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Critique of The Jurisprudential Case Against the Constitutional Socio-Economic Rights

by
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I. INTRODUCTION

The fundamental distinction between negative and positive right, is actually the duty distinction,[1] as some rights are negative because they impose a negative duty and some right are positive because they impose a positive duty. The differences between negative and positive rights have been classically expounded by Charles Fried:

> "A positive right is a claim to something — a share of material goods, or some particular good like the attention of a lawyer or a doctor, or perhaps the claim to a result like health or enlightenment — while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the right not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation."[2]

Fundamental rights under the Indian Constitution are generally available against the State and it primarily is a safeguard against the State's excesses and therefore in that sense fundamental rights are traditionally understood as negative rights. This understanding about fundamental rights is also in sync with the popular understanding about the first generation of human rights, namely, civil and political rights which are considered to be negative rights meant to guard an individual against the possible excesses of the State directed against the individual. This simplistic popular theorisation

about civil and political rights masks the complexities underlying the real discourse around these rights which has resulted in second generation of human rights, namely, the socio-economic right being relegated to a secondary position and ultimately stripped of its 'right' character.

II. ARTICLE 32 OF THE INDIAN CONSTITUTION AS A MEASURE TO REALISE THE FUNDAMENTAL RIGHTS

As Understood Traditionally

The manner in which legal rights are traditionally understood, the demand for the observance of duty corresponding to the right can actually be claimed pursuant to breach of such rights and therefore right of peremptory relief safeguarding the guarantee of rights is very often belied. For example under the Constitution of India if the right to life and personal liberty is guaranteed by a recourse to Article 32 of the Constitution (which happens to be the popular understanding of how fundamental rights under the Indian Constitution are guaranteed) then the fact that Article 32 can only be invoked by a person pursuant to the breach of fundamental rights clearly establishes the fact that Article 32 actually cannot guarantee the right to life and personal liberty, what in fact is guaranteed by Article 32 is a remedy in case of breach

of the rights given under Article 21. The dawn of this realisation though would make the fundamental rights vulnerable in theory as well and therefore would demand the assurance against the breach of rights as the first measure and judicial remedy in case of breach as a secondary measure, with the acknowledgement of the failure of protection of fundamental rights in the first instance.

Individual's recourse to Article 32 would therefore continue to buttress the argument against the guarantee of fundamental rights, since; in an ideal case scenario resort to Article 32 should actually become an obsolete practice, as its recourse is premised on the breach of guaranteed rights. This capacity to invoke this remedial right pursuant to the breach of fundamental rights, again presupposes the capable individuals and does not address the cause of persons not capable financially or socially to resort to this remedial right. So, you have a situation where the measure guaranteeing the protection of rights envisages breach of the guaranteed right and the remedial right therefore which is claimed to be guaranteeing the observance of duties corresponding to the rights again presupposes the capacity of the right holder to enforce this remedy and therefore again does not focus on the consequence of the right holder not getting his right. Interestingly though the right to recourse for judicial remedies under Article 32 pursuant to the breach of fundamental rights is actually a positive right but since most of

the fundamental rights including Article 21 are couched as negative rights, the recourse to Article 32 would always be contingent upon the breach of fundamental right and therefore in practice in relation to other fundamental rights, it is a negative right.

Modern or the Contemporary Understanding

However, if the right to life and personal liberty is to be guaranteed, the right, first of all has to be a positive right, so that the judicial remedy under Article 32 can actually ensure the protection of this right and not merely provide for a remedial measure pursuant to breach. This will still be dependent, however, on the capacity of the right holder but at least the possibility for the protection of right by way of recourse to judicial remedy can actually work logically. A measure like public interest litigation which primarily addresses this absence of capacity in the right holder to realise the rights by allowing public spirited persons to espouse the cause of incapable right holders can then be a relatively effective substitute for the protection of fundamental rights. This kind of measure though would first of all demand the concern for the consequence of the right being not realised which does not seem to be the concern of will theory of rights. Concern for the realisation of rights is to found in the interest theory of rights, which is premised on the realisation of the content of right. However, this would also demand a positive right and therefore a corresponding positive duty, because if the content of right is a negative duty i.e. not to intervene, then the fact remains that until the right is violated the duty is observed automatically and therefore legal recourse for the protection of such a negative right would invariably be premised on the breach of the very negative duty. All the more reasons therefore to insist that if respect for rights are to be cultivated in our legal system, it can only happen by making rights positive and by imposing positive duties. This is not to say that rights should therefore be stripped of its negative facet, it should be there but as a secondary measure but not as the very content of right.

