1. Introduction
The protection of human rights at all levels, international, regional, and domestic has come a long way from the traditional liberal, “negative” view of human rights, to more equally protect all human rights, recognising their importance for human dignity. As noted, shifts in constitutionalism have mean that classical liberal, older Western constitutions incorporating civil and political rights alone are increasingly viewed as having a defect or lacuna as against those from the global south, which seek to protect both sets of rights. In fact, since the mid-1970s, an increasing number of countries have been seen to include socioeconomic rights either as justiciable rights or in aspirational terms in their constitutions. The Constitutions of India and South Africa can be seen as falling within the category of Constitutions from the global south which include both sets of rights, though the treatment of economic and social rights in the two constitutions differs. While the Indian Constitution (termed as an instance of an “early social democratic constitution”\(^1\)) incorporates these rights as non-justiciable directive principles, their non-enforceability by courts expressly mentioned in the text, the South African Constitution places them as part of the justiciable bill of rights, enabling individuals to approach courts for their non-enforcement. But non-justiciable socioeconomic rights in India, has not meant that these rights have remained aspirations or that the courts have not engaged with them. Legislation has been enacted, and schemes and programmes initiated (albeit with shortcomings, including in implementation), and the judiciary has through liberal interpretation of the fundamental rights, protected these rights in practice, making them effectively justiciable. Likewise, justiciable socioeconomic rights in the South African Constitution, has not meant absolute protection. As in India, legislation and schemes and

programmes have been given effect to, but limitations akin to those in the International Covenant on Economic, Social and Cultural Rights (ICESCR) have meant more limited protection compared to that of civil and political rights. Moreover, while individuals are enabled to approach courts seeking protection of their constitutionally recognised social and economic rights, the judiciary merely assesses the reasonableness of the measures taken by the state as required under the constitution, often not translating into immediate relief for claimants. The two systems, and judiciaries, have thus approached socioeconomic rights very differently, yet there are certain similarities between them.

The questions sought to be answered by the present study include how the legal position of socioeconomic rights in India stands with respect to that in South Africa, and how the approach of the judiciary with respect to these rights in the two countries, compares. The present chapter seeks to compare the position of socioeconomic rights in the two countries to answer these and related questions. Proceeding from the previous two chapters that detailed the socioeconomic position, challenges, and the legal and judicial protection of these rights in the two countries, this chapter will make a comparison of the two in each of these contexts. The chapter is divided into seven sections besides the present section. The first and second sections compare the socioeconomic position of the two countries, and the major socioeconomic challenges faced by them. It is found that in terms of socioeconomic position, though the two countries differ in terms of economic classification, with reference to individual parameters, the position varies with neither clearly ahead of the other on any of these. Challenges faced include some common issues, which impact the enjoyment of socioeconomic rights, and also issues specific to each country. Constitutionally, the status of socioeconomic rights in the two countries varies, although when the backgrounds of framing of the constitutions are looked into, it is apparent that the framers had similar aims, though the approach adopted differed. This aspect is covered in the fourth section. The next section of the chapter compares the legislation enacted in the two countries towards
realisation of these rights in the areas of the right to work and workers’ rights, social assistance, standard of living, and health. Thereafter, the schemes and programmes initiated by the governments in both countries are looked into, along with the challenges faced in their implementation. The second last section considers the judicial role in both countries in the protection of socioeconomic rights. The higher judiciaries of the two countries have taken very different approaches towards the protection of socioeconomic rights. While the role of the Indian judiciary has been “activist”, the approach of the South African Constitutional Court is described as deferential and restrained. Despite this, there are as mentioned, certain similarities in approach. Moreover, on issues such as implementation of decisions, there is some similarity in the position of the two countries. The concluding section highlights the main findings of the chapter.

2. Social and Economic Position
A comparison of the various social and economic indicators pertaining to India and South Africa, as discussed in Chapters IV and V, when attempted here, reveals that neither country can be said to be in a “better” socioeconomic position on all indicators, though South Africa has an edge over India on many of the indicators. The indicators considered include GDP and income levels, unemployment and labour participation statistics, statistics on infant mortality and life expectancy, maternal mortality, enrolment rates for primary and secondary levels, and completion rates for primary levels, besides poverty estimates in light of poverty being both a cause and consequence of the denial or ineffective enjoyment of socioeconomic rights.² It must be clarified here, that on some aspects, data for both countries from the same source and pertaining to the same time period was unavailable, hence for comparative purposes, older data has been used, where necessary.

In terms of the classification of the two countries by the World Bank, South Africa is a “upper middle income country”, while India is a “lower middle income country”, with the former having a

GNI in 2015 of over twice that of India (USD 12,870 and USD 6030, respectively) but in terms of GDP, that of India is higher (USD 2.089 trillion vis-à-vis USD 314.6 million). However, in terms of human development, though the HDI ranking of the two countries differs (at 119 and 131, respectively), both have been classified as “middle human development” countries by the Human Development Report. South Africa stands in a better position in terms of the secondary gross school enrolment ratio (at 103.8 and 83.3 for females and males vis-à-vis 69.2 and 68.6 (f/m) for India), literacy rate among persons aged 15 and above (94.3 percent vis-à-vis 72.1 percent for India), physicians per 1000 population (0.8 vis-à-vis 0.7 for India), infant mortality (33.6 vis-à-vis 37.9 for India), maternal mortality ratio (138 vis-à-vis 174 for India), infant mortality rate (38 per 1000 live births vis-à-vis 41 for India). As far as infant mortality is concerned, a look at the figures shows that the position in India has steadily improved from 1990 to 2015: from 88.3 to 66.4 (2000) to 38.9 (2015), while in South Africa, the position has fluctuated going from 47.4 to 54 (2000) and down to 33.6 in 2015. In terms of improvement on this indicator, India is in a significantly better position and has showed consistent progress. Moreover, among the statistics discussed, it can be seen that some such as infant mortality and infant mortality rate and physicians per 1000 population, the difference between the two countries is small, while on others such as secondary gross school enrolment ratio, literacy rate (among persons aged 15 and above), and maternal mortality ratio, it is significant.

In the case of indicators related to health, as concerns population with access to improved drinking water sources, and sanitation facilities, both of which impact the right to health, a mixed picture is seen. While in the case of sanitation, the position is better in the case of South Africa, and significantly so in the rural areas of South Africa (69.6 percent and 60.5 percent (u/r) vis-à-vis 62.6


percent and 28.5 percent (u/r) for India—the difference being of over 30 percentage points), in the case of access to improved drinking water sources, the position of urban South Africa is better, though the difference is of only 2.5 percentage points (99.6 percent vis-à-vis 97.1 percent for India), while of rural South Africa is behind that of India, the difference being about 11 percentage points (81.4 percent vis-à-vis 92.7 percent for India).\(^6\) In the case of undernourishment in the population, South Africa stands in a significantly better position at 5 percent of the population being undernourished as opposed to 15 percent in India, as per World Bank indicators. In terms of physicians per 1000 population, as mentioned, South Africa is in a better position but not significantly so. Again in terms of healthcare expenditures, both estimates considered, place South Africa (8.8 percent of GDP and 4.2 percent of GDP) in a better position than India (4.7 percent of GDP and 1.4 percent of GDP).\(^7\) The global hunger index on which India scores 28.5 places India within the "serious" category, while South Africa's score at 11.8 places it in a far better place in the "moderate" category.\(^8\)

A comparison of statistics on the incidence of poverty in the two countries proves more difficult with different sources providing vastly differing figures in both cases. For instance, while according to a BBC Report, and one conducted by Statistics South Africa, 45.5–48 percent of the South African Population lived below the poverty line in 2011, while Word Bank estimates for the population living below the USD 1.90 level was only 16.6 percent. On the other hand, World Bank estimates for the same category in India showed 21.2 percent of the population living below this level in 2011, while other studies placed poverty levels at between 14.9 percent and 37.2 percent for different years between 2004 and 2008. In terms of World Bank estimates, a larger percentage of India's population lives below the USD 1.90 line than is the case for South Africa with similar results and a more significant gap at USD 3.10 levels (58 percent for India and 34.7 percent for

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\(^6\) See Department of Economic and Social Affairs, \textit{ibid}.


\(^8\) "Global Hunger Index", http://ghi.ifpri.org/ (last visited 7 October 2017).
South Africa). Internal estimates, however, show a lower percentage of poverty in India than South Africa, but it is difficult to compare these as the figures are from different sources and pertain to different years.

