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Centrally Sponsored Schemes and Centre-state Relations: A Comment

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Abstract

This paper argues that the present structure of Union-State financial transfers is one of the reasons for India's ad hoc, scheme-based welfare structure. Scholars such as Ruparelia (2013) and Tillin et al. (2015) have praised India's attempts to codify some welfare entitlements, such as the right to food and public works, and have argued that there is a need for more robust statutory measures in other areas as well. In this paper, I argue that the push for statutory rights must be seen in light of Union-State financial relations. Many important welfare measures are made by way of tied grants, or Centrally Sponsored Schemes (CSS), under *Article 282* of the Constitution. This is not unconstitutional, and may perhaps even have been intended by the framers of the Constitution. Nevertheless, CSS are an important practical limitation on States' ability to legislate on welfare subjects within their competence and to take on programmes different from those designed by the Union. Further, I argue that there is a need for restructuring the current system of CSS to allow the States greater autonomy in designing welfare programmes, and to enable States to provide stable, statute-based entitlements for social and economic welfare.

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Contents

Introduction.....	1
1. Centrally Sponsored Schemes in the Constitution.....	3
1.1 Overview of Union-State Financial Relations in the Constitution.....	3
1.2 History of <i>Article 282</i> and CSS.....	5
1.2.1 <i>Article 282</i> and Constitutional Issues.....	6
1.2.2 <i>Bhim Singh's Case</i>	8
1.2.3 Post <i>Bhim Singh</i> : Reforming CSS.....	9
1.3 <i>Article 282</i> and the Competence of States.....	10
2. How Statutes Matter: CSS and Legally Enforceable Rights.....	14
2.1 DPSPs and Justiciable Rights.....	14
2.2 CSS and Statutes: The Cases of MGNREGA and NFSA.....	16
3. Making Statutes Work: Some Suggestions.....	20
Conclusion.....	23

Introduction

For the first fifty years of the Indian republic, social and economic welfare was primarily administered through ad hoc measures known as schemes. The Union Government designed and implemented a number of Central Sector Schemes directly, but was also responsible for Centrally Sponsored Schemes (CSS). With CSS, the Union Government would design and fund a programme, which would then be implemented by the States.²

In the early 2000s, there was a shift to “*rights-based welfare*.”³ The Government of India codified several important aspects of social welfare into statutes. These included Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA), the Right of Children to Free and Compulsory Education Act, 2009 (RTEA) and the National Food Security Act, 2013 (NFSA). This was welcomed by the academic community, who described it as a “new social contract” between Indians and the State.⁴

Despite the beginnings of a shift to a statute-based welfare system, ad hoc CSS continue to be an important part of India’s welfare system. Ayushman Bharat⁵ and Swachh Bharat Mission,⁶ which pertain to health and sanitation respectively, are important parts of the Government’s welfare programme. Further, in addition to MGNREGA and the Public Distribution System (PDS) architecture, the National Social Assistance Programme (NSAP) was leveraged to provide relief to beneficiaries during the national lockdown following the outbreak of COVID-19.⁷

These CSS have a curious place in India’s federal setup. The Indian Constitution provides a strict demarcation between the legislative competences of the Union and the States.⁸ Yet, the Union, which also has far greater control over the nation’s finances than the States, plays a leading role in determining welfare priorities for the nation through schemes and budgetary allocations.⁹ CSS are generally designed with respect to subjects

²Bibek Debroy ‘Restructuring of centrally sponsored schemes cannot be done without consultation with States.’ (12 September 2019) *Financial Express*, accessible at: <https://www.financialexpress.com/opinion/centrally-sponsored-schemes-restructuring-cannot-be-done-without-consultation-with-States/1703515/> (Accessed on 29 July 2020).

³Sanjay Ruparelia ‘India’s New Rights Agenda: Genesis, Promises, Risks’ (2013) 86(3) *Pacific Affairs* 569-590

⁴Ibid. See also, James Chiriyankandath, Diego Maiorano, James Manor & Louise Tillin. *The Politics of Poverty Reduction in India: The UPA Government 2004 to 2014*. (Orient Blackswan 2020)

⁵Website of Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana, accessible at: <https://pmjay.gov.in/>, (Accessed on 3 August 2020)

⁶Swachh Bharat Mission, accessible at: <https://swachhbharatmission.gov.in/SBMCMS/index.htm>, (accessed 3 August 2020)

⁷Finance Minister announces Rs 1.70 Lakh Crore relief package under Pradhan Mantri Garib Kalyan Yojana for the poor to help them fight the battle against Corona Virus.’ (26 March 2020) *Press Information Bureau*, accessible at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1608345> (Accessed on 29 July 2020)

⁸Article 246 r/w VII Schedule, Constitution of India, 1949.

⁹Planning Commission of India. ‘1st Five Year Plan.’ (1951), accessible at: <http://planningcommission.nic.in/plans/planrel/fiveyr/1st/1planch4.html> (Accessed on 29 July 2020)

within the State or Concurrent List of the Constitution.¹⁰ In other words, they often pertain to matters that would properly have been left to the States. Meanwhile, there has been limited progress in creating a set of robust, statute-based entitlements for citizens both at the Union and State levels.

In this paper, I examine the reasons for this in light of CSS and the provisions on Union-State relations in the Constitution. I first examine *Article 282*, which is the enabling provision for the Union to make budgetary allocations for CSS, and argue that the Constitution always intended for the Union to make provisions for schemes through budgetary grants. Next, I argue that while CSS are constitutional, they may have a negative effect on States' abilities to determine their own development priorities and to formulate policies in this respect. I reason that there are strong policy reasons for a statute-based welfare system even within the framework of the Constitution. Finally, I look at the working of the MGNREGA and NFSA and propose some conditions to make statute-based welfare workable within the current constitutional framework.

¹⁰Administrative Reforms Commission (ARC), *Report of the Study Team on Centre State Relationships*. (1968), accessible at: <http://14.139.60.153/bitstream/123456789/1707/1/Report%20of%20the%20Study%20Team%20Centre%20State%20Relationships%20Volume-I%2C%20September%201967-DC-4613-pdf.pdf> (Accessed on 20 July 2020)

1. Centrally Sponsored Schemes in the Constitution

1.1 Overview of Union-State Financial Relations in the Constitution

The Constitution provides for a clear demarcation of the legislative competence of the States and the Union. *Article 246* provides that the Union is competent to legislate on matters in the Union List of the Seventh Schedule, and the States may legislate on those in the State List. Both Parliament and the States may legislate on matters in the Concurrent List. Parliament may also legislate on any matter not expressly mentioned in the three lists, by virtue of the residuary powers in *Article 248* and Entry 97 of List I. Any statute enacted without legislative competence is void *ab initio*.¹¹ The Constitution also provides that the executive power of the States¹² and the Union¹³ are co-extensive with their legislative power.

The Constitution also provides a clear demarcation of financial and taxing powers. In addition to the heads of legislative competence, the three lists in the Seventh Schedule set out different taxing powers of the Union and the States. *Article 266* provides for the Consolidated Fund of India and the States, into which public moneys and taxes are deposited. Exceptions to this are set out in *Articles 268* and *269*. *Article 270* provides that taxes and duties collected by the Union are to be distributed between the Union and States, in such proportion as the President may prescribe, based on the recommendations of the Finance Commission. The Finance Commission is set up under *Article 280* of the Constitution. The powers of the Finance Commission include, *inter alia*, determining the distribution of taxes between the Union and the States. The Constitution also provides for grants-in-aid from the Union to the States, based on the needs of individual States for development, in *Article 275*.

These financial provisions must be seen in the broader context of India's federal structure. As several scholars have noted, India is an "asymmetric federation,"¹⁴ where the Union exercises much wider powers than the States. This extends to taxation powers as well — important heads such as income tax,¹⁵ excise duties¹⁶ and corporation tax¹⁷ are in the domain of the Union. The Union is in a much stronger financial position than the States, and hence, the Constitution provides for an elaborate structure for the devolution of funds from the Union to the States. This structure, where the Union has greater control of finances than the States, is borrowed from the Government of India Act, 1935¹⁸

¹¹*State of Gujarat v. Shree Ambica Mills*, AIR 1974 SC 1300.

¹²Article 162, Constitution of India, 1949

¹³Article 73, Constitution of India, 1949.

¹⁴Louise Tillin, 'Asymmetric Federalism' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016).

¹⁵Entry 82, List I, VII Schedule, Constitution of India, 1949.

¹⁶Entry 84, List I, VII Schedule, Constitution of India, 1949.

¹⁷Entry 85, List I, VII Schedule, Constitution of India, 1949.

¹⁸S. 100 r/w VII Schedule, Government of India Act, 1935.

and was approved by the Expert Committee on Financial Relations in the Constituent Assembly.¹⁹

In addition to these provisions, the Union is also empowered to spend moneys directly. This is done by way of budgetary grant under *Article 282*, which carves out a very limited exception to the strict demarcation of legislative competence in *Article 246*. It provides that “*the Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.*” Thus, the Union or the States may make grants to spend moneys, for any public purpose, even if they do not otherwise have the competence to do so.