III. PHILOSOPHICAL CONTESTATION

Frank B. Cross in his powerful attack on positive legal rights[3] makes a very important point by arguing that the proponents of positive legal rights presume that since negative legal rights give to the right holder a right against the State, therefore protection of the very thing for which the individual has the negative right of non-intervention against the State, in itself is a value to be preserved to such an extent that every individual has a right to that very thing and not only a negative right to not to be deprived of that

very thing.[4] Cross argues that this presumption that the activity for which the negative right exists against the State is in itself a virtue to be protected as right, ignores the fact that merely because it is the right of a person to not to be prohibited from doing an act, the act in itself does not become a very desirable thing to do by the right holder. For example, a person has the right against self incrimination; it does not therefore mean that a person can never implicate himself voluntarily with a view to seek punishment or help the case of the prosecution. Likewise unrestricted freedom of speech completely devoid of the norms of society, other organisations or private associations could actually lead to excess of rude and undesirable speech. However, interestingly Cross did not talk about the desirability of any of the second generation rights or socio-economic rights here which have been read as implicit in a constitutional right to life by constitutional courts in several jurisdictions. Based on this argument he also observes that Amartya Sen's argument in Resources, Values and Development[5] that the theoretical distinction between negative and positive rights is philosophically unsupportable is actually flawed. Sen in Resources, Values and Development has stated the following:

> "……valuing negative freedom must have some positive implications. If I see that negative freedom is valuable, and I hear that you are about to be molested by someone, and I can stop him or her from doing that, then I should certainly be under some obligation to consider doing that stopping. It is not adequate for me to resist molesting you; it is necessary that I value the things I can do to stop others from molesting you. I would fail to value negative freedom if I were to refuse to consider what I could do in defence of negative freedom."[6]

Amartya Sen's argument that the philosophical grounding for the distinction between first generation and second generation rights have been rather fragile has primarily been directed against the rejection of socio-economic rights from the ambit of justiciable right.[7] Cross argues that Sen's argument has an unsupported premise that because the society provides me a negative right to do something, it is therefore a good thing to do. Cross, therefore succinctly argues that "granting a private freedom to do 'Z' does not necessarily imply that 'Z' is a good thing; it might merely imply that freedom of choice is a good thing or, alternatively, that the pragmatic consequences of

such freedom from governmental restraint might yield a better society than permitting restriction by the government."[8]

Cross has then provided for his second theoretical challenge to the conception of positive rights as justiciable legal rights by arguing that the premise for any right is the consequences that the rights will have in terms of making our society better.[9] He

therefore, argues that since negative rights would only require courts to effectively proscribe governments and not compel government to advance rights in case of positive rights; it is plausible to conclude that protection of negative rights would be useful for us as the positive rights are dependent upon the resources of State. In recent decades, however, philosophers have largely disagreed with this opinion and have turned towards the positive freedom.[10] Amartya Sen refers to the factors constitutive of impediments in the way of a person's enjoyment of negative freedoms as unfreedoms[11] and argues for substantive freedom, i.e. capabilities — to choose a life one has reason to value.[12] Sen identifies poverty as a factor which results in deprivation of basic capabilities. The notion of substantive freedom and capability relates to the idea of positive freedom. Absence of capability would result in lack of capacity to choose a life one has reason to value which can logically be attributed to the absence of positive freedom for a person otherwise endowed with negative freedom. Poverty is the reason behind the felt need for the cause of socio-economic rights and would therefore make the existence of negative freedoms meaningless for an impoverished person because negative freedoms presuppose right holders as capable individuals and not capability deprived individuals.

IV. TWO OFTEN CONFLATED DISTINCTIONS BETWEEN CIVIL AND POLITICAL RIGHTS AND SOCIO-ECONOMIC RIGHTS

Matthias Klatt observes that all first generation classical liberal rights may actually have a positive dimension, and socio-economic rights also protect a *status negatives* i.e. sphere of individual freedom where the State is prohibited to intervene.[13] This is interesting because Klatt argues that it is myth to consider that only second generation rights are positive right and that all first generation rights are negative rights, in fact he argues that positive rights are there in classical first generation liberal rights and negative rights are there in the second generation socio-economic rights. In fact

his article, he addresses the justiciability issues related to the adjudication of positive rights and observes that positive dimension of rights is debated mostly in relation to socio-economic or social rights such as right to education, health, housing or water, however, "the positive dimension is by no means limited to social rights"[14] and in fact it extends to the first generation traditionally conceived negative rights as well.[15]

The distinction between civil and political rights on one hand and socio-economic rights on the other, coupled with the distinction between the negative rights and positive rights have often been conflated.[16] Not all traditional civil and political rights are negative because they impose a duty on State not to intervene.[17] However, going by the fact that it is correct to distinguish between negative and positive rights according to nature of duties imposed by these right on the holders of duty i.e. State corresponding to the right, it is quite clear that the civil right to a fair trial is not a negative right, since it actually demands for the establishment an entire judicial system.[18] Likewise, the right to seek redressal in the court is a positive right as it imposes an obligation on the State to exercise justice and therefore serve people's cause.[19] Among all the civil rights, those which pertain to the relationship between the individual and the courts are positive rights.[20]

