Chapter II

Socio-economic Rights under the Indian Constitution

James Nickel has expounded the contemporary idea of human rights very accurately. Nickel’s account of human rights can be summarised as: “rights are claims by right holders against the addressees, who are usually, though not only, States, they are held by all persons (i.e. universal), are high priority and urgent norms, are numerous and specific claims (e.g. right to fair trial, social security) instead of few and highly abstract claims (e.g. dignity and equality), are normative claims whose truth is not dependent on legal recognition, and are meant to be minimum standards instead of complete statement of what is just.”

2.1 Philosophical Foundations of Human Needs as Legal Rights

Minimalism is the feature that distinguishes human rights in theory from the practice of human rights. This minimalism of human rights implies that these rights have priority over the other policy considerations of the State and therefore satisfaction of these wants as human rights are not amenable to the State’s mandate in prioritising other policy considerations over these rights.

The philosophical foundations of human needs as legal rights stems from the recognition of the idea of human dignity, freedom (which is not limited to mere absence of coercion) and substantive equality as legal rights; since the absence of human needs on the face of it appears to be inconsistent with the idea of human dignity, freedom and substantive equality. Professor

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72 Ibid.
73 Ibid.
H. L. A. Hart observed “Freedom (absence of coercion) can be valueless to those victims of unrestricted competition too poor to make use of it; so it will be pedantic to point out to them that though starving they are free. This is the truth exaggerated by the Marxist whose identification of poverty with lack of freedom confuses two different evils.”\(^{74}\) This statement clearly lays down the traditionally entrenched understanding of freedom, as being confined to absence of coercion. Capability of individuals in being able to meaningfully enjoy their freedom was not within the conception of liberty and was therefore considered alien to it. However, Hart was not the only one among the modern influential thinkers who have conceptualised this caged conception of liberty, some leading jurists like John Stuart Mill and John Rawls have also excluded from their discussion on liberties and freedoms, the needs of human beings deprived of basic means to sustain human life in a meaningful way.\(^{75}\)

Robert Nozick also stated that “No one has a right to do something whose realization requires certain uses of things and activities that other people have entitlements over.”\(^{76}\) Nozick also addresses the question concerning the State’s legitimacy by arguing that the existence of individual rights is compatible with the existence of the State in the capacity of a mere “night watchman”\(^{77}\) and therefore only a minimal State’s existence is compatible with the existence of individual right of self ownership.\(^{78}\) By self ownership every person is owner of his or her self and cannot be used for other, howsoever admirable may be the purpose.\(^{79}\) Self ownership gives rise to property rights in other resources by individuals mixing their labour with


\(^{75}\) Ibid.


\(^{78}\) Ibid.

\(^{79}\) Ibid.
resources which are unowned.\textsuperscript{80} Having acquired the ownership of resources, the person can transfer it to others and that is how the transferee would become the owner of the resources transferred.\textsuperscript{81}

This is how the distribution of resources becomes just, regardless of where they have ended up and in what proportion.\textsuperscript{82} This feature of rights works against the basic needs whose fulfilment in our society would to a great extent depend upon the sharing of interests by those who have property or freedoms in abundance.\textsuperscript{83} Thus, this school of thought presupposes individuals’ capability in pursuit of freedom without the intervention of State and this thought has dominated the legal and constitutional discourse around the conceptualisation of rights. This has kept the basic need debate outside the discourse of rights and has also ensured that even after recognition of some of basic human needs as rights, it remains relegated to secondary position, in the name of welfare rights.\textsuperscript{84} This anti-basic need tradition has blocked the fruits of rights strategy in relation to basic needs to the marginalised in the society and the intellectual enquiry pertaining to the rights discourse therefore has remained elitist and western society oriented.\textsuperscript{85}

However, more than being able to list the index of socio-economic rights, it is important to find the normative reasons for the recognition of socio-economic rights as human rights.\textsuperscript{86} Jeff King identifies the following four normative standards as the justification for the attribution of normativity to the cause of socio-economic rights – dignity, freedom, utilitarianism and social

\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{83} Supra note 74 at 162.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
citizenship.\textsuperscript{87} The idea of well-being is attached to the idea of dignity, both being the attributes of human condition\textsuperscript{88} and the link therefore between human dignity and rights such as, adequate housing, health, social security and education is too obvious to warrant any discussion.\textsuperscript{89} Most of these rights rank higher in hierarchy compared to several cherished civil rights.\textsuperscript{90} However, despite this, why these rights are recognised as ‘second generation rights’ is a complex historical question.\textsuperscript{91} But, the fact that the cause of human rights in the twentieth century was espoused by the property owning upper and middle class of Britain, France and United States of America is well known.\textsuperscript{92}

Freedom refers to the idea of freedom not being limited to the idea of freedom as a civil and political right, which presupposes the right holders as capable right bearing individuals. Lack of access to socio-economic rights deprives a person from having the capacity to exercise his freedom in a meaningful way. So, a starving man cannot be said to be free. Jeff King also argues that the utilitarianism also promotes socio-economic rights as emphasis on greater happiness would demand satisfying more preferences and improving welfare.\textsuperscript{93} The fourth plank of argument in favour of socio-economic rights for Jeff King rests on the idea of social citizenship, which emphasises the aspect of meaningful participation of citizens in the political life. It emphasises on the idea of freedom as having the capacity for meaningful

\textsuperscript{87} Id. at 22-25.
\textsuperscript{88} Id. at 22.
\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
\textsuperscript{91} Ibid.
\textsuperscript{93} \textit{Supra} note 86 at 24.
participation which is essential for the political decision making and therefore finds the enlightenment notion of freedom being limited to the idea of non interference, insufficient.\textsuperscript{94}

