Chapter V

Comparative Constitutional and International Law Perspective

It is worth reminding ourselves that the quest for the realisation of constitutional socio-economic rights through judicial intervention or the task of making socio-economic rights justiciable is not peculiar to India only, in fact several developing countries of the world are presently grappling with this issue. South Africa, Brazil, Colombia, Nigeria, and Indonesia to name a few are some of the important developing countries who are presently the subject matter of several academic pursuits because of the significant development that had taken place in this area in these countries.\footnote{See generally, Varun Gauri and Daniel Brinks (eds.), Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (Cambridge University Press, New York, 2008).} In the field of International Law as well, measures to ensure more accountability of States towards the obligations under the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) is being consistently emphasised. International adjudication of rights recognised under the Convention have now been attempted by providing for an individual complaints mechanism under the Optional Protocol to ICESCR (OP-ICESCR) which has entered into force from 5\textsuperscript{th} May 2013, three months after the 10\textsuperscript{th} ratification of the protocol.

These developments therefore, call for a study of these developments with a view to develop a comparative perspective on this issue. Keeping this objective in mind this chapter is devoted to studying some of important developments in this regard in countries such as South Africa, Ireland, USA and UK. South Africa for the obvious reason of having a Constitution expressly making socio-economic rights justiciable as part of the bill of rights; Ireland is important as the concept of DPSPs in the Indian Constitution is actually taken from there and, USA and
UK are always important legal systems to be studied in the domain comparative constitutional law. A portion will also be dedicated to studying the developments in the field of International Law.

5.1 Socio-economic Rights Adjudication in South Africa

South African Constitution of 1996 is known for its progressive outlook primarily because of the inclusion of socio-economic rights expressly within the judicially enforceable bill of rights⁴⁴² and courts have a wide discretion to grant what is ‘just and equitable’.⁴⁴³ It is argued that this measure is also attributable to the influence of the developments in terms of constitutional socio-economic rights in India at the behest of courts in India led by the Supreme Court of India.⁴⁴⁴ The preamble of the South African Constitution is also significant in this regard which emphasises on recognising ‘the injustices of our past’ and therefore honouring them ‘who suffered for justice and freedom in the past’. It also asserts to ‘improve the quality of life of all citizens and free the potential of each person’. These clarion calls emanating from the preamble set the bedrock for the development of judicially enforceable constitutional socio-economic rights against the harrowing past of apartheid. Bundlender J. observes in City Action Group v. City of Cape Town⁴⁴⁵

“Ours is a transformative Constitution ....... Whatever the position may be in the USA or other countries, that is not the purpose of our Constitution. Our Constitution provides a mandate, a

⁴⁴² See, Supra note 163 and 164.
⁴⁴⁴ Upendra Baxi, “Constitutionalism as a Site of State Formative Practices”, 21 Cardozo L. Rev. 1183 at 1205. Baxi asserts that the influence of the development on this front in India has impacted South African Constitution which has expressly democratized standing as an integral part of bill of rights. See, Article 38 of Constitution of South Africa
framework and to some extent a blueprint for the transformation of our society from its racist and unequal past to a society in which all can live with dignity.”

In its Certification judgment the Constitutional Court of South Africa while addressing the argument that socio-economic rights adjudication violates the principle of separation of powers held that it is true that the judicial enforcement of socio-economic rights may have budgetary implications but even the judicial enforcement of some civil and political rights such as right to fair trial and right to legal aid can have these implications too. The Court stated that adjudication of socio-economic right under the bill of rights by the courts is a task not so different so as to be construed as violative of separation of powers.⁴⁴⁶

The South African Constitution apart from binding the State in respect of bill of rights, it also recognises the obligation of natural and juristic persons in this regards as well. So, apart from the vertical approach in relation to bill of rights it also expressly follows a horizontal approach in this regard. Article 8(1) provides that the bill of rights applies to all, and binds the legislature, the executive, judiciary and all the organs of the State. Article 8(2) provides that a provision in the bill of rights ‘binds a natural person and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. Apart from this another significant aspect of South African Constitution is the express mention of standing before the court in relation to the claims relating to the bill of rights. Article 38 expressly recognises that locus standi is not limited to the person aggrieved only and gives the right to agitate such causes to anyone acting on behalf of someone who cannot act on his own; it also recognises class action and actions in public

⁴⁴⁶ Supra note 167 at para 77, 78.
interest. Clearly, the impact of the procedural development in the quest for the constitutional adjudication of socio-economic rights in countries like India is visible here.

5.1.1 Leading Socio-economic Rights Cases

The landmark cases that have laid the foundations of the constitutional court’s jurisprudence in are Soobramoney v. Minister of Health, KwaZulu-Natal⁴⁴⁷, The Government of Republic of South Africa v. Irene Grootboom⁴⁴⁸ and Minister of Health v. Treatment Action Campaign⁴⁴⁹. Soobramoney⁴⁵⁰ was the first major constitutional court case to consider the enforceability of socio-economic rights.⁴⁵¹ The applicant an unemployed man suffering from renal failure wanted the cost of his medical treatment including dialysis to be borne by the provincial hospital as he cannot afford the cost of the treatment. Without this the applicant would die because of his medical condition. He relied on section 11 (right to life) and section 27(3) (right to emergency medical treatment of the South African Constitution. The application was dismissed by the High Court and was subsequently taken to the Constitutional Court. The Constitutional Court held that the right to medical treatment should not be inferred from right to life in section 11 since the right to access health care services is being entrenched in section 27. It further held that right to emergency medical care under section 27(3) is limited to sudden ‘catastrophes’, which require immediate medical attention and not the treatment of chronic illnesses meant for prolonging the life of the patients. Regarding the qualified right to access medical health care under section 27(1) and 27(2) of the Constitution, the Court held

⁴⁴⁸ Available at http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases (last visited on 12 Dec. 2014).
⁴⁵⁰ Supra note 447.
that the applicant has not shown that the guidelines set by the hospital authorities are unreasonable nor was it suggested that the guidelines were applied irrationally and unfairly. The Court also observed that inclusion of such right to expensive medical treatment will increase the budget on health and thereby may dramatically prejudice the other priorities of the State.

In the famous decision of the South African Constitutional Court in the case of *The Government of Republic of South Africa v. Irene Grootboom*\(^{452}\) the Constitution of the Republic of South Africa, 1996 in its Bill of Rights under Chapter II of the Constitution explicitly provides judicially enforceable right of housing, health care, food, water and social security. In *Grootboom*, a group of extremely poor people (the respondents) have moved onto a vacant land privately owned and earmarked for formal low cost housing. Eviction proceedings were successfully instituted against these people, and the resulting court order was implemented in a manner reminiscent of the apartheid style evictions\(^{453}\) by destroying the property whatever little they had in the process. Thereafter, the respondents landed up on the Wallacedene sports field with only plastic sheets with them, which provided very little protection in winter rains. Next day, the respondent’s attorney wrote to the municipal authorities demanding that the municipality must fulfill its constitutional obligation and provide shelter to the respondents. Not satisfied with the response of the municipal authorities they instituted legal action against the government, demanding that the municipality must fulfill its constitutional obligations towards them, which according to them ensures at least basic shelter. The High Court ordered some relief to be granted to the respondents. The government then appealed against the decision to the Constitutional Court. The respondents

\(^{452}\) *Supra* note 50.
\(^{453}\) *Supra* note 50, Yacoob, J. at para 10.
plea was based on section 26 and 28(1) (c)\textsuperscript{454} of the South African Constitution which according to them obligates the government to provide them with basic shelter. The South African constitutional Court in its certification judgement\textsuperscript{455} had already declared that the socio-economic rights contained in the Bill of Rights of the South African Constitution are justiciable in the court of law. In \textit{Grootboom} case considerable weight was given to the fact that the United Nations Committee on the interpretation and application of the International Covenant on Economic, Social and Cultural Rights has held that socio-economic rights contain a ‘minimum core obligation’ that must be fulfilled by State parties. The Constitutional Court without rejecting the minimum core obligation argument flowing from the Covenant concluded that it is not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right.