Turning to political rights, such as right to freedom of political association and to freedom of expression, in the political context, are negative rights. However, they are in fact that political version of more general civil rights and as such they are not in essence political rights.[21] Interestingly, though the constitution of India in article 19

(1) of the Constitution puts this right in the sense of it being a positive right. Article 19(1)(a) states that "All citizens shall have the right to freedom of speech and expression." This is significant to note that Article 19 unlike Article 21 of the Constitution which puts the right to life and personal liberty categorically in negative terms[22] presents the fundamental freedoms enshrined as fundamental rights in Article 19 as positive rights. Significantly, though the fact that even Article 19 can only be enforced in a court of law by way of Article 32 or Article 226 of the Constitution, even the rights enshrined in Article 19 technically become negative rights as recourse to Articles 32 and 226 of the Constitution premised on the breach of fundamental rights.

It is certainly a vexed puzzle though, because if we say that the recourse to Articles 32 and 226 is contingent upon the breach of fundamental rights then whether the right violated is the negative right of non-intervention with the individual's freedom by the State or the positive right of and individual to have that freedom? The fact that fundamental rights are available against the State would indicate that right violated is actually the negative right of non intervention by the State since the positive right of being able to have that freedom extends the ambit of right by making it available against entities other than State as well. However, at least, can it be said that the right in the positive sense can be limited to the right to have freedom from State; this automatically makes the right negative in the manner in which fundamental rights are traditionally conceived, since the right would be talked about only in case of violation by the State, since for protecting the right the State really does not need to do anything, in fact not doing anything automatically protects the right of the individual. This very importantly tells us how the two concepts of negative and positive rights are actually conflated.

Frank B. Cross in his strident defence for the argument that only negative rights can be legal rights has said that the proponents of positive rights presume that negative protection of rights automatically means that the right not to be deprived of an interest would mean automatically that such an interest is to be protected positively as well. According to him, this is not the case. A logical corollary of this argument would be that if you have freedom that you should not be stopped from expressing your point of view it does not automatically means that your interest in freedom of your speech should be protected positively as well. This can further be buttressed from the fact many a times your speech is not needed or in fact is irrelevant. However, the questions actually is whether the positive protection is being claimed for the speech or freedom of speech, because freedom of speech signifies that though the freedom of speech exists but it is not incumbent upon the right holder to necessarily express herself. So, the question is; whether we can actually say that though it is a right of a person that his freedom of speech is not interfered with but there is no right of that person that he has a right to freedom of speech. This confounding of the interest that is protected by law can only be decoded if we look how legal rights are conceived in statutes. In a statute an interest is a right of person if there is a positive right of what is known as enforcement of that interest which is a right and the enforcement necessarily presupposes violation of the interest protected. Therefore, legal right have been traditionally construed as negative but does that mean that there is no positive right in the protection of the interest before it is actually snatched from the right holder. This appears to state the obvious that it is actually very strenuous to maintain the dichotomy between negative and positive rights.

V. ABSENCE OF COMPULSION TO EXERCISE THE RIGHT AS A RIGHT UNDER ARTICLE 21

It can generally be said about freedoms available to human beings under the Indian Constitution that along with the freedom in relation to the exercise of something, it is also implicit in the right that the right holder is free not to exercise that freedom. So, absence of compulsion to exercise the right is also included in the ambit of rights. However, right to life under Article 21 of the Constitution is not to be read in the same sense as other freedoms. The Supreme Court in *Gian Kaur* v. *State of Punjab*[23] while declaring constitutional the criminalisation of attempt to commit suicide under section 309 the Indian Penal Code held that making a comparison between the right to freedom of speech etc. and the "right to life"[24] is "inapposite"[25] as the two cannot be compared because of the difference in the nature. This appears to be an emphatic denouncement of the argument that protection for a negative right in all cases does not presuppose a positive right to the protection of the interest. In fact the Supreme Court reiterated several times what it called the "right to life" under Article 21 of the Constitution.

