

# LESSONS FOR SOUTH AFRICAN SOCIAL ASSISTANCE LAW FROM INDIA: PART 1 – THE TIES THAT BIND: THE INDIAN CONSTITUTION AND REASONS FOR COMPARING SOUTH AFRICA WITH INDIA<sup>\*</sup>

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## SUMMARY

This is the first of two articles dealing with the constitutional right of access to social assistance in South Africa by way of comparison with the social justice provisions applicable in India. Part I deals specifically with the significance of a comparison between these two countries and focuses on the provisions of the Indian Constitution and court judgments which may inform social policy in South Africa. Part II will highlight the duty of the state in South Africa given the wording of section 27 of the Constitution and will, based on lessons from India, argue that use of the right to life may be a solution for people not qualifying for any social assistance in South Africa despite being in desperate need.

## 1 INTRODUCTION

Courts around the world are frequently confronted by many of the same difficult issues and the judicial world is becoming a global one where judges in different jurisdictions are increasingly looking to a wide variety of sources to interpret their own human rights provisions.<sup>1</sup> The universal nature of human rights and human rights guarantees have also contributed to the globalization of the judicial world in the field of human rights. Since the Second World War, there has been a global emphasis on human rights, which led to the passing of the Universal Declaration of Human Rights and the signing of the International Covenants on Civil and Political Rights and

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<sup>1</sup> L'Heureux-Dube "Human Rights: A Worldwide Dialogue" in Kirpal, Desai, Subramaniam, Dhavan and Ramachandran (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 214 215.

on Economic, Social and Cultural Rights. These have been reflected, in various forms, in regional human rights treaties and in human rights guarantees in national constitutions. For example, the drafters of the Indian Constitution incorporated most of the rights enumerated in the Universal Declaration of Human Rights.<sup>2</sup>

The growing internationalization of the judiciary has also been facilitated by the advancement of communication technology which makes it much easier to consult comparative constitutional sources in argument and in judgments.<sup>3</sup>

Despite this, it must be ensured that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied as there are important reasons why solutions developed in one jurisdiction may be inappropriate in another. Political and social realities, values and traditions differ across different countries.<sup>4</sup> The economies of South Africa and India, for example, are different, as is the make up of their respective societies, while the functioning of the South African Human Rights Commission is a significant South African advantage, at least in theory.<sup>5</sup> It has also been held that whilst the Indian jurisprudence on certain subjects (such as the development of the right to life to include the imposition of positive obligations on the state in respect of the basic needs of its inhabitants) contains valuable insights, it is necessary to bear in mind that the Indian Constitution is structured differently to the South African Constitution. The South African Bill of Rights imposes certain positive obligations directly on the state and it is the court's duty to apply the obligations as formulated in the Constitution without unnecessarily drawing inferences that would be inconsistent therewith.<sup>6</sup>

Despite inevitable differences between Indian and South African society, both have strong connections to the British tradition, and the common law and the Constitutions of both countries guarantee fundamental human rights which have increasingly been given effect to.<sup>7</sup> It is submitted that India has the potential to offer a great deal more to South African legal study in the future, particularly with reference to constitutional law, a fact which is slowly being recognised by researchers on the subject.

According to Sachs J:

"We look to the Indian Supreme Court which had a brilliant period of judicial activism when a certain section of the Indian intelligentsia felt let down by Parliament. They were demoralized by the failure of Parliament to fulfil the promise of the constitution, by the corruption of government, by the authoritarian rule that was practiced so often at that time. Some of the judges

<sup>2</sup> Kachwaha *The Judiciary in India: Determinant of its Independence and Impartiality* (1998) 109.

<sup>3</sup> L'Heureux-Dube 225.

<sup>4</sup> L'Heureux-Dube 226.

<sup>5</sup> Heyns and Brand "Introduction to Socio-economic Rights in the South African Constitution" in Bekker (ed) *A Compilation of Essential Documents on Economic, Social and Cultural Rights* Economic and Social Rights Series Vol 1 (June 1999) 1 14-15.

<sup>6</sup> *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 12 BCLR 1696 (CC) par 15.

<sup>7</sup> India continues to apply parts of British law post-independence. A 372(1) of the Indian Constitution provides for the continuation of "all the law in force in the territory of India immediately before the commencement of this Constitution ... until altered or repealed or amended by a competent Legislature or other competent authority".

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felt the courts must do something to rescue the promise of the constitution, and through a very active and ingenious interpretation bringing different clauses together they gave millions of people the chance to feel 'we are people in our country, we have constitutional rights, we can approach the courts' ... the right to life is not simply the right not to be killed, it is the right to quality of life; if a person is homeless and has nowhere else to sleep, she or he cannot simply for the sake of city aesthetics be pushed out into the bush where there is even less shelter and protection than in the city.<sup>8</sup>

The preambles to the Indian and South African Constitutions are similar in their championing of the ideals of "social justice" and the improvement of the quality of life of all citizens. In addition, the sections dealing with social assistance in both Constitutions contain an internal limitation related to the economic capacity of the state. The favourable comparison also extends to concepts such as the granting of "appropriate relief", the wide interpretations of *locus standi* and the importance in both jurisdictions of the foundational values of equality, human dignity and life.

An obvious criticism of this paper from the outset may be that a comparative study would have been better directed towards a country that has little poverty and which has succeeded in reducing poverty on a large scale. It is conceded that a study of Indian attempts at poverty reduction is often an exercise in futility. Despite its plethora of problems, however, it must be appreciated that some projects or policies have succeeded even in environments in India completely not conducive for poverty reduction and with harsh initial poverty and inequality.<sup>9</sup> It is submitted that both the success stories and some of the failures in India provide insight into mechanisms for poverty alleviation in South Africa.

It is noteworthy that the post-apartheid South African judiciary has itself identified its Indian counterpart as a key source of reference, as will be indicated below. Although it may be argued that poverty manifests itself in different ways in South Africa and India, the similarity in the experience of poverty in both countries is well illustrated by President Thabo Mbeki's comments on poverty in both regions in an article entitled "India and South Africa: The ties that bind". Mbeki, correctly it is submitted, refers to a broad but single poverty challenge including underdevelopment and marginalisation facing two-thirds of the population of the world – the majority being resident in developing countries such as India and South Africa.<sup>10</sup>

As far as it is necessary to justify a comparison of poverty in South Africa and India, given the unavoidable difference in social and economic conditions which characterise all countries, it is noteworthy that in June 2003, India, Brazil and South Africa established a Trilateral Dialogue Forum to enable these three countries to address issues of global concern such as poverty collectively. The fact that there exists the "India-Africa Fund" for joint responses to poverty is further evidence of the aptness of a comparison

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<sup>8</sup> Sachs "Making Rights Work – The South African Experience" in Smith *Making Rights Work* (1999) 1 10. See also Nageswara Rao "Human Rights Initiatives" in Nirmal *Human Rights in India: Historical, Social and Political Perspectives* (2000) 53 68.

