

STANDARD OF JUDICIAL REVIEW WITH RESPECT TO SOCIO-ECONOMIC RIGHTS IN INDIA

ARPITA SARKAR*

Judicial review of legislative actions with respect to socio-economic rights has attracted intriguing debate among the constitutional law and political science scholars for some time now. The scholarships endorsing both the sides of the arguments are equally supported with logic and experiences. However, such a difference in opinion should not be problematised. Our societies in terms of political states have emerged from different civilizations with their own cultures and histories. Therefore, expectation of a homogenised standard of judicial review throughout the different families of legal system is neither possible nor desirable. This paper makes a humble attempt to discuss the concept of judicial review and the characteristics of socio-economic rights as theories. Some effort has also been made to highlight the different forms of judicial review practiced in different legal systems. The court's reviews of socio-economic policies in India have often been termed as judicial activism and have generated severe criticisms. But time and again the judiciary has taken the liberty to comment upon numerous policies enacted by the legislature. It has been argued in this paper that such criticism by the courts is desirable in a democracy like India. In fact, the judiciary may also enter into

* 5th Year student, WB National University of Juridical Sciences, Kolkata. I wish to express my gratitude to all my teachers for being such a kind support. I wish to thank Professor Mahendra P. Singh for his constant support and mentoring both academically and otherwise. This paper would not have been possible without his inspiration. My heartfelt thanks also goes to Ms. Jasmine Joseph for her tireless editing of every bit of the paper and her precious inputs. I hope this paper makes a valuable addition to the existing literature on the issue.

dialogues with other administrative authorities for the implementation of socio-economic rights in India when such administrative authorities are vested with statutory powers for implementation of rights. But, these interactions by the court should be made with a qualification that the criticism by the court remains dialogic and deliberative and in no case becomes dictating. This argument forms the crux of the paper.

I. INTRODUCTION

Judicial review is defined as “the subjection of legislation to the rule of law”.¹ Judicial review of legislative actions is practiced in various forms in different parts of the world.² While US judiciary authorises the court to repeal an unconstitutional legislation, the judiciary in the United Kingdom is authorised only with the declaratory power. The judiciary in UK can go no further than directing that a law is unconstitutional and should be amended. Jeremy Waldron rests his argument against the case of judicial review on the premise that the courts are no better than the legislatures at resolving disputes. Richard Fallon on the other hand, diligently refutes the idea endorsed by Waldron contending that the fairness and legitimacy of a procedural mechanism depends on the end that they serve. Since judicial review is reasonably designed to improve the substantive political justice by safeguarding against the violation of rights of the individuals, it is considered politically legitimate.³

¹ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1354 (2006).

² *Id.*

³ Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008).

Therefore, judicial review is often challenged on the ground of democratic legitimacy for its counter-majoritarian outcome. But it is important to understand that the political legitimacy of judicial review is a more holistic approach and democratic legitimacy only forms a part of it. Further, the democratic procedure is often not the perfect one and in such cases, judicial review acts as the protector of societal commitment to the protection of individual rights. Therefore, the deficiency of democratic legitimacy in the process of judicial review is often refurbished by a more desirable politically legitimate outcome.⁴ Different standards of judicial review are practiced in different parts of the world depending on the legal system and the object of the review. When dealing with judicial review of fundamental rights, its counter-majoritarian characteristics is ignored for the greater cause of the protection of rights of individuals. This does not hold true in case of review of socio-economic rights. Judicial intervention in these cases is often criticised as the violation of constitutional mandate of separation of power. Therefore, it becomes important to explore the ideal degree of intervention by the court in these cases that would maintain harmony among the different organs of the democracy.

This paper commits to explore the standard of judicial review that is most suitable with regards to the socio-economic rights, particularly in India. Standard of review with respect to socio economic rights have generated huge debate when Professor Tushnet's work, *Weak Courts, Strong Rights* came into the public domain. Tushnet argues that the three organs of the state have equal power over the constitution, and therefore, by conferring strong authority over the judiciary, one might cause misbalance of the power ideally vested. Since Indian judiciary's power tends to incline towards the strong form, Professor Tushnet's claim that socio- economic rights

⁴ *Id.*

get implemented better in the weak form of judicial review invites us to revisit our own theory of judiciary's power. This paper intends to discuss the issues in four parts. The first part discusses the most popular standards of judicial review with their respective justifications that legitimise their exercise in the legal system. Since the review of socio-economic rights form the centre of discussion of this work, Part II has been dedicated to provide clarity regarding the definition and characteristics of socio-economic rights. Part III discusses the reason behind adopting different standard of judicial review in different parts of the world whereas Part IV is specifically dedicated to the standard of review for socio-economic rights in India. Prior to conclusion, some ideas have been built to accommodate Professor Tushnet's idea into the Indian legal system with existing constitutional provisions.