The essence of human rights in general converges upon the following three human interests: “\textit{well being} (absence of physical suffering, basis of self respect), \textit{autonomy} (a vision of people controlling to some degree, their own destiny, fashioning it through successive decisions throughout their lives) and \textit{social participation} (meaningful potential for participation in social and communal life).”\textsuperscript{95} A human rights discourse therefore insists upon the prospect for a minimally decent life.\textsuperscript{96}

\textbf{2.1.1 Distinguishing Right from Good and Neutrality of State}

The notion of fundamental right or bill of rights being negative stems from the fact that doing so would ensure neutrality of State as State would not have its own conception of good and therefore in the process individual rights would not be trampled. Central to the defence of rights as restraint is the thought that State must not impose on its citizens its own version of good.\textsuperscript{97} It is the right of the individual to take the call on his own perception of good life and this is considered fundamental to liberty and thereby requiring the duties of restraint upon State to prevent the State from thrusting particular values.\textsuperscript{98} It is here that the liberalism takes a decisive shift from the Aristotelian approach that there is an objective ‘good’ discernible by the exercise of rational faculties.\textsuperscript{99} Joseph Raz has also pointed out therefore that the Government cannot be subjected to a positive duty to act, even if doing so would improve the

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\textsuperscript{94} \textit{Id.} at 25.  \\
\textsuperscript{95} \textit{Id.} at 28.  \\
\textsuperscript{96} \textit{Supra} note 36 at 22.  \\
\textsuperscript{97} \textit{Supra} note 14 at 18.  \\
\textsuperscript{98} \textit{Id.} at 19.  \\
\textsuperscript{99} \textit{Ibid.}
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state of affairs, as the State must remain neutral to the valid and invalid ideals of good.\textsuperscript{100} The quest for rational objective goods therefore has to be kept away from the State in a manner that State is deprived of the capacity to realise it by asking the individuals also to accept the goods so found by the State. Not doing so would be an illiberal exercise. Since good is an ideal, its realization would not be rational and therefore individuals must always be guarded against imposition of goods upon them without their consent. Such a conception of distinguishing liberalism and rationality in finding goods would therefore demand that quest for good undertaken by the State must be insulated from the individuals’ liberty and therefore State must be kept away from that individuals’ space, thereby allowing the individuals to pursue their own conception of good.

The fact, however, remains that the autonomy and individualism are themselves value commitments which are actually masked by the dominant discourse around the State’s duty to restrain itself. However, this particular understanding of human needs and aspirations, despite masquerading as impartiality is actually the one which makes collective goals and interpersonal relationships subservient. It also ignores the individuals’ initial endowments and their ability to mobilize the resources at their disposal in an effective manner and access to social goods such as education and training.\textsuperscript{101}

John Rawls puts it, the better endowed, who have a fortunate place in the distribution of native endowments they do not morally deserve, are encouraged to acquire still further benefits on condition that they train their native endowments and use them in ways that


contribute to the good of less endowed, who do not deserve their lesser place either.\textsuperscript{102} Rawls has tried to argue for the attributes of a just system rather than the details of a particular system. Rawls has also argued that a political conception of justice cannot do without preferring a particular doctrine over others.\textsuperscript{103} A Rawls claim to neutrality depends on finding a consensus and not for being able to point to a rational political conception of justice. In fact for Rawls rationality depends on finding overlapping consensus and therefore the consensus itself would be reflective of rationality and reasonableness. The central notion of rationality for Rawls is therefore not value neutral.\textsuperscript{104} However, it might be impossible to achieve a consensus on some pivotal political questions owing to the fact that no such overlapping consensus exists.\textsuperscript{105} The conclusion therefore is to forsake the attempted dichotomy between issues in which State must not intervene and those in which no such duty to restrain is upon the State without actually violating the principle of neutrality, even when rationality would only mean consensus and not a value-free conception of State role, upon which apparently to State duty of restrain is actually hinged.

2.1.2 The Harm Principle and Positive duties

The harm principle is the foremost justification of the scope of legitimacy of the State’s authority to make inroads into individuals’ freedom.\textsuperscript{106} Formulated by Mill, it states that the government is only justified to restrict individuals’ freedom by using coercion to prevent the individual from causing harm to others.\textsuperscript{107} Joseph Raz widens the traditional notion of harm

\textsuperscript{103} \textit{Id.} at 154.
\textsuperscript{104} \textit{Supra} note 14 at 22.
\textsuperscript{106} \textit{Supra} note 14 at 29
\textsuperscript{107} \textit{Ibid.}
and therefore within its fold includes the failure to improve the situation of others. This richer conception of harm allows us to apply the harm principle in relation to positive duties of State as well, as the non fulfilment of positive duties by the State would not result in improving the lives of people from deprived sections of the society and therefore State can legitimately impose duties on others who are capable to promote the autonomy of others. This duty can be imposed regardless of the fact that the duty cast upon the persons have absolutely no role in making others less autonomous. Doing so, therefore “decouples responsibility from fault”. This in turn means that State can use the means of coercion to force people to contribute to the well being of others. Joseph Raz has therefore, concluded that a government with the responsibility of promoting the autonomy of citizens is well within its right to redistribute resources. This synthesis permits the reconciliation of positive and negative duties. Individuals contributing may in turn gain fulfilment and once this is achieved the coercive measures of State directed towards them can actually be taken as a mean to add to their freedom rather than detracting from it.