Instead, the Constitutional Court speaking through Yacoob, J. held\textsuperscript{456} that the real question in terms of our Constitution is whether the measures taken by the State to realize the right afforded by section 26 are reasonable? However, the court added that considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been spent better. It is necessary to recognize that the State has a wide range of options before it to give effect to its constitutional duty. But, a programme undertaken by the State that excludes a significant section of the society cannot be said to be reasonable. Applying this principle to the facts of the case Yacoob, J, found that the State has instituted an integrated housing development policy and medium and long term objectives of the policy are appreciable. However, the housing

\footnotesize{\textsuperscript{454} Every child has the right to basic nutrition, shelter, basic healthcare services and social services.}

\footnotesize{\textsuperscript{455} \textit{Supra} note 446.}

\footnotesize{\textsuperscript{456} 10 other judges of the Constitutional Court concurred with Yacoob, J.}
programme lacked any component for those in desperate need. He found that the absence of such a component was unreasonable and thus concluded that the nationwide housing programme falls short of obligations imposed upon national government by section 26(2) of the Constitution to the extent it fails to recognize that the State must provide for relief for those in desperate need of access to housing.

Interpreting section 28(1) (c) of the Constitution, the court held that the right to shelter for children under this provision is applicable to those who are not in the care of their parent/guardian, i.e. in some alternative care or abandoned. In this case, since the children were in the care of their parents section 28(1) (c) is not applicable. The reasonableness approach adopted by the Constitutional Court in this case is known as the reasonableness form of adjudication of socio-economic rights, which is an offshoot of weak form judicial review.

In *Treatment Action Campaign*\(^{457}\) limited number of measures adopted by the State to prevent the transmission of HIV from mother to child was challenged as violative of the qualified right to have access to healthcare services given under section 27(1) and 27(2) of the Constitution of South Africa. The Constitutional Court asked the government of South Africa to make available a drug called Nevirapine which inhibits the transmission of HIV/AIDS from pregnant mothers or nursing mothers to their child from about 12 to 25 percent. The government was resisting this claim, not because of budgetary constrain for the cost of medicine but for the accompanied counselling program which was necessary according to it. Another concern was that the widespread use of the drug might actually lead to development of drug resistant virus. Negating the contentions of the government the Court ordered it to

\(^{457}\) *Supra* note 449.
make the drug available to everyone without a counselling program as the drug in itself would be beneficial. Regarding the argument of growth of drug resistant virus, the Court stated that the risk is well worth running. In this case the distribution of drugs was to be done by the company manufacturing the drug; therefore, the decision despite being clubbed as an instance of strong social and economic rights is actually having no budgetary implications.\textsuperscript{458}

In these the Constitutional Court of South Africa has developed what is called the reasonableness model of constitutional socio-economic rights adjudication.\textsuperscript{459} The observation made by Yacoob J. very clearly stipulates this point.\textsuperscript{460} The Court has explicitly rejected an individualised form of relief. In \textit{Grootboom} the Court favoured a weak remedial approach in the form of reasonableness inquiry. The Court gave a declaratory relief without fixing the timeline for implementation of the requisite measures. Largely similar approach was adopted by the Court in \textit{Treatment Action Campaign}. Following \textit{Grootboom}, here also the Court rejected the minimum core as it would be ‘impossible to give everyone access even to a core service immediately.’\textsuperscript{461} But following the scientific data the Court was of the view that not allowing access to Nevirapine is an unreasonable measure even if it is partially effective. Limiting access to such a drug therefore is unreasonable and in violation of section 27(2) of the Constitution. So, in this case the Court apart from passing the declaratory relief also granted mandatory relief unlike \textit{Grootboom}.

Reasonableness approach therefore offers considerable latitude to the legislature in realising the rights and therefore scores heavily on the point of legitimacy. It is certainly principled but its effectiveness is questionable. A constitutional culture of respect for the

\textsuperscript{458} \textit{Supra} note 412 at 247.
\textsuperscript{459} See, \textit{Supra} note 51 at 756, 757 and \textit{Supra} note 451 at loc. 4222.
\textsuperscript{460} \textit{Supra} note 456 aforesaid Yacoob J.
\textsuperscript{461} \textit{Supra} note 449 at para 35.
declaratory orders of the court would be the key to ensure the effectiveness of this model as in most of the cases the applicants before the courts would not be getting the remedies claimed. However, for this, the burden of proving the reasonableness of its actions in providing for rights or for the lack of its provisioning must rest upon the State.\textsuperscript{462} This would include the onus of proving the exhaustion of reasonable alternatives to guard against the total denial of basic needs of disadvantaged groups.\textsuperscript{463}

5.1.2 Enforcement of Negative Duties Imposed by Socio-economic Rights

Another issue that has arisen in South Africa in relation to the socio-economic rights is the issue of issue of depriving somebody of the existing access to basic needs. This is characterised as the issue involving negative constitutional socio-economic rights. This has mostly arisen in the context of depriving peoples of their homes for the reason of homes being built on others’ or governments land.\textsuperscript{464} Evicting people from their homes comes in the way of the explicit guarantee of right to housing provided under section 26(3) of the Constitution. In \textit{Port Elizabeth Municipality v. Various Occupiers}\textsuperscript{465} the case concerned the eviction of people occupying sacks in the privately owned land. The Court acknowledged that the eviction may take place even it means depriving people of their homes.\textsuperscript{466} However, the Court said that Courts must be reluctant to order eviction of people unless it is satisfied that the reasonable alternative is available even as an interim measure before the ensuring the ultimate

\textsuperscript{462} \textit{Supra} note 451 at loc. 4435.
\textsuperscript{463} \textit{Ibid.}
\textsuperscript{464} \textit{Id.} at loc. 4440.
\textsuperscript{466} \textit{Id.} at para 21.
access to a housing programme.\textsuperscript{467} In the clash between the right to property and the genuine despair of the homeless the court should not automatically privilege property rights.\textsuperscript{468}

5.1.3 Exercise of Supervisory Jurisdiction by the Constitutional Court

The exercise of supervisory jurisdiction by the courts with a view to implement its orders plays a very crucial role in the actual enforcement of the orders of the court as the orders passed by the court in such cases generally require a time frame for implementation as they cannot be realized immediately.\textsuperscript{469} The High Courts in South Africa have generally ordered supervisory jurisdiction but the Constitutional Court has generally been reluctant to order the supervisory jurisdiction.\textsuperscript{470} The lack of supervisory role for the courts makes the declaratory order weak. The tardy implementation of the declaratory order in \textit{Grootboom} is blamed upon the lack of exercise of supervisory jurisdiction by the Constitutional Court.\textsuperscript{471} In relation to \textit{Grootboom} a settlement agreement allowed Grootboom community to reside on the periphery of the wallacedene sports field on a temporary basis until housing became available to them under the State’s housing scheme.\textsuperscript{472} Provision was also made the better the living conditions in existing accommodation by providing for waterproofing and basic sanitation and water.\textsuperscript{473} In relation to the general order of the Constitutional Court in \textit{Grootboom} to provide for housing measures for those in desperate needs of housing, it is only in August 2003 that the national and provincial ministers of housing approved a programme entitled ‘\textit{Housing}