II. STANDARD OF JUDICIAL REVIEW AND THEIR JUSTIFICATIONS

The two clearly identified forms of judicial review practiced across the world are the strong and the weak form of judicial review. Strong form of judicial review exists when the reasonable interpretation by the court prevails over the reasonable interpretation by the legislature. The court, in this system, has the authority to interpret the constitution.⁵ Apart from declining the application of a statute, the court, in a strong judicial review system, can also modify a statute to make it compatible with the provisions of the constitution and conform to individual rights. In a stronger form of judicial review, the court even has the power to strike down a law from the statute book altogether. Some European courts and even Indian courts have this power.⁶

The weak form of review, in contrast, places legislature as the ultimate authority with regards to the interpretation

⁵ Brett Max Kaufman, *Weak Courts on Steroids: Improving Weak Form of Judicial Review*, 87 TEX. L. REV. 639, 640-641 (2009).

⁶ Waldron, *supra* note 1, at 1355.

of the Constitution. This form of review can be practiced in a legal system in a number of ways: One of the ways is by conferring only declaratory power to the court. In this process, the court can scrutinise a particular legislation for its conformity to individual rights but may not decline to apply it. The effect is only declaratory in such cases. A court in United Kingdom may issue “declaration of incompatibility” in the cases where the court is satisfied that the provisions of a particular legislation is incompatible with the Convention rights which are set out in the European Convention of Human Rights as incorporated into the British Law through the Human Rights Act, 1998. The Human Rights Act itself provides that such declaration by the court does not render an Act unconstitutional and further, such declaration is not binding on the parties. It simply has a declaratory effect.⁷ A further weaker form of judicial review exists in countries like New Zealand. The courts, in this form of review system, do not decline to apply legislation when it violates human rights as set out in the Bill of Rights Act, 1990. Rather, the court strives to find interpretations that would avoid the violation. The declarations by the New Zealand courts do not have any value in legislative processes. There is further, a third form of judicial review that introduces a dialogic mode of review. The Canadian legal system authorises the court the power to review a legislative Act and the court has the power to decline a national or provincial legislation if they violate the Canadian Charter of Rights and Freedom. But the Canadian Charter itself grants the legislature the discretion to respond to such judicial review. There are two provisions in the Charter that accommodates different legislative responses to the ruling of the court. The first one in Section 1 of the Canadian Charter which authorises the legislature to re-enact the impugned provision with further demonstrated justification. This results in accepting the interpretation by the court but at the same

⁷ *Id.* at 1355, 641.

time rejecting its application. The second provision is available under the Charter is Section 33. This is the “notwithstanding clause” of the Charter which authorises the legislature to reject the court’s interpretation of incompatibility.⁸

Both the form of judicial review is legitimised with their own justifications. The weak form of judicial review is more popular among the scholars due to its dialogic characteristics and democratic legitimacy. The weak form of judicial review is based on the premise that there can be reasonable disagreement on crucial constitutional questions. Weak form of review leads to judicial invitation to continuous deliberation between the legislature and the court on constitutional interpretation. This acknowledgement of disagreement provides judicial review with democratic legitimacy and self governance.⁹ The weak form of judicial review is also accepted on the premise that all the three branches of the government are entitled to interpret the constitution for its own unique purpose and none of the branches is obliged to accept the interpretation made by the other branch. Weak form of review simply initiates deliberation rather than imposing the court’s interpretation on the other branches of the government.

