberty, these foundational values lay the basis of the constitutionality of the Indian Constitution.

But before proceeding to what the Constitution has to offer for safeguarding the interests of the Indian citizens, and how there exists a conflict between some of the principles, it is imperative that one understands these principles (mainly liberty and equality) correctly as they form a major part of this research project. Liberty is derived from the Latin word *liber*, which means free. In other words, it denotes a state where there exist no restraints.³ It signifies the freedom of the individual to do whatever he likes but this is not an absolute concept. Without compliance to some common rules, co-existence amongst people can seem farfetched. Laski has said that: “Historical experience has evolved for us rules of convenience which promote right living; and to compel obedience to them is a justifiable limitation to freedom”.⁴ Liberty, therefore, remains to be an important pre-requisite in order to provide the individual with an environment, a non-hostile one, where he may progress according to his wish, needless to say under the reasonable restrictions imposed by the laws of the state.

It is inclusive of various types of liberties, be it natural liberty, referring to which Rousseau rightly said: “What a man loses in his social contract is his natural liberty and an unlimited right to anything which tempts him, which he can obtain”⁵, or civil liberty, whose importance was rightly recognized during what a lot of people over the years have referred to as ‘the darkest hour of the Indian democracy’, the period of emergency. The principles of liberty therefore, were embedded even more firmly than before after this period when the Indians realized that the constitution is not a dead document of almost zero significance for the general masses but can rather act as a weapon to serve one’s interest in a “legal and democratic manner’. The Indian constitution also speaks of the political liberty of the citizens also referred to as “**constitutional liberty**” by Leacock⁶, i.e. the right of the people to choose their government.

² Preamble, the Constitution of India.

³ ANUP CHAND KAPUR, PRINCIPLES OF POLITICAL SCIENCE 269 (S.Chand & Co. Ltd; 12th Ed.) (1950).

⁴ LASKI, A GRAMMAR OF POLITICS 143 (HarperCollins Publishers Ltd; 5th ed. 1967) (1925).

⁵ Dick Arneson, *Notes on Rousseau, The Social Contract* 3 available at: <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/NotesonRousseauSocialContract.pdf>.

⁶ LEACOCK, ELEMENTS OF POLITICAL SCIENCE, CHAPTER V (1906).

The Declaration of the Rights of Man (1789) issued by the National Assembly of France quoted that “*Men are born, and always continue, free and equal in respect of their rights*”⁷. A somewhat similar statement can be found in the American Declaration of Independence: “*We hold these truths to be self-evident, that all men are created equal*”⁸. The principle of equality lays a very basic yet extremely powerful proposition that everyone falling under the same authority, usually a state in the modern context, will be treated equally and no special privileges be it on the grounds of caste, race, religion, sex, divine authority etc. will be offered to anyone. It can be seen that it in a way eliminates the perks that anyone might receive on the basis of his ascribed status. Be it Dicey’s Rule of law⁹ is also a portrayal of the same where he tends to suggest both equality before law and equal protection of law, a linchpin of the Indian constitution firmly and suitably placed under article 14 of the Constitution of India.¹⁰

But what makes them extremely crucial in the case of democracies like India is not the presence of these values individually but rather a web of interdependence amongst them. Liberty and equality are not the rivals of each other; on the contrary they are complementary to each other and the presence of one facilitates the functioning and effectiveness of the other. As rightly said by Tawney, “*a large measure of equality, so far being inimical to liberty, is essential to it*”¹¹. What is meant actually is that it is never the question of which one of the two will triumph over the other but rather it is their optimum co-existence that leads to welfare in the true sense in a welfare state.

With all said about these values, in order to achieve these ideals enshrined in the preamble and to be a welfare state, one of the most important provisions are the Fundamental Rights (hereinafter FRs) and The Directive Principles of State Policy (hereinafter DPSPs) contained in Part III and IV of the Constitution respectively. They are an inseparable part of the Indian constitution and it is almost impossible to imagine how the history of the Indian administrative system would have been, had the FRs and the DPSPs been any different from what they are. The Constitution of India has mainly laid two mandates to the Parliament, the Legislatures of the States and to all institutions

⁷The Declaration of Rights of Man (1789).

⁸ The American Declaration of Independence (1776).

⁹A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF CONSTITUTION (London and New York, Macmillan and co.) (1885).

¹⁰ INDIAN CONST. Art 14: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

¹¹ R.H. TAWNEY, EQUALITY, 245 (HarperCollins Publishers Ltd, 1965) (1931).

of the government (as only a govt. Institution can be held accountable for the violation of the fundamental rights¹²). They are:

- 1) Not to take away or abridge certain rights thereby imposing negative obligations on the state (the FRs); and
- 2) To apply certain principles while looking after the policy formation of a state and overlooking its functioning. (the DPSPs)

As discussed earlier, both the FRs as well as the DPSPs, contain the essence of the values mentioned earlier. Let's devote our attention to liberty first. For instance, Article 21 of the Constitution¹³, perhaps the most crucial important FR, has been interpreted in recent years in a manner which has led to the inclusion of a lot of aspects under the right to life. Cases like those of *Nargesh Meerza*¹⁴ have taken it to such an extent that the right of a married woman to be autonomous to decide her pregnancy is also a part of this immensely vast and often extremely liberal principle. Another example in the same regard of liberty from the side of the DPSPs can be taken to be Article 43-A of the constitution which gives the state a directive to ensure of the participation of workers in the management of industries, in a way giving them the liberty to be a part of the managerial aspects of the organizations they work in.¹⁵

Coming to equality, Article 14 of the constitution¹⁶ is the linchpin of this principle in the context of the Indian Constitution. It embarks upon the Rule of law propagated by Dicey, which mentions that the citizens be subject to both equality before law, i.e. everybody be equal in the eyes of law, as well as, equal protection of law meaning thereby that irrespective of the differences that may be amongst the various classes of the society, law will safeguard the interests of all the citizens in an

¹² INDIAN CONST. art. 12: Definition In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

¹³ INDIAN CONST. art. 21: Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁴ Air India Etc. Etc. v. Nargesh Meerza & Ors. Etc. Etc. SCR (1) (1982) 438.

¹⁵ INDIAN CONST. Art 43-A: Living wage, etc, for workers The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co operative basis in rural areas.

¹⁶ INDIAN CONST. Art 14: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

equal manner. The same can be said for Article 39-A¹⁷, as it provides for equal justice and free legal aid.

The main purpose for pointing out that these various FRs and DPSPs are laid down upon the foundation of the principles of liberty and equality is to point out to the reader that it is not a competition or a race amongst the FRs or the DPSPs. Both of them have played an important part in the process of law making as well as governance of India. This is the reason why Chandrachud C.J. in the landmark judgement in the case of *Minerva Mills*¹⁸ opined that “the Fundamental Rights are not an end in themselves, but are, means to an end”. Further it has also been said that the FRs and the DPSPs together constitute the conscience of the constitution.

In the same case itself, the court took a view that the Indian Constitution relies heavily upon the balance between both the FRs as well as the DPSPs. Furthermore, the court also held that to give primacy of one over the other will disturb the harmony among the two which is considered to be the basic feature of the Indian Constitution. Meaning thereby, the court clearly identified the complementary nature of the two parts and recognized them as being at par with each other rather than the strict principle that the DPSPs aren't enforceable in a court of law.

This in itself, in a way, is the proof of the fact that both the provisions rely heavily on each other. But this isn't always the case. Over the years, the judiciary has struggled and given different takes upon these questions: What will be the outcome when the two, i.e. FRs and the DPSPs stand in contradiction to one another? Will the judiciary stick to the literal and strict interpretation or will it consider the true essence of the constitution?

2.1 Judicial Trends

There has been a perpetual controversy pertaining to the constitutional relationship between Fundamental Rights and Directive Principles of State Policy. Whenever fundamental rights and directive principles have been put against each other in the past, the judiciary's attitude has varied and evolved itself over time. Can a directive principle be given primacy over a fundamental right

¹⁷INDIAN CONST. Art. 39- A: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

¹⁸*Minerva Mills v. Union of India*, AIR (1980) SC 1789

when they both come into conflict with each other? Or is the non-enforceability of directive principles to be emphasized and accordingly they are to be subordinated? Or can both of them be put at par and treated as co-equals? The answers to these questions given by the judiciary have ranged from irreconcilability and supremacy of fundamental rights, to harmonious construction and integration, and in some of the more recent cases the directive principles have been given primacy. The genesis of this debate came from the question of enforceability. While Part III is enforceable in a court of law, Article 37 expressly states that Part IV is not enforceable in court.¹⁹ This non-enforceability was stressed upon and it was advocated that DPSPs are not law and if the State fails to enforce them, there cannot be any legal consequences. Any law passed which gives effect to the directive principles, has to keep in mind all the constitutional limitations like the fundamental rights and in case it does not do so, then it is unconstitutional.²⁰

Early Supreme Court decisions gave paramount importance to fundamental rights based on this constitutional provision. Soon after the Constitution came into force, in the case of *State of Madras v. Champakam Dorairajan*,²¹ a Brahmin filed an application to the High Court under Article 226 of the Constitution for protection of her fundamental rights under Article 15(1) and Article 29(2) as she was denied a seat in the medical college on the ground that there were 2 seats reserved for Brahmins which were already filled. It was held that Article 37 expressly states that directive principles are unenforceable and therefore cannot override the fundamental principles contained in Part III. The Chapter of Fundamental Rights is sacrosanct and cannot be curtailed by any legislative or executive act or order, except to the extent provided in the Articles under Part III. The directive principles should obey, and run subsidiary to the fundamental rights. That same year, Parliament amended the Constitution to introduce Article 15(4), specifically allowing for affirmative action in educational institutions. In *Venkataraman v. State of Madras*²², which is the companion case to, the petitioner who was a Brahmin contended that the Public Service Commission had not considered his application for the post of district munsif on merits but applied the rule of communal rotation. It was held by the Supreme Court that the Madras government's

¹⁹ INDIAN CONST., art. 37; V. N. SHUKLA, CONSTITUTION OF INDIA (Eastern Book Company, 12th ed. 2013).

²⁰ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA Vol. 2, Chap. XVII (Universal Law Pub Co. Ltd. 4th Ed., 2013) (1993).

²¹ AIR 1951 SC 226.

²² AIR 1951 SC 229.

order to give preference to the Harijans and backward classes was unconstitutional for it was discriminatory in relation to other backward classes.

In 1967, came *Golak Nath's case*²³ where again, it was reiterated that fundamental rights cannot be diluted to implement the directive principles. Subsequently, in the 24th Amendment Act, 1971 the Parliament amended Article 13 and Article 368 of the Constitution. By this amendment, it was held that the Parliament had the power to amend any part of the constitution including the fundamental rights and the word 'law' used in Article 13 does not include constitutional amendments.

Slowly and gradually, the Supreme Court's view on the relation between Part III and Part IV began to change. It started giving value to the directive principles and harmonizing the two. Even though it maintained that directive principles are not enforceable, it was observed that "Where two judicial choices are available, the construction in conformity with the social philosophy of the Directive Principles has preference."²⁴ Thus, the courts started actually implementing the directive principles and thus prevented them from becoming a dead rope of sand. Of course, the directive principles were imbibed in the constitution by our constitution makers because they wanted them to be implemented and did not intend for them to become redundant. Although it was maintained that directive principles are subordinate to fundamental rights, it was a step forward from the previous views of them being strictly non-enforceable.

The doctrine of harmonious construction came to be introduced as a new approach to resolve the conflict. The doctrine follows a simple rule that whenever two or more laws are in conflict with each other, they should be read as a whole and in such a manner so that effect can be given to both. In *Mohd. Hanif Qureshi v. State of Bihar*²⁵, the court quashed a prohibition on the slaughter of all cattle, on the ground that it was an unreasonable restriction on the right to carry on a butcher's business, as guaranteed by Article 19(1)(g), notwithstanding the Directive under Article 41. However, it was stated that the Constitution has to be read harmoniously, and the Directive principles must be enforced, but it must not be done in such a way that its laws takes away or abridges the fundamental rights.

²³ 1967 AIR 1643.

²⁴ *Mumbai Kangar Sabha v. Abdulbhai*, AIR 1976 SC 1455.

²⁵ 1958 AIR 731.

A similar view was taken in *In Re Kerala Education Bill*²⁶ where the court held that a law which sought to force minority education institutions for children not to charge fees would infringe the fundamental right guaranteed to such institution by Article 30, even though the State was charged by Article 45 with the duty to provide free education for children below 14. However, Das C.J. said that the courts must not entirely ignore the Directive Principles and the principle of harmonious construction should be embraced to give effect to both Fundamental Rights and Directive Principles as much as possible. It was indicated that while interpreting a statute, the courts would look for the light to the ‘lode star’ of Directive Principles.

Thus, without making the directive principles making completely justifiable, the judiciary started to implement the values underlying them to the extent that it was possible. The Supreme Court realized that there is no need to think that there is a conflict on the whole between FRs and DPSPs. They are complementary and supplementary to each other.²⁷ Since then, the judicial view towards directive principles has become more positive and affirmative in nature. They came to be regarded as co-equals.

In *Kesavananda Bharti v. State of Kerala*²⁸, Justice Hegde and Justice Mukherji²⁹ observed that “the fundamental rights and directive principles constitute the ‘conscience of the constitution’. There is no antithesis between the fundamental rights and directive principles and one supplements the other.”

In *State of Kerala v. N.M Thomas*³⁰, it was held that the Directive Principles and Fundamental rights should be interpreted in harmony with each other and every attempt should be made by the court to resolve any apparent inconsistency between them.

In *Pathumma v. State of Kerala*³¹, the Supreme Court has highlighted that the object of the directive principles is to fix certain socio-economic goals for immediate accomplishment by

²⁶ AIR 1958 SC 956.

²⁷ *Chandra Bhavan Boarding and Lodging, Bangalore v. State of Mysore*, AIR 1970 SC 2042 at 2050.

²⁸ AIR 1973 SC 1461.

²⁹ *Id.* at 1641.

³⁰ AIR 1976 SC 490.

³¹ AIR 1978 SC 771.

bringing about a non-violent social revolution. The constitution aims at bringing about synthesis between Fundamental rights and the Directive principles.

Subsequently, in *Ashoka Kumar Thakur v. Union of India*,³² it was opined by Chief Justice Balakrishna said that no discrimination can be made between the two parts of the Constitution. The Fundamental rights embody political and civil rights whereas directive principles stand for social and economic rights. Just because directive principles are non-justiciable does not mean that they are of subordinate importance.

Chief Justice Chandrachud, in *Minerva Mills Limited v/s Union of India*³³ held that the constitution was established on the bed-rock of balance between part III and part IV. To give complete primacy to one over the other was to disturb the harmony of the constitution. This harmony and balance between fundamental rights and the directive principles is a crucial part of the basic structure of the constitution. Both the fundamental rights and directive principles of the state policy are exemplifying the philosophy of our constitution, the philosophy of justice- social, economic and political. They are “the two wheels of the chariot as an aid to make social and economic democracy a truism.”³⁴

In *Bandhua Mukti Morcha v/s Union of India*³⁵, the practice of following strict legalism in the application of laws implementing directive principles, which in turn endorse fundamental rights, has strengthened the role of directive principles in the inter-relationship doctrine.

In *Unnikrishnan v. state of Andhra Pradesh*³⁶, Justice Jeevan Reddy held that the fundamental rights and directive principles are supplementary and complimentary to each other, and not exclusionary of each other, and that the fundamental rights are but a means to achieve the goal indicated in the directive principles that “fundamental rights must be construed in the light of the directive principles.”³⁷

³² (2008) 6 SCC 1, at page 515.

³³ 1980 AIR 1789.

³⁴ *Id.*

³⁵ 1984 AIR 802.

³⁶ 1993 AIR 2178.

³⁷ *Id.*

In *Dalmia Cement's case*³⁸, it has been emphasized that the core of the obligation of the constitution to the social revolution through rule of law lies in effectuation of the fundamental rights and directive principles as supplementary and complementary to each other. The preamble to the constitution, fundamental rights and directive principles-‘the trinity’-are the conscience of the constitution.

Thus, the new phase that emerged in the Indian judiciary is of integration of the fundamental rights and directive principles. They are no longer regarded as being exclusionary to one another, but supplementary and complementary to each other. Thus, so far we have seen stages ranging from irreconcilability to giving some importance to the directive principles and the values they are based upon, to harmonious construction and treating them as co-equals which are exclusive of each other. Both of them have to be read together. Directive principles are now used to define the scope of and broaden the fundamental rights. The biggest beneficiary of this new trend is Article 21. By reading Article 21 with the directive principles, the Supreme Court has derived numerous fundamental rights. Few of these are- The Right to live with human dignity, Right to enjoy pollution free water and air and environment, Right to shelter, Right to education and Right to Privacy.

Directive principles have also come to be regarded as relevant for determining the scope of ‘reasonable restrictions’ under Article 19. A restriction that promotes any of the objects of the directive principles is reasonable.

In *Laxmi Khandsari v. State of Uttar Pradesh*³⁹, the Supreme Court has stressed that an importance consideration which the courts must keep in mind in determining the reasonableness of a restriction is that it should not disregard the directive principles. The directive principles intend to establish an egalitarian society so as to bring about a welfare state and these principles should be kept in mind when deciding whether or not the restrictions are reasonable under Article 19.

Ban on slaughter of cows, bulls and bullocks to make sure that the public has a sufficient supply of milk, and to safeguard availability of sufficient number of draught cattle for agricultural tasks

³⁸ (1996) 10 SCC 104.

³⁹ 1981 AIR 873.

was held reasonable under Art 19(6) in view of the directive principle contained in Articles 47 and 48.

In *Welfare Assn., A.R.P. v. Ranjit P. Gohil*⁴⁰, the term “transfer of property” in entry 6 and the term “contrast” in entry 7 of list III were broadly construed relying on the directive principles of state policy especially those contained in Article 38 and 39 of the constitution.

In short, read with several directive principles, Article 21 has emerged into a multi-dimensional fundamental right. Article 14 and Article 39(d), when read together, have resulted in the development of the principle of equal pay for equal work.

Lastly, reference may be made to Article 31C. Article 31C as ratified in 1972, through the constitution (twenty-fifth) amendment act sought to give pre-eminence to Articles 39(b) and (c) over the fundamental rights contained in Articles 14, 19 and 31. The Supreme Court declared the Amendment valid in the *Kesavananda case*. The court stressed that there is no conflict between the directive principles and the fundamental rights as they complement each other in targeting at the same goal of bringing about a social revolution and the creation of a welfare state, which is visualized in the preamble. The courts therefore have a obligation to interpret the constitution as to guarantee implementation of the directive principles and to blend the social objectives underlying therein with individual rights. Justice Mathew went farthest in assigning to the directive principle, a substantial place in the constitutional structure. According to him, “In building up a just social order it is sometimes imperative that the fundamental rights should be subordinate to directive principles. Economic goals have an incontestable claim for priority over ideological ones on the ground that excellence comes only after existence. It is only if men exist that there can be fundamental rights.”⁴¹

The courts off late have played an active role in assisting socio-economic development at a large level which requires work at the ground level. Thus, in light of the advantage of the society at large, the Directive Principles may be used to determine the scope of public interest to limit the magnitude of Fundamental Rights. However, this does not mean that the directive principles should be given preference over the fundamental rights. It is the opinion of many that directive

⁴⁰ (2003) 9 SCC 358, at Page 381.

⁴¹ *Supra* note 10.

principles were enacted to show the way in which fundamental rights should be enforced. The cases should be decided in such a manner that both these parts are put to their best use and their underlying values are highlighted. Only then, will our country succeed in achieving its goal of socio-economic development and moving towards a welfare state. In the words of Justice Krishna Iyer, “Indian humanity, having given to itself a Constitution, has, by that act, dedicated itself to progress through law, the content and conscience of which in the contemporary context is gathered from Part IV thereof.”⁴²

3.1 Conclusion

Since there has been a substantive amount of discussion regarding what this situation of the tussle or rather a stand-off between the fundamental rights and directive principles, it is very much important to find a path where both of these principles whose harmonious co-existence is considered to be one of the basic features of the Indian Constitution, actually co-exist. Hence, these are the suggestions which might help the judiciary to give the country a much more clear perspective when it comes to a conflict between the two:

- (a) It is almost impossible to develop a straitjacket formula which works as a panache in each and every case. It ultimately should come down to what the need of a particular case is. For instance, if restricting the Directive Principles to being non-enforceable in a particular case serves the cause of justice and welfare in that scenario then they should remain non-enforceable for that particular case. What actually should be prevented is developing this into a formula and applying it to every case.
- (b) There should be a separate forum for listening to such matters. Jurists like Upendra Baxi have agreed over the years that every judge is not fit for every scenario. A special tribunal or forum should be constituted which specifically listens to matters of such nature.
- (c) The biggest problem in this regard remains the fact that this particular issue is still viewed with the nomenclature of “Fundamental Rights v. Directive Principles” when it should actually be “Fundamental Rights and Directive Principles”. The constitution makers have kept both the provisions with the objective and the aspiration that they will serve both. The government as well as the people. Hence, it is the responsibility of the appropriate

⁴² V.R. KRISHNA IYER, THE LEGAL PROCESS AND PLANNED DEVELOPMENT, 7 JCPS, 2 (1973).

authorities to make sure that a harmonious co-existence amongst them is possible. As discussed earlier, in terms of liberty and equality, fundamental rights and directive principles as well are complementary to each other. They facilitate each other's working in a manner which pushes them to their highest potential. Hence, preferring one over the other is just underutilizing a vast resource.

It is not the case that attempt to make the DPSPs justifiable hasn't been made. An amendment had been moved in the constituent assembly in regard for the same. This step although wasn't successful and was turned down, claiming that there was no use in getting carried away by "sentiments". This remains the fact that a court of law cannot strictly speaking enforce a DPSP, but this wasn't the original concept that gave strength to this provision. It was thought to be the opinion of the public that gave this provision its teeth. The basic idea was that since they are the principles of governance that more or less make sure of the welfare of the people, every government in power will follow them. Elections which would be held regularly would have made sure that if the above laid proposition lies in vain, then the culprit government be not allowed to enjoy governance for the next tenure.

Pandit Jawharlal Nehru, while pointing out on the issue of a state of conflict between the directive principles and the fundamental rights observed that:

"The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static to preserve certain rights which exist. Both again are rights. But somehow and sometime, it might so happen that the dynamic movement and the static standstill do not quite fit into each other."⁴³

Hence, what it means is, in case of a conflict the judiciary has to take due notice of the Directive Principles of State Policy.

Judges like Bhagawati and V.R. Krishna Iyer can be viewed as what one might refer to as the activist judges. By activist judges what is meant is that the judges who are willing to add new dimensions and be interpretative in their approach while adhering to a particular matter in question.

⁴³ LSD (1951) II Cols. 8822-23.

What becomes here of the utmost importance is these activist judges only, over the years, through their interpretations have given such a wide dimension to our Constitution.

What one might say in the end regarding this particular debate in regard to the question of delivering a preferential treatment to either of the two, i.e. the FRs or the DPSPs, is that there must have existed a rationale behind making both, Fundamental Rights and directive Principles part of the Indian Constitution. If talked in terms of a welfare state, the concept of welfare cannot be truly realized until and unless both, the citizens and the sovereign in power are assigned with their respective rights and duties. For a citizen, fundamental rights offer him a blanket and guarantee him certain inalienable rights. Directive Principles on the other hand, actually strengthen the citizen's case by ensuring that a fair government with fair policies will govern him in a fair manner. Hence, the question of liberty or equality or rather Fundamental Rights or Directive Principles is in itself a false proposition. A body cannot function properly without the presence of all of its senses. If one is taken out, the entire body suffers. Similarly, the Constitution of India which is often referred to as a "living document" because of its ever evolving nature is served by senses like Fundamental Rights and Directive Principles. Choosing one over the other will not only be erroneous but will also be a hindrance to making a society where the Constitution works at its optimum level. Hence what is really needed to be done is finding a mid-way to this conflict which leads to a welfare state in the true sense. These provisions are of no use if the only thing that they deliver is a sense of superiority over the other. It is not a race where the powerful will be rewarded and the weak will be consoled, but is rather a joint venture that aims towards a satisfied customer of the justice delivery system. Hence, as once Frances Wright rightly once rightly said, "Equality is the soul of liberty; there is, in fact, no liberty without it." Meaning thereby, the existence of one depends upon the uninterrupted services of the other. Let both of them complement each other, you will have a swift and satisfied society within an efficient justice delivery system.

THE INCREASING IMPORTANCE OF THE DIRECTIVE PRINCIPLES OF STATE POLICY AND JUDICIAL ACTIVISM

*Saif Rasul Khan**

1.1 Introduction

The Constitution of India is the most important document for independent India. The Preamble in the Constitution of India states a number of goals and ideals. In order to achieve the same enshrined and to establish a welfare state, Fundamental Rights and the Directive Principles of State Policy (“**DPSP**”) have been provided for in the Constitution. The Fundamental Rights are enumerated in Part III, Articles 12 to 35 and the DPSPs are stated in Part IV, Articles 36 to 51. Fundamental Rights are the most important and crucial rights for any citizen. A human being cannot survive in dignified manner in a civilized society without these rights. Fundamental Rights are known as “basic rights” which every citizen is entitled to by virtue of the Constitution. They are justiciable, i.e. they can be referred to as a matter of right in the Court of law. They are also called as “individual rights or negative rights” and impose negative obligations on the state not to encroach upon individual liberty.

Part-IV of the Constitution deals with Directive Principles of State Policy. They are positive rights and impose positive obligations on the state. They are not justiciable and thus citizens cannot demand the rights, unlike Fundamental Rights. These are the recommendations to the state in Legislative, Executive and Administrative matters. (State means Legislative and Executive organs of the Central and State governments, all local authorities and all other public authorities in the country). In GOI (Government of India) Act, 1935 “Instruments of Instructions” enumerated and in the Indian Constitution, they are called Directive Principles of State Policy. DPSP embody the

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concept of a welfare state. Many of the provisions in Part IV correspond to the provisions of the international Covenant on Economic Social and Cultural Rights (ICESCR).

At the time of drafting of the Constitution, it was initially felt that all of the rights in the DPSP should be made justiciable. However, a compromise had to be struck between those who felt that the DPSPs could not possibly be enforced as rights and those who insisted that the Constitution should reflect a strong social agenda. Consequently, Article 37 of the Constitution declares that the DPSP, “*shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws*”.

2.1 Fundamental Rights versus DPSPs

Right from the time the Constitution came into force, there has been a situation of legal conflict between Fundamental Rights and duty of State to implement the DPSPs. The very first case being that of enactment of laws for Zamindari Abolition which came into direct conflict with Fundamental Right of Property which was subsequently removed from Part III of the constitution and placed under Article 300A. The Supreme Court in the case of ***Champakam Dorairajan v. State of Madras***¹(1951) held that DPSPs cannot override the provisions of Part III of the constitution. The DPSPs have to run subservient to the Fundamental Rights and the DPSPs must be in conformity with the Fundamental Rights:

*“The Directive Principles of the State Policy, which by Article 37 are expressly made unenforceable by a court cannot override the provisions found in part III (Fundamental Rights) which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The chapter on fundamental rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Article in part III. The Directive Principles of state policy have to conform to and run as subsidiary to the chapter on Fundamental Rights.”*²

¹ *Champakam Dorairajan v. State of Madras*, AIR 1951 SC 226.

² *Id.*

With the passage of time, the Supreme Court came to adopt the view that although Directive Principles, as such, were legally non-enforceable, nevertheless, while interpreting a statute, the courts could look for light to the “lode star” of the Directive Principles. “*Where two judicial choices are available, the construction in conformity with the social philosophy*” of the Directive Principles has preference. The courts therefore could interpret a statute to implement Directive Principles instead of reducing them to mere theoretical ideas. This is on the assumptions that the lawmakers are not unmindful or oblivious of the Directive Principles. Further, the courts also adopted the view that in determining the scope and ambit of Fundamental Rights, the Directive Principles should not be completely ignored and that the courts should adopt the principles of harmonious construction and attempt to give effect to both as far as possible. Thus, Supreme Court in the *Re Kerala Education Bill (1957)*³ had propounded the *Doctrine of Harmonious Construction* to avoid a situation of conflict while enforcing DPSPs and the Fundamental Rights. As per this doctrine the court held that there is no inherent conflict between Fundamental Rights and DPSPs and the courts while interpreting a law should attempt to give effect to both as far as possible i.e. should try to harmonize the two as far as possible. The court further said that where two interpretation of the law are possible, and one interpretation validates the law while other interpretation makes the law unconstitutional and void, then the first interpretation, which validates the law, should be adopted. However, if only one interpretation is possible which leads to conflict between DPSPs and Fundamental Rights, the court has no option but to implement Fundamental Rights in preference to DPSPs. The Parliament responded by amending and modifying various Fundamental Rights which were coming in conflict with DPSPs. The Supreme court, however, in the *Golaknath Case*⁴(1967) pronounced that Parliament cannot amend the Fundamental Rights to give effect to the DPSPs. The Parliament responded again by bringing 25th Amendment Act of the constitution, which inserted Article 31C in Part, III. Article 31 C contained two provisions:

- a. If a law is made to give effect to DPSPs in Article 39(b) and Article 39(c) and in the process, the law violates Article 14, Article 19 or Article 31, and then the law should not be declared as unconstitutional and void merely on this ground.
- b. Any such law that contains the declaration that it is to give effect to DPSPs in Article 39(b)

³ *Re Kerala Education Bill*, 1959 1 SCR 995.

⁴ *Golaknath v. State of Punjab*, AIR 1967 SC 1634.

c. Article(c) shall not be questioned in a court of law.

The above Amendment was challenged in the *Keshavananda Bharati Case*⁵(1973). In this case, the second clause of Article 31C was as declared as unconstitutional and void as it was against the Basic Structure of the constitution propounded in this case itself. However, the SC upheld the first provision of the Article 31C. In *Keshavananda Bharti v. State of Kerala*, Judges Hegde and Mukherjee¹⁵ observed that:

“the fundamental rights and directive principles constitute the “conscience of the constitution” there is no antithesis between the fundamental rights and directive principles and one supplements the other.”

Judges Shelat and Grover observed in their judgment that:

“both parts III (fundamental rights) and IV (directive principle) have to be balanced and a harmonized then alone the dignity of the individual can be achieved they were meant to supplement each other”.

The 42nd Amendment added new Directive Principles, viz. Article 39A, Article 43A and Article 48A. The 42nd Amendment gave primacy to the Directive Principles, by stating, *“No law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights”*. It extended the scope of above first provision of Article 31C by including within its purview any law to implement any of the DPSPs specified in Part IV of the constitutional and not merely Article 39(b) or (c). However, this extension was declared as unconstitutional and void by the Supreme Court in the *Minerva Mills Case*⁶(1980). In its judgement, the Supreme Court declared two provisions of the 42nd Amendment, which prevent any constitutional amendment from being *“called in question in any Court on any ground”*, and accord precedence to the Directive Principles of State Policy over the Fundamental Rights of individuals respectively, as unconstitutional. Justice Chandrachud said that the Fundamental Rights *“are not an end in themselves but are the means to an end.”* The end is specified in the Directive Principles. It was further observed in the same case that the Fundamental Rights and

⁵ *Keshavnanda Bharti v. State of Kerala*, (1973) 4 SCC 225.

⁶ *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

Directive Principles together “*constitute the core of commitment to social revolution and they, together, are the conscience of the constitution.*” The Indian constitution is founded on the bedrock of “balance” between the two.

Maneka Gandhi v. Union of India⁷ was a landmark case. The case involved the refusal by the Government to grant a passport to the petitioner, which thus restrained her liberty to travel. In answering the question whether this denial could be sustained without a pre-decisional hearing, the Court proceeded to explain the scope and content of the right to life and liberty. The question posed and the answer given now was: *‘Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously the procedure cannot be arbitrary, unfair or unreasonable’*. Once the scope of Article 21 had been explained, the door was open to its expansive interpretation to include various facets of life.

In 1981, in ***Francis Coralie Mullin v. The Administrator***⁸, the Supreme Court declared that,

“The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities 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 magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.”

The Supreme Court said in ***State of Kerala v. N.M Thomas***⁹, that the Directive Principles and Fundamental rights should be construed in harmony with each other and every attempt should be made by the court to resolve any apparent inconsistency between them.

In ***Pathumma v. State of Kerala***¹⁰, the Supreme Court has emphasized that the purpose of the directive principles is to fix certain socio-economic goals for immediate attainment by bringing

⁷ *Maneka Gandhi v. Union of India*, 1978 SRC (2) 621

⁸ *Francis Coralie Mullin v. The Administrator*, AIR 1981 SC 746.

⁹ *State of Kerala v. N.M Thomas*, AIR 1976 SC 490; (1976) 2 SCC 310

¹⁰ *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1

about a non-violent social revolution. The Constitution aims at bringing about synthesis between Fundamental Rights and the Directive principles.

The present position is that only Article 39 (b) and Article 39 (c) can be given precedence over Article 14, 19 and not all the Directive Principles. The Directive Principles and Fundamental Rights are not regarded as exclusionary of each other. They are regarded as supplementary and complementary to each other. In course of time, the judicial attitude has veered from irreconcilability to integration of the Fundamental Rights and the Directive Principles. The Directive Principles which have been declared to be “*fundamental*” in the governance of the country cannot be isolated from Fundamental Rights. The Directive Principles have to be read into the Fundamental Rights. The “right to education” furnishes an example of such relationship.