<sup>9</sup> Lipton *Successes in Anti-Poverty* (1998) 1.

<sup>10</sup> Mbeki "India and South Africa: The Ties that Bind" Friday 17 October 2003 *This Day* 15.

between these nations.<sup>11</sup> As Mbeki has said with reference to India and South Africa:

“Our two countries are free. Yet none among us would contest the fact that to be truly free we have to attain a certain level of development.”<sup>12</sup>

India and South Africa share a number of things in common, including problems regarding access to social assistance. In fact, it is arguable that India is currently in a weaker position than South Africa as a result of its uncontrollable population problem. India also experiences a geographic and technical resource situation which renders its problems more acute than South Africa, such as:

- Falling land / man ratio;
- Regional scarcity and imbalance of natural resources of soil and water with the consequent repeated annual flooding in certain areas;
- Uncertainty of rainfall;
- Lack of technological capital to effect improvement of production resources; and
- The lack of awareness of methods of technological operations by the work force.<sup>13</sup>

As a result, it is envisaged that some “solutions” which may have been implemented in that country (even unsuccessfully) could open doors to practical solutions in South Africa. On a theoretical level, the relevance of couching such rights in a Bill of Rights (as in South Africa) or in “directive principles” (which are strictly speaking unenforceable in a court as in India) will be examined. The Indian Constitution recognizes a range of socio-economic rights as “directive principles of state policy”. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) has taken the brave step of following this example by recognising the right to have access to social security as a fundamental human right in its Bill of Rights. More importantly, South Africa has taken this recognition a step further by providing that this right, like the other rights in the Bill of Rights, may be enforced in the courts.<sup>14</sup> This is different from the Indian experience which, it will be shown, is forced to read-in socio-economic rights as part of an expanded interpretation of the right to life. The aspects of the right which are immediately enforceable in South Africa and the extent to which this recognition should be extended will be studied with particular reference to Indian case law. The questions to be answered include whether or not Indian case law can inform South Africa’s emerging jurisprudence regarding the interpretation of socio-economic rights. To answer this it will be necessary to examine whether any progress made by India in reducing poverty may be ascribed to their case law or to governmental policy. To the extent that this question is answered in the affirmative, the possibility and manner in which

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Agnihotri *National Employment Programmes in India* (1992) 239.

<sup>14</sup> Liebenberg “The Right to Social Security: Response From a South African Perspective” in Brand and Russell *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* (2002) 147.

such experience may be translated into South Africa's situation will be considered. It must be understood that the Indian experience will be applied to South Africa in an attempt to find solutions to problems in South Africa and not the other way around. The focus remains on South Africa and its problems while the comparative study with India has been conducted in order to assess whether or not some guidance may be obtained from a country with similar problems (on a larger scale) but which has enjoyed a longer constitutional history.

## 2 BACKGROUND TO THE INDIAN CONSTITUTION

After two centuries of British colonial rule, the Constituent Assembly of India was created in 1947 to write a constitution for and on behalf of the people of India.<sup>15</sup> The Indian Constitution which emerged is the lengthiest and the most detailed of all the constitutions in the world.<sup>16</sup>

In order to understand why some provisions were written into the Indian Constitution it is necessary to deal briefly with the composition of the Constituent Assembly. Significantly, it comprised eminent personalities of the time drawn from different walks of life. In addition to politicians and constitutional law experts, the Constituent Assembly included freedom fighters, educationalists, poets, writers and other persons who had made a mark in their respective fields.<sup>17</sup> The attributes of the chairman of the Drafting Committee are also noteworthy. Dr BR Ambedkar apparently accepted the appointment as a once-in-a-lifetime opportunity to protect the rights of the hitherto deprived, in particular the "untouchable" caste. Ambedkar was a staunch believer in constitutionalism and the Drafting Committee accordingly decided to utilise the Indian Constitution as the fundamental instrument to bring about social change and justice in India.<sup>18</sup>

Just as South Africa's constitutional drafters were able to draw on the experience of previous constitutions in the 1990's, the framers of the Indian Constitution were aware that there were other constitutions and documents which had given expression to certain fundamental ideals as the goals toward which a country should strive.<sup>19</sup> They studied the working of the available constitutions as well as the difficulties which were faced in their operation. The Universal Declaration of Human Rights had been adopted by the General Assembly of the United Nations and the first ten Amendments to the Constitution of the United States of America which had been passed also contained certain rights akin to human rights. The drafters were also aware that the USA, the United Kingdom and Germany had already passed social welfare legislation, that the Constitution of Japan contained a chapter headed "Rights and Duties of the People" and that section 8 of Article 1 of the Constitution of the USA contained a "welfare clause" empowering the

<sup>15</sup> Rajsekhariah "The Indian Constitution and Socio-economic Justice: The Ambedkar Perspective" in Singh and Gadkar *Social Development and Justice in India* (1995) 230.

<sup>16</sup> Kumar *Constitutional Law of India* 2ed (2000) 14.

<sup>17</sup> Rajsekhariah 231.

<sup>18</sup> *Ibid.*

<sup>19</sup> Saharay *The Constitution of India: An Analytical Approach* 2ed (1997) 33; *Central Inland Water Transport Corporation Ltd v Brojo Nath* 1986 Lab IC 1312 (SC) (par 30, 31, 32, 35 and 36); and AIR 1986 SC 1571.

federal Government to enact laws for the overall general welfare of the people. The Constituent Assembly was arguably most influenced by the Constitution of Ireland, which contained one chapter headed "Fundamental Rights" and another headed "Directive Principles of State Policy", although characteristics of all these documents and constitutions permeate the Indian Constitution today.<sup>20</sup>

The actual language of the Indian Constitution borrowed heavily from the American document, to the point where almost every fundamental right has a counterpart in the USA. The Constitution of India also established a Supreme Court more akin to its American counterpart than the British House of Lords and adopted a federal system that drew upon the experience of other federations such as the USA, Canada, Switzerland and Australia.<sup>21</sup> India has also been influenced by the American Constitution in the development of its own human rights protections.

