

DEBATING SOCIOECONOMIC RIGHTS: POTENTIALS AND LIMITATIONS

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Second generation rights referred to as positive rights involve states' obligations towards its citizens. The second generation rights are not justifiable in the court of law owing to the lack of resources with the state to realise such rights. However, the resource dependancy of such rights is overstated as countries like South Africa have made such rights enforceable. Enforceable entitlements can 'put food on the plate' and contribute to substantive equality. The conceptual barriers to constitutionalizing socioeconomic rights are that it would threaten the traditional notion of separation of power. Incorporating socio-economic rights into the Constitutions in a meaningful way can be one of the potential possibilities of alleviating deprivations. In recent times, in the interests of maintaining social and political democracy, the Courts have begun to play a role in fashioning ways to give content to socioeconomic rights. The process of establishing individual enforceable entitlements might destabilize prevailing notions of resource scarcity and thereby open space for transformation.

INTRODUCTION

International human rights experts speak of three generations of rights¹. First generation rights are civil and political rights which are also called negative rights². Second generation rights involve states' socioeconomic obligations towards its citizens and are usually referred to as positive rights³. Finally, third generation rights are exemplified by the right to clean and healthy environment⁴ etc. In almost all the states first generation rights are constitutionalized, whereas, second and third generation rights are not. The second generation rights i.e. socioeconomic rights remained under-developed because their enforcement is considered to be difficult and resource dependent. Contrary to this notion of difficulty, the recent trend in literature on enforce-ability of socioeconomic rights presents a consensus that these

¹Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher & David W. Leebron, Human Rights, New York Foundation Press, New York, 1999.

²*Ibid.*

³*Ibid.*

⁴*Ibid.*

impediments are overstated⁵. It was the Universal Declaration of Human Rights that put socioeconomic rights at the center stage in discourse on rights⁶. Also, the general consensus that impediments in the way of constitutionalization of the socioeconomic rights are overstated is supported by the recent incorporation of socioeconomic rights by countries like South Africa in their constitution.

In this paper I will try to argue that the debate around constitutionalizing socioeconomic rights is more of a conceptual one. No doubt that constitutionalizing socioeconomic rights has certain limitations but its potentials can be instrumental in realization of the right to life and dignity.

ENFORCING POSITIVE AND NEGATIVE RIGHTS

Historically, the states had no hesitation in constitutionalizing civil and political rights as the states could comply with the enforcement of civil and political rights just by omission⁷. On the other hand for constitutionalizing socioeconomic rights the states have an obligation to deliver goods and services⁸. The drafters of The Constitution of the India in Constituent Assembly also argued against making socioeconomic rights justifiable⁹. After much deliberation the socioeconomic rights were made fundamental in the governance of the State but were not made enforceable in the court of law.

However, enforceable entitlements can 'put food on the plate'¹⁰ and contribute to substantive equality. The establishment and implementation of legally enforceable entitlements involve the following dimensions. First, an individual's substantive right is legally articulated. Second, this right only becomes an entitlement when there is an available legal mechanism

⁵Danilo Turk, *Final Report: The Realization of Economic, Social and Cultural Rights*, 128, 184, U.N. Doc. U.N.

⁶ Universal Declaration of Human Rights, U.N. Doc A/810 (Dec10, 1948), available at www.un.org

⁷Christian Curtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, *International Commission of Jurists*, Geneva, 2008.

⁸ Henry Shu, 'Basic Rights, Subsistence, Affluence' and US Foreign policy, 2nd ed., Princeton University Press, Princeton, 1996.

⁹See Mary Katzenstein, Smitu Kothari, and Uday Mehta, "Social movement politics in India: Institutions, interests, and identities," in Atul Kohli, ed., *The Success of India's Democracy* Cambridge University Press, Cambridge, 2001.