However, as mentioned, in the case of some indicators, India stands in a better position than South Africa. These include life expectancy at birth as per figures for the year 2015 (68.34 vis-à-vis 57.44 and in the time period 2010–15 in both countries (68.9 and 66.1 (f/m) vis-à-vis 59.1 and 54.9 (f/m) in South Africa), primary gross school enrolment ratios (107.92 vis-à-vis 99.72 in South Africa)), and unemployment (% of labour force). As far as life expectancy at birth is concerned, a look at the figures shows not only that India is in a better position, but that life expectancy in South Africa has in fact deteriorated having been at 62.12 in 1990, falling to 55.83 in 2000, and improving somewhat at 57.44 in 2015, an important reason behind the same being the HIV/AIDS pandemic in the country. Life expectancy is one of the indicators of the composite health index of the HDI. On unemployment, according to all the sources looked into, India is in a significantly better position at 3.5 (% of labour force) as compared to about 25 (% of labour force) in South Africa.

While on many parameters, South Africa stands in a similar or better position than India, in terms of satisfaction among people on well-being, as regards quality of education, healthcare, standard of living, and safety, and the nature of their jobs, the level of satisfaction is higher in India than South Africa on most parameters, other than education, where the position is almost similar.

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11 UNDP, supra note 4 at 240.
12 Id. at 252. In South Africa, satisfaction on education quality, healthcare quality, and standard of living was found in 74, 59, and 42 percent of persons respectively, while 50 percent persons felt they had an ideal job and 42 percent persons felt safe. In India, respectively, 76, 62, and 63 percent persons were satisfied with the education quality, healthcare quality, and standard of living while 80 and 69 percent persons believed they had an ideal job and feel safe. Id.
The comparison above, thus shows a mixed position with regard to socioeconomic indicators and statistics in the two countries. Leaving aside economic growth, while much progress has been made on indicators that can be said to reflect human development such as health, education, employment, poverty, etc., and thus the enjoyment of socioeconomic rights in both countries, both remain medium human development countries about 12 places apart in the UNDP’s 2016 ranking. Much thus remains to be done towards the full realisation of socioeconomic rights, as well as in the realisation of these rights for vulnerable sections.

3. Social and Economic Challenges
While India and South Africa differ in terms of socioeconomic indicators, each country faring better than the other on some parameters, both countries being in the middle income and medium human development categories, still have several socioeconomic challenges before them. While the two countries are differently placed on various socioeconomic indicators, in some instances, as discussed, the difference between them is not very pronounced though in others it is significant. There are thus socioeconomic challenges common to them, as well as those that are specific to or more pronounced in each. Poverty, hunger, lack of access to clean and safe drinking water, homelessness, illiteracy, unemployment, lack of access to medical care, etc. are some challenges that relate to economic and social rights, and where large numbers of people face these challenges, it may be said that there is lack of access to these rights or that they are not effectively enjoyed.

Poverty in particular, is a challenge faced by both countries under study. As discussed in the previous section, in terms of percentage poor, the percentage of the Indian population living below the international poverty line, both of USD 1.90 a day and USD 3.10 a day is higher than the figures for South Africa though according to other (including internal) estimates, the figures for South Africa are higher in percentage terms. Irrespective of the differences/discrepancies in percentages, poverty is an issue facing India, where a large section of the population still lives below the poverty
line, as well as in South Africa, where as has been pointed out, the situation is being exacerbated
by another issue facing the country—the HIV/AIDS pandemic.\textsuperscript{13} Poverty is a situation where there
is in particular, denial of socioeconomic rights, though enjoyment of civil and political rights is also
impacted. In India, even if the lower estimates of about 15 percent (2008–09) or more moderate
ones of nearly 30 percent of the population (2011–12) living below the poverty line are accepted,
in view of the size of the population, vast numbers of persons continue to live in poverty.\textsuperscript{14} Again in
South Africa, internal indices have identified 1.2 million households as multidimensionally poor.\textsuperscript{15}
In addressing poverty, needless to say, realisation of socioeconomic rights has an important role to
play.

Another common challenge can be said to relate to access to improved sanitation, where a
large percentage of the population in both rural and urban areas in both countries does not have
access to these facilities.\textsuperscript{16} The situation is dire in rural India, but in both countries in urban and
rural areas, over 30 percent of the population lacks access to improved sanitation facilities. A
related issue is that of basic services, which in the South African case, as discussed, was
inadequately available to between 8 and 70 percent of the population across various income
groups.\textsuperscript{17}

\textsuperscript{13} Sandra Liebenberg, "The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South
Africa", 17 South African Journal on Human Rights 232, 235 (2001). See also Tara Usher, "Adjudication of Socio-
economic Rights: One Size Does Not Fit All", 1(1) UCL Human Rights Review 154, 154 (2008) (who notes that the
two countries face some of the same problems regarding poverty).
\textsuperscript{14} Institute of Applied Manpower Research, India: Human Development Report 2011 4 (Oxford University
Press/Planning Commission, Government of India, 2011); Aasha Kapur Mehta, Andrew Shepherd, Shashanka Bhide,
Amita Shah, and Anand Kumar, India Chronic Poverty Report: Towards Solutions and New Compacts in a Dynamic
Context 10 (Indian Institute of Public Administration, New Delhi, 2011); Task Force on Elimination of Poverty in
India, "Regional Consultation Meeting", http://niti.gov.in/writereaddata/files/presentation%20for%20regional%20meetings-%20NITI%20AAYOG.pdf (last
visited 28 November 2017).
\textsuperscript{15} Statistics South Africa, Census 2011: Income Dynamics and Poverty Status of Household in South Africa 46
(Statistics South Africa, Pretoria, 2015).
\textsuperscript{16} As discussed in South Africa 69.6 percent in urban and 60.5 percent in rural areas and in India, 62.6 percent in
urban and 28.5 percent in rural areas had access to improved sanitation facilities in 2014. Department of Economic
and Social Affairs, supra note 5 at 98, 191.
\textsuperscript{17} Statistics South Africa, supra note 15 at 28.
In the area of education, India lags behind in the secondary gross school enrolment ratio while in South Africa, the primary gross enrolment ratio is somewhat lower than that of India, though the difference in secondary gross school enrolment ratio between the two is far more significant. Primary education enrolment and completion rates in India have not reached the target of universal primary education. While literacy is less of a challenge for South Africa with 94.3 percent literacy in persons aged 15 and above as against only 72.1 percent in India, South Africa faces a challenge of education and skills mismatches, besides lack of availability of qualified teachers and adequate learning materials.

An issue more specific to South Africa is that of unemployment which is as high as 25% of the labour force. This is so despite improvements in various other indicators in the country which is noted to have “jobless economic growth”. This situation is related to the education and skills mismatch. Low wages, minimal benefits, and high income inequalities also plague the country. The inequalities prevalent in society are traced to the impacts of Apartheid, an effect comparable with vast inequalities observed in Indian society just after independence which the Constitution framers sought to remedy.

A major health challenge plaguing the country is that of the HIV/AIDS pandemic affecting over 18 percent of the adult population of the country, which also as discussed, exacerbates the poverty situation and productivity. In addition, the situation of AIDS orphans must be considered. Also in the context of health, the availability of physicians per 1000 population at 0.8 and 0.7 in South Africa and India, respectively remains far below the figures of 2.5 and 2.8 for the United

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19 UNDP, supra note 4 at 232.
States and United Kingdom, respectively.\textsuperscript{23} Healthcare expenditure too, of 4.7 percent of GDP in India and 8.8 percent of GDP in South Africa is far below that of that of the developed world at 17.1 percent in the United States, for example.\textsuperscript{24} Both the availability of physicians and expenditure on healthcare, thus need to be addressed in both countries, the challenge posed in the latter case being greater in India. Infant mortality in both countries, despite having reduced, to 34 in India and 38 in South Africa (per 1000 live births), remains significantly below the best levels in the world (3 in the Euro area), as is also the case for maternal mortality at 174 in India and 138 in South Africa, much below the world best levels of 6 in the Euro area.\textsuperscript{25} In India, hunger and hunger-related deaths are major issues that need to be addressed with the country falling in the “serious” category on the global hunger index, the situation being critical as compared to South Africa in the “moderate” category,\textsuperscript{26} though hunger still poses a challenge. The same is the case with malnutrition, which at 15 percent in India poses a greater challenge than 5 percent in South Africa,\textsuperscript{27} with numerous cases of malnutrition, and malnutrition-related deaths reported from time to time.

Thus, both countries face socioeconomic challenges in the areas of poverty, education, healthcare, hunger, and related basic services such as adequate sanitation to different degrees, demonstrating that much needs to be done towards realisation of socioeconomic rights in both countries.

\textsuperscript{23} Department of Economic and Social Affairs, supra note 5 at 98, 191, 218, 220.
\textsuperscript{24} Id. at 98, 191, 220.
\textsuperscript{26} “Global Hunger Index”, supra note 8.