3.1 Judicial Activism

3.1.1 The Origin of the PIL

The internal emergency that was in force between 1975 and 1977 and its consequences contributed extensively to the change in the judiciary’s insight of its role in the working of the Constitution. The period of the emergency witnessed major violations of basic rights of life and liberty. There were also manifest violations of the right to freedom of speech and expression. The popularly elected government was weak and it did not last very long. It collapsed by 1978/1979, which was when the judiciary initiated the public-interest litigation (PIL) movement. The development of the jurisprudence of Economic, Social and Cultural Rights is inextricably connected to this noteworthy progress. The post-emergency period provided the accurate setting for the judiciary to redeem itself as a protector and enforcer of the rule of law. PIL was the necessary tool and this development helped the judiciary to reach out to the vast majority of the citizens, differing in social and economic status. The insuperable walls of procedure were taken apart and the doors of the Supreme Court were made open to people and issues that had never reached there before. By relaxing the rules of standing and procedure to the point where even a postcard could be treated as a writ petition, the judiciary ushered in a new phase of activism where litigants were freed from the unnecessary formalities. This development contributed significantly to raise the status of DPSPs in our country. A number of social issues were taken up the Court, which under the cover of Fundamental Rights helped in the implementation of DPSPs. The

combined effect of the expanded interpretation of the right to life and the use of PIL as a tool led the court into areas where there was a crying need for social justice. These were areas where there was a direct interaction between law and poverty, as in the case of bonded labor and child labor, and crime and poverty, as in the case of under trials in jails. In reading several of these concomitant rights of dignity, living conditions, health into the ambit of the right to life, the court overcame the difficulty of justiciability of these as economic and social rights. These rights were hitherto, in their manifestation as DPSP, considered non-enforceable. Directive Principles have been used to broaden, and to give depth to some Fundamental Rights and to imply some more rights there from for the people over and above what are expressly stated in the Fundamental Rights.

3.1.2 The Transformation of Fundamental Rights

That biggest beneficiary of this approach has been Article 21. Reading Article 21, with the Directive Principles, the Supreme Court has derived many rights, which are stated in some form in the DPSPs.

Further, Article 39-A of the Indian constitution provides for “Equal Justice and free legal Aid”. It (39-A) was inserted/added by the Constitution (Forty Second Amendment) Act, 1976. It came into force from 3.1.1977 and reads as follows: *“The state shall secure that the operation of the legal system promote justice, on the basis of equal opportunities and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”*.

This Article was added to the constitution pursuant to the new policy of the government to give legal aid to economically backward classes of people. As such, ‘Legal aid’ and ‘speedy trial’ have now been held to be Fundamental Rights under Article 21 of the constitution available to all prisoners and enforceable by the courts. The state is under the duty to provide lawyer to a poor person and it must pay to the lawyer, his fees as fixed by the court.

In *M Hoskot v. State of Maharashtra* and *Hussainara Khatoon v Home Secretary, State of Bihar*¹¹, the court held that the legal aid and speedy trial are Fundamental Rights under Article 21 of the constitution which are available to all detainees. Further, it ruled that the state is under a

¹¹ *M Hoskot v State of Maharashtra and Hussainara Khatoon v Home Secretary, State of Bihar*, AIR 1979 SC 1322

duty to provide a lawyer to a poor person, and it must pay to the lawyer his fees as fixed by the court.

In *Center of Legal Research v State of Kerala*¹², the court held that in order to achieve the objectives in Article 39-A, the state must encourage and support the participation of voluntary organizations and social action groups in operating the legal aid programmes. Further, legal aid schemes, which are meant to bring social justice to the people, cannot remain confined to traditional or litigation-orientation attitudes, and must take into account the socio-economic conditions prevailing in the country, and adopt more dynamic approaches. The voluntary organizations must be involved and supported for implementing the legal aid programme, and they should be free from government control.

In *Abdul Hassan v. Delhi Vidyut Board*¹³, the Supreme Court commended the system of Lok Adalats set up by the Parliament by enacting the Legal Services Authority Act 1987. The court directed that most authorities ought to set up such adalats.

In *State of Maharashtra v. Manubhai Bagaji Vashi*¹⁴, the Supreme Court held that Article 21 read with Article 39-A casts a duty on the state to offer grants-in-aid to recognized private law colleges, which qualify for receipt of the grant. The previously mentioned duty cast on the state cannot be whittled down in any manner, either by pleading paucity of funds, or otherwise.

Article 41 of the Constitution provides that the State shall within the limits of its economic capacity and development; make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 38 states that the state shall strive to promote the welfare of the people and Article 43 states it shall endeavor to secure a living wage and a decent standard of life to all workers. In *Bandhua Mukti Morcha v. Union of India*,¹⁵ a PIL by an NGO highlighted the deplorable condition of bonded laborers in a quarry in Haryana, not very far from the Supreme Court. A host of protective and welfare-oriented labor legislation, including the Bonded Labour

¹² *Center of Legal Research v State of Kerala*, AIR 1986 SC 1322

¹³ *Abdul Hassan v. Delhi Vidyut Board*, AIR 1999 DEL 88

¹⁴ *State of Maharashtra v Manubhai Bagaji Vashi*, 1995 5 SCC 730

¹⁵ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, 811-812 : (1984) 3 SCC 161

(Abolition) Act and the Minimum Wages Act, were being observed in the breach. The court said that,

“The 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 Article 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 for 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.”

“Since the Directive Principles of State Policy contained in clauses (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity, but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation, for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21, more so in the context of Article 256 which provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State.”

Thus, the court converted what seemed a non-justiciable issue into a justiciable one by invoking the wide sweep of the enforceable Article 21.

There is no reference to a fundamental right to Shelter in Part III of the Constitution of India. This right has been seen as forming part of Article 21 itself. However, the Court has never really acknowledged a positive obligation on the State to provide housing to the homeless. In *Olga Tellis v. Bombay Municipal Corporation*¹⁶, the court held that the right to life included the right to

¹⁶ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.

livelihood. The petitioners contended that since they would be deprived of their livelihood if they were evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence be unconstitutional. The Court did not go that far and thus, denied that contention, by stating that:

“No one has the right to make use of a public property for a private purpose without requisite authorisation and, therefore, it is erroneous to contend that pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon . . . If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorised.”

In *Municipal Corporation of Delhi v. Gurnam Kaur*,¹⁷ the court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legal enforceable right. In *Sodan Singh v. NDMC*¹⁸, a constitution bench of the Supreme Court reiterated that the question whether there can at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative.

The right to health has been perhaps the least difficult area for the court in terms of justiciability, but not in terms of enforceability. Article 47 of DPSP provides for the duty of the state to improve public health. However, the court has always recognized the right to health as being an integral part of the right to life.¹⁹ In *Consumer Education and Research Centre v. Union of India*,²⁰ the court, in a PIL, tackled the problem of the health of workers in the asbestos industry. Noticing that long years of exposure to the harmful chemical could result in debilitating asbestosis, the court mandated compulsory health insurance for every worker as enforcement of the worker's fundamental right to health.

¹⁷ *Municipal Corporation of Delhi v. Gurnam Kaur*, (1989) 1 SCC 101.

¹⁸ *Sodan Singh v. NDMC*, (1989) 4 SCC 155.

¹⁹ *Parmanand Katara v. Union of India* (1989) 4 SCC 286.

²⁰ *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42.

The Supreme Court in the affirmative in *Mohini Jain v. State of Karnataka*²¹ answered the question whether the right to education was a fundamental right and enforceable as such. The judgement of the Supreme Court of India in *Unnikrishnan J. P. v. State of Andhra Pradesh*²², resulted in the insertion of Article 21-A in Part III of the Indian Constitution in 2002. The Article provides for the fundamental right of education to all children between the ages of 6 and 14. The case pertained to the charging of ‘capitation’ fees from students seeking admission, by private medical and engineering colleges. The college managements were seeking enforcement of their right to do business. The court expressly negated this claim and proceeded to examine the nature of the right to education. The court refused to accept the non-enforceability of DPSP and the margin of appreciation claimed by the State for its progressive realization. The Court asked:

“It is a noteworthy that among the several Articles in Part IV, only Article 45 speaks of a time-limit; no other Article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the Article merely calls upon it to endeavor to provide the same and on the further ground that the said Article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years – more than four times the period stipulated in Article 45 – convert the obligation created by the Article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not speak of the “limits of its economic capacity and development” as does Article 41, which inter alia speaks of right to education. What has actually happened is – more money is spent and more attention is directed to higher education than to – and at the cost of – primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age). Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the Government – we

²¹ *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.

²² *Unnikrishnan J. P. v. State of Andhra Pradesh*, (1993) 1 SCC 645.

are only emphasizing the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question... ”²³

The issue of recurrent famines in some of the drought-prone regions of India has received a mixed reaction in courts. When a PIL case concerning starvation deaths in some of the poorest districts in the state of Orissa was taken up for consideration, the reaction of the Supreme Court in 1989 was to defer to the subjective opinion of the executive Government that the situation was being tackled effectively. In the early 1990s, civil society groups to take action approached the National Human Rights Commission (NHRC), but its intervention also had only limited success. The Indian Supreme Court’s engagement, again in a PIL case, which confronted the paradox of food scarcity while the State’s silos overflowed with food grains in the midst of starvation, has been a contrast to the earlier response.

3.1.3 The Special Bench of the Supreme Court on Social Justice

The Chief Justice of India, Justice H.L. Dattu ordered the constitution of a Special Bench titled as “Social Justice Bench” to deal with issues troubling the common-man in daily life. This is the first time that the Supreme Court has set up a dedicated bench to hear cases pertaining to public interest. The Social Justice Bench will not only hear the pending matters but also all fresh PILs filed before it. Currently, such cases are scattered over different Benches. The said Special Bench will hear the matters relating to society and its members, in order to secure social justice, one of the ideals of the Indian Constitution. This Bench started functioning from 12 December, 2014 and in order to ensure that the matters are monitored on regular basis, it will continue to sit on every working Friday at 2.00 p.m. The Bench comprises of Hon'ble Mr. Justice Madan B. Lokur and Hon'ble Mr. Justice Uday U. Lalit. With the establishment of the Social Justice Bench, the Hon'ble Supreme Court has captured the essence of social justice, recreating focus on the principle of ‘justice for all’ and the primary effect will be that cases with a strong social component will be heard and judgment will be delivered at a much faster pace than what has been the trend so far. This is bound to have a salutary effect on the overall conflict-management scenario. Keeping in mind the same, the efforts taken up by the Hon'ble Supreme Court is highly commendable. This Bench has committed itself to the issues of social justice and this will result in a further push to the ideals

²³ *Id.*

enumerated in Part IV of the Indian Constitution. Out of around 200 such cases pending in the court, 65 cases have been identified to begin with and the cases, already pending before other benches, may be transferred to the special bench on the directions of the Chief Justice of India. Some of the cases identified are-

- Release of surplus food grains for people affected by natural calamities;
- Framing a comprehensive scheme for public distribution;
- Rehabilitation of sex workers;
- Prevention of untimely death of pregnant women and children due to malnourishment or lack of medical care;
- Hygienic mid-day meal;
- Shelter homes for the destitute and homeless;
- Education for the children;²⁴

Prominent cases taken up by the Bench

(a) Narmada Bachao Andolan Petition

The Special Social Justice Bench constituted by the Hon'ble Chief Justice of the Supreme Court of India, heard the Narmada Bachao Andolan's petition challenging the unlawful decision of the Narmada Control Authority in June 2014 to raise the height of the Sardar Sarovar dam by 17 meters. It was the first case heard by the newly constituted Bench, presided by Hon'ble Justice M. B. Lokur and Hon'ble Justice U. Lalit. The special bench asked the parties, including N.B.A. activist Medha Patkar, to file short synopsis by December 24 as it did not want to waste time going through records running into thousands of pages. "So all of you should have your brief ready on or before December 24. The time shall not be extended... We want the matter to be pushed..." it said.

(b) Welfare of Tribals

²⁴ Official notification on set up of the Special Social Justice Bench, released by the Supreme Court of India; Document available at supremecourtindia.nic.in

The Court then heard a 2005 petition filed by Akhil Bhartiya Vanvasi Kalyan Ashram seeking welfare of tribals and the Court asked the Centre to file a comprehensive affidavit on the issues arising out of the Public Interest Litigation.

(c) Child Labour

After briefly hearing the issues arising in matters like child labour, child trafficking and child bondage, the Bench directed the Ministry of Women and Child Welfare to act as a nodal agency and convene a meeting of secretaries of concerned States and Union territories to ensure compliance of its directions. It also directed the Secretary of Union Ministry of Women and Child Welfare to hold meetings with other central ministries concerned like MHA, Ministry of Labour.

(d) Separate Hostels for SC/ST students

A Public Interest Litigation was filed highlighting the poor condition of hostels and lack of remedial measures. The Special Bench, while issuing notices to all States and Union Territories (UTs), questioned the need of separate hostels for SC/ST students. "*Why should they be segregated from the mainstream?*" the Bench asked.

(e) Night Shelters

The specially constituted Social Justice Bench of the Supreme Court ordered the Centre and the Delhi government to provide adequate number of night shelters for the homeless before the winter got harsher. The Bench directed the National Mission Management Unit to hold meetings on or before December 31 with the Chief Secretaries of all states to set up night shelters.²⁵

4.1 Conclusion

Thus, it is clear that the Economic, Social and Cultural rights are no less important than Fundamental Rights in the Constitution. They are enforceable when they are estimated as supplying the content of a Fundamental Right, but not just by themselves. The judiciary has played

²⁵ News Article, DNA Newspaper dated December 12, 2014, titled "Social Justice Bench of Supreme Court starts hearing PILs."

an incredibly efficient role in protecting not only the Fundamental Rights of the citizens but have also pinned the state to its obligations towards the citizens by referring to the DPSP. Such obligation, the court has explained in the context of right to environment, can confer corresponding rights on the citizen:

“It need hardly be added that the duty cast on the State under Articles 47 and 48-A in particular of Part IV of the Constitution is to be read as conferring a corresponding right on the citizens and, therefore, the right under Article 21 at least must be read to include the same within its ambit. At this point of time, the effect of the quality of the environment on the life of the inhabitants is much too obvious to require any emphasis or elaboration.”²⁶

The Economic, Social and Cultural rights that the DPSP symbolize must be read as forming a part of the Fundamental Rights and thus must be implemented effectively. The State must necessary take all the steps to ensure that the constitutional mandate referred to in Part IV is implemented to the letter. The State must be constantly reminded of its obligation and duties to its citizens and this can be shaped to a considerable extent by a creative and activist judiciary. Thus, there is no tussle between the concepts of Liberty and Equality. They are on an equal footing and one supplements the other. It is only by their inter-dependence that we can truly set up a welfare nation, as envisaged by the Constitutional framers and realize the expectations of our citizens.

²⁶ *M. C. Mehta v. Union of India* (1998) 9 SCC 591 para. 6.

LIBERTY & ACTIVISM: THE NEVER ENDING CONFRONTATION OF DIRECTIVE POLICIES OVER EGALITARIANISM

*Joyeeta Chandra**

The version of liberty that the preachers of an equitable society seek is somewhat blurred or rather only a part of the facet of reality. Liberty as much associated with libertarianism probes for how there is need for non-aggressive government as well as the civilians not coercing each other. However in a tradition ridden country like India where every faction demands for its sanction liberty can never confide with equality. It has been an existent fact since the inception of the constitution that equality shall only exist among equals and but liberty is practiced among all factions, because the right to free will is something that is executed by all equally. However such can't be the case with equality because not everyone has equal opportunities which plays a vital role but cannot be rebutted as being inequality.

Therefore, the purpose of this paper is to probe as how equality and liberty are independent and interdependent on each other. This paper shall also have a magnifying research as to how these two slit each other. The paper shall also research on how various factors play their part in these elements while at the same time comparing the issue in hand with other sovereigns. The paper shall relate the notion of equality with liberalism and how it encompasses different group and ideological movements such as feminism, while at the same time relating it to the concept of liberty. The second part of the paper shall deal with how over the years judicial activism has turned into judicial chauvinism and changed the complete platform of the Indian constitution. The hearsay that what is more rudimentary to life should be given prevalence over what forms the social welfare state because it is that the faction that forms it have been proved rather just like an obiter dicta of a case. Therefore, the paper shall probe on how the instrument of judicial review attacks on the fundamental rights and despite the fact of its primary need, sometimes the directive principles hold

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authority. The paper shall probe on those issues whereby the DPSP have been given more importance than what the fundamental rights bar. The paper shall individually probe on these directive policies and dissect them in lieu to their contradiction with equality. Hence, “to stop a battle, one must prevent the internal war on law”.

1.1 The Idea of Liberty and its Dimensions

From where the inception of the term “liberty” took is hard to place. However, if it only signifies free will then arguably the birth of the Indian constitution should be the right time to place it. But what is this free will, what is its purpose? The very question poses a big threat to the notion of free will because free will to murder someone might not encompass the very periphery of liberty. The very purpose for such could not be reprimanded.

In philosophical terms, liberty involves free will which itself encompasses the concepts of advice, persuasion, deliberation, guilt and sin. This is how a course of action is limited but is this in execution in the Indian constitution? Or rather the preachers are worshipping a mirage of liberty? In India, the most applicable definition of liberty would be, “social and political freedom enjoyed by all civilians”. For the protection of such freedom the constitution provides Article 21 of the Indian constitution which clearly states for “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Article 21 secures for Indian citizens same rights which the British citizens derive from the famous Magna Carta. Art. 21 imposes an obligation on the executive to observe the forms and rules of law when depriving individuals of their rights to life or liberty.

The basic ideology that underlies any sovereign constitution is that all men were created equal, even though not born equally in wealth, status or their opportunities. This is the basic framework of the law of nature and rule of law function since as regards to rule of law it has to uphold that it is in harmony with the concepts of generality, equality and certainty. Therefore, not gaining similar or equal opportunities may not be the base for coercing the government to formulate laws for equalisation of conditions. Now another debatable issue that comes into the picture is when the factions make two parallel lines, intersecting lines, the parallel lines being “freedom” and “liberty”. It is vital that the one has his books clear on how different of a concept “freedom” is. The recent movie *Gabbar* focused on how a civilian distressed over the present corruption conditions and

governmental functioning and takes charge into his hand to remove corruption. This may certainly be perceived as dramatic but in fact it is where one could extract the meaning of the two terms. Liberty is the condition wherein individuals behave according to their will and govern themselves, taking responsibility for their actions and behaviour. Then again it could be positive or negative, “positive liberty” wherein individuals act on their own will without being influenced by any social restrictions. Then again liberty is derived from freedom which could be defined as the state of being free to enjoy political, social, and civil liberties. It is the power to decide one’s actions, and the state of being free from restraints or confinement. Thus, by analysing the above example, it was the protagonist’s freedom to choose a more morally sound method in his road to reform “corruption” while it was his liberty, that he chose to take a villainous-heroic role without any restraints. However in either case one has to be bound by what is morally and ethically sound.

Through the lens of history one can only find India in much custom-tradition ridden form, so why is liberty such a fallacious belief in such a large democracy? When the society is disintegrated into several linguistic, caste etc. based hierarchies, it is unlikely that liberty and equality could come later than the demands for individualism. In the past, caste has played a dominant role in both the Indian legislature and society, holding the very roots of Indian democracy. Caste in its own form played both for the better or worse, however seeing back it is leant towards the worse. With caste still as one of the major factors in the technology era, liberty is miles apart because to act according to one’s will should include the right to choose one’s partners wherein as being suggested the right to equality also plays its role. But the immense number of cases decked for “honour killing” proves our notions of liberty are yet to be reached and so is equality. Much accepted fact that equality can never exist among unequal’s but can caste be the deciding factor for who equals whom since much is said that “each person is born equal”.¹

2.1 Ideological belief and race towards the Apex - *Equality v. Liberty*

If we seek to discuss it in the truest sense of its notion then, what do these values apply for in the normal or daily legislative instances? Before turning pages to the ideological belief, it is vital to understand as to what challenges the lawmakers face when they weigh the two notions. In this que the first one which has posed a major threat to the country’s legal system could be “right to die or

¹ Pete Didonato, Equality vs. Liberty, The Federalist Papers, <http://www.thefederalistpapers.org/current-events/equality-vs-liberty>.

committing suicide”. As fast paced the life becomes , the much more the criminal mind becomes and affects the psychology of a man with resulting to the final question “ I have right over my body, so I can choose to do what I want with it” , much affected by the prowess of the media and gaining awareness. In such situations the legal fraternity comes into the grey area of law, when several factions demand the same in lieu of their right to equality and liberty to do so. The High Court of Bombay in *State of Maharashtra v. Maruti Sripati Dubal*², held that the right to life guaranteed under Article 21 includes right to die, and the Hon’ble High Court struck down section 309 IPC which provides punishment for attempt to commit suicide by a person as unconstitutional. In *P. Rathinam v. Union of India*³ however, a Division Bench of the Supreme Court while supporting the decision of the High Court of Bombay in the previous case held that under Article 21 right to life also include right to die and laid down that section 309 of Indian Penal Court which deals with ‘attempt to commit suicide is a penal offence’ as unconstitutional. However, this issue was raised again before the court in *Gian Kaur v. State of Punjab*. In this case, a five-judge Constitutional Bench of the Supreme Court overruled the *P. Ratinam’s case*⁴ and held that Right to Life under Article 21 of the Constitution does not include Right to die or Right to be killed and there is no ground to hold that the section 309, IPC is constitutionally invalid.

This being the legal perspective, but by passing the issue through the lens of ideological belief, the thoughts of libertarianism and liberalism should be mentioned. In the right words, it comes under the philosophy of suicide. In this the liberalism asserts that a person's life belongs only to them, and no other person has any right to force their own ideals that life must be lived. Rather, only the individual involved can make such a decision, and whatever decision they make should be respected. Philosopher Thomas Szasz goes further, arguing that suicide is the most basic right of all. If freedom is self-ownership, it is ownership over one's own life and body, then so is the right to end that life which is the most basic of all. “If others can force you to live, you do not own yourself and belong to them”. Now here comes a very prudent question, if all people have ownership over their being, then they should all have equal rights in judging what to do with their being, in such a case a sovereign doesn’t needs law to govern. Seemingly the picture doesn’t fits straight. The law prohibits “suicide” because if every person were allowed this right and be

² 1987 (1) Bom CR 499.

³ 1994 AIR 1844.

⁴ *Id.*

justified then there would be no room for criminal codes. However one also does not completely comply with this notion. Liberty is where equality cannot exist and equality is where liberty cannot exist.

As much as libertarianism thought is applied, it is to be understood that free will without restraint is to be exercised imbued with ethnic principles with non-aggressive form. One if demands equality and in the process exercises his free will to achieve something it is not to be done by coercing one another's liberty. One of the most prudent example for such could be male chauvinism which took its inception during World War II. After the war ended and men returned home to find jobs in the workplace, male chauvinism was on the rise. Men who had been the main source of labour, and they expected to come back to their previous employment, found women had stepped into many of their positions to fill their positions.

On one hand, it is reiterated through the voice of the statutes that there is no gender proclivity and existing legislature could put up with the rising demands of the feminist faction, while on the other with the chauvinistic remarks the judges still make about the rights of women make us wonder whether equality in gender roles is a reality or not. Ideology may inhibit difference of opinion but the fact that the two contradict, can never be overturned.

3.1 Feminism and Libertarianism – *Accounting for liberty*

Libertarianism association with the feminist movement began with the ideology of “free thought”. It was traced in anarchism resulting to anarcha-feminism beginning with Josiah Warren who laid great stress upon the women's rights .They had an initial battle for the provisions and removal of suppressions from marriage laws for women's. Anarcha-feminism developed as a fusion of radical feminism and anarchism, and viewed “patriarchy” as a fundamental manifestation of compulsory government. Anarcha-feminists, like other radical feminists, criticised and advocated the abolition of traditional conceptions of family, education and gender roles. Here the concept of equality was widely applied, while at the same time not waiving the concept of liberty. The fire spread when the debate began as to how the laws for “women related issues” were made by men, rather than women. The structural and functional perspective of gender defined roles also arose the issues of the traditional concepts and much relations of equality. However much was yet to come in forms of cyber- crimes and the Medical Termination of Pregnancy (MTP) Act ,because from the act arose

the issues of sex selective abortions which was an issue of gender equality which split the concept of a woman's autonomy and existence itself. Although on occasions, it was contended that liberty to do with one's body resides within a soul, but it must be rebutted with the fact that the "life and equality both are to be safeguarded".

4.1 Equality and liberty on a different plane- *Hijack of Nations to the Battle*

The above said examples much deal with either what the Indian laws are presently facing in its tussle against the liberty-equality war or what the individual battle has been facing, but a common nexus where the present century has ended in its grey area in which even the apex of courts or the biggest of the nation's find hard to deal would be "same sex marriage" or precisely LGBT rights. Beginning with the United Nations, the issue of the conflict between religion and same-sex marriages was debated in Maine, where a referendum held it invalidated and so the legislation recognizing same-sex marriage. People who were not in the support of same-sex marriage argued, inter alia, that the legislation should be removed because of its impact on religious liberty. That argument would have been denied then, had the original legislation provided meaningful religious liberty protection. In many states where same-sex marriage was on the lawmakers list, proponents of same-sex marriage had vigorously opposed any religious exemption beyond the religious institution ceremony provision. In New Hampshire, for example, the governor had insisted on broad religious liberty protection as one of the condition for signing same-sex marriage legislation. The legislature originally complied with it, including protection that roughly followed what the proposed statute above urged. But, under intense pressure from supporters of same-sex marriage, the legislature retreated to a far restricted and mostly meaningless protection for religious institutions. The governor did not insist on the original version, and now the New Hampshire statute legalizes same-sex marriage at the expense of religious liberty.

One of the judgements for the same happened in *Employment Division v. Smith*⁵, in which the Supreme Court held that facially neutral, generally applicable laws which burdened religion, need no special legislative justification and, therefore, would not be subject to compelling (or other heightened) interest analysis. Laws that mandate the acceptance of the validity of same-sex marriage would be neutral laws of general applicability and, hence, would require no special

⁵494 U.S. 872(1990).

justification to fulfil the federal constitutional guarantee of free exercise of religion. On the other hand, such indirect burdens on religious practices might violate state constitutional religious liberty guarantees in those states departing from the rule introduced in *Smith*.

However, the question here doesn't merely concern religious liberty for if asked any man of antecedent generation and even in this generation they may have a hundred marks for heterogeneous relationship for that is the only way to achieve the ends. But because the "law of nature" and religious sanction provide a better reason to back one's reasoning it is right way to place it .If the question is only about "liberty" then , the landmark supreme court judgement,

Lawrence v. Texas⁶ in which the 6–3 ruling the Court struck down the sodomy law in Texas and, by extension, invalidated sodomy laws Lawrence⁷ explicitly overruled *Bowers*⁸, holding that it had viewed the liberty interest too narrowly., making same-sex activity legal in every U.S. state and territory. However, it is not concerned merely with liberty because, the basic rights to be treated equally could not be equally denied. Since it is a stated fact that, every person belonging to either gender is human and has been born equally only to be treated as an equal civilian in the vision of law. Here is where one has to find what should be the correct balance between these, and purport what could be the outcome of any actions .To claim equal citizenship over bare religious liberty claims should be foremost.

The Indian plane for this issue is also not set on a different foot, because the civilians of India, value culture and religion more than the preaching's of liberty and equality, for which one would not be sarcastic, because since, the ages religion has played a vital role in the Indian history and judiciary. For the proponents of the issue this system would not make sense, and it would be deemed as a transgression of the boundaries of liberty and equality, but at the end of the day, it is an individualistic issue. The offence of homosexuality is read under this section as an Unnatural Offence. The major provisions of criminalisation of same-sex acts is found in the Section 377 of the Indian Penal Code (IPC) of 1860.However if by any means one can draw an absolute line between what weighs the most, "liberty" or "equality", then the question remains unanswered and

⁶ 539 U.S. 558 (2003)

⁷ *Id.*

⁸ 478 U.S. 186 (1986)

in ambiguous position, for every faction shall demand it individually and sometimes maybe even at the expense of another. But to carefully choose as to what would not harm the shield of a welfare state and help achieving one's rights, lies in the person's judgement.

4.1 Judicial Activism and Fundamental Rights-*The Battle of Benches*

4.1.1 Judicial activism turned chauvinism – retaliating course of law

It is fascinating as to how over the years the judiciary has gained the undeniable powers to almost form a retaliating shield for the lawmakers. But where does the inception of judicial activism lest chauvinism takes place? Since independence, judiciary has been very actively playing a role in dispensing the justice since the case of *A K Gopalan v. State of Madras*⁹ case followed by *Shankari Prasad case*¹⁰, etc. However, judiciary remained submissive till the 1960s however its assertiveness started in 1973 when the Allahabad High Court rejected the candidature of Indira Gandhi and introduction of public interest litigation by Justice P N Bhagwati further expanded the scope of judicial activism. From the stream of activism flew chauvinist methodology which became a part of much accepted judicial procedure, however in the landmark decision of *Minerva Mills Ltd. and Ors. v. Union of India and Ors*¹¹ used the word in the lieu of regional superiority and depicted regional chauvinism. Judicial activism is a way through which relief is provided to the underprivileged and aggrieved citizens. Judicial activism is a way of providing a base for policy making in competition with the legislature and executive. However over the past decades the eyes of factions have only witnessed the harsher side of judiciary. It is a stated fact that what the law purports is for a better integrated society, however when self-inflicted emotions control the senses of a decision maker then it is liable to cause transgression of the basic structure. But what is this basic structure and why are the law sealers taking a villainous role for the act of interpretation? The basic structure could take various forms as every soul has different perspective, so he shall count on different notes, however without equal status and free restraints, life is next to a heinous beast.

4.1.2 Rudimental or obligatory – backdrop of judicial review

⁹ 1950 AIR 27.

¹⁰ AIR 1951 SC 455.

¹¹ AIR 1980 SC 1789.

The basic object for any legislation or judiciary is to understand whether the statute is inappropriate in its constitution is rudimentary or obligatory? Or the rights incorporated fall in which of the two? To understand rudimentary is something without which one thing cannot survive whilst the latter speak of which is required but can be managed with. So the war between fundamental rights and the directive principles of state policies is not a new issue but took inception since back. So what infuriated it? Why is there a strain? Which is superior?

The Directive Principles of State Policy (DPSP) are contained in part IV, from the articles 36 to 50, of the Indian Constitution. Many of the provisions correspond to the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹² For instance, article 43 provides that the state shall venture to secure, by suitable legislation or economic organization or in any other way, to all the workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of respite and social and cultural opportunities, and in particular the state shall venture to promote cottage industries on an individual or cooperative basis in the rural areas. This corresponds more or less to articles 11 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, some of the International Covenant on Economic, Social and Cultural Rights (ICESCR) rights, for instance, the right to health (article 12), have been interpreted by the Indian Supreme Court to form a part of the right to life under article 21 of the Constitution, thus making it directly enforceable and justiciable. As a party to the ICESCR, the Indian lawmakers has enacted laws giving effect to some of its treaty obligations and these laws are in turn enforceable in and by the courts.

Now since the concept itself is so dynamic and viable that a lot references could be used, such as the differences between the Economic, social and cultural rights and The International Covenant on Civil and Political Rights (ICCPR), whereby both initiated from United Nations General Assembly, but are much similar to the concept of fundamental rights and directive principles of state policy. Of the two, which is more rudimentary, be it one's right to "life" included in the latter or the right to education in the earlier. Here is where one draws a line between rudimentary and obligatory. However being a chain reaction both affect each other, since without proper health a

¹² Justifiability of ESC Rights-the Indian Experience,
<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>.

faction cannot exist and to attain such level of medical advancement, one needs education. But which is superior? With all voices in sync, the faction would support to what supports the branches of life, but then overwhelming the waves of essential rights would be, whether the right to housing be given consideration. However, synonymous to the concept of liberty and equality, both are weighed on a different scale, “no life to live with the right health in the houses”.

Similarly the two parts of the Indian constitution, the fundamental rights (Part III) and the directive principles of state policy (Part IV) are considered on a different scale, because what is elementary for the sound living of the factions must be what should be considered most prime in “judicial activism”. It is not rebutted that there may be instances where the state needs to divert from its notions of understanding of basic importance and may apply differently to fit the mould. However, it is not implied that must be done so as to completely quash the horizons of judicial review. Such became evident when a series a judgement took place over the tussle, first being *State of Madras v. Champakam Dorairajan*¹³ whereby the Supreme Court first, the court said, “The directive principles have to conform to and run subsidiary to the chapter on fundamental rights”. Much related to issues of equality but dealing with the two constituents, the case was by the *Fundamental Rights Case*¹⁴, in which the majority opinions reflected the view that “what is elementary in the governance of the country cannot be less significant than what is significant in the life of the individual”. Another judge constituting the majority in the similar case said- “In building up of a just social order, it is sometimes imperative that the fundamental rights should be subordinated to directive principles.” This view, that the fundamental rights and directive principles of state policy are complementary to each other, “neither part being superior to the other,”¹⁵ has held the ground firm since.

Articles 39(a) and 39 (b) provide 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 to livelihood.

¹³ (1951) SCR 525.

¹⁴ Mathew, J. in the Fundamental Rights case, note 1 above, SCC para. 1707, p. 879.

¹⁵ V .R. Krishna Iyer, J. in State of Kerala v. N. M.. Thomas (1976) 2 SCC 310 at para. 134, p. 367.

(b) That the ownership and control of the material resources of the community are so distributed as best to sub serve the common good.