The remaining funds devolve by way of grants under *Article 282*. From 1950 to 2014, the Planning Commission, a non-statutory body chaired by the Prime Minister, was responsible for making Plan Grants to States.²⁰ These development plans also provided for the States to contribute a portion of the funds for each sector.²¹ Another non-statutory body, the National Development Council, was also set up shortly after the Planning Commission, and also played an important role in designing Central welfare programmes.²² The Planning Commission and National Development Council were wound up in 2014 and replaced by the NITI Aayog, another non-statutory body headed by the Prime Minister.²³

Although the NITI Aayog does not frame Five Year Plans, its role overlaps with that of the Planning Commission insofar as it plays a significant role in the design of CSS.²⁴ In fact, Reddy and Reddy (2019) note that while there is no longer a separate set of normal plan devolutions, there are a significant number of discretionary transfers between the Union and the States.²⁵ Many of these are through CSS, which are schemes designed by the Union but implemented by the States in accordance with the terms of the Union grant.²⁶ Another portion of Union funds devolves by way of Central Sector Schemes, which are designed and implemented by the Union directly in the States.²⁷ These Central Sector Schemes pertain to subjects over which the Union has legislative and executive competence.²⁸

¹⁹Report of the Expert Committee on the Financial Provisions of the Union Constitution.’ (1947 Appendix B to Constituent Assembly Debates, (8 November 1948), accessible at: <http://loksabhaph.nic.in/Debates/cadebatefiles/C04111948.html>

²⁰Nirvikar Singh, ‘Fiscal Federalism,’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016).

²¹Y.V. Reddy and G.V. Reddy, *Indian Fiscal Federalism* (OUP 2019). Part of this was to accommodate the Gadgil Formula, which provided that 30% of all transfers were to be assigned to special category States. Also define major and special category States.

²²Prabhat Patnaik, ‘From the Planning Commission to the NITI Aayog’ (2015) 50(4) *Economic and Political Weekly* 10; Puja Mehra, ‘NDC to be scrapped, NITI Aayog council likely to get its powers’ (1 January 2016) *The Hindu*, accessible at: <https://www.thehindu.com/news/national/NDC-to-be-scrapped-NITI-Aayog-council-likely-to-get-its-powers/article13975094.ece> (Accessed on 4 August 2020)

²³Ibid.

²⁴Singh (n 19).

²⁵Reddy and Reddy (n 20).

²⁶Debroy (n 1)

²⁷Debroy (n 1)

²⁸*Union of India Expenditure Budget 2020-21: Central Sector Schemes*, accessible at: <https://www.indiabudget.gov.in/doc/eb/stat4b.pdf> (Accessed on 4 August 2020)

1.2 History of *Article 282* and CSS

The wording of *Article 282* is almost identical to that of S. 150(2) of the Government of India Act, 1935, which read that “*the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature, as the case may be, may make laws.*” This provision made a significant departure from the Government of India Act, 1919, which disallowed transfers between the Union and the States.²⁹ The Administrative Reforms Commission notes that the first use of the provision was in 1943-44 when federal assistance was provided in response to the Bengal famine.³⁰

While this may have been intended only as an emergency provision in 1935, the framers of the Constitution appear to have taken a different view with respect to the scope of *Article 282*. In 1945, Dr. Ambedkar’s *States and Minorities* suggested that a provision which read “*that the Power of the Central and Provincial Governments to make grants for any purpose, notwithstanding that the purpose is not one for which the Union or State Legislature as the case may be, make laws shall not be abridged taken away*”³¹ be included under the marginal heading, “*Power of Governments to spend money for any purposes connected with Government of India including purposes beneficial to the Minorities.*” The Report of the Expert Committee on Financial Provisions of the Union Constitution, submitted to the Constituent Assembly in 1948, also recognised that “*during the developmental stages of the country it will be necessary for the Centre to make specific purpose grants to the Provinces from time to time,*” in addition to the grants-in-aid recommended by the Finance Commission.³²

This suggests that the provision was not intended to be an exceptional or emergency provision, but to provide an overriding spending power to the State and Union Government. This is also supported by the Constituent Assembly Debates, during which Dr. Ambedkar noted that this provision did not limit the Union’s powers to incur expenditure even outside the scope of List I of the Constitution, and that the legislative competence of the Union and States should not be examined in light of the power to make grants.³³ The only modification here, however, was the words “public purpose” were added in the Draft Constitution³⁴ and retained in *Article 282*.

²⁹ARC (n 9)

³⁰ARC (n 9)

³¹B.R. Ambedkar, *States and Minorities*. (1945), accessible at: https://www.constitutionofindia.net/historical_constitutions/States_and_minorities_dr_b_r_ambedkar_1945_1st%20January%201945, [Article III Section III Clause 4]. (Accessed on 29 July 2020).

³²Expert Committee (n 18).

³³Constituent Assembly Debates (1946-1950), Volume IX, Debates on 31.08.1949:

Dr. BR Ambedkar said

I should also like to draw the attention of the Members of the House to another important article, which is article 262, which is much wider in scope. It says-

“The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws.”

As the House will see, it has a much wider scope. It says that although a subject may not be within List I, nonetheless, Parliament would be free to make a grant.

³⁴Article 262, Draft Constitution of India, 1948.

In any event, *Article 282* was soon used for the implementation of a number of CSS. The Planning Commission, an extra-constitutional body established by executive order in 1950, recommended a number of CSS, which were then implemented by way of grants under *Article 282*. Expenditure for the Hirakud Dam was authorised through a CSS in the First Five Year Plan, even though irrigation is a State subject, as States lacked the resources to embark on similar large-scale projects.³⁵ Subsequently, CSS on areas such as rural irrigation,³⁶ rural employment,³⁷ and food supply³⁸ were put in place through various Five Year Plans.³⁹ While some efforts were made through the 1960s and 70s to reduce and rationalise CSS, a number of new schemes were formulated and introduced through the years.⁴⁰ One study of Union-State fiscal transfers found that nearly three-fifths of transfers were made outside the scope of Financial Commission awards, and up to 35% of Central Plan Assistance for States was made by way of CSS.⁴¹ By the end of the Eleventh Plan, 41.65% of the Union's Gross Budgetary Support to States was routed through 155 CSS,⁴² meaning that a considerable share of the Union's resources were spent on subjects properly within the domain of States.⁴³

1.2.1 *Article 282* and Constitutional Issues

The use of *Article 282* to provide grants to States has generated considerable controversy over the years. In 1965, in his Minute to the Report of the Fourth Finance Commission, Justice P.V. Rajamannar observed that the wording of *Article 282* required that any grant to a State by the Union would need to be for a specific public purpose.⁴⁴ They could not be used for general-purpose grants.

Later criticisms of CSS stemmed from the outsize role of the Planning Commission, which was not contemplated in the Constitution. In 1990, H.K. Paranjape argued that while

³⁵Planning Commission of India. 1st Five Year Plan. (1951), accessible at: <http://planningcommission.nic.in/plans/planrel/fiveyr/1st/1planch4.html> (Accessed on 27 July 2020).

³⁶National Commission to Review the Working of the Constitution, A Consultation Paper on Social Security and Employment. (2001), accessible at: <http://legalaffairs.gov.in/sites/default/files/%28IV%29Social%20Security%20and%20Employment.pdf> (Accessed on 27 July 2020). National Watershed Development Project for Rainfed Areas (NWDPA) was a 100% Centrally Sponsored Programme introduced in 1990.

³⁷NCRWC 2001 (n 35). A number of programmes were introduced for this: Rural Man Power Programme in 1960; Feed For Work (FWP)- (1977); National Rural Employment Programme(NREP) -1980; Jawahar Rozgar Yojana (JRY) 1989; Employment Assurance Scheme (EAS) 1993. These were integrated into MGNREGA in 2005

³⁸NCRWGMGNREGAC 2001 in(n 2005.35). PDS was launched in 1950.

³⁹NCRWC 2001(n 35).

⁴⁰Report of the Committee on Restructuring Centrally Sponsored Schemes (Chaturvedi Committee) (2011), accessible at: http://planningcommission.nic.in/reports/genrep/css/rep_css1710.pdf. (Accessed on 20 July 2020). The Chaturvedi Committee Report refers to reports of the National Development Council. See also Reddy and Reddy (n 20).

⁴¹I.S. Gulati & K.K. George, 'Centre-State Resource Transfers, 1951-84: An Appraisal' (1985) 20(7) Economic and Political Weekly 287-295.

⁴²Chaturvedi Committee (n 39).

⁴³S.C. Garg, 'Transformation of Central Grants to States: Growing Conditionality and Bypassing State Budgets' (2006) 41(48) Economic and Political Weekly 4977-4984. Garg calculates the share of central resources at about 50% of all transfers to States.