India, emerging out of colonial rule in 1947, and South Africa out of apartheid to democracy in the mid-1990s, framed new constitutions to transform their societies based on democracy and respect for human rights. The concerns of the drafters of the Indian Constitution of the vast inequalities that existed in society in wealth, education, healthcare, access to land, etc. which were seen as requiring urgent action, were very similar to those of the framers of the South African Constitution. South Africa, as Davis highlights, had an "appalling history of racism, poverty, and concomitant skewed distribution of wealth along racial lines". The framers of the two constitutions thus shared the aim of seeking to bring about social and economic transformation.

Both constitutions, as discussed, contain provisions on socioeconomic rights but the approach of the two towards bringing social transformation differs.

While the Indian Constitution incorporates these rights in the form of directive principles of state policy, inspired by the Irish model, the South African Constitution, in the context of which the inclusion of these rights “assumed central importance”, includes them as justiciable rights, and part of a Bill of Rights, which sets out both civil and political rights, and economic, social, and cultural rights. The Indian Constitution in article 37 specifically declares that the rights in part IV are not enforceable by courts although they are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles making laws". The text of the Indian Constitution thus makes a clear distinction between the enforceable fundamental rights and non-enforceable directive principles. An exception to this general position in the Indian context is the right of children between the ages of 6 and 14 to free and compulsory education, which is a justiciable fundamental right by virtue of a Constitutional amendment in 2002. Also, the

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31 Davis, supra note 29 at 688.
prohibition of forced labour [Article 23] and of child labour below the age of 14 in factories, mines, or other hazardous employment [Article 24], concerned with the right to work, also form part of the justiciable fundamental rights. In the South African Constitution, while socioeconomic rights are expressly justiciable, the language employed in the context of most of these rights (enumerated in sections 26–29) includes limitations of requiring the state to take "reasonable legislative and other measures", "within its available resources", "to achieve the progressive realisation of each of these rights". The limitations of progressive realisation and availability of resources are comparable with the provisions of article 2 of the ICESCR which contains similar qualifications, requiring states parties to take steps "to the maximum of its available resources, with a view to achieving progressively the full realization" of the rights recognised by the ICESCR, though article 2 uses the term "maximum available resources" and requires parties "to take steps" "by all appropriate means including particularly, the adoption of legislative measures", progressively towards "full realization" of the rights thereunder. The requirement of taking "reasonable steps" is, however, present only in the South African Constitution and not the text of the ICESCR. However, the optional protocol to the ICESCR under article 8(4) as discussed in chapter III, influenced by South African jurisprudence, envisages the examination of the "reasonableness" of the steps taken, when assessing whether states parties have acted in compliance with the covenant. These limitations are applicable with regard to the rights on access to housing, healthcare services, food, water, social security and further education, but the right to basic education (of children and adults) and the rights of children [Section 28] in the South African context, and that of education in the Indian context for children between 6 and 14 years of age, are not subject to them. Further, protection against arbitrary evictions, and evictions without an order of the court in section 26(3), and the right to emergency medical treatment in section 27(3) are "negatively" worded, and also, do not as such, contain any limitations. Thus, the obligations

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imposed on the state under the South African Constitution are similar to those under the ICESCR and its optional protocol, except in the instances discussed. However, when the language used in the provisions on socioeconomic rights in the South African Constitution is compared with that used in provisions on civil and political rights, it is clear that the latter are defined without any qualifications, as such on state obligations. Thus although both civil and political rights and socioeconomic rights are justiciable under its provisions, there is a difference in the degree of obligations imposed. The position is comparable to that of civil and political rights, and economic, social, and cultural rights in the ICCPR and ICESCR (and their optional protocols on individual communications), respectively.

In the Indian Constitution too, there is a distinction between the justiciable fundamental rights and non-justiciable directive principles (blurred in practice). Although the rights included in the directive principles are not enforceable by courts, the state is required to apply the principles in making laws. Article 41 requires the state to take measures toward securing the right to work, education, and public assistance within the limits of its economic capacity and development, which limitations are again comparable with considerations on resources, and progressive realisation in the ICESCR and the South African Constitution. These limitations are, however, not set out in general terms applicable to all the principles in part IV of the Constitution, nor specifically mentioned in each of the articles of part IV. The Indian constitutional position on socioeconomic rights can also partly be compared to the position of the ICESCR as it stood prior to the adoption of the optional protocol as, while it imposes a duty on the state to implement the directive principles, it does not provide any judicial remedies or make them “justiciable” as the term is commonly understood.

Besides the question of justiciability, a comparison of the economic and social rights incorporated in the South African Constitution with those mentioned in the directive principles of state policy in the Indian Constitution, also reveals some differences. The South African
Constitution specifically mentions the right to food, water, and healthcare services, housing [Sections 26, 27, 29 (1)(b)], as well as education. The provisions of part IV of the Indian Constitution, however, mention raising the level of nutrition, improvement of the standard of living of the people, and improvement in public health [Article 47] and not specifically food, water, and healthcare services, though this provision may be interpreted to include these aspects. Similarly, while the words social security are not used as such, article 41 requires the state to provide public assistance to people in cases of unemployment, sickness, old age, disablement or other cases of undeserved want. As to education, the duty of the state to provide free and compulsory education (to children from the ages of six to fourteen) is now a fundamental right without any limitations [Article 21-A] as is the case under the South African Constitution [Section 29(1)(a)]. Section 29(1) of the South African Constitution, however, uses the term “basic education” and extends its application to adult basic education, while the provision in the Indian Constitution is limited to children, and within a specified age bracket. In addition, in India, the state is within the limits of its economic capacity and development to make effective provisions for education [Article 41]. The South African Constitution contains a specific provision on fair labour practices and trade union rights [Section 23] but does not specifically enumerate work conditions or labour practices, while the Indian Constitution covers issues of forced labour, and certain rights of workers (for instance, work, prohibition of forced labour, livelihood, living wage, equal remuneration, just and fair conditions of work, maternity relief, among others; articles 23, 39, 42, 43) but does not specifically enumerate rights in the context of trade unions. Moreover, while the Indian Constitution speaks of securing “the right to work” [Article 41], the South African Constitution does not expressly recognise this right. A provision on legal aid finds mention in the Indian Constitution [Article 39A] but there is no specific equivalent provision in the South African Constitution.

In the context of the rights of children, while the South African Constitution speaks of basic nutrition, basic healthcare, and shelter [Section 28(1)(c)], the Indian Constitution refers to children
being secured opportunities to develop in a healthy manner, and in conditions of freedom and dignity [Article 39(f)]. While the latter provision is different phrased, it can be interpreted to cover the rights referred to in the South African Constitution, as well as further rights on account of its use of the term "dignity" as discussed in Chapter IV. Besides these rights, are the right to basic education, and further education in section 29(1) in South Africa, which would be applicable (though not confined) to children, and the right to free and compulsory education for children from the ages of six to fourteen in article 21A, and early childhood care and education up to the age of six under article 45 in India. The South African Constitution also contains other detailed provisions on children's rights including on the right to family and parental care; protection from exploitative labour practices; protection from maltreatment, neglect, abuse, or degradation; besides in relation to work providing that children not be permitted or required to perform work that is inappropriate for their age or places them at risk to their well-being, education, physical or mental health or spiritual, moral or social development [Section 28(1)(b), (e), (d), (f)]. Article 24 of the Indian Constitution prohibits the employment of children under the age of fourteen in factories, mines, and other hazardous employment, while article 39(f) requires that childhood and youth be protected against exploitation and moral abandonment. Both Constitutions thus contain provisions (articles 39(f) and 24 in India, and section 28 in South Africa) reflecting article 10(3) of the ICESCR which requires inter alia, that children and young persons be protected from economic and social exploitation, and that their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development be punishable by law.

On the other hand, some provisions of the directive principles in the Indian Constitution are specific to the Indian context such as on the organisation of village panchayats [Article 40], a uniform civil code for citizens [Article 44], the promotion of educational and economic interests of the scheduled castes, scheduled tribes, and other weaker sections [Article 46], and organisation of agriculture and animal husbandry [Article 48], etc. These issues are relevant to the specific social
and economic context in India having reference to local self-governance, the different legal systems/provisions applicable to parties in certain matters (personal law), and protection of the interests of disadvantaged sections.

Below is a brief tabular comparison of the different socioeconomic rights in the Indian and South African Constitutions and those in the ICESCR.