Articles 31B and 31C of the Constitution were introduced by the 1st and 25th amendments in the Indian Constitution. In fact the Fundamental Rights case concerned with the constitutional validity of article 31C of the Constitution, in which the court has retained its power of judicial review to examine if, in fact, the legislation has intended to achieve very the objective of articles 39(b) and (c), and whether the legislation is an amendment to the Constitution, whether it violates the basic structure of the constitution. Many a times courts have protected itself from any menace against the riot of violation, if in cases there is violation against “right to equality”, so as to bring agrarian reforms or other cultural reforms. Similarly, courts have used directive principles of state policy to uphold the constitutional validity of statutes that apparently impose restrictions on the fundamental rights. So is the verdict being overruled by the judiciary’s own verdict or is it to fix the mould, as the interpreters would wish for? In a traditional country like India, from the birth of child he is taught about the virtues and morals, but not about what fundamental rights he is going to inherit as a person. One is taught to be more moral then a law bound and learned civilian, because it is an assumption that with morality comes all the aspect being a good lawful citizen. These two dynamic concepts are still mid- air because morality plays a major part in our legal system. The directive principles of state policy derives its major ideology from the concept of morality. To presume that what is based on the value or virtues or moral of a person is still deemed higher to what breathes in the soul of a person is a hypocrite remark. The Fundamental rights case raised the similar issue on the concept of fundamental rights having no originating base, however if even being empty as they were, they still had scope for further developing the base and moreover had since time of its inception provided people a backbone for what was elementary to them, if not in all, rather than the policies which built on the moral grounds.

4.1.3 The Eventual battle against the Rights

In several of the decisions passed by the apex court, it was ruled as to how running both the fundamental rights and directive principles together was vital, but throughout out the cases the *ratio decidendi* changed and the above became mere obiter dicta. Numerous cases were lined in a row to fit the mould of judicial “activism”. It is rightful to have a magnifying research on each individual directive policies and how they overruled the elementary rights

(a) *Right to Shelter*

In *Shanti Star Builders v. Narayan K. Totam*¹⁶, the court has recited its word in an envisaging manner that, “The right to life . . . would take within its sweep the right to food . . . and a reasonable accommodation to live in.” Unlike certain other Economic, Social and Cultural rights, the right to shelter, which forms part of the right to an adequate standard of living under article 11 of the International Covenant on Economic, Social and Cultural Rights, finds no similar expression in the Directive Policies. This right has been seen as forming part of Article 21 itself.

Similarly some of the other Fundamental rights include many other directive policies such as again witnesses in the landmark case of *Olga Telis v. Bombay Municipal Corporation*¹⁷ the court held that the right to life also included the “right to livelihood”. The petitioners contended that since they would be deprived of their livelihood if they were ousted from their slum and pavement dwellings, their expulsion would be next to deprivation of their life, and hence would be unconstitutional.¹⁸ The court, however, was not prepared to go to that extent. It denied that contention, by saying that:

“No one has the right to make use of a public property for a private purpose without requisite authorisation and, therefore, it is erroneous to contend that pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon . . . If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorised”.

However tracing back to the time of John Rawls and his Justice theory which has one of the postulates beginning from “the most disadvantaged section should be given the greatest benefit”, keeping harmonious with the first principle of “each person is to have an equal right to the most extensive basic liberty”. As already reiterated several times that each person is born equal but does not have equal opportunities’, so for those disadvantaged sections , if not equal wealth then, to

¹⁶ (1990) 1 SCC 520.

¹⁷ (1985) 3 SCC 545.

¹⁸ Justifiability of ESC Rights—the Indian Experience,
<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>.

provide sound economic and social conditions is the job of the constitution. Just by evicting these factions and passing up the statutes would not help the situations. Here since fundamental right is inclusive of the directive policies, so either both should run parallel or what is in best need of the civilians of the country should be chosen. And for strengthening such rudimentary rights the prevalence of morality should not be taken, but what is going to create a “social welfare state” must be taken into count.

(b) Right to Work

Article 6 of The International Covenant on Economic, Social and Cultural Rights (ICESCR) which firmly states for, work, under "just and favourable conditions" is quite synonymous to Article 41 of the Indian constitution stating, “the State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.” Article 38 states that “the state shall strive to promote the welfare of the people” and article 43 states “it shall endeavour to secure a living wage and a decent standard of life to all workers”. One of the cases in which the problem of enforceability of such a right was posed before the apex Court was of large-scale abolition of posts of village officers in the State of Tamil Nadu in India. After this case began the intersection of the policies and rights and war of laws began for the right to work provision. It was only after this case that the court had felt much more independent to interfere even in areas which would have been considered to be in the domain of the policy of the “executive”. Where the issue was of regularizing the services of a large number of casual (non-permanent) workers in the posts and telegraphs department of the government, the court has not hesitated to invoke the directive principle of state policies to direct such regularization.

Then again by the instrument of Public Interest Litigation¹⁹, the court breathed life into the fact that the fundamental rights derive its soul from the directive principles and without it cannot stand firm and by the virtue of judicial activism, article 21 was spoken to be the part of clauses (e) and (f) of Article 39 and Article 41 and 42, the court converting what seemed a non-justiciable issue into a justiciable one by invoking the wide streak of the enforceable article 21.

¹⁹ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

(c) *Right to Education*

This right is a right which has its position on both the cliffs, as mentioned above the Economic, social and cultural rights and International Covenant on Economic, Social and Cultural Rights (ICESCR) are also in mid-way battle. But for such, this rights position for one, is disputed. Article 45 of the directive principles of state policy, which corresponds to article 13(1) of the ICESCR, states, “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.” Now the question arises as to whether the right to education was a fundamental right and enforceable, such was answered by the Supreme Court in the affirmative in *Mohini Jain v. State of Karnataka*.²⁰ The correctness of this decision was examined by a larger bench of five judges in *Unnikrishnan J.P. v. State of Andhra Pradesh*.²¹ For as such the above ratio goes it was the view that the policies flow from the fundamental rights and that they derive their decisions with the base of it, however if in the above example article 21 was used to supplement the other the directive policies then the similar should be applied with the other judgements. It is true that right to education is a much demanded and required need for any civilian a sovereign for sustainable and industrial development. But to fit the mould of law and fluctuating from either will make both lose their initial status. The parameters of life and liberty included in Article 21 is not exhaustive but inclusive of all the traits found in the legislation.

5.1 Conclusion

It can never be said that a person requires either liberty or needs only to at an equal frequency with another. Their battle is a confrontation which has went since decades, but the question at the present moment should be, whether one can survive without either of the two? The answer in all sync would be “no”. For one person to be in an equal plane with the other factions might be difficult but it is not really difficult to obtain liberty and decide one’s course of action. It is impossible for every person to achieve equal status and impose upon the government the conditions for equality and also not possible to achieve another’s wealth, but one can always decide his political and social actions according to the course of actions.²² Equality is not fundamental to liberty. It is its

²⁰ (1992) 3 SCC 666

²¹ (1993) 1 SCC 645

²² Julian Glover, *Liberty is equality's intractable opposite*, The guardian, Wednesday 24, February, 2010.

intractable opposite. It wouldn't be wrong to say "more equality and less liberty, or more liberty and less equality. However to find a mid-way balance between the both is the job of judiciary and the lawmakers and for the past decades several statutes and several acts has worked towards that direction. Whether that was achieved or not, is only for the future generations to witness.

Equality and liberty, are the concepts not much left out in the judicial provisions which act through judicial activism. According to Professor Upendra Baxi, judicial activism is an inscriptive term. It means different things to different people. While some may define the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., while others have criticized this term by describing it as judicial extremism, judicial terrorism, and transgression into the domains of the other organs of the State negating the constitutional spiritedness. There were different periods, which activism witnessed however during the post-emergency period, it was found that there were three forms of judicial activism which were observed in India. The first form of judicial activism was the evolution of human rights jurisprudence. The second form of judicial activism were the procedural innovations through Public Interest Litigations. The third form was doctrinal activism through the concept of rule of law. Matters of policy of government became subject to the Court's scrutiny. Distribution of food-grains to then people below poverty line was monitored, which even made the Prime Minister remind the Court that it was interfering with the complex food distribution policies of government.

If this wasn't the only activism phase of judiciary, it prevailed on the battle between the fundamental rights and the directive principles of state policy. Though at first the view that the fundamental rights is superior prevailed, however it didn't take long for the policies to find its way upwards. One believes that fundamental rights are rudimentary and should be always have the first seat but if the things fall into consideration then the policies should only act as supplements to the rights. It can't be denied that the directive policies form a part for the welfare state but it should also not be overlooked that fundamental rights are the life supports of that welfare state. What one does supports would be the fact that "activism is beneficial only when it doesn't becomes chauvinism". Hence, "to create a new era of realism and mindful jurisprudence, one has to oust the aging chauvinism".

ENSURING SOCIAL JUSTICE: THE WAY FORWARD

*D.K. Balakrisnan**

Pt. Jawahar Lal Nehru had once said “First work of this assembly is to make India independent by a new constitution through which starving people will get complete meal and cloths, and each Indian will get best option that he can progress himself”. Therefore, the provisions of directive principles of state policy and fundamental rights were incorporated in the constitution. The fundamental rights stand for ensuring liberty to the individuals and are justiciable whereas the directive principles are the set of principles that are needed for the good governance of the country. The directive principles of state policy largely say about reducing the inequities (social, economic and cultural). However these guidelines cannot be enforced in the court of law.

*India is a very poor country where a large mass of the population reside in slums and don't get even two square meals a day. What is the meaning of fundamental rights to those people who remain in starvation? Hobson had rightly said that “What god is freedom to a starving man”. Equality is the basis for liberty and if there is no equality then ensuring liberty to the citizens is a complete hoax. As directive principles are non-justiciable, the Supreme Court in the **Champakam Dorairajan case** had clearly declared directive principles are non-justiciable and cannot be enforced in the court of law. However the trends started to change in the mid 1970's with the growth of judicial activism. In cases like **Olga Tellis v. Bombay Municipal Corporation** the judges with the help of directive principles of state policy expanded the scope of fundamental rights. Although implementing Directive principles is the function of legislature and executive still then the judiciary has intervened time to time when the legislature was found wanting on its duties to make laws. For example when there were no sufficient laws on sexual harassment the Supreme Court intervened and provided for guidelines in the case of **Vishakha v State Of Rajasthan**. It also intervened when there were no proper guidelines for arrest the Supreme Court intervened*

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*with the case of **D.K. Basu v. State of West Bengal** and provided eleven guidelines for the procedure of arrest.*

The scope of my paper will be restricted to explain the relationship of equality and liberty with reference to an in depth analysis of the cases of Supreme Court and the attempt by the judges of the Supreme Court to ensure social justice.

1.1 Introduction

The directive principles of the state policy are contained in Articles 36-51 of the constitution of India. The idea to have such principles in the constitution has been borrowed from the Irish constitution. They are a set of guidelines which are considered fundamental for the governance of the country. Originally, the directive principles were more akin to moral, rather than to legal, precepts as they did not have much value from a legal point of view. The main idea underlying this principle was that they would serve an educational purpose and may also acts as a restraint as the political party that comes into power. Therefore Article 37 says it clearly that directive principles cannot be enforced in the court of law but they serve as fundamental principles for governance to the ruling party. However the trend is changing and the directive principles are now getting enforced by the courts.

The difference between the Fundamental Rights and the Directive Principles of the State policy are that the fundamental rights are enforceable whereas the directive principles are not enforceable. In addition to it the fundamental rights are more of a political right whereas the directive principles are socio - economic rights. The fundamental rights are the tools which act as protectors of the citizens from the oppression of the ruling party. It acts as a check on the existing government. The directive principles on the other hand are the socio - economic rights that ought to be given to the citizens by necessary state action.

2.1 Traditional view on Directive Principles of the State Policy and Fundamental Rights

The Directive Principles of State Policy were supposed to act as the guidelines to the government while framing its laws and policies. In the constituent assembly debates eminent scholars like Professor K. T. Shah had argued that the directive principles were as important as the fundamental rights and should be made justiciable in the court of law. However, Dr B. R. Ambedkar said that

the DPSP needed to be unenforceable keeping in the view the condition of the country. At that time India had still not recovered from the losses by partition and the 200 years of systematic colonial exploitation. To enforce the directive principles the country needed a lot of resources and at that point of time almost half of the country's population lived in poverty.

Therefore the directive principles were made as non-justiciable and left to the option of the government in power to enforce those principles or not. The principle behind this was that the sanction behind the enforcement of directive principles would be the electorates and not the courts of law. The courts too were of the view that they would not enforce any directive principle as they did not create any fundamental right in favour of an individual. In the case of *Ranjan Diwedi v Union of India*¹ it was held by the Supreme Court that it would not issue the writ of mandamus for the enforcement of directive principles.

During the framing of the fundamental rights the memories of brutal suppression of the basic human rights of the individuals were alive in the minds of the framers. As early as the establishment of the Indian National Congress the implementation of fundamental rights was high on the agenda. The first formal demands for a bill of rights were incorporated in the Constitution of India Bill, 1886. This shows the mindset of the framers while drafting the fundamental rights.

The fundamental rights therefore in contrary to the directive principles were made enforceable and justiciable in nature. They create negative obligations on the state, i.e. the state is required to refrain from doing something, and it is easier to enforce through a court a negative, as compared to a positive, obligation. Accordingly Article 13 also declares that a law inconsistent with a fundamental right is void. But there has never been any provision in the constitution as regards the directive principles. Therefore a law inconsistent with a directive principle cannot be declared invalid.

3.1 Judicial Discretion and the “Democratic Objection”

The judiciary, led by the Supreme Court, it has come up with new policies sending a signal that the law needs to change according to the needs of the society. According to the horizontal power sharing in the constitution power is distributed amongst the three organs of the government

¹ AIR 1983 SC 624.

(judiciary, legislature and the executive). Therefore the court has sought to replace the division of powers among three branches of government “with a 'Unitarian' claim of formal judicial supremacy”.

This supremacy emerged out of both substantive and procedural developments in the Indian Supreme Court's jurisprudence. The directive principles in Part IV of the Constitution were drafted as non-justiciable guidelines, but have become justiciable rights under the right to "live with dignity" in Article 21.²

The Right to Food litigation exemplifies this transformation and shows how the Supreme Court has become a major player in formulating national socioeconomic policy. As of 2005, the Court in that case had issued forty-four interim orders and appointed two Commissioners charged with “monitoring and reporting to this Court of the implementation by the respondents of the various welfare measures and schemes.”³ This sort of judicial policymaking calls forth a serious democratic objection. The Court today constrains democratic decision making on a wide range- and potentially indefinite-set of policy issues, this sort of judicial policymaking calls forth a serious democratic objection. The Court today constrains democratic decision making on a wide range- and potentially indefinite-set of policy issues, leading many commentators to declare it the "most powerful court in the world."⁴

The court's role in Indian political life is difficult to compare with that of a Rawlsian liberal conception of democracy. The theory propounds the concept of a loose “horizontal” separation of powers. In the present context the Michelman's theory seems to be more apt. Michelman does not rely or even accept the very concept of the separation of powers trope, in which legislatures make policy choices without regard to law and courts appear later to review the legality of legislative action. In fact, he argues that the democratic objection, which grows out of this view, "trades on a particular, contestable and indeed poor, conception of democracy."⁵ Therefore the society need not accept this narrow conception of separation of powers or the very idea that the norms which are

² Mullin v. Adm'r, Union Territory of Delhi, (1981) 2 S.C.R. 516 (India).

³ <http://www.righttofoodindia.org/orders/interimorders.html> seen on 30.07.2015.

⁴ Alexander Fischer, Higher Law Making as a Political Resource: Constitutional Amendments and the Constructive Fragmentation of Sovereignty in India, in SOVEREIGNTY AND DIVERSITY 186 (Miodrag Jovanovi6 & Kristin Henrard eds. 2008).

⁵ JOHN RAWLS, POLITICAL LIBERALISM 217 (1993).

not enforceable in the court of law should not be a part of the constitutional law. In fact, Michelman puts forth a different conception—one in which constitutional law figures prominently in the "conduct of public affairs," constraining the acts of the executive and legislature.

This view relies on a framing of socioeconomic guarantees as directive principles guiding legislative action toward certain societal goals, and not as judicially enforceable rights. Even if courts are kept away from adjudicating socioeconomic rights, there is still value in placing these rights within a Constitution. The value lies in a subtle but important effect that constitutional status confers—it would create a "certain pressure on the frame of mind" of citizens and their representatives to consider principles of socioeconomic justice in their deliberations and public policy decisions. These principles would not overly constrain democratic policymaking but give a "certain inflection to political public reason."

This is what the framers of the constitution had in my mind when they separated Fundamental Rights from the Directive Principles by making the former justiciable and the latter as non-justiciable.

Firstly as a result of this the court started the expansive interpretation of the fundamental rights. For example in *Maneka Gandhi v Union of India*⁶ the court had given an expansive interpretation of Article 21. In the case of *Mullin v. Adm'r, Union Territory of Delhi*⁷, the Supreme Court declared that Article 21 meant right to "live with dignity" which included "the bare necessities of life like nutrition, clothing and shelter" overhead. However the court placed no limits to the expansive interpretation of this fundamental right. The "Right to Food" litigation is emblematic of that growth—it began as a case about the supply and distribution of food to famine-affected populations, but now encompasses issues of homelessness, maternity, and child development. In another recent case, the Supreme Court declared that even the "right to sleep" falls within the ambit of Article 21. According to the Court, "*sleep is essential . . . to maintain the delicate balance of health necessary for its very existence and survival.*"⁸

⁶ 1978 AIR 597.

⁷ (1981) 2 S.C.R. 516.

⁸ In Re Ramlila Maidan Incident Dt. 4/5.06.2011 v. Home Sec'y, Union of India, 2012 STPL (Web) 124 S.C. (India) at 76.

Cases like this suggest that the right to “live with dignity” has potentially infinite scope. It calls to mind W.E. Forbath's right to “social citizenship” that would provide assurances to all citizens that they can make a decent living through forms of social participation that provide the opportunity for self-improvement, material interdependence, and security for all.⁹

A second way in which the Indian Supreme Court has increased its influence on socioeconomic policy is by liberalizing the procedures and relaxing the requirement of *locus standi*”. It has informally created a new kind of jurisdiction named as “epistolary jurisdiction”. This has made it easy for the common people to approach the court. It has largely come to the aid of the NGO’s, where they can voice their grievances on behalf of the large segments of the population, and in process, obtain relief against the government.

For example in the case of *PUCL v. Union of India*¹⁰, PUCL filed a writ petition on the grounds of article 32 alleging right to food. It had filed a writ petition on behalf of thousands affected by the famine, even though the NGO was directly not affected. However the court accepted the petition although it did not fulfill the requirements of “locus standi” in strict sense. Over time, the case expanded to include all Indian states as respondents, meaning that the Supreme Court's interim orders could potentially impact all Indian citizens.

Finally, a third and related means toward greater policymaking authority for the Indian Supreme Court is a series of procedural innovations; this includes the continuing mandamus and the appointment of special commissions that enable it to monitor compliance with its orders. The "Right to Food" litigation has continued for more than eleven years, with the Court having issued forty-four interim orders by 2005 and several more since then.¹¹ More strikingly, the Court instructed both central and state governments on how to allocate resources under various socioeconomic policy schemes and instituted timelines for their completion. The Court also appointed special commissioners to monitor and report whether government actors are complying with the Court's orders.

⁹ W.E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1887-88 (2001) [hereinafter Forbath, *Constitutional Welfare Rights*].

¹⁰ Writ Petition (Civil) No. 196 (2001) (India).

¹¹ <http://www.righttofoodindia.org/orders/interimorders.html>, seen at 31.07.2015.

Together, these developments illustrate the judiciary's rise as a policymaking institution and call forth a serious democratic objection. The fact that socioeconomic rights are couched in very broad terms under Article 21 is problematic in the Indian context, but need not be per se. For instance, the Indian Supreme Court continued to locate a number of rights within the right to "live with dignity," but instead of formulating and enforcing its own policy prescriptions to remedy violations of those rights, it simply held government policies to a reasonableness standard. In this scenario, a "constitutionally declared right . . . of social citizenship would leave just about every major issue of public policy still to be decided."

Going forward, the Indian Supreme Court would lessen the democratic objection if it were to clearly prescribe limits on the "right to live with dignity" and set forth a standard of review for socioeconomic policy schemes. However, this seems unlikely in light of judicially-created procedural innovations at every stage of litigation that have allowed the Court to transform itself into a policymaking institution capable of affecting change on a large scale.¹²

4.1 The Contractarian Objection to Constitutional Socioeconomic Rights in India

The contractarian objection focuses on the difficulty of measuring government compliance with socioeconomic rights. Social contractarians maintain that a citizen will only agree to abide by a constitution-which provides the government coercive power to compel her to act in prescribed ways and the ability to make policy choices with which she disagrees-if she sees other citizens and her government also complying with this constitution.¹³ This ability to observe others abiding by the constitution is essential. It allows each citizen to confirm that the constitution's provisions, entailing commitments that make it universally acceptable, are in fact real.¹⁴

The Indian Supreme Court has assumed an increasingly prominent role in the formulation and enforcement of socioeconomic policy through both substantive and procedural shifts in its jurisprudence. But has it set forth publicly acceptable reasons to justify its decisions to relax procedural requirements under Article 32 of the Constitution and to make socioeconomic rights

¹² Clark D. Cunningham, Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience, 29 J. INDIAN L. INST, 522-23 (1987).

¹³ Frank I. Michelman, The Constitution, Social Rights, and Liberal Political Justification, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 35-36.

¹⁴ JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); RAWLS, JUSTICE AS FAIRNESS.

justiciable under Article 21? This is the central question posed by the contractarian objection. It shifts our focus from the Court's role in India's constitutional framework to the legitimacy of its decision-making process.

The contractarian objection begins with the premise that a constitution's legitimacy requires, at a minimum, that rational citizens (acting reasonably) understand its terms and can agree to be governed by them.¹⁵ If citizens cannot understand the terms or are unable to determine if their government or fellow citizens are complying with constitutional principles, they will not regard the constitution as a legitimate source of political authority.¹⁶ To put this objection in the context of socioeconomic rights, recall that Rawls clearly differentiates between the first principle of justice that sets out a scheme of basic liberties that are “constitutionally essential,” and the second principle, which pertains to non-constitutionally essential questions of social and economic policy.¹⁷ A constitutional system can be legitimate if it complies with a range of basic liberties, but nonetheless unjust for failing to pursue socioeconomic justice.¹⁸

While the second principle is not constitutionally essential, it nonetheless pertains to what Rawls calls “basic justice” and is therefore governed by the constraint of public reason.¹⁹ This requires citizens and their public institutions to present each other with publicly acceptable reasons for their political views, to be willing to listen to others, and to display “fair-mindedness in deciding when accommodations to their views should reasonably be made.” This requires citizens and their public institutions to present each other with publicly acceptable reasons for their political views, to be willing to listen to others, and to display “fair-mindedness in deciding when accommodations to their views should reasonably be made.” The constraint of public reason applies more stringently to the Supreme Court. In many democratic societies, including India's, the Supreme Court is the final arbiter of constitutional interpretation. Its justices must articulate the best interpretation of the Constitution through reasoned opinions that are grounded in political values that reflect their best understanding of the public conception of justice. Unlike ordinary citizens or their elected

¹⁵ Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE*, 35, (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

¹⁶ *Ibid* at 36.

¹⁷ *Supra*, note 15, at 46.

¹⁸ See Michelman, *Justice as Fairness*, *supra* note 14, at 1414.

¹⁹ RAWLS, *POLITICAL LIBERALISM*, *supra* note 15, at 214; see Michelman, *supra* note 14, at 37-38.

representatives who deliberate on a range of policy issues, the justices are concerned with the higher (constitutional) law and matters of basic justice, and therefore must only use public reasons to explain their decisions. The need for the Court to explain its decisions through public reasons is heightened with regard to socioeconomic rights. These rights "lack the trait of transparency," as it is difficult to measure if they are being realized at any given moment. This lack of transparency accounts for one of the primary distinctions between the first and second principles. Rawls believes that in comparison to the second principle, it is far easier to tell whether . . . [Constitutional] essentials are realized." He states that the realization of the second principle is "always open to reasonable differences of opinion . . . [it] depends on inference and judgment in assessing complex social and economic information." Thus, Rawls argues that the first principle should apply "at the stage of the constitutional convention," while issues of socioeconomic justice should be decided by elected representatives after the basic constitutional structure is in place. In essence, this is the structure adopted by the framers of the Indian Constitution. They set forth a scheme of basic liberties in Part III of the Constitution, followed by non-justiciable Directive Principles of State Policy in Part IV. The Indian Supreme Court altered this constitutional structure by interpreting Articles 21 and 32 to make socioeconomic rights justiciable and allow the Court to assume a central role in their enforcement.

As the "exemplar of public reason," the Supreme Court's decisions must reasonably comport with the text of the Constitution, constitutional precedents, and political understandings of the Constitution to articulate "a coherent constitutional view over the whole range of their decisions." If its decisions do not meet these criteria, citizens might lose confidence that public reason applies to decisions of socioeconomic justice and the "extant system of positive legal ordering is unjust." More broadly, if citizens cannot understand what constitutionally essential provisions require, they will doubt the legitimacy of the whole constitutional system.

With respect to Article 32, the Court's decisions appear to fit within the constraint of public reason. As a preliminary matter, the text of Article 32 sets forth a flexible standard rather than a fixed rule that allows the Court some interpretive discretion. It states that citizens may petition the Supreme Court via "appropriate proceedings" to obtain relief for violations of fundamental rights. As discussed in Part III, *supra*, the term "appropriate proceedings" originally limited standing to petitioners directly affected by a challenged law. Yet, over time the Court loosened this

requirement to accommodate petitions from any member of the public on behalf of disadvantaged individuals or groups. This interpretation is within the bounds of public reason because the phrase “appropriate proceedings” clearly sets forth a standard rather than a rule. All mainstream theories of constitutional interpretation, with the exception of what Jack Balkin calls “original expected application,” would accept that the phrase “appropriate proceedings” can (or even should) evolve over time. The Court is also quite clear in its reasoning on this question of interpretation. For instance, in *Bandhua Mukti Morcha*²⁰, Justice Bhagwati states,

“There is no limitation in regard to the kind of proceeding envisaged in clause (1) of Article 32 except that the proceeding must be “appropriate” and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely, enforcement of a fundamental right.”

Justice Bhagwati also described the changing nature of litigation, where “Public Interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government.” Here, Justice Bhagwati defends the Court's evolving interpretation of Article 32 on the grounds that “appropriate proceedings” should be interpreted according to the purpose of the litigation in question, and the purpose of public interest litigation, particularly in a country like India, is to allow ordinary citizens to approach the Court to hold the government accountable on matters of social justice.

While this justification does not lessen (and might even reinforce) the democratic objection, it overcomes the contractarian objection. The Court has interpreted Article 32 in a manner consistent with the text that recognizes the framers' broader goals of social revolution, as well as the real need for PIL in India. This fulfills the constraint of public reason: the Court's reasoning is transparent, clearly articulated, and is accessible to all Indian citizens in light of their own reasons.

The Court's reasoning with regard to Article 21 is more problematic. The Court has interpreted the right to life expansively to include a right to “live with dignity” which includes a range of socioeconomic rights. However, the structure of the Indian Constitution clearly demarcates fundamental rights in Part III and directive principles in Part IV. More importantly, Article 37 of the Constitution states that directive principles “shall not be enforceable by any court” even though

²⁰ 1984 AIR 802.

these principles are “fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” Unlike Article 32, which uses a flexible standard, Article 37 sets forth a clear rule. The text of Article 37 is unambiguous and does not permit any deviation. Indeed, no major theory of constitutional interpretation would endorse a judicial interpretation of a bright-line rule that deviates from the plain meaning of the language of the text.

The Indian Supreme Court therefore has a heavy burden in justifying its deviation from the text of Article 37. In the seminal cases that transformed the meaning of Article 21 into a broader right to live with dignity, the Court's reasoning is inadequate-it either sidesteps or completely ignores the clear textual command of Article 37.

In the *Maneka Gandhi Case*, the Court first first set out a broader interpretation of Article 21, the Court included substantial dicta about the right to life without providing any justification for these pronouncements. It says, for instance, that fundamental rights in Part III of the Constitution “*represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.*”

It then builds on these broad assertions in Francis Coralie, proclaiming that the right to life “*includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.*”

As with the excerpt from Maneka Gandhi, this definition of the right to life appears to be invented out of whole cloth, without reference to any precedent, constituent assembly debate, or other source of law. Moreover, both the Maneka Gandhi and the Francis Coralie decisions fail even to mention Article 37, much less explain how the Court got past the plain meaning of Article 37 when it reinterpreted Article 21 to make socioeconomic rights justiciable.

Justice Bhagwati provided some hints as to the Court's reasoning on this issue in the. First, he acknowledges that directive principles “are not enforceable in a court of law” and the Court therefore cannot compel the government to pass laws or executive orders to meet socioeconomic goals. Still, he adds that if the state has already passed legislation impacting socioeconomic justice,

state actors “can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.”

The distinction drawn here is illusory. Article 37 does not merely state that courts cannot compel the state to pass laws or orders; it flatly prohibits the enforcement of directive principles. Justice Bhagwati does not put forth evidence to support his view that Article 37 is not intended to apply to judicial review of existing laws. Further, even if the Court is permitted to review existing laws affecting socioeconomic policy, it has never clearly stated (in this case or otherwise) exactly to what standard the government is held. Additionally, as the "Right to Food" litigation demonstrates, the Court does not confine itself to a “reasonableness” or “minimum core” standard, but actually imposes its own policy prescriptions and timelines for completion on elected officials.

Justice Bhagwati's opinion in *Bandhua Mukti Morcha* also states that certain directive principles (Articles 39, 41, and 42) provide Article 21 with its "life breath." These articles direct the state to secure, inter alia, a fair economic system, adequate livelihood, education, public health access, and humane working conditions for all citizens. According to Justice Bhagwati, these principles constitute "the minimum requirements which must exist in order to enable a person to live with human dignity." The Court therefore implies a degree of interplay between Parts III and IV of the Constitution. It uses the directive principles to determine the scope and meaning of fundamental rights. Thus, Part IV of the Constitution is not justiciable on its own, but plays an important role in defining what the "right to life" encompasses.

5.1 Fundamental Rights and Directive Principles are Complementary

The next phase in the battle between fundamental rights and directive principles was characterized by efforts to interpret them in such a way that they are seen as complementary and supplementary to each other. The new approach was motivated by the criticism that previous decisions emphasized fundamental rights to such an extent that very little came from implementing the directive principles. Sharma observes that it is tragic to note that the judiciary, when it comes to social change, has “*failed to appreciate the insights of the Constitution and needs of society and*

has not shown evidence of foresight of the inevitable, futuristic projections”.²¹ He argues as follows:

*“Our judiciary has unwillingly allowed itself to be unduly obsessed by static jurisprudential concepts, procedural technicalities and rules of construction born and grown in foreign soil and appropriate to other developed societies.”*²²

One of the first cases in which the Supreme Court adopted a more conciliatory approach was that of *Sajjan Singh v. State of Rajasthan*.²³ In this case the court heard that if the chapter on fundamental rights were not amended, there was a great danger that the much needed socioeconomic reforms would not be able to take place. The court stressed the fact that the fundamental rights and directive principles formed the basis of the Constitution and that they should therefore be interpreted harmoniously.²⁴ Although the court maintained that the fundamental rights were not amendable, a new attitude was initiated, namely that these rights should be interpreted in the light of the ideals set by the directive principles.

An important case in the development of the relationship between fundamental rights and directive principles, was *Chandra Bhawan Boarding and Lodging Bangalore v The State of Mysore*.²⁵ In this case the petitioner challenged the provisions of the Minimum Wage Act, 1948 on the basis that it violated Art 14 of the Constitution. He alleged that the act conferred 'unguided and uncontrolled' discretion to the government to fix minimum wages, which interfered with the freedom of trade. The state replied that in terms of the directive principles it was its duty to provide a basis for minimum wages.

The court ruled that there was no conflict between the fundamental rights and directive principles and that they were 'complementary and supplementary'. Directive principles enable the state to place various duties on its citizens, and if such duties are not fulfilled the 'hopes and aspirations aroused by the Constitution will be belied if the minimum of the lowest of our citizens are not met'. The court concluded as follows:

²¹ S K Sharma Justice and Social Order in India (1984) at 26.

²² *Ibid.*

²³ AIR 1965 SC 845.

²⁴ *Supra* at 846.

²⁵ 1970 SCR 600.

'Freedom to trade does not mean freedom to exploit. The provisions of the Constitution are not erected as barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the preamble to the Constitution . . . While rights conferred under Part 3 are fundamental, the directives given under Part 4 are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part 3 and Part 4. They are complementary and supplementary to each other.'

This equality of status of the chapters on fundamental principles and directive principles was formulated as follows in ***Keshavananda Bharati v. State of Kerala***²⁶:

“Perhaps the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the State and the directive principles, would be to look upon the directive principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits to that path, which could be mended or amended by displacements, replacements or curtailments of enlargements of any part according to the needs of those who had to use the path.”

The second phase was thus characterized by the Supreme Court's view that instead of the fundamental rights and directive principles being contrary to each other they were complementary in nature. The reasoning in this phase was as follows:

- The duty of the court is to establish and maintain a balance between the interests of the individual and the obligation of the state to undertake socio-economic programmes for the benefit of all the people.
- Rather than asking which of the sets of principles carries more weight, the directive principles should be used as an instrument to interpret and better understand the scope of fundamental rights.
- The courts were inclined to be more pragmatic in comparison with the previous dogmatic stance, which left very little room for the state to fulfil its constitutional duties.

²⁶ 1973 4 SCC 225.

6.1 Directive Principles as the Spirit of the Constitution

The current phase of development in the relationship between fundamental rights and directive principles is characterized by the activist role that the courts are playing in effecting socio-economic change. This approach is based on primarily two arguments. The first is that it was the intention of the framers of the Constitution that the state should not only be aware of what was expected of it, but that it should have constitutional support for undertaking certain socio-economic projects. The second is that, due to the conservative approach of the courts through the years, the state has not succeeded in effectively fulfilling its obligations as formulated in the directive principles. The desperate conditions, in which millions of people still found themselves, necessitated a joint approach by the legislature, the executive and the judiciary to address the intense socio-economic disparities.

The new philosophy was reflected in the watershed case in 1977 of *Maneka Gandhi v. Union of India*.²⁷ Since this case the courts have been taking an increasingly active position in addressing the plight of the underprivileged. The Supreme Court held that the preamble and the directive principles represented the contours and parameters of public interest and that state action could limit certain individual rights if this was in the public interest.

