Minerva Mills Ltd. & Ors. v. *Union of India & Ors*: A Jurisprudential Perspective

Part I

A Snapshot of the Judgment

(I) Factual Matrix

In the aftermath of the enunciation of the doctrine of basic structure of the Constitution by the Supreme Court in the case of *Keshavanandha Bharti* v. *State of Kerala*[1], this case involved challenge to the constitutionality of Section 4 of the Constitution (42nd Amendment) Act, 1976, which amended Article 31C of the Constitution by substituting the words and figures "all or any of the principles laid down in Part IV" for the words and figures "the principles specified in Clause (b) or Clause (c) of Article 39". Article 31C, as amended reads thus:

> 31C. Notwithstanding anything contained in Article 31. no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV 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, 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 ft does not give effect to such policy:
>
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

A second challenge was mounted on Section 55 of the Constitution (42nd Amendment) Act, 1976, which inserted Sub-sections (4) and (5) of Article 368 which read thus:

[1] (1973) 4 SCC 225.

(4) No amendment of this Constitution (including the provisions of Part III; made for purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

(II) Question before the Court

Whether the amendments introduced by Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 damage the basic structure of the Constitution by destroying any of its basic features or essential elements?

(III) Decision of the Court

By a majority of 4:1, the Court held the Section 4 of the Constitution (42nd Amendment) Act, 1976 as being unconstitutional on the ground of violation of the basic structure. Similarly, the Section 55 of the Constitution (42nd Amendment) Act, 1976 was held unconstitutional unanimously. A detailed look at the majority and minority opinions in this regard is the key to understanding the philosophy underlying the decisions on both the aforesaid aspects.

i. Majority Opinion

The majority opinion was delivered by Chief Justice Chandrachud on behalf of Gupta J., Untawalia J. and Kailasam J.

(1) Validity of Amendments to Article 368

Chandrachud, C.J., discerned the ratio of *Keshavanada Bharti*'s case as '*Parliament has the right to make alterations in the Constitution so long as they are within its basic framework*'.[2] The aforesaid amendments tend to confer unlimited amending power on to the Parliament extending up to the effacement of the Constitution itself. In the Post- *Keshavanada* phase, the Court refused to recognize that the constituent power of Parliament can override the basic

[2] *Minerva Mills Ltd. & Ors.* v. *Union of India (UOI) & Ors.,* AIR 1980 SC 1789, at Para 21.

structure and identity of the Constitutional document. The majority held that the limited amending power of the Parliament was itself a basic feature of the Constitution and could not be used to remove the limitations on this power by means of such amendments. In the words of the majority:[3]

> *Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.*

Thus, clause (5) was declared as unconstitutional on the ground of damaging the basic features of the Constitution. Moving further, clause (4) which barred judicial review in cases of constitutional amendments was held unconstitutional as it sought to make the entire Part III unenforceable and thus, enlarge the power of the Parliament limited by Article 13. The Court reasoned that if a constitutional amendment goes beyond the pale of judicial review then ordinary laws made in pursuance thereof will escape judicial scrutiny by virtue of protection offered by such an omnipotent amendment. Hence, such a clause was in transgression of the limitations on the amending power and hence unconstitutional.[4]

(2) Validity of Amendments to Article 31C

The amendment made to Article 31C vastly extended its scope from protection of laws made for the purposes of Article 39 (b) and (c) to all the Articles under Part IV from challenge on the ground of Article 14 and 19. The Court transformed it into a question of the following complexion:[5]

> The main controversy in these petitions centres round the question *whether the directive principles of State policy contained in Port IV can have primacy over the fundamental rights conferred by Part III of the Constitution*. *That is the heart of the matter*. Every

[3] *Id*, at Para 22.

[4] See *Id*, at Paras 25-27.

[5] *Id*, at Para 45.

> Other consideration and all other contentions are in the nature of by-products of that central theme of the case. The competing claims of parts 111 and IV constitute the pivotal point of the case because Article 31C as amended by Section 4 of the 42nd Amendment provides in terms that a law giving effect to any directive principle cannot be challenged as void on the ground that it violates the rights conferred by Article 14 or Article 19. The 42nd Amendment by its Section 4 thus subordinates the fundamental rights conferred by Articles 14 and 19 to the Directive Principles.