2.1.3 Institutional Critique and Feasibility Critique

Amartya Sen in his book the ‘The Idea of Justice’ has identified two specific lines of reproach in relation to the inclusion of human needs as rights; namely institutional critique and feasibility critique. ‘Institutional critique’ points to the absence of any bearer of obligations as correlatives, in so far the claim over basic human needs as rights are concerned. Prof. Sen, however, rebuffs these two objections as being devoid of any coherent theoretical premise as

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108 Ibid.
109 Ibid.
110 Supra note 100 at 415-417.
111 Supra note 14 at 29
112 Id at 29, 30.
even the classical ‘first generation’ rights, like freedom from assault can actually be seen as imposing imperfect obligations on others who are not identified bearer of obligations.\textsuperscript{114}

Similarly, social and economic rights may call for the inclusion of both perfect and imperfect rights.\textsuperscript{115} The ‘feasibility critique’ on the other hand proceeds from the argument that even with the best of efforts it may still be impossible to give effect to the content of alleged economic and social rights. Prof. Sen states that this charge is actually an empirical observation of some interest made into a criticism for accepting these interests as rights based on this wrong and largely undefended presumption that to be coherent, human rights must be completely accomplishable for everyone.\textsuperscript{116}

Kai Moller in his book\textsuperscript{117} identifies what according to him is the dominant narrative of the global model of constitutional rights. According to him the dominant narrative holds –

“(i) that rights cover only a limited domain by protecting only certain especially important interests of individuals;

(ii) that rights impose exclusively or primarily negative obligations upon the State;

(iii) that rights operate only between a citizen and his government, not between private citizens; and

(iv) that rights enjoy a special normative force, which means that they can be outweighed, if at all, only under exceptional circumstances.”

\textsuperscript{114} Ibid.
\textsuperscript{115} Id. at 383.
\textsuperscript{116} Id. at 383.
However, he accepts the fact that out of the four attributes of the dominant narratives, the second one has been considerably eroded because of the increasing recognition of social and economic rights.\textsuperscript{118} Obvious impact of the growing recognition of social and economic rights will have the bearing on the first one by inflating the sphere of rights. The third aspect of this dominant narrative is significant as rights, be it fundamental rights or human rights are generally available against the State only and not against private persons. The logical corollary of this argument is that even in relation to rights traditionally within the territory of rights would only be considered one if the breach of the rights is at the behest of the State. Therefore, right to life and liberty is a right only against State and not against individuals; so if this right is threatened or violated by a private person then there is no breach of this rights taking place. This obviously is linked to the second attribute of the narrative, since rights cannot impose positive obligations upon State, so even vis-a-vis the first generation rights there would not be a positive obligation upon the State to protect the citizens from their rights being violated if the rights are threatened or violated by the private citizens.

However, inroads have been made in relation to this narrative as well and consequently rights, specially the first generation rights are not only available against the State and therefore the understanding is that first generation rights impose a positive obligation upon the State to protect it from being violated from private persons as well and therefore, even first generations rights give rise to positive duties of State and failure to fulfil this duty would also be violation of these rights by the State on account of its failure to protect these rights. Socio-economic rights also impose positive obligations upon State; however the positive means is

\textsuperscript{118} Ibid.
by no means limited to social rights.\textsuperscript{119} Socio-economic rights also impose negative obligations.\textsuperscript{120} It therefore, follows that first generation rights cannot be distinguished from socio-economic rights using the positive negative dichotomy.\textsuperscript{121} Positive rights therefore, embrace the positive dimensions of rights, no matter which generation the right stems from.\textsuperscript{122}

2.2 Meaning of Social and Economic Rights

In international law scholarship human rights are often divided into three classifications or ‘generations.’\textsuperscript{123} Civil and Political rights are referred to as first generation rights, economic, social and cultural rights as the second generation rights; and group rights including the right of people to self determination and minority rights are known as third generation rights.\textsuperscript{124} The second generation of rights relate to substantive equality and address primarily the social and economic needs of individuals. The three generations also refer to a certain hierarchy of rights in terms of political preference, first generation being the most preferred, followed by the second and third generation rights respectively.

There is no categorical basis for preference for one nomenclature over others by various scholars in relation to socio-economic rights; preference tends to be conditioned by the

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\textsuperscript{120} “At the very minimum, socio-economic rights can be negatively protected from improper invasion.” \textit{Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa.} Available at http://www.saflii.org/za/cases/ZACC/1996/26.html, (last visited on Apr. 21, 2016).
\textsuperscript{122} Supra note 119 at 355.
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geographical and disciplinary reasons. The commentators from United States prefer the term welfare rights, British commentators and social philosophers in general prefer social rights and those who are more influenced by the terminology of International Law prefer economic, social and cultural rights. All this refers to the same set of rights, namely “right to meeting of needs, amongst which the most important are the right to a minimum income, the right to housing, the right to health care, and the right to education”, but these are the different ways of referring to these rights. One of the reasons for generally not referring to ‘cultural right’ connotes the fact that, though significant, cultural rights are not the concern of study aimed at studying the aforesaid rights.