\textsuperscript{467} Ibid.
\textsuperscript{468} \textit{Id.} at para 23.
\textsuperscript{469} See generally, Rohan J. Alva, “Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India?” 44 \textit{Hong Kong L. J.} 207.
\textsuperscript{470} \textit{Supra} note 451 at loc. 4669.
\textsuperscript{471} Ibid.
\textsuperscript{472} Ibid.
\textsuperscript{473} Ibid.
Assistance in Emergency Circumstances.\textsuperscript{474} This scheme was later incorporated in the National Housing Code in 2004.\textsuperscript{475} However, it remains to be tested whether this programme fulfils the constitutional obligations flowing from section 26 as enumerated in the \textit{Grootboom} judgement.\textsuperscript{476} Even the \textit{Grootboom} community still resides in the temporary accommodation on the periphery of wallacedene sports field even after 5 years of the \textit{Grootboom} judgement.\textsuperscript{477} The Court should therefore shed its reluctance and supervise its declaratory orders in order to bring out structural changes needed to realise the socio-economic rights in the bill of rights.\textsuperscript{478}

5.2 Socio-economic Rights Adjudication in Ireland

The Prime Minister of India Narendra Modi in his official visit to Ireland in September, 2015 stated that “Our Constitutions have something sacred in common. The Directive Principles of State Policy in the Indian Constitution are inspired by the Irish Constitution.”\textsuperscript{479} In this context therefore it is significant to find out the status of the India’s counterpart to directive principles in the State of Ireland under the Irish Constitution. Irish Constitution is the oldest in Europe and it predates the discourse on international human rights including socio-economic rights.\textsuperscript{480} Irish Constitution provides for the non-justiciable ‘directive principles of social policy’ which are the principles for the State to apply towards the promotion of the people as a whole in the socio-economic field.

\textsuperscript{474} \textit{Id.} at 4681.
\textsuperscript{475} \textit{Ibid.}
\textsuperscript{476} \textit{Ibid.}
\textsuperscript{477} \textit{Ibid.}
\textsuperscript{478} \textit{Id.} at 4708.
5.2. 1 Directive Principles of Social Policy

Directive principles of social policy in the Irish Constitution are contained in Article 45. Article 45 says that the principles of social policy are meant for the general guidance of the Irish Parliament called ‘Oireachtas’. It further says that the ‘application of these principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of the Constitution’. Article 45 has inspired the adoption of directive principles of State policy in the Indian Constitution which has been used by the Supreme Court of India to develop the jurisprudence of constitutionally enforceable socio-economic rights. Several expressions used in Article 45 bear close resemblance to the expressions used in the different provisions of Part IV of the Indian Constitution part from being expressly declared to be not enforceable in a court of law. For example Article 45.1 states that “the State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of national life.” This is very similar to the expression used in Article 38(1) of Indian Constitution. Article 45 of the Irish Constitution is very similar to Article 39 of the Indian Constitution which emphasises that the State in particular must direct its policy towards securing adequate means of livelihood for citizens, distribution of ownership and control of material resources of the community to subserve the common good and no concentration of ownership or control of essential commodities in a few individuals to the common detriment.

483 See, and compare it with Article 38(1) of the Constitution of India.
Breaking the British tradition Ireland opted for written constitution with entrenched fundamental rights authorising the courts for the enforcement of fundamental rights, however with an imperfect separation of powers resembling India. The courts in Ireland have asserted their central constitutional role in the protection of fundamental rights. Rights guaranteed under the Irish Constitution include the common catalogue of rights protected in liberal democracies such as right to life, to equality, freedom of expression and assembly, trial in due course of law and freedom of conscience. The right protected under the Irish Constitution except the right to education under Article 42 are mainly civil and political rights. The Socio-economic rights are mainly given in Article 45 in the form on non-enforceable principles of social policy. These are mainly influenced by the Catholic social teachings. In contrast to Indian Constitutional experience Article 45 has been a veritable dead letter and claims for socio-economic rights have to be pursued through other avenues.

5.2.2 Background to the Contemporary Approach of the Irish Courts

The judgment in the O’Reilly v. Limerick Corporation by the High Court can be regarded as the origin of the contemporary and dominant approach of the Irish Supreme Court in

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484 Supra note 482 at 140.
485 Ibid.
486 Article 40.3.2
487 Article 40.1
488 Article 40.6
489 Article 38.1
490 Article 44.2
491 Supra note 482 at 141.
492 Ibid.
493 Ibid.
494 Ibid.
relation to socio-economic rights.\textsuperscript{496} In this case the plaintiffs were from a travelling community living in conditions of extreme deprivation. They petitioned the court seeking servicing halts for them under the Housing Act, 1996. They also demanded damages from the State owing to their sufferings in the past as it violated according to them their guaranteed constitutional right. They asserted that providing certain minimum standard of basic material conditions is necessary to foster and protect someone’s dignity and freedom as a human being which is one of the unenumerated personal rights covered under Article 40.3.2 which guarantees the protection of personal rights without specifying the right protected under personal rights. This unenumerated personal right has given rise to an important and beneficial strain of judicial activism.\textsuperscript{497} However, rejecting the plea of the plaintiff Justice Costello found this to be outside the functions of the court and hence the remedy claimed is not the constitutionally enforceable rights. He emphasised the Aristotelian distinction between commutative and distributive justice and therefore this being a matter of distributive justice falls outside the jurisdiction of the court. He further added that the manner in which justice is administered in the courts makes court the wholly inappropriate institution for the fulfilment of such claims. He therefore, stressed that such a petition should be presented before the ‘Leinster House’ (Parliament) rather than in the ‘Four Courts’ (seat of Irish main courts).

Aoife Nolan has argued that the remedy sought in the aforesaid case was actually in the nature of commutative/rectificatory justice as it involves a constitutional wrong by way of the beach of the constitutional right of a citizen and the remedy sought therefore is meant to rectify the

\textsuperscript{496} Ibid.
\textsuperscript{497} Supra note 482 at 142.
wrong committed by the State.\textsuperscript{498} She further finds fault with the suggestion of petitioning the legislature for such remedies given by Justice Costello because disenfranchised group do not possess the political clout to make their voices heard before the legislative bodies.\textsuperscript{499}

5.2.3 Selected Rights

5.2.3.1 Protection of Socio-economic Rights by means of Civil and Political Rights

Several civil and political right related provisions can be expanded to include socio-economic rights within its ambit. Unenumerated personal rights can be expanded in a meaningful way to include socio-economic rights. The Constitution Review Group in Ireland concluded that the right of anyone falling below the minimum level of subsistence can be protected by the judicial vindication of his personal rights under the constitutionally guaranteed right to life and bodily integrity.\textsuperscript{500} An important judgment in this context is that of the High Court given in \textit{Ryan v. Attorney General}\textsuperscript{501} wherein the applicant challenged the legislation mandating compulsory fluoridation of water supply as violative of the right to bodily integrity on her and her family. Though, Justice Kenny speaking for the court rejected the claim as there was sufficient scientific evidence to suggest that fluoridation of water supply is for public good but accepted the argument that the applicant has a right to bodily integrity under the Constitution regardless of the fact that no such right is referred in the text of the Constitution. He observed that the personal rights which can be invoked to invalidate a legislation are not only those which are specified in Article 40 rather it includes all the rights because of the ‘Christian and democratic nature of the State.’ Kenny’s judgment was approved by a majority

\textsuperscript{499} \textit{Id} at 10.
\textsuperscript{500} \textit{Ibid}.
\textsuperscript{501} [1965] IR 294 as cited in \textit{Supra} note 482 at 142.
of the Supreme Court and after this precedent got established, several judgments have entrenched this precedent now.\textsuperscript{502}

Another example of the expansive reading of the right to life was done in \textit{G v. An Board Uchtala}\textsuperscript{503} where it was held that the right to life necessarily implies and includes the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at par with human standards by ensuring access to food, clothing and habitation. Justice O’Flaherty of the Supreme Court in \textit{Heeney v. Dublin Corporation}\textsuperscript{504} observed that there is a hierarchy of constitutional rights and at the top of the list is right to life followed by the right to health and with that the right to the integrity of one’s dwelling house. Subsequently, the High Court has also recognised that the unenumerated right to bodily integrity imposes a positive obligation upon the State to provide serviced halting sites for a claim by travellers living in deplorable conditions. The court in this case ordered the construction of three serviced halting sites. However, these decisions about the socio-economic rights are at odds with the Supreme Court findings in \textit{Sinnott v. Minister of Education}.\textsuperscript{505} Thus far the Supreme Court of Ireland has not read socio-economic rights as implicit in the right to bodily integrity.\textsuperscript{506}

5.2.3.2 The Right to Education

Notwithstanding the general exclusion of socio-economic rights, the right to primary education finds mention in the text of the Constitution as a right. Right to primary education enshrined in Article 42.4 states that:

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\textsuperscript{502} Supra note 482 at 143.
\textsuperscript{503} [1980] IR 32 as cited in Supra note 498 at 10.
\textsuperscript{504} [1998] IESC 26 as cited in Supra note 498 at 11.
\textsuperscript{505} [2001] 2 IR 545 as cited in Supra note 498 at 7.
\textsuperscript{506} Id. at 11, 12.
\end{flushleft}
The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it provide other educational facilities or institutions with due regard, however, for the rights of the parents, especially in the matter of religion and moral formation.