¹⁰*Supra* note 1.

through which an individual can realize the entitlement. Third, even entitlements announced in law and tied to an enforcement procedure are not actual entitlements until they are experienced. Finally, the process of establishing individual enforceable entitlements might destabilize prevailing notions of resource scarcity and thereby open space for transformation.¹¹

CONCEPTUAL BARRIERS

The conceptual barriers to constitutionalizing socioeconomic rights are that it would threaten the traditional notion of separation of power¹²; socioeconomic issues are considered to fall within the domain of legislature rather than the domain of unrepresentative judiciary¹³; and there is a feeling of distrust regarding the ability or capability of judiciary to enforce such rights. The positive and negative rights distinction which claims that the negative rights have a higher status than the positive rights can also prove to be an impediment in adjudication of socioeconomic rights. Socioeconomic rights are ‘positive rights,’ requiring the state to spend resources to provide the remedy. Whereas, in case of negative rights i.e. civil and political the only requirement is that the state has to refrain from unjust interference with individual liberty¹⁴. In the times of Neo-liberal and capitalists economies the ‘positive rights’ criticism tends to align with the ideology that the state intervention in the free trade regime is seen as a hurdle.

The challenge to constitutionalizing also socioeconomic rights comes from the fact that the provisions for nutrition, education, health etc. are already taken care of by welfare provisions of the state. It is then suggested that the establishment of new enforceable rights is not only unnecessary but would put an extra burden on the state exchequer and will also put extra

¹¹ Supra note 1.

¹² David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, in *Human Rights and Judicial Review: A Comparative Perspective*, edited by *David M Beatty*. Dordrecht: M Nijhoff, 1994.

¹³ Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J

¹⁴ Sandra Freedman, *Human Rights Transformation: Positive rights and positive duties*, Oxford University Press, Oxford, 2000.

work pressure on the judiciary¹⁵. Here it is to be noted that in countries where socioeconomic rights are strongly enforceable, the litigation is very low.¹⁶

IMPACT OF ENFORCING SOCIO ECONOMIC RIGHTS

Social and economic deprivation has been detrimental not only to the development but also to the well being of the people. Incorporating socio-economic rights into the Constitutions in a meaningful way can be one of the potential possibilities of alleviating deprivations. To call socio economic rights as positive rights is to just take away the meaning from them because in essence socio economic rights are as important as the civil and political rights. Socio economic rights consist of provisions which are essential for living a life of dignity. These rights have been called rights essential for the “basic well being” of humanity. Looking at the importance of socio economic rights the implication of the denial of the same will amount to denial of civil rights. For example, if a person is not educated or has no access to health care or maternity health care, the right to freedom of speech becomes meaningless¹⁷.

An enforceable right offers a rational justification for claiming and creating an entitlement. This entitlement then protects the right against the possible threats from state or otherwise. Right is a claim and not a request. Therefore, upholding of right is not benevolence from the state but while respecting such a right the state fulfills an obligation. A right usually creates a correlative duty on the state only but sometimes also upon the non state actors.

A rights-based approach is comprehensive in its consideration of the full range of indivisible, interdependent and interrelated rights: civil, cultural, economic, political and social¹⁸. Equally important is that a rights-based approach applies guiding principles to ensure an acceptable development programming process¹⁹. ‘The main principles followed may be summarized in

¹⁵ Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees, Social Rights in a New South African Constitution*, 141 U. PA L. REV. 1, 15 (1992)

¹⁶ In case of Sweden where socio economic rights are very strong the litigation is very low; *See*, World Watch, Volume 18 World watch Institute, 2005

¹⁷ *Supra* note 23.

¹⁸ Mia Swart Left Out In The Cold? *Crafting Constitutional Remedies for the Poorest Of the Poor*, Hein Online -- 27 Colum. J.L. & Soc. Probs. 53 1993-1994

the simple acronym that stands for: *participation, accountability, non-discrimination, empowerment and linkages to human rights standards*²⁰ .

