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THE NECESSITY OF THE ‘SOCIAL JUSTICE BENCH’ OF THE SUPREME COURT: A FAILED EXPERIMENT?

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I. THE NECESSITY OF THE SOCIAL JUSTICE BENCH OF THE SUPREME COURT: A NOVEL IDEA BUT A FAILED APPROACH?

Within two weeks of Justice Khehar’s tenure as the Chief Justice of India, the ‘Social Justice Bench’ was reintroduced in the Supreme Court and is scheduled to sit every Friday from 2pm onwards. Introduced in the year 2014 by the then CJI, H.L Dattu, the social justice bench was constituted specifically to deal with matters in the realm of ‘social justice’ which were pending in front of the Apex Court.¹ Some of the issues which was considered to be under the ‘purview of social justice’ was: release of surplus food grains for areas affected by drought and famine, frame fresh schemes for public distribution of food grains, taking steps to prevent untimely death of women and children, equality in providing medical facilities, provision of night shelters for the homeless and the destitute, provision of hygienic and clean drinking water etc.² Cases dealing with missing children, human trafficking, police brutality, protecting dignity of women and children are also some examples of ‘social justice’ cases where the Bench has assumed jurisdiction.³

While constituting the social justice bench CJI H.L Dattu was of the opinion that ‘*In the Supreme Court several cases relating to the domain of ‘social justice’ has been pending for several years. The CJI is of the view that these cases shall be given a specialised approach for their early disposal so the masses will realise the fruits of the rights provided to them under the Constitution.*’⁴ The idea behind the judiciary’s intervention to address these issues was undoubtedly a welcome move. A new leaf was turned in the realm of judicial activism and it was expected that the Apex court will be able to exert enough pressure on the Central Government to carry out essential reforms in existing schemes and come up with new schemes. A few achievements of the Bench in this regard is that, it provided for an institutional mechanism for rehabilitation of acid attack victims⁵ and also forced the Centre to effectively utilize the 2% cess

¹ *Social Justice Benches of the Supreme Court*, IAS Point, available at <http://www.gktoday.in/iaspoint/current/social-justice-benches-of-supreme-court-of-india/> last accessed on 1/04/2017

² Ibid.

³ Ibid.

⁴ Dhananjay Mahapatra, *New CJI revives social justice bench*, The Times of India (January 19, 2017), available at <http://timesofindia.indiatimes.com/india/new-cji-revives-social-justice-bench/articleshow/56656590.cms> last accessed on 1/04/2017

⁵ *Laxmi v Union of India* (2014) 4 SCC 427

which it levied on the cost of construction from builders for the betterment and welfare of construction workers and for the education of their children⁶ and due to the opinion delivered by the Apex Court the Rs. 20,000 crore collected by the Centre by way of cess is now being used under the policy of Employees Provident fund Office where all construction workers are necessarily required to register themselves.⁷ Coming to the aid of acid attack victims, the Apex Court vouched for free treatment of such acid attack survivors at private hospitals and urged the Medical council of India to take up this matter at the earliest.⁸ However, inspite of these few achievements, the Social Justice Bench has failed to deliver on many crucial issues and this is evident from the fact that the Bench has failed to dispose of even one case in the one year it functioned.⁹ The essay seeks to study these failures and the reasons behind these failures in depth.

One of the major failures of the Bench is the ineffective handling and the lackadaisical manner in which the bench handled the case of *All India Kashmiri Samaj v UOI*.¹⁰ The case which dealt with evolving a rehabilitation scheme for pundits in Jammu & Kashmir who have migrated from the State so as to facilitate their return was adjourned three times. The Bench also failed to arrive at a conclusion in the case of *State of Tamil Nadu v Union of India*¹¹ which dealt with schemes aiming to protect vulnerable and exploited children. The only question raised by Justice Lokur was although the schemes appeared wonderful and progressive on paper why wasn't it being implemented yet.¹² Another example is the case of *Nisha Bagchi v Union of India*¹³ which dealt with amendment of rules under the Juvenile Justice Act where the counsel for the petitioner brought to the notice of how Rule 12 of the Juvenile Justice Act is *ultra vires* to Sections 68 and 7A of the Act as well as appropriate tests to be laid down for age determination¹⁴ These were critical questions raised by the petitioners however, the Bench could not arrive at a conclusion even after the sixth hearing and therefore, the case was further adjourned. The terms 'social justice' clearly imply a sense of speediness. These are matters of genuine public concern and should be treated as speedily and effectively as possible; the same reason for which this Bench was created in the first place. Speedy trial of such matters was the primary concern with which this Bench was formed however; the Bench failed to deliver on those grounds and cases with significant public importance kept being dragged on In such a situation it is pertinent to ask the question that what is the difference between this 'special Social Justice Bench' and any other Bench of the Supreme Court? And the only answer to that question will be the Social Justice Bench is a specialised Bench established for the purpose of judicial activism but the time taken