Article 42.4 provides for a right to free primary education to every child and therefore a corresponding duty upon the State to realise this rights. The main reason for the entrenchment of this right is not the commitment to an egalitarian cause rather it is to give effect to the historic agreement between State and religious bodies, whereby the State agreed to fund the education and religious order would provide it.\textsuperscript{507} However, it definitely provides for a constitutional basis to claim the socio-economic right of education.\textsuperscript{508} At the same time though, it does not necessarily place a duty upon State to provide free primary education rather it enjoins it to provide for such primary education by funding the education initiatives of private and corporate entities.\textsuperscript{509}

O’Dalaigh C.J. in \textit{Ryan}\textsuperscript{510} stated that “Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.” In \textit{O’Donoghue v. Minister for Health},\textsuperscript{511} O’Hanlon J. held that the right to primary education also extends to mentally disabled children and rejected the argument of the State that such children are ineducable. Education by enabling the best possible use of inherent and potential capacities is certainly possible in case of such children regardless of how limited those capacities may be. O’Dalaigh C.J consequently held that the State has

\begin{itemize}
\item \textsuperscript{507} Supra note 482 at 148.
\item \textsuperscript{508} Ibid.
\item \textsuperscript{509} Supra note 498 at 13.
\item \textsuperscript{510} Supra note 501 at para 350 as cited in Supra note 482 at 149.
\item \textsuperscript{511} [1996] 2 IR 20 as cited in Supra note 501.
\end{itemize}
failed to provide the children suffering from autism their constitutional right to primary education and in this context he ushered in a change in so far as the enforcement of positive obligations of the State meant for the fulfilment of socio-economic rights. He also granted damages to the petitioners and held that State’s obligation under Article 42.4 covers all children in the State and special measures are to be undertaken by the State for such children who because of their special needs are unable to benefit from the conventional education.

The right to primary education was again an issue in Sinnott v. Minister of Education\textsuperscript{512} wherein the right to primary education of a 23 years old severely autistic man as the State had not provided for any special measures for education of persons with such disability. The primary question however was whether the right to primary education can be claimed as in this case by a man who has crossed the age of eighteen? The High Court speaking through Justice Barr stated that in the absence of any specific age related embargo it would be wrong to imply any age limitation on the constitutional obligation of State to provide primary education to those in need owing to severe mental handicap. Thus, for him the ultimate criterion to determine the claimant’s eligibility to seek this right is not ‘age’ but ‘need’. This judgment was appealed before the Supreme Court which disagreed with the decision of the High Court and held by way of majority that a person who has attained the age of eighteen can no more be a child even if he suffers from severe mental handicap.\textsuperscript{513} The term ‘child’ has a clear age related meaning in this context. It is therefore arguable that the scope of right to education has been gradually curtailed by the Supreme Court in an era on increased

\textsuperscript{512} Supra note 498 at 15.
\textsuperscript{513} Sinnott v. Minister of Education, [2001]2 IR 241 as cited in Supra note 482 at151.
resources.\textsuperscript{514} It is also not in sync with the Ireland’s obligations to realise the socio-economic rights progressively under ICESCR.\textsuperscript{515}

5.2.4 The Rejection of Right to Education in Ireland

In the year 2001 the Irish Supreme Court delivered two of the most significant judgments in Irish constitutional jurisprudence\textsuperscript{516}: \textit{Sinnott v. Minister of Education}\textsuperscript{517} and \textit{TD v. Minister of Education}\textsuperscript{518}. These cases dealt with the issue of right to education vis-a-vis the obligation of State in case of severely disabled people and the education needs of ‘at risk’ children whose parents for one reason or another have failed to fulfil the need of their children respectively. In these cases the court had to determine the extent of the enforcement of positive obligations that can be demanded by the courts in Ireland. The two cases where also about the question as to whether or not Irish courts would protect the socio-economic rights and if yes, then to what extent.\textsuperscript{519} Overturning the decision of High Court in both these cases the Supreme Court favoured the traditional conception of role of organs of State in a democracy leaving positive obligations of the State to be fulfilled in accordance with the complete discretion of the legislature and the executive. The decision of the Supreme Court in \textit{O’Reilly}\textsuperscript{520} perhaps had set the pace already for the court to take such a stand.

In \textit{Sinnott v. Minister of Education} the Supreme Court declined to extend the right to primary education giving rise to a consequent positive obligation upon the State by limiting the right to those below the age of eighteen. After this the court was not required to address the

\textsuperscript{514} Supra note 498 at18.
\textsuperscript{515} Ibid.
\textsuperscript{516} Supra note 498 at151.
\textsuperscript{517} Supra note 505.
\textsuperscript{518} [2001]4 IR 545 as cited in Supra note 482 at151.
\textsuperscript{519} Supra note 482 at151.
\textsuperscript{520} Supra note 495.
implications on separation of powers which such positive obligation enforcement measures tend to have. Nevertheless, the court in a way reiterated that the State may have failed to fulfil its positive obligations but that in itself does not entitle the courts to intervene and enforce compliance with the obligations. The court should be equally concerned that in doing so it is not trenching upon the territory of other organs of the State. This note of caution certainly puts the drive to ensure the enforcement of positive obligations of State through courts to halt.

In *TD v. Minister of Education*, the applicants were a sample of large group of children in the care of regional Health Boards (local authorities) who special needs were not being taken care of by the State. They were put up in various places such as detention centres, police stations, adult prisons and psychiatric hospitals. In *TD* the Supreme Court heard an appeal against the decision of Justice Kelly in the High Court granting a mandatory injunction ordering the Minister to take all necessary steps to opening of secure and high support units in set locations with fixed number of beds within a fixed time period. The appeal was based on the argument that the order ventures into the policy domain of the executive and therefore violates the separation of power principle. All five judges of the bench decided unanimously that the distribution of nation’s wealth is a matter for executive and the legislature including Justice Denham who disagreed strongly with the majority’s findings. The majority of the Supreme Court reversed the decision of the High Court by holding that the Constitution with the exception of right to education does not and should not protect any socio-economic rights and even where the Constitution confers a right on the courts to enforce such rights, the courts should seek to enforce such rights by way of mandatory orders only in exceptional cases. The observation of Hardiman J. is very significant in this regard. He categorically stated that if owing to the failure of the executive and legislature, judiciary steps in to provide remedies; it
would amount to enormous increase in the powers of the unelected judiciary at the expense of politically accountable branches of the government.