In view of the ratio of *Keshavanada Bharti*'s case, the majority set on the enquiry whether Article 14 and 19 could be said to be part of the basic structure of the Constitution so that no constitutional amendment may be made to abrogate them. The majority then undertook the task of weighing Directive Principles of State Policy [hereinafter 'DPSPs'] against the Fundamental Rights. In respect of DPSPs it observed:[6]

> In the words of Granville Austin, (The Indian Constitution: Corner Stone of a Nation, p. 50) the Indian Constitution is first and foremost -a social document and the majority of its provisions are aimed at furthering the goats of social revolution by establishing the conditions necessary for its achievement. Therefore, the importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive Principles of State policy are fundamental in the governance of the country and the Attorney General is right that there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. The promise of a better tomorrow must be fulfilled to-day, day after tomorrow it runs the risk of being conveniently forgotten.

However, the preservation of basic liberties provided under Part III has also been a solemn endeavour of the Indian Constitution. In view of the drafting history of Indian Constitution, both Part III and Part IV formed an integral and indivisible scheme and thus in the opinion of the majority '*to destroy the guarantees given by Part III in order purportedly to achieve the goals of*

[6] *Id,* at Para 47.

Part IV is plainly to subvert the Constitution by destroying its basic structure.'[7] The relation between the two parts was explained in the words quoted underneath:[8]

> The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. *In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution*.... *Those rights are not an end in themselves but are the means to an end, The end is specified in Part IV*.

Thus, the majority echoed that the goals set out in Part IV have to be achieved without the abrogation of the means provided for by Part III. Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution.
Moving further, it held that the impugned constitutional amendment denuded Articles 14 and 19 of their functional utility by abrogating their affect altogether in respect of laws under Article 31C. Since bulk of laws would be relatable to Part IV, Article 14 and 19 will virtually cease to operate. Equating a *total deprivation of fundamental rights in a limited area* to *abrogation of fundamental rights*, it held that:[9]

> Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental

[7] *Id*, at Para 59.

[8] *Id*, at Para 61.

[9] *Id*, at Para 68.

> freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when Government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment.

Hence, the majority declared the amendment to be beyond the powers of Parliament as violative of the essential features of the Constitution while emphasizing that:[10]

> Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

ii. Minority Opinion

The minority opinion delivered by Justice Bhagwati is elegant, nuanced and presents a plausible alternative to the way the majority looked upon the question of balance between Part III and Part IV. Though, the opinion deals with the validity of Articles 31A and 31B as well but as that is a part of the judgment in *Waman Rao* v. *Union of India*[11], the author will not be deliberating on that part. Relying on the judgment of *Indira Gandhi* v. *Raj Narain*[12], Justice Bhagwati opined that basic structure or essential features of the Constitution have to be found within the specific provisions of the Constitution itself. He quoted Justice Mathew from *Raj Narain*'s case:

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[10] *Id*, at Para 79.

[11] (1981) 2 SCC 362.

[12] AIR 1975 SC 2299.

> "To be a basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution. What constitutes basic structure is not like a twinkling star up above the Constitution."

(1) Validity of Amendments to Article 368

Justice Bhagwati opined that clause (4) which barred judicial review of a constitutional amendment was invalid as it damaged two basic features of the Constitution viz. limited amending power of the Parliament and judicial review over the transgression of limitations on Parliament's power.[13] It sought to arrogate the Parliament from the status of 'creature of the Constitution' to an authority 'above the Constitution' by removing all limitations on the constituent power and empowering it to alter the basic structure and identity of the Constitution. Secondly, the Constitution broadly demarcates the functions of the three organs and charges the judiciary with the function of adjudging the validity of laws. By pre-declaration of the validity of all amendments, the Parliament usurped the function of judicial review and thus violated the aforesaid basic feature of the Constitution. Furthermore, in view of the limited amending power of the Parliament as declared by the Court in *Keshavananda Bharati*'s case it could not have declared its power to be unlimited under clause (5) and thus, clause (5) is unconstitutional and void. This amendment had the effect of transforming the Indian constitution from a controlled constitution to an uncontrolled one and thus, violated an essential feature of the Constitution.

