

Duties or Rights: Should Duties Trump over Rights?

Dr. Ajay Kr. Sharma¹

Abstract

A narrative is emerging in India that appears to be giving primacy to the fundamental duties of the citizens over their fundamental rights. This article attempts to understand and flesh out the significance of these two, their relationship, and the interplay between them, as contextualised in our Constitutional scheme, with the help of various Supreme Court decisions. It indulges in a discussion on the pragmatic functional relationship between Parts III, IV, and IV-A of the Constitution. It also brings various significant perspectives on the 'right-duty' relationship to the fore, to objectively appreciate the primary importance of the fundamental rights of the citizens and the State's duty to preserve and protect the same. It also emphasises on the importance, weighty role, and the constitutional obligations of the higher courts in preserving the Constitution and the rule of law, by providing effective redress to the aggrieved citizens who bring valid claims of their fundamental rights violations by the State organs and instrumentalities.

Keywords: Fundamental Duties, Constitution, Fundamental Rights, Duties, State, Citizens, Gandhi, Directive Principles.

I. Introduction

Prime Minister Modi in his address on 12th October 2021 on the occasion of the 28th Foundation Day of the National Human Rights Commission emphasised on talking about both rights and duties simultaneously and not separately, giving more emphasis to the duties so that the 'rights are ensured', and thus called upon the citizens to *do* their duties earnestly, though be *aware* of their rights.²

¹ Assistant Professor, Campus Law Centre (Faculty of Law), University of Delhi.

² Biggest infringement of human rights take place when they are seen from political prism: PM, NARENDRA MODI (2021), <https://www.narendramodi.in/text-of-prime-minister-narendra-modi-s-address-at-28th-national-human-rights-commission-nhrc-foundation-day-programme-557836>.

Similarly, a year earlier, Justice S.A. Bobde, the then Chief Justice of India while speaking at the International Judicial Conference in February 2020 reportedly drew our attention to the significance of fundamental duties, and highlighted that, “legal rights have correlatives of legal duties” — and so, stressed upon the need of the citizens performing their fundamental duties.³ He also quoted father of the nation, Mahatma Gandhi, from Hind Swaraj where he had stated that, “real rights are a result of performance of duty”.⁴ Going back even further, President Kovind in his address to the Members of Parliament at the inaugural function of the ‘Constitution Day’ on 26th November 2019 duly emphasised upon the fundamental duties of the citizens of India in the Constitution of India; and reminded citizenry of these ‘moral responsibilities’.⁵ He also quoted Gandhi, who termed duty as the true source of rights; to stress upon the importance of doing one’s duties.⁶ So, the citizens of India have been recently reminded for over three years by the top constitutional functionaries to solemnly do their duties.

Though none of the above-mentioned constitutional dignitaries undermined the importance of the fundamental rights and their rightful importance; later on, in the public and private spaces, a narrative seems to have emerged which places the fundamental duties of a citizen (contained in Part IV-A of the Constitution of India consisting of a solitary Article 51-A, which at present lists eleven fundamental duties) at a higher pedestal than her fundamental rights. This is possibly with an objective to disparagingly counter any alleged fundamental rights breach claim of a claimant citizen against the State with a counterclaim of the claimant’s failure to discharge some fundamental duty. This paper attempts to indulge in an informed discussion and analysis on the correctness of this emerging narrative by exploring the relation between the fundamental rights and duties, and their respective weights and values in our Constitutional scheme. It does not

³ See “Full Text of CJ’s Speech (at First International Judicial Conference 2020)” *The Leaflet*, Feb. 22, 2020, available at: <http://theleaflet.in/individual-at-the-heart-of-the-constitution-individuals-rights-are-fundamental-asserts-cji-bobde/>

⁴ *Ibid.*

⁵ See “Address by the President of India, Shri Ram Nath Kovind at the Inaugural Function of ‘Constitution Day’”, Nov. 26, 2019, available at: <https://presidentofindia.nic.in/speeches-detail.htm?767>.

