5.1 INTRODUCTION

The protection of basic human rights is one of the most pressing and yet most elusive goals of the international community. Since the adoption of the Universal Declaration of Human Rights in 1948, there has been a rapid growth in international law mechanisms for the protection of human rights. There are nearly 100 universal and regional agreements regarding the protection of human rights to which a vast majority of nation States bind themselves today. Yet, the lingering effects of violence, disease, famine, and the destruction of economic and social infrastructure continue to violate human rights and increase the world’s death toll.

Together these formal mechanisms, with the informal mechanisms in terms of civil society, transnational advocacy networks, social movements, and non-governmental organizations have created new standards of international human rights norms. These combined efforts at both the formal and informal level have reduced, to a certain extent, the democratic deficit in international law making by giving increased opportunity to nongovernmental actors to participate in formation of global human rights standards.

The real question is what good are these international human rights norms if they are not enforced at all? Even though there are international institutional mechanisms for enforcement of human rights treaties, to monitor and enforce treaty obligations, they prove to be weak in enforcing international human rights norms. So what should be done when international mechanisms are not enough for enforcement of international

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2 One conservative estimate of the direct death toll from civil wars since 1945 exceeds 16 million, more than five times as many people as have died in interState wars. In the 1990s, over 90 percent of deaths caused by war occurred in internal conflicts. See Jeremy M. Weinstein, In tide Rebellion 4-5 (New York: Cambridge University Press, 2007)
3 Lucke, supra note 2.
human rights norms? As Hathaway and Burton suggest, global civil society and domestic enforcement mechanisms could play an important role in the effective enforcement of international human rights norms. Where international bodies are less active in the enforcement of treaty commitments (as in the area of human rights) it falls upon domestic institutions to fill the gap. Many scholars argue that domestic enforcement mechanisms such as domestic courts could play an important role in enforcing international human rights norms.\(^4\)

But are domestic courts obliged to enforce international human rights norms? Under most of the international human rights instruments, a State party is required to take appropriate measures to implement its international human rights promises, which include adoption of legislative measures.

It has been argued specifically in the context of the economic, social and cultural rights that legislation is indispensable in order to apply international human rights norms to relations between private individuals, to override inconsistent legislation, or to remedy situations where non-legislative measures have been proven ineffective.\(^5\) In this scenario when a State fails to fulfil its international obligations, domestic courts, are in a position to implement the responsibility of the State party. The Constitution provides for the domestic courts to serve as a mediator between the international human rights norms and national society. There is no single variable that conclusively explains the enforcement of international human rights norms by domestic courts in general; as a result, it is difficult to generalize from experiences of domestic courts in different jurisdictions. There are many variables such as domestic political pressures, particular constitutional structures and histories, legal culture and the relative independence of courts which determine how effectively domestic courts could enforce international human rights norms.

### 5.1.1 Civil Society and Human Rights

The first decade of the 21st century has been particularly hard for civil society organisations and human rights defenders. Negative global trends that began soon


after 9/11 have come to a head as many governments have encroached on fundamental freedoms through harsh security measures and other legal and policy restrictions.

As highlighted by civil society watchdog groups, UN human rights bodies and other close observers, these trends began soon after 9/11 when UN Security Council Resolution 1373 calling on all UN member States to take concrete steps to tackle terrorism was introduced. While the intention behind the resolution to protect civilians and State structures from acts of terrorism may have been sound, the negative consequences on fundamental freedoms, including the rights of civil society actors, have been devastating as many governments have used the climate of fear to dilute civil liberties, reduce personal privacy, lower fair trial standards and restrict the free movement of people across borders. Moreover, the ability of citizens and civil society organisations to express democratic dissent has been severely curtailed through a clampdown on the freedoms of expression, association and assembly in both the global north and south.

5.1.2 Various kinds of restrictions on civil society

Over-zealous officials and law makers in long-standing democracies, emerging democracies and in overtly authoritarian countries have relentlessly chipped away at democratic freedoms, curbing the ability of CSOs to ensure transparency, accountability and respect for human rights in the public sphere. A major area of concern is the introduction of laws to regulate civil society activities, including the ability to establish organisations freely, carry out regular functions without official interference and obtain funding from abroad. A number of Sub-Saharan African countries including Ethiopia, Uganda and Zambia have introduced restrictive NGO laws.

Moves have been afoot in Latin American countries such as Venezuela to limit international cooperation activities and foreign funding for civil society groups. CIVICUS Civil Society index findings from the 2008-2011 phase report that 48% of CSO representatives in 25 geographically and politically diverse countries believe that the laws in their country are ‘highly restrictive’ or ‘quite limiting’ for civil
society activities. Additionally, a number of high ranking officials including heads of government and State have made highly critical pronouncements about the positioning and role of CSOs which are having severely negative consequences in CSO interface with public officials. Notably, a number of western democracies have drastically slashed public spending for civil society groups as punishment for challenging their domestic and foreign policies.

Another common occurrence is the rising number of motivated prosecutions of civil society activists, resulting in their imprisonment through flawed trials to prevent them from continuing their work in countries as diverse as Uzbekistan and India. Physical attacks, torture and harassment of family members are rife in many contexts, which makes civil society activism a highly risky endeavour, as recently witnessed amongst the pro-democracy movements that have flowered in the Middle East and North Africa region. In many cases, civil society members have paid the highest price for their work and beliefs through targeted assassinations by both State and non-State actors. Although a common occurrence in countries such as Columbia and the Philippines, this phenomenon is more widespread than is reported in mainstream media, in many cases, investigations are not conducted properly and the perpetrators continue to evade justice. Brutal crackdowns on peaceful assemblies are another major area of concern, with heavy handed tactics being employed by security forces to suppress calls for greater democratic freedoms.

5.1.3 Acknowledgment of the backlash on civil society by the UN

On 10 December 2010, the UN Secretary General, Ban Ki-moon, in acknowledging these negative trends, dedicated the observance of International Human Rights Day to human rights defenders who continue their work despite the multiple risks being faced by them -including harassment, being stripped of their jobs, wrongful imprisonment, torture, beatings and murder. He emphasised that States bear the primary responsibility to protect human rights advocates.

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6 See Bridging the Gaps: Citizens, Organisations and Dissociation -summary report of the 2008-2011 CIVICUS Civil Society Index project, to be published by CIVICUS, September 2011.
Earlier in September 2010, the UN High Commissioner for Human Rights, Navi Pillay, made an appeal to the UN Human Rights Council to take action to address the global trend of restriction on civil society space: “Special procedures mandate holders, press reports and advocates consistently point out that human rights defenders, journalists and civil society activists in all regions of the world face threats to their lives and security because of their work”.

Significantly, the UN Special Rapporteur on Human Rights Defenders, Margaret Sekaggya, chose to focus her 2008-2009 report on the security of human rights defenders and the various protection measures implemented at the national, regional and international levels that should guarantee their physical safety. She identified a number of “worrying trends” and called for “urgent and effective solutions, not only by States but also defenders themselves”. These included stigmatisation of human rights defenders and their growing categorisation as “terrorists”, “enemies of the State” or “political opponents” by State authorities and the State-owned media which contributed to the perception that defenders are legitimate targets for abuse by State and non-State actors.

A July 2011 report by the Special Rapporteur laments that a number of States have introduced legal and practical restrictions on human rights defenders in breach of international law and the principles contained in the UN Declaration on Human Rights Defenders.

5.1.4 The UN Declaration on Human Rights Defenders

The UN Declaration obliges States to protect the following rights of individuals, groups and organs of society engaged in the protection and promotion of universally recognised human rights and fundamental freedoms:

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• To seek the protection and realisation of human rights at the national and international levels.
• To conduct human rights work individually and in association with others.
• To form associations and non-governmental organisations.
• To meet or assemble peacefully.
• To seek, obtain, receive and hold information relating to human rights.
• To develop and discuss new human rights ideas and principles and to advocate their acceptance.
• To submit to governmental bodies and agencies, and organisations concerned with public affairs, criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may impede the realisation of human rights.
• To make complaints about official policies and acts relating to human rights and to have such complaints reviewed.
• To offer and provide professionally qualified legal assistance or other advice and assistance in defence of human rights.
• To attend public hearings, proceedings and trials in order to assess their compliance with national law and international human rights obligations.
• To unhindered access to and communication with non-governmental and intergovernmental organisations.
• To benefit from an effective remedy.
• To the lawful exercise of the occupation or profession of human rights defender.
• To effective protection under national law in reacting against or opposing, through peaceful means, acts or omissions attributable to the State that result in violations of human rights.
• To solicit, receive and utilise resources for the purpose of protecting human rights (including the receipt of funds from abroad).
5.1.5 Highlighting of Negative Trends by Civil Society

CIVICUS’ own monitoring, as well as reports by well respected groups from across the globe, reveal sharp spikes in the frequency and intensity of attacks on CSOs. CIVICUS has observed in a report on the Clampdown on Civil Society Space in 2009-2010 that, “what began as a knee-jerk reaction to a horrific event in 2001 (9/11) assumed a life of its own by the end of the decade when the full force of the unrelenting onslaught on fundamental freedoms through security and other regulatory measures assumed global prominence.”