(2) Validity of Amendments to Article 31C

Examining the inter-relationship between Part III and Part IV, Justice Bhagwati opined that from a human rights perspective, there was no essential differentiation in the nature of civil and political rights enshrined under Part III and socio-economic rights under Part IV. The division into justiciable and non-justiciable compartments does not subtract from their relative importance and significance.[14] Describing the nature of Constitution as a '*social document*', he opined that '*majority of its provisions are either directly aimed at furthering the goals of the*

[13] *Minerva Mills Ltd. & Ors.* v. *Union of India (UOI) & Ors.*, AIR 1980 SC 1789, at Paras 91-95.

[14] *Id*, at Para 112.

socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement'.[15] Speaking on the inter-relationship he stated:[16]

> The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions, in which there can be social and economic Justice to every one, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour, to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes social and economic democracy with Fundamental Rights available to all irrespective of their power, position or wealth. *The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights*. *The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate*! There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed?

Discarding the Hohfeldian analysis of rights and duties as jural perpetual correlatives, he opined that despite the fact that Part IV does not create any right in the citizens to enforce the provisions, it still casts a duty on the State to implement the provisions contained under it.[17]Absence of a jural correlative 'right' does not detract from the binding nature of the State's duty and in his own illuminating words:[18]

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[15] *Id*, at Para 113.

[16] *Ibid.*

[17] *Id*, at Para 116.

[18] *Ibid.*

> In fact, *non-compliance with the Directive Principles would be unconstitutional on the part of the State* and it would not only constitute a breach of faith with the people who imposed this constitutional obligation on the State but it would also render a vital part of the Constitution meaningless and futile.

Further illuminating upon the absence of precedence of Fundamental Rights over the DPSPs, he stated that:[19]

> Would such a law enacted in discharge of the constitutional obligation laid upon the State under Article 37 be invalid, because it infringes a Fundamental Right? If *the court takes the view that it is invalid, would it not be placing Fundamental Rights above Directive Principles, a position not supported at all by the history of their enactment as also by the constitutional scheme already discussed by me*. T*he two constitutional obligations, one in regard to Fundamental Rights and the other in regard to Directive Principles, are of equal strength and merit and were is no reason why, in case of conflict, the former should be given precedence over the latter…..The effect of giving greater weightage to the constitutional mandate in regard to Fundamental Rights would be to relegate the Directive Principles to a secondary position and emasculate the constitutional command that the Directive Principles shall be fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws*…..The result would be that a positive mandate of the Constitution commanding the State to make a law would be defeated by a negative constitutional obligation not to encroach upon a Fundamental Right and the law made by the legislature pursuant to a positive constitutional command would be delegitimised and declared unconstitutional. This plainly would be contrary to the constitutional scheme because, as already pointed out by me, *the Constitution does not accord a higher place to the constitutional obligation in regard to Fundamental Rights over the constitutional obligation in regard to Directive Principles and does not say that the implementation of the Directive Principles shall only be within the permissible limits laid down in the Chapter on Fundamental Rights.*

However, venturing forth to support Article 31 C, he opined that the said amendment was made with a view to resolve the conflict between Fundamental Rights and DPSPs. In his own words:[20]

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[19] *Id*, at Para 118.

[20] *Ibid.*

> I find it difficult to understand how it can at all be said that the basic structure of the Constitution is affected when for evolving a modus vivandi for resolving a possible remote conflict between two constitutional mandates of equally fundamental character, Parliament decides by way of amendment of Article 31C that *in case of such conflict the constitutional mandate in regard to Directive Principles shall prevail over the constitutional mandate in regard to the Fundamental Rights under Articles 14 and 19.* The amendment in Article 31C far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all and every one including the low visibility areas of humanity in the country will be able to exercise Fundamental Rights and the dignity of the individual and the worth of the human person which are cherished values will not remain merely the exclusive privileges of a few but become a living reality for the many.