Fundamental to this new approach is the belief that the function of the courts is not only to interpret the law but 'to make it by imaginatively sharing the passion of the Constitution for social justice'. The active role of the courts since the Maneka Gandhi case has gained such momentum that 'by-an affirmative action the courts are trying to force the government to create favourable conditions for effective realisation of the new individual, collective, diffuse rights'.

The status of the directive principles was enhanced by Art 31c, which was included in the Twenty-Fifth Amendment in 1971. This amendment and the Forty-Second Amendment in 1976 gave primacy to the directive principles in certain circumstances over fundamental rights. The amendments were introduced by the Congress Government in the belief that it was the only way to give effect to the directive principles without their being restricted by fundamental rights. The early 1980s witnessed a resurgence of the debate on fundamental rights and directive principles with the case of *Minerva Mills Ltd v. Union of India*. The petitioners owned a textile company

²⁷ 1978 1 SCC 248.

which had been nationalized under the Sick Textile Undertaking (Nationalization) Act, 1974. The petitioners questioned the constitutional validity of the act as well as the amendment to the Constitution. Section 55 of the amendment stated that no amendment to the Constitution could be called into question by any court and that there was no limitation on the power of parliament to amend the Constitution. The court held that the amendment was void due to the fact that parliament could not distort the Constitution out of recognition by amending it. The petitioners argued that fundamental rights could not be infringed and that the disputed Art 31c 'virtually abrogates and destroys fundamental rights in normal times'.

The court declared that parliament had not the power to 'destroy' the guarantees of the fundamental rights to achieve the goals set by the directive principles.²⁸ It concluded that:

“The goals set out in Part 4 (directive principles), have therefore, to be achieved without the abrogation of the means provided for by Part 3 (fundamental rights). It is in this sense that Parts 3 and 4 together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.”

The court concluded that parliament had acted outside its authority by giving precedence to the directive principles over the fundamental rights of Arts 14 and 19.

This decision was questioned and overruled by the Supreme Court in *Sanjiev Coke Mfg Co v M/s Bharat Coking Coal Ltd.*²⁹ The court suggested that the part of the Minerva case which dealt with Art 31c was an obiter dictum and therefore not binding. The court therefore ruled that the Coking Coal Mines (Nationalization) Act, 1972 was protected by Art 31c of the Constitution and had preference over the fundamental rights on the basis that it gave effect to Art 39(6)105 of the directive principles. The decision of the court in Sanijiev Coke supports the argument that “the fundamentalness of the directives is based on natural law and they are equally fundamental along with fundamental rights”.

²⁸ AIR 1980 SC 1789.

²⁹ AIR 1983 SC 239.

The uncertainty of the two conflicting decisions by the Supreme Court was settled in *State of Tamil Nadu v. L. Abu Kavier Bai*.³⁰ In this case the court held that although the directive principles were not enforceable, it was the duty of the court to make a real attempt to harmonize them with the fundamental rights. The court referred to the decision of the Constituent Assembly to provide for two separate chapters:

“We must appreciate that the reason why the founding fathers of our Constitution did not advisedly make these principles enforceable was perhaps due to the vital consideration of giving the Government sufficient latitude to implement these principles from time to time according to capacity, situations and circumstances that may arise.”

7.1 Conclusion

Therefore, it can be concluded that liberty and equality are complementary to each other and are not contradictory. In our constitution basically the “fundamental rights” represent the characteristics of liberty and “directive principles” represent the characteristics of equality. Although the directive principles may be unenforceable in nature still then they are very important for the interpretation of fundamental rights. In the paper itself it has been seen that in most of the cases that the fundamental rights are read with the directive principles of the state policy in order to understand the meaning of the fundamental rights.

The main reason for which the framers of the Constituent Assembly made the directive principles unenforceable was that the economy of the nation was at a very pitiable condition. However now with the rapid growth of the Indian economy it can be said that the government has enough resources to make the directive principles enforceable. Therefore the judiciary has stepped up to give preference to the directive principles over fundamental rights in order to ensure justice.

³⁰ AIR 1984 SC 725.

FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY: CO-EXISTENCE OR CONFLICT?

*Anubha Gangal**

Fundamental rights and directive principles of state policy as enshrined in the Indian constitution denote the inalienable rights and duties of an individual. The idea of constitutionally embodied fundamental rights emerged in India in 1928 itself. The concept of Directive Principles embedded in the Constitution was inspired by and based on Article 45 of the Irish Constitution. The fundamental rights as enlisted in Part III of the constitution are a direction to the state regarding its obligations towards the individuals, while the directive principles of state policy in Part IV reflect the ideals and socio-economic goals that the state should aim to achieve in its governance. The fundamental rights are justifiable and guaranteed by the constitution, while the directive principles of state policy are directives to the state and the government machinery which are unenforceable in courts of law.

*Time and again the conflict between the enforceability of fundamental rights and directive principles of state policy has come to the fore. The reason behind the conflict seems to be the phraseology of the provisions with respect to the enforceability of both the parts and their interpretation by the courts of the land. Part III of the constitution is explicitly said to be enforceable in a court of law and Part IV is merely directive in nature, which suggests its unenforceability. In **State of Madras v. Srimathi Champakam**, the apex court held that “directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights”.*

The legislature had expressed its disappointment regarding the judiciary’s blatant interpretation and emphasis on the fundamental rights while ignoring the scope of directive principles of state policy. It was felt that a balanced emphasis is required to be given to both fundamental rights and

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*the directive principles of state policy. Cases like **Chandra Bhawan Boarding and Lodging Bangalore v State of Mysore, Kesavanda Bharati v State of Kerala and Minerva Mills Ltd. v Union of India** stressed on the harmonious relation between Part III and Part IV of the constitution and encompassed that they were in fact supplementary to each other.*

Thus to ensure development not only on micro level, but on macro level; the guardians of the constitution need to harmoniously interpret and apply the provisions related to fundamental rights and the directive principles of state policy. This paper seeks to understand the relation between these two constitutional provisions and their application in order to achieve balanced growth of human relations. It seeks to understand the rationale behind activist judges giving precedence to directive principle of state policy over fundamental rights. Through this paper the author aims to reflect over recent case laws and trace the development of this ideology.

1.1 Introduction

Rights that do not flow from duty well performed are not worth having. - Mohandas Gandhi

Fundamental rights and directive principles of state policy as enshrined in the Indian constitution denote the inalienable rights and duties of an individual. The fundamental rights as enlisted in Part III of the constitution are a direction to the state regarding its obligations towards the individuals, while the directive principles of state policy in Part IV reflect the ideals and socio-economic goals that the state should aim to achieve in its governance. The fundamental rights are justifiable and guaranteed by the constitution, while the directive principles of state policy are directives to the state and the government machinery which are unenforceable in courts of law. The important question is whether there is in fact a conflict between the two parts of the constitution or a conceptual overlapping. This paper seeks to understand the relation between these two constitutional provisions and their application in order to achieve balanced growth of human relations. It seeks to understand the rationale behind activist judges giving precedence to directive principle of state policy over fundamental rights.

Part III of the constitution contains a long list of fundamental rights. This chapter of the constitution of India has very well been described as the Magna Carta of India. The inclusion of the chapter on fundamental rights in the constitution of India is in accordance with the modern

democratic thought, which ideally seeks to preserve which is an indispensable condition of a free society. The aim of having a declaration of fundamental rights is that certain elementary rights, such as, right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majority in legislature of the country should not have a free hand in interfering with these fundamental rights.¹

The Supreme Court has time and again emphasized the importance of fundamental rights (Articles 14-32) and how they are not a gift from the state to the citizens, but a confirmation of their existence and protection.² In *Maneka Gandhi v. Union of India*, the Supreme Court held that the provisions of Part III should be given widest possible interpretation.³

The directive principles of state policy contained in Part IV of the constitution (Articles 36-51) set out the aims and objectives to be taken up by the States in the governance of the country. The concept of Directive Principles embedded in the Constitution was inspired by and based on Article 45 of the Irish Constitution.⁴ Nigeria had the opportunity of experiencing Directive Principles of State Policy in 1970 with the introduction of the chapter on Fundamental Objectives and Directive Principles of State Policy to their Constitution. It is stated that the ideology that underlies the Directive Principles of State Policy is to develop the “political ideals as to how society can be organized and ruled to be the best advantage of all”⁵. Parts III and IV of the Indian Constitution were once described by CJ. Chandrachud to be, ‘the conscience of the Constitution.’⁶

The idea of constitutionally embodied fundamental rights emerged in India in 1928 itself. The Motilal Committee Report of 1928 clearly envisaged inalienable rights derived from the Bill of Rights enshrined in the American Constitution to be accorded to the individual.⁷ The directive principles are the ideals which the union and state governments must keep in mind while they formulate policy or pass a law. They lay down certain social, economic and political principles,

¹ *A. K. Gopalan v. Union of India*, AIR 1950 SC 27

² *M. Nagraj v. Union of India*, AIR 2007 SC 71

³ AIR 1978 SC 597

⁴ Maureen Callahan Vandermay, *The Role of the Judiciary in India's Constitutional Democracy*, 20 HASTINGS INT'L & COMP. L. REV.103, [1996-1997]

⁵ Akande J.O, *Fundamental Objectives and Directive Principles of State Policy within the Framework of a Liberal Economy*, ;Vol. 4, THE ADVOCATE: A JOURNAL OF CONTEMPORARY LEGAL ISSUES at p. 691 (2000)

⁶ *Minerva Mills v Union of India* [1980] 2 SCC 591

⁷ Vuayashri Sripat, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 Am. U. INT'L L. REV, 428 (1998).

suitable to peculiar conditions prevailing in India. In the words of Sri G.N. Joshi “they constitute a very comprehensive political, social and economic programme for a modern democratic state.”

8

Dr. B R Ambedkar in the constituent assembly emphasized on the objective to bring about economic democracy and the idea to achieve it. He said that:

“Having regard to the fact there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the idea of economic democracy, to strike in their own way, to persuade the electorates that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act. It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing. It is therefore, no use saying that the directive principles have no value. In any judgment the directive principles have a great value; for they lay down that our ideal is economic democracy.”⁹

Part IV of the Constitution commences with Article 37, which states: “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

This article on subsequent readings highlights three underlying principles, first – non-enforceability means that no one can ask the court to strike down a law that stands in contravention to the directive principles; unlike fundamental rights. But does non-enforceability also bar the Courts from using the Directive Principles in considering, interpreting and adjudicating upon other laws? Second –Part III of the constitution guarantees rights that are ‘fundamental’, while part IV lays down principles that are ‘nevertheless fundamental in the governance of the country’. Does ‘fundamental’ as a prefix to the rights under part III and as a characteristic in part IV, imply

⁸ DR. J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA 435, (51st ed 2014)

⁹ *Constituent Assembly Debates*, Vol. III. At p. 494-95.

conceptual overlapping? And third – what is the nature of the ‘duty’ that Article 37 imposes upon the State? Is it a constitutional duty, a legal duty or a moral duty?

2.1 The Early Notions of Judicial Interpretation

According to Article 37, the directive principles, though they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making law, they are expressly made non-justifiable. On the other hand, fundamental rights are enforceable by the courts (Article 32) and the courts are bound to declare as void any law that is inconsistent with the fundamental rights.

In *State of Madras v. Srimathi Champakam Dorairajan*,¹⁰ the Supreme Court observed that “The directive principles of state policy which by Article 37 are expressly made unenforceable by courts cannot override the provisions of Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. Directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.” It held the chapter on fundamental rights as sacrosanct and in case of any conflict between fundamental rights and directive principles, the fundamental rights would prevail.

The Court’s attitude in this case reflected the strict adherence to the enforceability of fundamental rights and unenforceability of directive principles. It reinstated the non-rigid nature of directive principles in the constitution and highlighted their major drawback; that of non-justifiability. The *Champakam Dorairajan case* defined the status of the directive principles as subordinate to that of fundamental rights.

Conclusively a holistic reading of Article 37 reads as, first – the non-enforceability clause is limited to just that: citizens may not move the Court seeking remedies for either breach of a directive principle, or for requiring Parliament to enact a directive principle into law. The objective of the framers was to protect the government from numerous litigation complications and instead focus on the issues at hand. The second and third parts – that highlight the fundamental nature of the Principles and the duty of the State to apply them; emphasize the importance of these principles and the constitutional obligation to observe them. Article 37, thus, is Pecksniffian as it creates a

¹⁰ AIR 1951 SC 228.

protected dimension with respect to the enforceability of directive principles, which renders their application a constitutional impossibility. While within the same dimension it highlights their indispensable characteristic.

This strict approach continued in *Muir Mills v. Suti Mills Mazdoor Union*¹¹, where the Directive principles were invoked in argument over workmen's rights to bonus payments. Muir Mills was not even a question of enforcement, as it involved only a question of interpretation. Nonetheless, the Court refused to use the Principles even as interpretive guides, preferring to adhere instead to traditional common law employment concepts of wages and bonuses. Various state High Courts followed the Supreme Court's lead, taking the non-enforcement clause as evidence that the Principles had no role whatsoever to play in the judicial task. In *Jaswant Kaur v. State of Bombay*¹², the Bombay High Court refused to let the directive principles guide its interpretation of the Bill of Rights, holding categorically that "any article conferring fundamental rights cannot be whittled down or qualified by anything that is contained in part IV of the Constitution."¹³

In this early phase of the Court's history, therefore, the Directive Principles were a classic example of what James Madison referred to as "parchment barriers". In the case of, *Mohd. Hanif Quareshi & Others v. The State Of Bihar*¹⁴ the petitioners, who were engaged in the butcher's trade and its subsidiary undertakings, challenged the constitutional validity of three Acts that together put a ban on the slaughter of animals; cows and her progeny; cows, buffaloes, heifers, bullocks and bulls, respectively. No exception was made in these Acts for bona fide religious practices. The three Acts were enacted in pursuance of the directive principle of state policy contained in Article 48 of the constitution. The petitioners challenged the validity of the Acts on the ground that they were violative of their fundamental rights under Articles 14, 19(1) (g) and 25 of the constitution. The court held that the directive principles laid down in Part IV of the constitution have to conform to and run subsidiary to the fundamental rights in Part III.

The approach of the court in dealing with matters relating to conflicts between fundamental rights and directive principles was rigid. The principles applied by the courts around that time were

¹¹ 1955 SCR (1) 991.

¹² AIR 1952 Bomb. 461.

¹³ Ibid [4] (Chagla C.J.).

¹⁴ 1958 AIR 731, 1959 SCR 629.

streamlined to strictly interpret Article 37 and make a clear stand on the supremacy of the fundamental rights. The court's attitude reflected the stiff and rigid ideology of the judiciary of that time which was not willing to encourage free interpretations. The judiciary was going by the book, in the literal sense. This approach makes us question the real intention of the constituent assembly in including the directive principles of state policy in the constitution.

In his initial constituent assembly speech Dr. Ambedkar repudiated the objection that the Directive principles were no more than pious wishes, arguing that no legal force did not imply no binding force. Ambedkar's use of the word "binding" (as opposed to "political" or "moral"), a word that is equally at home in both a legal and a non-legal context, seems to indicate that the Principles, while falling well short of enforceability, were not meant to be legally irrelevant either.¹⁵

Even in the recent case of *Lily Thomas and Ors. v. Union of India and Others*¹⁶, the Supreme Court has reiterated that it has no power to give direction for enforcement of the Directive Principles of State Policy and those do not create any judiciable right and are, thus, not enforceable by the courts.

3.1 The Transformation in the Outlook of the Judges

The Courts' attitude underwent a change in the subsequent years as it revised the yardsticks for determining the validity of the directive principles. The development of a broad minded and open ended outlook took time to develop and was not uniform initially. The development should be traced chronologically to best understand the revolution in the judiciary's mindset.

In *State of Bombay v. Balsara*,¹⁷ the Supreme Court gave weight to Article 47 which directs the state to bring about prohibition of consumption of intoxicating drink except for medical purposes to support its decision that the restriction imposed by the Bombay Prohibition Act was a reasonable restriction on the right to engage in any profession or carry on any trade. This was a positive step towards recognizing the importance of directive principles in the governance of the country while achieving humanitarian objectives.

¹⁵ *Constituent Assembly Debates*, Vol. VII.

¹⁶ AIR 2000 SC 1650.

¹⁷ AIR 1951 SC 318 at pg. 329.

When the court dealt with Zamindari abolition cases its attitude was considerably modified. In *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh*¹⁸, the court held that our Constitution gives protection to the right of private property by article 19(1)(f) not absolutely but subject to reasonable restrictions to be imposed by law in the interest of the general public under clause (5) and grants the State the power, if it may so exercise, under Article 31, to deprive the owner of his property by authority of law subject to payment of compensation if the deprivation is by way of acquisition or requisition of the property by the State. It is thus quite clear that a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution. It further observed that ‘it cannot be overlooked that the directive principles set forth in Part IV of Constitution are not merely the policy of any particular political party but are intended to be principles fixed by the Constitution for directing the State policy whatever party may come into power.’

In *Re Kerala Education Bill*¹⁹, the Supreme Court observed that though the directive principles cannot override the fundamental rights, the court should not completely ignore them in their interpretation of fundamental rights. While reaffirming the primacy of the fundamental rights, the Court nonetheless opened the gates for Directive principles to play a tangible, if subsidiary role in interpretation, holding that the “scope and ambit” of the fundamental rights should be determined in such a harmonious way, that full effect is given both to Part III and Part IV.

Part IV comprises of “goals”, and Part III contains “rights” that the government must respect in pursuit of its goals. This, according to the Courts is the a priori distinction between Part III and Part IV, which ought to inform the judicial approach to issues involving fundamental rights and DPSPs. In the aftermath of *In Re Kerala Education Bill*, the Court made the Directive principles an integral part of any enquiry into the validity of fundamental rights restrictions. *Jugal Kishore v. Labour Commissioner*²⁰ referred to directive principles of state policy, citing no less than three of the Principles to hold that notice requirements and other restrictions upon employers’ discretion were restrictions in interests of the general public. Similarly, in *Chandrabhawan Boarding & Lodging Bangalore v. State of Mysore*²¹, the Court upheld state minimum wage legislation,

¹⁸ AIR 1952 SC 352.

¹⁹ AIR 1957 SC 956.

²⁰ AIR 1958 Pat 442.

²¹ 1970 SCR (2) 600.

cursorily dismissing the 19(1) (g) claims of the employers by stating that ‘Freedom of trade does not mean freedom to exploit.’ Chandrabhawan is also noticeable in that it came at the end of the 60s, and marked another shift in the Court’s jurisprudence by abandoning the “subordinate-but-relevant” doctrine of *In Re Kerala Education Bill*. In *Chandrabhawan*, the Court observed that the bill of rights and the directive principles were “complementary and supplementary” to each other.

In *Kesavanda Bharti v. State of Kerala*²², the Supreme Court said that fundamental rights and directive principles aim at the same goal of bringing about a social revolution and establishment of a welfare state and they can be interpreted and applied together. They are supplementary and complimentary to each other. It can well be said that directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal is to be achieved. The same sentiments were echoed in the case of *Minerva Mills v. Union of India*²³, where it was stated that there is no conflict between the directive principles and the fundamental rights. They were said to be complementary to each other. It is not necessary to sacrifice one for the other. Chandrachud J. speaking for the majority observes:

*“But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner, the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal human freedoms.”*²⁴

In view of this, the courts took over the responsibility to interpret the provisions of the constitution in such a way so as to ensure the implementation of the directive principles and to harmonize the social objectives underlying the directives with the individual rights. This was understood to be the mandate of the Constitution not to the Legislature and the Executive only, but to the Courts as well.²⁵

The judgment in *Minerva Mills* was reduced to the status of obiter which later created confusion regarding the validity of directive principles. The confusion was removed by the Supreme Court

²² AIR 1973 SC 1461.

²³ AIR 1980 SC 1789.

²⁴ *Ibid* at 1807.

²⁵ *Ranjan Dwivedi v. Union of India*, AIR 1983 SC 624.

in *State of Tamil Nadu v. L. Abu Kavur Bai*²⁶. The Court held that although the directive principles are not enforceable yet the Court should make a real attempt at harmonizing and reconciling the directive principles and the fundamental right and any collision between the two should be avoided as far as possible. In *Grih Kalyan Kendra Workers Union v. Union of India*²⁷, the Supreme Court has enforced the provisions of Article 39(d) by giving the directive principles the status of fundamental rights.

In *Tamil Nadu Freedom Fighters v. The Government Of Tamil Nadu*²⁸ the court made an interesting observation when a registered society moved the court seeking to restrain the State of Tamil Nadu from manufacturing and thereby doing business or trade in the so-called cheap liquor inspired by Article 47. 'The question in the instant case is not whether the court can direct the State to implement the directive principle of State policy but whether the State can ignore the directive principle and make a law which is opposed to the State policy. There can be no State policy which is opposed to public interest. Everything which is in consonance with the directive principle of State policy in Part 4 of the Constitution must ordinarily be in the public interest.' This case reflected the progressive mindset of the judiciary. Directive principles were no longer left to be dead letters in the constitution, but were now being recognized for their indispensable nature in the process of governance. The court highlighted the need for the State to conform to directive principles in its law making process. The focus was shifted from the court's responsibility of determining the status of the directive principles to the State's responsibility of not ignoring them. Public interest was yet again emphasized to be the driving force in all legislations and public dealings.

In *Kanaka Durga Wines and Ors. vs Govt. Of A.P. And Ors*²⁹ the court observed that the directive principles of State policy embodied in Article 47 and other directives contained in Part IV are fundamental in the governance of the State. A case similar to Mohd. Hanif Qureshi case came to light in the year 2006- *State of Gujarat v. Mirazpur Moti Kureshi Kassab Jamat*³⁰. However this case was principally different in terms of the judgment as the Court did not degrade directive

²⁶ AIR 1984 SC 626.

²⁷ AIR 1991 SC 1173.

²⁸ 1992 1 MLJ 582.

²⁹ 1995 (3) ALT 228.

³⁰ AIR 2006 SC 212.

principles to a status subsidiary to that of fundamental rights. Instead the 7 Judge constitutional Bench of the Supreme Court following its number of earlier decisions held that directive principles are relevant in considering the reasonability of restrictions imposed on fundamental rights. It is a constitutional mandate under Article 37 that in making laws the state shall apply the directive principles. The opinion of the judges in this case was in sharp contrast to that opined by judges in Mohd. Hanif Qureshi case. It definitely was a welcome change.

The mandate of Article 37 of the Constitution, that while the directive Principles of State Policy shall not be enforceable by any Court, the principles are 'nevertheless fundamental in the governance of the country' and 'it shall be the duty of the State to apply these principles in making laws'. Addressed to Courts, what the injunction means is that while Courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of Judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy.³¹

With the development of the judicial ideology regarding the status of directive principles over the years, some directive principles were elevated to the status of fundamental rights. Such a change is nothing short of a judicial miracle in a country where during the drafting of the constitution, directive principles were being considered to be scrapped altogether. The development process was a slow and dragged one but the end result has been worth the constitutional struggle. The changed approach was developed by a new judicial technique of construing the provisions contained in Part III of the Constitution. The technique was of giving fundamental rights a wider scope with the help of the concepts contained in directive principles. The court began to integrate the concepts of Part IV of the constitution with the fundamental rights, thereby creating a wide dimension which focused on delivering justice and equality in totality. The Courts were no longer focused on just the fundamental rights, but a creative combination of directive principles and fundamental rights. In this process, the Court infused the concept of social justice into fundamental rights and did away with the rigid conception of them being only individual rights.

³¹ *Smt. Mala Banerjee vs The State Of West Bengal And Ors.* 2008 (1) CHN 979.

Articles 38 and 39 embody the jurisprudential doctrine of ‘distributive justice’. The constitution permits and even directs the State to administer what may be termed ‘distributive justice’. The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities rectifying the injustice resulting from dealings and transactions between unequals in society.³² Article 38(1) provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice-social, economic and political-shall inform all the institutions of national life. This directive only reaffirms what has already been said in the Preamble according to which the function of the Republic is to secure to all its citizens social, economic and political justice.³³ **In *Air India Statutory Corporation v. United Labour Union***³⁴, the Supreme Court explained the concept of Social justice. “The concept of social justice consists of diverse principles essential for the orderly growth and development of personality of every citizen.” “The constitution, therefore mandates, the State to accord justice to all members of the society in all facets of human activity.” In ***Nair Service Society v. State of Kerala***³⁵, the Court reinstated the fact that the ‘equality before law’ has many facets and is a dynamic concept. The law seeking to achieve the said purpose is to be interpreted not only on anvil of articles 14, 16 but also having regards to international laws. Social justice was, inter alia suggested to be carried out by economic empowerment of the weaker sections³⁶ and regularization of daily wage workers.³⁷

Legal aid and speedy trial were held to be the fundamental rights under Article 21 of the constitution available to all prisoners and enforceable by the courts³⁸. Article 39-A directs the state to ensure that the operation of the legal system promote justice, on a basis of equal opportunities and shall, in particular, provide free legal aid, by suitable legislation or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This was a progressive step in constitutional history. ***Hussainara Khatoon v. Home Secretary, State of Bihar***³⁹ a case which moved for the release of under-trial prisoners in Bihar,

³² *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*, (1986) 3 SCC 156.

³³ J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA 437 (51st ed 2014).

³⁴ AIR 1997 SC 645.

³⁵ AIR 2007 SC 2891.

³⁶ *Charan Singh v. State of Punjab*, AIR 1997 SC 1052.

³⁷ *Gujarat Agricultural University v. Rathod Labhu Bechar*, AIR 2001 SC 706.

³⁸ *H.M Hoskot v. State of Maharashtra*, AIR 1978 SC 1548.

³⁹ AIR 1979 SC 1360.

some of whom had been imprisoned as under-trials for terms longer than the maximum punishable imprisonment period under the law, waiting for the trial procedure led to the introduction of the Legal Aid Services Programme for Free Legal Aid to under-trials. There was no express provision in the constitution under the fundamental rights to provide free legal aid and speedy trial to under-trials. But, inspiration was drawn from the directive principles to serve justice to those who had suffered at the harsh ends of law. Had it not been for the progressive thinking of the judges, the right to equality before law and equal protection of the laws⁴⁰ and the right to life and personal liberty⁴¹ In *Kishore v. State of Himachal Pradesh* it was held that legal aid may be treated as part of the right created under Article 21.⁴² An important impact of Article 39-A read with Article 21 has been to reinforce the right of a person involved in a criminal proceeding to legal aid.⁴³ Its impact has not just been unilateral, this article has also been used to interpret and even expand the right conferred by Section 304 of the Code of Criminal Procedure, 1973, as can be seen in *State of Harayana v. Smt. Darshana Devi*⁴⁴ and *Sukh Das v. Union territory*.⁴⁵

In a notable judgment in *State of Maharashtra v. Manubhai Bagaji Vashi*⁴⁶, the Supreme Court held that Article 21 read with Article 39-A casts a duty on the State to afford grants-in-aid to recognized private law colleges, similar to other faculties, which qualify for receipt of the grant. The aforesaid duty cast on the State cannot be whittled down in any manner, either by pleading paucity of funds or otherwise. The Court's strict dictation signifies the recognition of this directive principle as a fundamental right.

Pursuant to Article 39 (d), Parliament enacted the Equal Remuneration Act, 1976. The directive principle contained in Article 39 (d) and the Act passed thereto could be judicially enforced by the court.⁴⁷ The Supreme Court in *Randhir Singh v. Union of India*⁴⁸ observed that though not a fundamental right, without the right to equal pay for equal work, the concept of equality as a

⁴⁰ Const. art.14 reads as "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

⁴¹ Const. art.21 provides, "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

⁴² AIR 1990 Cr LJ 2289.

⁴³ P.M BAKSHI, THE CONSTITUTION OF INDIA 104 (Universal Law Publishing; 12th ed. 2013).

⁴⁴ AIR 1979 SC 855.

⁴⁵ AIR 1986 SC 991.

⁴⁶ (1995) 5 SCC 730.

⁴⁷ J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA 438 (51st ed. 2014).

⁴⁸ AIR 1982 SC 879.

fundamental right would be meaningless. Dealing with the plea of equal pay for equal work, the Court observed:

“But, it certainly is a constitutional goal... Directive Principles, as have been pointed out in some of the judgments of this Court have to be read into fundamental right as a matter of interpretation... To the vast majority of the people the equality clause will have some substance if equal work means equal pay.”

The court therefore construed Article 14 and 16 in the light of the preamble and Article 39 (d) and held that “pay for equal work is deducible from those Articles and may be applied properly applied to cases of unequal scales of pay based on no classification or wrong classification..” The same sentiments were echoed in cases like *D.S.Nakara v. Union of India*⁴⁹ and *R.K Ramchandran Iyer v. Union of India*⁵⁰. Subsequently it was held in cases like *Surinder Singh v. Engineer-in-Chief, C.P.W.D*⁵¹ and *Dhirendra Chamoli v. State of U.P*⁵² that the doctrine of equal pay for equal work is equally applicable to persons employed on a daily wage basis. They are also entitled to the same wages as other permanent employees in the department employed to do the identical work.⁵³

In an extension of its objective to deliver social justice, provisions of articles 39(e), 39(f), 41 and 47 were suggested to be read together to make suitable provisions regarding child labour.⁵⁴ Accordingly, the Supreme Court in *M.C.Mehta v. State of Tamil Nadu*⁵⁵ issued directions to the

⁴⁹ AIR 1983 SC 130.

⁵⁰ AIR 1984 SC 541.

⁵¹ AIR 1986 SC 534.

⁵² (1986) 1 SCC 637.

⁵³ *Daily Rated Casual Labour v. Union of India*, (1988) 1 SCC 122

⁵⁴ Const. art.39(e) reads as- “that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength”

Const. art.39(f) reads as-“ 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.”

Const. art. 41 reads as- “Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”

Const. art. 47 reads as- “Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”

⁵⁵ AIR 1997 SC 699.

state to see that an adult member of the family whose child is in employment in a factory, mine or hazardous employment gets employment anywhere, in lieu of the child. This was a step to protect the constitutional right of these children guaranteed by Article 24, which was being grossly violated and the Court was requested to issue appropriate directions to the Government to take steps to abolish child labour.⁵⁶

In another landmark judgment, *Unnikrishnan v. State of A.P.*⁵⁷, the Supreme Court held that the ‘Right to education’ up to the age of 14 years is a fundamental right within the meaning of Article 21 of the constitution, but thereafter the obligation of the State to provide education is subject to the limits of its economic capacity. The Court declared that “the right to education flows directly from right to life.” The Constitution (86th Amendment) Act, 2002 substituted a new article for Article 45 which provides that “the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.” This has been necessitated as a result of making the right to education of children up to 14 years of age a fundamental right. Through this judgment the court raised the status of a directive principle to that of a fundamental right, essentially signifying its fundamental importance in achieving social justice.

Under Article 48-A, the state is burdened with the responsibility of making an endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Under Article 51-A, there is duty of citizens to protect and improve the natural environment including forests, lakes, rivers and wildlife to have compassion for living creature.⁵⁸ Justice Kuldeep Singh of the Supreme Court in *M.C Mehta v. Kamal Nath*⁵⁹ referred to a legal theory of ‘Doctrine of Public Trust’ developed by the ancient Roman Empire that certain common properties such as air, sea, water and forests are of immense importance to the people in general and they must be held by the Government as a trustee for the free and unimpeded use by the general public and it would be wholly unjustified to make them a subject of private ownership. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit

⁵⁶ Const. art.24 reads as- “Prohibition of employment of children in factories, etc No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”

⁵⁷ (1993) 1 SCC 645.

⁵⁸ *Association for Environmental Protection v. State of Kerala*, AIR 2013 SC 2500.

⁵⁹ 1997 (1) SCC 388.

their use for private ownership or commercial exploitation to satisfy the greed of the few. *Subhash Kumar v. State of Bihar*⁶⁰ held that Articles 14, 21 and 51A (g) are to be read together.

4.1 Conclusion

The judiciary took time, but it did eventually broaden its perspective in order to achieve the constitutional goals enshrined as ‘Directive Principles of State Policy’. The journey was not a smooth one with cases like **Champakam Dorairajan**, **Mohd. Hanif Qureshi** and the likes; completely disregarding the importance of the directive principles. But a paradigm shift in the judiciary’s approach was seen with the cases like in *Re Kerala Education Bill*, *Abu Kavar Bai*, *Kesavananda Bharti* etc. Directive principles were eventually recognized, not as mere strings of words in the constitution, but as a catalyst to achieve social, political and economic goals. Cases like *H.M. Hoskot*, *Hussainara Khatoon*, *M.C. Mehta*, etc elevated the status of directive principles to that of fundamental rights. Elevated to inalienable fundamental rights they became enforceable by themselves. The Directives in our Constitution are forerunner of the UNO Convention of Right to Development as inalienable human right and every person is entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights, fundamental freedom would be fully realized.⁶¹ This new trend and the decisions show that activist judges are not letting orthodox ideologies dictate their decision making. Instead of becoming a stumbling block the judiciary has now taken itself the responsibility of implementing the Directive Principles.⁶²

⁶⁰ AIR 1991 SC 420.

⁶¹ J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA 455 (51st ed 2014).

⁶² *Ibid* Pg. 457.

TRANSFORMATION OF INDIAN ECONOMY FROM LICENCE RAJ TO COMPETITION ERA

*Anjali Rai**

*Diwanshi Rohatgi***

Indian economy had made an attempt to move from command and control regime to the regime based on free market principles thus, unleashed the latent and suppressed energy of our people and with the aim to promote the interests of consumers and to ensure freedom of trade carried on by other participants in the market. It has been an exemplar shift, in approach to economic policies, in the external sector, foreign direct investment, and the financial sector.

