

## **Positive rights: Nature and implications**

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### **INTRODUCTION**

Positive Rights are those rights that are imagined as having a correlative duty of interference as opposed to negative rights which have a correlative duty of non-interference. This is a legal understanding of rights based in the Hohfeldian structuralist analysis, with the key criteria of decision being the correlative duty. However there are scholars who have argued that these theoretical distinctions are not very robust. Stephen Holmes and Cass Sunstein, for example have argued in their book<sup>1</sup> that all rights are positive rights as all rights require the state to undertake financial expenditure and on another level Henry Shue<sup>2</sup> has argued that all rights have three kinds of duties – of aid, avoidance and protection and thus the theoretical rambling over positive and negative rights does not make sense. While these arguments are well established and robust, positive rights remain to exist as a conceptual category and have taken on different names like socio-economic rights, second generation rights, along with the original positive rights to remain in contention. Moreover, the focus world over on rights based development, right to development and human rights based approach to development has kept the idea of positive rights alive in the minds of practitioners and theoreticians alike. For social sciences of different hues like economics and political science and especially for the applied study of public policy the idea of positive rights is a challenge to reckon with. In this paper the author has attempted to bring forth the impact of the idea of positive rights on the sphere of policy and policy studies by dwelling on the nature of positive rights. In the process it is attempted to show that the idea of positive rights is not as ideological as it seems and is perhaps a practical necessity at times; at the same time, the amount of power that can be potentially commanded with the help of positive rights make these instruments an unstable tool in the hands of the state.

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1. Stephen Holmes, Cass Sunstein, *The Cost of Rights: Why Liberty depends on Taxes*, W. W. Norton & Company, New York.
  2. Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, Princeton, 1980.

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**Nature of positive rights :**

Positive Rights exact claims on the finances of governments. Positive claims like, the right to education, the right to food are not claims of non-interference. They are claims for allocation and distribution of resources to get the concerned goods and services by the claimant. This is the first implication of positive rights. Their delivery is considered expensive and once constitutionalised, it is considered to be very difficult to curtail expenditures on these rights. But one can also argue that these expenditures are necessary expenditures. This leads us to the second nature of positive rights which is that many a times positive rights are rights to merit goods, goods that are believed to be important for human development and welfare. Thus a dichotomy gets attached at the beginning itself where these rights are necessary but expensive at the same time. With this dichotomy comes the complexity associated with the duty related with positive rights. The positive duty associated with positive rights is diffused with respect to the point of duty as well as with respect to what exactly the duty is. This can further be explained by juxtaposing positive rights with negative rights. With negative rights both the duty and the point of duty is very clear. The duty is that of non-interference and the point of duty is on everyone. Thus if person X has a negative right to freedom of expression then it is everybody's duty not to interfere with that person's right to freedom of expression. If anybody interferes with the right to expression of X then that right is violated. The nature of negative rights is apparently conceptually neat. There is a right holder, there are duty holders and violation is well defined. But with respect to positive rights things are not so smooth. If X has a right to education, who has the duty to ensure that X gets education? Is it the parents, or the government, or the society or all of these three? Moreover, what is the content of this duty to educate X? Is it formal education, informal education, skill based education, moral education or a mix of these or all of these? These complexities inherent in the concept of positive rights generate further complexities when these rights are attempted to be introduced by state or demanded by claimants. The diffusion of duty is also very clearly visible in the famous 'good Samaritan' example. If person X is lying unconscious at a road crossing, whose duty is it to take that person to the hospital? These complexities within the conception of positive rights emerging from their nature of being expensive, important, diffused with respect to duty and point of duty make them susceptible to rhetoric on the part of the claimants as well as the people against whom the claims are made. In a democratic setup like that of India, where social justice, liberty and welfare are imagined in the founding document itself, positive rights are imagined to be deliverable at the altar of performance of the government or the state. With such an inherently complex nature and with the point of claim being the government or the state, the complexity is further enhanced as the state has the capacity to utilise these claims for its own benefits.

**Positive Rights in India :**

In India, the constitution is the source of rights of citizens. While the chapter on fundamental rights is the source of negative rights, the chapter on directive principles of state policy is the source of positive rights. "These directive principles impose a duty on the political branches of government to pursue certain principles and objectives – many of which

could be described as positive rights”<sup>3</sup>. This chapter in the constitution talks about the general directions to the government which are to be respected by the government when taking policy decisions. One such right in this chapter was the right to education, which was the only directive principle which had a deadline by which it had to be achieved or materialised. This right to education was originally thought of as to be achieved within ten years of coming into force of the constitution. However, it is a fact that it took a lot more time than that to achieve this goal right.