⁶ *Ibid.*

present an *ad hominem* personal criticism of anyone who subscribes to the above narrative.

The structure of my commentary is as follows: it tries to demystify the relationship between rights and duties from various standpoints and perspectives; it discusses the basis of defining the duties of a citizen, apart from appreciating the basis and limits of fundamental rights; and also, attempts to understand the role and obligations of the State and its instrumentalities in preserving the fundamental rights while enforcing legal duties, which also involves an appreciation of the checks and balances built in our constitutional scheme of separation of powers. It also examines the legitimacy and compulsion to perform clearly illegal duties prescribed by the State, apart from certain unintended pernicious effects of prioritizing the duties over rights. This paper also indulges in a discussion about the nature of the power of judicial review and the constitutional obligation of the higher courts to redress the breaches of fundamental rights by State action, apart from attempting to understand through judicial imprimaturs, the varied interpretations of the constitutional provisions relating to the fundamental rights, directive principles of state policy, and fundamental duties and their interplay; before turning to the final concluding remarks. Thus, this paper succinctly fleshes out various key dimensions of the above duty-based narrative, which is being pushed to the limit in certain quarters, and explores the significance and contours of the rights-based discourse.

II. Rights-Duty Relationship, Fundamental Rights and their Enforcement

The fundamental confusion generated in this discourse arises while tracing a jural relation between legal rights and legal duties when it is simplistically stated, on Hohfeld's deontological construct of rights, that every right has a corresponding duty, or more technically: every right has a correlative of duty — even though Hohfeld understood, that the term 'right' is indiscriminately and loosely used in various senses, as power, or a privilege, or as immunity, apart from 'right' as understood in the strictest sense, whose correlative is 'duty'.⁷ Using Hohfeld's model to understand fundamental rights as the rights in strict sense also presents

⁷ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE LAW J. 16, 30 (1913).

problems of its own, as the nature of different fundamental rights vary.⁸ Rights themselves need legal recognition before they can be enforced, as the famous legal maxim *ubi jus ibi remedium* also prescribes. They can have a statutory basis or even higher, the Constitutional basis itself. Some of them are fundamental in nature, and so sacrosanct they are, that they have been kept separate in the Part III of the Constitution of India.

Now, against whom can one petition the constitutional courts alleging violation of these fundamental rights? It is against the 'State', as defined under Article 12 of the Constitution of India. So, now let us limit this discourse to the citizens' rights and duties, which have been most talked about recently. Let us come back to the 'duty' in the Hohfeldian sense, and its relation with the 'right', in a strict sense. It is perfectly fine to call duty as correlative of a right. But, the right is asserted and enforced by the one, who is a holder of such rights, against the *other* person, who is under a corresponding duty not to violate the rights of the rights holder. If the latter violates the rights of the former, then the former can sue the latter to enforce those rights. So, if the 'State' violates certain fundamental right(s) of some right bearer say, *X* then, *X* can seek redressal against the State from the constitutional courts in this country.

The enforcement machinery for enforcing the fundamental rights is itself provided in the Constitution under Article 226 and Article 32 (which itself is a fundamental right), which enable moving the High Courts and the Supreme Court of India respectively. And, many of these fundamental rights under Part III are available to not only citizens of India, who form a class of natural persons getting legal recognition as such under the Constitution of India; but also, other classes of natural persons, including foreign nationals, refugees, etc.. Some of them have been even enforced by the artificial persons like, the Companies also. The fundamental rights are not privileges earned by first doing one's fundamental duties as citizens; these basic rights have been recognised by the Constitution, and are non negotiable. In this realm the Supreme Court has also expanded the umbrella of fundamental rights provisions by doing their expansive interpretation from time to time.

⁸ See L. H. LaRue, *Hohfeldian Rights and Fundamental Rights*, 35 UNIV. TOR. LAW J. 86 (1985).