Paper throws light on shift from the post-Independence socialist-style economy to the world's largest free market economy i.e., three modes of economic administration. These are the planned economy till the end of the 1970s where government has final authority to take decisions regarding production, consumption and distribution. The licence raj system was result of planned economy, to start a business, one has to obtain approximately 80 licences, which are resultant into disinterest in taking new initiative and also somehow increased the corruption rate and fraud that lead to downfall in growth. Secondly, limited liberalisation period of 1980s made a sea change in terms of licensing policy in favour of large business houses, making them free from the provisions of MRTP ACT and FERA. Thirdly, the post-reform period beginning in early 1990s to unshackle the Indian economy from cobwebs of unnecessary bureaucratic control and to introduce liberalisation focusing on economic freedom, free trade policies, foreign investment in the form of FII and FDI.

There has been radical change in our trade situation since 1991 is perhaps unprecedented in Indian economic history since independence. With the emergence of new economic policy of 1991,

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a need was felt for promoting competition in domestic market, technological up-degradation and modernisation hence COMPETITION ACT of 2000 was passed. The objectives are to prevent anti-competition practices, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade for all participants in the markets in India. Despite of positive elements which will lead to desired level of competition, the negative elements in this act will reduce or eliminate any obstacle that stand in a way of fuller competition.

The main questions authors would discuss in this paper is how in the present milieu of competitive environment, competition is key to survival of a business which is surrounded by rivals from within and without? What are the economic challenges India still faces in pushing ahead with reforms so that it remains not just the world's biggest free market democracy, but so that it becomes the most exciting and dynamic one, are largely political?

1.1 Pre-1991 Economy

Economy of India in pre-British era had been self-sufficient agricultural and rural in character. Country was prominent in the world for its handicraft industries in cotton and silk textiles, metal and precious stone works etc.¹ At the drawn of the independence from the British colonial rule, Indian economy was in shattering, state mass population of poor, illiterate and unemployed sections of the society was looking towards the national leaders of that period for building a new India which could provide positive hopes to them.²

Indian economic environment after centuries of external subjugation has unwaveringly undergone a drastic change due to the government policies. The Indian national congress under the inspiration of charismatic Prime Minister Pt. Jawaharlal Nehru was in favour of a greater role of government in all activities of development for achieving social justice. He paved the way for creation of a large base and scope for public sector by introducing the First Industrial Policy Resolution in 1948 and sets up the national planning committee which advocated that state should own and control all means of production.³ This could lift up the socio- economic and growth of the country as

¹ Dutt & Sundharam, “Indian Economy”, (63rd ed).

² Subhojit Goswami, “Development in India after Independence”, <http://www.mapsofindia.com/my-india/india/development-in-india-after-independence>, 20th July 2015, 5:10pm IST

³ Shodhganga, “Growth of public sector in India in pre and post liberalisation period”, http://shodhganga.inflibnet.ac.in/bitstream/10603/4474/7/07_chapter%202.pdf, 20th july 2015, 5:20pm IST

enshrined in 2nd five year plan (the Nehru-Mahalanobis strategy of industrial development through capital goods and heavy industries), this strategy emphasised investment in the heavy industries to achieve industrialisation which was assumed to be the basic condition for rapid economic development. Hence, planned industrialization became a major doctrine for tackling economic backwardness in developing countries.⁴ The planners felt that immense natural and human resources of the country was ideally suited for industries, resources should therefore be applied more towards development of industry rather than to agriculture sector. Indian agriculture was suffering from heavy population pressure on land. Marginal productivity of labour on land was zero and negative. This pressure on land could reduce by shifting surplus population to industrial sector. The setting up and expansion of the industrial sector became necessary condition for raising national product. Rapid industrialisation was an essential condition for the development of not only agriculture sector but also the other sectors. With the expansion of industrial sector and the shifting of labour from rural to urban areas, the demand of food grains and agriculture raw materials would increase. At the same time increased production and supply of fertilizers, pesticides, agricultural machinery etc. would help in the expansion of agriculture production. Hence the growth of industrialisation and expansion of market there would be expansion of trade and commerce in transportation, in banking and finance etc.⁵

Although the Nehru model of development provided a tremendous role for public sector undertakings but also left some field for private sector to bloom. Since the adoption of first Industrial Policy Resolution in 1948 significant development took place in India. According to this policy industries were be kept under three- public sector, private sector and the joint sector. Hence, it contemplated a mixed economy. Later on, in the second industrial policy replacing policy of 1956 gave a new classification of industries. The first category comprised industry which would be solely owned by the state i.e., 17 industries under state control –arms and ammunitions, atomic energy, iron and steel, heavy casting and forging of iron and steel; machinery required for iron and steel production, for minings, for machine tool manufactures etc, heavy electrical industries, coal; mineral oils, mining; iron ore and other important minerals like copper, lead and zinc;

⁴ 2nd Five year plan, <http://planningcommission.gov.in/plans/planrel/fiveyr/2nd/2planch2.html>, 20th july 2015, 6:15pm IST

⁵ Dutt & Sundharam, “Indian Economy”, (63rd ed).

aircraft; air transport, railways, ship building; telephone, telegraph and wireless equipment; generation and distribution of electricity.

The second category consisted of industries which the private sector could supplement the efforts of the state sector, with the state taking sole responsibility for starting new units; there were twelve industries – other mining industries, aluminium and other non ferrous metals not included in category 1; machine tools, ferroalloys and tool steels, the chemical industry; antibiotics and other essential drugs; fertilizers; synthetic rubber, carbonization of coal; chemical pulp; road transport and sea transport.

The third category consisted of remaining industries which were to be in private sector. Despite of having a separate category of private sector yet it was kept under the state control through licenses. Under the Industries (development and regulation) act 1951 which was passed to implement the industrial policy resolution of 1948 and to empower the government to take necessary steps to regulate the pattern of industrial development through licensing.

License raj was the outcome of Indian planned economy where each and every aspect is controlled by states and central government. It was required to (i) establish a new factory, (ii) carry on business in an existing unlicensed factory (iii) significantly expand an existing factory capacity, (iv) start a new product line and (v) change location.⁶ No new industry was allowed unless a license was obtained from the government. This policy was used to promote industries in backward areas, it was easier to obtain license if the industrial unit was established in backward area. Apart from this they also got concessions such as tax benefits and electricity at lower tariff. Even the existing industries have to obtain license to expand its production or to diversify their activities. This was basically meant to keep check that quantity of goods produced should not be more than it is required in the economy i.e., licensing became the key means of allocating production targets set out in the 2nd five year plan and in 3rd year plan which continued on the same strategy with tremendous investment in heavy industries, but the deficiency of target operated a failure of planning. However, the point that needs to be highlighted is that industrial targets influenced industrial growth significantly but they could not determine it. Shortfall in available inputs and foreign exchange, delayed execution, exigencies of the licensing procedure itself and similar

⁶ Philippe Aghion, Robin Burgess, Stephen Redding & Fabrizio Zilibotti, "The Unequal Effects of Liberalization: Evidence from Dismantling the License Raj in India", <http://sticerd.lse.ac.uk/dps/de/DEDPS45pdf>, 23rd JULY 2015.

factors often held up fulfilment of targets by holding up licensing or installation of licensed capacities or their utilization to achieve target levels of production. The reliance on licensing could restrict but not encourage investments by the private sector in fulfilment of the targets.⁷

Applications for industrial licenses were made to the Ministry of Industrial Development and then reviewed by an inter-ministerial Licensing Committee. The bureaucratic nature of licensing policy imposed a substantive administrative burden on firms and increased corruptions. There was also considerable uncertainty that whether license application would be approved within the time frame or not. For example 35% of licenses were rejected between 1959 and 1960. Delays in approval process were common and of indefinite length. The Licensing Committee reviewed applications on a sequential, first-come, first-served basis, and since the 2nd-year plans laid down targets or ceilings for industrial capacity, this provided an incentive for pre-emptive license applications. This system favoured the larger industrial houses (e.g. Birla, J.K. and Tata) which were better informed, organized and submitted multiple early applications as a means of foreclosing on plan capacity as per the reports of Hazari committee.⁸ After this, Government of India appointed a committee under the chairmanship of Mr. Subimal Dutt in 1967 known as industrial licensing policy inquiry committee basically to inquiry the working of licensing system in India. The *Dutt Committee* recognised the fact that industrial licensing which was specifically meant to implement industrial policy of government, but it failed to achieve the objective of planned economic development. It was a negative instrument. The committee while accepting the fact that other monetary and fiscal instruments be pressed into service to achieve the goal of the development, still voted for the continuance of the licensing system as to make it perfect instrument of industrial growth.⁹

Between 1950s and 1980s the economy of India stagnated around 3.5% and there was low annual growth rate.¹⁰ There was a large public sector and losses were incurred by state-owned enterprises. Government sought to restrict the scope and the growth of private sector through industrial policies

⁷ T. P Bhatt, "Growth and structural changes in Indian industry", <http://isidev.nic.in/pdf/WP1302.pdf>, 22nd July 2015.

⁸ Chirashree Das Gupta, Globalisation, Corporate Legal Liability and Big Business Houses in India, , http://www.cisd.soas.ac.uk/Editor/assets/chirashreedasgupta_final.pdf, 23rd July 2015, 12:30 pm IST.

⁹ Smriti Chand, "Dutt committee on industrial licensing", , <http://www.yourarticlelibrary.com/industries/dutt-committee-on-industrial-licensing/23446/>, 23rd July 2015, 1:15 pm IST.

¹⁰ Political economy of India, <http://business.mapsofindia.com/india-economy/political.html>, 24th July 2015, 2 pm IST.

of 1948 and 1956 along with the licensing procedures hence monopoly of public sector was created ultimately leads to poor infrastructure investment. Many large enterprises in the private sector carried their operations through virtual monopoly and oligopoly. Taking advantage of the absence of foreign competitions, these entered into collusion and eliminated internal competition openly or secretly. They got effective control over the market and exploited the innocent consumers. Many enterprises created artificial scarcities of the products and gave the impression of excessive demand of their products. These enterprises even influenced government policies to their own advantage and ensured favourable tax measure, fiscal incentives for export and foreign collaborations agreements. They raised huge financial resources from financial institutions. Consequently they enjoyed their monopoly power and hence there were restrictive trade practices and to overcome these practices MRTP act of 1970 was passed. ¹¹

Recognition of the problems in economy environment of India because of prevailing licensing system led to various reforms undertaken in 1970s which made an attempt to consolidate the application process and to boost exemption and expansion limits. The Industrial Policy Statement of 1973 culled high-priority industries where investment from large industrial houses and foreign companies would be permitted and Industrial Policy Statement of 1977 set emphasis on decentralisation and development of small-scale and cottage industries.¹²

Before 1980s witnessed that economy was largely based on central planning, set out the private sector at periphery of the economy. But 1980s onwards, Indira Gandhi and his son Rajiv Gandhi began a process of liberalising. The general assembly brought about the industrial policy statement of 1980. Main gist of industrial policy was to regularise the excess capacity installed over and above the license capacity .Apart from this government also proposed to adopt privileges of automatic expansion of capacity to all industries so that there would be full utilisation of capacity and maximization of production. In pursuance of this policy a new licensing policy was adopted which aimed at reviving the economic infrastructure inhabited by infrastructural gaps and inadequacies in performance. The objective of new licensing policy reflected a thirst for the yields of industrialisation and economic progress .This policy exempted the licensing requirement for an existing licensed undertaking to substantially increased production capacity on the existing lines,

¹¹ Dutt & Sundharam, “*Indian Economy*”, (63rd ed).

¹² Statement on industrial policy, http://dipp.nic.in/English/Policies/Industrial_policy_statement.pdf, 25th july 2015, 3:15pm IST.

If the total investment does not exceed at 3 crore and if it does not require foreign exchange in excess of 10% of ex-factory value of output or rupees 25 lakh whichever is less. No new license was required to manufacture a new item and no license should be obtained for small scale units to produce any of the items reserved for the sector under the following conditions-

1. Unit must not belong to any dominant undertaking as defined in MRTP act.
2. The unit and other interconnected unit must not possess asset exceeding rupees 20 crore.
3. In respect of foreign ownership, there must not be over 40% of equity owned by foreign companies or subsidiaries or foreign individual.
4. The item must not fall under schedule A of industrial policy of 1980.¹³

To sum up, the industrial policy of 1980 had liberalised licensing for large and big business houses but by blurring the distinction between small scale and large scale industries it sought to promote latter at the cost of former.

2.1 1991 First Generation Reforms

Dr. Manmohan Singh was appointed to the position of Finance Minister in 1991 under Prime Minister P.V. Narasimha Rao. He faced the crucial 1991 Balance of Payments crisis. India's foreign reserves barely amounted to US\$1 billion, enough to pay for a few weeks of imports.

In 1991, Singh ushered in the dramatic, first generation economic reforms. They were dramatic in that they were "structural", dismantling many post-Partition socialist-style policies.¹⁴ The changes aimed to unshackle Indian firms and entrepreneurs from red tape, foster competition, and open India to the global economy. Singh started the process of simplification and rationalisation of the tax system. Many controls and regulation on the industry were removed, which meant the death of the Permit Raj and a free rein to entrepreneurs.

The reforms may be put into three broad categories: External Sector Reforms, Foreign Direct Investment (FDI) Reforms, and Financial Sector Reforms. Each is discussed in turn below, with

¹³ The monopolies and restrictive trade practices act , 1969.

¹⁴ Anne O. Krueger & Sajjid Z. Chinoy, *Introduction, in Reforming India's External, Financial, and Fiscal Policies* , Stanford University Publication.

greatest emphasis on the first category. Across all three categories were three common denominators: de-regulation, privatisation and rationalisation.

2.1.1 External Sector Reforms

The “external sector” includes not only to international trade (imports and exports), but also to exchange rates and capital flows. Indian reforms on trade were particularly impressive, even dramatic. The foreign trade policy in India was made very restrictive after initiation of the programme of industrialisation in the Second Plan. Only import of capital equipment, machinery, components, spare parts, industrial raw material was allowed. Import of all inessential items was strictly controlled. In order to rectify the situation, devaluation was carried out. It was followed by announcement of new foreign trade policy and foreign trade reforms.

There are some of the major measures which have been undertaken to reform the external sector of the nation:

(a) Exchange Rate Stabilisation

The rupee was overvalued for most of the period prior to 1991 thus adversely affecting exports. The rupee was devalued twice in July, 1991 amounting to cumulative devaluation of about 19 percent. India also dismantled the dual exchange rate system it had created to cope with the 1991 BOP crisis, eliminated foreign exchange licensing, and requirements concerning export-based imports and import compression.¹⁵

The RBI used to control the foreign exchange in accordance with the Foreign Exchange Regulation Act, 1973, as amended periodically. By 1993, and since then, the *rupee* was freely convertible for all current account transactions (*i.e.*, for purposes of Article VIII of the *Articles of Agreement of the International Monetary Fund*).¹⁶ To be sure, the float is a managed one, but that is hardly peculiar to India. And full capital account liberalisation has yet to occur, which again is not an expectation unique to India. It was in 1994 that various types of current account transactions were liberalised from exchange control regulations with some indicative limits. Certain capital account

¹⁵Anne O. Krueger & Sajjid Z. Chinoy, *Introduction*, in Reforming India's External, Financial, and Fiscal Policies.

transactions were also freed from exchange controls. India is moving towards fuller capital account convertibility in a phased manner.

(b) FDI Reforms

Amidst the first generation reforms were legal and policy changes to encourage FDI. Egregious regulations were wiped away in favour of aggressive inducements to attract multinational corporations (MNCs) to open, expand, and operate production facilities in India, and hire Indian workers. Three such clusters of measures stood out.¹⁷

1. India relaxed investment (equity share ownership) limits on foreign direct investment (FDI) in certain sectors, such as telecommunications. In particular, reversing pre-1991 strictures, India dropped its insistence on restricting FDI entry to government-determined priority sectors, and eliminated its 40 percent cap on foreign equity participation in joint ventures (JVs).¹⁸
2. India eliminated trade-related FDI restrictions. No longer was a foreign direct investor obligated to export a certain percentage of its production. That obligation had been as high as 100 percent in some sectors, and was manifestly designed to protect Indian producers of like products. India also dropped domestic production content obligations, so foreign investors could source inputs and intermediate items from the most efficient suppliers, whether they were Indian or not. Again, the pre-1991 rule had been designed to protect domestic suppliers.
3. India created Special Economic Zones (SEZs). They were modelled loosely after the famous SEZs in China inaugurated in the late 1970s in the Deng Xiaoping era.
4. India began improving its intellectual property (IP) regime. Foreign direct investors (as well as exporters) look carefully at the state of intellectual property rights (IPRs) as a factor in deciding where to place an investment: they expect not only protection at least at internationally-acceptable levels, but also actual IPR enforcement by legal and judicial authorities. And they do not want to be forced to transfer patents, trademarks, copyrights,

¹⁷T.N. Srinivasan, *Integrating India with the World Economy: Progress, Problems, and Prospects*, in Reforming India's External, Financial, and Fiscal Policies.

¹⁸RamachandraGuha, The Delhi Dilemma, Financial Times, <http://www.ft.com/cms/s/2/c49f2894-e597-11e2-ad1a-00144feabdc0.html>, 5th July 2015, 1pm IST.

or trade secrets to local firms. As the 1998 WTO Appellate Body Report in the *India Patent* dispute India emerged from the Uruguay Round (1986-1994) of multilateral trade negotiations with a sub-par record on enactment and enforcement of IP laws.¹⁹ So, with the 1991 reforms, India loosened requirements about technology transfer. It extended patent protection to pharmaceuticals, agricultural chemicals, and certain food products.

(c) Financial Sector Reforms

Financial sector reforms aimed to liberalize commercial and investment banking markets and institutions operating in India. Three market reforms were key: partial freeing of interest rates; promotion of competition among commercial and investment banks; and creation of a new securities exchange for equities trading.²⁰ The reforms also included technological innovations, such as electronic trading and un-certificated securities, and greater efficiencies in clearing and settlement.

Underlying all three categories was a shift in economic ideology from the era of Prime Minister Nehru and his daughter, Prime Minister Indira Gandhi: away from central planning, and toward the market. Trade was not to be discouraged, but promoted. Foreign investment was not to be regarded with suspicion, much less hostility, but to be pursued. Finance was not to be a backward and inefficient sector, but rather a dynamic, innovative link between savings and investment. Among the many indicators of the paradigmatic shift was the shrinkage in the size of the Indian government. The central government fiscal deficit as a percentage of GDP dropped from 7.7 to 5.5 percent between 1990-1991 and 1992-1993.

The reforms worked quickly. Spurred by a private sector unshackled from government strictures, real annual growth in Indian GDP exceeded 6 percent in the mid-1990s. In 1996, the share of exports in Indian GDP rose to 9.2 percent, and between 1993 and 1996, Indian merchandise exports

¹⁹India–Patent Protection for Pharmaceutical and Agricultural Chemical Products, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm, 5th July 2015, 1:30pm IST.

²⁰ Anne O. Krueger & Sajjid Z. Chinoy, Introduction, in *Reforming India's External, Financial, and Fiscal Policies*, Stanford University Publication.

and imports (measured in U.S. dollar value terms) grew at an average rate of 20 percent per annum.²¹ The share of India in the growth of world exports increased. So:

Together with deregulation of industry and fiscal stabilisation, these external sector reforms yielded exceptionally good results by the mid-1990s. Export growth soared to 20 percent in three successive years, inward remittances quadrupled to \$8 billion by 1994-95, foreign investment rose from negligible amounts to over \$6 billion by 1996-97, foreign exchange reserves climbed steeply from the precarious levels of 1991 to over \$26 billion by the end of 1996-97, and the debt-service ratio was halved over the decade.

3.1 Competition Policy Era

LPG model liberated the industry from the shackles of the licensing system, reduced the role of public sector and encouraged foreign private participation due to which India became a global which expanded the scope of international and intercultural relationships The modern organisation is a global organisation that has to compete in global prospective. Hence, Indian markets now have to face competition from within the country and outside. After financial crisis highlighted the importance of healthy and effective competition thereby firms would innovate more and keep their prices down for consumers and ultimately improves productivity.²² Increased competition gave the customers wider choice in purchasing better quality goods and services Competition helped the firms to utilise the capacity to produce, it increases the efficiency and optimum allocation of resources so that productivity can be improved. Competition act of 2000 was passed removing the MRTP act as it was not in tune with liberalisation policy, to promote ensure freedom for all participants in market, promote and sustain all types of competition, prevent and discontinue those practices which are against policy of competition, to prevent the dominant power in the market and to regulate amalgamations and acquisitions which are likely to reduce competitions. ²³

²² *Ranjana iyer* "Competition law and policy : A brief overview of the Indian perspective"
<http://lawquestinternational.com/competition-law-and-policy-brief-overview-indian-perspective>, 30th July 2015,
 5:34pm IST

²³ Competition act 2000

3.1.1 New Needs for Competition Policy

The Indian corporate sector has utilized a variety of strategies in the post-reform period to cope with the increasing competitive pressures due to internal and external liberalisation. With the maturing of the Indian oligopolies, the competition policy needs of the country are also undergoing changes. Some salient aspects of the changes in the Indian industrial sector are:

- a. The Indian corporate sector is vigorously restructuring itself. Restructuring is mainly geared towards consolidation in few chosen areas to correct the inefficiencies created by over-diversification in the pre-reform era.
- b. MNCs have actively participated in the merger and acquisition process to get market entry or to strengthen their presence. Acquisitions have been used by MNCs to quickly get access to various complementary assets.
- c. MNCs are better placed for domestic firms in the acquisition game because of their deep pockets and relatively cheaper access to capital. The intentions to invest in India by MNCs are significantly influenced by these differences in the cost of capital.
- d. The reliance of the Indian corporate sector on foreign technology purchase has increased. More and more technology flows are now tied with equity. Purchase of technology (especially foreign) is taking precedence over R and D; in house technology generation has taken a backseat. Besides, a large variety of inter-firm alliances are taking place.
- e. Firms are making efforts to improve manufacturing capability. This is being done through building alliances as well as through initiatives within the firm. Quality upgradation seems to be an important priority. These efforts at improving manufacturing capability may still prove to be inadequate to meet the competitive challenges. These inadequacies may also adversely affect India's chances of efficiency seeking FDI, the need for which has been emphasised.
- f. Product differentiation strategy seems to be dominating over strategies of building distribution and marketing related complementary assets. Such a strategy helps Indian firms to stand up to transnationals with their strong and internationally recognised brands. Yet, because of inadequate attention to R and D and manufacturing, which have significant pay off but in the long run, the long-term competitiveness of many Indian corporates is in

doubt. Besides, interestingly, distribution and marketing related expenditures (and not advertising) seem to have led to higher margins and profitability in the 1990s.

- g. Export based growth strategies are being adopted by some of the corporate sector firms but such strategies are not widespread; export orientation increased appreciably in the early years of reform but have seen a major collapse since 1997-98. Overall, exposure to the international market is still inadequate to put the Indian firms on higher growth and learning trajectories.
- h. Overall, concentration levels in most Industrial groups have either shown no trend (increase/decrease) or have declined during the 1990s. In very few product groups a trend increase was observed during the post-reform period. However, a large number of industries remain very concentrated even in the late 1990s.
- i. While no significant trend was observed in the price cost margins for most of the industries profitability rates were positively affected by product group specific concentration levels in the 1990s. The fact that a similar relationship has been observed for the 1970s and 1980s suggests stability of the links between concentration and profitability.

The policy initiatives will need to encourage investments in R&D and in complementary assets like manufacturing, etc. It would also have to ensure rapid increases in exports. The cost of capital advantage of the MNCs is real and needs to be tackled squarely. Else, the Indian corporate sector may not be able to win the battle in spite of all the strategic initiatives mentioned earlier. At the moment, the MNCs seem to hold an unfair advantage over domestic firms in the M&A game. Despite the fact that there is no increase in concentrations in most industries, they remain high in many industry groups. While it is difficult to ascertain whether higher profitability in concentrated industries is a result of collusion or higher efficiency, given the positive link between profitability and concentration, a competition policy focus on concentrated industries is unavoidable. However, as Indian oligopolies mature with a wide range of non-price competitive strategies, the task of competition authorities to distinguish between market power and efficiency related influences will become increasingly difficult.

4.1 Current Scenario and Challenges Faced by Indian Economy

From the beginning of the second decade of the present century, the bad phase of Indian economy started where the GDP growth rate remained below 5 percent for the two consecutive years in

2012-13 and 2013-14.²⁴ This below 5 percent growth rate for two consecutive years was last witnessed way back in 1986-87 and 1987-88. However, in the current financial years i.e. 2014-15, Indian economy started showing the signs of recovery and is poised to overcome the below percent growth rate witnessed for the last two years. This moderation of growth after achieving three consecutive years of above 9 percent growth rate between 2005-06 and 2007-08 is the fall out of failure of Indian economy to cope with several external and internal challenges.

In the external sector, persistent uncertainty in global outlook caused by crisis in Euro area and general slowdown in global economy compounded by structural constraints and inflationary pressures in domestic economy resulted in protracted slowdown. In order to cope with the external challenges like global slowdown, country should have adequate foreign exchange reserves, sustainable level of current account deficit (CAD), stable exchange rate, etc.

However, things have improved a little now as the year 2013-14 ended with the CAD of 1.7 percent of GDP, exchange rate after plummeting to INR68 per US\$ in August 2014 improved to INR 60.49 foreign exchange reserves raised to USD314.9 billion dollars in June 2014. These developments on external account have generated some optimism that Indian economy is now better prepared to confront the challenges in external economy.

In the domestic arena also, improvement is observed on fiscal front as fiscal deficit declined from 5.7 percent of GDP in 2011-12 to 4.5 percent in 2013-14. Much of this improvement on fiscal front is achieved by reduction in expenditure rather than improvement in revenue. Nevertheless, the corrections in fiscal and current account deficit augur well for macroeconomic stabilization.

Despite the improvement in twin deficits, some structural challenges are enumerated by Economic Survey 2013-14 which were responsible for current economic slowdown in India –

- Difficulties in taking quick decisions on project proposals have affected the ease of doing business. This has resulted in project delays and insufficient complementary decisions.
- Ill-targeted subsidies cramp the fiscal space for public investment and distort allocation of resources.

²⁴ <http://thegreatlittleblog.blogspot.in/2015/01/current-scenario-of-indian-economy.html>, 20th July 2015, 1:30pm IST.

- Low manufacturing base, especially of capital goods and low value addition in manufacturing. Manufacturing growth and exports could be facilitated with simplified procedures, easy credit and reduced transaction cost.
- Presence of large informal sector and inadequate labour absorption in the formal sector. Absence of required skills is considered as an important reason.
- Sustaining high economic growth is difficult without robust agriculture growth. Low agricultural productivity is hampering the economic turnaround.
- Issues related to significant presence of intermediaries in different tiers of marketing, shortage of storage and processing infrastructure, interstate movement of agriculture produce needed to be addressed.

Other challenges faced by Indian economy which hamper the movement towards higher growth trajectory includes energy, infrastructure, growth inequalities, policy paralysis, slow employment growth, disappointing manufacturing sector growth, slowdown in services particularly internal trade transport and storage etc.

For the revival of sustainable growth of over 8 percent in the coming years, a multi-pronged approach is required to correct the structural anomalies. Growth and employment generation can be improved directly by increasing the investment rate. But investment cannot be increased by merely manipulating the interest rate. If an investor didn't find the atmosphere conducive to make adequate returns on expenditure, low interest rates can't force to invest savings. Thus the foremost challenge before the new government is to create an environment which is investment friendly and which can attract capital not from just domestic sources but from the foreign sources as well.

5.1 Conclusion: The Way Forward

We have highlighted some of the major dilemmas faced by economies in transition in the context of competition policy, and argued that some of the solutions to these dilemmas are not simple. Broadly, competition policy is essential for an economy in transition as it complements other liberalising initiatives. However, the scope, sequencing and timing of competition and other policies will have to be determined by each economy according to its own compulsions and needs.

Like other countries, India will have to explicitly take into account its historical and the socio-economic context while contemplating competition policy reforms. Many of the extant distortions in the market have been caused by earlier policies/institutions. In such a scenario, simultaneous dismantling and creation of institutions to safeguard competitive forces is a difficult task. There are different perceptions about the major competition related problems facing the country today. Consequently, developing a consensus on competition issues will remain a complex task. The analysis strongly suggests that significant efforts are required at the policy level to explicitly recognise the links between policies relating to competition, trade and investment on the one hand and macroeconomic policy initiatives on the other.

It is time that the ministries of finance, industry, commerce and Law work together! It also needs to be recognised that due to contextual and other differences, no single institutional model is applicable everywhere. While such differences will remain, certain basic principles in institution building like independence of the competition agency, adequate resource availability, significant analytical skills and transparency of its actions would be crucial for deterring anti-competitive behaviour in all countries. Selection of personnel is one of the most important parts of institution building. It may also be crucial to ensure that the regulators do not become over-enthusiastic, resort to over-regulation and misuse their powers. Capture of the competition agency by the regulators is as likely as the capture by the regulated. Such a fear seems more real in de-regulating environments like India. Ill-defined jurisdictions only facilitate such over-enthusiastic regulation.

At last we want to conclude, in India protection and controls are being replaced by a competitive and de-regulated open economic system. In the pre-reform era, various restraints to competition existed:

(i) investment restraints (licensing); (ii) control over acquisition of economic power through Monopolies and Restrictive Trade Practices Act (MRTP); (iii) public sector reservation for infrastructure and other industries creating monopolies in various areas; (iv) product reservation for the small-scale sector; (v) government procurement policies favouring public and small-scale sectors; (vi) trade restrictions and high tariffs; and (vii) restrictions on foreign direct investment.

The new economic policy has both the positive as well as negative results for India. Because of the globalisation opportunity to access global market, high technology, and increased possibility

of large industries of developing countries to become important players in International era. On the other hand it compromised welfare and identity of people belonging to poor countries and widened the scope of economic disparities among people and nations. Market economy has increased the consumption of high income groups and growth has been only in service sector such as telecommunications, information technology, finance. Entertainment, travel, real estate etc as a result important sectors like agriculture and manufacturing Industries which provided livelihood to millions of people in the country.

Reforms have not benefitted agriculture and industrial sector as there had been decline in public investment in this sector. Industrial sector has slowed down due to availability of cheap imports and lower investments. Free market competition ensured capitalist justice. Every factor of production is paid according its contribution and there is no exploitation. Secondly economic efficiency by making price equal to marginal cost and resources use efficiency is maintained. There is complete freedom at market place - freedom to choose, freedom to take decisions and free opportunities to follow. It breaks up monopolies. According to global competitiveness index India is ranked very low however it has law of competition to punish the firm's that violates the rules of competition. The world capitalist countries and international institutions are pressing hard for further reduction in tariffs and duties so that it became more accessible to foreign firms. Indian firms are becoming more mobile.

FROM CRONY CAPITALISM TO INNOVATION & LIBERTY: CHALLENGES TO THE INDIAN COMPETITION LAW REGIME

*Pragalbha Priyakar**

Serving as an essential hand maiden to efficient trade, the Competition Law Policy of India aimed at reforming a rigorous legal system to one that promotes equilibrium between the producers, consumers and social interests of the nation. As opposed to the much prevalent 'License-Permit Raj' which had suggestions of crony capitalism, the new legal regime was a breakthrough from the tradition of consumer protection through countless restrictions, licenses and labyrinths of procedures causing near stagnation of research output and innovation in India. Though, the transition towards a free economy from one which prevented freedom of decision of sellers requires no regulation. However, the Competition Law Policy of India came into effect for containing the failures and distortions of market from imparting a crooked effect on the competitive spirit. Significantly, after all these years of economic reforms, India stands at the crossroads. While one road leads it to economic prosperity and glory, the other leads to social inequality. With near ignorance of the latter, it is anticipated that the day is near when the very purpose for which the reforms were started, will lose their significance rapidly and would throw the country back into the 'unionist' era.

Set in this background, the present paper analyses the varied contours of the Indian Competition Law Policy which was perceived as a panacea to all the ailments of a growing Indian economy. Also, it examines the emergence of various sectoral regulators and policy frameworks by

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governments both at the state and federal level which have impeded the market process and distorted competition at a sub-national level. More so, amidst the discussion focusing on trade liberalisation, the paper also delves into the concerns for a global competition policy, and which has been on the international agenda for too short a time for its significance to be appreciated. While contrasting between the past and present, the deliberations also target the Competition Law Policy in India as an active interpretational exercise which leads to suggestions towards a chicken-and-egg situation as to what came first, the law or the policy. Focus on extra-territorial application of the Indian Competition Law and its impacts are also evaluated in the backdrop of an increasing globalisation of cross-border business activities. Alongside, the unsung hurdles which Competition Commission faces in its struggle for greater autonomy and lesser intervention from other sectoral regulators are also sought from the deliberative exercise.

Having undergone the rigours of colonial capitalism, India, in the past, had embraced a Legal framework which premised its commercial arm on the principles of ‘*caveat emptor*’ and protection of consumers. This might be both, a response to the futuristic apprehensions of the law makers as well as a stimulus to a torturous past. Regarding the protection of consumer interests to be of crucial significance and as a modality to capacitate its domestic producers, a plethora of legislations saw light of the day and regulated the reigns of economy. But, as this normative giant grew in India, it started eating away its own roots. Much evidently, its repressive nature made the native producers extremely weak in terms of innovation and development quotient – which beyond doubt are assets quintessential to strengthen the spine of any economy¹. This gets affirmed by post-liberalisation statistical records which indicate that in the duration from 1995 to 2009, the country climbed by just one position from 12th to 11th in terms of contribution of research articles². Whereas, during the same period, China climbed from 14th position to second position and U.S. continued to have the largest number of absolute researchers in the world. Moreover, since the government agencies were the repositories of large scientific data during the repressive regulatory

¹ Aghion et. Al., *Competition and Growth with Step-by-Step Innovation: An Example*, EUROPEAN ECONOMIC REVIEW, PAPERS AND PROCEEDINGS XLI (1997), 771–782. The authors have suggested an inverted-U relationship between product market competition and innovation by outlining the significance of Innovation and development in accelerating the economic progress in any economy. See also Aghion, Philippe et. al., *Competition and Innovation: An Inverted-U Relationship*, 2010 QUARTERLY JOURNAL OF ECONOMICS 704.