**Socioeconomic Rights in the ICESCR, and the Constitutions of India and South Africa**

<table>
<thead>
<tr>
<th>Right</th>
<th>ICESCR</th>
<th>Constitution of India</th>
<th>Constitution of the Republic of South Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to work</td>
<td>Article 6(1)</td>
<td>Article 41</td>
<td></td>
</tr>
<tr>
<td>Right to just and favourable conditions of work, and equal remuneration for work of equal value</td>
<td>Article 7</td>
<td>Article 39(d), Article 42</td>
<td>Section 23</td>
</tr>
<tr>
<td>Rights of/reating to trade unions</td>
<td>Article 8</td>
<td>n.a. (statutorily recognised)</td>
<td>Section 23 (2), (4), (5)</td>
</tr>
<tr>
<td>Right to an adequate standard of living and to be free from hunger</td>
<td>Article 11</td>
<td>Article 47</td>
<td>Sections 26, Section 27</td>
</tr>
<tr>
<td>Right to education including free and compulsory primary education</td>
<td>Article 13, Article 14</td>
<td>Article 21-A, Article 41, Article 45</td>
<td>Section 29</td>
</tr>
</tbody>
</table>
Another difference that Pillay identifies when comparing the provisions on socioeconomic rights in the two Constitutions, is that in comparison with the Indian directive principles, the South African socioeconomic rights provisions “are a less detailed, more functional, spelling out of the economic and social needs enforceable by courts—less a vision of the state’s programme for socio-economic reform and more a guide to the courts about how to implement the rights through their judgments”.33 Socioeconomic rights being couched in the South African Constitution in narrow terms, and confined to a finite list, has meant that the South African Constitutional Court is more restrained.34 The Indian Constitution, however, is viewed as “futuristic in envisioning the social and economic transformation that India may undergo”.35

Thus, while the two countries have clearly adopted two different approaches to socioeconomic rights when incorporating them in their respective constitutions, that of justiciable socioeconomic rights in South Africa, and non-justiciable socioeconomic rights in India (except in the case of primary education and certain rights related to work, and child labour that are fundamental rights), the above discussion has also revealed some similarities in the two constitutions. Not only were both constitutions adopted in comparable circumstances, the framers thus being faced with similar social and economic circumstances that they sought to address, the

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33 Pillay, supra note 27 at 340–41.
35 Kothari, supra note 30 at 32.
framers of both constitutions sought to achieve through their respective documents, socioeconomic transformation. Again, although there are differences in content in the two constitutions, there are also some similarities. The case is also the same for the limitations imposed of “available resources” in the South African Constitution comparable with "limits of its economic capacity" in article 41 in the Indian Constitution, and progressive realisation comparable with the requirement of “development” which may indicate that the rights or directive principle (in article 41) is to be achieved in accordance with the level of development, that is, progressively. The two thus cannot be said to be entirely distinct.

5. Legislation
Legislation giving effect to constitutional provisions on socioeconomic rights has been enacted in both countries on a range of issues. Chapters IV and V broadly discussed legislation in the two countries in the context of the right to work and workers' rights, social security and social assistance, standard of living, and health. As there are numerous pieces of legislation enacted in these areas, they were looked at only broadly, with a focus on some important and recent legislation and the rights and duties of parties and available remedies, rather than an exhaustive description of all legislation. While comparison between specific pieces of legislation, or on the content of provisions may not be possible in each case, this sections attempts to bring out certain similarities and differences that stand out in the respective legislative frameworks.

Right to Work and Workers Rights
Legislation on workers’ rights and the conditions of work which enable people to exercise their right to work effectively and with dignity have been enacted in both countries, as discussed in the two previous chapters in much detail. These seek to ensure dignified and fair working conditions, as well as safety and health. Legislation in both countries broadly address the same issues as to work hours, wages and payment, overtime, safety and health at the place of work, rest periods,
and holidays, employment of children/young persons, as well as discrimination in recruitment and promotions, among others, but there are certain differences observable. In the Indian context, a plethora of legislation has been enacted over time to address various aspects of workers’ rights as well as in respect of various sectors, with separate legislation on minimum wages, payment of wages, bonuses, gratuity, and on working conditions for factories, mines, contract labour, building construction, and equal remuneration, etc. Although in South Africa too, there are various Acts that address workers’ rights and labour relations, a number of these elements are somewhat more consolidated under the Basic Conditions of Employment Act which applies to “all employers and employees” [Section 3], and the Employment Equity Act, which focuses on non-discrimination and fairness in employment.

As mentioned, there is variation in some of the standards set out under the Indian and South African provisions. For instance, as far as work hours are concerned, the limits set out by the Basic Conditions of Employment Act are somewhat different from those in the Indian Factories Act, 1948, and Mines Act, 1952, being forty-eight hours per week and nine hours a day in the Factories Act and forty-five hours a week and nine hours a day in the South African case for five-day weeks, and eight hours a day for six-day weeks. Thus, the work hours per day in the South African law are based on the number of work days per week, which is not specified in the Indian law but will effectively be so, as the total maximum hours are fixed. As per the limits of total work hours in a week, the limits for daily work hours for six day weeks would be effectively the same in both countries.

Another distinguishing and positive feature in the South African provisions is that the Basic Conditions of Employment Act contemplates fewer work hours of 40 hours a week and eight hours a day through collective bargaining or sectoral determinations, taking account of the positive impact of such a change on both health and welfare of workers and employment opportunities and economic efficiency. In other words, while the maximum limits for work hours are prescribed by
statute, it also attempts to achieve a more ideal state of affairs both from the perspective of employee welfare and efficiency, through the Minister (through sectoral determination) or through legislation, as well as through the efforts of the parties themselves, such as by collective bargaining. Such reduction is contemplated to be progressive, thus being in line with ICESCR and constitutional progressive realisation standards. Changes in other work conditions can also be brought about through collective bargaining, but must be consistent with the Act.

On the issue of discrimination in employment and related matters, the Employment Equity Act in South Africa specifically imposes a duty on employers to promote equal opportunity besides prohibiting unfair discrimination in employment, which includes harassment. In addition, under this Act, affirmative action measures are also required to be implemented by certain designated employers to ensure representation of all designated groups in all occupational levels. The Act also contains provisions for preparation of employment equity plans, and reduction of income differentials by designated employers. It may be noted that the term "designated employer" is defined by the Act [Section 1], besides on other parameters, in terms of the number of employees or total turnover, and is not restricted to the state as an employer. Moreover, the Act sets out the mechanism for redressal of grievances or proceedings against contraventions of the Act, with the provisions envisaging the imposition of heavy fines. Further, under the Employment Equity Act, employers are specifically required to submit statements on remuneration and benefits received by each occupational category and level of the employers’ workforce and take measures to progressively reduce unequal remuneration differentials, wherever these are reflected in the statement, subject to the guidance of the Minister [Section 27].

As far as Indian law is concerned, it is the Constitution itself that sets out equality provisions in respect of employment requiring the state not to discriminate in matters of employment, and to ensure equality of opportunity in matters of employment or appointment under it [Article 16 (1) and (2)]. The provision also allows for affirmative action in the form of reservation of appointments
or posts in favour of any “backward classes of citizens”, as well as in matters of promotion [Article 16 (4)]. In Indian legislation, the Equal Remuneration Act basically focuses on ensuring inequalities in income for similar or same work carried out by men and women, besides addressing other forms of discrimination against women in employment such as in recruitment, promotion, training, and transfer. However, it does not check discrimination on other grounds by employers, unlike the South African Employment Equity Act, which prohibits unfair discrimination on various grounds including race, gender, colour, marital status, ethnic or social origin, disability, etc. among others [section 6]. In India, there is as such no statutory provision imposing such non-discrimination or affirmative action requirements on private employers. While the Constitution, which specifies broader grounds for protection against discrimination, can be relied on for remedies as concerns equality issues in general, and specifically on employment [Article 16], the latter would be limited only to appointments and posts under the state. Penalties for non-compliance with the Equal Remuneration Act, however, include both imprisonment and fines, while under the Employment Equity Act include only fines, besides compensation and damages.

As discussed, the right to work is specifically mentioned in the Indian Constitution but not in the South African Constitution. India has in 2005, enacted legislation giving effect to what can be seen as a step towards ensuring the minimum core of the right to work by securing at least 100 days of work to those who volunteer in accordance with its conditions, while leaving open the obligation to progressively provide further employment. This is however confined to rural areas. However, so far, South Africa does not have any like legislation, though as in India, various schemes to generate employment have been initiated but these are not incorporated in any statute.