⁴⁴Justice P.V. Rajamannar, Minute to the Report of the Fourth Finance Commission, accessible at: <https://fincomindia.nic.in/ShowContent.aspx?uid1=3&uid2=0&uid3=0&uid4=0> (Accessed on 10 July 2020) ["Rajamannar Minute"]

“Article 282 confers on the Union or a State a spending power without conferring legislative power,”⁴⁵ in practice, the Planning Commission took on a central role in determining development priorities of States, even on matters properly within the State list.⁴⁶ Concerns were also raised that the excessive reliance on ad hoc grants artificially limited the role of the Finance Commission set up under *Article 280*.⁴⁷ In the same year, in an opinion to the Ninth Finance Commission, the jurist N.A. Palkhivala submitted that *Article 282* was intended only to be used as a residuary provision, and that the distribution of grants to States ought properly to be determined by the Finance Commission under *Article 275*.⁴⁸ Likewise, K. K. Venugopal reasoned that the proviso to *Article 275* could not be used to restrict its scope, and that the language of *Article 275* was wide enough to contemplate all ordinary transfers between the Union and the States — including those covered by CSS. Such grants should, therefore, be made based on the recommendations of the Finance Commission under *Article 280*.

Many others have taken a contrary view with respect to the constitutionality of transfers under *Article 282*. In 1968, the Administrative Reforms Commission (ARC) noted that the reliance on *Article 282* for making grants for CSS “*though not unconstitutional, is not neat*.”⁴⁹ In doing so, the Commission noted that the framers of the Constitution had anticipated that large, specific-purpose grants would need to be made for the development of the States. The ARC’s objection was not to the use of CSS as a tool for development, but the extent to which they were used. CSS had allowed the Union to take on the role of deciding State-level development priorities — meaning that States did not always have the resources available to spend on development projects that they found important. This has implications on how States access and utilise funds under grants for CSS - as Commission noted, States displayed “*an unhealthy desire to spend the money to earn the assistance rather than to see that the money is well spent*.”⁵⁰ One of the key recommendations of the report is that CSS be confined to areas of national importance only. States must have the discretion to determine the allocation of resources on most development issues within their jurisdiction.⁵¹ Subsequent reports on Union-State relations, such as the Sarkaria Commission Report,⁵² and the Puncchi Commission Report⁵³ have also reasoned that the use of *Article 282* for transfers from the Union to the States is not unconstitutional.

⁴⁵Rajamannar Minute, [92].

⁴⁶H. K. Paranjape, ‘Planning Commission as a Constitutional Body.’ (1990) *Economic and Political Weekly*, 25(45), 2479-2481.

⁴⁷M. Govinda Rao, ‘A Review of Indian Fiscal Federalism’ in *Report of the Commission on Centre-State Relations Supplementary Volume II: Research Studies*, accessible at: http://interStateCouncil.nic.in/wp-content/uploads/2015/06/Suppl_VolII_Research_Studies.pdf (Accessed on 4 August 2020) Govinda Rao traces this to restricting the role of the FC to non-plan grants.

⁴⁸Cited from Second Report of the Ninth Finance Commission for 1990-1995 (1989): accessible at: https://archive.org/stream/dli.csl.212/212_djvu.txt (Accessed on 27 July 2020) at [26]

⁴⁹ARC (n 9), 74.

⁵⁰ARC (n 9), 128-129.

⁵¹ARC (n 9).

⁵²*Report of the Commission on Centre-State Relations (Sarkaria Commission)* (1989), accessible at: <http://interStateCouncil.nic.in/report-of-the-sarkaria-commission/> (Accessed on 4 August 2020).

⁵³*Report of the Commission on Centre-State Relations (Puncchi Commission)* (2010), accessible at: <http://interStateCouncil.nic.in/report-of-the-commission-on-centre-State-relations/> (Accessed on 4 August 2020).

1.2.2 *Bhim Singh's Case*

Many questions pertaining to the use of *Article 282* by the Union were settled by *Bhim Singh v. Union of India*⁵⁴ in 2010, where the Supreme Court examined the constitutionality of the Members of Parliament Local Area Development Scheme (MPLADS).⁵⁵ This scheme provided Members of Parliament (MPs) with grants to use for creating durable assets in their constituencies. It was challenged on the grounds that the wording of *Article 282* only provided the power to make grants in exceptional situations for well-defined public purposes, and could not be used for broad grant-making powers. To do so would effectively amount to encroachment into subjects properly within the competence of States. The Court disagreed with this and reasoned that it would be improper to place limitations on the interpretation of *Article 282*, and that it should be given the widest possible construction. In other words, “*Article 282 is normally meant for special, temporary or ad hoc schemes. However, the matter of expenditure for a “public purpose,” is subject to fulfilment of the constitutional requirements. The power under Article 282 to sanction grant[s] is not restricted.*”⁵⁶ Consequently, the term “public purpose” was to receive a wide interpretation and would extend even to purposes that had not yet been determined, such as in MPLADS.

The Court also made two important observations with respect to the Government’s exercise of power under *Article 282*. *Bhim Singh* relied on *Ram Jawaya Kapur*⁵⁷ to hold that the term “law” in *Article 282* would include Appropriation Acts, which are legislations passed solely to authorise expenditure from the Consolidated Fund.⁵⁸ An Appropriation Act to authorise grants for a public purpose — whether or not the subject is one over which Parliament has competence — is sufficient to authorise a grant. Further, like many other welfare schemes, MPLADS was in furtherance of the Directive Principles of State Policy, and this was sufficient to satisfy the requirements of a public purpose.

Finally, the Court rejected the view that the scheme lacked any accountability structure. In the specific facts of MPLADS, there were limits on the scope of work that may be undertaken by MPs and a requirement that MPLADS must be implemented through the Panchayati Raj institutions wherever possible. There was also a provision to provide information on the works and the expenditure for them. The Court noted that this was an adequate accountability mechanism, and further, that “*when a regime of accountability is available within the Scheme, it is not proper for the Court to strike it down, unless it violates any constitutional principle.*”⁵⁹ In other words, it was enough that there was some degree of oversight by the public, even if there was no separate dispute resolution system envisaged in the scheme.

It is submitted that the decision in *Bhim Singh* is correct. The words of the Constitution do not place a limit on the use of *Article 282* by either the Union or the States. In fact, unlike the provisions of *Articles 270 to 281*, which only contemplate one-way transfers by the Union to the States, *Article 282* provides for grants by both the Union and the

⁵⁴*Bhim Singh v. Union of India* (2010)5 SCC 538

⁵⁵*Bhim Singh* (n 53) at ¶76(3)

⁵⁶*Bhim Singh* (n 53) at ¶76. Emphasis added

⁵⁷*Rai Sahib Ram Jawaya Kapur vs. State of Punjab*, (1955) 2 SCR 225.

⁵⁸Article 204 r/w Article 266(3), Constitution of India, 1949.

⁵⁹*Bhim Singh* (n 53) at 76

States. This implies that the limits in *Articles 270* and *275* may not be applicable here. Moreover, while the language of *Article 275* does not *restrict* the scope of grants-in-aid in any manner, as K.K. Venugopal has argued,⁶⁰ there are also no limitations on the power of the Union or the States under *Article 282*. It is submitted that a proper reading of *Articles 282* and *275* together must not restrict the scope of either provision. This means that the Union has the discretion to make grants to the States under either provision.

Bhim Singh effectively opened the way for CSS to be used for a wide range of development activities, by way of a grant under *Article 282*. Subsequent decisions have upheld the view that the Government has wide discretion to determine the “public purposes” for which to make grants under this provision, and that the Court would not interfere with this decision.⁶¹ It is important to note, however, that *Article 282* only confers a power to “incur expenditure”⁶² and not to carry out legislative or executive acts. Thus, while the Union can make grants by CSS, the implementation of these schemes properly falls within the competences of the States. This is, in turn, has consequences for States’ ability to allocate resources within their jurisdictions, as is explored in Section 1.3.

1.2.3 Post *Bhim Singh*: Reforming CSS

Some attempts were made to rationalise the CSS system after *Bhim Singh*. In 2011, the Chaturvedi Committee report recommended that the number of CSS in operation be reduced, and 20% of funds for CSS be treated as “flexi funds” to be used at the State’s discretion.⁶³ One reason for this was that the 9 flagship schemes,⁶⁴ on important areas such as employment and health, received nearly 75% of the total allocation on CSS, while many other schemes received too few funds to carry out any meaningful activity.⁶⁵ Likewise, the Fourteenth Finance Commission recognised that States had experienced difficulties with meeting the State contribution to CSS and had recommended that a greater proportion of Union funds be devolved as untied grants.⁶⁶ It has also been recommended that CSS be classified into “core of core,” “core” and “optional” schemes, to allow States to determine which Union schemes are appropriate for the State to implement.⁶⁷

⁶⁰Roundtable Discussion on Legal Issues’ in National Institute of Public Finance and Policy ed., *The Ninth Finance Commission: Issues and Recommendations* (NIPFP 1993), accessible at: https://nipfp.org.in/media/pdf/books/BK_35/The%20Ninth%20Finance%20Commission%20Issues%20And%20Recommendations.pdf (Accessed on 4 August 2020) 207, 209.