Social and Economic Rights therefore are known by way of several synonymous expressions, viz. Economic and social rights, Social Rights, welfare rights and socio-economic rights, and consequently very often these appellations are used interchangeably. However, there is no discord in so far as identifying the content of these rights are concerned, but at the same time giving an exhaustive illustrative list of the content of these rights is also tenuous. For Katharine G. Young socio-economic rights, sometimes also called social rights include the rights to access food, water, housing, health care, education and social security – what might approximate the basic goods and services to secure dignified existence. Amartya Sen includes within the fold of welfare rights “......entitlements to pensions, unemployment

126 *Id.* at 3.
129 *Supra* note 2 and *Supra* note 59.
130 *Supra* note 86 and *Supra* note 51.
131 *Supra* note 113 at 379.
132 *Supra* note 117 & *Supra* note 24.
133 *Supra* note 2 at 385, 386.
benefits and other special public provisions aimed at curtailing certain identified economic and social deprivations, and the list of deprivations to be covered can be extended to include illiteracy and preventable ill health”\textsuperscript{134}, he further puts it that for the proponents of welfare rights it is seen as “important ‘second generation’ rights, such as a common entitlement to subsistence or to medical care......”\textsuperscript{135} Certain minimum need is necessary for an individual to lead a life of respect. Shue identifies the core as unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal public health care.\textsuperscript{136}

Franklin Delano Roosevelt, the former President of the Unites States of America argued for the realisation of what he called the “second bill of rights” for every American, which according to him includes –

“The right to useful and remunerative job in the industries or shops or farms or mines of the nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and opportunity to achieve and enjoy good health;

\textsuperscript{134} Supra note 113 at 379-380
\textsuperscript{135} Id. at 379,380.
\textsuperscript{136} Shue, Basic Rights 23(Princeton University, Princeton, 1996).
The right to adequate protection from economic fears of old age, sickness, accident and unemployment;

The right to a good education.”\(^{137}\)

There is a direct link between the second bill of rights and Roosevelt’s famous speech in the year 1941, in which he argued for four freedoms: freedom of speech, freedom of religion, freedom from want and freedom from fear.\(^{138}\) According to him these essential freedoms should exist everywhere in the world.\(^{139}\) The second bill of rights was directed against the realisation of freedom from want.\(^{140}\) Freedom from want in Roosevelt’s view meant “economic understandings which will secure to every nation everywhere a healthy peacetime life for its inhabitants.”\(^{141}\)

Social rights in the form of rights to healthcare, housing, education and social security are large subsets of social rights.\(^{142}\) Jeff King has identified the five different senses of Social Rights as follows –

**2.2.1 Moral sense**

1. Social human rights: These are the human rights the philosophers speak about, rights we enjoy as a matter of political morality and whose existence is not dependent on any recognition. Because they are human rights, they are taken as global baseline standards, and they therefore have a minimalist character.


\(^{138}\) *Id.* at 1.

\(^{139}\) *Ibid.*

\(^{140}\) *Ibid.*

\(^{141}\) *Ibid.*

\(^{142}\) *Supra* note 86 at 18.
2. Social citizenship rights: These are social rights generated by some account of distributive justice but which may be limited to particular communities, and which thus typically go beyond the minimalism of social human rights. They specify the requirements of a more egalitarian vision of social citizenship. These rights can be quite specific and seem generous when specified in legal form, and may include entitlements such as four week annual holidays with pay, extensive protections for collective bargaining, paid maternity and paternity leave, and legal protections against unjustified dismissals.

2.2 Legal Sense

3. International social rights: These are the social rights recognised in international law, which are chiefly designed to mirror our social human rights but which may extend beyond or fall short of them in elements of detail. They may also include social citizenship rights, as do the revised European Social Charter and elements of EU Charter of Fundamental Rights, and the bulk of International Labour Organisation’s many labour and social security conventions.

4. Legislative social rights: These are the rights embedded in legislation and enforceable in ordinary public law before the courts and tribunals.

5. Constitutional social rights: These rights are enacted in constitutions and may be justiciable or non-justiciable, and may include social human rights, social citizenship rights, and reference to relevant international social rights.¹⁴³

Jeff King has argued for the social minimum i.e. minimal respect for well being, autonomy and social participation, upon which the idea of human rights converges would demand the provision for the bundle of resources in order to satisfy the following in the preferential order:

¹⁴³ Id. at 18, 19.
“A healthy subsistence threshold meeting physical needs for shelter, nutrition, childhood development, health and psychological security;

A social participation threshold, which would guarantee an education sufficient for basic economic and social participation, insurance against economic shocks, and the resources required for minimal social engagement with family and peers; and

An agency threshold, which would require the education and economic stability required, in a given society, to engage in basic life planning, including the capacity to frame and achieve long term goals.”\textsuperscript{144}

It is important to note here that this is not the same as arguing for the fulfilment of the three thresholds mentioned above; as what is demanded, is a provision for realisation and not the realisation \textit{per se}.

Basic needs based approach to minimum core also comes at a price.\textsuperscript{145} This can actually make the beneficiaries the passive recipient of pre-determine services rather than active agent engaged in progressively interpreting their needs and shaping their life conditions.\textsuperscript{146} There are empirical links between material deprivations and lack of democratic voice.\textsuperscript{147} The value based normative account of minimum core i.e. dignity, equality and freedom, however, is insufficient to concretise minimum core and therefore the idea of minimum core would still suffer from the vice of indeterminacy.\textsuperscript{148} This value based normative justification of socio-

\textsuperscript{144} Supra note 86 at 30.
\textsuperscript{145} Katharine G. Young, “The Minimum Core of Economic and Social Right: A Concept in Search of Content, 33 \textit{Yale J. Int’l L.} 113 at 132.
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid.
economic rights is what Katharine Young calls “essence approach”\footnote{Id. at 138.}, which for different people will be different as the advocates of human flourishing and human survival may differ on this question of essence of minimum core. Individually too, the value based normative may differ in their interpretation, for example an interpretation of right to education would draw heavily from freedom whereas the interpretation of right to health relies heavily upon the idea of human dignity.\footnote{Ibid.} While the normative justification for the minimum core must continue the dialogues and contestations the resultant standard must retain an open, contestable and fluid idea of minimum core.\footnote{Ibid.} However, Sandra Fredman has argued that the fundamental value informing the right envisages the possibility of deriving the content of minimum core.\footnote{Supra note 14 at 212.} She has argued that positive obligations as indeterminate as obligations for restraint are.\footnote{Id. at 71.}