36 Sections 4 and 5, Equal Remuneration Act, 1976.
37 As far as discrimination in access to public places such as shops, public restaurants, tanks, etc. is concerned, article 15(2) which provides protection against the same on various grounds applies also against individuals and private parties. See S. Muralidhar, “India: The Expectations and Challenges of Judicial Enforcement of Social Rights”, in Malcom Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 105 (Cambridge University Press, New York, 2008).
In both countries, despite these differences, legislation is in place to ensure fair, safe, and healthy working conditions, imposing responsibilities on employers with penalties including imprisonment for non-compliance, and providing mechanisms for aggrieved persons to seek remedies, thus making available justiciable rights relating to workers and working conditions. Legislation in both countries give effect to constitutional obligations (recognising the provision of fair labour conditions in South Africa [Section 23] or just and humane conditions of work and maternity relief, as well as living wage, equal remuneration etc., in India [Articles 39, 42, and 43]) besides those in the ICESCR [Article 7] requiring states to recognise the right of everyone to equal remuneration, safe and healthy working conditions, equal opportunity, and rest and leisure among others. These statutes can also be seen as fulfilling the state’s obligation to protect, whereby it attempts to ensure provision of adequate working conditions by employers (including the state as employer) and provides a mechanism, whereby redress can be obtained for non-compliance.

Social Insurance and Assistance
Both countries have also enacted legislation on social assistance or social security, some of which provide for similar kinds (though not identical) of protections and benefits. Compensation for injuries sustained during the course of employment, for instance, is provided for in India under the pre-independence Workmen’s Compensation Act, 1923, and under the Compensation for Occupational Injuries and Diseases Act, 1993 in South Africa. The Compensation for Occupational Injuries and Diseases Act, 1993 also provides for compensation in case of occupational diseases, while in India, employees having contracted occupational diseases are deemed to have contracted employment injuries under the Employees State Insurance Act.

A range of benefits for employees including maternity benefit, illness benefit, dependant’s benefit, unemployment benefit, and adoption benefits in South Africa are provided for under the Unemployment Insurance Act, 2001, which sets out the process for claiming and receiving the same. In India, some of these and other benefits such as maternity benefit, dependant’s benefit,
and benefit for sickness and disablement besides medical benefit and funeral expenses are also provided under the Employees State Insurance Act. Both the Unemployment Insurance Act in South Africa and Employees State Insurance Act in India create funds based inter alia, on contributions by employers and employees. As far as unemployment benefits are concerned, in India, the Mahatma Gandhi National Rural Employment Guarantee Act (MNREGA) contemplates the payment of an unemployment allowance to those who are not provided employment despite having applied under that Act, which provides as discussed, for a certain minimum period of employment. This allowance is, however, paid by the state and not through such contributory funds.

A further set of benefits in the form of grants to those in need, such as persons with disability, foster children, older persons, and war veterans, besides for care dependency and grant-in-aid are paid in South Africa under the Social Assistance Act, 2004. In India, some such benefits such as the Old Age Pension, are paid through programmes and schemes initiated in that behalf but are not recognised statutorily, though some forms of pension including for children, are provided for under the Employees Provident Fund and Miscellaneous Provisions Act.

Pensions are another area in which legislation in both countries make certain provisions. In South Africa, the Special Pensions Act, provides for pensions for those who have “made sacrifices or served the public interest in the cause of establishing a democratic constitutional order” as its preamble clarifies, with payments to be made to spouses or surviving dependants. In India, the Employees Provident Fund and Miscellaneous Provisions Act enables the government to frame schemes for various forms of pension such as superannuation pension, retiring pension or permanent disablement pension; and widow or widower’s pension, children pension, or orphan pension (some of which may also be compared to social grants paid in South Africa) and also provides for deposit-linked insurance schemes and provident funds for employees. However, unlike
social grants in South Africa, these would be payable in respect of employees of the categories of establishments to which the Act applies.

Most (though not all) of these statutes provide for remedies in case of non-payment, determination of amounts, and penalties or compliance orders in case of employers’ or other authorities’ failure to perform their duties under the respective statutes, in most cases making the right enforceable. Under these pieces of legislation, the state in both countries can be seen as giving effect to the obligations to protect (imposing obligations on employers) and fulfil/provide (for instance, by providing grants and pensions).

**Standard of Living**

Improvement in the standard of living for the people is a constitutional objective in both the countries; for instance, the preamble of the South African Constitution speaks of improving the “quality of life of the citizens and freeing the potential of each person”, while articles 43 and 47 of the Indian Constitution speak of ensuring a decent standard of life and the duty of the state to raise the standard of living of the people, respectively.

The legislatures of the two countries have enacted legislation on some aspects of basic needs such as South Africa on housing, and water, and India on food security. The South African National Housing Act defines in detail the duties of the Minister and all three levels of government towards giving effect to the right to housing in section 26 of the Constitution, besides the general principles for facilitating a sustainable housing development process with accountability in the form of annual reports submitted to parliament, and monitoring of performance. The Act does not, however, speak in terms of the rights of people or define specific benefits. Other legislation relating to shelter includes the Rental Housing Act providing for a mechanism of dispute resolution between landlord and tenant, protecting against unfair discrimination, while squatting is decriminalised by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which ensures inter alia, that evictions are carried out where required, respecting the dignity of those concerned. In
India, there is no specific legislation on housing comparable to the National Housing Act but various Rent Control Laws seek to provide resolution of disputes between landlord and tenant, and protect tenants against unfair evictions and increases in rent.

India on the other hand, has enacted the National Food Security Act in 2013 statutorily incorporating certain food based schemes, specifically the Targeted Public Distribution System (TPDS), which entitles vulnerable sections to certain amounts of foodgrain at subsidised rates. Provision is also made for free meals to pregnant and lactating women, and children up to the age of fourteen through schools or anganwadis, with additional special provisions for those who are malnourished. The Act recognises these benefits in the form of entitlements of beneficiaries. It defines the responsibilities of the Central and state governments in this regard, and provides a grievance redressal mechanism, but this is through the mechanisms set out by the Act and not through courts. The Act can once again be seen as a step towards fulfilling a minimum core obligation, while leaving the option open to the state to provide a stronger level of protection. Transparency and accountability in the form, inter alia, of availability of records and social audits are contemplated. There is no like legislation in South Africa.

On water, however, a somewhat better comparison can be made between the legislation of the two countries though in India, as mentioned, water being a state subject, there is no central law on water. However, the centre has prepared a framework water law. On the other hand, South Africa has a National Water Act. Both the South African Act and Indian framework law have some similarities and are based on similar principles. For instance, both the legislation and framework law view water as a public trust, and the principle of sustainability runs through the text. Both documents deal with a range of issues such as water use, water user associations, pricing, pollution, etc. Both contemplate the use of alternative dispute resolution mechanisms, including mediation and negotiation for water disputes or conflicts and the Indian framework law also specifically mentions conciliation. The South African Act also establishes the National Water
Tribunal to exercise an appellate function in respect of various authorities under the Act. However, while the Indian framework law specifically recognises the right to sufficient quantity of safe water for everyone, the South African Act speaks of entitlement to water for certain specified purposes, such as domestic use, domestic gardening, and animal watering, among others. While the Indian framework law recommends penalties in certain respects, it does not define specific offences and penalties as in case of the South African Act.

Aspects dealing with standard of living issues or basic necessities have thus been dealt with in both countries though not in all cases in the form of rights, the Housing Act of South Africa, for instance, merely setting out responsibilities of the government. Remedies or grievance redressal mechanisms, though not all judicial (for instance, under the National Food Security Act) have been provided in most, though not all of these statutes, some of which also specifically contain transparency and accountability provisions. As in other categories, legislation on comparable subject matter, that is water, has both similarities and differences, though it is based on somewhat similar principles.

**Health**

While South Africa has a National Health Act, 2003, in India, a National Health Bill was drafted in 2009, but so far no Act has been passed. In India, though, as noted, there are various pieces of legislation dealing with aspects of the right to health such as the Mental Health Act, 1987 and Transplantation of Human Organs Act, 1994. However, India does not yet have a separate legislation seeking to give effect to the right to health. The draft bill however, seeks to ensure a comprehensive right to health covering private healthcare providers and aspects required for the right to be ensured effectively, including food, water, sanitation, and even shelter, treating these as determinants of health. The South African legislation is, however, not so broadly phrased. The preamble of the South African legislation takes note of the need to heal the divisions of the past, besides various constitutional obligations in respect of this right, and the Indian draft bill stresses
on dignity and its importance in the context of other human rights, besides other aspects. However, both the South African legislation and the Indian draft bill have certain commonalities including on subject matter, though the South African legislation deals with a range of issues not touched on in the Indian bill, such as use of blood, blood products, and tissues besides issues of current relevance such as reproductive cloning, and transplantation, the latter being covered in India by separate legislation. Both legislation and bill, however, speak of rights and duties of users and providers of healthcare services (Chapter 2, National Health Act, 2003 (South Africa); Clauses 14–16, National Health Bill, 2009 (India)), including the right of providers (and corresponding duty of users) to be treated with dignity and respect. Both documents also incorporate the respect–protect–fulfil (in the South African case, also "promote") typology which is in line with CESCR interpretations and the South African Constitutional requirements. Both also provide for grievance redressal through filing of complaints including through in-house complaints forums; while in the Indian bill, complaints before district courts may also be filed, in the South African case the municipal council is also required to make such provision. Thus, both provide remedies or mechanisms for grievance redressal though in the South African case, this is not judicial. However, both seek to protect comprehensively, the right to health.