This argument of the nature of right to life and right to other freedoms being different is also very significant from the point of view of socio-economic rights as the source of socio-economic rights being enforceable fundamental rights under the Constitution of India as an argument is Article 21. As human dignity happens to be the cornerstone, which is compromised because of the absence of socio-economic rights and human dignity being repeatedly pointed out by the Supreme Court of India as comprising the essence of what right to life actually means, the argument that socio-economic rights are the sole beneficiary of the wrong reading of Article 21 as including positive right to life, also falls flat. If Article 21 includes a positive right to life which relates to the first generation civil and political rights then certainly finding faults with the reading of socio-economic rights as positive rights and therefore outside the ambit of enforceable right to life being not a negative right gets weakened considerably. It follows therefore that liberal rights cannot be distinguished from socio-economic rights using the dichotomy of positive-negative rights.[26]

VI. CIVIL AND POLITICAL RIGHTS AS POSITIVE RIGHTS

Positive civil and political rights as enforceable rights may actually pose equal amount of problematic questions which the adjudication of socio-economic rights poses. However, interestingly it has seldom been argued as instances of judicial overreach in the annals of Indian polity. Therefore, positive civil and political rights certainly have an edge over socio-economic rights since it does not have to actually overcome the challenge of constitutional legitimacy, however, if fundamental rights are actually negative rights then even the judicial enforcement of positive civil and political rights should be contested on the point of its constitutional legitimacy with equal vehemence.

The legitimacy challenges pertaining to civil and political rights, if any have been limited to the technical ground of *locus standi* of the petitioner, since most of these petitions are filed in the court by way of public interest litigations. Therefore, the challenge to substantial question of positive civil and political right being not adjudicatory has often escaped unchallenged. Though, the positive civil and political rights may have escaped scrutiny on the point of its constitutional legitimacy but the overwhelming cause for this appears to be the presumption that fundamental rights in the form of civil and political rights have been provided for by the Indian Constitution to every person in India regardless of its positive and negative character. In this context, the challenge to the argument of socio-economic rights being adjudicatory legal rights by referring to its positive character appears to be an argument which is logically incoherent when compared with the positive civil and political rights.

In *D.K. Basu* v. *State of W.B.*[27] the Supreme Court expressed its deep anguish over the lack of respect for constitutional ethos particularly the fundamental rights of the persons in the police custody by the police. With a view to safeguard the fundamental right to life which prohibits torture in police custody the Court insisted on the fulfilment of certain guidelines to be followed by police and recognised the same as the rights of the arrested persons. This clearly establishes the fact that the fundamental right to life as civil and political rights also gives rise to positive obligations upon the State to guard itself against the possible excesses. The guidelines given by the Court includes the right of the arrested person to be informed of the rights of the person arrested person under the law, namely, the right to meet the lawyer during the investigation, a next friend of the arrestee to be informed about the arrest as soon as possible and at the request of the arrested person be examined for any minor or major injuries at the time of arrest along with

medical check up by an approved doctor appointed by the Director Health Services every 48 hours during the custody etc.

Right to life as Civil and Political Right in Jeopardy Owing to State's Inaction

It is also important to understand that positive civil and political rights involve the kind of positive duties not only in relation to State but even in relation to acts which are not attributable to State. Therefore positive civil and political rights also impose upon the State a duty not to omit to protect the life and freedom of right holders from the State but even ordinary individuals. Not accepting this premise would mean that the protection of life of an ordinary Indian from other Indians is not a duty owed by the State corresponding to the fundamental right of the individuals as the violator of the right is not State and only if the potential offender is an agent of State that the positive duty to protect is owed by the State. This point is also very significant because another argument often raised against the judicial enforcement of socio-economic rights has been that it forces the State to protect the interest of the right holder, when in fact the interest of the right holder is not in peril owing to the commission of some act or likely act by the State; whereas fundamental rights are available against the State.

Therefore, a political duty not to omit the protection of life of the ordinary individual from anyone cannot be made into a legal duty. The fact that a person's access to basic amenities to life meant for the survival of human life is not impeded by a positive act attributable to the State, therefore, there cannot be a legal socio-economic right. But if we go by the fact that even such enforcements of positive civil and political rights which are not in peril owing to some action attributable to the State but owing to

some inaction attributable to State are judicially enforceable under a petition filed for the enforcement of fundamental right, only goes to show that State's inaction can also result in violation of enforceable fundamental right. Therefore, again the mounting of the challenge against the judicial enforcement of socio-economic rights by arguing that it actually treats even State's inaction as violation of right whereas it is only the actions of the State which can logically violate fundamental rights, appears to be logically incoherent when compared with the cases wherein, petitions have been entertained by the Court against the State inaction in relation to acts not committed or not likely to be committed by the State, simply because the civil and political rights of the right holder had been in jeopardy.