In his esteemed opinion, no law which is really and genuinely for giving effect to a Directive Principle could be inconsistent with the egalitarian principle and therefore, the protection granted to it under the amended Article 31C against violation of Article 14 cannot have the effect of damaging the basic structure. He specified that every law enacted under Article 31C is required to satisfy the test of 'real and substantial connection' and judicial review will be open in this limited arena. Article 31 C will only protect the provisions which are basically and essentially necessary for giving effect to the Directive Principles and not those of incidental and subsidiary character. Hence, no *carte blanche* immunity being granted to all laws, the amendment to Article 31 C was not unconstitutional.

Part II

Jurisprudential Analysis

While recognizing the importance of a rich jurisprudential analysis possible through application of alternative strands of thought viz. post-modernist thought and social constructivism, the author humbly detracts from such an analysis in view of a nuanced analysis of *Keshavananda Bharati*'s case on these very lines which the author had an opportunity to peruse. As the *Minerva Mills*' case applies the same basic structure doctrine, a reference to the aforesaid jurisprudential

analysis of the basic structure doctrine may suffice for the purposes of this paper.[21] In this part of the paper, I seek to analyse the jurisprudential underpinnings of the decision in *Minerva Mills*' case on the inter-relationship of Part III and Part IV of the Indian Constitution and the two divergent opinions rendered. The analysis is set on a three fold pedestal viz. Roscoe Pound's Theory of Valuation of Competing Interests, the Perspective of Legal Realists and the Hohfeldian Analysis on Jural Correlation between Right and Duty.

(1) Roscoe Pound's Theory of Valuation of Competing Interests

Justice Benzamin Cardozo describes the 'weighing of interests' as a principal function of the judge.[22] However, he offers no standard for valuation of such interests except a generalized opinion that the choice made by the judge should be premised on "experience, study and reflection", and "life itself".[23] To move to a concrete test, it is more appropriate to use Pound's method of valuation of interests.[24] Pound deliberates on the valuation of interests and the guiding standards to be applied in weighing their comparative strength and desirability in cases of conflict between two such interests. In his esteemed opinion, a balance can never be struck between an 'individual interest' and a 'social interest' as pitting these two against each other in this form involves a pre-judgment in the latter's favour.[25] No sane person making a sound judgment will ever place an 'individual interest' above the whole 'collective interest' and thus, no question of balance can ever arise. Pound emphasized the inter-relationship between 'individual' and 'social' interests whereby the former can be regarded as a part of the latter and thus, capable of being transformed into form of the latter.[26] Thus, the proper method of weighing interest in cases of 'balance' is to put them on the same plane by translation of individual

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[21] *See* Burman, Anirudh, "Locating Post-Modern Constitutionalism in India: The Basic Structure Doctrine". Available at SSRN: http://ssrn.com/abstract=1006621.

[22] BENJAMIN CARDOZO, NATURE OF JUDICIAL PROCESS 113 (Indian Reprint 2002).

[23] *Ibid.*

[24] ROSCOE POUND, JURISPRUDENCE 328 (Law Book Exchange Ltd., New Jersey, vol. III, 1959).

[25] *Id*, at 328.

[26] *Id*, at 329.

interest into larger social interest of the same kind relating to the social group to which individual belongs and then assess the need for a law to protect and facilitate such interests.[27]

In *Minerva Mill*'s case, the problem before the Court was exactly the same viz. to decide the inter-relationship between Fundamental Rights and DPSPs and the difference in approach of the majority and minority offers valuable insights into the manner of determining their *inter-se* primacy. The majority opinion seconds Pound's method by refusing to regard Part III as merely a fasciculus of individual rights and regard them as subservient to the social interests embodied in Part IV.[28] It regards Fundamental Rights as a 'means' to an 'end' which is the DPSPs and declares the harmony and balance between them as an essential feature of the basic structure of the Constitution.[29] The essence of the approach is to refuse to view Fundamental Rights e.g. the right to equality under Article 14 as a right of an individual petitioner in a case but to regard it as a collective interest in achieving an egalitarian society. Individual interests are seen as a means to achieve broader social interests which the majority opinion views as a sum of these individual interests. In the author's opinion, the 'balance' attained is immaculate as the majority refuses to validate the complete abrogation of the collective interests in securing civil and political rights for the attainment of other social interest under the DPSPs. In essence this is Pound's approach of balance which can be described in his own words as:[30]

> *Secure all interests so far as possible with the least sacrifice of the totality of the interests or the scheme of the interests as a whole*.

