

Social Rights Proximity and Judicial Activism in India

Babita, Research Scholar, Faculty of Law, Tanta University, Sri Ganganagar, Rajasthan

Dr. Durga Choudhary, Assistant professor, Faculty of Law, Tanta University, Sri Ganganagar (Rajasthan)

Abstract

The aspirational constitutionalism brings with it a form of proximity of socio economic rights. Such proximity may often lead to a mismatch between the constitutional text and constitutional reality. The judiciary becomes an important player in balancing such mismatch, however without exercise of judicial restraint such balancing has tendency to compromise the traditional concepts of separation of power and democracy. This article seeks to analyze how the trio of Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism exist in relation to and complement and supplement each other.

Keywords: Aspirational Constitutionalism, Social Rights Proximity.

1. INTRODUCTION

Constitutionalism has many folds. Protective, transformational, functional etc. are few to mention. The Aspirational Constitutionalism is a more common phenomenon in the modern constitutions. However they often suffer with the proximity syndrome when it comes to the socio- rights. The elaborate constitutional provisions often leads to rigidity, countering which often results in abundance of interpretation. Though the Aspirational Constitutionalism, Social Rights proximity and Judicial Activism are independently existing phenomenon, they are none the less interrelated. One often complement or supplement other. Hence it becomes necessary to understand them and their interplay. This Article makes an effort to understand the trio and the interrelatedness if not interdependence, in light of the Indian Constitution. Point 2 discusses the aspirational constitutionalism with native examples followed by Point 3 which presents the proximity and the difficulties arising therefrom. Point 4 finally discusses the role of judicial activism viz-a-viz social right proximity in Indian Constitution. Lastly the author seeks to conclude his remarks with observations made.

2. UNDERSTANDING ASPIRATIONAL CONSTITUTIONALISM

There are two major conceptions of constitutionalism. The first looks to its purpose. The second looks to its promise. Let us call the first conception of constitutionalism functional constitutionalism, and the second aspirational constitutionalism¹ Functional Constitutionalism concerns the Constitution in more structural way. The structure of Government, distribution and separation of power, checks and balances, establishment of Institutions etc. concerns the Functional Constitutionalism. In its functional conception a Constitution remains nothing short of a set of rules that defines the general ordering or arrangement of its constituent elements and govern their conduct. More or less it inspires from the Austenian positive morality. Aspirational Constitutionalism, on the other hand, seeks to give a higher purpose or meaning to functional aspects of a constitution. It doesn't succumb to the contemporary constitutional reality but rather envision the prosperity of the community and set goals and standards for a community to achieve and live by. It seeks to establish a more idealized reality and harmonious community and further promote suspension of personal/private interests for the larger public good. The functional provisions serve their purpose immediately, even if the structures created by it are inadequate, they can be ratified later on. For example introduction of Anti-Defection Law. However the aspirational provisions are more futuristic, not always though. The aspirational provisions can be understood in two ways backward looking and forward looking. For example prohibition of Sati- pratha, reflects a realization of society that it is bad enough to continue with and should be banned. It is an example of backward looking aspirational provision. On the contrary the forward looking provisions seek to achieve a more desirable constitutional reality for example

¹Richard Albert, *The Cult Of Constitutionalism*, 39 FLA. ST. U. L. REV. 373 (2012).