In *NHRC* v. *State of Gujarat*[28] converting a special leave petition into a petition under Article 32 of Constitution of India the Supreme Court while

holding that right to a reasonable and fair trial is a fundamental right flowing from Articles 21 and 14 of the Indian Constitution ordered for the protection of witnesses by the Government of Gujarat, their families and relatives in nine different criminal cases pending before the different courts in the State of Gujarat until further orders. These cases were lodged against the alleged perpetrators of one of the worst communal riots that India has ever seen in the State of Gujarat in the year 2002. Now in this order of the Court one can clearly see that the witnesses are not to be protected against the possible excesses by the State Government. In fact the witnesses require protection from the friends and sympathisers of the persons accused. Failure to provide protection to the witnesses is inaction on the part of State and yet this possible failure is amenable to judicial intervention. This clearly establishes that fundamental rights are not to be protected positively only when the possible violator happens to be State, in fact the fundamental right to life of a person includes his right to be protected by the State against the possible excesses that may be committed against him by persons not affiliated to the State as well. In this case State is legally accountable for its inaction in relation to other's act of aggression and not for doing some act resulting in the violation of rights.

In *NHRC* v. *State of Gujarat*[29] disposing off a petition filed by the National Human Rights Commission under article 32 of the Constitution, the Supreme Court of India in order to ensure the faith of the people in general in the criminal justice system in the State of Gujarat in the aftermath of one of the worst communal riots ordered the constitution of a Special Investigation Team (SIT) lead by P.K. Raghavan (a retired IPS officer and former Director of CBI) to investigate into several criminal cases. The constitution of SIT by the Court however was not objected to by the State of Gujarat on the same grounds of ensuring people's faith and specially that of the victims of communal riot. The Court also agreed to monitor the progress of the investigations to be performed by the SIT by asking it to submit its report after investigation within three months, to it. This is significant because, this signifies that the remedy of continuing mandamus which is common in case socio-economic rights adjudication is also not unique to it.[30]

In *NHRC* v. *State of Gujarat*[31] in another instance, wherein continuing the task of monitoring the investigation by the SIT, the Supreme Court asked the SIT to continue to investigate the cases until the completion of the trial and to file supplementary charge-sheets in case of new evidence being discovered or evidence of involvement of new persons in the commission

of the crime being found. The Court also empowered the SIT to provide for the protection of witness if it is demanded by witnesses. The Court regretted the absence of a witness protection law in India and only owing to practical difficulties did not order for a general witness protection scheme. It also emphasised the necessity of fairness of trial and held the victim to be an inseparable stakeholder in the process of trial and therefore asked the State Government of Gujarat to appoint public prosecutors in the cases in consultation with the SIT and the opinion of SIT was made binding in this regard. In its order, the court also highlighted the purpose of a criminal trial which according to is to discover, vindicate and establish the truth. This emphasises how even in common law systems, the quest for truth remains the ultimate purpose and not the fulfilment of formalities of trial. The Court also requested the High Court of Gujarat to appoint experienced judges for the trial and also ordered the said courts to hear the matters related to post Godhra incidents on a day to day basis, as expeditious disposal of cases is required in communal riot matters.

In *Zahira Habibulla H. Sheikh* v. *State of Gujarat*[32] the Supreme Court very significantly ordered the retrial of a case outside the State of Gujarat as part of the communal violence that happened in the aftermath of Godhra incident in the year 2002. The case is popularly known as the 'Best Bakery' case. In this case, though the matter had come to the Supreme Court as a special leave petition under article 136 of the Constitution against the decision of the Gujarat High which had rejected the giving of additional evidence in the case after the conclusion of the trial practically affirming the decision of the Sessions court acquitting all the accused persons. The petitioner Zahira Sheikh who also happened to be an important witness in the case had claimed that she was repeatedly threatened by several men not to depose as a witness supporting the case of the prosecution while the trial was ongoing before the Sessions court. The Supreme Court considering the gravity of the case converted the special leave petition into a writ petition and took very serious note of the callous indifference with which the State Government had taken up the case both in the Sessions Court and the High Court. The Court observed that the public prosecutors in this case have acted like defence counsel. The confidence of the Supreme Court in the capacity of the State of Gujarat in conducting a free and fair trial was so shaken that it ordered a retrial of the case in the State of Maharashtra under jurisdiction of Bombay High Court.[33]

In *State of W.B.* v. *Committee for Protection of Democratic Rights*[34], the Supreme Court held that the High Courts and the Supreme Court order for the investigation of a cognizable offence be conducted by the Central Bureau of Investigation (CBI) with a view to protect the fundamental rights of the persons in general and right to life in particular without the consent of the State Government, even if such a course in not envisaged in the Delhi Special Police Establishment Act, 1946 under which the CBI is formed, is valid. However, the Court also gave a caveat that such a power should be exercised sparingly and only when the same is necessary to instil the confidence and credibility in the investigation.