Katharine Young has further examined the feasibility of the consensus approach to minimum core and not a contested one.\footnote{Supra note 145 at 140.} She observes that “applying this consensual scale to economic and social rights has advantages in ascertaining the settled meaning of each right’s core, while allowing pluralist disagreement at its fringes.”\footnote{Ibid.} However, even consensus approach according to her is no less contentious than the essence approach. Except for popularising the inquiry, not much can actually be achieved by the recourse to the consensus approach;\footnote{Id. at 151.} it presents a vague and conservatively articulate core.\footnote{Id. at 174.} It does not tell us whose consensus
would count and whose would remain peripheral.\footnote{Ibid.} Katharine Young has also analysed the fourth basis for determining the content of socio-economic rights by emphasising on obligations of State. Obligations approach serves to substantiate the socio-economic rights by reference to the claims of justiciability before the Courts.\footnote{Id. at 158.} However, the justiciability also cannot make the content of social and economic rights determinate as it suffers from the problem of polycentricity; something that the judiciary is not accustomed to and therefore not considered to be the domain of judiciary.\footnote{Id at 163.} Polycentric questions are certainly opposed to the idea of core and since socio-economic rights are by its very nature polycentric, quest for the minimum core becomes all the more difficult. This however, is not to mean that a quest to unravel the polycentric nature of these claims are not to be undertaken but this certainly reminds us about the fact that it perhaps is an ongoing quest at present.

However, for Jeff King the basic duties of state towards the fulfilment of the social minimum, so as to ensure compliance with the social human rights include the following:

“(i) A duty to take expeditious steps, to the maximum of available resources, and subject to reasonable conditions of eligibility (e.g. residency, personal responsibility, conditionality) to secure the social minimum to all; and

(ii) To give immediate effect to the following obligations:

(a) To define and regularly update the healthy subsistence, social participation and agency thresholds;
(b) To establish framework legislation and executive institutions for securing the social minimum to all; and

(c) To hear and respond to complaints, in an official and public capacity, about alleged deprivations of social minimum.\(^{161}\)

The aforesaid basic duties of state towards the fulfilment of the social minimum are very significant pointers for the courts set out to enforce socio-economic rights, as the biggest challenge faced by the courts charged with enforcing these rights is to have a roadmap to proceed on. This is important as enforcement of positive rights cannot be equated at par with the enforcement of negative rights by the courts as it would not be fact specific as is generally the case with negative rights and would invariable involve a dialogue between court and the government about the questions important for the realization of these rights. It therefore sets out the important pointers for the courts by citing relevant questions that the courts must ask having been charged with the responsibility of enforcing socio-economic rights.

It is significant, nevertheless to see that Jeff King is advocating for measure to supervise the progressive realisation of socio-economic rights, itself as the social minimum and not actually identifying the minimum core from within the socio-economic rights. This conceptualisation comes very close to the reasonableness approach of the judicial enforcement of socio-economic approach enshrined in the Constitution of South Africa. In the widely discussed decision of the South African Constitutional Court in the case of *The Government of Republic of South Africa & Others v. Irene Grootboom & Others*\(^{162}\), the Constitution of the Republic of South Africa, 1996 in its Bill of Rights under Chapter II of the Constitution explicitly

\(^{161}\) *Supra* note 86 at 35-36.

\(^{162}\) *Supra* note 50.
provides judicially enforceable right of housing\textsuperscript{163}, health care, food, water and social security\textsuperscript{164}. In \textit{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\textsuperscript{165} 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 plea was based on section 26 and 28(1) (c)\textsuperscript{166} of the South African Constitution which according to them

\textsuperscript{163} \textbf{Section 26}. Housing – (1) Everyone has the right to have access to adequate housing.
\hspace{0.5cm} (2) The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right.
\hspace{0.5cm} (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

\textsuperscript{164} \textbf{Section 27}. Health care, food, water and social security – (1) Everyone has the right to have access to –
\hspace{1cm} (a) health care services, including reproductive health care;
\hspace{1cm} (b) sufficient food and water; and
\hspace{1cm} (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
\hspace{0.5cm} (2) The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.
\hspace{0.5cm} (3) No one may be refused emergency medical treatment.

\textsuperscript{165} \textit{Supra} note 50, Yacoob, J. at para 10.

\textsuperscript{166} Every child has the right to basic nutrition, shelter, basic healthcare services and social services.
obligates the government to provide them with basic shelter. The South African constitutional Court in its certification judgement\textsuperscript{167} 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 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{168} 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 programme lacked any component for those in desperate need. He found that the absence of

\textsuperscript{168} 10 other judges of the Constitutional Court concurred with Yacoob, J.
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.

This however, appears to be a climb down from the ambitious quest of realising the socio-economic rights by treating such rights at par with the civil and political rights by creating a judicially enforceable individual right remedy mechanism. Minimum core discourse still largely connotes the idea of individualised remedy by way of judicial enforcement in most of the academic writings and not the idea of social minimum as espoused by Jeff King. The dilution of minimum core is primarily because of the nature of socio-economic rights which is rarely claimed as a negative right; rather generally it will be claimed as a positive right. Judicial enforcement of right is premised on breach of rights as remedial measure, whereas, judicial enforcement of socio-economic rights cannot be a remedial measure as it is cannot be compared with traditionally understood notion of liberty which every person is naturally endowed with. However, even civil and political rights cannot be guaranteed by way of mere judicial enforcement, as judicial involvement per se would be premised upon the breach of

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169 See Supra notes 2, 14, 30 and 51.
such rights, if rights are breached, it certainly is not guaranteed. What is guaranteed is a remedial measure in case of violation of rights and therefore, truly speaking guaranteeing even civil and political rights is only possible if the rights in general are treated as positive. This is the reason why individualised remedy in case of minimum core is not feasible. If we were to bring the analogy of specific relief from the Specific Relief Act, 1963; the minimum core would always demand specific fulfilment of duty owed and not a mere compensation for an occasional breach of obligation as is generally the case in case of violation of traditionally understood enforceable rights.