Suppose, the Supreme Court is moved under Article 32, then the enforcement of his fundamental right is *guaranteed* by the Constitution; though, due to certain judicially evolved practices and pragmatic considerations, the Supreme Court may require the High Court to be moved initially, or even rarely, reject a belated claim. So, the judiciary keeps a check on the other two organs of the State viz., the executive and the legislature, if their actions lead to violation *inter alia* of the fundamental rights, as the ‘State’ is generally enjoined by the Constitution itself from making the laws which are inconsistent with or in derogation of the fundamental rights in form of taking away or abridging these rights — and, if such laws are made, they have been declared to be void under Article 13 of the Constitution. Even the writs in nature of *Certiorari* can be issued by these superior courts to quash judicial orders also. The judicial review does not stop at the review of executive action, which is the bulk of Administrative Law; but extends to the judicial review of legislative action as well, which may lead to even striking down of legislations, as has been done by the courts several times in the past — though these legislations are passed by democratically *elected* representatives of the people by *majority*, which comprise the legislature in states, and the Parliament at the Centre. The constitutional amendments can also be struck down as violative of the ‘basic structure’ of the Constitution; though the exercise of constituent power is no longer equated with mere legislative action, post *Kesavananda Bharati*’s case.⁹

Even, President Kovind in his above speech had said, “we need to perform our duties and thereby create circumstances which would ensure effective protection of rights”.¹⁰ This prescription is equally relevant for the citizens, to emphasise on the reasonable limitations on their fundamental rights, cautioning those who mistakenly take them to be absolute, as well as for the State and its instrumentalities, who are primarily obligated to protect and preserve the fundamental rights in our constitutional scheme. Can the constitutional courts say, “X failed to discharge some fundamental duty, and thus X is disentitled to seek relief from us for violation of his fundamental right by the State?” No. The Supreme Court of India in past cases afforded fundamental rights protection to

⁹ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

¹⁰ *Supra* note 4.

the under-trials, convicts, and even death-row prisoners, when such protection was sought. In fact, a three-judge bench of the Supreme Court in *Ankush Maruti Shinde v. State of Maharashtra* recalled the previous judgment of conviction by the Supreme Court, passed by a two-judge bench, and not only reversed the same acquitting the appellants, who had been awarded death penalty, due to lack of fair investigation but, also awarded them five lakh rupees each as a ‘reasonable compensation’ to be paid by the State, as their fundamental rights under Articles 20 and 21 were held to be violated due to a serious lapse on the part of the investigating agency, which affected fair investigation and fair trial, as a consequence of which they languished in the prison for sixteen years.¹¹

III. Interplay between Fundamental Rights, Directive Principles, and Fundamental Duties

The Supreme Court has come a long way from *Champakam Dorairajan*¹² which relegated the Directive Principles of State Policy to a subsidiary position in comparison to the fundamental rights, to *Ashoka Kumar Thakur*¹³ where the Supreme Court observed, that both fundamental rights and the directive principles are ‘complementary and supplementary’ to one another — that Part III cannot be read in isolation, and Part IV is equally important — and, that “Principles of Part IV have to be gradually transformed into fundamental rights depending upon the economic capacity of the State”.

Parts III and IV of the Constitution do not always ostensibly conflict with each other, and in fact, they supplement each other in certain scenarios e.g., in the cases concerning environmental measures. Like, in *Hindustan Zinc Limited* case certain provisions for promotion and co-generation of energy from renewable sources were held to protect the fundamental right to life under Art. 21, as well as to advance the mandate of the Art. 48-A of the directive principles of state policy, and Art. 51A-(g) which — though casts a fundamental duty on the citizens to protect and improve environment — as per the Supreme Court, “*mandate upon the State and its instrumentalities to protect the environment in the area*” so, that

¹¹ *Ankush Maruti Shinde v. State of Maharashtra*, 2019 Indlaw SC 279.

¹² *State of Madras v. Champakam Dorairajan*, (1951) S.C.R. 525.

