

# Social and Constitutional Rights

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**Abstract:** *The Indian constitutional structure of the division between fundamental rights and directive principles, and the debates on social rights during the drafting of the Constitution. With this background, some of the most important judgments of the Supreme Court in the last ten years in the field of social rights have been analyzed, looking specifically at the enforcement and justifiability of the right to food, right to education and the right to health. The developments in the last decade are significant as during this time the venomous effects of globalisation and dangers of deprivation of basic social rights have been acutely felt and this has been studied. The basic necessities of life encompass at a minimum, the right to adequate nutrition, shelter, health, education, work and environment. All of these rights provide foundations upon which human development can occur and human freedom can flourish. In addition, such basic social rights should be conceptualized in terms of an entitlement both to be equal as humans and to be equal as members of society.*

**Keywords:** Indian Constitution, Fundamental Rights, Judgments, Social rights.

## 1. Introduction

The fundamental rights being justiciable under our Constitution, further justifiability of the directive principles was considered unnecessary; apart from the unfeasibility of their direct enforcement. However, the directive principles have been read into the justiciable fundamental rights, particularly articles 14 and 21, to improve the quality of governance needed for the realization of the fundamental rights. This judicial creativity was possible only because of the clear linkage between the fundamental rights and the directive principles.

The Indian constitutional structure of the division between fundamental rights and directive principles, and the debates on social rights during the drafting of the Constitution. With this background, some of the most important judgments of the Supreme Court in the last ten years in the field of social rights have been analyzed, looking specifically at the enforcement and justifiability of the right to food, right to education and the right to health. The developments in the last decade are significant as during this time the venomous effects of globalisation and dangers of deprivation of basic social rights have been acutely felt and this has been studied. The study of the recent case-law in the nineties on these social rights is of interest because the Supreme Court has proved a judicial willingness and capacity to address aspects of social rights in a way that challenges many preconceived notions of the judicial role.<sup>1</sup> From the nineties onwards we can see that the Supreme Court has shown a positive and marked tendency to take the principle of the interdependence of human rights seriously and to interpret entrenched constitutional guarantees of the fundamental rights in the light of the directive principles.

Moving ahead from the position that social rights and civil and political rights are indivisible and interdependent, through the discussion and analysis of the specific rights to food, health and education, this article argues that social rights can indeed be made enforceable and are amenable to judicial implementation. The recent Indian experience shows that their enforceability still remains the crucial factor and gives ample examples of ways in which innovative remedies

have been used to enforce social and economic rights by the judiciary.

Social rights” refer to those rights that protect the basic necessities of life or rights that provide for the foundation 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<sup>2</sup> as basic entitlements. Sen argues that people are entitled in the prevailing system of institutional rights, to adequate means for survival and entitlements are the totality of things a person can have by virtue of her rights, which in turn depends on the legitimized process of acquiring goods under the relevant system.

The basic necessities of life encompass at a minimum, the right to adequate nutrition, shelter, health, education, work and environment. All of these rights provide foundations upon which human development can occur and human freedom can flourish. In addition, such basic social rights should be conceptualized in terms of an entitlement both to be equal as humans and to be equal as members of society.<sup>3</sup>

## 2. Social rights in the Constitution

Human rights in the Constitution are divided into two separate parts. Part III of the Constitution houses the “fundamental rights”, which in conventional human rights language may be termed as civil and political rights. Part IV of the Constitution contains the directive principles of State policy (DPSPs), which include all the social, economic and cultural rights.

Social rights or basic entitlements have been recognised internationally as being as important as other civil and political human rights. As Frank Michelman argues, the fact that social rights make commercial demands or call for government action and not just moderation, does not in itself differentiate them radically from the standpoint of justifiability from constitutionally protected rights to equality before the law, right to speech and expression or to so-called negative liberties.<sup>4</sup> At the very minimum social rights can sometimes even be “negatively protected” by comfortable forms of judicial intervention, for example

when municipal zoning and land use laws, insofar as they constrict local housing, can be open to challenge.

While the fundamental rights mentioned in Part III are justiciable under the Constitution, DPSPs are not justiciable rights and their non-compliance cannot be taken as a claim for enforcement against the State, as per the text of the Constitution.<sup>5</sup>

The Constitution aimed at not only achieving political independence from colonial rule but also resolved to establish a new social order based on social, economic and political justice.<sup>6</sup> Social revolution was put at the top of the national agenda by the Constituent Assembly and DPSPs, it was thought, would make explicit the “socialist” as well as the social revolutionary content of the Constitution.<sup>7</sup>

It is very interesting to discover that during the drafting of the Constitution, some of the directive principles of State policy were initially part of the declaration of fundamental rights adopted by the Congress party at Karachi. Among the advocates for DPSPs in the Drafting Committee were Munshi, DrAmbedkar, Prof. K.T. Shah and B.N. Rau. They would have made the directive principles, or an even more difficult social programme, justiciable. They disliked mere precepts and in the end supported them in the belief that half a loaf was better than none. Munshi had even included in his draft list of rights, the “rights of workers” and “social rights”, which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living.<sup>8</sup>

Ultimately the bifurcation between civil and political rights and social and economic rights was made under the Constitution because the latter, it was felt, could not be made enforceable until appropriate action was taken by the State to bring about changes in the economy. The importance given to Part IV is reflected in the speech of DrAmbedkar when he insisted on the use of the word “strive” in Article 38:

“We have used it because it is our intention that even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these directive principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives. ... Otherwise it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.”<sup>9</sup>

Such insightful thinking of the framers of the Constitution was futuristic since it falls in line with the “progressive realization of rights” language of the International Covenant for Economic, Social and Cultural Rights (ICESCR)<sup>10</sup> and gives weight to the argument that the enforceability of social rights was never thought of as being dependent only on the availability of resources.