The International Center for Not-for-Profit Law (ICNL) in its inaugural issue of the quarterly publication ‘Global Trends in NGO Law’ published in March 2009, highlighted: “Despite the increasing attention paid to the backlash against civil society and democracy, many governments continue to use the legislative tools at their disposal to control and restrict NGOs.”

Human Rights Watch in its 2010 report mentioned that the reaction against activists exposing human rights abuses grew particularly intense in 2009. Freedom House reported that 2009 was the fourth consecutive year in which global freedom suffered a decline - the longest consecutive period of setbacks for civil and political freedoms in the nearly 40 year history of writing the report.

In 2011 ACT Alliance produced a policy paper analysing the phenomenon of shrinking political space for civil society based on case studies in 14 countries, reporting that CSOs are being hindered in various ways through counter-terrorism measures, the war on terror, securitisation of aid as well as repressive governance in authoritarian States. Additionally, studies and monitoring by the Commonwealth

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Human Rights Initiative,¹⁶ the East and Horn of Africa Human Rights Defenders Project¹⁷ and the Euro-Mediterranean Network¹⁸ confirm the narrowing of this space.

### 5.1.6 Positive Developments

Nevertheless, within this overall negative climate there are some welcome developments. The Universal Periodic Review of the UN Human Rights Council has emerged as a key platform to highlight concerns about civil society freedoms.¹⁹ It is a unique process that involves a review of the human rights record of all UN member States and so far all States have taken this process seriously. Civil society has an important place in this process to submit reports about countries under review.

A landmark resolution on the freedom of peaceful assembly and association was passed at the UN Human Rights Council at the end of September 2010. The resolution, supported by a Diverse group of countries, was passed unanimously. It calls upon UN member States to abide by their international human rights obligations and establishes a Special Rapporteur on the Freedom of Peaceful Assembly and Association. The resolution was achieved after sustained lobbying and engagement by the Community of Democracies Working Group on Enabling and Protecting Civil Society, which includes a number of governments and key civil society groups.

### 5.1.7 Civil Society’s Intervention to Check Communalism in India

I shall confine myself to a schematic analysis of the responses of CSOs in India. I shall focus on the following themes: (i) seeking justice to the victims of gross human rights violations such as communal violence and the aftermath; (ii) campaigning and mobilising

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¹⁹ Website on the Office of the UN High Commissioner on Human Rights section on the Universal Periodic Review Mechanism http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx
in favour of rebuilding and strengthening the secular fabric of society; (iii) rehabilitation and resettlement of victims of communal and other ethno-identity violence.

5.1.8 Seeking Justice for Victims and doing Campaigns for Secularism

From the very beginning, ‘Seeking Justice’ stands as the single most urgent concern in civil society interventions. The bulk of activities carried out by CSOs in India in this regard follow strategies to help mobilise opinion and people in favour of a perspective of justice. At yet another level, they use constitutional methods of redressal such as courts or demanding new legal frameworks (legal reform). The actualisation of the idea of justice therefore has a retributive dimension (seeking punishment of the culprits who committed the acts of violence/violations) and a campaign dimension (seeking responsible State action to maintain peace and a just environment and seeking citizen participation in support of such demands).

An important strategy of CSOs has been ‘fact finding’ missions. The earlier response during 1970s and early 1980s came from the Civil liberties groups. The method of fact finding subsequently became part of the NGO activities and more recently emerged as ‘investigative journalism’ practices in the media.

Since the beginning of 1990s, with the rise of NGO-isation of human rights activity, numerous human rights NGOs began to take up similar activities. By late 1990s, new NGOs or social action groups with a special focus on communalism began to emerge. Magazines like Communalism Combat appeared, besides the civil liberties magazines like PUCL Bulletin and many vernacular magazines of civil liberties groups, uncovering a variety of trends in communalisation of polity and society. The main

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20 The strategy of ‘fact finding’ appears to have arrived through the Indian civil liberties organisations drawing inspiration from the experience of civil liberties movements elsewhere, especially from the American Civil Liberties Union in the US and the National Council for Civil Liberties in the UK. Ever since the first fact finding of the Jalianwalabagh incident in 1918, conducted by the Indian National Congress it remained an important way of both creating an authentic and impartial ‘alternative’ truth to that of the version of the State. The activity comprises of forming a group of respected individuals drawn from public life and make them survey all the affected sides of the incident in concern and produce a narrative that will explain what the truth according to them is. A more procedurally standardized process was adopted by the United Nations in dealing with gross human rights violations since 1970s in the form of Truth Commissions. The bibliography at the end provides a number of examples of these fact-finding reports.
assumption that underpins this strategy is that presenting correct information can lead to the mobilisation of opinion and people for a cause within a democracy. Fact-finding helped CSOs to highlight hidden dimensions and aspects into the discussion and also generated momentum for interventions. Although fact-finding continues as an important strategy of human rights interventions, of late its effectiveness or ability to mobilise has begun to depend upon how the dominant media space responds or accommodates the findings.\textsuperscript{21} Similarly, there is perceptible change in the urban middle class orientation to social action, there is a growing presence of new media oriented engagement as channels of expression which contrast with previous strategies of direct mobilisation. With the rise of specialist NGOs, such as the advocacy NGOs in the field of human rights and justice, a practice of initiating court cases pursuing justice in a concentrated and focused manner also emerged. Fighting court cases was not new. Civil liberties organisations have always engaged with the court system and their predominant engagement was with the issue of liberty. The issues were primarily related to seeking bail, or fighting cases of those indicted under the charge of sedition or treason or detained under Preventive Detention Laws of extraordinary kind. With the arrival of advocacy NGOs’ in 1990s new possibilities of employing law for seeking other aspects of justice, for example victim compensation, or seeking court interventions to remedy perceived notions of discrimination (as in the case of Section 377 pertaining to the persecution of sexual minorities under the Criminal Law in India) or seeking State intervention by framing progressive laws to correct social inequalities and discrimination (as in the case of domestic violence or violence against the Scheduled Castes and Scheduled Tribes).

The NGO interventions in advocacy did create new possibilities, especially during the period in which the Apex Court in India was identified as a ‘progressive’ activist court and made numerous interventions in favour of the rights of the poor and

\textsuperscript{21} It is useful to recount a specific case that might help communicate my point. Regarding extra-judicial killings, which in local parlance is known as ‘encounters’ wherein the suspected far-left activists and their sympathizers get killed, the civil liberties groups have campaigned since the beginning of 1970s. certain groups like the Andhra Pradesh Civil Liberties Committee (APCLC) carried legal battles in the higher courts seeking judicial interventions to stop what they called ‘fake encounters’. However, the courts, including the Apex Court, were quite wary of arriving at any decisive verdict or injunction in favour of the civil liberties argument (Balagopal).
marginalised through what came to be known as the Public Interest Limitation process (Baxi, 1985; Sathe, 2003). However, the recent scenario became more complicated with some plausible change which has been identified in the nature of the Apex Count responses to the Public Interest Litigation cases (Baxi, 2002). In addition, there are changing orientations of national and international philanthropic organisations and their orientation to rights and which kind of rights etc., which highlight the continuing vulnerability of these interventions.  

5.1.9 New Challenges in the Post-godhra Gujarat

What emerged during the post-Godhra Gujarat violence, beyond the justice question, is the enormity of the task of compensation, rehabilitation and resettlement of the victims and finding ways of social reconciliation. The intervention of courts in terms of providing compensation alone is not adequate for rehabilitation and resettlement for thousands of families who lost substantive, if not their total sources of livelihood and who suffered the demise of family members. Although there is no comprehensive account of the rehabilitation and resettlement process, available accounts, both oral as well as published, indicate many unanswered questions (CSSS, 2010; Chandhoke, Priyadarshi, Tyagi, & Khanna, 2007; Mander, 2006).