⁶¹In *Subramaniam Balaji v. State of Tamil Nadu* (2013) 9 SCC 659, the Supreme Court upheld constitutionality of a State government programme providing free home appliances on the grounds that the term “public purpose” in *Article 282* was wide enough to contemplate this.

⁶²*Bhim Singh* (n 53) at 76.

⁶³Chaturvedi Committee (n 39)

⁶⁴The Chaturvedi Committee (n 39) lists the following MGNREGA, Indira Awas Yojana; PM Gram Sadak Yojana; National Rural Health Mission; Integrated Child Development Scheme; Total Sanitation Campaign; Sarva Shiksha Abhiyan and Rajiv Gandhi Drinking Water Programme.

⁶⁵Chaturvedi Committee (n 39)

⁶⁶Report of the Fourteenth Finance Commission (2015), accessible at: https://www.thehinducentre.com/multimedia/archive/02321/14th_Finance_Commi_2321247a.pdf (Accessed on 4 August 2020).

⁶⁷NITI Aayog. Report of the Sub Group of Chief Ministers on the Rationalisation of Centrally Sponsored Schemes. (2015), accessible at: <https://niti.gov.in/sites/default/files/2019-08/Final%20Report%20of%20the%20Sub-Group%20submitter%20to%20PM.pdf> (Accessed on 20 July 2020)

Following the recommendations of the Fourteenth Finance Commission, the Union increased the proportion of transfers to States under the divisible pool of taxes to 42% and reduced the component of CSS. This, coupled with the introduction of “flexi-funds,” has allowed States greater discretion in defining priorities for governance.⁶⁸

While there have been attempts to rationalise CSS and to limit the number of schemes in operation, CSS still form an important part of India’s development agenda. There are a total of 30 CSS in operation as of 2020-21.⁶⁹ About 27% of the total transfers to States in the Union Budget for 2020-2021 — over INR 33 lakh crores — were for CSS.⁷⁰ In 2018, the Ministry of Finance stated that the budgetary allocation for CSS has increased by 40% from Rs. 2,03,740 crores in 2015-16 to Rs. 3,05,517 crores in 2018-19.⁷¹

1.3 *Article 282* and the Competence of States

CSS do not place any legal limits on the power of the States. CSS are not ordinarily made by statute, and would therefore not be subject to the limitations in *Article 254* of the Constitution. In *Ram Jawaya Kapur*, the Supreme Court made the following observations with respect to the expenditure of funds under *Article 282*:

The expression “law” here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in, the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised.⁷²

In other words, as far as CSS are concerned, the scope of Parliament’s power with respect to *Article 282* is *only* to authorise expenditure. It does not have competence to legislate on the subject matter of the scheme, and therefore, the scope of an Appropriation Act is only with respect to the expenditure and not the content of the scheme. Where a CSS pertains to a subject in the State List, the Appropriation Act authorising expenditure on the scheme cannot be a limit on the State’s competence to legislate on the same subject.

This becomes more complex with a subject in the Concurrent List, over which the Union and the States both have competence. However, here too, the Appropriation Act only authorises expenditure, and not the scheme itself. Further, when a State implements a CSS, it exercises its executive power. The Union’s executive power does not come in to

⁶⁸Accountability Initiative The Future of Centre-State Relations for Social Sector Programmes: A Discussion Note (2015), accessible at: http://accountabilityindia.in/sites/default/files/ai_discussion_note_jaipur_workshop_2015.pdf (Accessed on 20 July 2020).

⁶⁹Lok Sabha Unstarred Question No. 1872 (07.03.2018), accessible at: <http://164.100.24.220/loksabhaquestions/annex/14/AU1872.pdf> (Accessed on 4 August 2020).

⁷⁰Author’s calculations based on Union Budget 2020-21. See Union Budget 2020-21: Expenditure Profile, accessible at: https://www.indiabudget.gov.in/expenditure_profile.php (Accessed on 5 August 2020).

⁷¹Lok Sabha Unstarred Question No. 2981 (28 December 2018), accessible at: <http://164.100.24.220/loksabhaquestions/annex/16/AU2981.pdf> (Accessed on 5 August 2020)

⁷²*Ram Jawaya Kapur* (n 56), ¶18

play. In the absence of specific legislation or executive order, there would be no bar on the State's power under *Article 254* or the proviso to *Article 162*.

It is also submitted that even if Parliament does enact legislation on any aspect of social or economic welfare, this does not act as a complete bar on the State's powers. *Article 254* provides that State legislation is only void to the extent that it is *repugnant* to Parliamentary legislation. In other words, a State may legislate on the same subject as Parliament, provided that it is not repugnant to it, but only incidental.⁷³ With respect to beneficial legislation pertaining to social welfare, such as NFSA or MGNREGA, it is submitted that States are not barred from providing additional benefits to those in their jurisdiction as this would not amount to repugnancy.⁷⁴

However, restricted grants, such as those under a CSS, can have other practical consequences for States. Tied grants by Parliament for the implementation of CSS are often rigid and inflexible, with little scope for the State to devise policies to suit their needs. States have argued that while CSS can promote a national vision for development, the rigid and inflexible nature of the grants often means that States cannot undertake expenditure to suit their specific needs.⁷⁵ This is particularly problematic when the grants stipulate the micro-level aspects of individual schemes, which may not be appropriate for all States.⁷⁶ Accepting a tied grant from the Union effectively means that States lose their discretion with respect to the implementation of the scheme.

These difficulties are compounded by the structure in place to receive Union funding for individual schemes. As noted above, States are in a much weaker financial position than the Union and depend on Union grants to fund many of their development programmes.⁷⁷ However, Parliament's legislative power under *Article 282* is purely discretionary, and limited only to the power to spend. Grants under *Article 282* need not be backed by specific legislation - it is enough for each grant under *Article 282* to be approved by way of an Appropriation Act,⁷⁸ which only approves expenditure based on each demand.⁷⁹ The quantum of each grant may vary from year to year, depending on the Union's priorities.⁸⁰ Since Parliament's competence is confined only to making grants for expenditure, and

⁷³*Fatehchand Himmatlal vs State of Maharashtra*, AIR 1977 SC 1825.

⁷⁴For instance, most States supplement the Union contribution to pensions under the National Social Assistance Programme. Union contributions towards the National Old Age Pension Scheme, for instance are only Rs. 200 for those between 65 and 80 and Rs. 500 to those over 80, per person, per month. See Aparajita Singh & Nishanth Kumar, 'The State of Social Pensions in India' (23 July 2019) *Dvara Research Blog*, accessible at: <https://www.dvara.com/blog/2019/07/23/the-State-of-social-pensions-in-india/> (Accessed on 4 August 2020).

⁷⁵NITI Aayog, (n 66).

⁷⁶Yamini Aiyar, 'The Future of Centrally Sponsored Schemes (CSS) in the New Era of Devolution' (19 August 2016) *The Accountability Initiative Blog* accessible at: <https://accountabilityindia.in/blog/5-the-future-of-centrally-sponsored-schemes-css-in-the-new-era-of-devolution/> (Accessed on 27 July 2020); Yamini Aiyar, 'What has changed for Centrally Sponsored Schemes (CSS) in 2015 — 16?' (10 August 2016) *The Accountability Initiative Blog*, accessible at: <https://accountabilityindia.in/blog/2-what-has-changed-for-centrally-sponsored-schemes-css-in-2015-16/> (Accessed on 27 July 2020).

⁷⁷Reddy and Reddy (n 20).

⁷⁸*Bhim Singh* (n 53).

⁷⁹Article 114 r/w Article 266, Constitution of India, 1949.

⁸⁰The Budget Briefs by Accountability Initiative highlight changes in allocation and utilization of scheme funds from year to year. Accountability Initiative, *Budget Briefs* (2006 onwards), accessible at: <https://accountabilityindia.in/budget-briefs/> (Accessed on 27 July 2020).

not to making policy on matters in the State List, it cannot create rights in favour of citizens through these grants. That power is conferred only on States who may implement schemes through State-level executive orders. This amounts to an exercise of the power of States under *Article 162*.⁸¹ *Article 162* imposes an embargo on the Union's power to act in respect of areas properly within the domain of States, and the effect of *Article 282* is only to lift the embargo in respect of grants for public purposes.⁸² In sum, a CSS effectively requires the State to exercise its executive power to a very limited degree (i.e., implementing each scheme).