The success of the drafters in assessing the provisions of the above-mentioned constitutions, highlighting weaknesses and taking steps to remove obstacles for their successful operation is evidenced by the fact that the Indian Constitution itself has become a key source of reference for other countries. A brief overview of the salient features of the Indian Constitution should strike a chord with readers from various countries which have adopted a constitutional democracy as their preferred means of government.

The Indian Constitution is written and is regarded as the supreme law of the country. It provides for a limited government in the sense that the sovereign powers are divided amongst the three organs of government, the executive, the legislature and the judiciary. Although the drafters of the Indian Constitution did not incorporate a strict doctrine of separation of powers, a system of checks and balances was clearly envisaged. The powers of each organ of state are well defined by the Indian Constitution so that no organ can go beyond its own powers or encroach upon those belonging to other organs.<sup>22</sup> Although the Indian Constitution places in the judiciary the authority to ensure that the limits imposed by it are not violated by any of the organs of state,<sup>23</sup> the power of judicial review cannot be used by the court to usurp or abdicate the powers of other organs.<sup>24</sup> India has a parliamentary form of government (as opposed to a presidential form) and universal adult suffrage.

Some characteristics are less common. The Indian Constitution is unique in its blend of rigidity and flexibility with some provisions capable of amendment by a simple majority while the rest require a special majority. It deals with the organisation and structure not only of the central government

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<sup>20</sup> *Ibid.*

<sup>21</sup> L'Heureux-Dube 216.

<sup>22</sup> Desai and Muralidhar "Public Interest Litigation: Potential and Problems" in Kirpal *et al* (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 159 176.

<sup>23</sup> The judiciary in India is independent. Judges enjoy security of tenure and unless they are impeached in terms of the Constitution they may not be removed before the expiry of their tenure. Furthermore, in the Constitution, the judges' salary and allowances may not be diminished.

<sup>24</sup> *Fertiliser Corporation Kamgar Union v Union of India* 1981 1 SCC 568 584.

but also of the states.<sup>25</sup> The country is a federation with strong centralising tendencies. It has reduced to writing many unwritten conventions of British law while the vastness of the country and other specific problems such as those concerning language, citizenship, government services, minorities and tribal areas are regulated largely by the Constitution itself and not simply by other legislation. In addition to the provision of fundamental rights and directive principles (which will be discussed in detail below), India followed Japan and included a section in its Constitution dealing with the fundamental duties of its citizens.<sup>26</sup>

The Constitution that emerged from the Constituent Assembly was accepted on 26 November 1949. Though it is not, by itself, enforceable in a court of law,<sup>27</sup> the preamble to any written Constitution, while stating the objects which the Constitution seeks to establish and promote, aids the legal interpretation of the Constitution where the language is found to be “ambiguous”.<sup>28</sup> The preamble to the Indian Constitution is essentially a summary of the idealistic views of Gandhi and Nehru and provides a clear understanding of the social, political and economic spirit that is meant to pervade the various provisions of the Constitution.<sup>29</sup>

It reads:

“We, the People of India, having solemnly resolved to constitute India into a Sovereign, Secular, Democratic Republic and to secure to all citizens Justice – Social, Economic and Political; Equality of status and of opportunity and to promote among them all Fraternity assuring dignity of the individual, and the unity and integrity of the nation.”

It is the concept of “social justice” and the constitutional provisions for this which are most relevant to a comparison with social assistance in South Africa. The Indian Constituent Assembly under Ambedkar provided for social and political measures in the Constitution principally for the removal of the practice of “untouchability”. The Indian socio-economic situation at the time was one severely prejudicial to certain castes of people, especially the “untouchable caste”, and the extreme poverty and social backwardness of these sections of society required special redistribution of resources for progress to be made.<sup>30</sup> It was hoped that Indian law would be an effective weapon for bringing about socio-economic justice, and the Constitution had to be devised accordingly.<sup>31</sup>

This society-centred approach has consistently found support in the successive governmental Five Year Plans in India. For example, the Second Five Year Plan conceded that profit could not be the sole criterion for determining the advancement of loans. According to this plan, the pattern of

<sup>25</sup> In this respect the Indian Constitution follows the precedent of Canada. See L’Heureux-Dube 225.

<sup>26</sup> A 51A of the Indian Constitution states, *inter alia*, that it shall be the duty of every citizen of India “to cherish and follow the noble ideals which inspired our national struggle for freedom” and “to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises”.

<sup>27</sup> *Gopalan v State of Madras* (1950); and *Union of India v Madam Gopal* (1954).

<sup>28</sup> *Re Berubari Union* A.I.R. (1960) SC 845 (846).

<sup>29</sup> Saharay 281; and Rajsekhariah 231.

<sup>30</sup> Rajsekhariah 234.

<sup>31</sup> Rajsekhariah 233.

development and the structure of socio-economic relations should be such that the result would not only be appreciable increases in national income and employment, but also greater equality in income and wealth. Social purpose, in terms of this plan, had to inform major decisions regarding production, consumption and investment so that the benefits of economic developments could increasingly accrue to the relatively less privileged classes of society, with a corresponding reduction of concentration of incomes, wealth and economic power.<sup>32</sup>

To this end, Articles 38 and 39(a-c) of the Indian Constitution are instructive:

“Article 38:

- 1 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 the national life;
- 2 The state shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.<sup>33</sup>

Article 39:

The state shall, in particular, direct its policy towards securing –

- (a) that citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.”

It has been argued that these sections form the cornerstone of India’s quest for a socialistic pattern of society.<sup>34</sup> It has already been noted that Ambedkar wanted to create a socio-economic revolution for the people of India through perfectly constitutional means by using the Constitution as an instrument of change. He firmly believed that there is a nexus between individual liberty and the economic structure of society and that change should include the social and economic components of life.<sup>35</sup> It was his contention that freedom from want, insecurity and unemployment is essential if fundamental rights are to be meaningful. He, therefore, wanted to establish socialism, retain parliamentary democracy and avoid dictatorship through the Constitution itself.

<sup>32</sup> Second Five Year Plan as quoted in Basu *Commentary on the Constitution of India* Vol 2 5ed (1965) 311.

<sup>33</sup> This clause was added by the 44<sup>th</sup> Amendment to the Constitution in 1978 by the Janata government in order to implement the promise of economic justice and equality of opportunity promised by the preamble.