¹³ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

the residents of that area lead a healthy life.¹⁴ By extending the fundamental duty under Art. 51-A to the State, the end result was that the impugned environmental regulations were prevented from being struck down on the alleged grounds of violation of Part III provisions viz., Articles 14 and 19(1)(g).

So, we now appreciate that right and duty are neither mutually exclusive nor destructive of each other; but they have an *essential* mutual coexisting relationship. So, one cannot exist without the other, but it is fundamentally wrong to narrate them in a manner as to sound as if the right and its corresponding duty vest in the same person; or, that violation of an inviolable right is justified in terms of violation of another duty by the right holder claimant. Next, we come to Parts III and IV of the Constitution. Again, reinforcing the sanctity and inviolability of fundamental rights in Part III, they are made justiciable, as discussed above; whereas, it is explicit in Part IV, that the Directive Principles of State Policy contained therein are not justiciable, but are supposed to be fundamental in guiding the State in its legislative and executive action — though, many laws e.g., which provide for affirmative action protect and *advance* fundamental rights have been protected in turn by the same provisions.

Though in the initial years of its existence, the Supreme Court of India gave primacy to Part III, protecting the rights of individual claimants, by striking down the laws violating the same — which led the Parliament to carry out constitutional amendments to insulate certain legislations from being struck down — later on, the top court started protecting the progressive laws, by upholding justifications under Part IV. Furthering this trend of apparent dilution of Part III, led the apex court to move towards asserting the importance of Part IV-A — which was inserted in the Constitution through the otherwise contentious 42nd amendment on the basis of recommendations of the *Swaran Singh Committee* — to decide the questions of fundamental rights violations. As Part IV-A is not justiciable — and again, the petitioner seeking action against the State for violation of petitioner's fundamental rights has to establish the same and a corresponding failure of the State in discharging its duty to protect those rights — recourse to Part IV-A by the State may sometimes increase the threshold of proving the violation of a Part III rights, as alleged by the petitioner. Though, seemingly counterintuitive, the

¹⁴ *Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission*, 2015 Indlaw SC 499.

petitioner may also rely on Part IV-A to bolster its claim against the State. For example, in *A.I.I.M.S. Student's Union v. A.I.I.M.S.* the Supreme Court, somewhat unconventionally, interpreted fundamental duties provision as a manifestation of peoples wish, applying it against the State action; and went on to interpret the fundamental duty of every citizen as the *collective duty of the State* — considering fundamental duties not only as a valuable guide to interpret constitutional and legal issues but, which can also be used for moulding the relief granted by the courts.¹⁵

As mentioned previously, the fundamental rights themselves cannot be, and are also not absolute, and are made subject to explicit reasonable restrictions provided within those provisions themselves. For example, arguably the most sacrosanct right after right to life and liberty under Art. 21, is the right to freedom of speech and expression of a citizen under Art. 19(1)(a), which is subject to express restrictions on certain grounds viz., in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence, all of which are specifically spelt out in Article 19(2). Though there is a considerable jurisprudence which has evolved under these provisions, and the major trends are clear; the outcomes of individual cases may be hard to predict, as much appears to be dependent on the expansive or restrictive interpretation of the fundamental right conferring provision when balancing it with the rights restrictive provisions.

Even when no ground of restriction is explicit a very strict textual interpretation of the fundamental right by the Courts like, of Art. 21 as done in the *A.D.M. Jabalpur* case (now overruled),¹⁶ may lead to defeating these very rights, which the higher courts are obligated to protect. These restrictions, which are considered to be reasonable, are justified as placing *necessary* fetters on the exercise of the individual fundamental rights — and so, aren't they *sufficient* restrictions also?; or other restrictive justifications from the other parts of the constitution like, Part IV-A should be brought in to create more impediments in form of higher thresholds for establishing fundamental rights violations by the State? These are intractable questions, and the libertarian and utilitarian lawyers and judges will

¹⁵ *A.I.I.M.S. Student's Union v. A.I.I.M.S.*, (2002) 1 SCC 428.