This arrangement of directive principles of state policy was thought of by many scholars as a tool of subverting the claims of people from their government. It must be remembered that the imagination of the government of a free India was based on the desires of how a government should be and that these desires formed the basis of the anti-colonial and anti-British movement. The rights of citizens in the constitution were carried forward from the 1931 resolution passed in the Congress session held at Karachi, where all rights were under the same category. However, in the constitution, positive rights were relegated to the category of directive principles which were imagined as non-justiciable in the court of law. Suhas Palshikar has argued that these non-justiciable rights were a curious and awkward arrangement. He says that,

“In any case this arrangement is curious and awkward. Curious, because the state is handed down a mandate which is optional as far as its implementation goes; and awkward because, in the ultimate analysis, this arrangement provides a legitimating ideology to the state on the one hand and on the other a space for curtailing individual rights in the name of welfare policies, something that happened during the mid -1970s. The state could get away with delegitimation of these rights without bringing about substantive welfare.”<sup>4</sup>

Moreover, the implication of these rights on the governance of the country was also a bit too problematic. These rights were imagined as directives for the state in the governance of the country and were protected by judicial review with the help of article 37 of the constitution. “The constitution expressly makes these provisions non-justiciable. These rights are, by command of the Constitution, unenforceable in the courts”<sup>5</sup>.

For Ambedkar these directives were very important even when these were not justiciable in the court of law. He was of the opinion that as these directives were to have implications on the way the politics and the economic system was to function, any design input that freezes their contents was going to be counter-productive. For Ambedkar, these directives were going to give power to the electorate to give direction to policy formation by electing those as rulers who respect the directives. Ambedkar said that,

“... while the constitution should contain a vision of economic democracy, it cannot privilege

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3. Jeffery Usman, Non justiciable Directive Principles: A Constitutional Design Defect, *Michigan State Journal of International Law*, 2007, p. 643
  4. Suhas Palshikar, “The Indian state” in Bhargava, Rajeev, ed, *Politics and ethics of the Indian Constitution*, 2009, pp. 151-152.
  5. Jeffery Usman, Non justiciable Directive Principles: A Constitutional Design Defect, *Michigan State Journal of International Law*, 2007, p. 643

one particular mechanism for accomplishing it. Some people, he said, believed that economic democracy could be brought about through individualism; others through socialism and still others through communism. These differences justified the directive principles remaining open ended, rather than fixed or rigid, in respect of mechanisms by which economic democracy may be realized within the framework of parliamentary democracy.<sup>6</sup>

These words of Ambedkar also point towards the complexity inherent in directive principles and positive rights. While they are important goals which need to be achieved, the method to achieve them can be varied. It was, it seems, important to keep them open ended, as was done in the constitution, to ensure that future generations had the freedom to choose the methods of achieving these goals.

However, the story of India's governance in the past 70 odd years impresses upon the observer that these directives were not adhered to by the democratic rulers of the nation in the truest of the sense. Political exigencies, identity politics, rhetoric in the name of welfare was the calling card for the politicians. It is obvious that the reason for such a turn of events was not just because of the way the politics was unfolding but also because these rights are complex and it is a requirement that the public sphere is well functioning for attainment of these rights, which was and still remains a area of concern for the democratic setup of Indian polity and policy systems.

### **Implications of positive rights :**

The foremost example of the implication of positive rights in India is the way the right to private property got disintegrated for the achievement of the land reforms imagined by the State which was purportedly for promotion of the principles enunciated in the directive principles based on positive rights. Right after independence and with the coming into force of the constitution, the executive and legislature in our country had undertaken the responsibility to infuse land reforms. In the field of Economics, the idea of pareto optimality is one of the core concepts to define the question of welfare. If we take from one person and give it to another, overall welfare is assumed to be not achieved. Welfare is possible only when one person is made better off without making any body worse off. With respect to land redistribution it was apparent that people were to be given land by taking from the ownership of others. But the Indian constitution had given ample amount of power to judiciary to protect the negative right to private property and thus an institutional tussle ensued between the court on one hand and the executive and legislature on the other hand. The executive and legislature were of the opinion that land reforms are necessary and should be pushed through. The courts were of the opinion that the right to private property was a fundamental right and cannot be run over. This example represents the conflict between fundamental rights and directives principles and thus between negative rights and positive rights. The idea of positive rights is not simple to promote. The result of this institutional tussle was that the judiciary had to come with the 'basic structure doctrine'<sup>7</sup> to impress upon the legislature that it does not

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6: Quoted in Niraja Jayal, *Citizenship and its Discontents: An Indian History*, Harvard University Press, 2013, p. 158.