<sup>34</sup> Jatava *Social Systems of India* (1998) 11.

<sup>35</sup> Rajsekhariah 236.



### 3 THE RELATIONSHIP BETWEEN DIRECTIVE PRINCIPLES AND FUNDAMENTAL RIGHTS

It is submitted that the key to understanding India's lengthy constitution lies in the relationship between the "directive principles of state policy" and the "fundamental rights" contained therein. Ambedkar could not write all the economic rights he would have liked to into the Indian Constitution. The Constitution of India has provided for two sets of rights – rights which are fundamental and justiciable, and rights that are not fundamental and are non-justiciable. The fundamental rights enshrined in Part III of the Constitution create only political rights. But economic rights such as those quoted above (Articles 38 and 39) are provided in Part IV in the nature of non-justiciable rights only. They are called the directive principles of state policy (directive principles).

The main differences between the fundamental rights and directive principles of state policy may be summarised as follows:

- (i) the fundamental rights are based on the Bill of Rights of the US Constitution whereas the directive principles are borrowed from the Constitution of Ireland;
- (ii) the fundamental rights are provided in Articles 12 to 35A of Part III of the Constitution, whereas the directive principles are included in Articles 36 to 51 of Part IV of the Constitution;
- (iii) the fundamental rights are enforceable under Articles 32 and 226 of the Constitution and as such they are accepted as being justiciable;
- (iv) it is debatable whether the directive principles create justiciable rights and are enforceable by the courts at all;
- (v) Article 13(2) prohibits the state from making any law which restricts the rights conferred by Part III of the Constitution, but there is no such categorical reduction of the power of the state regarding the directive principles.<sup>36</sup>

The debate surrounding the justiciability of the directive principles is crucial for the argument at hand because it is this part of the Indian Constitution which contains a number of socio-economic rights. In fact, the directive principles appear to provide "rights" more expansive in nature than India, or any other country, can physically provide. They are preceded, however, by a declaration in Article 37 that, while the provisions are fundamental in the governance of the country and are expected to be kept in mind by the state in enacting laws, they cannot be enforced by any court. Such a declaration understandably raises questions as to the precise status of, and weight to be given to, these principles.<sup>37</sup>

The relationship between the directive principles and the legislative power of the Indian state is less controversial as it is accepted that the legislative power of the Indian state is only guided by the directive principles. Ignorance or disobedience by the state of the directive principles cannot affect the

<sup>36</sup> *Hanif v State of Bihar* AIR 1958 SC 731.

<sup>37</sup> Ranganathan *Constitution of India: Five Decades (1950-1999)* (1999) 335.

state's legislative power.<sup>38</sup> The mandate of Article 37 is to restrict courts to evolving, affirming and adopting principles of interpretation which will further the goals of the directive principles without allowing the courts to direct the making of legislation in this regard.<sup>39</sup>

It is well settled that the Indian Constitution is the supreme law of the country, because any law which violates any of its provisions would be void.<sup>40</sup> Broadly speaking, such a law, if it violated fundamental rights, would be struck down by the Supreme Court in an application under Article 32, or by the High Courts under Article 226. The consequence of a piece of legislation "violating" a directive principle is problematic because Article 37 provides that the directive principles shall not be enforced by any court. It has been argued that such a law would not be a violation at all and would be valid.<sup>41</sup> This argument follows from a wide reading of Article 37 that since there is no legal obligation on Parliament or the State Legislatures to make laws complying with directive principles and because they are unenforceable in any court, the directive principles are not law at all and certainly do not qualify as part of the supreme law.<sup>42</sup> Support for this view stems from the fact that Part IV of the Constitution is the only Part which, if contravened by a law, does not render that law void. Seervai concludes that the directive principles set out in the Indian Constitution are not binding because the state is free to observe or apply them as it deems fit.<sup>43</sup>

Such reasoning must be criticised because of the unanswered paradox between the argument that there would have been no consequence if the directive principles had been omitted from the Constitution (because they are non-binding in nature) and the fact that they have indeed been included as part of the document which is accepted as being the supreme law of India.

Nevertheless, the initial decisions dealing with the issue, namely *State of Madras v Champakam Dorairajan*<sup>44</sup> and *In re Kerala Education Bill, 1957*<sup>45</sup> supported the primacy of fundamental rights over directive principles in the event of a direct conflict between the two.

In the *Champakam Dorairajan* case, the Madras Government divided seats in colleges on the basis of religion and caste contrary to Article 29(2) (a fundamental right). It was argued that the division could be supported on the basis of Article 46 (a directive principle) of the Constitution which makes the state responsible for promoting the educational interests of the weaker sections of the people. The Supreme Court held that the fundamental right under Article 29(2) overrides the directive principles and the Government Ordinance was struck down. The directive principles were expressed as

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<sup>38</sup> Saharay 282. *Deep Chand v State of UP* AIR 1959 SC 648 (par 26); and 1959 2 SCR (Supp 8).

<sup>39</sup> *UPSE Board v Hari Shanker* AIR 1979 SC 65 (par 4A); and 1978 Lab IC 1537.

<sup>40</sup> Seervai *Constitutional Law of India: A Critical Commentary* Vol 2 4ed (1993) 1923.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> AIR 1951 SC 226; and 1951 SCJ 313.

<sup>45</sup> AIR 1958 SC 956; and 1959 SCR 995.

being unenforceable and subsidiary to the fundamental rights, incapable of overriding them.<sup>46</sup>

This was followed by *In re Kerala Educational Bill*, where the State of Kerala tried to ban the charging of fees to students in primary classes. Private schools affected by the ban challenged the Bill's validity. The ban was sought to be justified with reference to Article 45 (a directive principle), which requires the state to provide free and compulsory education for all children until they complete 14 years of age. The Supreme Court noted that Article 30(1) (a fundamental right) gave minorities the right to administer their own educational institutions and held that the obligation of the Government in terms of Article 45 had to be discharged without impairing fundamental rights. As the ban on the collection of fees affected this right adversely, the Bill was held to be unconstitutional.