⁶ *Supra* note 1

⁷ *Ibid.*

⁸ *Treat Acid attack victims for free: SC to private hospitals*, FirstPost (10th April, 2015), available at <http://www.firstpost.com/india/treat-acid-attack-victims-free-sc-private-hospitals-2192661.html> last accessed on 05/04/2017

⁹ SCOI Report, *7 cases showing why SC's Social Justice Bench has failed to close a single case of social justice*, Legally India (29th August, 2015), available at <http://www.legallyindia.com/supreme-court/7-cases-showing-why-sc-s-social-justice-bench-has-failed-to-close-a-single-case-of-social-justice-20150829-6518> last accessed on 04/04/2017

¹⁰ *Supra* note 1

¹¹ *Supra* note 9

¹² Apurva Vishwanath, *Was the Social Justice Bench of the Supreme Court a failed idea?* Livemint (29th March 2016), available at <http://www.livemint.com/Opinion/HesmpZOsc2rJtCBdi7xnN/Was-the-social-justice-bench-of-the-Supreme-Court-a-failed-i.html> last accessed on 04/04/2017

¹³ *Ibid.*

¹⁴ *Ibid.*

by the this special Bench and any other Bench of the Supreme Court in disposing of cases is practically same. The examples of the number of failures by this Bench kept on increasing with the case of *Sanjeev Panigrahi v Union of India*¹⁵ where the Bench expressed disbelief that the Central government has not given any priority to amending the archaic provisions under The National Policy for Older Persons which is more than 15 years old.¹⁶ The petitioner in the given case argued that unlike the practice in foreign countries, India did not have a social security policy for the aged.¹⁷

In another case where an Indian Express newspaper report was presented before the Bench the Bench called the law enforcement authority in Uttar Pradesh ‘a joke’ but did not issue any directives about how the issue should be dealt with. In the said case it was reported that women cops had put the minor victim of sexual assault behind bars and no witnesses had been examined and also enquired as to whether the witnesses were being intimidated or threatened.¹⁸ Next was the *Prajwala* case where the founder of *Prajwala* foundation, Ms Sunita Krishnan brought to the Court’s notice the hundreds and thousands of sexually explicit videos which were in circulation on the internet as well as via instant messaging apps such as Whatsapp but the Bench failed issue directives as to how this should be dealt with and only agreed to the suggestion that a special Board will be created with officials of Whatsapp Inc., and a solution will be arrived at to stop such menace.¹⁹ Understandably, this was not the order that was desired for. Instead of issuing orders that would enable police officers to catch hold of the culprits, the Court opted for a more lax approach by way of reviews and negotiations. Cybercrimes require speedy action because the victim’s privacy and reputation is at stake and while it is agreeable that reforms are necessary, it is primarily important that the culprits behind such activities are brought to justice. And then there was the *Devadasis* case²⁰ which was again inefficiently handled by the Bench. The case centred on the issue that the funds allotted for rehabilitation of *Devadasis* has been misused and more accountability must be ensured. The case was adjourned²¹. These are a few examples of how the Social Justice Bench though, constituted for a noble cause has failed to deliver and does not really contribute significantly to the cause of ‘social justice’.