6. Government Schemes and Programmes

In addition to the various pieces of legislation enacted to give effect to socioeconomic rights, governments in both countries have from time to time initiated schemes and programmes towards the realisation of these rights, addressing poverty, unemployment, adequate nutrition, and health, among other aspects. In both countries, most such schemes are geared (and justifiably so) towards ensuring the provision of these rights for vulnerable sections, which can be seen as seeking to ensure minimum essential levels for the sections that lack these rights, and thus in line with the countries' international human rights obligations. One exception to this is the South African National Health Insurance Scheme introduced in 2012, which seeks to provide universal health
coverage in view of high costs of healthcare. Indian health schemes including the National Rural Health Mission (NRHM) and Rashtriya Swasthiya Bima Yojna (RSBY), the latter also providing insurance coverage for health expenses, are geared towards vulnerable sections (those below the poverty line) and rural areas.

Both countries have introduced schemes for employment generation (for instance, Mahatma Gandhi National Rural Employment Guarantee in India, and the Expanded Public Works Scheme in South Africa, both of which also inter alia, involve infrastructure creation), food (mid-day meal scheme in India and National School Nutrition Programme in South Africa, both of which have the dual aim of providing food to school-going children and enhancing school enrolments and attendance), social assistance (social assistance scheme in South Africa providing 7 different grants, and various schemes in India providing old age pension, maternity benefit, family benefit, etc.), and health (the NRHM in India, and National Health Insurance Scheme in South Africa), among others. In both countries, some of these schemes have been incorporated in statutes such as the Mahatma Gandhi National Rural Employment Guarantee Scheme under MNREGA, and Targeted Public Distribution System under the National Food Security Act, 2013 in India, and the Social Assistance Scheme in South Africa under the Social Assistance Act, 2004. The schemes on food and MNREGA in India seek to ensure minimum levels of food and employment to sections that lack the same, by specifying a minimum amount of foodgrain and days of employment to be made available.

The implementation of these schemes in both countries is seen to have mixed results. In the case of India, among the positives, the number of persons living in poverty has been reduced by a significant figure, improvements have been seen in health indicators such as maternal mortality ratio, and enhanced livelihood security, and creation of productive community assets. Similarly, in South Africa, over 4 million jobs have been created, and 16 million persons benefit from the social assistance scheme. In fact, the reforms in the social assistance scheme can be seen as a success story in South Africa, where compared to the scheme in the apartheid period, plagued by
discrimination, delays, and corruption, reaching only 3 million beneficiaries, the reformed scheme reaches 16 million beneficiaries with savings of R2 billion annually, besides having achieved some success in addressing corruption.

However, the implementation of such schemes in both countries also sees problems. In India, for instance, planning and implementation failures have been noted in MNREGA besides the insufficiency of the 100-day employment guarantee in achieving its objectives, corruption is one of the problems facing the public distribution system, and health expenses have increased despite the RSBY. In South Africa also, in the Expanded Public Works Programme, only a fraction of the money reaches the beneficiaries, besides under delivery in programme goals; the social assistance programme still sees delays, an onerous application process, and allegations of fraud; while allegations of corruption are seen in the National School Nutrition Programme.

Schemes and programmes initiated by the government towards the realisation of socioeconomic rights, despite the problems faced, have an important role to play as evidenced by the successes achieved in terms of employment provision, improvement in school attendance, and health indicators, besides assisting those in dire poverty. While legislation provides a broad framework for the realisation of the rights, schemes and programmes, some of which are part of statutes, have a more direct role in their realisation, and along with appropriate judicial remedies, form a comprehensive scheme in which rights can be ensured and protected. Focus must thus be on addressing the shortcomings in the schemes towards better implementation, which can be achieved, as demonstrated by the reforms in the South African Social Assistance Scheme.

7. Role of the Judiciary
The approach adopted by the judiciary and interpretation given to the provisions on socioeconomic rights, impacts both the scope of protection and extent of state obligations. In a broad sense, the approach of the Indian judiciary as regards these rights has been seen to be strong, providing
“strong” remedies (in the sense described by Tushnet\(^{38}\)) in many cases, but also weak ones in others, thus being described as oscillating, while that of the South African Constitutional Court is seen generally as more restrained and deferential, though it too has issued stronger orders in some cases. The approach of the two judiciaries is found to be impacted by the social circumstances and responsiveness of the other branches of the state, including the legislature, besides also the structure of the judiciary. In India, while the judiciary can be seen as having made certain socioeconomic rights effectively justiciable, in South Africa, the judiciary has essentially sought to maintain a balance between its review function and the respective functions of the other branches.

In India, as discussed, while the constitution does not recognise socioeconomic rights as justiciable, it is through judicial interpretation that many socioeconomic rights can be said to have become effectively justiciable by being read into the provisions on civil and political rights, that is the fundamental rights, particularly the right to life. Thus, while these rights are constitutionally justiciable in South Africa, in India, it is essentially the judiciary that has made them so. Such a liberal interpretation, along with the development of the mechanism of public interest litigation (PIL) and relaxation of locus standi rules has contributed to the broadening of the scope of article 21 to include a range of socioeconomic rights. This approach is also not confined to article 21 alone, but has also been seen in the equality provisions of the Constitution. A similar approach has been taken by the European Court of Human Rights (ECtHR) in various decisions, after emphasising the interdependence of and interrelationship between all human rights, in *Airey v. Ireland*\(^{39}\) among other decisions, as discussed in Chapter III. The Human Rights Committee (HRC) under the ICCPR, and the Inter-American Court have also protected socioeconomic rights through civil and political rights provisions, in some decisions. In this process, the Indian Supreme Court has also adopted innovative mechanisms such as that of continuing mandamus to enable more effective monitoring.


\(^{39}\) (1979–1980) 2 EHRR 305.
of its decisions, as well as appointment of commissioners/commissions for fact-finding and monitoring of implementation. Overall, its approach is seen as mixed, and oscillating between strong and weak approaches. Also, while in its initial socioeconomic rights decisions, it was seen as seeking to protect the rights of the poor, more recent decisions have been found to be more middle-class, and law-and-order oriented, besides even favouring development and a “globalitarian class”, and at variance with the protection of socioeconomic rights.\textsuperscript{40}

On the other hand, the South African Constitutional Court has been seen to adopt an approach that is deferential and restrained. This approach holds the government accountable for their choices, and appears more beneficial in the long-term, being in line with the separation of powers.\textsuperscript{41} The Indian judiciary, on the other hand, has been criticised, as discussed on encroaching on the powers of other branches, by making policy decisions, and even “legislating”, though some have argued (including the courts in many decisions) that it does not generally enter the realm of policy, but acts where there is failure on part of the government to do so. Thus, while the South African judiciary’s approach is in keeping with the doctrine of separation of powers, the Indian judiciary’s approach is seen as contrary to it, in many instances. However, there is justification for this. While the South African Constitutional Court’s approach in some cases (particularly Soobramoney, its first socioeconomic rights case), is seen as weak, the strong rights and strong remedies approach is not seen as appropriate in the South African context, as the government is not unresponsive or unwilling towards the need for basic goods, unlike the chronic failings of one institution, which may have led to reliance on, and a need for responsiveness from others, as is the


case in jurisdictions such as India and the United States.\textsuperscript{42} Also, the fact that the image of the legislature and executive in India is somewhat tarnished by corruption, has shifted the line of separation of powers from deference towards judicial activism.\textsuperscript{43} Thus, in India, the activist role of the judiciary is a response to the failure of the other branches to take appropriate steps towards ensuring socioeconomic rights. In fact, judicial intervention towards the protection of welfare rights is seen as legitimate only where it reflects shared popular values disappointed by the formal democratic process.\textsuperscript{44} On the other hand, the South African judiciary has been argued to advance distinctive techniques to deal with socioeconomic rights in each of its decisions, which may be seen as responding to government action.\textsuperscript{45} Tushnet finds the “weak rights” approach in the South African context consistent with the language used in the Constitution and in particular, with the requirement of reasonableness. He writes:

> Constitutional provisions allowing governments to adopt reasonable programs to achieve social welfare rights, a willingness to find some programs unreasonable, and a remedial system that does not guarantee that any particular plaintiff will receive individualized relief: these are the characteristics of weak substantive social welfare rights.\textsuperscript{46}

But it may not necessarily be the case that the functioning of both these judiciaries necessarily fall within a single category. As Gauri points out, the functioning of courts the world over need not necessarily be in line with a particular institutional model; rather their tasks depend on their interactions with other organs of society, a more useful measure of assessment being their


\textsuperscript{43} Usher, supra note 13 at 154.