Uniform CivilCode.²

It is not, however, easy to accommodate the distinct values and aspirations held by a community as diverse and heterogeneous as India. Here Constitution was not a product of a long experienced history but the recently imposed foreign systems. Although the Charter Acts, Indian Council Acts, and the Government of India Acts had contributed to the formal structure provided by the modern Constitution, however, it was more or less concerned with the functional aspect of it. At the stroke of midnight hour when the world slept, India awoke to life and freedom with billions of aspirations and hopes. The diversity of its populace made it more difficult for its leaders to make a Constitution which could accommodate all these aspirations. The partition of India becomes more relevant to quote here, it evidence that a Constitution cannot be treated merely as a set of rules providing for a Governmental structures but it must also cater to the aspirations of the masses it seeks to govern. The Partition could be suppressed by adopting the erstwhile Communal Electorate prevalent during British Raj, for that was the constitutional reality, but then a compromise had to be made with the aspirations of an equal society and harmonious community. Similarly, the Constitutional makers may encounter a way different constitutional reality than that they aspire for. For example the multiple Languages or the rigid Caste System. However these could be done away with the constitutional innovations such Part-XVII of Constitution of India and the Reservation System etc. But sometimes these constitutional innovation may hinder the aspirational provisions. As we have seen above though the functional provisions (Communal Electorate) are normative in nature they may be interlinked with the aspirational provisions (Equality), same goes with Reservation. Hence, there can be overlap between the functional and aspirational conceptions of constitutionalism also. Thus there arise a need to balance both the conceptions of the constitutionalism. The difficulty of forcing the consensus between the distinct stakeholders and balancing the functional and aspirational aspects of the Constitution often lead to a dangerous mismatch between the constitutional reality and the constitutional expectation. Such mismatch may often lead to disregarding of constitutional force and its effective implementation. Catarina Botelho argues that ‘The dangers of an extremely aspirational constitution are plain to see. First there is distressing lack of trust between the constitutional text and constitutional reality. This disconnection is potentially disturbing for the constitutional project of a State, as it threatens its probity and suitability.’ She further adds that ‘When the Constitution is not politically neutral and functionalize its fundamental rights ideologically it risks of being overcome by a democratic volatility’.³This has been experienced in the form of enactment of laws for abolition of Zamindari System which were inconsistent with the fundamental right to property which led to addition of Ninth Schedule in the Constitution and the famous judgement in *Keshvananda Bharti vs State of Kerala*.⁴

The various difficulties discussed above presents us with a fundamental question as to whether the various constitutional aspirations (except the basic liberties) are necessary elements of the constitutional text or they can be dispensed with so as to reduce the mismatch between the constitutional text and constitutional reality. An effort is made to discuss this question in the following section.

3. THE PROLIXITY OF THE SOCIAL RIGHTS UNDER INDIAN CONSTITUTION

The concept of Human Rights was mooted long before the Indian Independence. However it was only in 1945 that the global community could witness a Universal Declaration of Human Rights. India had also long seen the oppression of its citizen by the colonial masters and it

²See also Robin West, *The Law's Aspiration*, HeinOnline -- 88 Nw. U. L. Rev. 241 1993-1994

³Catarina Botelho, *Aspirational Constitutionalism, Social Rights Prolixity and Judicial Activism. A Trinity or Triology?*, CALQ (2017) Vol. 3.4.

⁴*His Holiness Sripadgalvaru Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 146

was her constitutional aspiration to secure to her citizens the basic liberties and human rights. These rights were offered in two separate packages i.e. Part-III and Part-IV of the Constitution. The Part-III contained the basic civil and political rights under the title Fundamental Rights whereas the Part-IV contained the social and economic rights under the title Directive Principles of State Policy. The rights contained under Part-III were enforceable whereas the rights under Part-IV were not enforceable in nature. It is pertinent to understand the concept of social rights here. Social Rights are those rights that protect the necessities of life or that provide for the foundations of an adequate quality of life. Social rights may also be defined as claims against the state to have certain basic social and economic needs of life satisfied. These social claims have also been defined by Amartya Sen (1999) as basic entitlements. Sen argues that people are entitled in the prevailing system of institutional rights, to adequate means for survival. Entitlements are the totality of things a person can have by virtue of her rights, which in turn depends on the legitimised process of acquiring goods under the relevant system.⁵

Whereas the civil liberties, often referred to as the negative rights, limits the scope of State action, the socio-economic rights, often referred to as the positive rights, imposes a positive obligation on the state. The Social Rights are distinct from the political and civil liberties and are deeply rooted in the aspirations of a socialist state. However the larger question is whether these rights should necessarily form the part of the constitutional texts or they can be left to the Legislatures to enact in view of the contemporary constitutional reality. Indeed the socio-economic paradigm is ever changing and certain backward looking provisions/rights may lose their significance over a course of time. Various scholars have opined differently in this regard.