The aforesaid cases on positive civil and political rights are in the nature of individual remedial actions though espoused by way of public interest litigations by public spirited organisations, individuals. In some cases the aggrieved has also approached the Supreme Court. It is however important to note that positive civil and political rights litigations have also resulted in prescriptive guidelines coming from the Court for observance other than the ones which are generally discernible from the *ratio decidendi* of the Supreme Court judgements. In a very significant development, the Supreme Court in *Vishaka* v. *State of Rajasthan*[35] the Supreme Court of India gave elaborate guidelines to be followed for the prevention of sexual harassment of women at workplaces in the absence of a statutory law. The public interest litigation was filed before the Court by several non-governmental organisations seeking judicial intervention for the absence of laws dealing with the issue of protection of women from sexual harassment at workplace. The immediate cause for the filing of the petition was the brutal gang rape of a village social worker in the State of Rajasthan.

The Court speaking through J.S. Verma, C.J. held each such incident of sexual harassment to be violative of the fundamental right of 'gender equality' and 'right to life and liberty' of women.[36] The Court held these incidents to be clear violations of rights flowing from Articles 14, 15 and 21 of the Constitution of India. The Court definitely was not referring to acts of sexual harassment by State under Article 12 of the Constitution but to any act of sexual harassment at the work place in general. Therefore, it again reiterates the fact that fundamental rights are not available only against the excesses of State but also against State's inaction against the excesses committed by other actors not associated with State. The Court thereafter relying on the developments in the field of international human rights law related to gender equality specifically the provisions of the Convention on Elimination of All Forms of Discriminations Against Women which are consistent with fundamental rights under the Indian Constitution and

relying for this purpose on the definition of human rights given under the Protection of Human Rights Act, 1993 gave detailed guidelines to be followed by every organisation employing women for their protection from sexual harassment at workplace.

The guidelines imposed the obligation upon such organisations to provide for a grievance redressal mechanism in every such organisation to address the complaints of sexual harassment. So, it imposed a positive obligation upon such organisations. Though, this redressal mechanism would take complaints after the commission of alleged acts of sexual harassment but the fact remains that this positive obligation to establish such grievance redressal mechanism exists corresponding to fundamental rights of working women is worth noting. The Court also emphasises that the guidelines would be treated as law declared by the Supreme Court as per article 141 of the Constitution of India. So, a prescriptive law in the form of guidelines was given by the Court. This is a significant example of a class action succeeding by way of a prescriptive measure for future beneficiaries in a petition filed for the enforcement of positive civil and political rights. Interestingly though, the order imposes obligations on the private organisations as well. However, whether it is still the responsibility of the State to ensure that every State and private organisations employing women adhere to these guidelines was not gone into by the Court.[37] But clearly, if it an act amounts to violation of fundamental rights then the onus of ensuring its prevention is the obligation owed by the State. The Parliament has now enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

and therefore the *Vishaka* Guidelines stand substituted by this Act now as the judgement had categorically stated that the guidelines have been given to only fill the void in the absence of a legislation regulating this field.

This establishes the fact that denying justiciability to socio-economic rights based on the claim that it obliges the State to fulfil the corresponding duties of rights in the absence of the fact that the fundamental rights of the right holder are not in jeopardy owing to some excesses committed by the State is an argument coined mainly against the socio-economic rights and has therefore no logical consistency when seen in the light of the decisions of the Court enforcing civil and political rights flowing from fundamental rights owing to State's inaction as aforesaid. This also brings to fore the fact that fundamental rights are not available 'against' the State necessarily as the content of right in such instances suggests that the corresponding duty of the State in respect of fundamental rights does extend to duties of

protecting the life of the right holders against the possible act of others putting his life and limb in peril.

Express Positive Civil and Political Rights under the Indian Constitution

It is not the fact that only the positive rights flowing from the traditionally conceived negative fundamental rights exhibit this character. In fact the fundamental rights contained in Part III of the Constitution itself envisages safeguards against the acts of other private persons as fundamental right. For example Article 17 abolishes untouchability and makes the practice of untouchability an offence punishable under in accordance with law. Clearly, it imposes a positive duty upon the State to ensure that untouchability is not practiced by anyone. Accordingly, article 23 makes human trafficking and forced labour offences, punishable in accordance with law; this again imposes a positive obligation upon the State to ensure that human trafficking and forced labour is not practiced by anyone in India. In respect of bonded labour Prof Upendra Baxi critically commented that "……although the Constitution of India declared as impermissibly exploitative and violative of the fundamental rights of Indians the practice of bonded labour, and commanded Parliament to make a law declaring this an offence, it was only in 1976 that it enacted a Bonded Labour Prohibition Act. Till then, at the national level, bonded labour was legally just, though constitutionally prohibited. Article 23, a fundamental right, stood cancelled for about a quarter century by legislative indifference, and is even now made nugatory by the stout refusal to implement the promise of the law."[38] This clearly proves that the omission by the Parliament to enact the law required and lack of implementation of the law, itself resulted in violation of fundamental rights.