\textsuperscript{44} Id. at 155.


\textsuperscript{46} Tushnet, supra note 38 at 244.
contributions to governance in a particular sector, by reference to normative benchmarks.\textsuperscript{47} The Indian judiciary’s approach as noted, oscillates between the strong and the weak. And as seen in the \textit{Treatment Action Campaign} decision, the Constitutional Court cannot be said to have adopted the weak rights approach in all its decisions. The \textit{Treatment Action Campaign} decision is seen as adopting a “strong welfare rights” approach on account of the court’s searching examination of the government’s justifications for restricting availability of the drug, and no deference being shown to the government’s decisions as such.\textsuperscript{48}

Thus, in effect, perhaps the approach of neither judiciary can be described as entirely strong or entirely weak with courts of both countries having taken strong and weak approaches in different decisions, though broadly the Indian and South African approaches can be classified as strong and weak, respectively.

The approach adopted by the South African Constitutional Court, as discussed, is that of reasonableness review. In other words, the government can adopt any choice available to it, so long as the same meets the requirements of reasonableness: but the actual policy choices are left to be determined by the government. In \textit{Republic of South Africa v. Irene Grootboom}, it observed that in considering reasonableness, it would not look into whether other more desirable or favourable measures could have been adopted or into whether public money could have been better spent, and recognised that a wide range of possible measures could adopted by the government, many of which would be reasonable.\textsuperscript{49} While the Indian Supreme Court has not applied the reasonableness test as in South Africa, or any such similar standard, it has held, for

\textsuperscript{47} Varun Gauri, “Public Interest Litigation in India: Overreaching or Underachieving?”, Policy Research Working paper 5109, The World Bank 7 (November 2009). Some such questions may include the position of the capacity and authority of institutions tasked with addressing the social issue before and after the litigation; availability of accurate information before and after the litigation; and effectiveness of functioning of mechanisms of accountability etc., before and after the litigation. Id. at 9–10. Scott and Macklem too, writing in the early 1990s, in defence of South Africa’s decision to entrench socioeconomic rights, argue that some “creative restructuring” of both the procedure and methodology of the judiciary would be necessary for the protection of these guarantees. Craig Scott and Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” 14(1) \textit{University of Pennsylvania Law Review} 1, 4 (1992).

\textsuperscript{48} Tushnet, supra note 38 at 245; Wesson, supra note 42 at 288; Klein, supra note 41 at 381–82.

\textsuperscript{49} (2001) 1 SA 46 (CC), ¶ 41.
instance in *Ram Lubhaya Bagga*,\(^{50}\) that it is not within the court’s domain to weigh the pros and cons of any policy adopted by government except where the same is arbitrary or violative of the constitution, statute, or any other law. Again, in *Sachidananda Pandey*,\(^{51}\) it was held that while the court may look into whether *appropriate* considerations have been borne in mind and irrelevant ones excluded, the “nice balancing” of relevant considerations is a task left to the government. Thus such policy choices in the Indian context too are seen as falling within the domain of the government. Moreover, the taking of relevant considerations into account and excluding irrelevant ones, is an aspect of reasonableness. In this regard, thus, their approaches can be said to be similar.

The conditional social rights approach as discussed in the Indian context, demonstrates that what the court has done in many cases is to direct the state to implement an existing programme, thus not as such impacting democratic legitimacy or amounting to policy making. This was the case, for instance, in the Right to Food case, *Bandhua Mukti Morcha*, *Swami Achyutanand Tirth*, etc. among others, which were concerned with implementation of existing legislation or programmes. This also justifies the courts’ interference in these matters as the court is not “creating” new rights, but merely enforcing what exists. In South Africa too, some cases could be seen as reflecting this approach, though it may not be required as a justification for their interference, courts being empowered to review socioeconomic rights. In *Treatment Action Campaign*, for instance, while the Court’s approach has been criticised for “overreach”, it is justified by some for merely extending a government programme, already in place.\(^{52}\) The view in the South African case of *Khosa*\(^ {53}\) may also be cited here, wherein the Court held that once a programme was initiated by the government, the

\(^{50}\) *State of Punjab v. Ram Lubhaya Bagga*, (1998) 4 SCC 117. Again in *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, it was held that it is for the Union and state governments to issue appropriate guidelines to determine the “creamy layer” in respect of socially and educationally backward classes. ¶154 (Judgment of K.G. Balakrishnan, CJ).

\(^{51}\) *Sachidananda Pandey v. State of West Bengal*, AIR 1987 SC 1109.


criteria for limiting it would have to be in accordance with the Bill of Rights. These can be said to reflect the conditional social rights approach.

Notwithstanding the strong or weak or combination of the two approaches adopted in the two countries, the value of dignity is of importance in the jurisprudence of both. In the case of South Africa, human dignity is one of the foundational values specified in the Constitution and thus applied by the Constitutional Court in its adjudication, being seen, as noted in Chapter V, as the "basis and universal aim of the existence of social rights". In the Indian context, as is apparent from the case-law of the Supreme Court on article 21 of the Constitution discussed in Chapter IV, it is in view of the right to life being interpreted as meaning the right to life with dignity, that the right is interpreted as including in its ambit various socioeconomic rights such as the basic necessities of food, shelter, etc. One commentator in fact, notes that the wide interpretation of "life" and "liberty" in article 21 is drawn from the "quintessential human dignity" of the individual, and this in turn can be traced to the philosophy of Ubuntu according to which "a person's humanity can only be expressed through others', the corollary to which is that in order to protect one's own dignity, preserving everyone else's dignity is of supreme importance".

Another similarity between the jurisprudence of the two courts on socioeconomic rights is in their reference to international human rights law and standards on which both courts have relied to support their protection of socioeconomic rights. A difference is of course, that while the Constitution of South Africa, as discussed in Chapter V, specifically requires the courts to "consider" international law in their interpretation of the Bill of Rights, the Indian Constitution does not specifically do so. Nonetheless in practice, courts in both countries have referred not only to international instruments but also other documents such as general comments of human rights bodies to interpret and protect socioeconomic rights. In Grootboom, it was clarified that

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55 Shruti Khanijow, "Ubuntu and the Concept of Restorative Justice: African Concept in Indian Corridors", 3 MLJ (Jour) 25, 28 (2013).
international law could be a “guide to interpretation”, though the weight attached to particular rules or principles would vary, but would be applicable where the principle in question directly binds South Africa.\(^{56}\) In *Jaftha v. Shoeman*, article 11 of the ICESCR and general comment 4 of the CESC\(\text{R}^\text{O}\) on housing were referred to.\(^{57}\) In India, in the decision in *Vishakha*, the Apex Court held that international conventions not inconsistent with the fundamental rights and in harmony with its spirit must be read into them to enlarge their meaning and content, to promote the object of the constitutional guarantee.\(^{58}\) The ICESCR has been referred to for instance in *Chameli Singh* (specifically, article 11 of the ICESCR in the context of the right to an adequate standard of living),\(^{59}\) *Unnikrishnan* (the UDHR and ICESCR in articulating education as a social right, while also recognising that higher education was to be progressively realised),\(^{60}\) *Charu Khurana v. Union of India* (the provisions of CEDAW to note that besides the right to work being an inalienable right of all human beings, the convention had commended the right to same employment opportunity),\(^{61}\) *Mohd. Ahmed (minor) v. Union of India*,\(^{62}\) (the right to health under the UDHR, ICESCR, the International Convention on Elimination of All Forms of Racial Discrimination, as well as General Comment 14 (on the right to health) of the CESC\(\text{R}^\text{O}), \) and *Municipal Corporation of Delhi v. Female Workers*\(^{63}\) (the provisions of CEDAW were read into the contract between the municipal corporation and female employees on muster role to hold them entitled to maternity benefits).