A crucial question arises on the grounds that although a special Bench had been constituted for this noble cause, what has been its contribution in improving social justice? Many would say that matters of social justice are time taking and therefore, require constant monitoring especially when multiple functionaries of the Government are involved.²² However, a Bench which was specifically mandated with the task of speedy disposal of social justice cases due to a spurt in public interest litigation had failed to dispose of even one case in the one year of its existence. This raises the question ‘then why constitute a special bench?’ The social justice bench was not the only novel initiative undertaken by the apex Court. Back during CJI Dattu’s tenure a special

¹⁵ *Supra* note 9

¹⁶ *SC nudge to review law for aged*, The Telegraph (28th August, 2015), available at https://www.telegraphindia.com/1150829/jsp/nation/story_39688.jsp#.WPiE00WGPIU last accessed on 05/04/2017

¹⁷ *Ibid.*

¹⁸ *Supra* note 9

¹⁹ *Ibid.*

²⁰ *SL Foundation (through its President) v Union of India*

²¹ *Ibid.*

²² *Supra* note 12

tax bench was constituted which would listen to not only pending tax cases but would also take up new ones and within nine months of its constitution the Court delivered judgments in 170 out of the 192 cases before it and the efficiency of the tax bench which comprised of Justices A.K Sikri and Rohinton Nariman was lauded by legal practitioners throughout the country.²³ However, the social justice bench in spite of being a flawless idea has suffered from that one thing which plagues every Indian court: delays. The nature of cases being heard by the Bench had been pending for way too long and dealt with sensitive matters such as dowry²⁴, protection of women, children and the elderly, inefficient law enforcement and the like but while the Bench kept adjourning these cases, it simultaneously failed in 'securing social justice' as envisioned by Justice Dattu and the Indian Constitution.²⁵ It seems the concept of this Bench was reduced to mere tokenism similar to what happened in the case of *Mahila* Courts in the country. In spite of *Mahila* courts and fast track courts being established in every nook and corner of the country for speedy disposal of rape and sexual assault cases, the rising incidents of crime against women speaks otherwise. It is pertinent that matters of such national importance be dealt with faster and probably with a larger bench so as to invest more authority on its decisions. The plight of the victims should be the primary consideration. Unnecessary delay of justice destroys the goals of social justice and constituting a Special Bench would only make sense if cases can be summarily disposed of and the victims in such cases be offered justice at the earliest. The Bench was dissolved by Justice T. S Thakur but has been revived again by Justice J. S Khehar and only time will tell whether the Bench has served its purpose.

II. THE AFTERMATH OF THE SOCIAL JUSTICE BENCH: A NEW ERA IN JUDICIAL ACTIVISM?

Judicial activism is not a new terminology and Courts across the country had actively intervened in policy decisions of the Legislature and the Executive by declaring them unconstitutional and contrary to the concept of fundamental rights. Judicial activism goes a step further from mere judicial review. Judicial activism intends to issue directives to the other organs of the Government on how policies must be framed and on how they must be implemented. And for a country like India where the Doctrine of Separation of Powers isn't followed in the truest sense of the term, judicial activism has become a refuge to all forms of injustice meted out by the Government; so much so that a special 'social justice bench' had to be constituted. The Judiciary in the last decade has shed its *pro status-quo* approach and has taken upon itself the responsibility of enforcing the rights of Indian citizens and as the days turn into months and months turn into years the judiciary's increasing interference in policy decisions has evinced mixed reactions.

²³ Alok Prasanna Kumar, *The apex court's tax bench experiment*, Livemint (23rd February, 2016), available at <http://www.livemint.com/Politics/EFALB5X66jz0i2KkiE7WeL/The-apex-courts-tax-bench-experiment.html> last accessed on 07/04/2017

²⁴ Ibid.

²⁵ Monalisa and Ashwaq Masoodi, *Supreme Court sets up social justice bench*, Livemint (4th December, 2014), available at <http://www.livemint.com/Politics/vUH4B7kKPH4WcSFbnfhRKP/SC-sets-up-social-justice-bench-to-deal-with-social-issues.html> last accessed on 10/04/2017

Public Interest Litigation had been instrumental in turning a new leaf in the history of judicial activism and took participative justice to a whole new level.²⁶ The social justice bench much like PILs has furthered the goals of judicial activism and as much as the prospect seems to be enriching, it would cause a serious dent to the Doctrine of Separation of Powers. Examining the purposefulness of the Bench, 'social justice' has not really been defined anywhere but impliedly; the Bench was expected to look into matters of social and national relevance which it did.²⁷ However, if the concept of 'social justice' is looked at narrowly it would merely mean *rectification of injustice when it comes to personal relations* however; the problem arises whilst interpreting the terms macrocosmically. 'Social justice' when talked about in the widest sense of the term would mean a complex and dynamic social change which seeks to establish a welfare state and harmonize rival opinions and reconcile individual conduct with that of general welfare.²⁸ And although the SC has not mentioned clearly which form of 'social justice' is being interpreted here, it is quite obvious that the Supreme Court intends to mete out social justice to everyone including the other branches of the Government. One can say the judicial activism has probably gone a little too far when one analyses the official statement by the Supreme Court which says that the Bench may entertain not only fresh cases but also fresh schemes. The judiciary has definitely stepped outside the purview of his jurisdiction here. By assuming the roles played by the legislature and the executive; the social justice bench is a *prima facie* unconstitutional establishment.²⁹