Later, in *Bandhua Mukti Morcha v Union of India*<sup>47</sup> the court observed that it could not relieve the plight of quarry workers by directing the state to enact legislation to implement Article 39(b) and (c) and Articles 41 and 42 as the directive principles could not be enforced by a court. The state was, however, directed to implement existing labour and social welfare legislation once it had been passed as the court had no difficulty in ordering the state to enforce the law, especially when non-enforcement would lead to denial of a fundamental right.<sup>48</sup>

The opposition to the general view expressed in these cases is based upon the legal argument highlighted above, namely that because directive principles are part of the same constitution as fundamental rights, neither is superior or inferior to the other. The alternative view suggests that both the fundamental rights and the directive principles supplement each other and have to be construed harmoniously.<sup>49</sup>

In numerous cases after *Champakam Dorairajan* the court has relied on directive principles to uphold the reasonableness of legislation which, it was contended, violated a fundamental right.<sup>50</sup> For example, this has been done in upholding legislation banning the slaughter of cattle,<sup>51</sup> in upholding the Kerala Agriculturists (Debt Relief) Act,<sup>52</sup> in giving preferential promotion to persons belonging to scheduled castes and tribes,<sup>53</sup> and in upholding the prohibition of alcohol.<sup>54</sup>

In pursuance of this approach, the court has attempted to balance the fundamental rights and directive principles. Thus the Supreme Court of India

<sup>46</sup> *State of Madras v Champakam Dorairajan* AIR 1951 SC 226 (par 8); see *In re, Kerala Education Bill 1957* AIR 1958 SC 956 (par 6); and *MH Quareshi v State of Bihar* AIR 1958 SC 731.

<sup>47</sup> AIR 1984 SC 802 812; and 1984 3 SCC 161.

<sup>48</sup> Singh *VN Shukla's Constitution of India* 10ed (2001 - reprint Nov 2003) 301.

<sup>49</sup> Singh 298.

<sup>50</sup> Setalvad "The Supreme Court on Human Rights and Social Justice: Changing Perspectives" in Kirpal *et al* (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 232 251.

<sup>51</sup> But only to cattle which were still productive and useful *Mohd Hanif Quareshi v Bihar* (1959) SCR 629; and (1958) ASC 73 as followed in *Hasmatullah v State of MP* AIR 1996 SC 2076.

<sup>52</sup> The court relied on a 38 and 39(b); and *Pathumma v State of Kerala* AIR 1978 SC 771.

<sup>53</sup> *A.B.S.K. Sangh (Pty) v Union of India* AIR 1981 SC 298. The court relied on a 46.

<sup>54</sup> *State of Andhra Pradesh v McDowell & Co* AIR 1996 SC 1627.

has, in determining if a restriction imposed by a law is a reasonable restriction in the interest of the public, referred to the provisions of Article 47.<sup>55</sup> Likewise, it took into consideration Article 39 in upholding its view that the abolition of certain tax by the state was for a public purpose<sup>56</sup> while Article 43 was the relevant directive principle for sustaining the validity of the Minimum Wages Act, 1948<sup>57</sup> and for upholding the validity of the Excise Rules granting exemption from payment of duty to small co-operative societies producing cotton fabrics.<sup>58</sup>

Although the court did not abandon its initial position immediately, in *Chandra Bhavan Boarding and Lodging v State of Mysore*<sup>59</sup> the court took its reasoning in the above-mentioned subsequent cases to its logical conclusion and held that it did not see any “conflict on the whole between the provisions contained in Part III and Part IV” and that “they are complementary and supplementary to each other”.<sup>60</sup>

#### 4 THE 25<sup>TH</sup> AND 42<sup>ND</sup> AMENDMENTS TO THE INDIAN CONSTITUTION

The debate in the courts regarding the relative importance of Parts III and IV ultimately required statutory intervention. The 25<sup>th</sup> Amendment, 1971 introduced Article 31C which was titled “Saving of Laws Giving Effect to Certain Directive Principles”.<sup>61</sup> It reads (after amendment) as follows:

“Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV (the principles specified in clause (b) or clause (c) of article 39) shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 (article 14, article 19 or article 31); and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.”

Article 31C clearly aims at a more effective implementation of the objectives set out in Part IV without the hindrance of the Part III provisions. This article was intended to save a law from a challenge to its constitutionality subject to the following limitations:

- (i) It is a law giving effect to the policy of the state towards securing the principles specified in clause (b) or (c) of Article 39;
- (ii) Such a law cannot be challenged as infringing the right guaranteed under Articles 14 (equality), 19 (freedom of speech) or 31 (saving of laws providing for acquisition of estates);

<sup>55</sup> *State of Bombay v FN Balsara* AIR 1951 SC 318; and 1951 SCR 682.

<sup>56</sup> *State of Bihar v Kameshwar Singh* AIR 1952 SC 352; and 1952 SCR 889.

<sup>57</sup> *Bijay Cotton Mills v State of Ajmer* AIR 1955 SC 33; and (1955) 1 SCR 752.

<sup>58</sup> *Orient Weaving Mills v Union of India* AIR 1963 SC 98.

<sup>59</sup> 1969 3 SCC 84; and AIR 1970 SC 2042 2050.

<sup>60</sup> Similarly, in *State of Kerala v NM Thomas* AIR 1976 SC 490, the court held that the directive principles and fundamental rights should be construed in harmony with each other and that every attempt should be made by the court to resolve any apparent inconsistency between them.

<sup>61</sup> *State of Tamil Nadu v Abu* AIR 1984 SC 326.

- (iii) The correctness of a declaration contained in any such law to the effect that it is for giving effect to such policy will not be liable to challenge in any court; and
- (iv) The law, if enacted by a state Legislature, should have received the assent of the President.<sup>62</sup>

The 42<sup>nd</sup> Amendment, 1976 went far beyond the 25<sup>th</sup> Amendment by attempting to make socio-economic rights more meaningful by placing the rights of individuals subservient to the rights of society.<sup>63</sup> It held that legislation giving effect to *any* directive principle would be placed beyond a challenge based upon infringement of fundamental rights. This was effectively a complete reversal of the relationship existing before 1971 – the only limitation to the protection being that the state law in question should have been reserved for the consideration of the President and received his assent. The effect of the 42<sup>nd</sup> Amendment to Article 31 was to make all directive principles and any legislation giving effect to any directive principle superior to fundamental rights. Although the Amendment was struck down in the case of *Minerva Mills v Union of India*<sup>64</sup> as violating the basic structure of the Constitution the Article, strangely, still reads as per the 42<sup>nd</sup> Amendment today.