The strong form of review, on the other hand, is justified on the premise of consequentialist perspective. Walter Sinott Armstrong is of the opinion that the right standard for judging strong and weak judicial review is their total consequences including welfare. Self governance, which drives the scholar to endorse the weak form of judicial review, is one of the desired objects and not the only desired object. The main reason for refuting the idea of weak judicial review system is

⁸ *Id.*

⁹ MARK TUSHNET, *WEAK COURT, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 67 (reviewed by Madhav Khosla, 2009).

the fact that “the full blast of sundry opinion” is a myth. The standard set on the premise of “the full blast of sundry opinion” as mentioned by Michelman and endorsed by Professor Tushnet, is not a realistic standard according to Armstrong. “Full blast of sundry opinion would mean taking into consideration the opinion of all the individuals taking part in a deliberation. The reality on the contrary is that the rule of majority and not the rule of unanimity prevail in legislature. It is rather impossible to have a unanimous opinion on every matter for a different opinion of merely one person would cause moving away from unanimity. The next best thing is therefore, decision of majority. However, often the situation is such that the tyrant majority tramples over the interest of the minority let alone disregarding it.¹⁰ Therefore, Armstrong argues that it is not only the judiciary which fails to take into account the unanimous opinion of the people falling under its jurisdiction. The legislature too fails in bringing out unanimous ideas.¹¹ Further, the strong form of judicial review also derives its legitimacy on the ground that the laws enacted are many a times the will of the elected representatives and not the direct will of the people. Even an honest representative often fails to uphold the interest of the people due to inertias including inadequate representations; political inequality etc. In such cases, the court invokes its authority to protect the interest of the society by protecting the commitments it has made to individuals residing within it.

Extreme deference to legislative actions or weak form of judicial review appears to be problematic to Rosalind Dixon. She opines that pure legislative supremacy might often produce consequences that fall short of inclusive and responsive constitutional ideals. The serious blockages that a legislative action might suffer from are classified into two

¹⁰ Walter Sinott Armstrong, *Weak and Strong Judicial Review*, 22 LAW AND PHILOSOPHY 381 (2003).

¹¹ *Id.*

categories. They are legislative blind spots and burden of inertia. Lack of foresightedness or lack of time often results in omission by the legislature to enact law in a way that preserves the right in all forms. This is blind spot of application. The legislature might also fail to appreciate the impact of legislature on different forms of life. This mainly occurs due to inadequate representation in the legislature. This is known as blind spot of perspective. Also, sometimes lack of legal experience causes omission of certain actions. This is more commonly known as blind spot of accommodation. With regards to burden of inertia, the legislature often fails to address rights-based claims to further competing legislative priorities which are electorally more pressing (also known as priority driven burden of inertia). Also, the cost involved for party integrity sometimes overrides the benefit of pursuing a more responsive legislative outcome (also known as coalition-driven inertia). Therefore, according to Dixon, some power should rest with the court to preserve the rights of common people that the legislature omits to uphold thereby justifying the strong form of judicial review.¹²

III. SOCIO-ECONOMIC RIGHTS AND THEIR CHARACTERISTICS

Judicial review of legislative actions with regards to economic and social rights is very different from the review of civil and political rights. Therefore, it is important to know the difference between the two categories. While drafting the international covenants, deliberations were made by different countries as to whether the socio-economic rights and the civil and political rights should be accommodated in a single covenant or two different covenants. Some developing nations in Asia, Africa, Latin America, USSR and European countries were of the opinion that both the categories of rights should be inscribed in a single covenant. They were of the opinion

¹² Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong Form versus Weak Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 402 (2007).

that a man does not represent a human person as regarded by UDHR when he is deprived of “economic, social and cultural rights”. However the claim for separate covenants was based on the contention that the two different categories of rights, though equal in importance, are distinct in their characteristics. The civil and political rights are those rights that can be immediately enforceable. The economic and social rights on the other hand, are those which are meant to be progressively implemented. The economic and social rights are meant to be attainable gradually due to the disparity in economic structures, standard of life and cultural rights in different states. Hence, two separate international covenants were adopted finally.¹³

Social rights are essentially the positive rights in contrast to the civil and political rights which are negative rights. While the civil and political rights abstain the state from certain acts that infringes the rights of its people, the social rights obliges the state to take certain action in furtherance of the welfare of the people. Social rights are positive because they involve affirmative action either in the form of funding or certain positive actions.¹⁴ As regards the relation between these negative and positive rights are concerned, the Indian Nationalist leaders found the both of the rights to be interconnected and indivisible. It has been also claimed that the UDHR, which elaborately discusses about right to food, education, social security and hunger, have largely borrowed from Latin American Socialist Constitution, powerful lobbying by the Latin American delegation and social assistance from India.¹⁵

¹³ Manoj Kumar Sinha, *New Dimension of International Human Rights Law, With Special Reference to Economic Rights*, 6 SOOCHOW LAW JOURNAL 65, 72-73 (2009).