When States do frame executive orders to implement CSS, with well-defined entitlements in favour of citizens, their ability to implement these schemes is limited by the quantum of the grant received from the Union. In effect, the States' power under *Article 162* is subject to the Union's exercise of its discretionary spending power under *Article 282*.⁸³ In other words, when the State runs out of funds for a scheme, it is unclear whether a person who fails to receive the benefits has any remedy in law. This means that at least as far as the availability of resources to implement a programme is concerned, the State's power to create valid entitlements becomes *conditional* on Parliament's discretion to make grants, while Parliament is not bound to exercise these powers in any particular way from year to year. In fact, the Government of Tamil Nadu raised this concern in its memorandum to the Fourth Finance Commission, where it noted that *Article 282* should not “*be overworked so as to become the more important instrument of financial assistance to the States and thus permit the centre to assume control even over subjects which are solely within the competence of the States.*”⁸⁴

It may also be argued that Parliament has an incentive to only provide for schemes directed at short-term measures, rather than to provide for systemic change.⁸⁵ Writing in 2010, M. Govinda Rao noted that there had been a serious rise in the number of fresh transfers, and fewer maintenance transfers. This meant that schemes created were not always followed through.⁸⁶ Deshpande et al. (2017) have found that scheme-based relief measures can play an important role in deciding electoral outcomes.⁸⁷ This, in turn, may mean that there are incentives to provide for short-term schemes close to elections, and to modify schemes based on which party is in power.⁸⁸

⁸¹Order dated 28 February 2011 in *D. Ramanathan v District Collector*, W.P.No.45950 of 2006 on the file of the High Court of Madras, retrieved from accessible at: <https://indiankanoon.org/doc/1713084/> (Accessed on 27 July 2020)

⁸²Justice Qureshi, ‘Minute of Dissent’ in *Second Report of the Ninth Finance Commission for 990-1995 (1989)* accessible at: https://archive.org/stream/dli.csl.212/212_djvu.txt at [47]; B.P.R. Vithal, ‘Role of Articles 275 and 282 in Federal Fiscal Transfers’ (1997) 32(28) *Economic and Political Weekly* at 1689-1691

⁸³Article 162(2), Constitution of India, 1949.

⁸⁴Cf. Singh (n 19), 537.

⁸⁵In particular, the Puncchi Commission report observed that both the Union and the States should evaluate the “*opportunity cost of populist measures*” in providing grants under *Article 282*. Puncchi Commission (n 52), [11]

⁸⁶Govinda Rao (n 46).

⁸⁷Rajeshwari Deshpande, Louise Tillin, & K.K. Kailash, ‘The BJP’s Welfare Schemes: Did They Make a Difference in the 2019 Elections?’ (2019) 7(2) *Studies in Indian Politics*

⁸⁸For example, recently, the National Pension Scheme was replaced by the Atal Pension Yojana with the change in government. See, Vishnu Prasad & Anand Sahasranamam, *An Initial Analysis of Atal Pension Yojana (9 March 2015) Dvara Blog*, accessible at: <https://www.dvara.com/blog/2015/03/09/an-initial-analysis-of-the-atal-pension-yojana/> (Accessed on 4 August 2020).

Moreover, the basis on which funds are released is also problematic. States play a crucial role in implementing CSS. Since the implementation of CSS is left to the States, there is considerable variation in how programmes are implemented, and State-level infrastructure and implementation can determine the success or failure of a programme.⁸⁹ States also have the power to implement schemes based on their own resources or from untied grants from the Union — many schemes require some contribution from the State for various components.⁹⁰ However, the quantum of a Union grant to a State is not determined by the shortfall to provide all the services in a scheme to all eligible beneficiaries, but by the incremental increase in expenditure as determined by the State itself.⁹¹ In his report to the NITI Aayog, M. Govinda Rao noted that the grants to States do not depend on the total expenditure required for services that ought to be provided, or the total amount needed to provide them, but only on the basis of expenditure actually incurred by the States in the previous year.⁹² This, coupled with rampant delays in the release of grants by the Union, means that States are rarely able to make the best use of resources devolved by way of CSS.⁹³

In sum, the Union's financial control over resources, and the devolution of resources through CSS, provide an important practical limitation on States' powers to legislate or make laws in respect of many matters within their legislative competence. The next section examines why this is problematic in terms of citizen's legal rights and the Government's accountability to citizens.

⁸⁹See Rajeshwari Deshpande, Louise Tillin, & K.K. Kailash. 'States as laboratories: The politics of social welfare policies in India.' (2017) 16(1) 85—105 . See also Louise Tillin, Anupama Saxena & Yatindra Singh Sisodia, 'Comparing the Politics of Food Subsidies in Chhattisgarh and Madhya Pradesh' in Louise Tillin, Rajeshwari Deshpande & K.K. Kailash, eds., *Politics of Welfare: Comparisons Across Indian States* (OUP 2015).

⁹⁰Chaturvedi Committee Report (n 39); Avani Kapur, (2019) 'Centre gives a lot of money to States for social welfare. A good policy, but only on paper' (25 June 2019). The Print accessible at: <https://theprint.in/opinion/centre-gives-a-lot-of-money-to-States-for-social-welfare-a-good-policy-but-only-on-paper/253685/>

⁹¹M. Govinda Rao, *Central Transfers to States in India: Rewarding Performance While Ensuring Equity: Report submitted to NITI Aayog* (2017). Accessible at: https://niti.gov.in/writereaddata/files/document_publication/Final%20Report_25Sept_2017.pdf (Accessed on 27 July 2020) ["Govinda Rao 2017"]

⁹²See Govinda Rao (n 90); Aiyar 2016 (n 75).

⁹³Govinda Rao (n 90); Accountability Initiative (n 79) In a presentation on 30.08.2019, Accountability Initiative observed that the release of central funds also depended on the proportionate release of State funds. States with fewer resources were unable to spend funds to receive a central grant, creating a vicious cycle. Accountability Initiative, 'Centrally Sponsored Schemes: An Instrument for Financing Development' (30 August 2019) Presentation Made at the Centre for Policy Research, New Delhi.

2. How Statutes Matter: CSS and Legally Enforceable Rights

2.1 DPSPs and Justiciable Rights

As the Supreme Court noted in *Bhim Singh*, many CSS pertain to various Directive Principles of State Policy set out in Part IV to the Constitution. These Directive Principles are not justiciable, but must form the basis of laws made by the State, subject to its economic capacity.⁹⁴

It is submitted that the proper tool by which to give effect to the Directive Principles is legislation. A statute may be passed by Parliament or by the State legislature only in accordance with the provisions of the Constitution.⁹⁵ This involves extensive debate on the floor of the house and even, possibly, comments from the public.⁹⁶ Once enacted, a statute can only be amended by way of the same legislative procedure.⁹⁷ By contrast, a scheme can be passed by way of an order passed by the executive, and withdrawn or modified without consultation by the legislature. This, in turn, means that they are subject to change at short notice. Floor level economic and social rights, such as the provision for food security or health, are crucial matters of State policy, and must be subjected to extensive scrutiny by the elected representatives of the people.

However, as I have argued above, financial control over CSS by the Union places a practical limit on States' powers to enact legislation in this regard. State legislatures are therefore constrained from discussing policies in respect of specific areas already covered by CSS. For the most part, these schemes are framed by the Union executive — legislative oversight is often restricted to the Appropriation Act.⁹⁸ This is problematic; the framers of the Constitution had intended the Directive Principles to guide legislatures, and these legislatures to be accountable to the electorate.⁹⁹ When crucial socio-economic welfare measures are effectively made by the Union executive, rather than by elected representatives in the legislature, citizens are deprived of an important measure of accountability in policymaking.

One argument that is often made is that citizens do have recourse before the Courts. Indian Courts have often stepped in and have provided an expansive reading of economic and social rights to citizens.¹⁰⁰ The Supreme Court has taken a wide view of the right to

⁹⁴Article 37 r/w Article 41, Constitution of India, 1949.

⁹⁵Article 107, Constitution of India, 1949.

⁹⁶Ministry of Parliamentary 'Manual of Parliamentary Procedures in the Government of India,' (2018) accessible at: https://mpa.gov.in/sites/default/files/Manual2018_0.pdf (Accessed on 27 July 2020)

⁹⁷Article 107, Constitution of India, 1949.

⁹⁸*Bhim Singh* (n 53); *Ram Jawaya Kapur* (n 56).

⁹⁹Constituent Assembly Debates, 19 November 1948, (2018) Accessible at:https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-19 (Accessed on 27 July 2020). See also Gautam Bhatia, 'Directive Principles of State Policy' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016).

¹⁰⁰Jayna Kothari, 'A Social Rights Model for Social Security: Learnings from India,' (2014) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 47(1), 5-21

life under *Article 21*, and has read rights to food,¹⁰¹ health,¹⁰² shelter¹⁰³ and pensions in old age,¹⁰⁴ into the right to life.