The approach of the Supreme Court in TD suggests that it is unlikely that the court as presently constituted will identify any further socio-economic rights under the unenumerated personal rights under Article 40.3.1. However the Supreme Court’s approach in In re Article 26 of the Constitution and the Health (Amendment) (No.2) Bill 2004 reflects slight moderation in the strict stand taken so far by the Supreme Court. In this the counsel submitted that right to life and right to bodily integrity under the Constitution imposes an obligation upon State to provide for at least the basic level of inpatient facilities to those persons who cannot provide for it themselves. However, rather than rejecting the plea out rightly as one would expect owing to the comments of the court in TD case the Court stated that, “.... in a discrete case in particular circumstances an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.” However, in the context of the case the Court did not take up this question rather assumed that there is a constitutional right to maintenance and went on to address the question whether the charges for which the Bill provided could be considered an unreasonable restriction on any such right. It concluded that they were not keeping in mind

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521 Supra note 498 at 21.
523 Murray J. at para 34 as cited in Supra note 498 at 21.
the scheme proposed under the Bill. This decision is positive compared to a very strident anti-unenumerated stance of the Court in *TD*.

From the above discussion one can conclude that the Irish Supreme Court has adopted a restrictive approach to constitutional socio-economic rights adjudication and therefore barring the constitutionally recognised right to primary education, the odds are stacked against the judicial recognition and enforcement of other constitutional socio-economic rights. The majority of Constitutional Review Group in the year 1996 rejected arguments favouring the inclusion of ‘a personal right to freedom from poverty or specific personal economic rights’ in the Constitution.\(^{525}\) Aoife Nolan has suggested that one way of getting past this restrictive approach is to amend the Irish Constitution by going for a referendum.\(^{526}\) However, it can still be argued that the decision of the Supreme Court in *In re Article 26 of the Constitution and the Health (Amendment) (No.2) Bill 2004* suggests that the debate in Ireland about the judicial enforcement of constitutional socio-economic rights has not been foreclosed.\(^{527}\)

### 5.3 Socio-economic Rights Adjudication in United Kingdom (UK)

The Constitution in the United Kingdom is for most part unwritten.\(^{528}\) Magna Carta of 1215 and 1297 and Bill of Rights of 1689 existed in the form of early protection of individual rights against an overarching monarchy. Infringements of liberty and property interests in case of ambiguities are to be interpreted by courts in a manner which is adverse to the interest of

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\(^{524}\) *Supra* note 498 at 22.

\(^{525}\) *Supra* note 498 at 27.

\(^{526}\) *Id.* at 26.

\(^{527}\) *Id.* at 28.

In a limited way courts also take note of international human rights law while interpreting ambiguous statutory terms. In this context therefore the adoption of Human Rights Act, 1998 was a watershed moment in the annals of British constitutional history. It came into effect in the year 2000 and led to a profound shift in the role of judiciary as the protector of rights. However, it would be a mistake to reckon the Human Rights Act as the point of departure in UK for the judicial protection of social welfare rights.

5.3.1 Human Rights Act, 1998

Human Rights Act was expected to herald a new beginning for the greater protection of socio-economic rights in UK. The Act incorporated most of the provisions of European Convention on Human Rights, 1950 (ECHR) and made the consideration of the European Court of Justice’s jurisprudence at Strasbourg under the ECHR obligatory in UK courts however, with the caveat of its conclusion being not binding. Therefore, the jurisprudence of Strasbourg court possesses a highly persuasive authority in UK. However, UK has not incorporated the European Social Charter, 1961 under its law and it has also not ratified the Protocol providing for a collective complaints mechanism under the European Social Charter.

Under section 7(1) and 7(3) of the Human Rights Act only a victim of the violation of Convention right can seek remedy from the Court. Section 6 empowers the Court to review the conduct of ‘public authorities’ of any persons performing ‘functions of a public nature.’

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530 Supra note 528 at loc. 14251.
531 Ibid.
532 Ibid.
533 Id. at 14262.
534 Id. at 14515.
535 Ibid.
What constitutes functions of a public nature is very significant in relation to welfare rights.\textsuperscript{536} The House of Lords in \textit{Aston Cantlow PCC v. Wallbank}\textsuperscript{537} held that the courts must decide whether the body whose act is challenged is ‘core public authority’ or ‘hybrid public authority.’ A core public authority, though, is not capable of being defined precisely is a body whose nature is governmental. This may be contrasted with hybrid authorities who may include private organisations exercising public functions. The House of Lords was of this view that a generous wide scope is to be given to the expression public function. Relevant factors to be taken into account includes whether the body is public funded, or whether it is performing statutory functions, substituting for governmental function or providing public service.

While reviewing primary legislations for its compatibility with Convention rights section 3 requires the courts to read the statutory provisions in a manner to be compatible with Convention rights even by way of a strained construction. Where such a construction is not possible, courts are required to issue a declaration of incompatibility under section 4. The political effect of such a declaration is profound as in relations to such declarations the government has made changes in the provisions in relation to each of such declarations, despite the fact that a declaration of incompatibility has got no effect on the validity of law.\textsuperscript{538}

Schedule I of the Human Rights Act contains the list of Convention rights. Dealing with the right to respect for private and family life under Article 8 it has been very often held that in order to engage with Article 8 it is not necessary to have a legal right of possession to

\textsuperscript{536} \textit{Id.} at 14526.
\textsuperscript{537} [2003] UKHL 37.
\textsuperscript{538} \textit{Supra} note 528 at loc. at 14551.
housing. In *Anufrijeva* case, it was held by the Court that Article 8 is capable of imposing a positive obligation upon the State to provide accommodation whether otherwise family life is seriously inhibited or if there is threat to the welfare of children. However, such an obligation can only be imposed in extreme circumstances. It was also observed that it is hard to conceive the occasion for such an obligation to arise in the absence of an occasion to engage with Article 3 which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. This raises an important question about the approach of the court vis-a-vis the approach of the European Court of Human Rights (ECtHR) in *Marzari v. Italy*. The ECtHR in *Marzari* did not make such an obligation emanating from Article 8 dependent upon the issue engaging with Article 3 as well. It is also pertinent to mention that all the reliefs claimed in *Anufrijeva* case were denied for the absence of circumstances to be sufficiently exceptional.

However, *Anufrijeva* approved the decision in *R (Bernard) v. Enfield London Borough Council* given by the High Court which did not use Article 3 as a threshold to ensure a positive obligation of State to provide for accommodation. In this case the High Court held that the council failed in its duty under Article 8 to provide housing to a disabled woman suiting her disability. This was also declared breach of the duty under the National Assistance Act, 1948. Herein, the lady was not having wheel-chair access to lavatory and as a result she often used to soil herself. She had no privacy and was confined to a small area. While this was not held to be violation of Article 3 but it was held to be violative of Article 8 as the

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539 Supra note 528 at 14644.
541 (1999) 28 EHRRC 175 as cited in Supra note 528 at loc. 14670.
542 [2002] EWHC 2282 as cited in Supra note 528 at location at loc. 14669.
possibility to have meaningful private and family life was non existant. The Court put considerable emphasis on the fact that disable people are particularly vulnerable.

The concern was contested again in Kay v. London Borough of Lambeth\(^{543}\), of the two appeals, one involved the family of travellers who had occupied council’s land for two days and sought to challenge the council’s order for possession on the ground of violation of Article 8 rights. They argued that following the Connors decision of ECtHR,\(^{544}\) the local authority had failed to fulfil its obligations under the statutory scheme to protect the travellers’ family and by ignoring to give adequate weight to their exceptional circumstances. Though the House of Lords unanimously rejected the petition but all their Lordships agreed that such a challenge though is not possible in a County Court but it can lie before a High Court for the violation of Article 8 rights even if there is no remedy for the petitioner under the domestic property law. This in itself is a shift from the earlier approach of treating these as non-justiciable.\(^{545}\) There was, however, a split verdict on the issue whether an article 8 defence can be raised in case of exceptional individual circumstances before the County Court. The majority rejected the view that any such challenge is possible before the County Court with which the minority disagreed.