¹⁴ Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFF. 369, 374.

¹⁵ Vijayasri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49, 66-67.

The existence of socio economic rights is well acknowledged but its enforceability has been quite a debated topic. Constitutional scholars have been skeptic about the enforceability of such rights in the court of law. The critics suggest keeping judicial review outside the ambit of court for normative as well as positive reasons. The argument of these scholars is based on the premise that judges lack institutional capacity to enforce these rights. Adjudication of social and welfare rights is said to have negative effect on the state revenue and income distribution. Many critics also base their argument against the enforcement of socio economic rights on the premise that socio economic rights are polycentric in nature. They share a complicated relationship with many other factors and hence, the judges lack the institutional resource to enforce them.¹⁶ The attitude towards the enforcement of socioeconomic right differs with countries. With regards to the status of socio economic rights in India, these rights are couched with more generic provisions of human dignity and security. Most of the constitutional scholars argue that the constitutional protection of rights extend merely to comply with the negative civil and political duties imposed on the state and in no way extends to obligating the state to perform positive duties.

IV. STANDARD OF JUDICIAL REVIEW IN DIFFERENT LEGAL SYSTEM WITH RESPECT TO SOCIO-ECONOMIC RIGHTS

Judicial review has often been discussed with respect to fundamental rights. Many scholars are of the opinion that strong form of judicial review often protects the interest of the minority which a weak form of review fails to protect. But it is interesting to explore as to which form of judicial review is suitable for the enforcement of socioeconomic rights. As Professor Tushnet suggests that a weak form of

¹⁶ TUSHNET, *supra* note 9, at 277.

review is more suitable for American legal system, his contention is largely debatable. The judicial review system of a country is highly dependent on its history and the provision of the constitution.

Taking Latin America as an example, enforcement of socioeconomic rights in this legal system has been one of the greatest challenges that Latin American democracy might have faced. Socio economic rights are characterised by their gradual enforcement and the political and economic forces that the state faces both from external as well as internal elements make it difficult for the enforcement of such rights. Latin America is known for its experimental role for the enforcement of these rights. The reason behind this is perhaps the fact that the country was witnessing the highest order of human rights abuses. The Inter-American Commission on Human Rights also points out various reasons that established the legitimacy of judicial review in the country. One of the reasons is the weakened representative bodies in legislature. The Latin American judiciary has been vigorously protecting the social rights since the dismantling of the earlier authoritarian and dictatorship regime. The Latin American courts are specially working for the interest of the often excluded social minority groups who lack adequate or no representation in the political decision making.¹⁷

The South African position is quite intriguing. South African judiciary practices a weak form of judicial review but the current South African jurisprudence appears to be a direct refutation to the traditional claims of disastrous consequences resulting from the enforcement of socio-economic protections. The South African court, on the contrary, has been criticised for its excessive restraint it has shown on the adjudication of social rights. Acknowledgement of the significance of socio economic rights in South Africa

¹⁷ Kaufman, *supra* note 5, at 653-654.

owes its significance to its apartheid history. The drafting of the new constitution and the recognition of the socio-economic rights have been the result of deep deliberation between the white minority ruling government and the African National Congress (ANC) in the early 1990s. The endeavour to include socio economic rights in the post apartheid constitution was consistent with the ANC throughout the period of deliberation. The interim constitution of 1994 contained very basic social welfare rights like right to education and welfare of children. This was due to the weak strength of the present ruling government existing then. But the final Constitution that was passed with requisite majority of the Assembly on 10th December 1996 contained extensive socioeconomic rights. Critics of these rights were of the opinion that these are not universally recognised fundamental rights and that the justiciability of such rights would violate the constitutional mandate of separation of power.¹⁸ These contentions were out rightly rejected by the 1996 Constitutional court in the case *In Re Certification of South African Constitution*¹⁹ and hence, the present South African Constitution expressly includes the core social rights in its text.

With regards to judicial enforcement of socio economic rights in South Africa, the jurisprudence has developed around three landmark cases. To begin with the *Soobramoney* case²⁰, a hospital policy prioritising the treatment of dialysis was challenged in the constitutional court on the grounds of right to health and emergency treatment. The court while enforcing

¹⁸ Christiansen, *supra* note 14, at 377-382.