It is submitted, however, that the wide reading of *Article 21*, and the availability of a judicial remedy before the writ Courts is not a substitute for legislation on social and economic welfare. For one, although Courts have held that budgetary constraints would not be a ground for the State not to perform its duty where there is a clear statutory right involved, they have hesitated to impose a positive duty on the state to spend funds to frame new policies. In *Municipal Council Ratlam v. Vardichand*,¹⁰⁵ the Supreme Court rejected the view that budgetary constraints could excuse a civic body from performing its duties under an Act, noting that “*otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget*”.¹⁰⁶ Subsequent cases have upheld this view, noting that the State cannot escape its constitutional obligations to provide legal aid to an indigent accused¹⁰⁷ or to provide urgent life-saving medical care under an existing Government provision¹⁰⁸ by claiming a lack of funds. In sum, where the Government provides for a clear right in a law that it has validly enacted, it cannot claim that it lacks the money to provide it to citizens.

However, Courts have hesitated to impose a positive duty on the State to frame policies in a particular way, and have deferred to the State’s assessment of its economic capacity. *Article 41* makes an express reference to the “*limits of [the State’s] economic capacity and development*” with reference to the duty to provide public assistance and securing the right to work. The State’s economic capacity would, therefore, determine the content of social and economic rights to which citizens are entitled.¹⁰⁹ Thus, the State’s duties to provide universal education¹¹⁰ and adequate pensions for destitute seniors¹¹¹ are both subject to its capacity to provide adequate resources for any fresh scheme.¹¹²

Some scholars have criticised this on the grounds that the Supreme Court has made social rights “conditional” on State action,¹¹³ and have failed to provide a minimum core of social and economic rights.¹¹⁴ It is submitted that this criticism is perhaps misplaced. The

¹⁰¹Order dated 3 July 2001 in *People’s Union of Civil Liberties (PUCL) v. Union of India*, in W.P. (Civil) No. 196 / 2001 on the file of the Supreme Court of India.

¹⁰²*Vincent Panikurlangara v Union of India*, AIR 1987 SC 990

¹⁰³*Chameli Singh v State of Uttar Pradesh*, (1996) 2 SCC 549

¹⁰⁴*Ashwani Kumar v Union of India*, (2019) 2 SCC 636

¹⁰⁵*Municipal Council Ratlam v. Vardichand* (1980) 4 SCC 162

¹⁰⁶*Ibid.*, ¶12

¹⁰⁷*Khatris v State of Bihar*, (1981)1 SCC 627

¹⁰⁸*Paschim Banga Khet Mazdoor Samity v State of West Bengal*, (1996) 4 SCC 37

¹⁰⁹*J.P. Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178

¹¹⁰*Ibid.*

¹¹¹*Ashwani Kumar* (n 103).

¹¹²It is noted that Article 21A, which makes the right to school level education has been made a fundamental right was inserted in 2002, vide the Eighty-Sixth (Constitution) Amendment Act, 2002.

¹¹³Madhav Khosla, ‘Making social rights conditional: Lessons from India.’ (2010) 8(4) *International Journal of Constitutional Law*, 739—765

¹¹⁴Ruparelia (n 2). See also, Yamini Aiyar & Michael Walton ‘Rights, Accountability and Citizenship: Examining India’s Emerging Welfare State’ (2014). *Accountability Initiative Working Paper Series Accessible at: http://www.accountabilityindia.in/sites/default/files/rights_based_welfare_State_aiyar_walton.pdf* (Accessed on 27 July 2020).

Supreme Court has rightly observed that providing social and economic benefits involves considering a number of factors beyond the economic capacity of the State. These may include a decision on the types of benefits provided, the manner in which these will be disbursed, and an assessment of the quantum of benefits available. These are matters best left to the appropriate legislature, and not the Courts.¹¹⁵ In fact, specifically with respect to *Article 282*, the High Courts of Bombay,¹¹⁶ Orissa,¹¹⁷ and Karnataka¹¹⁸ have all held that the Government's expenditure under *Article 282* could not be challenged in Court on the grounds that it was used for an inappropriate public purpose. The only forum to do this was the floor of the legislature.¹¹⁹

What does this mean for citizens? Even where a welfare scheme does not provide for a separate accountability mechanism,¹²⁰ citizens may still have a general right to seek enforcement of a programme in the Civil Courts¹²¹ or in the writ Court,¹²² subject to the limitations discussed in this paper. However, the Courts cannot address questions of the adequacy or wisdom of a Government measure, or indeed, the wisdom of the public purpose mentioned in a grant under *Article 282*. These decisions are best left to the legislature, where the merits of a particular welfare measure can be examined from several perspectives, and the views of the public can be factored in.

2.2 CSS and Statutes: The Cases of MGNREGA and NFSA

At this stage, it is useful to make a comparison between ad hoc schemes and two statutes enacted by the Union guaranteeing specific social and economic rights. In what was described as a “new social contract” between citizens and the State,¹²³ Parliament enacted a series of legislation in the early 2000s. Three of these — MGNREGA, RTE and NFSA are implemented as CSS. The right to food and guaranteed public work were part of the Common Minimum Programme of the UPA Government,¹²⁴ while the right to education had been included in the chapter on fundamental rights in 2002.¹²⁵ The three enactments all pertain to subjects in the Concurrent List of the Constitution,¹²⁶ meaning that the Union had the competence to enact these laws.

Crucially, the statutes create rights in favour of citizens, which may be enforced against the Central Government — in other words, if the Union fails to provide for any measure

¹¹⁵In *S.R. Bommai v Union of India*, (1994)3 SCC 1, the Supreme Court has held that the separation of powers between the legislative, executive and judiciary is part of the basic structure of the Constitution.

¹¹⁶*Laxman Moreshwar Mahurkar v. Balkrishna Jagannath Kinikar*, AIR 1961 Bom 167

¹¹⁷*Bira Kishore Mohanty v State of Orissa*, AIR 1975 Ori 8

¹¹⁸*KN Subba Reddy v State of Karnataka*, AIR 1993 Kar 66.

¹¹⁹As Nirvikar Singh points out, these three judgments went to the appropriateness of the transfer, rather than the constitutionality of the use of Article 282 in and of itself. Singh (n 19).

¹²⁰Nicholas Robinson, ‘Entitlement only by ‘right’ (23 October 2012) *The Hindu Business Line*, accessible at: <https://www.thehindubusinessline.com/opinion/entitlement-only-by-right/article22994601.ece> (Accessed on 4 August 2020).

¹²¹S. 9 CPC r/w s. 79, Code of Civil Procedure, 1908.

¹²²Article 226, Constitution of India, 1949.

¹²³Ruparelia (n 2).

¹²⁴See also Chiriyankandath et al (n 3).

¹²⁵Article 21A, Constitution of India, 1949.

¹²⁶Entry 23 and Entry 25, List III, VII Schedule, Constitution of India, 1949.

necessary for a State to implement the programmes, a citizen has a clear right against the Centre. This was, in fact, an important aspect of the debates around the Acts — the Rangarajan Committee on the National Food Security Bill had even suggested a lower set of duties on the State, in case there were difficulties with providing these benefits at a later date.¹²⁷ All three statutes provide for clear and specific rights in favour of citizens, as well as an accountability mechanism built into the statutory framework, as set out in the table below.

Act	Benefit	Accountability Structure
Mahatma Gandhi National Rural Employment Guarantee Act, 2005	S. 3 provides 100 days of work per household to any adult member willing to do manual labour.	S. 7 provides for the payment of unemployment allowance where the Government was unable to provide work. S. 17 also provides for social audits of MGNREGA work.
National Food Security Act, 2013	S. 3 provides for 5kgs of food grain per person per month in priority households. S. 4 provides for cash transfers to pregnant and lactating women, and s. 5 provides for mid-day meals in schools.	Ss. 14 and 15 require each State to set up a grievance redressal mechanism, staffed by a District Grievance Redressal Officer. Chapter VIII and IX of the Act set out the responsibility of the State and Union Governments, respectively. S. 28 provides for social audits.
Right of Children to Free and Compulsory Education Act, 2009	S. 3 provides that all children shall have the right to free and compulsory education between the ages of 6 and 14. S. 8, 9 and 10 provide for the duties of the appropriate Government, the local authority and the child's guardians respectively.	S. 32 provides that any person with a grievance may make a written complaint to the local authority, who is bound to take action in a period of 3 months.

The implementation of the three Acts has not been perfect;¹²⁸ however, they represent an important step forward. MGNREGA and NFSA, in particular, have had considerable success since they were implemented.¹²⁹ Accountability Initiative has found that about 89% of households who have demanded work under MGNREGA received it.¹³⁰ Nationally, more than 50% of MNREGA workers are women, well above the statutory floor of

¹²⁷Report of the Expert Committee on the National Food Security Bill (Rangarajan Committee)(2010), Accessible at: http://www.environmentportal.in/files/rep_NFSB.pdf (Accessed on 27 July 2020)

¹²⁸For instance, see Jean Dreze, Prankur Gupta, Reetika Khera & Isabel Pimenta, 'Casting the Net: India's Public Distribution System after the Food Security Act' (2019) 54(6) *Economic and Political Weekly*, 36-47; Ankita Aggarwal, 'Ten Ways MNREGS Workers Do Not Get Paid.' (11 February 2017) 52(6) *Economic and Political Weekly Engage*, accessible at: <https://www.epw.in/journal/2017/6/web-exclusives/ten-ways-mgnrega-workers-do-not-get-paid.html> (Accessed on 4 August 2020); Manisha Shah & Bryce Millett Steinberg, 'The Right To Education Act: Trends In Enrollment, Test Scores, And School Quality' (2019, February). National Bureau of Economic Research Working Paper No. 25608, accessible at:<https://www.nber.org/papers/w25608.pdf> (Accessed on 4 August 2020).