It is needless to say that the democracies may turn into mob-rule and ultimately in tyranny if the law makers are not guided by certain fundamental values. To prevent such backsliding in times of crisis, wise statesmen and stateswomen frame constitutions with structural mechanisms to prevent mob rule, and with rights provisions to be employed by the judiciary to check the worst excesses of the mob mentality.⁶ The restrictions that constitution imposes on a state in form of civil or political rights ensures that the constitutional aspirations are lived up to and not thwarted by the post constitutional politics. Pakistan or Nepal for instance has changed its constitution a couple of times and still face a constitutional uncertainty.

On the other hand, Catarina Botelho argues that, these positive and negative rights can also have a cost of enforcement on the State. Though the negative rights are more or less in the denial form and hence the active cost may be less but the positive right may have significant bearing on the Governmental budget. For example the recently inserted Right to Education⁷ under Article 21A has resulted into welfare legislation and burdened the public as well as the private players to extend free education. She argues that 'Regarding the rights' cost, there is a tendency to consider social rights as overly pricey when compared to the cost free liberty rights. The truth is that all fundamental rights have significant budgetary implications and the idea of costs free rights is a myth.⁸ In furtherance the aid given to the Cultural and Minority institution also has some bearing on the Government expenditure. Apart from these even the negative rights such as equality under Article 16 also to certain extent hamper the smooth flow of governmental activities as they require extensive procedures to be carried out.

⁵Kothari, J, 'Social Rights and the Indian Constitution', 2004 (2) Law, Social Justice & Global Development Journal

⁶Michel C. Dorf, The Aspirational Constitution, HeinOnline -- 77 Geo. Wash. L. Rev. 1631 2008-2009

⁷Though Right to education is included in the Part -III of the Constitution it is referred to as a positive right as it emerges from the Part-IV; Also refer Progressive Realization of Rights

⁸Catarina Botelho, Aspirational Constitutionalism, Social Rights Proximity and Judicial Activism. A Trinity or Triology?, CALQ (2017) Vol. 3.4.

The Indian Constitution serve as a fine example of Social Right prolixity with rights in the form of constitutional directives and can be progressively realized. Such as right to an adequate means of livelihood, equal pay for equal work for both men and women, health of workers, freedom and dignity of children and youth, free legal aid, organisation of village Panchayat, Right to work, Right to public assistance in cases of unemployment, old age, sickness and disablement, uniform civil Code for the citizens, promotion of educational and economic interests of scheduled castes, scheduled tribes and weaker sections, raising the level of nutrition and the standard of living and improvement of public health, organisation of agriculture and animal husbandry, protection and improvement of environment and safeguarding of forests and wild life, protection of monuments and places and objects of national importance, separation of judiciary from executive, promotion of international peace and security etc. However being the non-justiciable they doesn't lead to much costs as the Social Rights prolixity often tends to produce.

However costs is not the only demerit of Social Rights prolixity. Many argues that it may compromise the functional aspect of the constitution and compromise the traditional notions of separation of powers and democracy.⁹Ellen Wiles argues that 'Socio-economic issues are considered to constitute the core of political policy: the realm of elected representatives rather than an unelected judiciary' and further that "...constitutional adjudication on socio-economic issues will ultimately have a negative impact on the development of social justice, on the basis that the judicial approach to change is inherently reactionary, and it is only the political sphere that enables radical debates that catalyze more progressive social policies. Both of these attitudes indicate a distrust of the judiciary as an institution and the process of constitutional review ingeneral."

However, the Indian experience has been mixed in this regard. The Judicial review has often lead to judicial activism however it has been balanced by judicial self-restraint also. The role of Indian judiciary has been crucial in safeguarding the socio-economic interests of the citizen and striking down in the anti-constitutional legislations. An attempt is made to analyse the judicial trends in this regard in the followingsection.