In Holub v. Secretary of State for the Home Department\(^{546}\) the Court of Appeal held that everyone is entitled to be educated to a minimum standard but not to the most effective education possible. In Ali v. Lord Grey School\(^{547}\) it was held that though everyone is entitled to education of certain minimum standard but this right does not include the right to study in a

\(^{543}\) [2006] UKHL 10 as cited in Supra note 528 at loc. 14682.
\(^{545}\) Supra note 528 at loc. 14697.
\(^{546}\) [2001] 1 WLR 1359 as cited in Supra note 528 at loc. 14760.
\(^{547}\) [2006] UKHL 14 as cited in Supra note 528 at loc. 14773.
particular institution. The Court decided that existence of an alternative, suitable and adequate education that the students or parents chose to not accept will preclude the finding in favour of the violation of the right to education under Article 2 to the Protocol 1 of ECHR.

The aforesaid discussion shows a more nuanced approach to the socio-economic rights adopted by the Courts in United Kingdom, especially owing to the enactment of Human Rights Act, 1998. This has resulted in non-justiciability of social rights being considered questions of according deference by the Courts to the government’s discretion and therefore not ruling out the possibility of intervention in exceptional specific circumstances. The jurisprudence of judicially enforceable socio-economic rights is still in its infancy; however the journey seems to have begun certainly.

5.4 Socio-economic Rights Adjudication United States of America

Franklin Delano Roosevelt, the former President of the Unites States of America argued for the realisation of “second bill of rights” for every American and listed guarantees respecting jobs, food and clothing, homes, medical care and health, education, and social security. The American Constitution does not talk about the socio-economic rights and this therefore has been the subject matter of serious academic inquiry for many working on the American Constitutional law, namely Cass S. Sunstein and Frank I. Michelman. Sunstein concludes his work on Franklin Delano Roosevelt’s clarion call for the inclusion of socioeconomic rights in the American Constitution as second bill of rights in following words: “Freedom from fear is inextricably linked to freedom from want. Liberty and citizenship are rooted in

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548 Franklin Delano Roosevelt as quoted in Supra note 137 in the beginning.
549 Supra note 137.
opportunity and security. In a sense, America lives under the second bill. But in another sense, we have lost sight of it. The second bill of rights should be reclaimed in its nation of origin.”\textsuperscript{551} Michelman on the contrary while addressing the issue of inclusion of second bill of rights in the American Constitution argues that “It would not necessarily be decisive, any more than judicial review, at this stage of our history, is purely a matter of choice.” The economic and social rights do not have strong foundations in USA and therefore the likelihood of a political cost for its non-fulfilment is negligible.\textsuperscript{552} There is need to develop a stronger jurisprudence for socio-economic rights given the highest rate of child poverty among wealthy countries and severe gaps in access to health care.\textsuperscript{553}

The framers of the US Constitution were primarily concerned with curbing the abuse of governmental power. So, the primary concern was not that the government would do too little for the people but that it might do too much for them. Apart from the exception of a negative right to property the American Constitution did not address economic and social rights or create any positive obligation for the State.\textsuperscript{554} The absence of socio-economic rights also presents American Constitution ‘morally egregious’ and it also reflects the ‘moral disposition’ American citizens in so far as American Constitution being reflective of the prevalent values of American people as a whole is concerned.\textsuperscript{555} Michelman argues that in United States, owing to the acceptance of the popular government and irreducible uncertainty, contestability, and contingency affecting the discretion in the realm of socioeconomic policy, any form of constitutionalized commitment to socioeconomic policy must be couched in abstract terms.

\textsuperscript{551} Supra note 137 at 233.
\textsuperscript{553} Ibid.
\textsuperscript{554} \textit{Id.} at 11930.
\textsuperscript{555} Ibid.
resembling the South African Style.\textsuperscript{556} He also argues that even such abstract constitutional commitments to socioeconomic policy could not ensure the escape of American courts from embarrassment and discreditation as the court will in every such case of judicial review choose between usurpation and abdication.\textsuperscript{557}

### 5.4.1 US Courts on Socioeconomic Rights

*Brown v. Board of Education*\textsuperscript{558} was the first major case directly addressing the right to education as an economic and social right. In this historic case the US Supreme Court declared the longstanding practice of racial segregation in public schools to be unconstitutional. The Court emphasised that where the State has accorded the opportunity of education, such opportunity must be accorded on equal terms.\textsuperscript{559} The Court also referred the right to education as a prerequisite for any meaningful exercise of other citizenship rights and thereby acknowledging albeit implicitly the interdependence of socioeconomic rights and, civil and political rights. In *Douglas v. California*\textsuperscript{561} the Court found that poor people are entitle to free legal representation in the first appeal against their conviction. In *Shapiro v. Thomson*\textsuperscript{562} the Court however held that public assistance benefit are privileges and not right. However, in *Goldberg v. Kelly*\textsuperscript{563} the Court declared the ambit of property interests protected under the due process clause of the US Constitution to be encompassing welfare payments.

\textsuperscript{556} *Id.* at 683.
\textsuperscript{557} *Ibid*.
\textsuperscript{558} 347 US 483 (1954).
\textsuperscript{559} *Id.* at 493.
\textsuperscript{560} *Id.* at 494.
\textsuperscript{561} 372 US 353 (1963) 357,358.
\textsuperscript{562} 398 US 618 (1969) at 627.
\textsuperscript{563} 397 US 254 (1970) at 264.
The scope of this decision has been further expanded by the Federal Circuit Courts to housing residents by asking for a public hearing. 564

The Supreme Court however was slowly becoming more hostile to socio-economic rights and rights of poor. 565 Judicial appointments by President Nixon appear to close the window for the growth of socio-economic rights. 566 In Dandridge v. Williams 567 the Supreme Court declared that the Constitution contains no affirmative State obligations to care for the poor. The Court said this while upholding a statute meant to cap the welfare grants below the level of what is needed to support a large family. 568 The Court specifically stated that the intractable socio-economic rights are not the business of this Court. 569 In Lindsay v. Normet 570 the Court while rejecting a challenge by the tenant against the eviction summary eviction order of the State stated that there is no constitutional right to adequate housing and made the following observation: “We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality....... Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationship are legislative, not judicial functions.” 571

Despite affording a robust protection to civil and political rights, in the US jurisprudence of rights the Supreme Court even rejected the principle of indivisibility and denied relief where

565 Supra note 552 at loc. 12137.
566 Ibid.
568 Ibid.
569 Id. at 487.
570 405 US 56 (1972) at 74.
571 Ibid.
the denial of socio-economic rights clearly undermined the civil and political rights.\textsuperscript{572} From
1990s onward the Supreme Court has further narrowed the legal avenues for the protection of poor.\textsuperscript{573} Now even the right to property for those with little or average income appears to be in risk after the Supreme Court in \textit{Kelo v. City of New London, Connecticut}\textsuperscript{574} upheld the locality’s eminent domain to confiscate property from mid and low income residents in order to facilitate the goal of economic development by the private developers. This judgement caused alarm across the nation.\textsuperscript{575} One of the amusing responses to this decision was to persuade a small municipality to confiscate the home of one of the justices who was in the majority in \textit{Kelo}.\textsuperscript{576}

As the US Supreme Court has failed to develop strategies to protect socio-economic rights under the Constitution, the legal advocates have turned towards sub-national (State Constitutions) as an avenue to further their strategy.\textsuperscript{577} Because the State Constitution plays a different role in the US legal System, it presents opportunities at the national level also.\textsuperscript{578} Within United States there are fifty sub-national Constitutions.\textsuperscript{579} State’s Constitution have played an important role in the protection of human rights in the United States.\textsuperscript{580} Tenth Amendment to the federal US Constitution leaves significant residual powers of government to the State.\textsuperscript{581} States in United States have sovereign powers to construe their Constitutions more broadly than the federal Constitution and to follow an independent path as regarding