The actual effect of *Minerva Mills* was to restrict the protection afforded to directive principles only to laws seeking to give effect to Articles 39(b) or (c). Furthermore, the case of *Kesavananda Bharati v State of Kerala*<sup>65</sup> held that the mere statutory declaration of a link between the legislation in question and Article 37 (as described in condition (iii) above) was inconclusive and subject to challenge. The 42<sup>nd</sup> Amendment was accordingly unconstitutional to the extent that it purported to hold otherwise.<sup>66</sup>

The 25<sup>th</sup> Amendment remains as having conferred a special status on the directive principles contained in Articles 39(b) and (c) by protecting legislation intended to give effect to them from constitutional challenge under Articles 14, 19 or 31.<sup>67</sup> Normally a law which violates fundamental rights is void even if it is intended to give effect to some directive principle. A law giving effect to Article 39(b) or (c) (that is, for avoidance of concentration of wealth and proper distribution of material resources) cannot, because of the 25<sup>th</sup> Amendment, be challenged even if this law infringes certain fundamental rights.<sup>68</sup>

It must be argued that the ambit of Article 39(b) and (c) is potentially wide and that there is significant scope for legislation to be used in furtherance of these sub-articles. For example, in *State of Bihar v Kameshwar Singh*<sup>69</sup> it

<sup>62</sup> Ranganathan 335.

<sup>63</sup> Rajsekhariah 238.

<sup>64</sup> AIR 1980 SC 1787; and 1989 3 SCC 625. See, however, the observations in *Sanjeev Coke Mfg Co v Bharat Coking Coal* AIR 1981 SC 271.

<sup>65</sup> AIR 1973 SC 1461; and 1973 4 SCC 225.

<sup>66</sup> *Tinsukhia Electric Supply Co Ltd v State of Assam* 1989 3 SCC 709; and *Assam Sillimanite v Union* 1992 Supp 1 SCC 692.

<sup>67</sup> Ranganathan 335.

<sup>68</sup> *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; 1973 4 SCC 225; *Waman Rao v Union of India* AIR 1981 SC 271; and 1981 2 SCC 362. Subba Rao *Indian Constitutional Law* 7ed (1998) revised by PK Rao 224.

<sup>69</sup> AIR 1952 SC 252 274 and 290.

was held (with reliance being placed on Article 39(b) and (c)) that the acquisition of big blocks of land under the Bihar Land Reforms Act, 1950, in order to bring about a reform in the land distribution system for the general benefit of the community, was a public purpose.<sup>70</sup>

In *State of Tamil Nadu v L Abu Kavur Bal*,<sup>71</sup> it was held that a law promulgated for nationalisation of motor transport services was valid as it was designed for preventing concentration of wealth and for distribution of the material resources of the community. In other words, the legislation gave effect to the directive principles contained in Article 39(b) or (c) and, because of this, was upheld.

Similarly, in *Sanjeev Coke Mfg v Bharat Coking Coal Ltd*<sup>72</sup> it was held that the Coking Coal Mines (Nationalisation) Act, 1972 is legislation for giving effect to the policy of the state towards securing the principle specified in Article 39(b) of the Constitution and is, therefore, immune under Article 31C from attack on the ground that it offends the fundamental right guaranteed by Article 14. This decision followed the views expressed by Bhagwati J (who delivered the minority judgment) in the *Minerva Mills*'s case and disapproved the observations to the contrary made therein which have been held to be *obiter*. This decision has followed the *ratio* laid down in *Kesavananda Bharati*'s case in upholding the validity of Article 31C of the Constitution.<sup>73</sup>

The case of *Krishna Murthy v Govt of AP*<sup>74</sup> was decided under the amended Article 31C. The State of Andhra Pradesh had passed the Andhra Pradesh Agricultural Indebtedness Relief Act, 1977 which purported to provide relief from indebtedness only to agricultural labourers, rural artisans and small farmers in the state – thereby infringing the fundamental right to equality (Article 14). Its constitutionality was upheld on the ground, *inter alia*, that the Act sought to give effect to the principles incorporated in Article 46.

Article 31C does not seek to abolish private property or industry altogether, although it acknowledges that both must yield to social control whenever the common good so requires. It is interesting to note that it was due to an initially individualistic interpretation afforded to Article 31 by the courts which frustrated the objective envisaged by Article 39 and accordingly, paved the way for amendments to the Article.<sup>75</sup> The directive principles are designed for the achievement of the socialistic goal envisaged in the Preamble. The legislature's interpretation of the directive principles, as espoused by the described amendments is consistent with this goal.<sup>76</sup>

Directive principles have recently, through legal reasoning, been elevated to the status of inalienable fundamental human rights in certain cases. For example, in *Air India Statutory Corporation v United Labour Union*<sup>77</sup> it was held by a full bench that the directive principles in the Constitution were

<sup>70</sup> Hidayatullah *Constitutional Law of India* Vol 1 (1984) 684.

<sup>71</sup> AIR 1984 SC 326; and 1984 1 SCC 515.

<sup>72</sup> AIR 1983 SC 239.

<sup>73</sup> Saharay 36.

<sup>74</sup> AIR 1979, AP 85.

<sup>75</sup> Basu 317.

<sup>76</sup> Hidayatullah 22.

<sup>77</sup> AIR 1997 SC 645 par 38.

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actually forerunners of the United Nations' Convention on the Right to Development as an inalienable human right and that all people are entitled to participate, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms would be fully realised. In addition, the court held that these principles had become embedded as an integral part of the Constitution in the directive principles and as such, now stood elevated to inalienable fundamental human rights. The court commented that social and economic democracy is the foundation for stable political democracy and confirmed that directive principles could be justiciable by themselves without having to be read into fundamental rights.<sup>78</sup>

## 5 PUBLIC INTEREST LITIGATION AND THE INDIAN JUDICIARY

During the second decade after the enactment of the Constitution (1960-1970), the economic situation in India was in a depression. The Third Five Year Plan had proved a dismal failure and the political climate was characterised by uncertainty and corruption.<sup>79</sup> The government of the time resorted to populist tactics, such as nationalization of banks, which it considered to be progressive measures to counter the economic decline and political instability.

It was in these circumstances that the Indian judiciary decided to attempt initiatives to facilitate a just economic, political and moral order in the interest of the country.<sup>80</sup>

Article 32(1) of the Indian Constitution states that the right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by part III of the Constitution (dealing with fundamental rights) is guaranteed. Subsection 2 states that "the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part".