In case of socio-economic rights, the life of the right holder is in peril owing to factors which disable him from accessing basic human needs which are generally not because of the acts attributable to some identifiable right and duties bearing persons. However, what is important is that the right against the State's inaction is not actually because of the life of the right holder being in peril owing to some act of another person but simply because the life of the right holder being in peril. This, however, does not mean that the precedents illustrative of the adjudication of positive right to life, as a civil and political right, present no difficulty in terms of the legitimate judicial role in the adjudication; as such adjudications also, may have possible budgetary implications, the argument which is given primarily against the adjudication of socio-economic rights. Nevertheless, such is the extent of the dominance of narrative around the enforceability of civil of political rights that these implications emanating from the

enforcement

of positive right to life often does not invite the scrutiny, which it perhaps deserves. Matthias Klatt has argued that judicial review of all positive rights whether first generation or second generation give rise to problems that can be categorised under the four headings of justification, content, structure and competence.[39]

VII. SOCIO-ECONOMIC RIGHTS AS NEGATIVE RIGHTS

In the popular conception, socio-economic rights are understood as positive rights as opposed to civil and political rights which are understood as negative rights. However, positive civil and political rights though not understood as a legal concept in the popular conception, certainly the positive civil and political rights was not outside the theorisation of rights as political right. Socio-economic rights on the other hand, even in the academic theorisation as a political right does not find much support. However, if socio-economic rights as positive right are enforceable fundamental right,[40] then not protecting negative socio-economic rights become a difficult proposition to defend, logically. For example if a person not having access to the shelter has a right to shelter then whether such a person can be forcibly ejected without offering an alternative accommodation, from a government land, if he happens to construct a temporary shelter on the land?

In *Olga Tellis* v. *Bombay Municipal Corpn.*[41] an interesting question arose before the Supreme Court owing to the order of the then Chief Minister of the State of Maharashtra to implement the provisions of the Bombay Municipal Corporation Act, 1888 which empowered the Commissioner of the municipal corporation to forcibly evict illegal encroachers of public land, be it pavement or slum dwellers in the Mumbai city even without a notice to this effect. The provisions, so empowering the Commissioner was challenged by the multiple petitioners who were pavement or slum dwellers and a public spirited journalist before the Court on the ground that since such a power deprives a person of his right to livelihood, since shelter is inextricably attached to livelihood in a city like Mumbai. It was argued that right to livelihood is part and parcel of the constitutionally guaranteed right to life under article 21 of the Constitution of India. The Court accepted the argument that right to livelihood is part of the right to life as a fundamental right but at the same time stated that right to life is subject to a procedure established by law and therefore it remains

to be seen whether this right to livelihood is rightly taken away under the provisions of the Bombay Municipal Corporation Act, 1888 or not.

It is interesting to compare here a negative civil and political right and a negative socio-economic right in a case of judicial review of legislation. The claim for negative protection of right to life, on its failure in the Court means that the right in question is not violated by the legislative measure and therefore State is true to its obligations imposed under the Constitution. Whereas, the failure of a claim against a legislative measure based on the violation of a negative socio-economic right, as is the case here in *Olga Tellis* does still seem to not extricate the State from the obligations emanating from the right. If the procedure which is taking away the right to livelihood is just and

fair, as it was held by the Supreme Court in this case where the Court held that there is no fundamental right to reside or squat on pavements or slums on the public land and that the eviction without notice provision is to be exercised using judicious discretion, as the provision for by passing the notice is an optional measure. But the Court did not even talked about the consequent breach of positive socio-economic rights by the State in this case.

Since, eviction of pavement and slum dwellers in this case was declared constitutionally valid, so court recognised that there is no negative socio-economic right of the pavement and slum dwellers, not to be evicted from the public property. But simultaneously, the Court also recognised the right to livelihood which in this case is dependent upon shelter. But if mere proving of the fact that the legislative measure is a fair measure to deprive a person of his livelihood, the question to be asked is, against whom a person has this right? It cannot be said that the right to livelihood is only for those who have a legally valid accommodation available. Socio-economic right as a fundamental right means that the obligation to fulfil is owed by the State and therefore, if the procedure to evict the pavement and slum dwellers from public land is valid procedure under article 21, the State is still in breach of its duty, as it now owes the obligation to provide for an alternative mode of livelihood which is this case is ensuring access to shelter. The Supreme Court, however, did not go into this question and simply ordered alternative accommodation for those pavement and slum dwellers who as per the past or existing housing schemes of the State Government are eligible for alternative accommodation.