² *Infra note 64.*

regime, it resulted in obstacles for Indian research, making it less attractive and with scuttling research output.

1.1 Competition Law Policy and the Economic Transition

'*License-Permit Raj*' was the term which became a general sobriquet for this period in Indian politico-economy, which saw the rise of bureaucratic control and autocratic political regimes. One of its products was the Monopolies and Restrictive Trade Practices Act of 1969 which was enacted with an objective to prevent the accumulation of economic power in the hands of a few and to ensure that aspirations of a growing consumer band are safeguarded. However, as the wave of economic liberalisation went past the country, legislations such as the Act of 1969 dismantled and became obsolete. Much was also contributed by the international economic developments relating to competition law and India's commitment at international fora to liberalise trade barriers³. Some scholars even suggest that the economic reforms of the early 1990's unleashed an explosion of pent-up commercial energy from the Indian economic fabric when the period saw tariff ramparts being torn down⁴. The '*Licence Raj*' system, as per them, did lend a way to private dynamism that was forced to compete with the world's best⁵. However, as the wave of liberalisation stretched its span in India, each sector ranging from industry to finance and from trade to infrastructure - all stood decimated to facilitate and usher a favourable investment climate. Though this has been a heated theme for debate across times, what requires a greater attention under this paper is an assessment of this transition.

2.1 Consumer Welfare & Un-notching the Markets: Is that All?

As we trace the roadmap to a modern Competition era in India, we witness the withering away of the Trade Restrictive setup which primarily based itself on a perception that markets necessarily failed. As the reforms unfolded and the perception changed, '*License Raj*' came to an end. It indeed

³ Blonigen, Bruce A and Yuka Ohno, *Endogenous protection, Foreign Direct Investment and Protection-Building trade*, JOURNAL OF INTERNATIONAL ECONOMICS 46 (2) 1998: 205-27.

⁴ Raju, K D, *The Inevitable Connection between Intellectual Property & Competition Law: Foreign Jurisprudence and Lessons for India*, 2013 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 18(2): 111-122.

⁵ Bhattacharjea, Aditya, *Competition Policy: India and the WTO*, 36 ECONOMIC AND POLITICAL WEEKLY 51 4710-4713.

was culmination of a period which had become an object of steamy opprobrium, a regime where the concerns were more on curbing monopoly than on promoting competition⁶. Taking a cue from this proposition, we would be at much ease as to analyse the very foundations of the modern Competition era in India. *Prima facie*, it might seem as a measure to discharge the onus on state for promoting welfare. But, on the contrary, equilibrium between the producers, consumers and social interests of the nation is what the Competition Act of 2002 aims at⁷. To be appropriate in terms, these aspects of economic and social planning along with an aim to regulate combinations which defeat the competitive spirit and aspiration of the Indian Consumer Band; as enshrined under Entry 20 read with Entry 21 of List III, Schedule VII to the Indian Constitution becomes the most authentic backbone for the regime in place. This is indubitably; a departure from the protectionist approach fabricated through a morass of restrictive procedures which India gripped up to, while catering to the much voiced provisions of the Directive Principles of State Policy under the Act of 1969. Thus, the march towards a free and liberalised economy mutated the much outmoded vision to one where experience of state failures and market failures has weighed in favour of the markets⁸.

Though, a detail of this transmutation which shaped the Indian legal scenario indicates flavours of smoothness and regularity, the void which had resulted due to the incommensurate regime, remained for a decade. It was during this time that the discussions focusing on a need to have a Competition Law Policy for India commenced. One side of the debate held their focus to the issues of *laissez faire* and vilting away of all restrictions leaving the markets to cure their own pitfalls whereas the other wing, delved into the dialectics between the producers with unequal bargaining position and the issues concerning safeguarding of the consumers⁹.

3.1 Need for the Indian Competition Law Policy: Questioning the Hypocritical Hypothesis

⁶ *Ibid.*

⁷ VINOD DHALL, *ESSAYS ON COMPETITION LAW AND POLICY IN INDIA*, NEW DELHI, 2007.

⁸ Singh, Vijay Kumar, *Competition Law and Policy in India: The Journey in a Decade*, 4 NUJS L. REV. 523 (2011). The author arguing in favour of the economic reforms illustrates the fashion in which they opened up the floodgates for competition in India which even passed over to revamp other policies as well. *See also* Hart, Oliver, *The Market Mechanism as an Incentive Scheme*, BELL JOURNAL OF ECONOMICS, XIV (1983), 366–382.

⁹ *Ibid.*

The commonly acknowledged perception of Competition Law policy indicates its prime objective as promotion and preservation of the competitive process in order to foster allocative efficiency which ensures the effective allocation of resources, internal efficiency which ensures that costs of production are kept at a minimum and dynamic efficiency which promotes innovative practices¹⁰. Much simply, it encompasses all policies which promote competition and facilitate efficient allocation of resources and those governmental measures that directly affect behaviour of enterprises and structure of the industry¹¹. Consequently, it's the competition which becomes the modality to reap the outcome of efficiency under the setup.

Here, a note may be taken of the fact that though the never ending saga of policy and Law which is akin to the *chicken-and-egg situation*¹² has dominated the legal thought for centuries altogether, but, in the present paper we use the term Competition Law Policy so as to be more precise with respect to the intended reference due to two prime causes. One, in India, the Competition Policy of the country saw a tacit expression only in the year 2011-12, while the Competition Law was already in place after the enactment of the Act of 2002. Secondly and much evidently, since the Act of 2002 was more of a stimuli-response to an ongoing overhaul operational over the Indian Legal and economic framework at that time, it had features of a policy as well and as a result, appears much detailed than its counterparts in other nations across the globe. Even today, traces as to the veracity of this proposition can be witnessed from the provisions of the Act of 2002 which not only lays down a substantive schema but also serves as guidance to its very own implementation.

Despite having purposed for a freer economy which is devoid of any regulations or procedures and having made claims in that regard; it might seem quite dialectical to have in place a Competition

¹⁰ *Competition Commission of India v. SAIL &Anr.*, 2011 COMP L R 0061. J. Swatanter Kumar stated, "The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices".

¹¹ Khemani, R.S. and Mark A. Dutz, *The Instruments of Competition Policy and their Relevance for Economic Policy* (PSD OCCASIONAL PAPER NO. 26, WORLD BANK, WASHINGTON DC, 1996).

¹² *Ibid.* See also JONES, ALISON AND BRENDA SURFIN, *EU COMPETITION LAW: TEXT, CASES AND MATERIALS* (2011). There are, however, contrary views which say competition law and policy are not synonymous.

Law Policy for India. However, a deeper musing into the issue would suggest that for any economy, measures like de-regulation, liberalisation and privatisation are crucial and might even be much more than desired, but they are no assurance of an efficient functioning of markets¹³. A typical illustration to this would be a case of an incumbent producer who may gain sufficient market power that might even hinder market access to new firms or producers. Complementing to this, the very potentiality of prevailing market forces to thwart the competitive spirit against the producers with a penurious bargaining power and in order to ensure that the consumers benefit the most from such market-places, makes the Policy framework an even greater necessity. While trade policies may eliminate barriers that restrict entry and exit, it is the competition policy only which can target business conduct that reduces actual and potential competition¹⁴. Adding to this, the ground-reality indicates that a significant number of monopolies remain in place and are highly unlikely to be remedied by market liberalisation. Such arrangements are required to be regulated in order to preclude them from abusing their dominant position and incurring in monopolistic practices in concerned sectors¹⁵. This assumes an even greater significance in the current Indian scenario where the possibility of permitting private investment in certain sectors is under consideration and for those which have been in scanner for long due to evidences of cartelisation like Airlines, banks, cement and telecom sectors¹⁶. Thus, it becomes quite obvious that bereft of an efficacious competition policy, the new investors will not be capacitated enough to compete in the same conditions as their fellows are, at present.

In addition, a stringent Competition Law policy also bears much merit owing to the possible permutations of private arrangements between producers which may be anti-competitive in spirit and are sufficiently potent to deter market efficiency – for both the consumers, as well as fellow producers. With implications ranging from entry-exit barriers to elimination of players from a particular sector, these practices have emerged in the recent past, to be particularly harmful for

¹³ Chunrong Ai and Xiaohong Chen, *Efficient Estimation of Models with Conditional Moment Restrictions Containing Unknown Functions*, *ECONOMETRICA*, LXXI (2003) 1795–1843.

¹⁴ *Supra note 7*.

¹⁵ Brander, J. A. and B. Spencer, *Tariffs and the extraction of foreign monopoly rents under potential entry*. IN J. N. BHAGWATI (ED.), *INTERNATIONAL TRADE: SELECTED READINGS*, MIT-PRESS, (1997, CAMBRIDGE (MA)) 141–160.

¹⁶ *Supra note 13*.

small and medium size firms¹⁷. For instance, the ever-rising number of international cartels has distorted international trade and investment flow that calls for a pan-national coordinated competition policy¹⁸. Moreover, even the domestic cartels would also definitely start proliferating provided there is an absence of a body entrusted with regulation of market practices and behaviour¹⁹. Once, the competitive spirit is cultivated, it leads to innovation and drives the concerned sector towards its respective development goals as firms operate under a continuous fear of being thrown out of business in case they do not innovate. A befitting illustration to this effect would be from the Telecom sector where Nokia Inc. became the ace producer in India for 14 years by attending to the unique needs of every Indian customer through the distinct features on its handsets. Now, it has lost the market share to Samsung Inc. as it didn't envision the futuristic competition goals and radical innovations²⁰.

Here, we must note that the aspect of innovation is not only restricted to technology and products but also covers a firm's business model, work practices, functions, logistics, processes and principles that define any business or trade institution²¹. Dell's supply chain management, Toyota's Global Production System, Wal-Mart's inventory management, Starbucks's re-imagining of the coffee shop have all been game-changing and revolutionary innovations in the recent past²². Hence, the vision of modern competition era in India to holistically club the suppression of monopolies and promotion of competition becomes crucial in the backdrop of evolution of products & companies²³. The only alleged flip-side to promotion of such ventures that

¹⁷ Aggarwal, Aradhna, *Macro Economic Determinants of Antidumping: A Comparative Analysis of Developed and Developing Countries*, 32 WORLD DEV. 1043 (2004).

¹⁸ *Ibid.*

¹⁹ Blundell, Richard and James Powell, *Endogeneity in Nonparametric and Semiparametric Regression Models*. In M. DEWATRIPONT, L. P. HANSEN, EDS., *ADVANCES IN ECONOMICS AND ECONOMETRICS*, VOL. II, ECONOMETRIC MONOGRAPH SERIES 36 (2006, CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2003). The author in this article, emphasises that even through all barriers are done away with, despite that some sort of regulatory mechanism must always exist so as to curb cartelization and monopolistic distortions.

²⁰ *Supra note 1*. See also Aghion, Philippe, Christopher Harris, Peter Howitt, and John Vickers, *Competition, Imitation and Growth with Step-by-Step Innovation*, REVIEW OF ECONOMIC STUDIES, LXVIII (2001) 467–492.

²¹ Winslow, Terry, *Competition Law and Policy: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity*, OECD JOURNAL OF COMPETITION LAW AND POLICY (2004) 7, 42.

²² *Supra note 18*.

²³ Nariman, Fali S., *Law and Economics* In VINOD DHALL (ED.), *COMPETITION LAW TODAY: CONCEPTS, ISSUES, AND THE LAW IN PRACTICE* (2007). *C.f.* Komninos, Assimikis P, *Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari*, SSRN 1870723 (2011). The latter scholarly opinion indicates

aim at innovation are Patent rights which particularly being a state-granted monopoly in the form of time-limited property rights are sought after significant amounts are invested in R&D. A reward to this endeavour comes as grant of exclusivity to the inventors over their respective inventions for a certain time so as to en-cash the first-mover advantage in the market. Though, it might be argued that patents may deter rivals and may lead to higher costs through licensing by the rights holder, most scholars approve of their existence as diluting patent rights through competition law would again be a disincentive to innovation – an aspect which is often aimed at by competition laws for a healthy economy.

Notwithstanding this, the arena which still remains most deliberated is the retail sector; where the ramparts of the old rigorous framework still stand to glory. Volumes of literature are available on themes which boast of restricting the entry of foreign players into retail. However, it gets more or less crystal clear that the prohibition on entry of foreign players into retail is only to facilitate and allow higher valuations for the existing Indian retail outlet owners at a later stage, when they can cash out²⁴. Earlier, businessmen used to corner various licences, permits and quotas but now, though some thrive on of entry restrictions this nature, the others stoop on the ambiguity of Press Note 18²⁵.

4.1 Competition Era and Issues of Trade Liberalisation

The discussions on modern Competition era taking its shape in India and replacing the ‘*License-Permit Raj*’ would be parsimonious if no reference is afforded to the international trade considerations and related commitments which were made by India at the international fora. Significantly, it was a key issue and a prime cause behind the ongoing phase of transition amidst the other concerns striving to ensure and manage competition and to derive the most out of liberalisation²⁶. An account of that period is illustrative to the fact that this task was all the more

that the drive to open up the gates for foreign Direct Investment has now shifted the control of establishing monopolies from the government to private players.

²⁴ Harsha, J., *Needed dismantling of data ‘License-Permit Raj’ to boost research and innovation in India*, 105 CURRENT SCIENCE 9 (2013) 1207.

²⁵ *Supra note* 13.

²⁶ RAMAPPA, T., *COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS*, (2006, OXFORD UNIVERSITY PRESS, NEW DELHI) 15.

cumbersome as the nation was not starting afresh due to various institutional mechanisms which already stood in place. Moreover, attempts at freeing and de-regulating were being taken up at a time when the global economic environment was also witnessing a transformation owing to the coming into existence of GATT (General Agreement on Trade & Tariffs) and subsequently, the negotiations to establish WTO/ITO (World Trade Organisation/International Trade Organisation)²⁷. As a result, it was highly anticipated that rules of the game *vis-a-vis* world trade would also change once these institutions get operational with their peculiar implications on domestic policymaking²⁸. In addition to this, no measures based on static welfare analysis could have proved adequate for third world countries like India²⁹. In this backdrop, this section analyses the aspects of trade liberalisation and its nexus with emergence of a Global Competition Policy.

5.1 Competition Policy & Trade Policy: Foes or Amigos?

Primarily, it has been suggested that trade liberalisation nullifies the need for a competition policy as anti-competitive practices are seen to be prevalent only in an economic setup with concentrated markets³⁰. A rationale behind this is that all domestic paradigms lose their potency to exercise market power due to a threat of potential competition irrespective of the share of imports in the domestic market³¹. An empirical backing to this proposition is lent by scholars who tend to find distinct degrees of convergence between domestic and international prices with the removal of

²⁷ Staiger, Robert W and Alan Sykes, *Currency Manipulation and World Trade*, 9 WORLD TRADE REV. 583 (2010). See also MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ART. X, APR. 15, 1994, 1897 U.N.T.S. 154, 160.

²⁸ FINGER, J. MICHAEL, MERLINDA D. INGCO & ULRICH REINCKE, *THE URUGUAY ROUND: STATISTICS ON TARIFF CONCESSIONS GIVEN AND RECEIVED* (1996). As the WTO came into existence much after the idea of trade liberalization was professed by GATT since 1947, it did not sought to provide any concessions to the contracting states in matters relating to any protectionist restriction adopted by them.

²⁹ Ramappa, T., *Repeal of the MRTP Act, 1969 – Reducing the Twilight Period*, available at <http://www.lawyersclubindia.com/articles/Repeal-of-the-MRTP-Act-1969-Reducing-the-Twilight-Period-1409.asp> (Last visited on June 25, 2015).

³⁰ *Infra note 30*.

³¹ Zach, Roger and Adrian Kunzler, *Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law*. In *THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES* (2010) 61, 71. See also Kovacic, William E., *How Does your Competition Agency Measure Up?*, 2011 EUROPEAN COMPETITION JOURNAL 25.

trade barriers and a negative relationship between price and cost or profit margins and imports³². However, there are yet others who bring forth a flip side to this issue. They illustrate as to how any competition policy which encapsulated trade liberalisation as its crucial agenda, was perceived as a panacea to the ailments of any economy, mostly in the developing countries like India and the manner in which it has disappointed the legal visionaries³³.

This also raises questions as to the exclusivity of the two. In a time where both trade liberalisation as well as the competition policy have failed to even put it over their respective visions, neither of them could be a remedy to the other's concerns. In simple terms, a liberalised trade policy cannot stand as a substitute for a competition policy and the two must always complement each other in their purport to promote trade, market access, global economic efficiency and consumer welfare³⁴. Necessarily, Competition Law and Policy is desired even where trade has been significantly liberalised. However, it is always the alignment between enforcing Competition Laws and other liberalisation initiatives which is to be taken into account for enabling the economy yield its intended outcome³⁵.

When we gauge the Indian Transition through this perspective, it appears extremely confounding to note that India was dosed both with the economic liberalisation measures and its commitments at WTO around the same time. While the former had much to bear with the socialistic objectives of the country by promoting consumer welfare and enhancing the competitive spirit amongst the domestic producers, the latter focused on its attempt to weaken down the trade barriers and enable the country to participate equally in the global market and that too, without its protectionist cloak getting on. The late enactment of the Act of 2002 could thus, be of no significance as soon after the economic reforms in the early 1990s, the Act of 1969 proved dysfunctional and rendered the

³² BHAGWATI, JAGDISH, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE (2008); *C.f.* Bagwell, Kyle and Robert W. Staiger, *A Theory of Managed Trade*, 1990 AMERICAN ECONOMIC REVIEW 80 (4): 779-795.

³³ Aghion, Philippe, Robin Burgess, Stephen Redding and Fabrizio Zilibotti, *The Unequal Effects of Liberalization: Evidence from Dismantling the License Raj in India*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER 12031.

³⁴ Topalova, Petia, *Trade Liberalization, Poverty, and Inequality: Evidence from Indian Districts*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER 11614 (2005). *See also* COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES, UNCTAD/DITC/CLP/2004/1.

³⁵ *Ibid.*

legal framework devoid of what it most crucially required then. This prevailing gap of almost a decade in essence was without any policy or a vision in place which at that instance, could have held the reins tight and would have assimilated the Indian policy framework on some common grounds. What could have been avoided much simply was embraced with much desperation and this has indeed parked the nation to be at cross-roads in the present times. While one road leads it to economic prosperity and glory, the other ends at social inequality³⁶. With mere reforms being proposed in the existing models and an absolute ignorance as to suggestions to a remedy for the socio-political accident which eventualised, it is anticipated that the day is near when the very purpose for which the reforms were started, will lose their significance rapidly and would throw the country back into the unionist era.

The discourse above carves out in much intrinsic terms, the basic handicaps which are faced by governments in transition economies. In all such instances, the political setup must always figure out an optimal way of stitching the trade and competition policy together³⁷. In this regard, the only consideration to be borne in mind is that if the accompanying economic policies and in particular, the exchange rate strategy is not correct, the remedial nature of trade liberalisation would reverse and would raze down the market scenario to be one of a skewed playing field that disfavours domestic production and stands completely averse to competition³⁸. In addition, exploitation of the extra-territorial nature of settlement process governing trade disputes, to weed out the out-of-border anti-competitive practices, has added to the peril³⁹.

More so, the interface between these two realms has also acquired much rhythm and importance owing to the deliberative exercise taking place in the WTO forums relating to the same. Recent

³⁶ Sen, Kumkum, *Old Wine in New Bottle – 2011 Competition Policy*, BUSINESS STANDARD (NEW DELHI) AUGUST 29, 2011. The author has argued as to how even the modern Competition law has not been able to keep up to the expectations of the law-makers and has made the entire play dismal by armouring the wealthier producers and those who have a greater say in the economy.

³⁷ Ram Mohan, T. T., *Competition Policy Dilemmas*, ECONOMIC & POLITICAL WEEKLY (July 2000).

³⁸ Melitz, Marc, *The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity*, 2003 *ECONOMETRICA* 71(6): 1695-725.

³⁹ Recent cases before WTO involving U.S. like the *Shrimp-Turtle cases* and the *Tuna-Dolphin cases* have witnessed an argument that its only the WTO provisions which have an extra-territorial application. They cannot be used as a modality to extend the scope of national laws as that would tumble down the balance of obligations which culminated into the negotiations.

cases at the WTO highlight issues that are relevant for countries which have either enacted or are modifying their competition policies. The obduracy for any country, particularly the developing ones can be enormous owing to the complexities, data and resource requirements for dealing with trade disputes of such a genre through the WTO mechanism⁴⁰. It requires an utmost degree of coordination between cells dealing in trade liberalisation issues and the authorities concerned with competition policy. However, if the settlements are struck with political support through a bilateral negotiation, it might further worsen the situation by introducing provisions such as Voluntary Export/Import restrictions which again, would be violative to the commitments of the concerned nations for trade liberalisation⁴¹. In addition, since almost all policy initiatives in a particular member nation to WTO can be questioned as a ‘*trade dispute*’ before WTO, it would necessarily be questioning not only a state’s freedom to institute policies in place domestically but also, as to the conduct of domestic firms in organizing their activities. This was exhibited at a much clearer level in the famous Kodak-Fuji case⁴² and the General case of Japanese Keiretsu⁴³ which accustomises us to the intensity of threats, an inter-country difference may pose to the international competition, trade and market access in the course of economic organisation. However, as far as India is concerned, the analysis leads us to some quintessential results which indicate that trade policy and its implementation must always be seen to have a concern with access to markets and therefore, to remove all artificial barriers to markets. Whereas, on the other hand, the Competition Law Policy must efficiently limit itself to prescribe the rules under which firms compete with one another in markets.

6.1 Global Markets and the clamour for Global Competitiveness

All markets have an endogenous structure where the firms through their explicit conduct not only sketch out their relevant geographic market but also do assist in shaping the design of the markets, as such⁴⁴. This leaves us to distinguish with much precision between the markets which haven’t adhered to reciprocal liberalisation of trade and those which though, have made efforts to open up

⁴⁰ *Supra note 37.*

⁴¹ Wendy L. Hansen, *The International Trade Commission and the Politics of Protectionism*, 84 AM. POL. SCI. REV. 21, 28 (1990).

⁴² *Kodak v. Fuji*, WT/DS 44 AND WT/DS 45.

⁴³ *The General case of Japanese Keiretsu*, WT/DS 44/R 478.

⁴⁴ *Supra note 18.*

their economy, still march forth with a pseudo-protectionist approach. This seems appropriate for developing nations such as India where complementary assets relating to marketing and distribution provide some additional benefits to domestic firms *vis-à-vis* the Multi-Nationals⁴⁵. In a typical situation where the market conditions favour the latter more, inclusion of inter-enterprise linkages in trade disputes will render a double blow to the domestic players, and hence to the spirit of competition in the long run⁴⁶. This is complemented by the widely acknowledged understanding that any competition policy does not lend itself very easily to incremental changes⁴⁷.

It does not therefore, come as astonishment, that the U.S. despite its clamour for negotiating an agreement on competition issues right from the Uruguay rounds is still reluctant to pursue its anti-trust objectives through the WTO. Though, the U.S. policymakers are well aware of the fact that business practices are better covered by anti-trust regime than by trade law but they fear the dilution of long established anti-trust rules in the process of multi-lateral negotiations⁴⁸. A similar apprehension is shared even for the government-condoned private business practices that are potent to create barriers to trade by restricting parallel importation – which might as well come under closer scrutiny⁴⁹. Consequently, notwithstanding the acknowledgement that anti-dumping interventions and government support for parallel importing prohibitions appear as sources of contingent protection from trade and price competition, there are several political obstacles to reduce the scope of these provisions⁵⁰.

⁴⁵ Chakravarthy, S., *Metamorphosis of Indian Competition Law*. In THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES 109 (2010).

⁴⁶ *Supra note 19*.

⁴⁷ TOWARDS A FUNCTIONAL COMPETITION POLICY FOR INDIA: AN OVERVIEW (PRADEEP S. MEHTA ED., 2005).

⁴⁸ MAVROIDIS, PETROS C, ET AL., THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO 265-80 (2008). *See also* UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, ART. 11.3, APR. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ANNEX 2, LEGAL INSTRUMENTS— RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 112 (1994).

⁴⁹ *Ibid.*

⁵⁰ Chakravarthy, S., *New Indian Competition Law on the Anvil* (RGICS WORKING PAPER SERIES No. 22, 2001) available at <http://www.rgics.org/pdf1/wpn-22.pdf> (Last visited on July 5, 2015).

In this regard, it is worth mentioning that U.S. has been much proficient in giving life to these provisions in the recent past and that too, much extensively⁵¹. Besides, it has recently won a major case where the WTO panel has held that the provisions of the U.S. Trade Act of 1974 (which was designed to take unilateral action against the country's trade partners) violates the commitment taken by it under the WTO⁵². In this backdrop, it is highly unlikely that the U.S. would aspire to drag issues related to competition policy under the ambit of WTO deliberations. As a result, in such a scenario it does not make sense for countries like India to agree to multilateral disciplines on competition policy unless it is agreed that prohibition on anti-dumping and unilateral sanctions would follow the adoption of common competition policies⁵³. This hypothesis carries much relevance in the present times when all such maladies are being proposed to be cured by emergence of a global competition policy, the confabulations regarding which has been on the international agenda only quite lately, and thus, award not much room to us for its importance to be appreciated.

Trade liberalisation in India has resulted in severe competition in the context of countries like China, Taiwan, South Korea, Malaysia and Thailand which pursue export-led growth with policies that favour exportable and importable goods production *via. inter alia* strategically undervalued currencies⁵⁴. The only modality through which the domestic industry can be given a chance to respond to their challenge is to precisely follow these countries in strategically undervaluing the native currency and not just its devaluation⁵⁵.

6.1 Moving Out of the Bounds: Implications of the Effects Doctrine

⁵¹ GUAY, TERRENCE, THE UNITED STATES AND THE EUROPEAN UNION: THE POLITICAL ECONOMY OF A RELATIONSHIP 39 (1999). *C.f.* Irwin, Douglas A, *Changes in US Tariffs: The Role of Import Prices and Commercial Policies*, 88 AM. ECON. REV. 1015, 1017–18 (1998).

⁵² *Ibid.* See also *United States — Sections 301–310 of the Trade Act 1974*, WT/DS152/R.

⁵³ *Infra note 53.* See also Krishna, Pravin, and Devashish Mitra, *Trade Liberalization, Market Discipline and Productivity Growth: New Evidence from India*, 1990 JOURNAL OF DEVELOPMENT ECONOMICS, 56(2): 447-62.

⁵⁴ Bown, Chad P, *Emerging Economies and the Emergence of South-South Protectionism*, WORLD BANK POLICY RESEARCH WORKING PAPER (AUGUST 2012). See also Bown, Chad P and Patricia Tovar, *Trade Liberalization, Antidumping and Safeguards: Evidence from India's Tariff Reform*, 2011 JOURNAL OF DEVELOPMENT ECONOMICS 96 (1): 115-125.

⁵⁵ *Ibid.*

As an indicia to the exposition made above, it would be purposeless to reiterate the role of the Act of 2002 in upkeeping the competitive spirit and the wave of liberalization. Its provisions while holding fast with its intent to prevent inequity and to ensure a free and ethical trade environment to the participants in the market, award the regulator i.e., the CCI (Competition Commission of India) – with powers to monitor anti-competitive behaviour taking place within the country. So also, it has been entrusted to take cognisance of an act in such connection taking place outside India but having an adverse effect on competition in country⁵⁶. The Act of 2002 by allowing CCI to exercise extra-territorial jurisdiction has also made it possible for the regulator to take action against such anticompetitive conduct involving imports and foreign cartels which may adversely affect the Indian market⁵⁷.

As we delve into this special provision which is much akin in nature to the extra-territorial nature of the provisions dealing with settlement of trade disputes before WTO, it's observed that an increase in globalisation of business along with the global acceptance of this provision under the Act of 2002 – often referred to as the '*effects doctrine*', has lead to expansion of the scope of national competition laws to cross-border business activities⁵⁸. The principles of extra-territorial jurisdiction can be bifurcated in two parts i.e., the subject matter - jurisdiction and enforcement - jurisdiction. For the purpose of subject matter - jurisdiction, the territorial and nationality principles are sufficient to undertake a great number of infringement of competition laws⁵⁹. Whereas, for giving effect to the enforcement – jurisdiction, it is understood that without entering into bilateral or multilateral agreements, the provisions of the Act of 2002 may not be given its due effect⁶⁰. Thus, the CCI must endeavour to enter into bilateral or multi-lateral agreements with other competition regulators in this regard⁶¹.

⁵⁶ SEC. 32, THE INDIAN COMPETITION ACT OF 2002.

⁵⁷ *Supra note 52*.

⁵⁸ *Haridas Exports v. All India Float Glass Mfrs. Association and Ors.* [2002] 111 COMP CAS 617 (SC).

⁵⁹ Basant, Rakesh and Morris, Sebastian, *Competition Policy in India: Issues for a Globalising Economy*, ECONOMIC AND POLITICAL WEEKLY (JULY 2000) 2735.

⁶⁰ Maheshwari, Kartik and Simone Reis, *Extraterritorial Application of the Competition Act and Its Impact*, COMPETITION LAW REPORTS (JANUARY 2012) 144.

⁶¹ The arrangements to be made as specified have been warranted for and provided under Sec. 18, The Indian Competition Act of 2002.

Notwithstanding that the effects doctrine is a common provision in the competition laws of other nations and even existed in the Act of 1969 as well, the difference in modality and efficiency with which the latter and the Act of 2002 deal with it, becomes a subject of greater relevance to us for analysing the transition. An illustration under the doctrine would mean that Country B could prosecute Country A's firm in B's own courts on the basis of the laws prevalent in B. This however, frequently runs into problems of gathering evidence and enforcing penalties and could also be interpreted as infringing the sovereignty of country A which could only be tackled through the principle of Comity of nations. Under positive comity, authorities in A will entertain complaints from B and proceed against the firm in their jurisdiction on the basis of their own laws. This has worked reasonably well between the European Union and the United States in recent years⁶². However, it requires similar regulatory frameworks and philosophies in the two jurisdictions.

Although, the administration of the Act of 1969 while dealing with this issue exhibited a lack of technical expertise with long delays in delivering judgments making it hardly likely for India to succeed in obtaining the benefits of reciprocal positive comity. Contrary to this, the modern competition regime has remedied these deficiencies and adopts an approach much similar to the one relating to positive comity, as discussed above⁶³. However, it may be noted that a reciprocal implication of this effects doctrine are absent in respect to Indian firms as many of the restrictive business practices such as export and import cartels and exclusionary vertical arrangements that restrict market access to imports are not practised on a significant scale by the Indian firms.

Moreover, during the period of transition which witnessed an almost absence of law guiding the Indian markets, much of the pitfalls of the Act of 1969 continued to haunt the economic scenario. This in turn, had a great repercussion on the perception of foreign players which has still not been reversed by the new Competition regime, operational for more than a decade now. The United States Trade Representative's (USTR) Report⁶⁴ which invariably comes down hard on any policy that impedes market access to American firms did then, ended up exonerating India on this score. Both state-owned and private Indian firms were reported to engage in most kinds of anti-

⁶² MASSIMO MOTA, *COMPETITION POLICY: THEORY AND PRACTICE* 30 (2004).

⁶³ RICHARD WHISH, *COMPETITION LAW* 13 (2009, OXFORD UNIVERSITY PRESS).

⁶⁴ OFFICE OF THE U. S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 61–62 (2010).

competitive practices with little or no fear of reaction from government overseers or actions from a clogged court system⁶⁵. It again hinted India to be suffering from the shackles of a slow bureaucracy and over-intervention of sectoral regulators despite having done away with its protectionist proclivity in the early 90's.

Consequently, the present legal framework needs to focus a great deal on revamping the Indian image in the global marketplace. One idea in this regard would have been to bring into force various provisions of the new Act at staggered intervals, as provided for in the Act itself, and to implement them aggressively against foreign firms, and then offer to bring them under international disciplines in exchange for suitable concessions. Now that this strategy has been met, a further analysis needs to be taken as to its implications.

7.1 Challenges to the Incumbent & the Road Ahead

Though the modern Competition era in India is much lauded for its holistic vision and has been often over-estimated to be a panacea for all glitches in the economic setup of the nation, it faces stark challenges from its very own foundation. As is well known, *inter alia* the rationale behind withering away of MRTPC (Monopolies & Restrictive Trade Practices Commission) was that it lacked adequate functional autonomy⁶⁶. A similar impediment is encountered even by CCI (Competition Commission of India) as established under the Act of 2002. It grapples with limitation over its jurisdiction in various matters and suffers from a lack of authority for the purpose of recruiting its workforce. Though several representations have been made in this regard to the government, the response from the Administrative chambers remains much cold where the control over the rules for employment of workforce rests till now.