On the contrary, the minority opinion is explicit in its recognition that the conflict between Part III and Part IV can be legitimately resolved by giving primacy to DPSPs over Fundamental Rights.[31] It eschews from recognizing the Fundamental Rights as social interest in securing the civil and political rights of the citizens. The conclusion concerning primacy of DPSPs over

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[27] *Id*, at 328-29.

[28] *Minerva Mills*, *supra* note 2, at Paras 48-61.

[29] *Id*, at Para 61.

[30] ROSCOE POUND, *supra* note 24, at 334.

[31] *Minerva Mills*, *supra* note 2, at Para 118.

Fundamental Rights cannot be called a 'balance' by any stretch of imagination. Applying Pound's approach, there cannot be any quarrel to the conclusion that Honourable Justice Bhagwati committed a logically fallacy in weighing two different kinds of interest, individual and social, and thus, made a pre-judgment rather than a considered judgment on 'balance' between the two.

(2) Conflict between Part III and Part IV: A Perspective of Legal Realism

> *We may try to see things as objectively as we please. Nonetheless we can never see with any eyes except our own.*[32]

Legal formalism postulates law as 'an internally valid, autonomous, and self-justifying science' in which right answers are 'derived from the autonomous, logical working out of the system.'[33] Formalists ascribe to the view that the role of a judge is 'to find the law, declare what it says, and apply its pre-existing prescriptions' without reference to social goals or human values.[34] On the other hand, realists discard this mechanist conception of a judge by relying on two factors viz. *doctrinal indeterminacy* and *doctrinal multiplicity*. [35] *Doctrinal indeterminacy* implies the ambiguity in the application of general legal rules or doctrines in hard cases while *doctrinal multiplicity* refers to multiple choices presented by each rule in its manner of application as well as the interaction of legal doctrines with others in the legal system. Thus, a judge always has to make a choice in the decision making process. Furthermore, one of the central tenets of the realist approach is to stress on 'jurisprudence of ends' i.e.:

> Legal realists insist that legal reasoning should be oriented towards the human ends served by law; that a jurisprudence of rules be substituted by a jurisprudence of ends. *Lawyers must forthrightly justify legal prescriptions in terms of their promotion of human values*. Legal institutions and legal rules must be evaluated in terms of their effectiveness

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[32] BENJAMIN CARDOZO, *supra* note 22, at 13.

[33] Hanoch Dagan, *The Realist Conception of Law,* 57 U. Toronto L.J. 607, 609 (2007).

[34] *Ibid.*

[35] *Id*, at 611-612.

in promoting their accepted values and the continued validity and desirability of these values. [36]

The decision in *Minerva Mills*'s case is an apt demonstration of the realist perspective. The attempt of the author is not to judge whether the judges were formalists or legal realists in their approach but whether the opinions reflect the shades of these contradictory strands. Both the opinions in the case offer new strands of thought; there were no pre-ordained legal doctrines before the Court to apply for determination of the question of inter-relationship between Part III and Part IV. Formalism stood knocked out. Faced with choice between DPSPs and Fundamental Rights, both opinions are anchored in social goals and human values as evident from the bare reading of the following passages:

Majority	**Minority**
Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.	The amendment in Article 31C far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all and every one including the low visibility areas of humanity in the country will be able to exercise Fundamental Rights and the dignity of the individual and the worth of the human person which are cherished values will not remain merely the exclusive privileges of a few but become a living reality for the many.

[36] *Id*, at 628-630.

Can the opinions and the conclusions arrived at by the judges be regarded as simplistic and mechanical application of pre-existing legal doctrines? Doesn't the conflict presented before the Court involve judgment on intricate questions of constitutional policy? What do the opinions of both majority and minority littered with considerations of social values of fundamental freedoms and socio-economic justice signify? To the author, the opinions present an evidence of the legal realist strand of thought in jurisprudence and repudiate a formalistic conception of law. A discussion of nature of judicial process as projected by Justice Benzamin Cardozo will further clarify the point sought to be made.