Thus laying the foundations for the principle that social rights are complementary, interdependent and indivisible from civil and political rights. It was held by the Supreme

Court that there is no disharmony between the directive principles and the fundamental rights, because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare State, which is envisaged in the preamble.<sup>11</sup> Following this, in *Unni Krishnan*<sup>12</sup>, the famous right to education judgment, Justice Jeevan Reddy declared: (SCC p. 730, para 165)

The provisions of Parts III and IV are supplementary and complementary to each other and not exclusionary of each other and that the fundamental rights are but a means to achieve the goal indicated in Part IV.

#### ***The right to food:***

While the Supreme Court has reiterated in several of its decisions that the right to life guaranteed in Article 21 of the Constitution, in its true meaning includes the basic right to *food, clothing and shelter*, it is indeed surprising that the justifiability of the specific right to food as an integral right under Article 21 had never been articulated or enforced until 2001!

#### ***Enforcement of the right to food***

The orders of the Supreme Court in the right to food petition are already being implemented at the ground level. Since the beginning of the 2002 academic year, primary schools in Rajasthan have been serving midday meals in compliance with Supreme Court orders, and among States that did not already have a Midday Meal Scheme; Rajasthan was the first to comply. Interestingly, the Midday Meal Scheme is not merely providing nutrition to the school children. In a survey conducted it has been found that it has resulted in a sharp increase in the enrolment of girls (36%) and a reduction in gender bias in enrolment in schools. Daily attendances of children in the schools has also increased and this was attributed to the midday meals.

#### ***Right to education***

The journey of the right to education — from being initially enumerated in the directive principles to being declared a fundamental right — has been a huge struggle and a triumph, for activists, child rights advocates, educationists and NGOs working on education all over the country. This journey however has been quite different from that of the other constitutional social rights, the main reason being that Article 45 of the directive principles gave a very different promise than the other provisions within the Constitution as it imposed a time-limit of ten years to implement the right to free and compulsory primary education.

Article 45 is the only article among all the articles in Part IV of the Constitution, which speaks of a time-limit within which this right should be made justiciable. Therefore, it was clear that when the Constitution of India was adopted in 1950, the framers of the Constitution were aware that for the realisation of a person’s capabilities and for full protection of her rights, education was an important tool. Thus, in addition to Article 45, the right to education has been referred in Articles 41 and 46 of the directive principles as well.

### ***The right to health***

With the recognition that both the preamble of the Constitution and the fundamental right to life in Article 21 emphasize the value of human dignity, the Supreme Court began to address the importance of health as a fundamental right. In the directive principles in Part IV of the Constitution, Article 47 declares that the "State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties". In addition to Article 47, the right to health also has its reference in Articles 38 (social order to promote the welfare of the people), 39(e) (health of workers, men, women and children must be protected against abuse), 41 (right to public assistance in certain cases, including sickness and disability) and 48-A (the State's duty to protect the environment) of the directive principles. In a series of cases dealing with the substantive content of the right to life the Court has found that the right to live with human dignity includes the right to good health.

### **3. Conclusion**

The Free India envisaged by Dr. Rajendra Prasad in the Constituent Assembly was, thus:

#### ***Let us resolve to create conditions in this country,***

When every individual will be free and provided with the wherewithal to develop and rise to his fullest stature,

When poverty and squalor and ignorance and ill health will have vanished,

When the distinction between high and low, between rich and poor, will have disappeared,

When religion will not only be professed and preached and practiced freely but will have become a cementing force for binding man to man and not serve as a disturbing and disrupting force dividing and separating,

When untouchability will have been forgotten like an unpleasant night dream,

When exploitation of man by man will have ceased,

When facilities and special arrangements will have been provided for the adimjatis of India and for all others who are backward, to enable them to catch up to others,

When this land will have not only enough food to feed its teeming millions but will once again have become a land flowing with rivers of milk,

When men and women will be laughing and working for all they are worth in fields and factories,

When every cottage and hamlet will be humming with the sweet music of village handicrafts and maids will be busy with them and singing to their tune,

When the sun and the moon will be shining on happy homes and loving faces.

- *Speaking in the Constituent Assembly on 15 August 1947.*

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- [2] A. Sen: Commodities and Capabilities (OUP, Oxford, 1999).
- [3] "Constitutional Ropes of Sand or Justiciable Guarantees?", supra fn 1.
- [4] F. Michelman: "The Constitution, Social Rights and Liberal Political Justification", Vol. I, Issue I, International Journal of Constitutional Law, p. 13.
- [5] See Article 37.
- [6] Preamble of the Constitution.
- [7] G. Austin: Working a Democratic Constitution: The Indian Experience (OUP, New Delhi, 1999); Mahavir Tyagi from the United Provinces, during the Constituent Assembly Debates said, "... The directive principles accommodate all the revolutionary slogans in a particular form as it is social and economic justice that is demanded by the most radical of the radicals of the world." — Constituent Assembly Debates Official Report, 19-11-1948, Vol. VII, Book 2 (Lok Sabha Secretariat, New Delhi, 1999).
- [8] G. Austin: The Indian Constitution: Cornerstone of a Nation (OUP, New Delhi, 2001), p. 78.
- [9] Constituent Assembly Debates, 19-11-1948, Vol. VII, p. 495.
- [10] ICESCR Article 2.1 states: "Each State party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technically to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures."
- [11] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225
- [12] *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645