4. JUDICIAL ACTIVISM AND SOCIAL RIGHT PROLIXITY.

Since Independence, the Courts in India have been adopting innovative ways for redressing the grievances of the disadvantaged persons. In many cases, the Supreme Court exercised its epistolary jurisdiction and took suo motto actions on mere postal letters disclosing the human rights violations in society

The Judicial approach to the Social Rights have been very different than other jurisdiction. On occasions the Indian Judiciary has come forward to even issue guidelines (judicial legislation) in its activism to secure the socio-economic or procedural rights to the citizens. Be it the Witness Protection Scheme, inclusion of NOTA, BCCI Case, or the famous Vishakha's Case. The Indian Judiciary in a way seeks to balance the constitutional texts with constitutional reality. Recently the reference to Doctrine of Progressive realization of rights or Constitutional Morality or the Transformative Constitutionalism, the Judiciary in India has been the subject of both criticism and appreciation. It has often been criticized for its liberal interpretation and judicial legislation when it comes to civil liberties. However, at the same it has also sought to extend the Social rights under Part-IV in the colour of Fundamental rights. The case of Olga Tellis¹⁰ is a classic example of recognising the Right to Livelihood (being a social right) and giving it the protection under Article 21. Many argues that such approach would lead to intermixing of two separate sets of rights while others have welcomed it. There is no doubt that though the courts have always attached very great importance to the

⁹See David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, in **HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE**

¹⁰Olga Tellis v. Bombay Municipal Corporation, (1985) 3 S.C.C. 545.

preservation of human liberties, no less importance has been attached to some of the Directive Principles of State Policy enunciated in Part IV The core of the commitment to the social revolution lies in parts III and IV. These are the conscience of the Constitution.¹¹

Madhav Khosla identifies the approach of Indian Supreme Court as the making of social rights conditional. He argues that An important feature of the conditional social rights model is that the court does not ask the state to build, for instance, more housing for the poor or more schools for children. In and of itself, this need not suggest much. It could simply represent the adoption of a weak remedial model in which the court declares that a right has been violated but recognizes that it can only provide a limited remedy.¹² Accordingly, the existence of a violation is conditional upon state action. A violation can only occur when the state undertakes an obligation but does not fulfill it. Thus the violation will only occur when a scheme has been initiated but is not being appropriately implemented¹³

He exemplifies that the Right to Livelihood in *Oliga Tellis* was not made universally justiciable but it was merely dependent on the facts peculiar to that case, Thus in a sense the Court merely sought to provide a limited guarantee without actually fundamentalising it. A similar conditional social rights model has also been observed in the case of *Mohini Jain*¹⁴ and *Unni Krishnan*¹⁵, he argues.

However that may not be entirely correct. The conceptualization of Public Interest Litigation has often led to many positive developments be it the Right to Education, Witness Protection Scheme or the guidelines in *Vishaka's* case¹⁶.

5. CONCLUSION

From the above discussions it clearly follows that the aspirational constitution is bound to encounter the social rights prolixity. The aspirations however might lead to a difference between the constitutional text and reality. The Judiciary here exercise an important function of balancing the mismatch, however it becomes imperative to restrain the judicial activism from becoming judicial overreach. The trio of Aspirational Constitutionalism, Social Rights prolixity and Judicial activism though stands independent of each other, however the three of them can balance each other and achieve the true goals envisioned by a Constitution. Indian example has been mixed of balance and imbalance, however the rights have been the epicentre of such discourse.

¹¹*Minerva Mills Ltd. v. Union of India* [AIR 1980 SC 1789]

¹²Madhava Koshala, Making social rights conditional: Lessons from India, *I•CON* (2010), Vol. 8 No. 4, 739–765

¹³*ibid*

¹⁴*Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666.

¹⁵*Unni Krishnan v. State of A. P.*, (1993) 1 S.C.C. 645

¹⁶*Vishaka v State of Rajasthan*, (1997) 6 SCC 241.