LIMITATIONS OF MAKING SOCIOECONOMIC RIGHTS JUSTIFIABLE

The limitations of enforcing socioeconomic rights comes to the fore in two situations: first, that constitutionalization of socio economic rights will put unprecedented responsibilities on the judiciary itself; second, that the creation of entitlements by the judiciary will have a negative impact on the development and evolution socio economic justice²¹. It is argued that the judicial approach towards transformation is generally reactionary while the legislative approach is embedded in the political debate in a participatory manner.²² However, similar problems are encountered with enforcement of civil and political rights as well. *Brown v. Board of Education*²³ condemned the policy of segregation in schools in America²⁴. This judgment upheld the right to equality which is a civil and political right. Thus, admitting the blacks in white schools entitled the black children to the same benefits as the whites which required a lot of resources. This judgment paves a way of thinking that the intervention of courts can prove helpful in ‘putting food on the plate’ and also can be a remedy available where the political policies are violating the basic rights of the people.

However, the difficulty with the adjudication of socioeconomic rights is that the courts decide matters on case to case basis which may lead to a dispute regarding the content of the rights itself. That may in turn hamper the long term development of the socio economic right. Nevertheless, judicial intervention can prove to have a focusing effect on the policy making as the decision of the court will help the state to streamline the socioeconomic policy better.

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ Supra note 13.

²² Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH.L REV 1990

²³ 347 U.S. 483, 495 (1954)

²⁴ Holding that separate schools for black and white children were "inherently unequal" and deprived the children of their right to equality; See, 347 U.S. 483, 495 (1954)

The judicial intervention can also have a positive effect on the accountability and can create transparency.²⁵

The court's intervention for the purpose of enforcing socioeconomic rights will not be a welcome step for free trade regimes as the court will tend to give effect to the distribution of resources²⁶. The U.S. Supreme Court has acknowledged that violations of socioeconomic rights do not get much attention owing to the libertarian bent of the state²⁷. The presumption that socio-economic rights are positive rights can be questioned on the grounds that: An analysis of negative rights will lead to the conclusion that their enforcement also requires availability of resources. This proposition is well argued by Henry Shue by comparing the role and expenditure the state has to incur on a negative right like right to security²⁸. In the case of *Airey v. Ireland*²⁹, it is depicted that a negative right needs no less expenditure and a meaningful implementation of negative right needs implementation of the positive right³⁰.

The individual entitlement discourse has its limitations as well. An excessive focus on individual entitlements ignores structural barriers to poverty reduction. Individual entitlement discourse draws attention away from the importance of collective values and action. In other words, treating welfare as an entitlement might weaken the effort of socially and economically deprived people against the state power. The effectiveness of collective action might wither as the rights will become private domains³¹.

²⁵ *Supra* note 14.

²⁶ Friedrich A. Hayek, *The Constitution of Liberty*, Edited by Ronald Hamowy, Routledge, Oxon, 2011.

²⁷ Henry J. Abraham et al, *Freedom and the Court: Civil Rights and Liberties in the United States*, 8th ed. Lawrence, Kansas: University Press of Kansas, Kansas, 2003.

²⁸ Charles Fried, *Right and Wrong*, Harvard University Press, Harvard, 1978.

²⁹ *Airey v. Ireland*, Eur. H.R. Rep. 305, 315 (1979)

³⁰ It was suggested that the right to a fair trial goes so far as to constitute a right to legal aid funding; *See, Hussain AraKhatoon vs. State of Bihar*, AIR 1979 SC 1360, 1369 and 1377.

³¹ C. Guarneri and P. Pederzoli, *From Democracy to Juristocracy? The power of judges: A comparative study of courts and democracy*, edited by C. A. Thomas, Oxford University Press, Oxford, 2002.

In alternative, in all the cases the judiciary does not have to determine socioeconomic rights in terms of resources availability. Judicial review of such rights can simply be the determination of the violation of such rights.

CHALLENGES TO ENFORCING SOCIOECONOMIC RIGHTS

Still one of the major issues which remain and are a potential practical problem with constitutionalizing socio economic rights, is that of the access to justice. The concern is that as in the case of civil and political rights it is only the rich and literate who have access to the courts. For the enforcement of these rights the poor and deprived may not be able to access the legal system for asserting their socio economic rights.³² Then, again only the wealthy and the rich will have the benefit of these rights. That will be exactly the opposite of what constitutionalizing socio economic rights aspire for. The Indian judiciary has been active and responsive to find a solution to the problem of access to justice. The entertainment of claims through public interest litigation is one such example. The semantics of *locus standi* were expanded by the court to give standing to those who are without the real and actual cause of action.³³ The judiciary has also been very lenient with the procedures and has even accepted letters and converted such letters into petitions.