The above sketch is not, as mentioned in the beginning of the paper, an attempt to evaluate the effectiveness of the human rights movement. It is only an attempt to identify the activities which aimed to secure justice for victims and their changing character in the context of changing times. It is difficult to provide any empirical figures about the nature and extent of mobilisation, as there is hardly any data on such matters. It is safe to conclude that methods like fact-finding has been partially appropriated by the new media space and thus place new demands on ways of imaging the task of mobilisation by human rights groups. Similarly, methods like

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22 Although there is no systematic reflection on the changing nature of support for human rights activities of CSOs in India, one hears frequently the diminishing support for human rights advocacy. Besides, there is also a general scenario of gradual withdrawal of bilateral aid support for civil society activities. Further, this is not limited to international aid policies, for even the national sources of philanthropic funding is also focusing on result oriented service delivery as opposed to human rights advocacy.
advocacy have undergone some changes especially in the light of transformations in the climate of judicial responses and orientations of philanthropic processes.

5.1.10 Rehabilitation, Resettlement, and Reconciliation

The issue of rehabilitation and resettlement originally emerged as part of discussions of rights of people who were affected by infrastructure projects like the construction of highways and mega dams (Baxi, 2000; Ramanathan, 1996). While this paper cannot delve into the details of these debates, it is suffice to indicate that the debate around these infrastructure projects continues to haunt the Indian political and economic elite in various forms. Examples include anti-dam or anti-infrastructure movements, such as the save Narmada campaign, the struggle against converting agricultural land for building factories, making the Special Economic Zones (SEZs), as in the recent mobilisations in Nandigram in West Bengal or mobilisation of tribals in Orissa against indiscriminate mining of forest land. The above illustrations indicate the persistent and unresolved nature of the issue of rehabilitation and resettlement in the larger development process.

The issue of rehabilitation and resettlement (R&R) in communal and caste violence remained, until post-2002 Gujarat, as mere symbolic gestures of politicians to provide compensation to victims of violence. The inadequacy of these gestures was all too clear from the beginning, but became glaringly obvious in the aftermath of Gujarat 2002. This paved the way for the formation of a campaign by CSOs to pursue a more systematic process of R&R (CSSS, 2010; Chandhoke, Priyadarshi, Tyagi, & Khanna, 2007; SAHR WARU et al, 2008). What emerged was the rise of informal as well as formal community-based groups, especially amongst Muslims, to address the substantive concerns of rehabilitation and resettlement. Besides the unsatisfactory State of R&R process, what seems to have been left out in the entire activity is the issue of 'reconciliation' (Powers, 2008; Oommen, 2009). Relevant questions here are: can societies that became polarised on communal lines be bridged back to normalcy? Can communities that entertained systematic prejudices and hate overcome the past and live together? Is it possible to address and resolve issues of peaceful co-existence without compromising on the concerns of justice and protection of fundamental
human rights? These and many other related questions became pertinent and striking for those engaged in anticommunalism activities in recent times, especially post-Gujarat 2002, which is by far the deepest scar on the secular fabric of India. The scale and magnitude of Gujarat 2002 created possibilities of mass exodus of minority communities, especially Muslims, from their original habitations into 'comfort zones' of community neighbourhoods, which are referred by secular groups as processes of 'Ghettoisation'. This became an important issue in the R & R process, especially in the context of housing concerns of the victims in Gujarat.

5.2 CIVIL LIBERTIES ORGANISATIONS AND HUMAN RIGHTS PROTECTION IN INDIA THROUGH COURTS

Non-Governmental Organizations and the voluntary organisations have done commendable work in responding the mass voice of weak, meek, poor, suppressed, downtrodden and exploited people and emerged as powerful protective shield of assistance in the field of legal battle to the needy per In this context, activated, sensitized, dynamic and dedicated approach of some prominent Non-Governmental Organization and the voluntary organisations is worthy to appreciate. For example, Bihar Legal Support Society, People Union for Democratic Rights (PUDR), Bandhua Mukti Morcha, Rural Litigation and Entitlement Kendera (RLEK), Common Cause A Registered Society [CCARS] etc. have invoked the judicial process by way of public interest litigation. Following are some illustrative cases instituted by these Non-Governmental Organizations and voluntary organisations to accelerate the momentum of missionary cause of human rights.

In Peoples Union for Democratic Rights v. Union of India\(^{23}\), it was held that the Peoples Union for Democratic Rights and locus standi to file a petition for enforcement of various labour laws under which certain benefits re conferred on the workers. The Union brought this fact to the notice of the Court through a letter. The Court rejected the argument that such 'public interest litigation’ would create arrears of cases and therefore they should not be encouraged. Bhagwati, J. (as he then was) declared, ‘Wo State had the right to tell its citizens that because a large number of

\(^{23}\) \textit{AIR}, 1983 SC 339
cases of the rich are pending in our court we will not help the poor to come to the
courts for seeking justice until the staggering load of cases of people who can afford
rich lawyers is disposed off”

In *Bandua Muki Morcha v. Union of India*\(^2\), an organisation dedicated at the cause
of release of bonded labours informed the Supreme Court through a letter that they
conducted a survey of the stone-quarries situated in Faridabad District of the State of
Haryana and found that there were a large number of labours working in these stone-
quarries under “inhuman and intolerable conditions” and many of them were bonded
labours. The petitioners prayed that a writ be issued for proper implementation of the
various provisions at the Constitutional and statutes with a view to ending the misery,
suffering and help of these labours, and release of bonded labourers. The Court
treated the Letter as a writ-petition, and appointed a Commission consisting of two
advocates to visit these stone quarries and make an inquiry and report to the Court
about the existence of bonded labourers, Speaking for the majority Bhagwati, J (as he
then was) on behalf of himself and Pathak and Amarendra Nath Sen JJ, held that
where a public interest litigation alleging the existence of bonded labourers is filed it
is not proper on the part of the Government to raise preliminary objection. On the
contrary, the Government should welcome an enquiry by the court so that if it is
found that there are bonded labourers or workers living in human condition such a
situation can be set right by the Government.

In *Bihar Legal Support Society, New Delhi V. The Chief Justice of India and others*,\(^2\) a
petition was kited b 1 social Worker seeking release of children below 16 years detained in
jails Supreme Co art directed that the petitioner should have access to in and should be
permitted to visit jails, children homes, remand homes, observation homes, borstal schools
and all institutions connected with housing delinquent or destitute children and that State
Government should assistance to the petitioner. It was also clarified that information
collected by petitioner will be placed he the Court and will not be published otherwise.

The court observed that it a child is a national asset, it is the duty of the State to look
after the child with a view to ensuring full of its personality. That is why all the

\(^2\) *AIR* 1984 SC 803
\(^2\) *AIR* 1986 SC 1773.
statues dealing with children provide that a child shall not be kept in jail. Even apart from this statutory prescription it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and coarsening his conscience and alienating him from the society. It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists, there are still a large number of children in different jails in the country. It is no answer on the part of the State to say that it has not got enough number of remand homes or observation homes or other places where children can be kept and that is why they are lodged in jail. It is also no answer or the part of the State to urge that the ward in the jail where the children are kept is separate from the word in which the other prisoners are detained. It is the atmosphere of the jail, which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. The State Governments must Set-up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial- Or no account should the children be kept in jail and if a State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail. AIR 1986 SC 1773.

In *Rural Litigation and Entitlement Kendra v. State of U.P.* the Supreme Court rightly remark that though procedural laws do apply in PIL yet every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court. Even if it is said that there was a final order, in a dispute regarding closure of mines causing environmental disorder in hi areas, the plea of res judicata could not be entertained in a subsequent public interest litigation to protect the environment. Undoubtedly, the Environment (Protection) Act, 1986 (29 of 1986) has come into force with effect from 19th November 1986. Under this Act power is vested in the Central Government to take measures to protect and improve the environment. The instant writ petitions were

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26 *AIR* (2001) 4 SCC 377
filed as early as 1983 more than three years before the Act came into force. The Supreme Court appointed several Expert Committees, received their reports and on the basis of materials placed before it, made directions, partly final and partly interlocutory, in regard to certain mines in the area. The Court has made several directions from time to time. As many as four reportable orders have been given. The several parties and their counsel have been heard for days together on different issues during the three and a quarter year of the tendency of the proceedings. The Act does not purport to and perhaps could not take away the jurisdiction of the Supreme Court to deal with a case of this type. In consideration of these facts, there would be no justification to decline the exercise of jurisdiction at this stage. Ordinarily the Court would not entertain a dispute for the adjudication of which a special provision has been made by law but that rule is not attracted in the instant case. Besides it is a rule of practice and prudence and not one of jurisdiction.