¹²⁹Chiriyankandath et al (n 3)

¹³⁰Avani Kapur & Meghna Paul, 'Mahatma Gandhi National Rural Employment Guarantee Scheme' (2020). 12(5) *Accountability Initiative Budget Briefs*, accessible at: <https://accountabilityindia.in/publication/mahatma-gandhi-national-rural-employment-guarantee-scheme-pre-budget/> (Accessed on 4 August 2020).

33%.¹³¹ The Courts have also taken note of the scope of the statutory right provided by MGNREGA in *Swaraj Abhiyan*, where the Court expressly rejected the argument that the Government could be excused from providing work under the scheme.¹³² This is in contrast to the decision in *Ashwani Kumar* cited above.

Likewise, several studies have confirmed that the introduction of the NFSA has improved access to food for Indian households. Puri (2017) has found that the coverage of households under PDS has increased from 14% to 59% after the introduction of the Act.¹³³ Other studies have pointed to improvements in plugging leakages¹³⁴ and reducing exclusion errors.¹³⁵ Further, some States have made efforts to supplement the benefits provided by MGNREGA and NFSA. Tamil Nadu, for example, provides rations to all residents of the State¹³⁶, while Kerala has an urban job guarantee programme on the lines of MGNREGA.¹³⁷

Questions of implementation aside, it is submitted that there is a value to providing for statute-based welfare entitlements. Both the MGNREGA and NFSA were passed as statutes after considerable debate in Parliament and among members of the public.¹³⁸ The programmes under these Acts can only be amended by an Act of Parliament, and cannot be modified to the detriment of beneficiaries by executive order. This, in turn, means that the entitlements under these Acts have remained relatively unchanged since they were enacted. In fact, the NFSA makes use of the PDS architecture, which has existed in some form since the 1940s.¹³⁹ This has given civil society enough time to become acquainted with the provisions of the two Acts and to make concerted demands for their implementation.¹⁴⁰ This has also been supported by creative accountability mechanisms,

¹³¹Briefs, accessible at: <https://accountabilityindia.in/publication/mahatma-gandhi-national-rural-employment-guarantee-scheme-mgnregs-2/> (Accessed on 4 August 2020).

¹³²*Swaraj Abhiyan v Union of India*, (2016) 7 SCC 498; *Swaraj Abhiyan v. Union of India*, Order dated 18 May 2018 in W.P. No. 857 of 2015 on the file of the Supreme Court of India, accessible at: <https://indiankanoon.org/doc/59849272/> (Accessed on 27 July 2020)

¹³³Raghav Puri, 'India's National Food Security Act (NFSA): Early Experiences' (2017) 4 LANS Working Paper Series, accessible at: <https://assets.publishing.service.gov.uk/media/5964831e40f0b60a44000154/NFSA-LWP.pdf> (Accessed on 4 August 2020)

¹³⁴Jean Dreze & Reetika Khera, 'Understanding Leakages in the Public Distribution System' (2015) 50(7) *Economic and Political Weekly* 39-42.

¹³⁵Shrayana Bhattacharya, Vanita Leah Falcao, & Raghav Puri, 'The Public Distribution System in India.' in Harold Alderman, Ugo Gentilini, & Ruslan Yemtsov eds, *The 1.5 Billion People Question : Food, Vouchers, or Cash Transfers?* (World Bank: 2017), accessible at: <https://www.worldbank.org/en/topic/safetynets/publication/food-vouchers-or-cash-transfers> (Accessed on 4 August 2020)

¹³⁶S. Vydhanathan S. & R.K. Radhakrishnan 'Behind the success story of universal PDS in TamilNadu' (10 August 2010) *The Hindu*, accessible at <https://www.thehindu.com/opinion/op-ed/Behind-the-success-story-of-universal-PDS-in-Tamil-Nadu/article16127805.ece#!> (Accessed on 27 July 2020)

¹³⁷Ayyankali Urban Employment Guarantee Scheme, cf. Centre for Sustainable Employment, Azim Premji University, *State of Working India* (Azim Premji University 2019).

¹³⁸Chiriyankandath et al. (n 3)

¹³⁹Sakshi Balani, 'Functioning of the Public Distribution System: An Analytical Report' (December 2013) PRS, accessible at: <https://www.prsindia.org/administrator/uploads/general/1388728622~TPDS%20Thematic%20Note.pdf> (Accessed on 4 August 2020).

¹⁴⁰Jean Dreze & Reetika Khera, 'Recent Social Security Initiatives in India' (2017) 98 *World Development* 55-72.

such as the social audits under the MGNREGA.¹⁴¹ By contrast, a lack of awareness in other, less clearly defined schemes can mean that citizens fail to take up welfare measures provided or to demand that the State implement a scheme in accordance with national guidelines.¹⁴² Most recently, in the aftermath of the COVID-19 crisis, a number of studies have also found that there has been greater success in reaching beneficiaries through PDS, rather than through other cash transfer programmes.¹⁴³

¹⁴¹See Chiriyankandath et al (n 3).

¹⁴²Ritwik Shukla, and Shaivya. 'How the Lack of Information Can Affect Health Insurance Schemes' (18 July 2019) *The Accountability Initiative Blog*, accessible at: <https://accountabilityindia.in/blog/how-the-lack-of-information-can-affect-health-insurance-schemes> (Accessed on 27 July 2020). It is possible that this may be one reason for the relatively poorer performance of the Right to Education Act — the Act provides for a long list of entitlements and requirements in each school. These are far more complex than those under the MGNREGA and NFSA.

¹⁴³Dvara Research, *COVID-19 Impact on Daily Lives Survey* (2020), accessible at: <https://www.dvara.com/research/social-protection-initiative/covid-19-impact-on-daily-life/> (Accessed on 4 August 2020); Azim Premji University, *COVID-19 Livelihoods Survey* (2020), accessible at: https://cse.azimpremjiuniversity.edu.in/wp-content/uploads/2020/06/Compilation-of-findings-APU-COVID-19-Livelihoods-Survey_Final.pdf (Accessed on 4 August 2020).

3. Making Statutes Work: Some Suggestions

As seen above, statutes provide for definite social and economic entitlements which, in turn, provide better protection to citizens than ad hoc schemes. The conditions of the grant and the amount provided for them may vary from year to year. This may, perhaps, act as a disincentive for States to provide well-defined statutory guarantees of welfare entitlements. As argued above, statutory entitlements, such as those in MGNREGA or NFSA cannot be amended except by Act of legislature, which means they cannot be changed easily from year to year. Once Parliament or a State legislature enacts legislation providing a well-defined social benefit, it must be prepared to allocate adequate funds for it from year to year.¹⁴⁴

It is also important for the Union to determine national welfare priorities, to ensure that all States develop at similar rates. Union guidance on State-level policies may also ensure a degree of uniformity in benefits available to residents of different States and to provide some alignment on State priorities.¹⁴⁵ For instance, one of the key objectives of Pradhan Mantri Jan Arogya Yojana (PM-JAY) is to make healthcare accessible throughout the territory of India.¹⁴⁶ Likewise, the One Nation One Ration Card scheme has been put in place to make food accessible to families who migrate for work.¹⁴⁷ Further, there are wide variations in the ability of different States to undertake capital expenditure on welfare measures — the richest States have a Gross State Domestic Product (GSDP) several times greater than that of poorer States; and without Union assistance, poorer States would simply not be able to carry out many development activities.¹⁴⁸ Under the present system of tax devolutions, wealthier States tend to receive a greater share of Union transfers per capita and have had a greater capacity for economic growth. This cycle may well continue unless adequate Union transfers are made to poorer States to enable them to catch up.¹⁴⁹ Moreover, the Union Government has traditionally taken a

¹⁴⁴See Rangarajan committee (n 126). The Rangarajan committee opposed the wide ambit of the National Food Security Act on financial grounds. In particular, the committee observed:

¶17. As noted at the outset the Expert Committee is fully in agreement with the idea that 60 years after independence the Indian State should be in a position to ensure that the country is rid of hunger and malnutrition caused by poverty. To that extent provision of minimum food entitlements at affordable prices to the vulnerable is a goal that few can quarrel with. However while operationalizing this idea, the consequences of conferring legal entitlements and failing to meet them have to be fully weighed in. Given the various constraints on stepping up production and procurement of food grains as well as its country wide distribution with minimal leakage - all of which are fixed in the short term - the implementation of the entire set of NAC recommendations may have to be calibrated, to prevent the State from being accused of renegeing on such an important right. The recommendations of the Expert Committee have to be seen in this spirit.