2.3 Conceptualising Socio-economic Rights under the Indian Constitution

Conceptualising socio-economic rights under the Indian Constitution is tumultuous task as this conceptualisation on face of it appears to be clouded by the present position and the manner in which the character of these rights is revealed by the text of the Constitution and the discussions in the Constituent Assembly that preceded the incorporation of these provisions. The contemporaneous understanding of the socio-economic rights under the Indian Constitution is very different from what it was at the time of commencement of the Constitution and this is primarily because of the judicial morphing led by the Supreme Court of India. Therefore, it is only appropriate that the socio-economic rights are categorised for its better conceptualisation into two heads:

(i) The conception as it was at the time of commencement of the Constitution

(ii) Present conception as morphed by the judicial pronouncements
2.3.1 The conception as it was at the time of commencement of the Constitution

Socio-economic rights, sometimes also called social rights\textsuperscript{170} include the rights to access food, water, housing, health care, education and social security – what might approximate the basic goods and services to secure dignified existence.\textsuperscript{171} The Constitution of India does not use the expression socio-economic rights at any place, however based on the general understanding of the factors constitutive of socio-economic rights, much of it can actually be located in Part IV of the Constitution as the Directive Principles of State Policy (DPSP). At the same time, the Constitution of India nowhere refers to DPSPs as rights and therefore there are serious doubts about the attribution of the phrase ‘rights’ which are ‘not enforceable by any court’\textsuperscript{172} unlike fundamental rights, Constitution of India refers to these as principles which are ‘fundamental in the governance of the country’\textsuperscript{173} and therefore the State is duty bound ‘to apply these principles in making laws’\textsuperscript{174}. The DPSPs therefore can be called policy goals for the executive and legislature as these were meant for governance and for making laws.

Part IV of the Constitution starting from Article 37 to 51 constitutes the provisions which embody these fundamental principles. These provisions cover a number of areas of governance ranging from securing and protecting a social order, minimising inequality among different groups of people, promotion of non concentration and distribution of wealth, right to an adequate means of livelihood, equal pay for equal work for both men and women, health of workers, freedom and dignity of children and youth, free legal aid, organisation of village Panchayat, Right to work, Right to education, Right to public assistance in cases of

\textsuperscript{170} \textit{Supra} note 51.
\textsuperscript{171} \textit{Supra} note 2 at 385, 386.
\textsuperscript{172} Article 37 of the Constitution of India.
\textsuperscript{173} \textit{Ibid}.
\textsuperscript{174} \textit{Ibid}.
unemployment, old age, sickness and disablement, just and humane conditions of work and maternity relief, living wage for workers, participation of workers in management of the industries, uniform civil Code for the citizens, promotion of educational and economic interests of scheduled castes, scheduled tribes and weaker sections, raising the level of nutrition and the standard of living and improvement of public health, organisation of agriculture and animal husbandry, protection and improvement of environment and safeguarding of forests and wild life, protection of monuments and places and objects of national importance, separation of judiciary from executive, promotion of international peace and security.

It is interesting to note that the two articles forming part of the DPSP use the expression ‘right’ – Article 39(a) states that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood and Article 41 stipulates that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement. It is clear as per Article 37 that these provisions are not enforceable in a court of law and yet the two provisions use the expression ‘right’ in these two articles. However, it is also clear from the language used in these provisions that these are not stated as legal rights or legal entitlement. It is important though that when it comes to other fundamental principles the word right has not been preferred by the framers of the Constitution. Therefore, Articles 37 and 41 definitely recognise a political right. The term right to adequate means of livelihood encompasses access to work, education and public assistance in cases of unemployment, old
age, sickness and disablement. So, we find that a general right to adequate means of livelihood also finds its components being specifically identified without claiming the exhaustion of the right to adequate means of livelihood. Education is referred to in other provisions like article 45 and 46 as well, though the term right to education is not used in these two provisions. However, the unamended version of Article 45 ordained that the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. This stipulation was definitely more than a mere optional fundamental principle for governance and therefore more than a mere political right, as the timeline of ten years was provided for ensuring access to free and compulsory education for all children until they complete fourteen years of age.

2.3.1.1 The conception as it was with the members of the Constituent Assembly

The discussion that took place with the framers of the Indian Constitution who were the members of the Constituent Assembly having the onerous task of framing the Indian Constitution is rather insightful. In the Assembly there was general acceptance of DPSPs as fundamental principles of governance, however the opposition only came from those who wanted it to be justiciable in the court of law.\textsuperscript{175} B. N. Rau was of the view that whether a law made or action taken for the realization of DPSPs shall be invalid for violating the justiciable fundamental rights must also be considered in relation to having an express provision in this