¹⁶ *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 SCC 521.

perhaps reach to the contrary conclusion in the same factual controversy. To save invalidation of a law enacted with a policy objective to pursue the directive principles — on the ground of its inconsistency with provisions of Part III viz., Arts. 14, 19, and 31 — 42nd constitutional amendment inserted provisions like, Art. 31-C for saving such laws from invalidation. The Supreme Court in *Minerva Mills* in fact, *inter alia* upheld Art. 31-C, but delineated its scope to only those laws whose pith and substance showed, that their dominant object was to further directive principles — which are meant to advance social and economic justice — even though they may violate the specified Part III provisions.¹⁷ This allowed for conferring primacy to Part IV over Part III on the basis of the constitutional amendment itself, which was not held to violate the basic structure of the Constitution — which is the only constraint on the constituent power post *Kesavananda Bharti* case — and thus, can be used to even abridge Part III rights contrary to the prescription for the ordinary laws under Article 13. Part III provisions, for example, enforce State responsibility in the realm of domestic law; though, the State Responsibility, in a different context, is also a well-recognised norm of international law. Part III and Part IV of the Constitution may also be seen to bifurcate justiciable civil and political rights, and non-justiciable social and economic rights respectively; as per the design of the Advisory Committee on Minorities and Fundamental Rights, appointed by the Constituent Assembly, under the chairmanship of Sardar Patel.¹⁸

IV. Prescription of Duties and Preference over Rights

Part IV-A of the Constitution of India, which lists and prescribes fundamental duties, is not justiciable, and thus cannot be the basis of initiating legal action by the State against the citizens; but, as discussed above, even the legal duties imposed by the State through legislation or executive orders may be struck down by the higher courts if they violate fundamental rights of the citizens. Till then, of course, it can be argued, that the subjects are under the legal duty to follow the law or suffer prescribed consequences for transgressions; and, as Dworkin

¹⁷ *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

¹⁸ S P Bhargava, *Fundamental Rights and the Indian Constitution*, 9 INDIAN J. POLIT. SCI. 24, 29 (1948).

submits, the subjects are under a *general moral duty* to follow them.¹⁹ For those who disobey the law, including those who claim to be the conscientious objectors, the executive will provide justification in the use the State machinery and its police powers against them to enforce the statutory duties imposed on the subjects.

But, what if the 'State' within the meaning of Article 12 prescribes *clearly* illegal and unconstitutional duties on the subjects governed by it? Will it be a *moral duty* of the subject to follow such diktats? What about the *duty*, not only moral, but also, legal and Constitutional, of the 'State' in not imposing such *duties*? Both, the substantive content and manner of enforcement of such prescriptive fiats imposing such *duties* may egregiously violate fundamental *rights* of the individuals who oppose and disobey such prescriptions. And yet, the popular majoritarian public perception and their frame of reference of duties is often too biased in favour of such usually, populist institutional diktats and prejudiced against the minority of violated individuals to reach a correct decision in these vexed and endless right-duty controversies. Under such circumstances, the courts often remain the sole legitimate recourse for seeking protection, recognition and enforcement of the rights of those who suffer through such 'State' action prescribing duties, which are both unconstitutional and illegal.

Let us substantiate this point through a concrete contemporary example prefaced with a question. Can one say that the lawyers who defend certain accused persons, against whom there are serious charges like, terrorism, sedition, gang rape, multiple coldblooded murders of indefensible victims are not doing their duty as *good citizens*? Some Bar Associations have thought so in individual cases, as they have passed resolutions prohibiting their member Advocates from providing legal representation to such accused persons in individual cases; and even practically coerced those Advocates who showed the courage to accept such briefs, leading them to seek protection from the courts. Were the members and office bearers of such Bar Associations who supported passage of such resolutions doing their *duty* as *good citizens* in forbidding other member Advocates from providing legal representation to such accused persons *charged* of heinous offences? Were the member Advocates under a *duty* to follow these resolutions? Or, were these Bodies of Advocates and their conforming members and office bearers