¹⁹ *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.), available at [http:// www.constitutionalcourt.org.za/Archimages/3626.PDF](http://www.constitutionalcourt.org.za/Archimages/3626.PDF).

²⁰ *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.), available at [http:// www.constitutionalcourt.org.za/Archimages/1617.PDF](http://www.constitutionalcourt.org.za/Archimages/1617.PDF).

the social right held that this would not require the court to overturn the policy based on limited resources. The *Grootboom*²¹ case is another landmark example of the enforcement of socioeconomic rights where the court held that the government program violated the Constitution by failing to develop and implement a comprehensive and inclusive housing program especially for people who did not have shelter and were living in an intolerable condition. Further, in the *Treatment Action Campaign* case²², a government action program that restricted the availability of certain drug to certain hospitals was declared to be unconstitutional by the court. The court in this case, was of the opinion that the government should frame a more comprehensive and inclusive health programs with the limited resources available.²³ It is however important to note that in all these cases, the court decided upon government inaction. None of the cases were based on judicial review of legislative actions as such.

V. THE INDIAN POSITION WITH RESPECT TO JUDICIAL REVIEW OF SOCIO-ECONOMIC RIGHTS

There are a significant number of cases where the Indian judiciary has enforced socio-economic rights by couching them with the fundamental rights guaranteed under Article 21 of the Constitution. The *Olga Tellis* case²⁴ is a classic example in this regard. Apart from this, there are series of environmental law cases where the judiciary has enforced

²¹ *Government of the Republic of South Africa v. Grootboom & Ors.*, 2001 (1) SA 46 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2798.PDF>.

²² *Minister of Health v. Treatment Action Campaign & Others* (No. 2), 2002 (5) SA 721 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2378.PDF>.

²³ *Id.* at 383.

²⁴ *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180.

social rights under the guise of fundamental rights. All of these cases deal with executive inactions. But since the aim of this paper is to explore the form of judicial review of legislative actions, these examples would not hold much relevance. Now, before we proceed with the discussion as to which form of judicial review of legislative action is best suited for India with respect to socio-economic rights, a few important points need to be answered. The primary question to be looked into is the status of judicial review in India and the standard of judicial review permitted as per the constitutional provisions.

As M.P. Jain contends, the scope of judicial review is narrower in India as compared to USA. The fundamental rights in Indian constitution are precisely worded with the restrictions demarcated unlike its US counterpart where a vast power is granted to the judiciary. It is presumed that the constitution makers were apprehensive that the court will be raised to the level of super legislature if such open ended power is vested in the judiciary.²⁵ But in spite of all the obstacles, the Indian judiciary has upheld a vibrant mode of judicial review in India. Again as contended by M.P. Jain, the Indian constitution explicitly allows judicial review under Articles 13, 32, 131-136, 143, 226 and 227 of the Constitution.²⁶

The Supreme Court has established the significance of judicial review in India time and again in the judgements of various cases. In *Keshavananda Bharati case*²⁷, Justice Khanna was of the opinion that the power of judicial review has to be exercised as long as the fundamental rights exist in India. Besides this, in *Minerva Mills Ltd. case*²⁸, the minority judgement delivered by Justice Bhagwati clearly presented

²⁵ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1564 (photo. reprint 2007) (5th ed, 2003).

²⁶ *Id.*

²⁷ *His Holiness Kesavananda Bharati v. The State of Kerala and Others*, A.I.R. 1997 S.C. 3127, 3170.

²⁸ *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789.

the picture that it is the duty of the judiciary to uphold the constitutional values and also enforce the constitutional limitations. According to J. Bhagwati, the power of judicial review unquestionably forms a part of the basic structure of the constitution. It is however important to note that the judges, in these cases upheld judicial review as a safety valve against the protection of fundamental rights guaranteed by the constitution though Chapters XLI and XLII of the Parliamentary debate on the Constitution (Forty-Forth) Amendment Bill shows that allegation has been brought against the judiciary for retarding the socio-economic development of the country through the exercise of the power of judicial review.²⁹

Therefore, it is clear that India practices a strong form of judicial review as far as the enforcement of fundamental rights are concerned. In fact, Article 13 with its explicit provision prohibits a weak form of review as far as fundamental rights are concerned. According to the provision of Article 13(2), State shall not make any law which curtails or takes away any fundamental right. Not only this, Article 13 confers a power and duty on the judiciary to declare a law void.³⁰ This power is not simply a declaratory power. A law becomes void as soon as the Indian judiciary declares it to be inconsistent with the provisions of the constitution. To maintain organisational deference, neither the courts easily declare a law unconstitutional nor does the legislature re-enacts the law declared unconstitutional by the court very easily. The strong form of review still exists and cannot be transformed into a weak form of review as far as fundamental rights are concerned.