In *Common Cause A Registered Society v. Union of India and others*, the allotments of retail outlet for petroleum products (the petrol pumps), by Capt. Satish Sharma Minister of State for Petroleum and Natural Gas, exercising the powers of the Central Government have been challenged in this public interest petition under Article 32 of the Constitution of India. The petition as originally filed was directed against corruption in various fields of public life. Mr. H.H. Shourie – Director “Common Cause” appearing in persons, invited Court’s attention to news item dated August 11, 1995, on the front page of “India Express” under the cap “In Satish Sharma’s Reign, Petrol and Patronage Flow Together” The Solicitor general who was present in Court, took notice of the news item and Stated that he would have the matter examined in the Ministry concerned and file an affidavit giving Ministry’s response to the news item. The news item, inter alia Stated as under:

“Not only the relatives of the most of the officials working for Captain Satish Sharma but even his own driver and the driver of his additional Private Secretary have been allotted petrol pump and gas agency respectively. We place on record our appreciation for Mr. M.D. Shourie, who, very ably, assisted us in this matter. He shall

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27 *AIR 1996 SC 3538 (Para 28)*
be entitled to costs, which we quantify as rupees fifty thousand. The cost shall he paid by Capt. Satish Sharma personally.

In *Gaurav Jain v. Union of India and Others*\(^\text{28}\) there was a petition seeking improvement in plight of prostitutes/fallen women and their progeny. The Apex Court issued directions for prevention of induction of women, in various forms into prostitution; their rescue from the vile flesh trade; and rehabilitation through various welfare measures so as to provide them with dignity of person, means of livelihood and socio-economic empowerment.

The court observed that it is the duty of the State and all voluntary Non-Governmental Organizations and public spirited persons to come into their aid to retrieve them from prostitution, rehabilitate them with a helping band to lead a life with dignity of person, self-employment through provisions of education, financial support, developed marketing facilities as some of major avenues in this behalf. Marriage is another object to give them real brains in society. Acceptance by the family is also another important input to rekindle the faith of self-respect and self-confidence. Housing, legal aid, free counseling assistance and all other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red light area contaminated with foul atmosphere\(^\text{29}\). Court observed and recognised that NGO is an effective armoury in its how to steer clear the social malady, economic reorganization as effective instruments to remove disunity and to prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law, and pragmatic direction pave way for social stability peace and order.

In the last, it can be said that in the Indian context, the present Non-Governmental Organizations movement towards human rights activism owes its origin to emergency ear and inherently to some of the leading events such as the “increasing weakness in professional efficiency of the State apparatus arid many of the democratic institutions like the bureaucracy, political parties, judiciary and the media, their social bias and political partisanship and the growing incredibility in popular perceptions which have a close bearing on India’s quest for nation-building, economic development and social

\(^{28}\) *AIR* 1997 SC 3021 para 28, 60

\(^{29}\) *Gaurav Jain v. Union of India and others*, *AIR* 1997 SC 3021 para 28, 60
transformation. In addition to this, the brutalisation of State machinery, criminalisation of politics, use of money, muscle and mafia in electoral practices misuse of preventive detention, intensification of the social and regional tensions in Kashmir, Assam, Punjab, Andhra Pradesh, Tamil Nadu and Karnataka, the demand for regional autonomy and the emergence of democratic groups like PUCL, PUDR, APCLC, etc. are also some of the results of this movement.\textsuperscript{30} It is evident that many Non-Governmental Organisations are working with stimulating zeal and sparkling style; with refreshing fearlessness and passion for socio-spiritual betterment; explores men and matters, issues and themes, displaying a deep commitment to humanity.\textsuperscript{31}

In Indian perspective, Non-Governmental Organizations have a delicate, sensitive, challenging and herculean task to achieve the missionary cause of human rights culture. There is a great need socio-legal protection to miserable downtrodden and helpless people in Indian milieu.\textsuperscript{32} No legal protection or social justice can be available to those who cannot organise themselves into vibrant pressure groups. It is precisely such sections of the wretched of the earth who need such protection and just most like the victims of dowry-murders and other atrocities, the unfortunate women forced to become prostitutes, devadasis women workers, working housewives the divorcees, the eunuchs, the orphans, the innocent children working under callous employers; children kidnapped, maimed and used by professional goondas for begging, and the children of divorced persons; the Vanavasis deprived of their traditional rights in forest areas, victims of the conspiracy of contractors, conservators and politicians, and display a large scale in the name of developmental projects like dams; the denotified communities or the ex-criminal tribes and all the nomadic mid ‘seminoniadic tribes’; the bonded labour; the dalits and the backward classes; those affected by natural calamities, such as, floods, fire, droughts, earthquakes, epidemics, etc. or by extraneous, us factors, such as, terrorism, riots, wars, accidents, sabotage, etc.\textsuperscript{33} All these unfortunate people arc unable to organise, themselves into effective pressure groups. As representatives of the moral and social conscience of the society,

\textsuperscript{30} V.R. Dasgupta, \textit{NGOs and Human Rights Activism: Continuing the Discussion} (2001) at p. 86.
\textsuperscript{32} Priya Prakash, \textit{NGOs Towards Redressing Societal Wrongs} (2001) at p. 432.
\textsuperscript{33} Mukundan, K. \textit{NGOs and Human Rights Culture} (2002) at p. 87.
the activists of the Non-Governmental Organisations are expected to do the needful to provide appropriate relief to them.

The most important function of the welfare State is the creation of conditions that, sure social justice by removing social inequalities created by capitalism. Poverty has been a problem in all times and it did not become less acute with the advancement of civilisation. Hence, there is a great responsibility on the shoulders of socialistic State to assure social justice to the poor masses of the society. The eradication and control of poverty is essentially the function of modern Welfare State. This can be done by launching suitable socio economic schemes by Government. But so long as it exists, it creates disabilities on the part of poor persons and they become unable to have the full benefit of legal and political rights. In this context, it is the paramount mission of the Non Governmental Organisations and voluntary organisations to undertake protective measures for the welfare of the weaker sections of the community and also to provide an additional support to the poor that they may be able to reap the full benefit of the welfare Legislation.

Non-Governmental Organisations and voluntary organizations also provide on intellectual and moral leadership to propagate and support the dynamic concept of rule of law by their mis-campaign, common cause programmes and pressure action strategies. The rule of law without legal aid is nothing but a pseudo slogan and a just myth. Equal access to justice for the rich and the poor alike must be seen as an essential part of the maintenance of the rule of law. Rule of law does not mean that the protection of law must be made available only to the fortunate few, and that taw should be allowed to be prostituted by vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and they are also the beneficiaries of the rule of law. We cannot be said to live under the rule of law under all citizens are effectively allowed to assert and defend their legal rights. If it does not happen then the rule of law exists on paper and not in reality. The rule of law oppresses the poor and the rich men take advantage of the rule of the law. The principle of the rule of law is not an end in itself. Left to it, it has been said that it has got all the propensity of becoming

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34 *PUDR v. Union of India*, AIR 1982 SCH, 73.
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quite an ‘unruly horse and has also the capacity of hitting the poor below the belt. Certainly this happens in the absence of legal aid or when a party is not adequately represented in a legal system.

Non-Governmental Organisations movement in modern legal, political and social theory is organically related to the urge for social justice. This idea dawned upon human consciousness after the French Revolution and the declaration of liberty, equality and fraternity as the guiding principle of social and political life. The term social justice is comprehensive of social, economic and political facets or life and its aim is to remove imbalances prevailing in the society amongst people particularly in social and economical spheres, and to ensure a reasonably equal and conducive situation for all round development of all people- Social justice represents a great humanistic aspiration in the world and provides necessary help to those persons who are not getting justice. Ulpian, who describes justice, as “giving each man his due’ must be properly understood. Functional and motivated theme of Non Governmental Organisations is based on the paramount mission that social Justice provides social due, and postulates- that no person should be deprived of justice due to social inequalities. Poverty must not become disqualification for those who seek justice.35

The Legal Aid Programme cannot be successfully implemented without the active cooperation of voluntary social organisations. The social workers can play active and useful rote in providing necessary co-operation by becoming a link between the person seeking legal aid and the aid rendering social welfare agencies. The constant and intensive participation of voluntary organisations and contribute a lot in solving legal and social problems of the poor and can easily become inextricable parts of the State Legal Aid Programme. The involvement of people in solving the problems of the poor marks a welcome shift from the stark division, which hitherto separated the affluent from the peon The Expert Committee on Legal Aid, has emphasized the necessity of voluntary organisations in the following words:

‘The object of legal aid is to bridge not only the gap between the rights which our people deserve and that which they have, but also the or between the rights conferred

on them by law and the prospects of their enforcement. If legal aid is conceived not as
an arithmetical total of instances and official assistance rendered in matters of law to
the needs and indigent but as a movement aiming to ensure for the people their just
right, the role of voluntary agencies in any such scheme will be largely self evident.  

The voluntary Organisations can evolve a strategy to change socio-economic structure
of the society, which is responsible for the creation and perpetuation of poverty and
denial of justice to the large masses of the people. They can make socio-legal
investigations for identifying injustices to the vulnerable and deprived sections of the
community and pursue judicial process for providing remedy to them. They can also
met as watchdogs of peoples interest and can encourage the poor people to mo
themselves. They may be able to locate the area where the application of law is
harsh on the poor.