This falls under the auspices of the legislation of 2002, which entrusts the government to take a decision on the number, qualification and salary structure of the employees to be hired and thus, leaves a little room for the Competition regulator to take a call suiting its requirements⁶⁷. However,

⁶⁵ *Ibid.*

⁶⁶ *Supra note 45.*

⁶⁷ *Supra note 55, Secs. 10 and 14*

scholarly opinions on this matter of immediate importance categories it to be a structural issue by emphasising the need for professionals and full-time employees well conversant with competition regulations to be a part of the Commission⁶⁸. Also, much criticism is attracted with respect to appointment of officials on deputation which evidently, weakens the professional standing of the regulator. A felicitous consequence of this proposition can be witnessed in the frequency at which several orders passed by the regulator have been challenged in the courts. Notwithstanding this, yet another encumbrance to the regime in place comes from the limited powers of the Director General (Inspection), which though has the powers to conduct search and seizures under the Act of 2002, but it gets limited to only such cases where he has obtained a warrant from the magistrate in that regard⁶⁹. This proves fatal to the fragile nature of evidences in competition matters, half of which, may not be amicable to admissibility in courts owing to an extremely wide ambit of terms like ‘agreement’ under the Act⁷⁰. The conundrum becomes even more evident, if we compare the Indian Legislative setup with its European counterparts which have inspired the framework in the former. The latter do award the powers to search and dawn raids on the investigative wing for the purpose of gathering documentary evidence in a probe⁷¹.

8.1 Conclusion

Tracing its journey between ideologies, the deliberations made above signified the major dilemma which India faced while traversing between the ‘*License-Permit Raj*’ to Competition era. Broadly, it was comprehended that the need for this transition was much voiced as the protectionist approach which India had adopted, by that time started mutating into a draconian rigour. As the investment rate started to stoop low and India’s image as an unfavourable destination grew, the government took immediate measures and opened up the roof to Indian economic setup. As this allowed for a competitive spirit to sprout from the domestic market, the increasing pressure for trade liberalisation around the same time started reversing the progression which India was about to embrace with much desperation. Despite this, the comprehensive architecture of the Competition

⁶⁸ AGHION, PHILIPPE AND RACHEL GRIFFITH, *COMPETITION AND GROWTH* (2005, CAMBRIDGE: MIT PRESS).

⁶⁹ *Supra note* 66, Sec. 41.

⁷⁰ *Ibid.*, Sec. 2(b). It defines an agreement to include any arrangement or understanding or actions in concert – (i) whether or not, such arrangement, understanding or action is formal or in writing; and (ii) whether or not such arrangement, or understanding or action is intended to be enforceable by legal proceedings.

⁷¹ *Supra note* 62.

Law regime which entered into the arena in 2002, commenced to effectually treat these pitfalls and started revamping the face of Indian economy with much strength and vigour.

Though the regime in place has been accused for alienating itself with its objective due to the dynamics with other policy frameworks in place, but, the situation can be very well improvised with regular reforms. Here, like other advanced nations, India will have to explicitly take into account the historical and the socio-economic context before contemplating or introducing any Competition Law Policy reforms. Since many of the extant distortions in the market have been caused by earlier institutions which remained operational for a long stretch, undoing the scars is no doubt a cumbersome task and would only reach closer to accomplishment as we continue express our reliance on the present structures while acknowledging the quintessence of the spirit of competition. In addition, an approach to harmonize the competition policy with other sectoral regulations can ease much of the pressure. This would be much feasible and desired as the mutual interference and interaction of all such sectoral regulators with CCI is optimum and in the recent past, has been a cause of concern for the policy analysts.

COMPETITION LAW: AN APERTURE TO ECONOMIC REGULATION IN NEO-LEGAL SYSTEM

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India, in its formative years of freedom, laid down the seeds of socialistic approach towards economic development. Five-year plans were designed with the aim of self-reliance and self-sufficiency of the Indian industry. In this process of indigeneity, focus was laid on strong governmental regime to ensure equal and prosperous distribution of resources. One such attempt of the state resulted in the enactment of the MRTP Act, 1969 with the basic aim of comprehensive control over direction, pattern and quantum of investment to ensure that wealth is not concentrated in the hands of the few.

Law has to be dynamic as conceptualised by father of sociology 'Auguste Comte'. In order to adjust with the changes promulgating in the society it is important for law to go into transition. The libertarianism theory is giving an orifice to individual choice through the prism of rule of law and personal liberty. It edifices government's role to fortify personal liberty by providing space for freedom of trade and markets. The very basic idea behind the approach is to flourish markets by inducing license free trade practice and refurbish the fabric of law with the evolution of society.

This paper would show the journey about the transition in Indian economic regulatory system through the MRTP Act, 1969 towards Competition Act, 2002 and its enforcement in August 2009. The voyage from a closed market era to an open market epoch with realistic laws, which can be contemplated with the New Economic Policy of 1991 and give birth to a system that enables free markets for the ennoblement of fair competition, entrepreneurship and individual choice. This

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paper instills the reasons as to why the Indian Economy was starving for the introduction of a new Competition Law regulator. In addition, it will endeavor to focus upon the outlets in implementation of the new law.

The deliberation is upon the premise that ‘license free rule is more apposite for the modern day India.’ the discourse would cover keen questions regarding whether the new policy is being successful in its course? What could be done to ameliorate the dismantled plight? And why this new approach has been devised?

1.1 Introduction

“Democracy no longer means what it was meant to. It has been taken back into the workshop. Each of its institutions has been hollowed out, and it has been returned to us as a vehicle for the free market, of the corporations. For the corporations, by the corporations.”

- Arundhati Roy

With the inception of human life, liberty has been considered and acknowledged as a prime virtue for its existence. It is a cradle to a developed and organised human society within the social and economic framework as it is a cardinal part of the natural law. Henceforth, the man made law does not instil power to curb the liberty as that would not cave in natural law principles. John Locke, the stalwart of libertarian theory, has asserted that having natural liberty is the most superior virtue and no other grander power should curtail the same.¹ His thoughts have laid down the impression of ideal governance. It envisages the imperativeness of liberty to conform to the individual freedom and its nourishment.

In the present paper, the cardinal contention covers the essentiality of liberty of markets in a democratic politics, as it is the highest form of it. It stresses upon free-markets approach, which infuse competition, individual choice and entrepreneurship. The father of economics, Adam Smith, emulated that ‘invisible hand’² in an economy would fortify that free-markets, which are left to its

¹ John Locke on Liberty and Freedom by DTC, available at <http://www.forfreedomssake.com/blog/2009/02/john-locke-on-liberty-and-freedom/>

² Emma Rothschild, *Adam Smith and the Invisible Hand*, AER, Vol. 84, No. 2, Papers and Proceedings of the Hundred and Sixth Annual Meeting of the American Economic Association (May, 1994), pp. 319-322, Published by: American Economic Association, available at <http://www.jstor.org/stable/2117851>

own running would be accruing to more benefits than intervention by the State on every venture. It is indeed very important to have regulations for the assurance of healthy competition in the market but those regulations should not be burdensome upon the constructive growth of an economy. Even the legislators of UK have ascertained the constitutive principle of liberty for the markets through the enlargement of their ambit by amending anti-trust laws. Therefore, for a fruitful and effective growth it is viable to adopt libertarianism as an approach towards development.

India is a country, which has always inclined towards a socialistic form of governance as it is being considered the most holistic pursuit by the stalwarts of the Constitution of India.³ Article 38 and 39 of the Indian Constitution enshrine the directive principles for the State that it should take care of the distribution of wealth and the concentration of wealth is not in the hands of few. It is because of these principles that from the inception of post-independence era, there has been induction of several Industrial Resolutions, such as Resolution of 1948 and 1956, which have given a framework to Indian economic regulations. Moreover, the introduction of Industries (development and regulation) Act, 1951 for regulating private sector and Monopolies and Restrictive Trade Practices Act, 1969 for the annulment of concentration of wealth in the hands of few have been legislated. In continuation of this Foreign Exchange Regulation Act was also enacted, whereby there was intervention by the Government for allowing the participation of the foreign companies. All the enactments have been endured for the augmentation of the industries and better economic welfare of the people for a fundamental growth of the country. However, these measures have failed in achieving the objectives laid down for them. In Addition, they promoted a number of inefficiencies, distortions and rigidities in the system.⁴

There is always a protocol, which has to be accoutred for the implementation and enforcement of any policy. The idea for the MRTP Act, to be repealed was to pursue a libertarian approach, as devised by the great thinkers like John Locke and Adam Smith that with less governmental

³Surendra Prasad Narain Singh, *Democratic Socialism: An Indian Approach*, IJPS, VOL.26, No.4, CONFERENCE NUMBER: XXVII INDIAN POLITICAL SCIENCE CONFERENCE: MYSORE, 28th, 29th, & 30th DECEMBER, 1965 (October-December,1965), pp. 142-149, Published by Indian Political Science Association, available at <http://www.jstor.org/stable/41854100>

⁴ S.K. MISRA AND V.K. PURI, INDIAN ECONOMY- IT'S DEVELOPMENT EXPERIENCE, Himalaya Publishing House, 27th Edition, pp 430-438

intervention there would be more growth in the market sector and that too with higher developmental aspects. It has been thought about that there would not be regulative law reforms rather competitive legislations, which increase the virile competition and give opportunity for the new start-ups to be settled in the Indian market economy.⁵ This would definitely magnify more development of the country with respect to economic advancements.

Consumer Protection Act, 1986 and Indian Competition Act, 2002 are the major attributes to the approach of evicting the anti-competitive environment in the country. By protecting, the consumers from the ill treatment of the business enterprises and by giving opportunity to the markets to enlarge without having any strict regulatory framework for entering into it. The whole approach was to mould a holistic environment for the business in India through these both legislations, as “*they are two wings of the same house*”.⁶ Both incline towards securing the consumer deception and fostering the prelation of the competition in the markets through stifling the stringent regulatory norms. This paper is an effort to show how in India the license permit raj has taken its course and its metamorphosis to the competition era and to a mixed economy. The liberty of markets has to be fortified and the regulations, which have been imposed to keep check over the market in India, should assist government in delving upon a constitutive formula for giving room to the markets to grow and sustain effectively.⁷ Moreover, India’s inability in structuring its growth and converting it into the development⁸ is a key discourse of the paper.

2.1 Orifice to the Licensing Era

After independence, it was the greatest challenge for the Indian Government to edifice a proper channel for economic regulations in order to have proper supervision and adjudication of the disputes arising out of these pursuits. The foremost step into this arena was devised through Industrial Resolution of 1948⁹ when certain industrial aspects have been discussed for the first time and both public and private enterprises have been considered thoroughly. The highlight of

⁵ Supra note 2

⁶ Thomas B. Leary, *Competition Law And Consumer Protection law: Two Wings Of The Same House*, ALJ, Vol. 32 pp. 1147-1151

⁷ Devendra G. Kodwani, *Economic Regulation of Utility Industries*, EPW, Vol. 35, NO.30 (Jul. 22-28,2000), pp. 2657-2661, Published by: Economic and Political Weekly, available at: <http://www.jstor.org.elibrary.nirmauni.ac.in/stable/4409534>

⁸ *Id.*

⁹ R.L. Varshney, *Government-Business Relations in India*, BHR, Vol. 38, No. 1, International Government-Business Issue (spring, 1964), pp. 22-57, Published by: The President and Fellows of Harvard College, available at: [://www.jstor.org.elibrary.nirmauni.ac.in/stable/3112486](http://www.jstor.org.elibrary.nirmauni.ac.in/stable/3112486)

the policy unfolds the industries where state is a monopoly. In addition, there was a provision of mixed sector in six different industries of strategic importance, there was also a pool of eighteen industries only pointed out for the governmental control and rest of the industries were being left for the exploration of private players. Then came the Industrial policy 1956¹⁰, in this policy the more emphasis was being given on the small and cottage industries and also the ambit for the industries coming under the state was widened. In addition, the mutual dependence of private and public sectors has been expanded, as only four industries have not been allowed for private functioning.¹¹ Nevertheless, the major step in regulating the economy was being taken through the enactment of Industries (Development and Regulation) Act, 1951. This Act was specifically dealing with providing license to the upcoming industries and enshrining certain guidelines for the strict measures of adjudication. The major emphasis was given on the following:

1. Maximum Governmental intervention in every facet,
2. Registration and licensing of industrial undertakings, enquiry of industries listed in the schedule of registration and cancellation of registration and license if found working out of the permitted ambit (restrictive provisions)
3. Direct regulation and control by the Government, Control on price, distribution, supply, etc and some constructive measures (reformative provisions)

These were the certain modulations brought by the enactment in regulating the economic affairs of the country. It was the first step towards infusing licensing measures on the industries, which further led to many extraneous consequences.¹²

The cardinal points of criticism regarding this particular Act have been pointed out by the several commissions' reports, appointed by the government itself such as Monopolies Enquiry Commission in 1964 (also famously known as Das Gupta Commission)¹³, Dr. R.K. Hazari Commission in 1965¹⁴ and Dutt Commission in 1967¹⁵. The very basic loophole founded by all

¹⁰ *Id.*

¹¹ Supra Note 4

¹² Supra Note 9.

¹³ J B Monterio, *Commissions of enquiry their limitations*, EPW, July 1964, pp. 1137-1142, available at http://www.epw.in/system/files/pdf/1964_16/28/commissions_of_inquirytheir_limitations.pdf

¹⁴ *Industrial Planning and Licensing Policy: Summary of the Hazari Report*, EPW, Vol. 2, no. 16 (Apr. 22, 1967), pp. 746-748, Published by: Economic and Political Weekly, available at [://www.jstor.org/stable/4357835](http://www.jstor.org/stable/4357835).

¹⁵ Aurobindo Ghose, *Joint Sector and 'Control' of Indian Monopoly*, EPW, Vol. 9, No. 23 (Jun. 8, 1974), pp. 906-916 Published by: Economic and Political Weekly, available at : <http://www.jstor.org/stable/436371>.

these commissions was in the very strategy of the government. They stipulated their major enquiry upon the fact that licensing measures have been failed to fulfil their objectives and concurrently failed in their quest (what government had actually planned).

The underlying idea was to decide and ensure the capacities according to plan priorities and targets. However, the licenses have not been allocated according to the prescribed approach and per chance, private companies ended up investing into only profitable area of their interests. Likewise, there was discretionary allocation done by the government without any transparency and due to the same licensing, concentration of power was also heightened up in the hands of few. In addition, there were several imbalances referring to regional biases, the Dutt committee has pointed out that few states like Maharashtra, Gujrat, Tamil Nadu and West Bengal had the most of the benefits. The whole approach turned out to be a mess during the strict licensing era, which has led to surfeit of repercussions.

3.1 Advent of Mahalanobis Committee and the MRTP era

The Mahalanobis Committee has made the most effective observations, as it has delved upon the adversities caused by the earlier enactments and policies vouched out by the government and prescribed certain mending. In pursuance of this, Monopolies and Restrictive Trade Practices Act was adopted in the year 1969 in order to curb the increasing concentration in the industrial sector. This Act has hooded national monopolies (covered by Section 20(a) of the Act as ‘single large undertakings’) and product monopolies (covered by Section 20(b) of the Act as ‘dominant undertakings’)¹⁶. These two categories have been made in order to have a control over the production capacity of big industries (although, this particular part was severed after 1985). The Act also included Restrictive Trade Practices (RTP) and Monopolistic Trade Practices (MTP).¹⁷ At a larger glance, the Act had devised approach towards curbing the monopolistic trade practices because until 1984 the Act was only looking after the monopolistic trade practices and not the unfair trade practices. The major concern for good governance should be increasing of the virile competition rather restricting only the monopolies in order to engulf a healthy economy.

¹⁶ Ryutaro Komiya, *A Note on Professor Mahalanobis' Model of Indian Economic Planning*, The Review of Economics and Statistics, Vol. 41, No. 1 (Feb. 1959), pp 29-35, Published by : The MIT Press, available at <http://www.jstor.org/stable/1925455>.

¹⁷ Pulapre Balakrishnan, *The Recovery of India: Economic Growth in the Nehru Era*, EPW, Vol. 42, No. 45/46 (Nov. 10 - 23, 2007), pp. 52-66 Published by: Economic and Political Weekly, available at <http://www.jstor.org/stable/40276833>.

M RTP Act superficially included¹⁸:

Monopolistic Trade Practices: Section 2(i) is talking about the same and it bears the responsibility for checking that the concentration of wealth is not there to the detriment of the public and it supervises that no company or enterprise should use the dominant position in order to abuse the market. It has been considered that such kinds of companies, who are taking unduly advantage of their position, should be penalized for consumer welfare.

Restrictive Trade Practices: it enshrines all the irregular and illegal activities, carried out by the companies in order to obstruct the business of some other companies. It is made to stifle such activities, which are anti-competitive in nature and should be restricted.

Unfair Trade Practices: Sachar Committee has recommended this particular provision and it is being added through Section 36-A of the Act. It was majorly included in order to evict the practices related to misrepresentation and misleading through the advertisements, unfulfilled guarantees and false promises of utility, quality and efficacy of the products.

This Act was being enacted keeping in mind the Directive Principles, given in the Constitution of India (Article 38 and 39), which state that the wealth should be distributed equally among the citizens and there ought not to be any disparities in it.

In order to adjudicate over the matters pertaining to the same there had been making of an MR TP Commission¹⁹, under the aegis of Section- 5 of the Act. It has to look after the matters pertaining to the restrictive trade practice, monopolistic trade practice and unfair trade practice and regarding the imports, whether it has been done in the correct procedure or not and it has to submit its findings to the government. There are some of the judgements delivered by the Commission pertaining to the same.

In *M/s Shyam Gas Company v. State of UP*²⁰, the gas agency was the sole proprietor of providing gas services in that area of the state. It took advantage of its position and favoured the condition that for having a gas connection, customers have to buy the gas stove from the company only. This

¹⁸ MR TP Act: Rise Fall and Need for Change: Eco Legal Analysis, available at <http://www.ukessays.com/essays/economics/mrtp-act-rise-fall-and-need-for-change-eco-legal-analysis-economics-essay.php>.

¹⁹ N. Ranganatha Samy, *Monopolies Commission and Misleading Advertisements*, EPW, Vol. 21, No. 41 (Oct. 11, 1986), p.1772, Published by: Economic and Political Weekly, available at <http://www.jstor.org/stable/4376197>.

²⁰ AIR (1991) ALL 129

particular act was being adjudged as a restrictive trade practice and the same was penalized. In another case of *Bal Krishna Khurana*, the seller was selling the sub-standard goods to the consumers, which has been found out to be an unfair trade practice by the commission and the same has been restrained from trading.

These were the few judgements, which portray a constitutive growth but slowly and gradually with the initiation of the new policy of 1991, the commission had given many foul judgements, which were not apt for the public interest at large.

4.1 Malfunctioning of the License-Permit Raj

In the last chapter we learned about the reasons of inception of the Monopolies and Restrictive Trade Practices Act, 1969. Also, we read about the handy Foreign Exchange Regulation Act, 1973. Just as there are pros and cons of everything, the same notion has been established in case of the MRTP Act, 1969. There are pros and cons of every legislation. The difference between any other Act which is still a law in our country and MRTP or any repealed Act is that the Repealed Acts have more cons than its pros, hence leading a way towards the malfunctioning of the system. These kinds of acts work as constant speed-breakers and never allow the economy to run free from all kinds of glitches. It is very pertinent to understand the reasons as to why this License Permit Raj (MRTP Act, 1969) was repealed completely and the Indian economy was starving for a new law in command. In spite of laudable objectives of the MRTP Act, it was unable to achieve its objectives both in terms of enforcement of the law and enforcement of its rulings. From the jurisprudential perspective the MRTP Commission took a fairly narrow view of private contractual view. However, in spite of notable rulings from the Supreme Court under the MRTP Act, from a regulation and enforcement perspective, the MRTP Act failed to achieved its objectives. Against this background, the Finance Minister of India in its budget speech in February, 1999 made the following statement in regards to the then existing MRTP Act –

“The MRTP Act, has become obsolete in certain areas in the light of international economic developments relating to competition law. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided

to appoint a committee to examine these range of issues and propose a modern competition law suitable for our condition”²¹.

The MRTP Act was passed at a time of strict regulation and licensing of Industries which was aimed at achieving the objectives of the MRTP Act, namely, to prevent (a) Economic Power concentration in a few hands and curbing monopolistic behavior, (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect consumers as well as to avoid concentration of wealth.²² The MRTP Act, was enacted at a time when India had the policy of "Command and Control" paradigm for the administration of the economic activities of the country. Most of the process attributes of competition, such as entry, price, scale, location etc. were regulated. Thus, the MRTP Act, had very little influence over these process attributes of competition, as they were part of a separate set of decisions and policies of the Government. As the new paradigm of economic reforms, namely, LPG took root in the mid 80s and intensively from the early 90s, the MRTP Act, was hardly adequate as a tool and a law to regulate the market and ensure the promotion of competition therein. The MRTP Act, though a competition law, could not be effective in the absence of other governmental policies inhering the element of competition²³. The MRTP Act conceived and legislated more than 30 years ago, was a consequence of “Command-and-Control” policy approach of the Government. The so call MRTP firms with assets more than Rs. 100 crores (about US \$ 22 million) were prohibited from entering and expanding in any sector except those listed in Appendix I of the Industrial (Development and Regulation) Act, 1951. Even, in respect of such listed sectors, the MRTP firms were required to obtain MRTP clearances in addition to the usual industrial licenses. In other words, the MRTP firms, generally considered big in size, were allowed to grow only under Government supervision. Size, therefore, was a pejorative factor in the thinking of the Government, the premise being “big

²¹ Ananth Desai ,*The Competition Act - Overview*, Nishith Desai Associates.

²² Subsequent to the 1991 amendment to the MRTP Act, there was a shift in emphasis towards prohibition of monopolistic, unfair or restriction trade practice rather than on concentration of wealth and control of monopolies. See Jaivir Singh, Monopolistic Trade Practices and Concentration of Wealth : Some Conceptual Problems of MRTP Act, *Economic and Political Weekly*, Vol. 35 No. 50 (Dec. 9-15, 2000) Page- 4437-4444.

²³ Dr. S Chakravarthy, *Why India Adopted a New Competition Law-MRPT Act metamorphoses into competition act*, CUTS International, 2009, available at www.cuts-international.org.

becoming bigger is ugly”²⁴. Yet another reason of failing of the MRTP Act, 1969 was the absence of definition or even mention of certain offending trade practices such as :

- Abuse of Dominance
- Cartels, Collusion and Price Fixing
- Bid Rigging
- Boycotts and Refusal to Deal
- Predatory pricing

The adoption of the economic reforms programme in 1991 was followed by pleas for scrapping the MRTP Act. The argument put forward was that the MRTP Act had lost its relevance in the new liberalized and global competitive scenario. It was said that only large companies could survive in the new global competitive markets and therefore 'size' should not be a restraint. Thus, there was a need to shift the focus from curbing monopolies to promoting competition. In this view, the government appointed an expert committee headed by S.V.S. Raghavan to examine the whole issue. The Raghavan Committee submitted its Report to the Government on Mar 22, 2000 where it proposed the adoption of a new competition law and doing away with the MRTP Act²⁵. Under the MRTP Act, all firms with assets above a certain size were classified as MRTP firms. Such firms were permitted to enter selected industries only and this also on a case-by-case approval basis. In addition to control through industrial licensing, such large firms for any investment proposals required separate approvals. The government felt that this was having a deleterious effect on many large firms in their plans for growth and diversification. Then there was introduction of new industrial policy with respect of MRTP and dominant undertakings. These firms will now be at par with others, and not require prior approvals from the government for investment in the de-licensed amended Act gave more emphasis to the prevention and control of monopolistic, restrictive and unfair trade practices so that consumers are adequately protected from such practices. Moreover, there was a need of a commission, which would regulate these trade practices. Perchance, the inception of the Monopolies and Restrictive Trade Practices Commission was there (MRTPC)²⁶. In spite of laudable objectives of the MRTP Act, it was unable to achieve

²⁴ *Id.*

²⁵ *Supra* Note 4.

²⁶ *Supra* Note 23.

its objectives in terms of both enforcement of the law and enforcement of its rulings²⁷. The Supreme Court of India upheld restrictive clauses in agreements²⁸ and applied the test of rule of reason in respect of such clauses in agreement²⁹. There are plethora of cases judged by the Supreme Court, which show signs of malfunctioned MRTP Act. In September 1996, on a complaint by the Alkali Manufacturers' Association of India (AMAI), the MRTP Commission granted an ex parte interim injunction order against the American Natural Soda Ash Corporation (ANSAC), restraining it from exporting soda ash to India. The commission in March 2000 confirmed this. Meanwhile, in September 1998, the All India Float Glass Manufacturers' Association³⁰ (AIFGMA) filed a somewhat similar complaint against three Indonesians. Both cases went in appeal to the Supreme Court, the appellants being ANSAC in the first case, and Haridas Exports (the Indian importer of the float glass consignment) in the second. Both cases involved allegations of predatory pricing, although that part of the complaint was not pressed by AMAI, which based its arguments mainly on the allegation that ANSAC was a cartel. In the float glass case, on the other hand, the question of predatory pricing was central. As it turned out, the Supreme Court did not go into either of these allegations. Instead, its judgment in *Haridas Exports vs All India Float Glass Manufacturers' Association*³¹, which also subsumed the *ANSAC vs AMAI* case, set aside both the injunctions because the MRTP Commission lacked jurisdiction.³² Taken together with *Haridas Exports*, these cases show that the MRTP Commission has displayed a tendency to issue orders against business practices or prices that it regards as 'unfair'. However, the proper role for a

²⁷ *Supra* Note 21.

²⁸ *TELCO vs Registrar of RT Agreement* 2SCC 55 (1977) and *M & M Limited v. Union Of India* 2 SCC 529 (1979)

²⁹ The Supreme Court propounded the following ratio : "The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to area or price will per se be a restrictive trade practice, every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the busmen to which the restraint is applied. Second, what was the condition before and after the restraint was applied. Third, what is the nature of the restraint and what is its actual and probable effect".

³⁰ *All India Float Glass Manufacturers 'Association vs P T Mulia Industrindo and Others*, 2000 CTJ 252 (MRTPC), para 21 of the chairman's order.

³¹ (2002) 6 SCC 600.

³² Aditya Bhattacharje, *India's Competition Policy: An Assessment*, EPW, Vol. 38, No. 34 (Aug. 23-29, 2003), pp. 3561-3563+3565-3574, Published by Economic and Political Weekly available at <http://www.jstor.org/stable/4413938>

competition authority, as rightly enunciated by the Supreme Court in setting most of these orders aside, is to restrain business practices that endanger competition.³³

5.1 New Policy and Liberalization - Competition Era

Since attaining Independence in 1947, India, for the better part of half a century thereafter, adopted and followed policies comprising what are known as “Command-and-Control” laws, rules, regulations and executive orders. The competition law of India, namely, the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act, for brief) was one such. It was in 1991 that widespread economic reforms were undertaken and consequently the march from “Command-and-Control” economy to an economy based more on free market principles commenced its stride. As is true of many countries, economic liberalisation has taken root in India and the need for an effective competition regime has also been recognised.³⁴ In the setting of the new monetary strategy ideal model, India has decided to sanction another law called the Competition Act, 2002 (Act, for brief). The MRTP Act has transformed into the new law, Competition Act, 2002. The new law is intended to nullify the surviving MRTP Act. Measures adopted by many countries are essentially designed to open competition in strategic sectors such as telecommunications, air lines, electricity generation and distribution etc. Such measures are a part of a tripod architecture with the three vertices, one may christen as Liberalisation, Privatisation, and Globalisation (LPG). A veneer running common to the LPG measures is the element of competition. The LPG syndrome seeks to make competition a driving force in the economic and commercial activities of the world. The law needed to yield to the changed and changing scenario on the economic and trade front. This was one important reason why a new competition law had to be framed. How difference and better was the new competition law as compared with the MRTP Act, 1969? Earlier in the paper it has been identified that there have been terms and issues about which there has not been any reference in the MRTP Act. The Competition Act, 2002 explicitly defines the offences of Abuse of Dominance, Cartels, Bid Riggings and Predatory Pricing. These definitions were not mentioned in the former Act. The Act explicitly mentions the criteria to measure if an unfair competition is being practiced. The MRTP Act, 1969 was rather ambiguous and subjective³⁵ by not giving any constructive measure to ascertain if any such things are being practiced or not. MRTP Act, 1969

³³ *Id.*

³⁴ *Supra* Note 23

³⁵ *Id.*

has also failed to define what is a restrictive trade practice or a monopolistic trade practice. Next, the Act mandates the Competition Commission of India shall not be bound by the provisions established in the Code of Civil Procedure, 1908. In this case, the MRTP Commission would be free of the provisions of CPC and would not be bound to abide by the said provisions which would be a miscarriage of Justice. Hence, in the year 1999, a committee was devised to decide the fate of the MRTP Act. The Committee was to decide on amendment or devising a new Act altogether. The central Government made a committee, which was headed by Mr. S.V.S Raghavan. This committee is also known as the Raghavan Committee³⁶. Other dignitaries of this committee were the Chairman Of Hindustan Lever Limited, a Consumer Activist, a Chartered Accountant and an Advocate. There were about 80 different competition laws of different countries at that time, which were available. No particular Competition Law of any country was taken as a model but features of different Competition Laws were considered relevant for the report of the Raghavan Committee. As India adopted the 1991 LPG policy it was contended that the MRTP Act, 1969 had outlived its utility. It was contended that a new Competition Law was required for the country as the country had adopted a new industrial policy which opened the gate for foreign companies to trade in and with India. The Finance Minister of India in 1999 at a parliamentary session went to the extent of saying that " The MRTP Act has become obsolete in certain areas in the light of International economic developments relating to Competition Law. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine the range of issues and propose a modern Competition Law suitable for its conditions." After considering the recommendations of the Standing Committee and effecting some refinements, the Parliament, on Dec 2002 passed the new law, namely, Competition Act, 2002. The bill was introduced in parliament in August 2001, and was referred to the standing committee on home affairs. The committee submitted its report in August 2002, but because parliament was not in session, it was not tabled in parliament until November 21. Thereafter, the government moved with alacrity: the Lok Sabha passed an amended bill on December 16, by the Rajya Sabha on December 20, and the resulting Competition Act 2002 received the presidential assent on January 13, 2003.³⁷ Adoption of liberalization policy invited a situation in which the MRTP Act

³⁶ Raghavan Committee Report, available at http://www.noragging.com/analysis/CR-2007_07_16_AnalysisRaghavanCommitteReport.pdf .

³⁷ Supra Note 32.

was not efficient anymore. India adopted Liberalization and invited foreign companies to trade and do business within India. This would mean that there would not be restriction of foreign companies to carry their trade in Indian soil. This change invited problems and clashes in the MRTP Act. The principles of Liberalization are totally opposing the MRTP rules. The new Competition Act, 2002 is not part of the Indian Jurisprudence. It has been made effective by the Government of India notification on March 31st, 2003. A staff has been appointed and the commission was running successfully. Nevertheless, like every other thing there are some lacunas in this act as well. There are still things, which are left to be rectified and are still left to be identified by the commission so that the running of the system could be more smoothened.

6.1 Liberalizing Trends and the New Law's Outlets

The government has passed the new law by keeping in view that with the inception of liberalization era, there would be more responsibility of managing the economic affairs. There were several changes made to the anti-trust laws of the country as discussed in the earlier discourse and all the changes were being made for the better growth of the economic condition of the country.³⁸ The major concern still revolves around the effective way of implementation of the law. The biggest setback in the whole process was that the cardinal operation of the law kicked off in 2009 and that too with not very commendable precision. There have been additions and modifications to the new law. For example, the addition of the dominant position to the Section 4 of the new law and the provision that the firms and companies '*should match up the competition*' would render at last the happening of most anti-competitive practices because the big firms would somehow unintentionally deter the new start-ups. They, in order to match up with the rivals would bring their prices down for the marginal sales and this would affect the whole sale of the new start-ups.³⁹

Moreover, the new law has replaced the MRTP commission set up by the previous enactment and because of this earlier, a writ petition was filed for not giving the functional status to the Competition Commission of India because it was vouched to be headed by bureaucrats and a judge headed MRPT Commission. The Amendment Act of 2007 revived the whole concept of Competition Commission of India and it has finally replaced the MRPT commission.

³⁸ Arun Ghosh, *Who's Afraid of Liberalisation?*, EPW, Vol. 30, No. 1 (Jan. 7, 1995), pp. 12-14, Published by Economic and Political Weekly, available at <http://www.jstor.org/stable/4402220>.

³⁹ Supra Note 32.

In addition, after the amendment of the new Act, there was a critical view taken for the new law by many observers of the industry that the law mainly ponders when it comes to collaboration with the foreign company upon finding of the domestic nexus of the particular business in India. This is under the scope of regulation by the commission under the garb of doctrine of acquisitions. Thus, if the acquirer is a foreign company and there is no domestic nexus when it comes to acquisition then the competition Act trigger would not apply due to these provisions.⁴⁰ Furthermore, there was a condition kept by the new law that acquisition formally would not take place until 210 days and that would render a very long period for the formal gestation of the companies. This long period of gestation would be a big hectic matter for the companies undergoing coupling and will raise certain uncertainty and ambiguity in transaction. There were certain implications and repercussions of this uncertainty as stated by the Dalal in his Article:⁴¹

- Perception among the customers
- Uncertainty as regards the ‘identity’ of the enterprise could create reluctance among the customers who could choose to shift to a more ‘stable’ competitor.
- Inability to make strategic and operational decisions as strategic business issues could remain in limbo.
- Human resources: in any acquisition or merger, the human resource element is crucial. This has dimensions relating to alignment of titles, roles and responsibilities. A long period of uncertainty could seriously dent moral and enhance attrition.
- Enterprise value (s): As a result of the uncertainty, the market could be dented due to long period gestation, causing highly negative factors for the market.

Therefore, the new law was made and formed with the view to bring a boost to the pedantic industrial policy. However, the law provided certain peculiarities, which even Adam Smith would not be supportive of. There have been ample of changes regarding the correct formation of the law. Nevertheless, very few fruitful results have been conceived.