Over time, case law has come to interpret Article 32 as allowing for ordinary citizens to petition the Supreme Court in matters where the central government is accused of infringing upon the fundamental rights in the constitution. To facilitate the use of this right, the court accepts epistle petitions (letters that state a legal claim). This form of litigation has the advantages of being both simple and inexpensive. There are also lenient standing rules. Issues in front of the court do not need to be ripe for hearing. In addition, the Constitution includes Article 226 which has been interpreted as giving any claimant the opportunity to file a claim on behalf of the public in

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<sup>78</sup> Saharay 281; and Kumar 348.

<sup>79</sup> Das "The Supreme Court: An Overview" in Kirpal *et al* (eds) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (2000) 16 18.

<sup>80</sup> *Ibid.*

a State Supreme Court, or High Court, when there is a state violation of a fundamental right or a right guaranteed by statute.<sup>81</sup>

The judiciary has been compelled to evolve its own mechanism for protecting socio-economic human rights in India and the above-mentioned Articles have been the catalyst for this. Judges have been forced to engage with the problem of access to courts and to cater for those who are most vulnerable in society. "Public interest litigation" on behalf of such people has been permitted (and even encouraged) in order for basic human rights to be enforced. This has been extended to claims involving socio-economic rights. A large number of petitions are filed before the High Courts and before the Supreme Court for enforcement of fundamental rights through this mechanism.<sup>82</sup>

Article 21 of the Indian Constitution states that "no person shall be deprived of his life or personal liberty except according to procedure established by law". This Article (which will be considered in greater detail below) has become the basis for many human rights judgments and has been used by the courts to promote a range of other rights. In *Madhav Hoskote v The State of Maharashtra*,<sup>83</sup> for example, free legal services to the poor were held to be an essential element of the just and fair procedure required by Article 21 before any deprivation of life or personal liberty would be tolerated.<sup>84</sup>

Public interest litigation may be defined as a co-operative or collaborative effort on the part of the petitioner, the state (or public authority) and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to extend social justice to them. It has been submitted that the state or public authority against whom public interest litigation is brought should welcome this as an opportunity to correct an injustice committed against the poor and weaker sections of the community whose welfare is and must be their prime concern, despite being the respondent in the case.<sup>85</sup>

The extension of public interest litigation to cases requiring positive state action has proved to be particularly significant in India. In *Municipal Council, Ratlam v Verdichand*<sup>86</sup> the residents of Ratlam, a city in Gujarat, moved the magistrate under section 133 of the Criminal Procedure Code requesting an order compelling the municipality to save them from the stench and stink caused by open drains and public excretion by nearby slum dwellers. The Municipal Council pleaded that it had no money to construct drainage. The magistrate rejected the plea and ordered the municipality to build drainage within six months. On appeal, the Sessions Court reversed the magistrate's order. The High Court, reversing the decision of the Sessions Court, affirmed the order of the magistrate. The Supreme Court on appeal from the decision of the High Court rejected the objection to the standing of a person to take

<sup>81</sup> Krishnan "The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India" 2003 *Human Rights Quarterly* 791 795.

<sup>82</sup> Manohar "Human Rights Agenda: A Perspective For Development" April-June 2003 *Journal of the Indian Law Institute* 163 170.

<sup>83</sup> AIR 1978 SC 1548.

<sup>84</sup> Manohar 2003 *Journal of the Indian Law Institute* 171.

<sup>85</sup> Narayana *Public Interest Litigation* 2ed (2001) 148.

<sup>86</sup> AIR 1980 SC 1622; and 1980 4 SCC 162.



proceedings under the criminal law on behalf of all the residents of Ratlam. The Judge held that such collective loss of quality of life was precisely what the court considered to be a threat to public interest. Such collective loss became justiciable because it resulted in the loss of the right to live with dignity, which every person has been guaranteed as a fundamental right by Article 21 of the Constitution. This, according to the court, was the wider concept of *locus standi* that permitted public participation in the judicial process against malfeasance of the municipality. The Judge observed that the judiciary must be informed by the conditions of developing countries in order to invoke the broader principle of access to justice necessitated by Article 38 of the Constitution. It was recognized for the first time that a person could approach the court challenging violations of collective rights and that the judicial process could be invoked for the enforcement of the positive obligations that public bodies have under the law. This was seen as especially suited to Indian conditions.<sup>87</sup>

This approach has subsequently been endorsed:

“Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of ‘cause of action’ and ‘person aggrieved’ and individual litigation is becoming obsolescent in some jurisdictions.”<sup>88</sup>

The Supreme Court of India has now been dealing with such collective complaints for a number of years in the field of socio-economic rights. For example, in 1970 the Indian parliament enacted the Bonded Labour System Abolition Act which, as the title suggests, endeavoured to end the bonded labour system throughout India. An organization devoted to the abolition of bonded labour noted that the Act was not being applied in many areas and filed a petition on behalf of some bonded labourers.<sup>89</sup> The Supreme Court held that in so far as these labourers lacked the means and the ability to go to court themselves, and in so far as the right to petition the court is a fundamental constitutional right, not to give them the ability to do so by improving their material conditions without at the same time allowing others to plead on their behalf made a mockery of their constitutional rights. The court rested its judgment on the premise that the different parts of the Constitution should not be read in isolation but should be taken to form a comprehensive statement about the way the country should be run. The court held that when issues of poverty are at stake, it would not adhere to a formalistic view of people who could move the court to act. In other words, a person or group motivated by a desire to see poverty remedied, as in the

<sup>87</sup> Sathe *Judicial Activism In India: Transgressing Borders and Enforcing Limits* 2ed (2003) 214.

<sup>88</sup> Justice Iyer in *Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v Union of India* AIR 1981 SC 298 317.

<sup>89</sup> Fabre *Social Rights Under the Constitution: Government and the Decent Life* (2000) 180. *Bandhua Mukti Morcha v Union of India* 1984 2 S.C.R 67 (India).

instant case, acting in the spirit of the Constitution, could successfully petition the court.<sup>90</sup>

Interestingly, in order to assess the validity of the claimants' complaint, the court sent lawyers to the quarry where the bonded labourers were held and requested that the state fund a social and legal academic inquiry into the area where the quarry was. The defendants argued that as neither these lawyers nor the authors of the inquiry would be cross-examined in court, the rules of the adversarial system were breached. The court rejected this claim on the same basis as its defence of the breach of traditional *locus standi* rules.