\textsuperscript{175} Granville Austin, \textit{The Indian Constitution: Cornerstone of a Nation} 75 (Oxford University Press, New Delhi, 2006).
regard in the Constitution itself.\textsuperscript{176} K. M. Munshi, K. T. Shah and B. R. Ambedkar wanted DPSPs or an even more rigorous social programme to be justiciable.\textsuperscript{177} Ambedkar’s proposal for social schemes, however where rejected on several occasions in the Assembly on the pretext that such schemes should be left to legislations and should not be embodies in the Constitution and therefore, from this position Ambedkar retreated to DPSPs.\textsuperscript{178} The drafting of justiciable rights and non justiciable principles was equally difficult, for example the right to equality was earlier put in the non-justiciable rights but later on included in the justiciable right whereas, the right to free primary education for children was earlier put in the category of justiciable rights but later on included as non-justiciable rights.\textsuperscript{179} So, with this hope that the accountability for the realisation of the principles contained in the DPSPs would be ensured by the people during every elections, the DPSPs were finally made non-justiciable.\textsuperscript{180}

2.3.2 Present conception as morphed by the judicial pronouncements

In \textit{Francis Coralie Mullin v. Union Territory of Delhi}\textsuperscript{181} the Supreme Court of India expanded the ambit of article 21 by including within the purview of article a right to human dignity and not that of an animal existence. Therefore, the court held that a dignified life therefore would include the right to shelter, clothing and nutrition being the bare necessities of life. This sweeping account of right to life encompasses a wider conception of civil and political rights and attempts to obliterate the age old distinction between civil and political rights and socio-economic rights by making the availability of socio-economic rights

\textsuperscript{176} \textit{Id.} at 75-76.
\textsuperscript{177} \textit{Id.} at 78.
\textsuperscript{178} \textit{Ibid.}
\textsuperscript{179} \textit{Id.} at 79.
\textsuperscript{180} \textit{Id.} at 78, a hope expressed by Dr. Ambedkar.
\textsuperscript{181} \textit{Supra} note 6.
indispensable for the realization of any civil and political rights and in the process makes socio-economic rights relating to the right to bare necessities of life a fundamental right, which is justiciable in a court of law. This also obliterates the fundamental conception that fundamental rights are generally negatives rights based on the idea of laissez-faire and therefore the illegitimate state intervention would call for the recourse to judicial remedies on account of breach of fundamental rights. Therefore, it paves the way for ‘positive’ fundamental rights.

The Supreme Court has followed this interpretative approach in later cases to hold that the right to life includes, inter alia, the rights to education in *Unni Krishnan v. State of A.P.*182, right to food in *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001), right to shelter in *Olga Tellis v. Bombay Municipal Corporation*183, right to health and medical care in *Paschim Banga Khet Mazdoor Samity v. State of W.B.*184. Thus, a range of justiciable socioeconomic rights has been realized since the *Francis Coralie* decision. To accomplish this feat, the Supreme Court substantively relied on an expansive reading of Article 21 where, despite the clear language in Article 37 stating that directive principles are not judicially enforceable; the right to life was held to encompass a right to live with dignity and therefore many of the directive principles.

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182 (1993) 1 SCC 645.
183 (1985) 3 SCC 545.
2.3.3 Human Dignity

The framework right of ‘human dignity’ under Article 21 of the Constitution along with an evolved conception of freedom encompasses the reasons for the recognition of several such socio-economic rights. However, the concept of human dignity is not confined to socio-economic rights only in fact it is squarely applicable even in relation to civil and political rights. Dignity warrants immediate address to the socio-economic needs of an individual and it would be paying a mere lip service to the cause of human dignity if access to material needs is denied owing to individual’s incapacity. A discourse around human dignity needs to be brought to the centre of human rights in order to generate the concern needed for the fulfilment of socio-economic rights. The courts in India have relied extensively to widen the sphere of fundamental rights to include socio-economic rights drawing from the provisions dealing with the socio-economic goals in the DPSPs.

The Supreme Court in *Francis Coralie Mullin* recognised the idea of human dignity to be applicable in relation to the socio-economic rights and as a consequence identified the right to basic essentials of life such as food, shelter and clothing implicit in it. In *Bandhua Mukti Morcha v. Union of India* again the Supreme Court emphasised on the right to human dignity and stressed the requirement of the basic essentials for human beings. In *Sodan Singh*

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185 Constitutional rights designed as principles – such as property, liberty and privacy- are inherently, framework rights and differ with constitutional rights designed as rules, for example the right against self incrimination. See, Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* 156 (Cambridge University Press, Cambridge, 2015).

186 For example the Supreme Court declared brain mapping, narco-analysis and polygraph test of an accused without the consent of the accused to be violative of his human dignity under Article 21 of the Constitution in *Selvi v. State of Karnataka*, (2010) 7 SCC 263


188 Id. at 22.

189 Id. at 29.

v. New Delhi Municipal Committee, the Supreme Court observed that corresponding to the global development on the human rights front judicial decisions in India are a strong pointer in terms of the recognition of an affirmative right to basic necessities of life under Article 21.

Human dignity has a long history as a subject of theological and philosophical analysis but a very short history as a constitutional value. It was first recognised by the Constitution of Finland in 1919 but after the Second World War the trend of recognising human dignity as a constitutional right began, namely German Basic Law (1949), Constitution of Columbia (1991), Israel’s Basic Law (1992), Constitution of Russia (1993), Constitution of South Africa (1996), Constitution of Poland (1997) and the Constitution of Switzerland (1999). However, the constitutional value of human dignity can be recognised by implication of the constitutional structure and architecture and the way the Constitution is interpreted.