¹⁹ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 186 (1977).

themselves failing in their Constitutional and statutory duty as Advocates, and even more so as the representatives of the Bar, in creating such impediments in administration of justice? Were the counsels willing to defend such accused persons *bad citizens*, not doing their *duty* by showing defiance to these resolutions? Or, were they conscientiously doing their professional *duty* as lawyers, protecting the rule of law, and advancing the cause of justice? A public debate on these issues is likely to remain inconclusive. More importantly, it cannot effectually and definitively decide this controversy; only courts can, but with unfortunate repercussions both individual and systemic, despite the decisions ultimately rendered in the favour of the wronged individuals.

So, several individual cases on these issues were litigated in various High Courts and the Supreme Court. The courts has consistently ruled against such bodies of the Bar, and protected the *rights* of such courageous defence counsels in their cause of *duty* beginning from the *A.S. Mohammed Rafi* case²⁰ of the Supreme Court in 2010 and yet, we find such populist but, unconstitutional and illegal Bar resolutions — which not only infringe the rights of the willing and conscientious defence counsels but also infinitely *more importantly* the fundamental rights of the accused persons particularly under Article 22(1) of the Constitution — are passed from time to time by some association of lawyers, in utter disregard to the rulings of the Supreme Court, and in violation of the relevant statutory and Constitutional provisions, which they are expected to protect and advance. The 2020 Karnataka High Court case of *B.T. Venkatesh* is the latest addition in this unfortunate list of cases.²¹ Notably, *Mohammed Rafi* judgment was directed, through that judgment itself, to be circulated in all the Bar Associations and State Bar Councils in India. So, these bodies of lawyers cannot claim to be ignorant of the law, though ignorance of law itself is not excusable, and these professional bodies of lawyers are anyways presumed to be learned in law.

²⁰ A.S. Mohammed Rafi v. State of Tamil Nadu, AIR 2011 SC 308.

²¹ TNN, *Ensure lawyers for sedition-accused: HC*, THE TIMES OF INDIA, February 28, 2020, <https://timesofindia.indiatimes.com/city/bengaluru/ensure-lawyers-for-sedition-accused-hc/articleshow/74357343.cms> (last visited Nov 1, 2020). *B.T. Venkatesh v. State of Karnataka*, Order dated March 17, 2020 (W.P. No. 4095 of 2020 (GM-RES) PIL), available at: <https://www.legitquest.com/case/bt-venkatesh-and-others-v-state-of-karnataka-and-others/1C2872>.

In showing contemptuous defiance to the highest court and constantly eroding the law, it appears that these professional bodies which passed such resolutions after *Mohammed Rafi* decision *still* vacuously think that they are ostensibly doing some *duty* in imposing such prohibitory *duties* on their member Advocates. And, the vast *majority* of their members may still either concur or confirm with such resolutions for various reasons, which somewhat lends a hollow legitimacy and recursivity to such measures. What is even more worrying for the entire rule of law, and justice system in this country is, that these reprehensible transgressions are done by the professional bodies comprising of the legal professionals, who are officers of the courts, and also represent the profession collectively in their courts. We must also appreciate, that the content of duty assumes more importance than the mere State authority that ordains it. So, is it the duty of public servants to carry out illegal orders, or order their subordinates to do so, merely on the basis of advancing the justification of doing their duty of following orders from their superiors? The Trials by Nuremberg Military Tribunals clearly negate such a justification, as the duty to prevent illegal wrongdoings was held to prevail under such circumstances, and it was held, that there was no duty to obey orders of the superior authority to carry out illegal executions.²² So, the obligation to discharge clearly illegal duties ordained by the 'State' cannot be insisted upon as *morally right*, and their legitimacy may be questioned on basis of both their nature and content.