There are many organisations, which are working in the field of legal aid. Indeed,
they require nurturing and nourishing by the State, State Bar Council, Social
Workers, etc. Such organisations may be classified into two categories; lawyer groups
and non-lawyer groups-neither lawyer nor layman alone can do justice within Legal
Aid Scheme Hence, there should be involvement of as the classes of persons in such
organisations. In addition to lawyers, other persons like businessmen, retired
officers, social workers who are dedicated to serve the society may also be associated
with such voluntary organisations. The Committee for implementing Legal Aid
Scheme, State Legal Aid and Advice Boards are supporting such organisations
financially. These agencies have also organised seminars, workshops, para-legal
training programmes, etc.

All though, there is no exhaustive list of organizations working in the field of legal
aid, however names of some agencies have published by CILAS-These are: (i)
 Chattisgarh Majdoor Sangh (Local Organisation of marginal farmers and landless
labour) in Sarai Palli Tehsil of Raipur District, (MP) (ii) Banwasi Sewa Ashram,
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Mirzapur (U.P., (iii) Antyodaya Cheta Manda, Mayurbhanj (Orissa), (iv) Rural Litigation and Entitlement Centre. Dehradun (U P) (v) Indian Association of Lawyers (Kerala Chapter), (vi) Society for Community Organization Trust (T.N.), (vii) Rural Entitlement and Legal Aid Centre, Gandhi Bhawan, Bhopal, (viii) Kashtakari Singhatua. a mass organization of marginal farmers and landless labourers working in Thana District of Maharashtra.

In Indian perspective, Non-Governmental Organisations and the voluntary organisations have done commendable work in responding the mass voice of weak, meek, poor suppressed, downtrodden and exploited people and emerged as powerful protective shield of assistance in the field of legal battle to the needy and dedicated approach of some prominent Non-Governmental Organisations and the voluntary organisations is worthy to appreciate. For example Bihar Legal Support Society, People Union for Democratic Rights (PUDR); Bandhua Mukti Marcha, Rural Litigation and Entitlement Kendera [RLEK] Common Cause A Registered Society [CCARS] etc. have invoked the judicial process by way of public interest litigation. There are many illustrative crimes instituted by these Non-Governmental Organizations and voluntary organisations to accelerate the momentum of missionary cause of human rights.40

In Indian context, a large number of Non-Governmental Organizations have been coming forward to undertake the Herculean task of promoting human rights at the grass-roots. For example, Non-Governmental Organizations like Vigil India Movement (Bangalore), Citizen for Democracy (Aligarh), Prayas (Delhi) Institute of Objective Studies (Delhi), Foundation for Legal Aki Environment and Social Action (Guntur, AR.), Human Rights Wing (Darbhanga, Bihar), Society for Rural Development and Action (Mandi, Himachal Pradesh), People’s Union of Civil Liberties (Srinagar, J & K), Indian People’s HRC (Bombay), Human Rights

Education Movement of India (Madras. Tamilnadu) are some of the trust-worthy and prominent institutions.

5.3 THE ROLE OF CIVIL SOCIETY IN PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA

5.3.1 Civil Society, State and Human Rights

It is important to bear in mind that civil society is composed of many diverse elements, and is divided between supporters of different and opposed social and political agendas. In country like South Africa, where State-sponsored racism was abolished but racist institutions and practices are prevalent in the private sphere, a simplistic identification of civil society with the realm of freedom, and of the State with the realm of coercion is untenable. In other words, we cannot look up to civil society as a magic solution to all social problems. Rather we must examine it critically, and evaluate the ways in which elements within it can act (possibly together with elements from other sectors) to advance worthwhile causes.

The structural limitations of formal democracy are particularly evident in countries such as South Africa, which are burdened by the historical legacy of an obtuse bureaucracy ruling over large masses of subjects who were not regarded as citizens. South Africa is politically led by a government that has formally committed itself to the welfare of all citizens, and the need to overcome the legacy of past neglect and human rights violation.

5.3.2 Civil society and Human Rights in South Africa

Research on civil society in post-apartheid South Africa has centred on the question of partnerships. Most studies seek to review the relations between human rights structure State structures and civil society organisations, and make recommendations on how these may be structured to enhance cooperation in the common cause of protection of Human Rights. Broader theoretical questions about State and power, and the potential for re-shaping the meaning of Human Rights in South Africa are

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41 A common feature of colonial rule in Africa, as argued by Mamdani, *Citizen and Subject* (1996).
rarely posed in this literature. In light of this, in what follows some of the relevant studies will be surveyed, to provide a sense of the importance of the issue to government, donors and civil society organisations themselves.

A clear definition of our object of investigation is important. In 1993 the Development Resources Centre (DRC) defined NGOs as “self-governing, voluntary, non-profit distributing organizations operating, not for commercial purposes but in the public interest, for the promotion of social welfare and development, religion, charity, education and research”. This definition limits its scope to organisations working in the public interest, excluding those that have a more private function or that have no clear social-public agenda. Precisely for this reason, it may be of interest for our purposes here (though it excludes a large number of community-based organisations and activities).

To the organisations included in public interest and benefit definitions presented above, the Johns Hopkins South African study adds associations that have no clear public agenda, such as co-operatives (small scale operations based on self help principles), stokvels (consisting of a group of people who contribute money to a pool, from which each member benefits in turn), burial societies (groups to which members contribute to assist with burial costs), religious organisations (which play a role in welfare, cultural, educational, and recreational life of communities), and local and community-oriented branches of political parties.

And finally, another recent study undertaken in the framework of the international Civicus civil society diamond study asked NGO members to identify characteristics that they associate with South African civil society. These included among others, being non-profit (operating not for private gain), voluntarism (using voluntary workers), having delivery orientation, being independent or autonomous of government and having their own constitution, rules, and governance structures.42

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42 Two Commas and a Full Stop: Civicus Index on Civil Society South Africa Country report, Cooperative on Research and Education (CORE) and Idasa, 2001. The study relied primarily on workshops at which participants from NGOs and CBOs reflected on their own experience as civil society activists.
Some participants in the CIVICUS study felt that civil society organisations represented the poor and the disadvantaged who live on the margins of society. Others felt that they operated on a mandate from members or beneficiaries regardless of social origins, were driven by the interests of communities and were established to respond to the needs of people and communities in the areas of welfare, service provision, training and technical assistance, community-based burial and savings groups, income generation, community development, advocacy and networking.

The discussion above points to a distinction we must make between the comprehensive and restrictive definitions of civil society organisations. As noted earlier, the restrictive definition, which focuses on those working in the public interest or benefit, is more relevant here as it focuses on organisations playing a developmental role by seeking to improve the social, cultural, and economic well being of communities and sectors in society. Other organisations may focus on survival activities, such as savings and burial societies, and lobbying and advocacy activities. They are important for an overall understanding of the nature of civil society organisations in South Africa, particularly as they focus on community-based activities, but are of less direct relevance to the notion of partnerships.

A series of studies conducted in the last five years have addressed various issues regarding the NGO, non-profit, voluntary sector, dealing among other issues with the notion of partnerships and the role of the sector in relation to the State. The following sections will examine some of these studies in order to reach conclusions about the State-of-the-art of civil society research, and follow this with a discussion of the limitations of existing work and the way to overcome them.

5.3.3 Rights Discourse and Social Mobilisation in South Africa

One of the distinguishing features of the transition away from apartheid towards a new political order in South Africa is the role that debates regarding social and human rights, and their relationships to discourses of popular power and democracy, have played in the process. Most anti-apartheid activists in the 1980s expected social transformation to follow the political demise of apartheid. In addition to abolishing racially discriminatory legislation, as a necessary first step, this called for some form
of redistribution of material resources. Various conceptualisations existed of what a future socio-economic policy might entail—from social-democratic reforms to the application of radically egalitarian principles—but there was a consensus that the transition process would begin with the ‘one person, one vote’ principle rather than culminate with it.

Most activists took it for granted that the State would play a major role in efforts to redress the legacy of apartheid, but rarely thought about the concrete legal and political mechanisms, practices and discourses that would facilitate achieving that goal. One such mechanism is the Bill of Rights, which became part of the 1996 Constitution. It sets the framework for exercising the role of the State, and defines conditions that must be met in order for the State to comply with constitutional requirements. These conditions have to do with the services and policies needed to ensure a basic standard of social justice and human dignity. They are usually referred to as socio-economic rights. They include the right to a healthy environment, access to adequate housing, health care services, sufficient food and water, social security, and basic and further education.