Discussing the role of a judge as a legislator, Justice Cardozo ascribes an important place to the interaction between the subjectivity of the judge as a human being and objectivity of standards expected of him to be applied in arriving at a decision.[37] A judge creates 'interstitial law' i.e. within the gaps of law left open by the legislator[38] and thus, such 'creation of law' demands from the judge the wisdom of the legislator himself.[39] Cardozo's assertion that in making choices the judge should be base his judgment on "experience, study and reflection", and "life itself", implies that application of objective standards in judicial decision making remains a myth as every judge, subject to all fallacies of human nature, may view solution to a problem in different context from how others may perceive it. To quote Justice Cardozo:[40]

> *Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be a litigant or a judge.*

Cardozo recognizes that every system of jurisprudence tends to the 'ideal of objective truth' but the human element of the judge as decision maker renders this ideal utopian.[41] Such subjectivity may specially creep in the use of the sociological method rather than the application of

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[37] BENJAMIN CARDOZO, *supra* note 13, at 167-168.

[38] *Id*, at 113, 67-70.

[39] *Id*, at 115.

[40] *Id*, at 167.

[41] *Id*, at 168-169.

precedents as the former conditions the decision making process of the judge by the standard of 'social welfare' – a subjective concept in itself.[42]

A look at the two sets of opinion reveals this dichotomy. Both majority and minority agree on the application of the precedent of *Keshavananda Bharati*'s case as the amendment was clearly in contravention of the law laid down by the Supreme Court. However, divergence occurs while making choice between Fundamental Rights and DPSPs. The judges were clearly faced with a question of 'constitutional policy' as the nature of question demanded a determination by the Constitutional makers themselves who chose to maintain a silence on it.[43] Acting in the capacity of independent legislators (as Justice Cardozo puts it), the judges in majority refused to abrogate one for another and linked them as 'means' and 'ends' while Justice Bhagwati accepted the primacy of one over another by deferring to the choice made by the Parliament through amendment in Article 31C. The divergence and the exposition undertaken for the vindication of their stands by the majority and the minority explain the nature of judicial process to which Cardozo adverts at length in the *Nature of Judicial Process*.

(3) Hohfeldian Analysis on Jural Correlation between Right and Duty

Wesley Newcomb Hohfeld's contribution to the field of jurisprudence consists in a lucid and logical exhibition of four meanings of the word 'right' in a scheme of "opposites" and "correlatives".[44] In his analysis, "rights" and "duties" form jural correlatives. In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty towards X to stay off the place. Thus, Hohfeld sought to define the scope of "rights" in terms of its correlative "duty"[45] and the existence of a 'duty' on one person implies the existence of 'claim-right' in another. In the constitutional paradigm, rights of individuals flow as reflex of the obligations cast on the State under the Constitution.[46]

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[42] *Id*, at 71-72.

[43] *Minerva Mills*, *supra* note 2, at Para 118.

[44] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16, 30 (1913).

[45] *Id*, at 31.

[46] *S.M.D. Kiran Pasha* v. *Government of Andhra Pradesh and Ors.*, (1990) 1 SCC 328.

The minority opinion in *Minerva Mills*' case raises an interesting question of application of this Hohfeldian analysis on Part IV i.e. the consequences of non-justiciability of Part IV on the nature of obligation cast on the State to implement its principles. The question is central to the analysis of inter-se *primacy* of DPSPs and Fundamental Rights. In fact, in *State of Madras* v. *Champakam Dorairajan* [47] , the Court had held that because Fundamental Rights are made enforceable in a court of law and Directive Principles are not, "*the Directive Principles have to conform to and run as subsidiary to the chapter on Fundamental rights*."

Thus, the million dollar question from a jurisprudential perspective is whether Part IV can really be regarded as a misfit in the Hohfeldian scheme of right-duty correlation? To the author, the answer appears to be an emphatic NO. From the drafting history of the Indian Constitution, it is amply clear that there was no division between Part III and Part IV in the original proposed scheme. [48] The differentiation was made at a later stage whereby Part IV was specifically rendered unenforceable in the courts of law[49] by virtue of Article 37.[50] It is obvious that DPSPs embody socio-economic rights of the citizens and cast a duty on the State to formulate its laws for attainment of these rights. The rights-duty correlation is established and the duty to implement DPSPs on the State does not exist in vacuum. It is important to understand the key distinction between '*existence of right*' and '*enforceability of right*'. Hohfeldian scheme is limited to the postulate that '*existence of duty*' implies '*existence of right*'. The '*enforceability of right*' is a concept more akin to *power* which is best described in the following words:[51]

> Right is often understood as a will power conferred by law. A 'right' in the sense is present if the conditions of the sanction that constitutes a legal obligation includes a motion, normally of the individual in relation to whom the obligation exists ; the motion is aimed at the execution of the sanction and has the form of a legal action brought before

[47] AIR 1951 SC 226, at Para 10.