Since this paper aims to explore as to which form of judicial review is best suited for the socio economic rights in

²⁹ JAIN, *supra* note 25, at 1565.

³⁰ *Id.* at 835.

India, it is plausible to move away from fundamental rights and focus on the socio-economic rights instead. The socio-economic rights in India are laid down in Part IV of the Constitution as the Directive Principles of State Policy and are made non-justiciable by the court under Article 37 of the Constitution. Eminent Constitutional law scholar H. M. Seervai was of the opinion that non-justiciability of the DPSPs exclude them from the ambit of law though, this opinion has been rejected by the subsequent scholars.³¹ Quite a few Directive Principles have been incorporated within the fundamental rights through judicial interpretation and in the process have been converted into fundamental rights. The courts in India are not reluctant towards the enforcement of socio-economic. An intriguing matter to observe here is the attitude of court towards affirmative actions in India. Affirmative actions are social rights though included within Part III of the constitution as fundamental rights. The courts have taken immense interest in striking down or amending the legislations enacted by the state meant for the upliftment for social, economic and educationally backward classes. In the recent Andhra Pradesh High Court judgement³², the court declared the Andhra Pradesh Reservation in favour of Socially and Educationally Backward Classes of Muslims Act, 2007 as unconstitutional as it discriminates on the ground of religion. The court could do so because the Act was challenged under Articles 15(1), 15(4), 16(2) and 16(4) of the Constitution which fall within the ambit of Part III of the Constitution. This would not have been possible if the Act was to be challenged under any provision outside Part III of the Constitution.

³¹ Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directive Principles- A Human Rights Perspective*, (2003) 5 S.C.C (Jour) 1, 1.

³² T. Muralidhar Rao v. State of A.P., Writ Petition Nos. 15267, 15268, 15269, 15270, 15330, 16562, 17086, 18494, 25852 of 2007 and 17679 of 2008, Andhra Pradesh High Court (Feb. 8, 2010).

It can be inferred therefore, that the socioeconomic rights can be made justiciable if the claim made on such positive rights can be included within the ambit of Part III of the constitution whereas those socio economic rights which are included outside Part IV remain non-justiciable. Judicial review with regards to socio-economic rights does not hold in the presence of Article 37 of the Indian Constitution. Even a plain reading of Article 37 would reveal that the provisions of Part IV are not enforceable by the court. It does not however state that the court cannot review an Act enacted by the legislature on the principles laid down in Part IV. This is where Professor Tushnet's weak form of judicial review becomes relevant. For the sake of clarity, it is important to mention that Tushnet, in his work mentions about weak form of judicial review with respect to issues involving civil liberties and not socio- economic right. Weak Review with respect to civil liberties, as observed earlier, cannot co-exist with Article 13 of the Indian Constitution. It might be useful however, to experiment Professor Tushnet's idea with respect to socio-economic rights.

When the legislature enacts a law which is in contravention to Part IV of the Constitution, the judiciary might exercise its weak form of review and initiate a deliberation that the provisions of the Act violates the principles laid down in Part IV. But this exercise can be initiated only in case of an enactment that violates the principles laid down in Part IV of the Constitution and not with regards to enforcement of social-welfare rights in case of legislative or administrative inactions. Socio-economic rights, as discussed in the previous part of the paper, require the state to initiate some positive actions on its part. Judiciary's intervention in such cases is often observed as an intrusion for often it comes in conflict of state's plan. Professor Tushnet suggests that whenever the conflict of interest becomes too strong between the different organs of the state, a weak form of review becomes useful. Weak form of review requires repeated