There are different ways in which discourses of socio-economic rights intersect with relations of power. One such way, the legal route, seeks to use the courts to enforce compliance by the State with its constitutional obligations. It does not challenge the primacy of the State in policy formulation and implementation, but rather aims to extend the scope of policy in order to provide relief to individuals and communities in crisis conditions. The activist route uses rights discourse as a mechanism to force the State to change its policies, but again without challenging the role of the State as such. It may use a legal strategy when it is deemed capable of yielding results, but usually regards it as a supplementary measure alongside the primary strategy of political struggle for change. The legal-activist route combines legal and popular mobilisation strategies in order to change policy but also to put in place an expanded definition of rights that may implications beyond each specific case. This latter route potentially poses a fundamental challenge to the organisation and the reach of State power, and therefore is of most interest here.
Challenges to the dominant role of government in social policy have come from different directions, from ‘below’ and ‘above’. They focus respectively on the role of civil society organisations in giving voice to marginalised constituencies that fall between the cracks of representative democracy, and on the role of human rights mechanisms (the courts, the Constitution, the South African Human Rights Commission, legal and activist NGOs) in shaping the operation of State structures. At times these challenges have been linked, serving to reinforce each other with the use of a similar notion of rights as a legitimating discourse. Although not opposed to the power of the State as such, these challenges raise questions about the scope of State power, the ways in which it shapes and is being shaped by other forms of power in society, and the extent to which it may be reconfigured in order to ensure a deeper and more meaningful democracy.

The Constitution does not provide clear guidelines with regard to the concrete obligations of government in relation to socio-economic rights, such as the creation of administrative and financial mechanisms or the adoption and implementation of policies. In most areas, with the exception of the provision of emergency medical treatment and prevention of house demolition or eviction, the Bill of Rights recognises that the realisation of rights cannot be expected to be immediate. The language used in the text emphasises that such realisation must be gradual, reasonable and practicable. Explicitly with regard to housing, health care, food, water, and social security, and implicitly with regard to other areas, steps taken by the State must be ‘reasonable’, the State must operate ‘within its available resources’, and realise the rights ‘progressively’.

Socio-economic rights are commonly seen as a mechanism to advance social demands and increase the pressure on government to provide basic services to disadvantaged citizens. Beyond that, the notion of rights potentially opens a broader challenge to power, which may lead to a shift in political discourse involving the State as well as the popular forces facing it. The most interesting issue that emerges in this context, then, is the role the discourse of rights plays in the way people articulate their needs. They may regard the socio-economic clauses in the Bill of Rights as rights, thus establishing their inalienable claim to certain material and
symbolic goods independently of State policies and priorities. On the other hand, they may regard these rights merely as social *demands* to be advanced and met in a political process, thus retaining the political primacy of the State. These are not mutually exclusive strategies of course, but the choice of focus on one or the other has implications for the configuration of power in society at large.

To clarify this point, people in need of emergency shelter, medical care, or clean water cannot be expected to concern themselves with the impact of their campaigns on the organisation of State power. Normally they would seek assistance from all available sources, and would regard the solution to their immediate needs as a primary goal to be achieved in the most effective manner possible. At the same time, their local campaigns may become linked to wider strategies used by legal authorities, civil society organisations and political movements to re-shape power *beyond* the specific issues at stake. Such linkages between the local and the global can be forged or articulated in different ways, and may contest or re-affirm the existing power relations.

I argue here that neither the legal discourse of rights nor popular mobilisation could provide on their own a strong challenge to the political primacy of State officials. This can only be done when the two are articulated in a critique of State power simultaneously from above and from below. The combination of legal-constitutional mechanisms and grassroots organisation is the best guarantee for a successful challenge to the State-centred politics as usual, which tends to leave citizens as subjects relying on the State for their survival. An alliance between forces in civil society and critical forces within other sectors (business, international agencies and the State itself) can facilitate such a challenge.

### 5.3.4 The Constitutional Provisions

The South African Constitution is written in plain language. It is also written in gender neutral language. But perhaps the most notable aspect of the South African Constitution is that it aims to transform society and respond to our history of inequality and oppression. It is often described as one of the most advanced and progressive Constitutions in the world. The Preamble specifically recognizes the
injustices of South Africa’s history, honours those who worked for freedom and aims to heal the divisions of the past. The Constitution contains social rights and a substantive conception of equality, affirmative State duties, horizontality, participatory governance, multiculturalism and historical self-consciousness (Klare 1998: 146). The socio-economic rights include the right to health care, food and housing, subject to the available resources of the State. As described above, the content of the Constitution was influenced in a large measure by both the public input as well as the deep involvement of civil society in the negotiation process. The Constitution also attempts to protect the continued involvement of the public and civil society in governance in various ways. It is committed to access to information and just administrative action. It dedicates a chapter to the basic values and principles of public administration in South Africa, including transparency and the right of the public to participate in policy-making. Several State institutions supporting constitutional democracy are also set up in terms of the Constitution. These are independent, and ‘subject only to the Constitution and the law’ (section 181(2)). They are accountable to the National Assembly and must present a report on their activities and performance of their functions annually (section 181(5)). Among these institutions are the Human Rights Commission, the Commission on Gender Equality and the Public Protector (a type of ombudsperson).

5.4 THE SOCIOECONOMIC CASES AND THEIR POTENTIAL

The Constitutional Court has thus far heard three matters directly involving the vindication of social rights in the 1996 Constitution. The first, Soobramoney v. Minister of Health, KwaZulu Natal (Soobramoney)43 involved a challenge to the resource rationing policy of a State hospital, according to which the appellant, who suffered from chronic renal failure amongst a plethora of other fatal illnesses, was excluded from a renal dialysis program due to the irreversibility of his condition and his general State of health, which rendered him ineligible for a kidney transplant. The policy was argued to violate the appellant’s right not to be refused emergency medical treatment or, in the alternative, his right to life. Rejecting both these claims (as scrutinized in Section IV below), the Court instead based its judgment on the right to have access to health care in

43 1998 (1) SA 765 (CC).
Section 27(1)(a) of the Constitution, and found that, due to the rationality and bona fides of the rationing policy, it could not be said that the State was in breach of its constitutional obligations. In holding thus, the Court showed significant deference to the administrative functionaries that conceived of and implemented the rationing policy. Justice Chaskalson (for the majority of the Court) held that courts should be “slow to interfere” with political decisions that determine health budgets and with functionary decisions that prioritize health expenditure, provided that such decisions were taken rationally and in good faith.

Notwithstanding the dismissal of the appeal, Soobramoney contained some (albeit tentative) positive indications for the future judicial determination of social rights cases. First, while the claim based on the organic interdependence of the rights to life and health was dismissed, the judgment contains a number of peripheral references to their related interdependence, acknowledging that the realization of social and economic rights are integral to the full enjoyment of the right to life. Second, the Court affirmed the importance of social rights in the South African democracy by stating that the aspiration of a truly equal society based on social justice (as proclaimed by the preamble to the Constitution) would have a “hollow ring” until the severe social deprivation of the majority of the South African population has been addressed. Third, whereas the degree of deference afforded to executive and administrative functionaries might seem exorbitant, the Court at least indicated the willingness to subject executive social policy to some degree of review, by implying that irrational or mala fide policies would not withstand constitutional scrutiny.

A more conclusive (and, for social rights advocates, more hopeful) indication of the standard of scrutiny to which social policy would be subjected was to emerge in Government of the Republic of South Africa v. Grootboom (Grootboom). The case involved the plight of a homeless community who were evicted from the land they

44 Id. 36.
45 Id. 29 (per Chaskalson P). See, also 59 (per Sachs J, concurring separately).
46 Related-interdependence, according to Scott, The Interdependence and Permeability of Human Rights Norms, supra note 7, at 782-83, involves viewing civil and social rights as “mutually reinforcing or mutually dependant, but distinct.”
47 Soobramoney, supra note 35, 31 (per Chaskalson P); 39 (per Madala J concurring separately); 54 (per Sachs J, (incurring separately). See, a/so comments in Pieterse, supra note 30, at 382-83; Scott & Alston, supra note 13, at 235.
48 Soobramoney, supra note 35, 8-9.
49 Id. 29. See Liebenberg, supra note 13, at 41-43; Scott & Alston, supra note 13, at 239-40.
50 2001 (1) SA 46 (CC).
had unlawfully been occupying, and who subsequently successfully petitioned the
High Court for an order that they be temporarily provided with adequate shelter until
they were permanently accommodated under a provincial housing plan. The High
Court based its order on a finding that the right of the community’s children to shelter
under Section 28(1)(c) of the Constitution had been infringed.\footnote{The High Court judgment is reported as Grootboom v. Oostenberg Municipality 2000 (3) BCLR 277 (c).} On appeal, a
unanimous Constitutional Court (per Justice Yacoob) overturned the High Court
decision (as criticized in Section IV below), and instead held that the community’s
right to have access to adequate housing under Section 26 of the Constitution had
been violated. This was so in essence because the relevant provincial government’s
housing plan did not pass the threshold of reasonableness contemplated by Section
26(2) of the Constitution.\footnote{Grootboom, supra note 42, 69, 95, 99.}