In this way, through public interest litigation, access to justice was simplified and appropriate jurisprudence was evolved for the benefit of the poor and illiterate. In the process, many of the age-old precedents, procedures, and technical rules were jettisoned by some judges. Empathy and judicial activism in favour of the weaker classes in fulfilment of the directive principles has become, to an extent, part of India's constitutional culture.<sup>91</sup>

But despite the Bar and the Supreme Court of India being credited on occasion as exemplifying innovative human rights interpretation,<sup>92</sup> it cannot be said that this attitude, as expressed by a sector of the judiciary, met with uniform approval in India. Even when legal history was being created, there was often dissension amongst the bench and the extracted cases and quotes cited above cannot mask the criticism encountered and the plethora of cases where opposite viewpoints were expressed. In virtually all the significant cases there have been differences of opinion amongst the judges with regard to the ultimate decision taken. Furthermore, because the benefits from these alternative perspectives manifest over time, they have been challenged as being of limited assistance to those who require help immediately. Delay is endemic within the Indian judiciary, a fact that effectively restricts the use of litigation. The courts also follow the principle of precedent in an *ad hoc* way, which causes confusion and diminishes legal certainty.<sup>93</sup> Moreover, the final decisions of the court have been questioned as being the mere preferences of the elderly persons chosen from time to time to head the judiciary.<sup>94</sup> Because every judicial decision rewards a particular interest or viewpoint, in a country with scarce resources such as India it is natural for controversial decisions to be criticised as being political in nature.<sup>95</sup>

In general, however, it is the political process in India which is viewed by much of the public as being corrupt and inaccessible whereas the courts routinely receive praise for their independence and integrity. The courts may, therefore, provide a more legitimate forum for those seeking to advocate a cause when they might otherwise not have an opportunity to do so. There is

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<sup>90</sup> Fabre 181. In *Gupta v Union of India* AIR 1982 SC 149 the Supreme Court confirmed that in cases where a person or a group of persons are unable to bring a case to court because of poverty or illiteracy, any individual or organisation acting *bona fide* could petition the court.

<sup>91</sup> Das 26.

<sup>92</sup> L'Heureux-Dube 224.

<sup>93</sup> Krishnan 2003 *Human Rights Quarterly* 819.

<sup>94</sup> Das 26.

<sup>95</sup> Das 45.

also evidence showing that when done in a coordinated, structured and repeated fashion, litigation has the potential for creating a culture of rights-consciousness within a society.<sup>96</sup>

## 6 CONCLUSION

This article commenced with an explanation of the relationship between the fundamental rights and directive principles of the Indian Constitution in light of the preamble's primary objective of social justice. The directive principles possess two characteristics which appear to be anomalous. Firstly, they are not enforceable in any court in terms of Article 37 and therefore, if a directive is not obeyed or implemented by the state, its implementation or obedience thereto cannot, strictly speaking, be secured through judicial proceedings. Secondly, they are acknowledged by Indians as being fundamental in the governance of the country and it is the duty of any government to apply the principles in making laws.<sup>97</sup>

The anomaly is highlighted by court decisions which have significantly diluted the first characteristic of non-enforcement in practice and which have, on occasion, enforced certain directive principles (as illustrated in par 6). The problem is not unique to India. Complete enforceability of directive principles would have the undesirable consequence of permitting the judiciary to compel a legislative authority to make a law – a proposition contrary to the notion of a separation of powers and irreconcilable with the idea of democracy. Consequently, the directive principles remain non-enforceable in theory.<sup>98</sup>

This does not necessarily mean that the directive principles are less important than the fundamental rights.<sup>99</sup> The second characteristic mentioned above stems from Article 37 of the Constitution. It follows that it becomes the duty of the court to apply the directive principles in interpreting the Constitution and other laws and that the directive principles should serve the courts as a source of interpretation. Fundamental rights should be interpreted in the light of the directive principles, which should be read into the fundamental rights whenever possible.<sup>100</sup> The court's duty in this regard is to strike a balance between competing claims of different interests.<sup>101</sup> But where two judicial choices are available, the construction in conformity with the social philosophy of Part IV has preference.<sup>102</sup>

A court in India must, in other words, prefer an interpretation which allows a fundamental right to incorporate a directive principle to an interpretation

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<sup>96</sup> Krishnan 2003 *Human Rights Quarterly* 818.

<sup>97</sup> Singh 298.

<sup>98</sup> The Planning Commission of India explained the non-enforcement clause contained in article 37 as follows: "The non-justiciable clause only provides that the infant state shall not be immediately called upon to account for not fulfilling the new obligations laid upon it. A state just awakened from freedom with its many preoccupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them." Kumar 348.

<sup>99</sup> *Ibid.*

<sup>100</sup> *ABSK Sangh (Pty) v Union of India* AIR 1981 SC 298.

<sup>101</sup> *Narendra Prasadji v State of Gujarat* AIR 1974 SC 2098 (par 30); and 1975 2 SC WR 496.

<sup>102</sup> *Mumbai Kamgar Sabha v Abdulbhai* AIR 1976 SC 1455 (par 29); and 1976 Lab IC 1012.

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which rejects a directive principle altogether.<sup>103</sup> In *Minerva Mills* it was held that “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution”.<sup>104</sup> Likewise, in *Unni Krishnan* the Supreme Court observed that the fundamental rights and directive principles are supplementary and complementary to each other and that the provisions in Part III should be interpreted having regard to the preamble and directive principles. In the *Kesavananda* case the Supreme Court has observed that Parts III and IV of the Constitution affect each other and intersect – they do not run as two parallel streams of law.

It is by means of judicial activism (through the allowance of public interest litigation) and a broad interpretation of the fundamental right to life (by indirectly reading directive principles into this right) that the Supreme Court in India has been able to give effect to the more important directive principles in certain cases. But the distinction between cases where the courts have deemed it fit to grant applicants relief and the cases where remedies have been rejected is a fine and controversial one. The key question may be *what causes courts to apply directive principles in circumstances where they do not have to?* One part of the answer to this question is that some cases of injustice are so serious that they clearly require judicial intervention. The Indian courts appear to be more than happy to oblige with a favourable judgment in such cases, using whichever section of the Constitution is most apropos (often coupled with extensive and lucid commentary on the pertinent issues). If this argument is accepted, then the crux of the matter becomes deciding *which cases require serious judicial intervention?* What is beyond dispute is that it is the judges in India who are deciding the outcome of this question in each and every case. This is problematic for a number of reasons and raises issues directly concerned with judicial certainty, consistency and the separation of powers between the judiciary and the legislature. It also brings into focus the importance of access to justice.

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<sup>103</sup> Hidayatullah 686.

<sup>104</sup> Singh 299.