The efforts taken by the apex Court in highlighting major issues plaguing the country is laudable but the Bench by itself is insufficient when it comes to creating a stir. Even where matters of 'social justice' are considered and an interpretation of the Constitution is required, the Bench will be estopped from deciding the case due to the presence of Article 145 (3) which prescribes a minimum number of 5 judges whilst answering substantial questions of law. Then what exactly is the purpose of this Bench? When 'social justice' is vague, what *kind* of social justice exactly does the apex court aim at delivering other than blatant interference. Healthy judicial activism is a welcoming move however; judicial activism which intends to overturn existing Governmental structures is a red flag. The very concept of 'social justice' would mean rendering fairness and unlike other regular Supreme Court benches the Social Justice Bench will be expected to come up with solution (new schemes if I may say so) to every problem presented before it in its quest for providing social justice.³⁰ Furthermore, one should not forget that *equity* is an important aspect to social justice. Both seek to establish an order of fair treatment and justice. The Supreme Court's decision in *Sadhuram Bansal v Pulin Behari Sarkar*³¹, is in stark contrast to what it seeks to achieve via the social justice bench. The Court in the said decision had allowed the petitioners who were originally trespassers to bid for the same land. This is obviously a departure from the

²⁶ Dnayesh Kumar, *Short essay on judicial activism in India*, Preserve Articles, available at <http://www.livemint.com/Politics/vUH4B7kKPH4WcSFbnfhRKP/SC-sets-up-social-justice-bench-to-deal-with-social-issues.html> last accessed on 11/04/2017

²⁷ Vishrut Kansal, *Supreme Court of India Social Justice Bench*, 1 Law, Social Justice and Global Development Journal 2,4 (2015), available at https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2015-1/kansal/lgd_2015_1_kansal_pdf.pdf last accessed on 12/04/2017

²⁸ Ibid.

²⁹ Ibid. at page 7

³⁰ Ibid. at page 8

³¹ [1984] AIR 1471 (SC)

principle of equity which says '*one who seeks equity must come with clean hands*'. Another case where the SC had held that '*a person seeking relief in public interest should approach the court of Equity not only with clean hands but also with a clean mind*' was the case of *Narmada Bachao Andolan v State of Andhra Pradesh*³². The Supreme Court has interpreted equity to be at par with social justice but with the Court's wrongful interpretation of the concept of equity, the fear that social justice would just be used a tool for interference in the affairs of the legislature and the executive is quite conclusive.

As per Granville Austin, the Indian Constitution is first and foremost a social document, a document which is committed to serving the poor, the needy and the oppressed.³³ And even though the concept of social justice Bench was formed to uphold this idea, the powers conferred on the Bench were not sufficient to carry out an important cause as this. Firstly and most importantly, whilst constituting this special Bench the apex Court failed to demarcate its powers and jurisdiction and on the contrary even tried to extend powers of the Bench to legislative and executive functions. The strength of the Bench was limited to only two judges which is grossly insufficient while disposing off cases which deal with erroneous policy implementation. A larger Bench would have been more authoritative in that regard. The Bench also lacked in efficiency as it failed to deliver even one single judgment in the span of one year especially when it was dealing with matters of prime importance which required speedy disposal. And lastly, the Bench failed to exert pressure on the Centre to take initiate reforms hence; even the aim of effective judicial activism was also left unaccomplished. The apex court should certainly seek to establish a more authoritative Special Bench which would deal with critical social issues requiring immediate action. The kind of social justice envisioned by Justice Dattu and the Constitution would be turned into reality with constructive judicial activism and which is within the purview of the Judiciary's functions.

³² [2011] AIR 1989 SC 138

³³ SC has given a dynamic shape to the concept of social justice: Hamid Ansari, LiveLaw.in, available at <http://www.livelaw.in/sc-given-dynamic-shape-concept-social-justice-vice-president-hamid-ansari/> last accessed on 14/04/2017