¹⁴⁵See, for instance, Aiyar (n 75)

¹⁴⁶National Health Authority, *Benefits of PM-JAY*, accessible at: <https://pmjay.gov.in/benefits-of-pmjay> (Accessed on 4 August 2020).

¹⁴⁷Sangeeta Ojha 'One nation, one ration card' explained in 10 points.' (15 May 2020) *Livemint*, accessible at: <https://www.livemint.com/news/india/-one-nation-one-ration-card-scheme-explained-in-10-points-11589524550728.html> (Accessed on 4 August 2020).

¹⁴⁸Govinda Rao (n 90).

¹⁴⁹P.S. Prasad, 'Roots of Uneven Regional Growth in India' (1988) 23(33) *Economic and Political Weekly* 1689-1692.

prominent role in welfare delivery, and States may be hesitant to make rapid changes in their welfare expenditure.¹⁵⁰

One way forward is to limit States' dependence on tied Union grants for specific purposes. There is a need for greater discretion on the part of States to determine welfare priorities and to define entitlements for persons within their Jurisdiction. This would mean the grant of enough untied funds to enable the State to design and implement policies at the State level without excessive dependence on the Union. As a corollary to this, even when the Union provides grants for a specific purpose, the State must have enough discretion not to be dependent on the Union's guidelines for every aspect of the scheme. Block grants, for development in a particular sector, may be a better way to set development priorities than CSS.¹⁵¹ This may also address the concern that the high level of Union control over every aspect of a tied grant may lead to less than ideal outcomes at the State level.¹⁵² The quantum of these grants should not depend only on the States' expenditure, but also on the outcomes achieved in each sector.¹⁵³ Moreover, these block grants must not be subject only to an incremental increase in expenditure, but must be based on the needs of each State. In this regard, it is important that untied grants are not all spent on Union projects, but that States are encouraged to use these funds to frame their own programmes as well.¹⁵⁴

Some scholars have suggested that Union rights-based legislation on matters in the Concurrent List may have a positive "diffusion effect" and encourage States to enact similar legislations on socio-economic rights within their domain.¹⁵⁵ One instance of this may be the right to public service legislations — while the Union bill on the right to public services was never passed,¹⁵⁶ many States have.¹⁵⁷ These legislations provide an accountability structure for services such as obtaining a birth certificate or mutating land records.¹⁵⁸

¹⁵⁰Avani Kapur 'Federalism and Social Policy' (May 2019) 717 *Seminar*, Accessible at: http://india-seminar.com/2019/717/717_avani_kapur.htm (Accessed on 29 July 2020).

¹⁵¹Ibid.

¹⁵²Lant Pritchett (2014) makes a distinction between "thin" activities, which are based on limited information (such as providing a pension), and "thick" activities, which require more guidance, such as teaching standards in schools. Lant Pritchett, 'The risks to education systems from design mismatch and global isomorphism,' (2014) CID Working Paper No. 277, accessible at: https://bsc.cid.harvard.edu/files/bsc/files/277_pritchett.pdf (Accessed on 27 July 2020). Aiyar and Walton (n 113) argue that the thin activities may be more suited to legislative intervention, while thick aspects may best be left to the realm of subordinate legislation or to the discretion of implementing agencies.

¹⁵³Govinda Rao (n 90).

¹⁵⁴Avani Kapur, Vastav Irava, Pandey S., and Udit Ranjan, 'Study of State Finances 2020-21', (2020) *Accountability Initiative, Centre for Policy Research*, accessible at: <https://accountabilityindia.in/publication/study-of-state-finances/> (Accessed on 4 August 2020). The authors note that even though the Fourteenth Finance Commission increased the allocation of the divisible pool of taxes, there was also a corresponding increase in State contributions to centrally sponsored schemes.

¹⁵⁵Ruparelia (n 2).

¹⁵⁶PRS India, 'The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011 (Citizens Charter),' *PRS India*, accessible at: <https://www.prsindia.org/billtrack/the-right-of-citizens-for-time-bound-delivery-of-goods-and-services-and-redressal-of-their-grievances-bill-2011-2125> (Accessed on 27 July 2020).

¹⁵⁷Aiyar and Walton (n 113). Thulaseedharan (2013) discusses enactments in Madhya Pradesh, Bihar, Chhattisgarh, Delhi, Himachal Pradesh, Jharkhand, Karnataka, Punjab, Uttar Pradesh and Uttarakhand. Sindhu Thulaseedharan, 'The Right to Public Services in India: A New Legal Scenario.' (2013) 55(1) *Journal of the Indian Law Institute*, 59-72.

¹⁵⁸Aiyar and Walton (n 113)

Meanwhile, although Madhya Pradesh had proposed laws on the right to health and water,¹⁵⁹ however, these have yet to be enacted. If the Union were to enact legislation on matters in the Union and Concurrent Lists, and to make longer-term commitments of finances towards sectors otherwise left to schemes, this may encourage States to make similar commitments in matters in the State and Concurrent Lists as well. Another possibility is that the Union and the States formulate model laws in consultation with one another on important aspects of social welfare.¹⁶⁰

Finally, there is a need for greater consultation with States on the formulation of schemes, to ensure that regional priorities are considered¹⁶¹ and that suitable, performance-based incentives are provided to States.¹⁶² Such consultation may also address the question of the type of rights guaranteed in statute and the extent of State discretion. The inter-State council under *Article 263* may provide one forum for negotiations between the Union and the States on questions of inter-governmental transfers.¹⁶³

¹⁵⁹Ayushman MP Conclave (2019), accessible at: <http://ayushmanbharat.mp.gov.in/conclave>

¹⁶⁰Recent examples of this are the Model Contract Farming Act, 2018 and the Model Tenancy Act, 2019.

¹⁶¹This suggestion was also made by the Puncchi Commission (n 52) in 2010.

¹⁶²For instance, the Fifteenth Finance Commission suggested the use of demographic performance and tax as performance-based criteria for the devolution of Union taxes. *Report of the Fifteenth Finance Commission for the year 2020-21* (November 2019), accessible at: <https://fincomindia.nic.in/ShowContent.aspx?uid1=3&uid2=0&uid3=0&uid4=0&uid5=0&uid6=0&uid7=0> (Accessed on 4 August 2020). It is suggested that criteria based on other development indicators also be considered.

¹⁶³Govinda Rao (n 46).

Conclusion

A number of scholars have argued that there is a need to move away from ad hoc, grant-based welfare measures to a more robust, rights-based system of social welfare in India. In this paper, I use the working of Centrally Sponsored Schemes as a means to transfer resources from the Union to the State to argue that the schemes have effectively limited States' abilities to create these statutory rights. I further argue that there is a need for reform of Union-State transfers so that the practical limitations on States' autonomy to frame policies are removed.

The Union Government plays a prominent role in determining State level development priorities through CSS. These are grants made by the Union for a specific purpose, i.e., the scheme guidelines, to be implemented by the States. Many of these grants are made under *Article 282*. The Union's use of *Article 282* to make specific development grants to States is not only constitutional, it also fits within the intentions of the framers of the Constitution with respect to the powers of the Centre and the State.

However, the use of *Article 282* can have some other effects on development policy. *Article 282* confines the Union's powers to making grants on subjects in the State List of the Constitution. This means that the implementation of any scheme must properly be left to the State. With CSS, the Union can now make the release of a grant conditional on the State complying with the Union's terms of the scheme. This leaves States with little discretion with respect to how those schemes are to be implemented. While States are still free to devise other schemes in the same sector, in practice, the Union has taken over one aspect of their legislative or executive power by tying resources to a CSS. By providing a financial limit on the State's power to legislate on particular areas, the Union has effectively limited their competence. Moreover, Parliament has limited powers and wide discretion under *Article 282*, meaning that it is not bound to make consistent, predictable grants to States year after year.

This is problematic. The scope of economic and social rights in India is properly within the domain of the legislature, and the States ought to play a pivotal role on matters within their competence. By making Union grants variable and highly discretionary, States are unable to plan for consistent and predictable welfare measures — such as those provided by statute — year after year. This means that State legislatures are unable to scrutinise and debate welfare measures to the same degree, which in turn means that citizens have far less accountability over the process of designing welfare measures.

There is no doubt that the Union should still play an important role in determining national priorities for development. One way to do so is to encourage the creation of clear entitlements through statute wherever possible, as in the case of MGNREGA and NFSA. Another possibility is to provide a greater share of Union assistance through block grants and to allow States a greater role in designing welfare measures implemented at the State. In any event, there is an urgent need for greater cooperation between the Union and the States of India to create a strong, rights-based welfare system for its citizens.