7: This doctrine was enunciated in the famous Kesavananda Bharati Case in the year 1973 by the Supreme Court

have unlimited powers to amend the constitution and judiciary can declare legislations and amendments *ultra vires* if it thinks that the 'basic structure' of the constitution is violated.

The other case of implication for positive rights is the example of the right to education. Even after being a directive principle with a time limit and where there was no possibility of any conflict with negative rights, the Indian State was unsuccessful in implementing the will expressed in the constitution. This implies that, the thought that people through the exercise of their voting power would be able to displace ruling elites who do not follow the directive principles, was not completely well founded. The disposition of the central government and the state government of that time was such that their focus was more on economic development and creation of technical and highly skilled human resource (higher education especially in the field of engineering and sciences) which was required in the pursuit of such economic development and thus they kept neglecting primary education for the masses which was imagined as a right in directive principles. The people were also not able to exert pressure on the ruling elites to deliver on this promise. It is only after the intervention of courts in the 1990s and the social activism by civil society that the State was able to generate the design of the right to education to some extent. This case again points out the complexity inherent in positive rights. Even after being an important right and even after having a deadline for its delivery, the state was unsuccessful in generating a critical mass, even within a democratic setup where the government is accountable for its decision making to the people. A democratic and a parliamentary system could not force the government and the state to deliver on the right to education for so many decades. The financial priorities of the state were very different. Its focus was on industrialization, creation of big dams and capital goods factories and thus the investments on these basic infrastructure demands were prioritised over primary education. These markers of economic development were important as they were critical for the growth of the nation and most likely were rightly prioritised, but at the same time it seems logical that the government should have prioritised education for the masses too.

In these two examples, one can see that the state focussed more energy on the one which was related with the expansion of the economy. Land resources were important for agricultural development and industrialization and thus for economic development whereas education for the masses was not of direct consequence. While these land reforms were being pushed to promote the egalitarian principles of land redistribution, that was not the only requirement that was going to be fulfilled. The government's record on land redistribution is abysmal even after the fall of right to private property. Education too does have positive ramification for economic development, but the state was more inclined towards a more systemic and far reaching intervention. How can one explain such a choice by the state? It is here that one can see that the state can become all powerful when it has the legitimising mechanism of positive rights backing its decision making. The choices that the state makes then are not always democratic. Positive rights can be utilised to create a highly centralised system of governance which over time becomes more and more technocratic and bureaucratic and less and less empathetic and responsive to the real needs and rights of the people. These choices made by the state do not necessarily reflect the claims of the people. They claim to resolve the claims of the people indirectly, in time through working of the infamous 'trickle down' mechanism. Policy is prepared to pursue the direction the state seems fit and legitimacy

for that policy direction is commanded in the name of positive rights. However, at the same time one can see the positive implication of these rights as well. As happened in the case of right to education, even after being non-justiciable in the court, when the court declares these rights in the form of empty declarations without providing any remedy, these declaratory rights become a partial source of social movement and can be utilised by the civil society, political parties, and concerned citizens to generate substance for these rights. These judicial declarations generate the necessary public will and critical discourse in the society at large, give credence to the claims of activists working for rights movements and generates overall empathy for these claims in the society by constant public discourse through articles, discussions, expert opinions, and bringing in of alternative data sources on current state of affairs. Thus, any last word on positive rights has to balance between the positives that they bring into the political and economic system and the negative that comes with its unstable and complex structure and nature.

### **Conclusion :**

Positive Rights can be tools of commanding power and legitimacy in the hands of the State as is visible in the clamour for land reform by the executive and legislature in the initial years of free India and the resultant deconstruction of right to private property in India. At the same time they can be a tool to generate accountability and generate democratic policy making and decentralisation of power if utilised properly. The constitutional democratic setup in our country is ideal for achieving development through the route of positive rights, if the public sphere is well functioning. And for that the courts, parliament, press, civil society and citizens have to respect each other's powers and boundaries to generate a democratic discourse around positive rights. It is not possible to create perfect order by centralising decision making powers into any one institution of governance and democratic governance requires all institutions to have independence to ensure that all kinds of varied and different positive claims are taken on board the decision making platform.

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