Social Welfare Laws and Federalism

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Rights-based welfare legislation, even if passed by the union government, needs implementation at the state level. State governments are not passive implementation agencies and have sometimes stymied the effective implementation of such laws. Three recent examples show the need to better imagine social welfare laws within the context of a federal framework to ensure effective implementation.

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During 2004–14, when the United Progressive Alliance government was in office at the union level, a whole host of legislation were introduced to meet the social welfare goals (Nilsen 2018). Some of them came into immediate effect—the Hindu Succession (Amendment) Act (HSAA), 2006 which granted coparcenary rights to daughters of Hindu landowners, at par with their brothers. Others, such as the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA), 2006 relied on the state and local authorities for effective implementation of the law. A third category of laws, such as the Right of Children to Free and Compulsory Education (RCFCE) Act, 2009 requires both the union and states to work in parallel to implement the legislation within their respective fields.

The latter two categories acknowledge India's federal structure where both the union and state governments draw legislative and executive powers from the Constitution and are considered sovereign in their own fields of legislation.[1] The union government does not have the resources to be able to reach every corner of the country and relying on the state governments for effective implementation makes eminent sense. However, this has also meant that the implementation of these vital social welfare laws has been uneven across the country and in some cases, state governments have actively attempted to nullify them.

In this column, I outline the challenges to the implementation of two such social welfare laws, namely the FRA and the RCFCE Act in a federal system. Both are rights-based legislations, guaranteeing the rights of children to education and the Adivasi communities to their forests. Neither of these rights are meaningful without on-ground efforts to ensure their implementation.

Public schools need to be built and administered, a framework for admission to private schools for children from disadvantaged sections needs to be put in place, and forest rights need to be demarcated on the ground to be meaningful. This is in contrast to the HSAA which vested the right to property for women but required no further implementation action by the states or union to become effective. Implementation of such rights was left to the individual rights holders who had to approach courts as and when needed.

The success or failure of the FRA and RCFCEA, on the other hand, therefore, depends largely on the willingness of the respective state governments to implement such a law.

Unrealised Forest Rights

The FRA was passed in 2006 with the intention of fully realising the rights of the Adivasis to forests—both the material and the cultural aspect.[2] Yet, in 16 years of its existence, only one state is fully implementing the law, though not completely (Barik 2022). In fact, by and large, its implementation seems to have stalled in most states across the country as large numbers of claims remain pending with the concerned state governments or have been rejected.

The rejection and pendency of claims threaten not only to stymie the implementation of the act but also render the rights entirely null and void. In an ill-thought-out and hasty move, the Supreme Court ordered the "eviction" of unsuccessful forest rights claimants (Chandran 2019) only to have to recall its order after mass mobilisation by the Adivasi communities prompted the union government to approach the court seeking a recall (PTI 2019).

For a legislation which is so wide-ranging (as it does affect the rights of hundreds of millions of Adivasis and traditional forest dwellers across the country), the implementation provision of the FRA is surprisingly bare bones. Only one section of the law (Section 6)

provides for the authorities who will take a decision on whether forest rights are to be granted or not, and very little detail is provided on how a claimant is supposed to show that they are entitled to forest rights. This has meant that the states have adopted very different courses of action resulting in exclusion of the genuine claims of Adivasis (Khergamkar 2019).

Minimising the Access to Education

Intended to fulfil the constitutional guarantee of free education to all children between the ages of 6–14 years, the RCFCE Act, among other things, also required private, non-aided schools to admit at least 25% of students from the neighbourhood, belonging to disadvantaged sections of society. This one provision was challenged in court by private schools and though the Supreme Court eventually held that it would not apply to minority institutions (aided or unaided), it was still made applicable to the bulk of private schools.

However, as with the FRA, implementation of the admission mandate in RCFCE has been patchy across the country (Sarin et al 2018), with some states, like Karnataka, even finding ways to almost entirely avoid enforcing this provision (Kumar 2019).

While this is a key and important part of the RCFCE Act, the law itself spends very little time addressing how this provision ought to be implemented and enforced. On the other hand, the RCFCE Act goes into great detail about the infrastructural and personnel needs of schools, which while important, is absurd to fix at a national level in a country as diverse as India. While going in great depth into these matters, which are actually tangential to the core right of free and compulsory education, the RCFCE Act does not sufficiently spell out, in enough detail, how the 25% admission requirement is to be implemented and enforced.

Conclusions

The purpose of the column is not to say that federalism is an impediment to enabling social welfare laws or that states should have no role in realising the rights. For a country as vast and diverse as India, it cannot be another way. Rather, the problem may be in the union government assuming that a one-size-fits-all approach in the context of such legislation works. While the goals of such social welfare legislation—whether it is protection of the rights of the Adivasis to forests or ensuring the children's access to quality education—are unexceptionable and constitutionally sound, what hinders effective implementation of these legislation might be overprescription or under-prescription.

In the case of the RCFCE Act, it is clearly overprescription that has been the problem. While the inclusion of children from disadvantaged backgrounds in neighbourhood schools is certainly a necessary measure, the RCFCE Act gives little guidance on how this ought to be implemented by the state governments. This has also meant that states such as Karnataka have taken questionable routes to implement the RCFCE Act's mandate resulting in a nullifying of this right.

With the FRA, it is the opposite problem. The law, while articulating the rights

aspect very clearly, has little or no guidance for gram sabhas and state governments on the appropriate mechanism for the implementation of the law. States have used vastly different methodologies to grant forest rights resulting in widely different levels of forest claims being accepted or rejected, leaving many in limbo about their status.

The answer does not lie in finding the perfect median between over- and under-prescription—such a median possibly does not exist and is impossible to arrive at since the context of each law is different. Rather, a different approach altogether might be needed—one which sees state governments as equal participants in the lawmaking process, providing crucial inputs in the design and formulation of the law. This does not necessarily need a formal mechanism such as the one adopted for the value added tax or goods and services tax. Rather, the appropriate example may come from the manner in which India held its first elections.

As Ornit Shani (2017) points out, even before the Constitution came into existence, guaranteeing universal adult franchise and even before the election commission came into existence, the secretariat of the Constituent Assembly had made plans to conduct India's first nationwide elections—a necessary precondition for which electoral rolls were drawn up that included every single adult of India. This process was not undertaken unilaterally by the then secretariat but by reaching out to the governments of not only the various provinces but also those of the extant princely states.

These inputs proved invaluable in the eventual exercise of preparing the first electoral rolls. Those officials in the provinces and the princely states who had some experience in conducting elections even during colonial rule had important insights into ensuring inclusion of everyone on the rolls. As Shani points out, officials were made aware of the problems at the local level, such as how to enrol homeless persons, how to address concerns of women who were uncomfortable with giving their names to a stranger, etc, because these were problems they had experienced first-hand before too.

As important as public debate and consultation are for lawmaking, it might be just as important for the effective implementation of laws to take on board the views and concerns of state governments, prior to the law being passed in Parliament. Indian states have not been the passive recipients of ideas about social welfare from the union government but have rather taken the lead in innovating laws, schemes, and administrative measures to ensure compliance. Taking their inputs before passing social welfare laws might not only lead to better implementation, but better laws as well.

NOTES

1 *S R Bommai v Union of India* (1994), 2 SCR 644.
2 *Orissa Mining Corporation v Ministry of Environment and Forests* (2013), 6 SCR 881.

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