\textsuperscript{572} \textit{Supra} note 552 at location at loc. 12196
\textsuperscript{573} \textit{Ibid.}
\textsuperscript{574} 125 S. Ct. 2655 (2005) at 2665, 2666.
\textsuperscript{575} \textit{Supra} note 552 at loc. 12208.
\textsuperscript{576} \textit{Id.} at 12221.
\textsuperscript{577} \textit{Ibid.}
\textsuperscript{578} \textit{Ibid.}
\textsuperscript{579} \textit{Ibid.}
\textsuperscript{580} \textit{Ibid.}
\textsuperscript{581} \textit{Id.} at 12228.
rights under their Constitutions.\textsuperscript{582} Particular significant among these independent paths opted by within the State’s Constitution are the measures for socio-economic rights protections.\textsuperscript{583} In fact socio-economic rights to the extent of its recognition in Unites States are mainly found in the State Constitutions.\textsuperscript{584}

Almost every State Constitution protects the right to education and several States’ Constitution confers the scope for positive obligations upon State for the purposes of the socio-economic rights in relation to several other such rights.\textsuperscript{585} Education, health care and housing have particularly been the areas where the State Courts have exhibited the zeal to adjudicate on the issues pertaining to it.\textsuperscript{586} In the area of education, the body of case laws under the State’s Constitution reflect the willingness of the courts to develop the standards to measure the State’s compliance with the constitutionally mandated positive obligations.\textsuperscript{587} In relation to housing the constitutional provision in different State’s Constitution vary dramatically and often courts adopt a deferential approach towards the legislative choices leaving little role for judicial oversight in the protection of the right.\textsuperscript{588} Half of the State’s Constitution provide some form of right to poor in relation to healthcare, only four however, contain mandatory language.\textsuperscript{589} In case of right to healthcare many State Courts follow a very deferential approach to legislative choices.\textsuperscript{590} In relation to the rights of the children separated

\textsuperscript{582} Ibid.
\textsuperscript{583} Ibid.
\textsuperscript{584} Ibid.
\textsuperscript{585} Ibid.
\textsuperscript{586} Id. at 12233, 12245, 12349, 12417.
\textsuperscript{587} Id. at 12337.
\textsuperscript{588} Id. at 12405, 12418.
\textsuperscript{589} Id. at 12438.
\textsuperscript{590} Ibid.
from the family the obligation of the State is not adequately recognised in the US law and policy.  

So, in the United States of America the judicial enforcement of constitutional socio-economic rights appears to be facing several obstacles like inherently decentralised efforts in various States, limited positive jurisprudential precedent, flawed federal model of adjudication capable of influencing State courts, and a lack of awareness about the alternative practices prevailing in the different legal systems.  

Addressing these obstacles appears to be important therefore to bring the socio-economic rights truly on the anvil of judicial recognition and enforcement. However, the relevance of the clarion call for the second bill of rights in the US Constitutions does not appear to be out of sync with the need. Nevertheless, for America, the better course seems to be the one advocated by Roosevelt and that is to treat the second bill of rights as a constitutive commitment. However, in the absence of actual inclusion, these constitutive commitments would not exert sufficient moral force and therefore the issue of inclusion of socio-economic rights in the US Constitution needs to be revisited specially in the light of experiences from countries such as South Africa which dispels most of the apprehensions about making the socio-economic rights expressly justiciable.

5.5 ICESCR and the Nature of Obligations of Member States

By the year 1952, it became clear that the increasing ideological disputes in the wake of Cold War between east and West prevented the adoption of a unified treaty, comprising all rights

591 *Id.* at 12473.
592 *Id.* at 12483.
593 *Supra* note 137 at 228.
594 See, *Id.* at 233.
contained in the Universal declaration of Human Rights (UDHR).\textsuperscript{595} By the ‘so called’ resolution of 1952, the Commission on Human Rights separated the UDHR guarantees into two separate draft treaties.\textsuperscript{596} This fundamental divide between the categories of right took more than 40 years to be settled.\textsuperscript{597} However, ultimately the proponents of a unified treaty had to give up and accept two separate treaties, adopted together on 16 December 1966 and both entered into force in 1976.

At the level of implementation, the Covenants exhibited marked distinctions, reflecting the ideological divide. While the International Covenant on Civil and Political Rights (ICCPR) provided for three monitoring mechanisms at the global level, namely state reporting, individual communications, and State complaint procedure, the ICESCR only included a State reporting procedure. Further entrenching the divide the ICESCR did not establish a separate supervisory committee in the text, but gave that task to the Economic and Social Council (ECOSOC). The Committee on Economic Social and Cultural Rights (CESCR) was only set up later by a resolution of ECOSOC and commenced working with independent experts from 1987. Since then, CESCR in principle receives one comprehensive report per Member State in every five years.\textsuperscript{598}

\textbf{5.5.1 The Nature of Obligations under ICESCR}

State’s obligations under the ICESCR are provided in Part II – Articles 2 to 5 of the Covenant and particularly in Articles 2 and 3. Since the adoption of the ICESCR, they have been further

\textsuperscript{596} \textit{Ibid.}
\textsuperscript{597} \textit{Ibid.}
\textsuperscript{598} \textit{Id. at 7.}
explained through the work of CESCR. From the beginning of its work the CESCR has taken
great pains to make the State parties understand the nature of the obligations contained in
Article 2(1) which is of prime importance in understanding the ICESCR fully and it is to be
seen as having a dynamic relationship with all other provisions of the ICESCR. On a
cursory reading, Article 2(1) merely seems to reiterate that the obligations contained in
Covenant are programmatic and therefore it is entirely up to the parties to implement the
guarantees contained in it. Article 2(1) reads:

“Each State Party to the present Covenant undertakes to take steps, individually and through
international assistance and cooperation, especially economic and technical, to the maximum
of its available resources, with a view to achieving progressively the full realisation of the
rights recognised in the present Covenant by all appropriate means, including particularly the
adoption of legislative measures.”

Commentators, mainly from the western world for very long concluded and a few still hold
the view that only ICCPR imposes direct legal obligations on State parties, whereas ICESCR
merely stipulates indirect legal obligations, needing steps for the implementation at the
national level for it to become fully operative. To endorse this view, literature on the
subject frequently uses the notion of self-executing and non-self executing treaty
obligations. While this categorisation is correct in relation to typical international law
treaty, such a notion should not be attributed to human rights treaties where obligations of
each State is primarily not referred to treaty partners as the reciprocity element of traditional

599 Id. at 12.
600 Ibid.
601 Id. at 12, 13.
602 Id. at 13.
treaty law cannot operate in the same way in human rights treaties.\textsuperscript{603} CESCR therefore, has maintained that while there are some aspects of individual rights mentioned in the Covenant which cannot be realistically realised immediately on in a short span of time and thereby give room for governmental discretion, every single rights however, contain elements which lend emphasis on their immediate implementation which must be honoured by the State parties without delay.\textsuperscript{604}

Although discussion continues as to whether the minimum core obligations under the ICESCR should be identified, as the CESCR has done, the view that in each Covenant right certain element exist which lend themselves to immediate implementation seems more convincing.\textsuperscript{605} The CESCR has consistently held since July, 2009 that in order to ensure that the provisions of the Covenant are not rendered devoid of any meaning, the State parties must at all times prioritise the guarantee of the minimum core obligations, that is ensuring essential foodstuffs, primary healthcare access, basic shelter and housing, access to potable water, social security and work, basic education and access to culture.\textsuperscript{606} Failure by any State to guarantee these essential prerequisites mandated for leading a life of dignity, ensuring the ‘survival kit’ as a minimum amounts to violation of the Covenant, unless the State party can exhibit that it was not practically possible to guarantee these minimal rights due to constraint of resources, armed conflict, tsunamis, earthquakes or other catastrophes.\textsuperscript{607} Thus, State

\textsuperscript{603} Ibid.
\textsuperscript{604} Ibid.
\textsuperscript{605} Ibid.
\textsuperscript{606} Id. at 14.
\textsuperscript{607} Id. at 14.
parties have the burden of proof to fulfil in case of their failure to provide for the basic survival requirements.  