interaction between different organs of the state over the interpretation of the Constitution. Also, since the conclusion is reached over intensive deliberation, the form of consensual outcome becomes more likely.³³ When there exists, a genuine uncertainty about some consequences, deliberation brings out better outcomes as compared to compulsive orders. Tushnet, in his paper, *The Core of the case for and against Judicial Review*,³⁴ spends some time discussing about certain rights which are explicitly declared non-judicial by the Constitution. He makes an attempt to convince that judicial review in such cases creates an additional veto power which might result in under enforcement of the rights. In any case, when the Constitution expressly prohibits the court from adjudicating such rights, judicial review can only invalidate laws by which the legislatures seek to promote certain positive rights. The judiciary as it is, is not authorised to promote these rights on their own.³⁵ This in no way means that Tushnet endorses judicial enforceability of such rights for he warns that judicial enforceability of positive rights might result in non-enactment of laws by the legislatures. When the legislature decides that enactment of a law would authorise the court to demand more from the enactment than is actually intended, then they would refrain from making laws altogether.³⁶

Framing Professor Tushnet's argument into our own Constitutional model, it appears plausible to allow weak form of judicial review for the socio-economic rights enshrined in the Constitution in the form of Directive Principles of State

³³ Mark Tushnet, *Weak-Form of Judicial Review and 'Core' Civil Liberties*, 41 HARV. CR-CLL REV. 1, 12 (2006).

³⁴ See Mark Tushnet, *How Different are the Core Cases for and against Judicial Review?* (Harvard Law Sch. Pub. Law & Legal Theory Working Group., Paper No. 09-04, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1320502.

³⁵ *Id.* at 15.

³⁶ *Id.*

Policy. Strong form of judicial review as it is, would require amendment of Article 37 which as mentioned by Professor Singh, would not create disharmony between fundamental rights and Directive Principles but would come with its own serious consequences. Professor Singh therefore suggests another intriguing option for enforcing the socio-economic rights. Since the courts often lack competence and expertise to enforce positive rights, he proposes various administrative institutions empowered under the law to use their statutory powers to ensure the implementation of these positive rights. He cites the National Human Rights Commission as one of these institutions who can balance this additional function of enforcing socio-economic rights with the existing function of protecting the civil liberties of individuals.³⁷ It therefore seems plausible to harmonise the solutions raised by the two legendary Constitutional law scholars to solve the debate of enforceability of socio-economic rights in India. Following Professor Tushnet's suggestion of a weak form of judicial review, the judiciary might take the opportunity to make a declaratory statement on socio-economic rights. Realising Professor Singh's idea might result in deliberation between the court and the administrative authorities empowered by the statutes to make practical approaches to handle the issues.

VI. CONCLUSION

The main purpose of judicial review is to ensure that the laws enacted by the legislature conform to the rule of law. The form of judicial review varies in different parts of the world based upon its history and legal system. It is not right to assume that judicial review of a legislature confers the judiciary with an upper hand over the other two organs of the government. Review of fundamental rights has been accepted as a legitimate practice in a democratic country either in the form of a necessary evil or as a just requirement.

³⁷ Singh, *supra* note 31, at 6-7.

Review of socioeconomic rights however, suffer from frictions among scholars. The main idea behind this work was to explore the just form of judicial review for the socioeconomic rights in India. It is clear by now that the fundamental rights and the Directive Principles are not strictly divided according to civil and political rights on one hand and economic, social and cultural rights on other hand respectively. Rather, the division is on the basis of positive and negative rights though the difference between positive and negative rights have also been blurred within Part III of the Constitution. Therefore, strong form of review can be implemented by the court on those rights which is included within Part III of the Constitution whereas those rights enshrined in Part IV remains unenforceable. A ray of hope emerges from the fact that review of the rights enshrined in Part IV is not prohibited explicitly by the court. Therefore, Tushnet's idea of weak form of review can be used in these areas where the legislators enact a law in contravention to the principles laid down in Part IV of the Constitution. The court can declare such enactments to be unconstitutional and can assist the legislature in framing laws that would conform to the principles laid down in the Constitution. Also, the court might make a dialogic approach with the other administrative bodies specialising in protection of human liberties to realise certain socio-economic rights. It is a fact that civil rights and socio-economic rights are not exclusive and independent of each other. Institutions like National Human Rights Commission often have to work towards realisation of certain positive rights required for the protection of the fundamental rights in spirit. Therefore, dialogues between these institutions might be helpful in the actual realisation of the much coveted positive rights.