Creating sustained public awareness about the fundamental duties of the citizens is fine. But, this does not absolve the State of its own *duties* towards its citizens; and clearly among its highest duties is to protect the *fundamental rights* of its citizens. Let us also consider here a possible implication on the future behaviour of the potential citizen claimants, who may incidentally develop *greater* reverence towards the State, after *internalising* their fundamental duties as the citizens. No doubt, it may help foster peace, order, and fraternity among the citizens, and between the citizens and the State, and so is a greatly desirable and efficient consequence. But, if the citizens become considerably less litigious, to the extent that they are even willing to overlook or tolerate *some* violations of their

²² KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 270 (2011).

fundamental rights by the State, and not willing to sue the State in courts, as they previously would have, is this a really desirable outcome?

From one perspective, such a consequential effect *may* be favoured, as litigation against the State adversely impacts its exchequer, and further strains already burdened resources of the State, including the courts. But now consider a counter perspective too. Will this help advance the ‘rule of law’? And also consider this, the State is involved in the most litigation. It sues as well as gets sued most. Will a more passive citizenry lead to a correspondingly more passive State in terms of bringing administrative and legal action against its subjects? Will an unchallenged unconstitutional action of the State not embolden it further to follow the suit in the future against other citizens as well? Perhaps, an action by the citizen claimant does not personally affect the impersonal machinery of the State — run on the public exchequer — as much as it affects an individual claimant, who may be consequentially devastated in case it ultimately fails. This should be a *sufficient* deterrent itself against initiating frivolous legal action against the State. We should not forget, that an individual citizen is no match against the executive action, backed by the State machinery and resources; and so, the violated citizen’s final recourse is to move the courts — when administrative mechanisms fail to yield — from whom it seeks protection and redressal, and must be afforded so, if rightfully deserved.

As the State can rightfully emphasise on its citizens’ *Svadharmā*, as prescribed in Art. 51-A, the citizens can expect that the State will also abide by its *Raja Dharmā* prescribed by the Constitution; though the latter is not preconditioned on the performance of the former. True, for Mahatma Gandhi duty was a source of right, and of primary importance; but his individualism has been viewed as more ethical and religious rather than political and social.²³ *Bapu* was an embodiment of truth, duty, values, and righteousness. We should not forget that, though he gave primacy to duty, Gandhi’s life’s mission was also to fight for the civil and political rights, and he led our freedom struggle against the British rule.²⁴ Gautam Bhatia has gone to the extent of advancing a suggestion to consider an update to the *Hind Swaraj* quote of Gandhi — cited by the then Chief Justice, and reproduced earlier

²³ G N Sarma, *Gandhi’s Concept of Duty*, 41 INDIAN J. POLIT. SCI. 214, 215–16 (1980).

²⁴ *Id.* at 215–16.

— and reverse the same, in this constitutional age, to: “real duties are the result of the fulfillment of rights”.²⁵

V. Conclusion

By upholding the constitutional provisions, principles, values, in form of adherence to the constitutionalism the Constitutional Courts also protect the legitimacy of the State from eroding, preventing it from slipping into a *Tacitus trap* — thereby allowing every Government to take quick remedial course corrections wherever and whenever it is found to be wanting in fulfilment of its obligations. Further, by preserving and asserting the independence of judiciary, which is a basic feature of our Constitution, the Constitutional Courts protect the inviolable provisions of the Constitution from being transgressed by the State; and by so doing their Constitutional duty they do *complete* justice, and it in turn protect and preserve their own identity and legitimacy. Though unlikely, in desperation, a State may seek to preserve its legitimacy on the basis of assertion of its brute executive power instead of the rule of law; but, as experience shows, pursuit of such a state policy is not going to help it in the long run, even though it may provide some delusive short-term assurance.