The Court held that, in order for a legislative or policy framework aimed at the
progressive realization of social rights to be regarded as reasonable, it must (both in
its content and its implementation) be adequate to facilitate the progressive
realization of the right within prevailing resource constraints, and must be
comprehensive, coherent, balanced and flexible. Such a program must further clearly
allocate responsibilities to different spheres of government, must cater for the
fulfillment of immediate needs in crisis situations and may not exclude a significant
sector of society (especially vulnerable sectors) from its ambit.\footnote{Id. n 39, 46.}
The housing program in question was held to fall short of the reasonableness standard primarily
because it did not cater to the immediate needs of vulnerable groups, and a
declaratory order was issued to that effect.\footnote{Id 69, 99.} Monitoring of the State’s compliance
with the implied obligation of the order to devise a plan that meets all the
requirements set out above was left to the SAHRC.\footnote{Id 97.}

Commentators have pointed out that Grootboom’s approach to ascertaining compliance
with socioeconomic duties may be likened to the use of reasonableness as review
standard in administrative law.\(^{56}\) While the preference of administrative law review of social policy over a more subject-specific inquiry into compliance with the requirements posed by progressive realization may rightly be criticized,\(^{57}\) the Court’s resort to (familiar) principles of administrative law makes sense, especially when keeping in mind that, in many (if not most) legal systems, the review of administrative policy involves striking an appropriate balance between judicial activism and judicial deference. By retreating to the comfort zone of administrative law, the *Grootboom* Court has made an important conceptual gain—it has mapped out a (what it considers appropriate) role for the judiciary in adjudicating the often polycentric issues raised by social rights claims. In doing so, *Grootboom* illustrates that vindicating social rights is not as far removed from courts’ “ordinary” review function as is often contended, and accordingly that the notion of vindicating them judicially is not necessarily far-fetched. As such, the *Grootboom* standard may well be useful in rendering the standard of “appropriateness” espoused by Article 2.1 of the ICESCR more concrete in a domestic legal setting.

Further commendable about *Grootboom* is its explicit affirmation of the justifiability and enforceability of socioeconomic rights,\(^{58}\) its unequivocal acknowledgment of the related interdependence of human rights\(^{59}\) and its seeming endorsement of the UN Committee on Economic Social and Cultural Rights’ understanding of progressive realization. As to the latter, the Court—significantly—appeared to agree that progressive realization requires the State to move “as expeditiously and effectively as possible” towards full realization of social rights and that deliberately retrogressive measures would prima facie indicate noncompliance with this obligation.\(^{60}\)


\(^{58}\) See Grootboom, *supra* note 42, 20, where the Court Stated: “The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.” See also Olivier, *supra* note 13, at 133.

\(^{59}\) Id. 24-25; 83, where the Court Stated: “The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom.”

\(^{60}\) Id. 45; where the Court quotes, with approval, 9 of General Comment 3 *The Nature of States Parties’ Obligations (Art. 2, para. 1 of the Covenant)* (Fifth sess., 1990); U.N. Doc. HRI\GEN\1 Rev.1 (1994), at 45.
The Court’s most recent social rights judgment, *Minister of Health v. Treatment Action Campaign (no 2) (TAC)*,\(^61\) has proved also to be its most forceful and most controversial. The Court dismissed an appeal by the Minister of Health against an order of the High Court that her department extend its program for the prevention of mother-to-child-transmission (MTCT) of HIV by making the drug Nevirapine available also outside of the designated public sector pilot sites where it was at that time being administered. The Court ordered that the drug be administered also in other public hospitals in cases where doing so was medically indicated, and where the capacity to provide HIV testing and counseling and to administer the drug existed.\(^62\) The government was accordingly instructed to remove bureaucratic restrictions that prevented the administering of the drug in such circumstances.\(^63\) The order followed on a finding that the right to have access to health care services in Section 27 of the Constitution had been breached, seeing that government’s existing MTCT prevention program, due primarily to its rigidity, failed to satisfy the requirements of reasonableness held forth in *Crootboom*. Other factors influencing the finding of unreasonableness included the drug’s proven efficacy, the fact that the human and financial resources to administer it were clearly available and the vulnerability of poor mothers and children outside of the catchment areas of the current program.\(^64\)

Arguably the *TAC* judgment’s greatest contribution is its unequivocal dismissal of the government’s argument that courts were not empowered to issue any Order other than a declaration of rights in polycentric socioeconomic rights matters, which has done more to affirm the justiciability of these rights than has been achieved in all of its previous declarations to that effect.\(^65\) While acknowledging that courts are not ideally suited to issue orders with multiple societal consequences and that the judiciary’s role in such matters should be “rather a restrained and focused” one that is largely limited to “requir[ing] the State to take measures to meet its constitutional obligations and to subject[ing] the reasonableness of these measures to evaluation,”\(^66\) the Court Stated that:

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\(^{62}\) *TAC* also again confirmed the generic justiciability of social rights. *Id.* 25.

\(^{63}\) *Id.* 38. *See also n 98, 113.
The Constitution requires the State to “respect, protect, promote and fulfill the rights in the Bill of Rights.” Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument . . . that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.\(^{67}\)

The Court went on to hold that its constitutional imperative to award “appropriate relief” where a right in the Bill of Rights had been infringed would, depending on the circumstances of the case, the nature of the right infringed and the degree of the infringement, allow (and sometimes require) it both to issue a mandatory order and to exercise supervisory jurisdiction.\(^{68}\) As long as court orders aimed at remedying noncompliance with obligations imposed by social rights, even though they may have budgetary consequences, are not “themselves directed at rearranging budgets” and are formulated in a way that allows the Executive the flexibility to adapt its policies when appropriate, they will not be in breach of the separation of powers doctrine.\(^{69}\)

That the Court meant also to translate its postulates into practice is clear from the terms of the order issued in \textit{TAC}, which not only sets out the extent to which government failed in carrying out its constitutional obligations, but also vindicates noncompliance with the obligation to respect the right of access to health care services (by ordering the removal of restrictions to the administering of the drug) as well as the obligation to fulfill the right (by ordering government to “permit and

\(^{67}\) Id. 99.
\(^{68}\) Id. 106.
\(^{69}\) Id. 38, 114.
facilitate,” through reasonable measures, the increased provision of the drug). The order further emphasizes that it does not “preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child-transmission of HIV.”

Read together, the three socioeconomic rights judgments indicate that courts are, contrary to popular belief, not rendered powerless by the doctrine of separation of powers when tasked with the domestic enforcement of social rights. Whereas courts need to be hesitant to disrupt budgetary and policy processes, the judgments show that social rights are in principle as capable of judicial vindication as their civil and political counterparts.

5.4.1 Civil Society and the Courts

As discussed above, in line with global trends, South Africa has adopted a system of constitutional supremacy with judicial review. This gives powers to the courts to decide matters often placed on the legislative agenda. As stressed above, the South African Constitution is the cornerstone of our democracy and envisages large-scale egalitarian social transformation. However, notwithstanding the content of the Constitution, a review of constitutional litigation in the past seven years leads inescapably to the conclusion that it is the more privileged groups in society that are seeking the protection of the Bill of Rights in the courts. Indeed there are few instances of the more disadvantaged groups in society—the very groups the Constitution was designed to protect—using constitutional litigation as a way of articulating and protecting their rights (Jagwanth, 1999: 200). In addition, the jurisprudence of the courts has often not yielded the protection for vulnerable groups which the Constitution appears to envisage. Given that in a constitutional democracy, courts are the primary protectors and final arbiters of constitutional rights, this trend is a disturbing one. However, the role of organized civil society in constitutional litigation tells a better story. The South African Constitution permits class action litigation – that is litigation on behalf of an entire group of people affected by the

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70 Id. 135(3)(aHb).  
71 Id. 135(4).
subject matter of the case. It also permits interest-group interventions in litigation, which allows organized civil society to intervene in a case and present arguments to the court. This has led to many successes for these groups. For example, the National Coalition of Gay and Lesbian Equality, a voluntary association of gay people in South Africa and 69 organizations and associations representing such people, successfully brought two cases before the Constitutional Court on the basis of discrimination on the ground of sexual orientation.\(^2^2\) Other groupings, which have successfully initiated or intervened in litigation in the Constitutional Court have been the Society for the Abolition of the Death Penalty,\(^3^3\) the Women’s Legal Centre,\(^4^4\) Christian Education South Africa,\(^5^5\) the AIDS Law Project\(^6^6\) and the Community Law Centre.\(^7^7\) The majority of the cases decided by the Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups, and it is rare to find suits brought by individual litigants in this regard. Institutional obstacles as well as lack of access to resources and lack of knowledge about the content of rights frequently make litigation in the courts virtually impossible for ordinary people. The role of civil society thus becomes paramount, and ensures that judicial rights discourse does not remain the domain of the privileged few in society. It is also important for civil society in modern democracies to ensure that the new forums of decision-making, like the courts, become accessible. Public interest litigation strategies and intervention in courts by organized civil society has resulted in tremendous victories for disadvantaged groups in other parts of the world too – most notably India and Canada.\(^7^8\)

An example of organized civil society bringing cases to the attention of the court is the recent high profiled case brought by an active and highly effective NGO, the Treatment Action Campaign (TAC) in the Pretoria High Court. In essence, the TAC

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\(^2^2\) These cases are National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC) and National Coalition of Gay and Lesbian Equality v Minister of Home Affairs 2000 (1) BCLR 39 (CC).