However, some fear that enforcement of socioeconomic rights may lead to infringement of separation of powers. Parliamentary supremacy and judicial review of parliamentary action have been always two contested sites involving the debate around constitutionalization of socioeconomic rights. For example, in South Africa, there is a growing concern whether the court should interfere with the budgetary allocations by the other organs of the state. For the courts opposing state priorities and resource-based arguments often put them under a challenge. Sometimes courts reject the argument that the government's failure constitutes violation of rights on the basis of the separation of powers argument or resource scarcity. This in turn challenges the effectiveness of the judiciary and its legitimacy as well.

CONCLUSION

³²Marc Galanter and Jayanth K. Krishnan, *“Bread for the poor’: Access to justice and the rights of the needy in India,”* Hastings Law Journal 55, 4 (2004)

³³Maharaj Singh v. State of Uttar Pradesh, [1976] 1 S.C.R. 1072, 1083

The different approaches towards understanding deprivation and vagrancy lead to the consensus that denial of socio economic rights as well as civil political rights lead to depravation. The state is not left with the resource scarcity argument for not giving effect to the socio-economic rights. Thus, after evaluating the situation one can safely say that constitutionalizing socio economic rights will not only provide a better way to fulfill the aspirations but can also prove to be a way for maintaining a constitutional dialogue between different organs of the state.

In India the resource scarcity argument was given consideration in the Constituent Assembly by the drafters of the Constitution. However, in the present time this argument can be refuted by raising questions with regard to corruption, mis-allocation of funds and tax policies etc in India. In recent times, out of the fear that democracy might be jeopardized, the Courts have begun to play a role in fashioning ways to give content to socio-economic rights. The separation of power doctrine, which in some countries is very strictly observed, presents a situation where constitutionalization of socio economic rights cannot be made legitimate. However, there are the constitutions like The Constitution of South Africa which have been able to give content to second generation rights as a result of the Court's interpretation of the Bill of Rights in South Africa.

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¹Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher & David W. Leebron, *Human Rights*, New York Foundation Press, New York, 1999.

¹*Ibid.*

¹*Ibid.*

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¹ Universal Declaration of Human Rights, U.N. Doc A/810 (Dec10, 1948), available at www.un.org

¹Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, *International Commission of Jurists*, Geneva, 2008.

¹ Henry Shu, 'Basic Rights, Subsistence, Affluence' and US Foreign policy, 2nd ed., Princeton University Press, Princeton, 1996.

¹See Mary Katzenstein, Smitu Kothari, and Uday Mehta, “Social movement politics in India: Institutions, interests, and identities,” in Atul Kohli, ed., *The Success of India’s Democracy* Cambridge University Press, Cambridge, 2001.

¹*Supra* note 1.

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¹David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, in *Human Rights and Judicial Review: A Comparative Perspective*, edited by *David M Beatty*. Dordrecht: M Nijhoff, 1994.

¹ Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J

¹Sandra Freedman, *Human Rights Transformation: Positive rights and positive duties*, Oxford University Press, Oxford, 2000.

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¹ In case of Sweden where socio economic rights are very strong the litigation is very low; *See*, World Watch, Volume 18 World watch Institute, 2005

¹*Supra* note 23.

¹ Mia Swart *Left Out In The Cold? Crafting Constitutional Remedies for the Poorest Of the Poor*, Hein Online -- 27 Colum. J.L. & Soc. Probs. 53 1993-1994

¹*Ibid*

¹*Ibid*

¹*Supra* note 13.

¹Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH.L REV 1990

¹347 U.S. 483, 495 (1954)

¹ Holding that separate schools for black and white children were "inherently unequal" and deprived the children of their right to equality; *See*, 347 U.S. 483, 495 (1954)

¹*Supra* note 14.

¹ Friedrich A. Hayek, *The Constitution of Liberty*, Edited by Ronald Hamowy, Routledge, Oxon, 2011.

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