In view of Ronald Dworkin’s initial classification of political theories, we can be said to have adopted the *right-based* model, as fundamental, for our Constitution; instead of a *duty-based* one.²⁶ Though, the democratic system provides the very foundation of constitutionalism, it cannot be the sole criterion to judge the *vires* of an executive action of the democratically elected government by the majority of electorate; and this is where the importance of the sacrosanct Constitutional provisions is realised. The policy of furthering the collective rights by allowing the State measures based on the directive principles, even though it meant tolerating certain fundamental rights breaches of certain individuals, appears to have progressively found favour with the Supreme Court — though the utilitarian streak of such policy may make it difficult to accurately judge its egalitarian character and efficacy; as it may *actually* be furthering certain *personal or*

²⁵ Gautam Bhatia, *Rights, duties and the Constitution*, THE HINDU, February 26, 2020, <https://www.thehindu.com/opinion/lead/rights-duties-and-the-constitution/article30915951.ece>.

²⁶ DWORKIN, *supra* note 18 at 171–72.

external preferences instead of its avowed objectives.²⁷ The rightness of a State action is judged on the basis of adherence to the Constitution, its spirit and values, and the constitutional morality. Rawls argues for the inviolability of an individual's justice — based on fairness — which should not be overridden even at the cost of entire society's welfare.²⁸ Amartya Sen proposes a 'goal-rights system', where certain rights are included within the systemic goals, apart from retaining their inherent instrumental value.²⁹

Gautam Bhatia quotes Samuel Moyn to caution about the traditions, which invoke the language of duty to efface or subordinate individual, which according to Ambedkar is the fundamental unit of the Constitution; and — with the help of an instructive case of the Supreme Court from 1980s which upheld differential treatment of male and female flight attendants — prescribes, that without the moral compass of fundamental rights by placing them “in the transformative Constitutional scheme the language of duties can lead to unpleasant consequences”.³⁰ Moyn himself considers it to be ‘grievous mistake’ to make enjoyment of rights depend on the assumption of duties, apparently as Gandhi insisted.³¹ In fact, Moyn goes on the extent of submitting that, “it is undeniable that the rhetoric of duties has often been deployed euphemistically by those whose true purpose is a return to tradition won by limiting the rights of others”. Even CJI Bobde, as then was, in his above cited speech, similarly reiterates that the individual and individual rights are at the heart of the Constitution, and were recognised as ‘fundamental’.³²

The upshot of the entire discussion is: though it is *desirable* that the citizens must be made aware of the significance of the fundamental *duties*, the *protection* of their fundamental *rights* against the *undesirable* unconstitutional State action remains an *unexceptionable* norm enshrined in the Constitution. The tenability and enforceability of the fundamental *rights* claims of the *citizens* is neither dependent upon nor preconditioned by their performance of fundamental *duties*,

²⁷ *Id.* at 234.

²⁸ JOHN RAWLS, A THEORY OF JUSTICE 3 (Revised Ed. ed. 1999).

²⁹ Amartya Sen, *Rights and Agency*, 11 PHILOS. PUBLIC AFF. 3, 15–16 (1982).

³⁰ Bhatia, *supra* note 24.

³¹ Samuel Moyn, *Rights vs. Duties: Reclaiming Civil Balance*, BOSTON REVIEW, 2016, <https://bostonreview.net/articles/samuel-moyn-rights-duties/>.

³² *Id.*

as *good citizens*. The superior courts as the guardians of the Constitution, must zealously protect these rights and provide redress and remedies whenever required — if needed, even *suo moto* or through Public Interest Litigation — as they are enjoined to do as per our Constitution as well as the established judicial norms, practices, culture, and the jurisprudence evolved in this regard, in the post-independent India. In view of the Dworkinian conception of individual rights as *political trumps*, in an apparent conflict, the fundamental rights should trump over fundamental duties — not the other way round — if the latter are advanced to reinforce an argument for a collective welfare State measure which violates individual fundamental rights.³³ It should be *always* remembered, that the fundamental rights of individual citizens need complete protection to enable the citizens to effectually discharge their fundamental duties.

³³ DWORKIN, *supra* note 18 at xi.