\(^3^3\) Intervention in S v Makwanyane 1995 (6) BCLR 665 (CC) and Mohamed v President of the Republic of South Africa 2001 (7) BCLR 685 (CC).

\(^4^4\) Intervention in Moseneke v Master of the High Court 2001 (2) BCLR 103 (CC).

\(^5^5\) Applicants in Christian Education South Africa v Minister of Education 1998 (12) BCLR 1449 (CC) and Christian Education South Africa v Minister of Education 2000 (10) BCLR 1051 (CC).

\(^6^6\) Intervention in Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC).

\(^7^7\) Intervention in Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC).

\(^7^8\) See particularly the work of the Women’s Legal Education Action Fund (LEAF) in Canada.
argued that the State was constitutionally obliged to provide anti-retrovirals to HIV positive pregnant women. The court agreed. The case is now on its way on appeal to the Constitutional Court. I wish to conclude with a discussion of this case because it presents a number of important issues and challenges for democracy under a system of constitutional supremacy and judicial review.

5.4.2 Civil Society in South Africa

Joseph Stiglitz (Nobel Prize-winning economist and Chief Economist at the World Bank until 2000) argued in a recent address to the International Labour Organisation that the reforms of recent decades have weakened ‘automatic economic stabilisers’, including social protection systems and schemes to help cover the unemployed and retired etc. He further argues that by weakening such systems, we have diminished their capacity to stimulate the economy in times when the economy itself is weakened.

The Black Sash is a leading civil society against of south Africa recognises that the social security system that they inherited was predicated on a racialised system that assumed the full employment of its beneficiaries. As such it was completely inadequate to address the social security needs of all South Africans. Black Sash argued consistently for a comprehensive social security system that provides cover for all living in South Africa across their full life cycle, for a range of needs, and that integrates both contributory and non-contributory forms of social security.

The current social protection measures, viz social assistance, provide a ‘survival mode safety net’ only to certain households who are fortunate enough to contain individuals in the current target groups. These include the disabled, elderly and very young Children between the ages of 15 and 18 and the unemployed are currently excluded. Furthermore, large proportions of working people do not benefit from private retirement or health savings and, further, certain categories of person are excluded from social insurance i.e. domestic workers and those in the informal sector, and casual and temporarily employed.

The struggle for a comprehensive social security system is therefore all the more necessary, as it is the poor who suffer most when these systems are weakened or not sufficiently resourced to cushion us during times of economic crisis.
Black Sash worked hard to unify South African racially fragmented social assistance provisions and tried to ensure that the current social security reforms were not just restricted to pension reforms but formed part of a bigger reform process that would take into account the large numbers of unemployed people in South Africa.

5.4.3 The Black Sash Strategy for Protection of Human Rights

The Black Sash experiences and voices of their staff - the passionate and dedicated people who give advice and support to thousands of vulnerable and marginalised members of society each year.

The Black Sash three key strategies - advice-giving, rights education and advocacy - were implemented across each of their three programme areas, namely comprehensive social security, consumer protection, and social service and subsidies.

The Black Sash rights education work intensified greatly in South Africa. They used the public media extensively to reach and inform millions of people about their socio-economic and civil rights. A testament to the success of their strategy was the huge spike in queries and calls they received at regional advice offices whenever they ran a campaign. The Black Sash have also managed to track their progress on the Black Sash website by looking at the increasing number of visitors who access and download You and Your Rights fact sheets.

In addition to Black Sash social security programme, in which they argue for comprehensive protection our consumer protection programme works toward building a fair credit and consumer environment. Black Sash programme titled Social Services and Subsidies is a much newer area of work but one that we will tackle with no less enthusiasm. This programme works toward developing accountable governance and service delivery. Recent events in our country indicate that our entry into this area of work must be accelerated if we are to ensure that the promise of the Constitution does not remain mere words. e do not have a moment to lose.
5.4.4 Organisational Sustainability

The Black Sash remains committed to developing its strategy for sustainability. Indeed, it is a challenge that is critically important for all of us who work within civil society. We have learnt that sustainability is about change, which is about adaptability and willingness to risk, while trying to keep one’s eye firmly on the strategic objectives and our vision.

With this in mind, they have reviewed and taken forward our strategic plan, and centralised and updated our financial systems. They have also adapted job descriptions in line with our strategic plans and made the necessary staff and infrastructure investments in our Information Systems.

The Black Sash got an opportunity to participate in a three-year programme set up by Atlantic Philanthropies and managed by Inyathelo, which aims to build sustainability in non-profit human rights organisations working with the poor in rural areas.

5.5 CONCLUSION

Non-governmental organizations or voluntary organizations play a vital role in the shaping and implementation of nation building. They have been contributing immensely towards various development programmes. NGOs/VOs provide innovative and alternative cost effective models for development. They mobilize people for constructive community work and often reach the most marginalized and vulnerable sections of society and contribute to the socio-economic development of the country, with a much wider outreach. The voluntary sector has a significant presence in almost all regions of the country and its role as an important partner of the Government in development is being increasingly recognized in India.

In the international crusade against human rights violations, the role of NGOs can hardly be over-emphasized. As a matter of fact, the development of international norms, institutions and procedures for the promotion and protection of human rights has gone hand in hand with working in the field of human rights. Civil Society played an important role during the drafting of the United Nations Charter as they lobbied for the inclusion of human rights provisions in the Charter and for a system that would give Civil Society of Organisation a formal institutional affiliation with and
standing before the UN organs. Article 71 of the UN Charter was implemented in due course by the Economic and Social Council and it established a formal system that enables qualified NGOs to obtain consultative status with the ECOSOC. Since then the human rights NGOs have played a very important role in the evolution of international system for the promotion and protection of human rights and in trying the make it work. It is the non-governmental organizations’ (NGOs) role to help States to protect and respect human rights. The existence and presence of NGOs in States all over the globe have formed a presence on the International stage and have helped to draw attention to the excess human rights violations that are taking place. An example of an NGO forming a presence on the international State and making a stand can be seen in the establishment of the International Criminal Court (ICC) at the Rome Conference in 1998 where Amnesty International (AI) was one of the main NGOs that supported ICC’s creation. NGOs have been viewed as the driving force behind human rights violation prevention and have played a large role in ensuring the human rights violations in countries world-wide remains an important political issue. NGOs have influenced and created further opposition to human rights violation through campaigns. NGOs through their work have lead to “the promotion and ‘universalization’ of human rights norms in India.”

In contrast, as we have seen, since 1994 South Africa has received an unprecedented amount of international political aid aimed at consolidating its liberal democracy. Even without the benefit of an in-depth, detailed study, one can safely conclude that there are few, if any, aspects of the new South African political system that have not been shaped by donor input. What of civil society? This chapter suggests that political aid to civil society has had two major consequences. First it has changed the debate on Human Right. During the past five years, it is possible to see a process in which Human Right has been redefined. Although half of South Africans still believe that access to housing, jobs and a decent income are essential components of a democratic society, this residual belief in social democracy is being eroded and replaced by the norms and practice of procedural Human Right. It is our argument that the North has played its role in this process by funding the liberal proponents of procedural democracy in civil society, and that, subsequently, political aid has successfully ‘influenced the rules of the game’. The second consequence is that this
has facilitated a newly legitimatised South African State to preside over the same intensely exploitative economic system, but this time unchallenged. External and domestic support for protection of Human Rights has successfully removed all challenges to the system. It has ensured that Human Right in the new South Africa is not about protecting the Individual rights but about effective system maintenance through the efforts of civil society.