2.3.3.1 Content of Human Dignity

The purpose of the constitutional right to human value is to realise the person’s humanity. At the core of person’s humanity stands the autonomy of her will as only she can determine her destiny. The unique purpose that characterises human dignity is distinguished from the general purpose of human dignity and within the constitutional right to human dignity both these purposes are combined. Human dignity as a framework right is the recognition of human dignity as a framework right whereas all other fundamental rights independently further human dignity in the respective spheres to which the right relates. A framework right

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192 Supra note 185 at 139.
193 Ibid.
194 Id. at 141.
195 Id. at 144.
196 Ibid.
197 Id. at 145.
is therefore a mother-right.\textsuperscript{198} From it the daughter-rights are derived, however, sometimes the daughter-rights can itself be a framework right and therefore from the daughter-rights at the lower level of generality, grand-daughter right are to be derived.\textsuperscript{199} A framework right, therefore, is a bundle of rights. The constitutional right to human dignity should be recognised as a residuary right; since that would be incompatible with the centrality of the constitutional value of human dignity in the Constitution.\textsuperscript{200} The link therefore between human dignity and rights such as, adequate housing, health, social security and education is too obvious to warrant any discussion.\textsuperscript{201}

2.4 Realising the goal of adjudicatory socio-economic rights

There seems to be a clear indication from these judgements of the Supreme Court that the Court has accepted the philosophical challenge mounted to the proposition that first generation rights come first being the enforceable rights and the second generation rights fulfilment cannot be the immediate priority. In fact the Court appears to have accepted the argument that freedom as absence of coercion is meaningless to a person too poor to make use of that freedom and therefore freedom cannot be understood as limited to absence of coercion. As a consequence therefore, enablement of the capacity to make use of that freedom is implicit in such freedom. Second generation rights which ensure well being, autonomy and social participation of human beings therefore become the factors upon which the enjoyment of first generation rights would be hinged. Bhagwati, J.’s insistence on dignified life as true meaning of right to life under article 21 of the Constitution in Francis Coralie Mullin clearly

\textsuperscript{198} Id. at 157.
\textsuperscript{199} Ibid.
\textsuperscript{200} Id. at 182.
\textsuperscript{201} Supra note 86 at 22.
demonstrates the embrace of this argument by the Court, as well being, autonomy and social participation can only ensure a life of dignity. The same has also been highlighted by Bhagwati J. when he states in *Francis Coralie Mullin* that a dignified life would include the right to access to shelter, clothing and nutrition.

However, this declaration by the Court does not only have to overcome the theoretical challenge of disrobing the socio-economic rights of its secondary character; rather the declaration of alteration of theoretical foundations must be reflected in reality as well or else it would simply be an empty rhetoric. As has been often said about judges, that we must not get carried away by what the judges have to say, we must look at what they do to what they say.202

The premise of judicial enforcement presupposes capable individuals as aggrieved persons bringing their petition before the Court after fulfilling the procedural formalities. Therefore, for the agitation of cause before the Courts, it has to be agitated by the person aggrieved. Keeping the same threshold for the judicial enforcement of judicially recognised socio-economic rights will make the very cause of judicial enforcement futile, as a person deprived of basic amenities to lead one’s life is definitely not expected to be capable enough to bring his grievance about the non-fulfilment of his judicially recognised enforceable socio-economic rights by the State before the Courts. On this front, however, the cause of socio-

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202 Upendra Baxi’s lecture on “Constitutionalism and Identity” at NALSAR, Hyderabad on February 17, 2017. Available at www.youtube.com/watch?v=ju0-27KqZKo, (last visted on Feb. 19, 2017). Prof. Baxi expresses his utter dismay that in *Olga Tellis* the Supreme Court despite declaring the right to shelter as fundamental right of the people was actually not very kind to the slum dwellers. Madhav Khosla also in his article talking about this case said how this fits into what he calls the conditional social rights adjudication and not the realization of the minimum core of socio-economic rights by the Supreme Court.
economic rights in India is fortunate to have the already existing phenomenon of public interest litigation in India which is based on the premise of addressing adjudicatory causes before the Courts by not giving particular importance to the procedural niceties otherwise necessary for bringing such causes before the Court.

2.5 Inference

Despite the existence of the normative standards for the constitution of basic human needs as right, because of the historical reasons and especially owing to the dominance of the anglo-saxon jurisprudence, the recognition of basic human needs as rights got relegated to the second generation rights in actual theorization in the Indian context. The normative standards of dignity, freedom, utilitarianism and social citizenship provide the requisite sound theoretical grounding to the rights based discourse around human needs. Interestingly, though, in the actual legal theorization, even second generation rights character was not accorded to basic human needs. The recognition of basic human needs, by way of recognizing the corresponding non-justiciable obligation of the State (and not that of the right holder and the rights) in the form of directive principles being fundamental in the governance of the country, intended to deny any normative grounding to a right based discourse around basic human needs.

The Constitution of India does not expressly talk about socio-economic rights barring the two Articles forming part of the directive principles which uses the expression ‘right’. Article 39(a) states that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood and
Article 41 stipulates that the State shall, within the limits of its economic capacity and
development, make effective provision for securing the right to work, to education and to
public assistance in cases of unemployment, old age, sickness and disablement. Apart from
this Article 45 in its unamended form imposed an obligation which was prioritized by the
Constitution itself by providing for free and fair education for children until they complete the
age of fourteen years to be achieved within ten years of the commencement of the
Constitution. The force of the nomenclature of ‘right’ and the command under the unamended
Article 45 along with the other directive principles gets blunted to a great extent by Article 37,
which makes directive principles not justiciable in a court of law. The Courts in India,
however, lead by the Supreme Court have acknowledged the logical inconsistency in
distinguishing the two set of rights, one as justiciable and other as non-justiciable under the
Indian Constitution, and have therefore read basic human needs forming part of the socio-
economic rights theorization being bare essentials to lead a dignified life, into the right to life
under Article 21. Indifference towards the obligation contained in the principles which are
fundamental in the governance of the country by the government have certainly acted as a
catalyst in enabling courts in taking an activist stand. This has re-oriented the basic human
needs into a justiciable right.