7.1 Conclusion and Analysis

As John Locke had said, “democracy in its purest form is most successful when accompanied with libertarianism”. It is a well established notion that liberty gives man a power to flourish without

⁴⁰ Ketan Dalal, *Competition Act Amendment may be a Deterrent for M&A's*, September 17, 2007, p. 18

⁴¹ *Id.*

any restrictions and it transcends every horizon. Likewise, at the same time law is an integral aspect of human life. It governs him throughout life and gives a framework as to how to follow the general pattern of the society. If we go for Law v. Liberty, it would be highly contestable to opt for one because both go hand in hand. The paper has formulated an approach and showed a transition as to how strict regulations were harmful for the growth of the country and not feasible for an economy to grow and how a new law has taken place in the same shoes thereon. The researchers in this paper have humbly attempted through different research methodologies to understand and keep a clear picture of the Economic changes, which started, from Pre-1991 Era, through the License Permit Raj System until the extinction of the "Command and Control" laws and inception of the new competition law.

The new law has its foundation in the policy of the 1991 and the suggestions given by Raghavan Committee. The basic idea has been to bring old law under the transit and to undergo some essential changes for the suitability of new legal and economic fabric of the country. The basic hypotheses of the paper unfolds that libertarianism is a holistic approach to achieve basic and cardinal goals of the democratic governance has been established.

Liberty always vouches for a higher responsibility and the researchers would forward the views as to what could be done to make this competition era more efficacious:

- The limits set by the new law for gestation period of the coupling of the companies should be revised and lowered down.
- The Supreme Court should take into the view that it is necessary to keep check over the CCI in order to ensure the smooth functioning and justice deliverance.
- Moreover, it is suggestive that the domestic nexus rule should be relaxed to certain extent for the better foreign investment.

Liberty has its own course to bring the flare of independence for any developing country and free markets are necessary for giving rise to individual voice and entrepreneurship.

INDIAN ECONOMY: LICENSING AND COMPETITION

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Kumar Mangalam Birla has rightly stated, “The License Raj in India was a time when, to set up an industry, you needed a license. This made the government an omnipresent and sort of all-pervasive authority.” Competition policy seeks to prevent restrictive business and market structures that significantly lessen competition. The objective of such a policy is to maintain and encourage competition in order to foster greater efficiency in resource allocation and maximize consumer welfare.

In order to study in detail the effect of License Raj Permit on Indian Economy, the paper shall be divided into three parts, based on the categorization of the Companies – i) incorporated prior to 1956, ii) incorporated between 1956 and 1980, iii) incorporated after 1980. The first era includes the period upto 1956, before the Industrial Policy Resolution was passed, when the newly independent India emphasized the importance to the economy of securing a continuous increase in production and its equitable distribution, and pointed out that the State must play of progressively active role in the development of Industries. The second era is actually called the era of “License Raj” between 1956 and 1980, when emphasis was laid on socialistic pattern of society. Thus industrial development was confined mostly to public sector or the state and economic concentration in private hands was prevented, following the prolongation of industrial

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policy. After 1980, the era when role of free market forces, competition and private entrepreneurship were recognized as the chief components for industrial development.

In India, law governing competition policy was Monopolistic and Restrictive Trade Practice Act, 1969 which was enacted with the objective of controlling monopolies and preventing economic concentration. This act was later repealed and replaced by Competition Act, 2002 which establishes a Commission to prevent practices having adverse effect on competition, to promote and sustain free markets and to protect freedom of trade and welfare of consumers. Both of these acts shall be discussed in detail in the paper. The paper will contribute by providing solutions advanced by various scholars to the License Raj in the Competitive era with personal inputs from the authors keeping into account the historical background of Indian economy and problems faced by the Indian economy currently.

1.1 Introduction- Beginning of the License Era

“Socialism is not only a way of life, but a certain scientific approach to social and economic problems”.

~ Jawaharlal Nehru

Under the leadership of India’s first Prime Minister Pandit Jawaharlal Nehru, India chose to become a Socialist Republic. He was greatly impressed by USSR’s centralized planning and its emergence as a superpower. However, planning growth and development of newly independent India was not merely economics for him. He saw planning as "*partnership of the people in a mighty enterprise & of being fellow travelers towards the next goal*". India was a new country racked by the pains of partition, huge country with millions and millions of poor, a primary source of raw materials for Great Britain with no industries of note; most people dependent on rain-fed agriculture for their livelihoods, poor infrastructure and no money in the treasury to build more.

Industrialization is considered as sine qua non of the economic development and a panacea for the vicious problem of economic backwardness.¹ Indian leadership believed in the same and during the post-World War II period India was probably the first non-communist developing country to

¹ Dinesh Narain Awasthi (1991) *Regional Patterns of Industrial Growth in India*, Concept Publishing Company.

have instituted a full-fledged industrial policy.² This policy was formulated and overseen by the first Prime Minister along with the statistician Prasanta Chandra Mahalanobis. Policy tended towards protectionism, with a strong emphasis on import substitution, industrialization under state monitoring, state intervention at the micro level in all businesses especially in labor and financial markets, a large public sector, business regulation, and central planning.³ This policy held sway for three decades, from 1950-1980. Jawaharlal Nehru said “*The forces in a capitalist society, if left unchecked, tend to make the rich richer and the poor poorer.*”

There was a widespread belief that without increasing the role of the state, it was not possible either to accelerate the process of growth or to create an industrial base for sustained economic development of the country⁴. Also it is an accepted fact that most of the private sector growth in the developed countries is based on a great deal of government intervention, protection and patronage. Even countries like Singapore and Taiwan followed a similar model of low intervention and high tariffs to provide protection to infant industries.

Thus, to make the private sector in consonance with the desired economic goals, certain measures were resorted, such as-

- *Foreign Investment Policy*- Investment by multinationals was subjected to draconian regulations as compared to national companies.
- *Controlled Prices*- The Government secured prices for a variety of essential products, for example, steel, sugar, aluminum, etc.
- *Subsidization of Exports*- Policies such as ‘Import Entitlement Scheme’ were introduced to mitigate the adverse effect of import quotas and tariffs on the exporting industries.
- *Import Control Regulations*- All the products for which imports were restricted was listed in a book called ‘Red Book’ to protect domestic industries from foreign competition.
- *Industrial Licensing*- Under this, it was made mandatory for any industry that wished to manufacture any product or wanted to expand its existing capacity had to obtain a license from the Government.

² Ajit Singh (2008) *The Past, Present And Future of Industrial Policy In India: Adapting to The Changing Domestic And International Environment*, Centre for Business Research, University of Cambridge.

³ Kelegama, Saman and Parikh, Kirit (2000) *"Political Economy of Growth and Reforms in South Asia"*, Second Draft.

⁴ Ruddar Dut, K.P.M. Sundharam, Indian Economy, S. Chand and Company Ltd., New Delhi, 2009, p.226.

All these measures helped by providing a quick start to the India's infant economy. However, some believe that the deteriorating situation of the India's economy in the 1960's, 1970's and 1980's was the consequence of such policies. This led to bitter criticism of India's initial planning schemes, out of which, licensing was condemned the most.

The economists were extremely critical of the policy –

*“The hopes of 1947 have been betrayed. India, despite all its advantages and a generous supply of aid from the capitalist West (whose ‘wasteful’ societies it deplored), has achieved less than 2 virtually any comparable third-world country. The cost in human terms has been staggering. Why has Indian development gone so tragically wrong? The short answer is this: the state has done far too much and far too little. It has crippled the economy, and burdened itself nearly to breaking point, by taking on jobs it has no business doing.”*⁵

Bradford DeLong, professor of Economics at UC Berkeley, wrote -

*“The conventional narrative of India's post-World War II economic history begins with a disastrous wrong turn by India's first Prime Minister, Jawaharlal Nehru, toward Fabian socialism, central planning, and an unbelievable quantity of bureaucratic red tape. This "license raj" strangled the private sector and led to rampant corruption and massive inefficiency.”*⁶

The term ‘License Raj’ was coined by Indian statesman Chakravarthi Rajagopalachari, who firmly opposed it for its potential for political corruption and economic stagnation and founded the Swatantra Party to oppose these practices.⁷ Kumar Mangalam Birla has rightly stated, *“The License Raj in India was a time when, to set up an industry, you needed a license. This made the government an omnipresent and sort of all-pervasive authority.”*

In order to study in detail the effect of License Raj Permit on Indian Economy, the paper is divided into three parts, based on the categorization of the firms – i) incorporated prior to 1956 , ii)

⁵ *The Economist*, "A Survey of India", May 4, 1991, p.9.

⁶ J. Bradford DeLong , *India Since Independence: An Analytic Growth Narrative*, 2001.

⁷ *The Swatantra Party and Indian Conservatism*. Cambridge University Press. 2007. p. 131. ISBN 978-0-521-04980-1.

incorporated between 1956 and 1980, iii) incorporated after 1980. The paper also discusses the MRTP Act, 1969 and the Competition Act, 2002. The paper throws light on various views expounded by scholars on the system of licensing followed by a conclusion.

2.1 Incorporated Prior to 1956

The Europeans and the British initially came to India as traders. The Industrial Revolution in the Great Britain resulted in increasing demand for raw materials for their factories and a market to sell their finished goods. India provided such a perfect platform to them to fulfill all their needs. Shashi Tharoor in his speech at Oxford University pointed out:

“India’s share of the world economy when Britain came to our shores was 23%. By the time the British left, it was down to less than 4%. Why? Simply due to the fact that India was governed for Britain’s benefit. Britain’s rise in two centuries was financed by its depredation of India.”

Prior to independence there was virtually any public sector in Indian economy. The only instances worthy of mention were the Railways, The Posts and Telegraphs, the Post Trusts, the Ordinance and Aircraft Factories and a few state managed undertakings like the government salt factories, quinine factories etc.⁸ Even such existing public sector undertakings weren’t working for the development of Indians , their sole agenda was to flourish Britain.

Thus after independence, the new lawmakers of India felt the need to frame such policies that shall benefit all the masses. The major agenda of all policies was social welfare and less importance was given to economic growth and development. This was achieved through industrial licensing and import licensing, to substitute imports with aboriginal industrial development. The Industrial Policy Resolutions and the five year plans model are considered as the rationale of evolution and growth of Public Sector in India. These policies provide for the co-existence of Public sector and Private sector within their distinguished areas but with a bigger role for the public sector. Prior to 1956, Industrial Policy Resolution of 1948 was passed.

⁸ Rudder Dutt, K.P.M. Sundharam, n. 1 p. 203

The main purpose of Industrial Policy Resolution of 1948 was to classify the industries into four categories which are as follows –

- Defense and Strategic industries such as arms and ammunition, control and production of atomic energy and the ownership and management of Railways were to be the exclusive monopoly of Central Government.
- The second category included coal, iron and steel, aircraft manufacture, ship building, manufacture of telephone, telegraphs and wireless (apparatus (excluding radio receiving sets) and mineral oils. New undertakings in this category could henceforth be undertaken only by the State. However the existing old enterprises were to be continued to run by private entrepreneurs till the question of their nationalization was decided by the State.
- The third category included industries like chemicals, fertilizers, rubber manufactures, cement, paper, newsprint, automobiles, electric engineering etc. which the Central Government would feel necessary to plan and regulate.
- The fourth category comprised of the ‘other industries’ which were left open to private undertaking, individual as well as co-operative with overall general control by the Government.

This marked the beginning of establishment of substantial industries in India. However, government felt the need to maintain sufficient powers in order to regulate industries in a number of ways. Thus Industrial (Development & Regulation) Act, 1951 was passed to promote planned industrial development in accordance with the Industrial Policy Resolution of 1948 by introducing licensing of certain specified industries. First Schedule of the Act specified licensing of all the major manufacturing industries which could be broadly classified as metallurgical industries, fuels, boilers and steam generating plants, prime movers(other than electrical generators), electrical equipment, telecommunications, transportation, industrial machinery, machine tools, agricultural machinery, earth moving machinery, miscellaneous mechanical and engineering industries, commercial-office-household equipments, medical and surgical appliances, industrial instruments, scientific instruments, mathematical-surveying-drawing instruments, fertilizers, chemicals (other than fertilizers), photographic raw film and paper, dye stuffs, drugs and pharmaceuticals, textiles (including those dyed, printed or otherwise processed), paper and pulp including paper products, sugar, fermentation industries, food processing industries, vegetable oil and vanaspathi, soaps-

cosmetics-toilet preparations, rubber goods, leather-leather goods and pickers, glue and gelatin, glass, ceramics, cement and gypsum products, timber products, defense industries and other miscellaneous industries such as cigarettes, oil stoves, etc.

Thus all the major production industries were subject to licensing. Also while giving licenses to the new undertakings government could lay down conditions regarding location, size, number of units, etc. as the government may deem fit. Government could also take over industries which fail to comply with the instructions given by them. This clearly indicates that the development of private industries was in the hold of the central government, restrictions on private industries increased after Industrial (Development & Regulation) Act, 1951 and so private industries could not prosper independently. Though this helped India achieve rate of economic growth two to three times high as compared to the British Era. But these policies were also put through certain criticism. Lack of co-ordination between public and private sector deprived India from the benefit of mixed economy. A noted economist A.H. Hanson expressed that, at that time Government was more interested in the control of private enterprises than in the public- private balance.⁹

Nevertheless, Industrial Policy Resolution, 1948 and Industrial (Development & Regulation) Act, 1951 were the seeds of Industrial policies and framework in India. Until 1991, the entire industrial policy was based on these two with certain modifications that were made timely which are discussed below.

3.1 Incorporated between 1956-1980

The draft of Second Five Year Plan (1956) stated, "the adoption of the socialist pattern of the society as the national objective, as well as the need for planned and rapid development, require that all industries of basic and strategic importance, or in nature of public utility services, should be in public sector.....The state has therefore, to assume direct responsibility for the future development of industries over a wider area."¹⁰

⁹ *Changing Face of India's Industrial Policies: A Look*, Dr. Babita Thakur, Rozika Gupta, Rajesh Singh, International Journal of Scientific and Research Publications, Volume 2, Issue 12, December 2012 1 ISSN 2250-3153

¹⁰ Planning Commission, *Second Five Year Plan (1956)*, Government of India Publication, New Delhi, P. 29.

Thus to achieve this goal, Industrial Policy Resolution of 1956 was passed. The Industrial Policy of year 1956 is known as ‘Economic Constitution’ of the country¹¹. As per the IPR, 1956, the industrial sector was divided into three schedules. Schedule A reserved 17 important industries exclusively for state enterprises. These included- Arms and ammunition and allied items of defense equipment; Atomic energy; Iron and Steel; Heavy castings and forgings of iron and steel; Heavy plant and machinery required for iron and steel production, for mining, for machine tool manufacture and for such other basic industries as may be specified by the Central Government; Heavy electrical plant including large hydraulic and steam turbines; Minerals specified in the Schedule to the Atomic Energy (Control of Production and Use) Order, 1953; Aircraft; Air transport; Railway Transport; Ship Building; Telephones and telephone cables, telegraph and wireless apparatus (excluding radio receiving sets); Generation and distribution of electricity; Coal and lignite; Mineral oils; Mining of iron ore, manganese ore, chrome-ore, gypsum, sulphur, gold and diamond; Mining and processing of copper, lead, zinc, tin, molybdenum and wolfram.

Schedule B included 12 important industries where state enterprises were to acquire dominant positions. They were - all other minerals (except minor minerals); Aluminium and other non-ferrous metals not included in schedule A; Machine tools; Ferroe- alloys and steel tools; Basic and intermediate products required by chemicals industries such as manufacture of drugs; Anti-biscuits and other essential drugs; Fertilizers; Synthetic rubber; Carbonization of coal; Chemical pulp; Road transport; and Sea transport.

Schedule C - All industries not included in Schedule A or B was to be included in this category.

The Industrial Policy Resolutions of 1948 and 1956 desired to achieve self sufficiency in industrial production for India. Domestic production was encouraged to curb the insufficient foreign investment. Huge investments by the State in heavy industries were designed to put the Indian industry on the path of a higher long-term growth. This strategy guided industrialization until the mid-1980s.

The following table illustrates the growth of investment in CPSE’s –

¹¹ https://en.wikipedia.org/wiki/Industrial_Policy_Resolution_of_1956

Year (As on march 31)	No. of units	Total Investment (in crores)
1951	5	29
1961	47	950
1980	179	18,150
1990	244	99,330
2001	242	2,74,198
2007	247	4,21,089
2008	214	7,63,815
2009	213	7,93,096
2010	217 (operating survey)	9,08,842

Source – Public Enterprises Survey (2009-2010)

This era is called the “License Era”, the policy of state being the dominant industrializer was followed. Private sector was occasionally granted license to produce items that were reserved for the public sector. However public sector could enter at its will wherever private sector played the dominant role.

During this period, the main focus of the industrial policy was shifted from development oriented to regulation oriented. Also with the change in time, new kinds of industries and a variation in the new range of products was witnessed. The IRDA, 1951 lost its prospective during this time and a new broader act was passed to regulate industries. The Monopolies and Restrictive Trade Practices Act came into existence on 27th December, 1969. The preamble to this act provided it to be that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and

restrictive trade practices and for matters connected therewith or incidental thereto. The act is discussed in detail in the next section.

Industrial Policy Notification of 1973 made licensing mandatory for all industries with investment above a certain level. Schedule IV and V specified certain industries where licensing was compulsory irrespective of size and a list comprising of specified small scale industries was reserved. Industrial policy statement was issued in the same year, Appendix I of which specified industries to which business houses and foreign companies were to be confined.

In order to setup an industry back then, a number of steps had to be gone through by an entrepreneur to obtain a license. Government controlled and monitored each and every step in order to maintain the state monopoly. These included, inter-alia, procedures relating to acquiring: a letter of intent, capital goods imports clearances, foreign-technology collaboration clearances, capital issue clearances, capital issue clearances, raw materials import clearances, essentially clearances, indigenous non-availability of equipment and materials clearances, monopolies clearances, small-scale sector clearances and clearances for locating in non-municipal areas.¹²

The government did introspect the license raj oriented industrial policy. Two key bodies were set up to study the effect of heavy licensing over Indian economy. They were – (i) the Monopolies Inquiry Commission of 1965 and (ii) the Industrial Licensing Policy Inquiry Committee in the year 1969. Both the committees declared that the system has failed practically on all accounts.

No steps were taken during the Indira Gandhi regime due to the fact that a large nexus was created among the bureaucrats, industrialists and managers, who wanted the license raj system to stay. A new attribute was added to this era – ‘corrupt’. These bureaucrats and managers used to take certain amount/commission/rent to grant license to these industrialist.

Desperation on the part of the government to maintain the monopoly and frequent changes made in laws resulted in a baffled system of industrial licensing. Some actions taken by the government were anti-policy related decisions. For instance, ‘Siemens’ was embraced in India by the

¹² *The hidden hand and the license raj: age and the growth of firms in India*, Sumit K Majumdar, Pradeep K Chibbar, working paper #9705-14, Research Support, University of Michigan Business School.

administration for power generation projects whereas multinational corporations like 'IBM' and 'Coca-Cola' were walked off at the same time.

Certain initial steps for liberalization were made during the short lived government of Morarji Desai (1977-1979), however they failed miserably. Agricultural development was the forte of the even shorter lived Charan Singh Government (1979-1980), not much thought was given to industrial policy.

3.1.1 Monopolistic and Restrictive Trade Practices Act, 1969

Competition Law for India was triggered by Articles 38 and 39 of the Constitution of India. These Articles are a part of the Directive Principles of State Policy. Pegging on the Directive Principles, the first Indian competition law was enacted in 1969 and was christened the **Monopolies and Restrictive Trade Practices Act (MRTP Act)**. The MRTP Act is regarded as the Competition law of India, because it defines a restrictive trade practice to mean a trade practice, which has, or may have the effect of preventing, distorting or restricting competition in any manner. Premises on which the MRTP Act rests are unrestrained interaction of competitive forces, maximum material progress through rational allocation of economic resources, availability of goods and services of quality at reasonable prices and finally a just and fair deal to the consumers.

Three areas informed till 1991 (when the MRTP Act was amended) the regulatory provisions of the MRTP Act, namely, concentration of economic power, competition law and consumer protection. The statute, till 1991 regulated growth but did not prohibit it. Even in its regulatory capacity, it controlled the growth only if it was detrimental to the common good. In terms of competition law and consumer protection, the objective of the MRTP Act is to curb Monopolistic, Restrictive and Unfair Trade Practices which disturb competition in the trade and industry and which adversely affect the consumer interest (Monopolistic, Restrictive and Unfair Trade Practices are described later in this paper) The regulatory provisions in the MRTP Act apply to almost every area of business – production, distribution, pricing, investment, purchasing, packaging, advertising, sales promotion, mergers, amalgamations and take over of undertakings (provisions relating to mergers, amalgamations and take-overs were deleted in the MRTP Act by the 1991 amendments to it).

The principal objectives sought to be achieved through the MRTP Act are:

- i) prevention of concentration of economic power to the common detriment;
- ii) control of monopolies;
- iii) prohibition of Monopolistic Trade Practices (MTP);
- iv) prohibition of Restrictive Trade Practices (RTP);
- v) prohibition of Unfair Trade Practices (UTP).

4.1 Incorporated after 1980

With the return of the Indira Gandhi government in 1980, the industrial policy of 1980 was passed on 23 July which aimed at restoring faith in the public sector. It mainly focused on the promoting competition in the domestic market and the efficient working of public enterprises. But it could not bring out the Indian economy which got stuck in a vicious circle of low productivity and poor growth. Jagdish Bhagwati summarized India's economy failure as:

“I would divide them into three major groups: extensive bureaucratic controls over production, investment and trade; inward-looking trade and foreign investment policies; and conventional confines of public utilities and infrastructure. The former two adversely affected the private sector's efficiency. The last, with the inefficient functioning of public sector enterprises, impaired additionally the public sector enterprises' contribution to the economy. Together, the three sets of policy decisions broadly set strict limits to what India could get out of its investment.”¹³

Certain steps were taken by the Rajiv Gandhi government (1984-1989) to deregulate the industrial licensing. Through the Industrial Policy Announcemnt, 1985 restrictions on business houses to Appendix I industries were removed so long as they entered specified industrially backward areas. Secondly, the minimum asset limit defining industrial houses was raised from Rs.200 Million to Rs. 1 Billion. Though Rajiv Gandhi never came up with an official industrial policy relating to the growth of private enterprises. Nevertheless, he paved the initial path of liberalization for lessening the burden on the government and in order to provide a fair chance to the private enterprises but deeply stressed the importance of socialist pattern of society and the key role of the public

¹³ Jagdish Bhagwati (1992) Pg 13.

enterprises. While delivering a speech in the Lok Sabha he declared public sector to be, “key to our development and a pathfinder to take the country to the 21st century.”¹⁴

After his assassination in the year 1989, the veteran Congress leader PV Narasimha Rao became the Prime Minister of India and it was during his term that India witnessed a drastic change in the economic policies. “Depleted official reserves, large deficits in balance of payments, and sharp decline in GDP growth which was reflected in similar declines in almost all sectors of the economy demanded urgent attention.”¹⁵

Thus to bring out the country from economic difficulty and to speed up the development, Dr. Manmohan Singh, finance minister in the Narsimha Rao Government took the charge . In an interview to PBS (2001), Singh said:

“I said to him (P V Narsimha Rao) it is possible that we will still collapse, but there is a chance that if we take bold measures we may turn around, and that, I said, is an opportunity. We must convert this crisis into an opportunity to build a new India, to do things which many people before us have thought and said should be done, but somehow were never done.”

This policy is popularly known as the ‘Liberalisation, Privatisation and Globalisation’. While presenting these reforms in the parliament budget session, Singh quoted Victor Hugo- “No power on earth can stop an idea whose time has come”. The policy could be summarized as follows:

- (i) **Liberalisation-** It basically means to emancipate the economy from bureaucratic cobweb to make it more competitive. Economic liberalism, in the classic rather than the American sense, refers to policies that reduce government constraints on economic behavior and thereby promote economic exchange: “marketization.”¹⁶ Following are its key features-
- To do away with the requisite of having a license for most of the industries.

¹⁴ Rajiv Gandhi's speech in Lok Sabha dated December 18th 1985.

¹⁵ Sunanda Sen, "State, Society and the Market", in Hashim, Rao, Ranganathan, Murthy (Eds.), Indian Industrial Development and Globalisation, Academic Foundation, New Delhi, 2009, p. 545.

¹⁶ *Introduction: the diffusion of liberalization*, Beth Simmons, Frank Dobbin, and Geoffrey Garrett, //FS2/CUP/3-PAGINATION/GDM/2-PROOFS/3B2/9780521878890C01.3D

- Freedom to determine the scale of business activities.
- Removal of restrictions for the movement of goods and services from one place to another.
- Freedom for fixation of prices for goods and services.
- Simplification of Import-Export Procedure
- Simplifying the path for foreign capital and technology.

(ii) **Privatisation-** To bring public sector undertaking either partially or wholly under the private ownership is called privatization. It follows that *privatization* in principle means the process of transfer of ownership, sometimes also of permanent or long-term usership, of a formerly common or public good to individuals and/or groups operating for private profit, i.e., its passage from public to segregated owner- and/or usership¹⁷. Chief features are-

- Reducing the role of public sector and increasing the role of private sector
- Reducing budgetary burden of the government
- Improving management of enterprises
- Reducing the pressure of government and increase in government treasury
- Increase in competition, following the path of mixed economy.

(iii) **Globalization-** Globalization refers to the process of integrating the economy of one's country with the rest of the world. Jan Aart Scholte states that "globalization stands out for quite a large public spread across the world as one of the defining terms of late twentieth century social consciousness."¹⁸ Its key features include-

- Free flow of goods and services all over the world.
- Free flow of capital globally.
- Free flow of information and technology in all the countries.
- Free movement of people for jobs, encouraging 'outsourcing'.

¹⁷ <http://fsi.stanford.edu/sites/default/files/Privatization.pdf>.

¹⁸ "Globalisation and Modernity," Jan Aart Scholte, Paper presented at the International Studies Association Convention, San Diego, 15–20 April 1995.

In a major move to liberalize the economy, the new industrial policy abolished all industrial licensing, irrespective of the level of investment, except for a short list of 18 industries (security and strategic, social reasons, hazardous chemicals and overriding environmental reasons and items of elitist consumption. In April 1993, further 3 more industries were delicensed (Motor cars, white goods, skins and leathers). In the year 1996-1997 6 major industries were delicensed. (Entertainment and electronic industry, animal fats and oils, tanned or dressed fur skins, chamois leather, asbestos and asbestos-based products, plywood and other wood and paper and newsprint). In 1998-99, coal and lignite, petroleum products and sugar were delicensed. Currently only 3 industries are exclusively PSUs. They are – atomic energy, Railway transport and substances specified in the schedule to the notification of the Government of India in the Department of Atomic Energy number S. O. 212(E), dated the 15th March, 1995.

The aftermath benefits of these reforms could be summarized into following points-

- *Improvement in Performance of the Economy:* The economy's performance in the post reform era has been quite impressive. The reforms started in year 1991 and if one leaves out 1991-92, which was exceptionally a bad year, the average annual growth rate between 1992-93 and 1999-2000 was 6.3%.
- *Growth in employment opportunities and better salaries:* Employment opportunities have remarkably increased due to coming up of many new Multinational Corporations (MNCs) as well as Domestic Corporate Companies. Many of the foreign companies are now outsourcing their jobs to India thereby increasing the job opportunities available in the country at high salaries.
- *Better performance after privatization:* Many public sector enterprises got privatized after 1991 and their performances substantially improved, by providing better customer facilities and higher pay to the employees.
- *Remarkable growth in foreign trade and rise in the foreign exchange reserves:* Undoubtedly, tremendous growth after the reforms was witnessed in the external sphere. After independence, India could not accumulate foreign exchange reserve, however after the reforms, Indian foreign exchange reserve increased substantially. With globalization, import/export with foreign countries benefitted our economy.

- *Check on inflation due to competition:* Prices of the final products are generally pushed up by the increase in prices of the raw materials. However, globalization and privatization increase competition and help to hold or even cut down the prices of final products even when the prices of raw materials go up. This is because competition raises productivity and thereby helps manufacturers to hold the prices at the same level or even reduce them.
- *Increase in foreign direct investment:* After the reforms, foreign investors have shown great enthusiasm in investing in India. India has become a popular choice for foreign corporations due to availability of cheap raw materials and manpower. Even investment in domestic private undertakings has increased by leaps and bounds.

And not just economically, these reforms have brought a sea change in the lifestyle and living standards of the people of India. However, with rise in competition, business giants used to enter into anti-competitive agreements such as cartels, abuse of dominance, tying agreements, predatory pricing, etc. To maintain a healthy competition in the market, need was felt for a competition watchdog and for enforcing competition law.

On 27 February, 1999, Yashwant Sinha, Finance minister, made the following announcement in his budget speech:

“The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our condition.”

And thus Competition Act of 2002 was passed as the MRTP Act was beyond repair and could not serve the purpose of the new competitive era. The act has been discussed in detail in the next section.

4.1.1 Competition Act, 2002

In October, 1999, the Government of India appointed a High Level Committee on Competition Policy and Competition Law to advise a modern competition law for the country in line with international developments and to suggest a legislative framework which may entail a new law or

appropriate amendments to the MRTP Act. After some refinements, following extensive consultations and discussions with all interested parties, the Parliament passed in December 2002 the new law, namely, the Competition Act, 2002. There are three areas of enforcement that provide the focus for most competition laws in the world today.¹⁹

- Agreements among enterprises
- Abuse of dominance
- Mergers or, more generally, combinations among enterprises

The rubric of the new law, **Competition Act, 2002** (Act, for brief) has essentially four compartments:

- Anti - Competition Agreements
- Abuse of Dominance
- Combinations Regulation
- Competition Advocacy

The Act posits the factors that would have to be considered by the adjudicating Authority in determining the “Relevant Product Market” and the “Relevant Geographic Market”, reproduced herein below:

RELEVANT PRODUCT MARKET

- physical characteristics or end-use of goods;
- price of goods or service;
- consumer preferences;
- exclusion of in-house production;
- existence of specialised producers;
- classification of industrial products

¹⁹ Although it does not directly form a part of competition law, legislation regarding various Regulatory Authorities falls under the larger ambit of competition policy.

RELEVANT GEOGRAPHIC MARKET

- regulatory trade barriers;
- local specification requirements;
- national procurement policies;
- adequate distribution facilities;
- transport costs;
- language;
- consumer preferences;
- need for secure or regular supplies or rapid after-sales services

The determination of ‘relevant market’ by the adjudicating Authority has to be done, having due regard to the ‘relevant product market’ and the ‘relevant geographic market’.

5.1 Conclusion

In this paper the authors have analyzed the journey of India’s industrial licensing policy, from its beginning before independence, Nehru’s influence, perspective of different governments regarding the same and finally the post reforms era. From industrial policy 1948 till competition act, 2002, India has come a long way. Today India is the second largest developing economy in the world after China and even a longer road awaits India to achieve the target of becoming a developed nation. The Indian economy has the potential to become the world's 3rd-largest Economy by next decade and one of the largest economies by mid-century.²⁰ The Industry sector has held a constant share of its economic contribution (26% of GDP in 2013-14).²¹

India lacks in taking up daring economic reforms or risks. Only when other countries have successfully adopted a model, India follows the lead. Montek Singh Ahluwalia wrote:

“India was a latecomer to economic reforms, embarking on the process in earnest only in 1991, in the wake of an exceptionally severe balance of payments crisis. The need for a policy shift had become evident much earlier, as many countries in

²⁰[<https://www.linkedin.com/pulse/20141021025537-47732347-india-world-s-largest-economy-by-2050-citi-report> The LinkedIn].

²¹ Share of different sector in Indian GDP.

East Asia achieved high growth and poverty reduction through policies which emphasized greater export orientation and encouragement of the private sector. India took some steps in this direction in the 1980s, but it was not until 1991 that the government signaled a systemic shift to a more open economy with greater reliance upon market forces, a larger role for the private sector including foreign investment, and a restructuring of the role of government.”

Also our economic policymakers are mostly politicians from non-economic backgrounds and lack expertise. India needs more experienced people for formulating efficient policy measures.

About iJustice

iJustice, a public interest legal advocacy initiative of the Centre for Civil Society (CCS), was started in the year 2013. It aims at advancing laws promoting personal, social and economic liberties, and at the same time imposing limits on the powers exercised by the State, through strategic litigation and legal advocacy.

Vision:

iJustice envisions an India where every individual can enjoy the right to life, liberty and property.

Mission:

To advance the rule of law based on individual freedom and economic liberty through litigation and advocacy.

Core focus areas:

- 1. Right to Education: iJustice advocates for an education market where all can avail education of their choice.*
- 2. Livelihood freedom: Taking forward CCS's Jeevika: Law, Liberty & Livelihood Campaign, iJustice is focusing on effective implementation of the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014.*
- 3. Others: iJustice also works towards advancing the fundamental right to freedom of speech and expression and other governance related issues.*

About Centre for Civil Society

Centre for Civil Society advances social change through public policy. Our work in education, livelihood, and policy training promotes choice and accountability across private and public sectors. To translate policy into practice, we engage with policy and opinion leaders through research, pilot projects and advocacy. We are India's leading liberal think tank, ranked 50 worldwide by the annual study conducted by the Think Tanks and Civil Society Program at the University of Pennsylvania.

CCS envisions a world where each individual leads a life of choice in personal, economic and political spheres and every institution is accountable. We successfully campaigned for livelihood freedom for street entrepreneurs, resulting in the passing of the Street Vendors (Regulation and Protection of Livelihood Act in March 2014. Our School Choice Campaign popularised the instrument of school vouchers in education, increasing choice and access to quality education for all.

Currently, our focus is on reshaping the school education policy landscape—shifting the focus to learning outcomes, expanding choice in education and advocating deregulation for private sector; amplifying the voice of budget private schools which are catering to the poor sections of society but face closure in the face of the RTE; enhancing choice and accountability through the CCS skill voucher model in government skilling programs; promoting livelihood freedom by facilitating effective implementation of the Street Vendors Act and creating future leaders through policy trainings and courses who will be champions of liberty in their fields going forward.