The nature of negative socio-economic rights is such that it cannot become an issue in relation to several socio-economic rights. In fact it is majorly an issue in relation to right to shelter only and this happens because of the availability of public lands and spaces in the cities and State authorities very often allowing, by their inaction, vacant public space to be inhabited by the slum dwellers by constructing temporary hutments, or

sometimes even by constructing permanent houses. This does not seem plausible in case of food, cloth, education and health etc. as theses resources are not available in public spaces to be grabbed by persons not having access to these, as can be case with those not having the access to shelter. However, this is considering the fact that access to shelter can be had and therefore there is a case for a negative right to shelter in the sense of not being deprived of shelter. Though, not in the same sense, but there can be a negative right in respect of other socio-economic rights as well. For example a child being thrown out of a primary school would amount to denial of a negative right to education.

VIII. CONCLUSION

The fact remains that protection of an interest underlying a right can be best ensured by way of the complementarity of both positive and negative duties necessary to safeguard the interest constituting the content of right. It is important to understand the nature of positive duties especially because of our preoccupation with negative rights as lawyers. First and foremost the charge of indeterminacy and incommensurability[42] is levelled against the positive duties so as to argue against their enforceability. However, the fact remains that such predisposition is misconceived as it is based on the premise that negative duties are determinate and commensurate. It is commonplace to subject negative duties to reasonable restrictions. For example the right to not to be deprived of the life and personal liberty under article 21 of the

Constitution of India is subject to a procedure established by law. The Supreme Court has held that the procedure established has to be a just, fair and reasonable procedure.[43] Now; just, fair and reasonable procedure is equally susceptible to value judgment and therefore not a good standard for taking decisions pertaining to right to life. The second main challenge for positive duties is to overcome the charge of it being progressive and requires timescale for compliance. However, even where the duty to optimize the positive right is progressive; it cannot be argued that the whole obligation therefore has been postponed.[44] The State is under an immediate and continuous obligation to make efforts to ensure the progressive realization of the positive rights in accordance with the available resources.[45] In particular resource constraint cannot be the excuse for the State not to devise strategies to achieve the fulfilment of positive duties and this can definitely be ensured by way of judicial intervention.

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[1] Cecile Fabre, *Social Rights Under The Constitution: Government And The Decent Life 41 (2000)*.

[2] Charles Fried, *Right And Wrong 110 (1978)*.

[3] Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857.

[4] *Id.* at 875.

[5] *Id.* at 875, 876.

[6] *Id.* at 875.

[7] See AMARTYA SEN, *The Idea of Justice* 379-385 (2009).

[8] *Supra* note 3 at 876.

[9] *Ibid*.

[10] *Supra* note 1 at 30.

[11] AMARTYA SEN, *Development as Freedom* 15 (2010).

[12] *Id.* at 74.

[13] Matthias Klatt, *Positive Rights: Who Decides? Judicial Review in Balance*, 13 Int'l J. Const. L. 354, 355 (2015).

[14] *Ibid*.

[15] *Ibid*.

[16] *Supra* note 1 at 43.

[17] *Id.* at 44.

[18] *Ibid*.

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

[22] Article 21 — "No person shall be deprived of his right to life and personal liberty except according to the procedure established by law."

[23] (1996) 2 SCC 648.

[24] *Id.* at 660.

[25] *Ibid*.

[26] *Supra* note 13 at 355.

[27] (1997) 1 SCC 416.

[28] (2008) 16 SCC 497.

[29] (2009) 6 SCC 342.

[30] See, Rohan J. Alva, *Continuing Mandamus: A Sufficient Protector of Socio-economic Rights in India*, 44 Hong Kong L.J. 207 (2014).

[31] (2009) 6 SCC 767.

[32] (2004) 4 SCC 158.

[33] Ironically though, in *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374, the Supreme Court also convicted Zahira Sheikh for contempt of court and sentenced her undergo simple imprisonment for one year for frequently changing her opinion while talking to press.

[34] (2010) 3 SCC 571.

[35] (1997) 6 SCC 241.

[36] *Id.* at 247.

[37] However, it took 16 years for the Supreme Court to implement its own guidelines in the Supreme Court and the guidelines were adhered to only in the year 2013. (January 12, 2017), http://delhidurbar.in/supreme-court-gender-panel-delayed/, November 18, 2013.)

[38] Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 JILI 1 (1993).

[39] *Supra* note 13 at 355.

[40] Socioeconomic rights were read as included within the ambit of Article 21 in *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 by the Supreme Court. It held that the right to life includes a broader right to "live with human dignity." This included positive rights such as "the bare necessities of life such as nutrition, clothing, and shelter."

[41] (1985) 3 SCC 545.

[42] SANDRA FREDMAN, *Human Rights Transformed: Positive Rights and Positive Duties* 70 (2008).

[43] *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248.

[44] *Supra* note 42 at 81.

[45] *Id.* at 80.