[48] *Minerva Mills*, *supra* note 2, at Para 112.

[49] *Ibid.*

[50] **Application of the principles contained in this Part**.—The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

[51] *S.M.D. Kiran Pasha* v. *Government of Andhra Pradesh and Ors.* (1990) 1 SCC 328.

> the law applying organ. Then this organ may apply the general norm to effectuate the right, which is the reflex of the legal obligation by executing the sanction. *The right which is the reflex of legal obligation is equipped with the legal power of the entitled individual to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation whose reflex is his right; or as it is sometimes called, the enforcement of the fulfilment of this obligation*. To make use of this legal power of motion is exercise of the right.

The distinction may appear artificial as it is correct to argue that a right without the element of 'enforceability' is tantamount to no right at all. However, the difference between 'existence' and 'exercise' is too concrete to be denied. To take an example, an 'aeroplane' cannot be called anything but an 'aeroplane' even if the law imposes a ban on everyone to fly it. Similarly, the mere fact that Article 37 bars the Courts from enforcing the provisions of Part IV does not detract from the essential truth that they are rights and have been made 'unenforceable' to serve overriding social imperatives. A more apt example is offered by Article 358 which gives the power to the State to override Article 19 in cases of emergency whereby Article 19 becomes 'unenforceable'. But this does not mean that citizens do not have the freedom of speech or freedom of movement in such a situation.[52] *Unenforceability* does not detract from *existence* of the right. In fact, *enforceability* is not even an essential element of law itself.[53] Article 37 merely puts the socio-economic rights of the citizens in perpetual suspension and it is clear that in future if Parliament makes Part IV enforceable, this suspension will end. An empirical justification of the stand taken by the author can be found in the later judgments of the Supreme Court itself

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[52] *See* Opinion of Justice H.R. Khanna in *Additional District Magistrate, Jabalpur* v. *Shivakant Shukla*, AIR 1976 SC 1207, at Paras 168-169 [Mere suspension of Article 21 cannot deprive individuals of the right to life which is independent of the Constitution and the Constitution merely recognizes this pre-existing right].

[53] G. G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement***,** *The* Modern Law Review, Vol. 19, No. 1. (Jan., 1956), pp. 1-13, at p.2; A. L. Goodhart, *The Nature of International Law*, Transactions of the Grotius Society, Vol. 22, Problems of Peace and War, Papers Read before the Society in the Year 1936. (1936), pp. 31-43, at pp.40-41.

whereby it has attempted to read Fundamental Rights in light of the Directive Principles[54] and has thus, ascribed limited *de facto* enforceability to the latter.

Conclusion

The divergence of majority and minority opinion in this case poses interesting jurisprudential issues relating to balance of interests, the decision making process of judges in areas where no pre-ordained rules are present and the peculiar place of Part IV, declared to be unenforceable by the Constitution itself, in the Hohfeldian right-duty paradigm. The object of this short paper was identification and exposition of these jurisprudential issues posed by the *Minerva Mills*' case. To be as objective as possible in highlighting these issues and attempting an analysis thereof, the author has refrained from adverting to the correctness of the decision on merits or the correctness of either of the approaches taken in the case itself by the majority and the minority.

[54] *Bandhua Mukti Morcha* v. *Union of India,* AIR 1984 SC 802; *Consumer Education and Research Centre* v. *Union of India,* AIR1995 SC 1811; *Unnikrishnan* v. *State of Andhra Pradesh* , AIR 1993 SC 2178; *Dalmia Cement (Bharat) Ltd.* v. *Union of India,* AIR 1984 SC 802.