According to the committee, socio-economic rights are justiciable and that appropriate remedies must be available in case of violation. It is however, recognised that judicial protection is not the only means of promotion and protection of rights in the Covenant, but at the same time it is an important aspect of the rights recognised under the Covenant as it is an effective means for the protection of rights of most vulnerable and disadvantaged people.  

Judicial measures are also seen as significant in relation to ensuring non-discrimination in the application of rights in the Covenant by the State parties. The Committee has therefore also raised the issue of independence of judiciary. The independence of judiciary is directly linked to the overall accountability of the States in relation to the rights recognised by the Covenant.

5.5.2 International Adjudication of ESC Rights: the OP-ICESCR

The CESCR have been for very long demanded for the establishment of a communication procedure similar to the one that exists for treaties like the International Covenant on Civil and Political Rights (ICCPR). Since, the Vienna World Conference on Human Rights in the year 1993, the call for an individual/collective complaint mechanism similar to the Optional

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608 Ibid.
609 General Comment 9, para 10 in Infra note 612 at 382.
610 General Comment 9, para 10 in Infra note 612 at 382.
611 General Comment 3 para 5 in Infra note 612 at 382.
613 General Comment 9, para 2 in Supra note 612 at 382.
614 Supra note 595 at 28.
Protocol to ICCPR (OP-ICCPR) increased. Commission of Human Rights/Human Rights Council (HRC) produced a draft Optional Protocol (OP) to ICESCR, which was adopted by consensus in April 2008, which was then approved by HRC and adopted by the United Nation General assembly finally on 10 December 2008 on the occasion of the 60th anniversary of Universal Declaration of Human Rights. On 5th May 2013 the OP entered into force three months after the deposit of 10th ratification.

One of the major bone of contentions was whether to allow an ‘a la carte’, or ‘opt-in’, or ‘opt-out’ vis-a-vis the different rights under the ICESCR or to go for either take it all (rights) or leave it. A number of States mainly from the Common Law jurisdictions and Switzerland favoured an ‘a la carte’ option but at the end of the negotiations, ultimately it was decided that the States have the choice to ‘take it or leave it’. This radical and comprehensive approach has got to do with the experience with fate of European Social Charter of 1961 which allowed the selective opt-in or opt-out approach, ultimately resulting in patch work ratification process and consequently the ratification of all the rights in the Charter never happened. Even the revised European Social Charter of 1996 remained ratified by only half of the European Union member States.

5.5.2.1 Specificities of the OP-ICESCR

Largely the OP-ICESCR follows the example of OP-ICCPR and all other communication procedures. Some of the features specific to OP-ICESCR include the following:

1. Individual or Collective Complaints

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615 Ibid.
616 Id. at 29.
617 Ibid.
Individual or group of individual possess the locus to file communications in relation to rights under the Covenant. OP does not allow Non Governmental Organisations (NGOs) to send communications themselves but NGOs can do so with the consent of individuals or group of individuals, unless the author of the communication can justify moving the petition without consent.618

2. Admissibility Criteria

If the complaint ‘does not reveal that the author has suffered a clear disadvantage’, then as per Article 4 of the OP the communication may be declined. This provision has been inserted as a safety valve for the CESCR which is supposed to examine the communications, getting overburdened, as it has happened in the European Convention on Human Rights system.

3. Resource allocation and the issue of reasonableness

The standard of review will be a reasonableness test under Article 8(4), OP-ICESCR. The most complex question is the role of CESCR in relation to the communications found admissible by it. How it will decide the resource allocation questions, are very significant in relation to the rights in the Covenant. Whether the committee should go into the macro questions in relation to the individual communications? These questions though are relevant causes of specific right violations, the CESCR in its ‘Committee Statement’619 decided against entertaining it and stated that instead it should be reserved for the State reporting procedure under the ICESCR.620 CESCR also states in the Committee Statement that it would fully respect the separation of powers, meaning thereby that the major policy choices are left to

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618 Rules 1(3) and 4 of the Rules of Procedure of the OP-ICESCR.
619 CESCR generally comes out with ‘General Comment’ which is taken as its actual practice and used as a tool to interpret the Covenant provisions. But in this case CESCR came up with ‘Committee Statement’.
620 Supra note 595 at 30, 31.
parliaments and to the executive, reserving only controlling functions for it excluding judicial
policy choices. The Statement then underlines the criteria to be applied in concluding
observations, recommending for example, compensation to victim as a remedial measure,
asking the State parties to remedy the circumstances resulting in the violation of rights,
suggestion of case by case low cost measure, and follow up measure at the domestic level in
order to ensure accountability, for instance, mandating that in its next periodic report the State
may address the steps taken to remedy the violation.\textsuperscript{621} Experience of national jurisdiction
needs to be necessarily taken into account.\textsuperscript{622} On the question of reasonableness, the CESCR
is likely to take into consideration, inter alia:

“(a) the extent to which the measures taken were deliberate, concrete and targeted towards the
fulfilment of Economic, Social and Cultural rights’

(b) whether the State party exercised its discretion in a non-discriminatory and non arbitrary
manner;

(c) thus showing that many issues are not resource dependent but matters of political will;

(d) where several policy options are available, whether the State party adopts the option that
lest restricts Covenant rights;

(e) the time frame in which steps were taken; and

\textsuperscript{621} \textit{Id.} at 31.
\textsuperscript{622} \textit{Id} at 32.
(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups and whether they were non-discriminatory, and whether they prioritised grave situations or situations of risk.”

4. Reservations

No express reservation clause has been included in OP-ICESCR and therefore for this purpose the general international treaty law under the Vienna Convention on the Law of Treaties would apply. Under the treaty reservations to a provision forming part of the object and purpose of the treaty would not be valid. But in relation to ICESCR this remains an open question in relation to the rights contained in the Covenant.

5.5.3 The Road ahead for OP-ICESCR

The OP has paved the way for greater publicity and people’s awareness about the socio-economic rights. The OP procedure will certainly contribute in building the adjudicatory jurisprudence in relation to the rights contained in the Covenant at the international level as well beyond the national jurisprudence. This protocol would certainly influence the debates around the world in relation to the implementation of socio-economic rights.

5.6 Inference

A comparative look at the developments in the field of socio-economic rights adjudication as aforesaid reveals a mix picture. The constitutional socio-economic rights adjudication is certainly at a more advanced stage in South Africa where socio-economic rights constitute part of the expressly guaranteed constitutionally enforceable rights. However, even there the

623 Id. at 31.
issue of extent of deference by the courts towards the executive and the legislature is being presently grappled with. Ireland, presents an interesting example as despite being the main influence in enabling the insertion of DPSPs under the Indian Constitution, the Supreme Court of Ireland appears to be not inclined to the idea of recognising constitutionally enforceable socio-economic rights.

The narrative around socio-economic rights adjudication in UK and USA are different, primarily because UK does not have a written Constitution and USA does not have socio-economic rights mentioned in its Constitution, not even in the form of principles of governance. Lack of evolution of constitutional socio-economic rights as a facet of civil and political rights UK and USA could be attributed to the fact that, being the developed nations, perhaps it was not the felt need. Nevertheless, call for constitutionalisation in the form of second bill of rights as emphasised by the former US President Roosevelt, is also to be found, at least in the academic debates around the issue. Peculiar feature of United States owing to fifty State Constitutions make the task of theorising the US position very difficult. The passage Human Rights Act in UK appears to be making inroads into the realm of adjudicatory socio-economic rights especially owing to the jurisprudence that is being developed by the European Court of Justice. In the field of International law, OP-ICESCR is an important milestone in the quest to make socio-economic rights justiciable, however any credible jurisprudence in this area is yet to emerge as the OP is still in its initial years.