Although the Court has on various occasions made reference to international law, in the Indian context, it has been noted that international norms rarely play a significant role in reaching a final

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\(^{57}\) (2005) 2 SA 140 (CC), ¶24.  
\(^{58}\) *Vishakha v. State of Rajasthan*, AIR 1997 SC 3011. In India, such reference has equally been made in the case of civil and political rights with the Supreme Court noting that the instrument’s provisions “were facets of fundamental rights and enforceable as such” (*People’s Union of Civil Liberties v. Union of India*, AIR 1997 SC 1203). Atul M. Setalvad, “The Supreme Court on Human Rights and Social Justice: Changing Perspectives”, in B.N. Kirpal, Ashok H. Desai, Gopal Subramanium, Rajeev Dhavan, and Raju Ramchandran (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* 243 (Oxford University Press, New Delhi, 2000).  
\(^{62}\) W.P. (c) 7279/2013 decided on 17 April 2014.  
\(^{63}\) AIR 2000 SC 1274. See also, *L. Kanaki v. The Secretary to the Government*, (2012) 3 LLJ 292 (Mad).
decision, with the emphasis being on the court’s own precedents and domestic law, and more significant reliance on international law being confined to issues where there is absence of domestic law.\textsuperscript{64}

Indian and South African Courts have also considered each other’s jurisprudence in different decisions. Jurisprudence of the South African Constitutional Court was referred to by the Supreme Court of India, for instance in State of Uttarakhand v. Balwant Singh Chaufal,\textsuperscript{65} to note the broad rules of standing and relaxed pleading requirements in the country to further the objective of improved access to justice. These included admission of letter petitions (S. v. Twala\textsuperscript{66}) and holding that form must give way to substance as far as concerns pleadings drafted by lay persons (Xinwa v. Volkswagen of South Africa).\textsuperscript{67} In Mohd. Ahmed (minor) v. Union of India,\textsuperscript{68} a reference was made to the decision in Soobramoney, though in the context of its reliance on the Indian Supreme Court’s decision in Paschim Bangh Kheth Mazdoor Samity. In South Africa, in Soobramoney,\textsuperscript{69} the decision in Paschim Bangh Kheth Mazdoor Samity was referred to but not applied as the court found that in that emergency treatment was clearly necessary which was not so in Soobramoney. It acknowledged that Indian jurisprudence (on the right to life) offered valuable insights, but the South African Constitution was structured differently to that of India. The Indian courts’ willingness

\textsuperscript{64} Lauren Birchfield and Jessica Corsi, "Between Starvation and Globalization: Realizing the Right to Food in India", 31(4) Michigan Journal of International Law 691, 704 (2010). Its reference to customary international law to incorporate the polluter pays principle into Indian law while seen as novel and significant has also been criticised as untenable for its reliance on the Constitution and environmental laws to support its decision on account of the domestic law not specifically incorporating the principle. Vijayshri Sripati, "Towards Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)”, 14 American University International Law Review 413, 470–71 (1998).
\textsuperscript{65} (2010) 3 SCC 402.
\textsuperscript{66} (2000) 1 SA 879.
\textsuperscript{67} (2003) 4 SA 390 (CC).
\textsuperscript{68} Supra note 62. Another Delhi High Court decision, Sudama Singh v. Government of Delhi, WP 8904/2009, decided on 11 February 2010, took note of the decisions in Grootboom and Joe Slovo, relied on by counsel therein. It may be mentioned that the decision emphasised that “jhuggi dwellers” not be treated as secondary citizens and their relocation should be a meaningful exercise consistent with their rights to life, livelihood and dignity.
to grant far-reaching orders was taken note of in TAC, reference being made to *M.C. Mehta v. State of Tamil Nadu*.\(^{70}\)

One ground on which the South African Constitutional Court's approach has been much criticised, is on its failure to include a supervisory element in its orders/decisions,\(^{71}\) which may lead to the result that in case of non-implementation, where the parties are unable or unwilling to approach the court again, the remedy may never be given effect to. On this a difference can be seen in the Indian judiciary's approach, best illustrated in the "right to food" case or *People's Union for Civil Liberties v. Union of India*, where it appointed Court Commissioners to monitor implementation of its orders and monitoring and reporting to the court on implementation of the welfare schemes and measures by its order of 29 October 2002. Commissions have also been appointed in other decisions for ascertaining or verifying facts\(^{72}\) and proposing remedies, though this is also not the practice in all human or fundamental rights cases before the court. In the *Grootboom* case in South Africa, the monitoring function was entrusted to the South African Human Rights Commission (SAHRC) but without a specific requirement to report back to the Court and it was noticed that the Commission did not report back to the Court.\(^{73}\) On this issue, it can thus be said that the Indian Supreme Court has been able to identify an approach that may ensure more effective implementation of its directions which is not the case in South Africa, but in this decision the involvement of an NGO in the movement from the beginning, bringing the action to the court may have played an additional role in the effectiveness of the decision as has been discussed, and will also be further considered in this section.

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\(^{72}\) It was suggested by Scott and Macklem in arguing for the entrenchment of social rights in South Africa that the country adopt the practice of commissions for fact gathering and reporting to the court. Scott and Macklem, *supra* note 47 at 144.

Another difference between the two jurisdictions lies in the availability of individual relief. In the South African case, the Court considers the measures taken by the government generally and thus, even though an individual may bring the action, there is no right on demand, despite the recognition of justiciable social rights in the Constitution. The Court makes directions towards ensuring that the elements of the policy not complying with the Constitution are addressed but does not provide specific relief to the applicant, at times citing (for instance, in Nokotyana v. Ekurhuleni Metropolitan Municipality74) the predicament of others in a similar situation who would not get a similar remedy, not being before the court. On the other hand, in the Indian case, despite no enforceable rights in the Constitution, the Court has directed remedies in individual cases also, for instance, in Mohd Ahmed v. Union of India where treatment for a rare disease was directed to be provided to the petitioner, a minor who belonged to an economically poor section. Again in Hussainara Khatoon, while the Court did not make any order on the provision of a legal aid system, it did direct the provision of a lawyer at the government’s cost.75 This is in addition to remedying the flaw in the policy or its implementation (that is a general remedy, applicable to all beneficiaries), for instance, in the Right to Food case, where it was the implementation of various food-based schemes that was directed.

The scope or extent of the rights has also been impacted by the restrained or liberal approach taken by the respective judiciaries, as well as by the limits set out in the constitutional text, as highlighted by commentators. Abeyratne, for instance finds, that the South African Constitutional Court has been more restrained in its approach to socioeconomic rights interpretation on account of the more finite and narrowly defined rights in the Constitution, while the Indian Supreme Court can interpret the right to life to include infinitely many rights.76 Moreover, the Indian judiciary has not specified any principles limiting the interpretation of the

74 (2009) ZA CC 33.
75 (1979) 3 SCR 532.
76 Abeyratne, supra note 34 at 53.
right to life with dignity and has not established any specific standard to review the government's socioeconomic policies. In light of this argument, it may perhaps be argued, that having narrowly couched but justiciable socioeconomic rights in the Constitution may result in a more restrained approach but one that takes steps progressively towards the full realisation of socioeconomic rights.

A further difference in the approach of the two judiciaries lies in the context of minimum standards of protection. Pillay notes the use by the Indian Supreme Court of the idea of a minimum standard of protection in the Sachidananda Pandey case, wherein the Court held that the least it can do in a case involving directive principles or fundamental duties is to determine whether relevant considerations have been taken into account and irrelevant ones excluded. Further, more recently, the Delhi High Court in Mohd. Ahmed (minor) v. Union of India, recognised that while the state could not provide treatment free to every citizen and financial considerations were relevant, it had a core obligation under the right to health which was non-derogable. This stands in contrast with the approach by the South African judiciary, which has declined to use the minimum core concept. But comparable to the Sachidananda Pandey decision, it can be said that the South African Constitutional Court has recognised a minimum standard of protection. For instance, in the Certification case, it held that at the minimum a negative protection from improper invasion of rights could be granted.

Implementation of court decisions on socioeconomic rights was another issue looked into in Chapters IV and V, since as noted, without implementation, the decisions would have no meaning for affected parties. On this aspect, many similarities are apparent in the two countries. Both countries have been seen to have a mixed record as far as implementation of decisions is concerned with some decisions yielding results and seeing serious efforts by the government

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77 Id. at 55.
78 Pillay, supra note 27 at 346.
79 Supra note 62.
80 Pillay, supra note 27 at 346.
towards implementation (such as TAC in South Africa) while others seeing limited or no action (such as in the South African case, Grootbroom, where the parties did not get any remedy, and decisions on the right to health in India). In India, with the adoption of more innovative monitoring mechanisms such as the appointment of commissioners, improvements in monitoring have been brought about. Another important factor in both countries vis-à-vis implementation of decisions is of the involvement of civil society in the litigation and follow up. In instances in both India and South Africa, judicial decisions or actions in protecting socioeconomic rights have been found to be more effective where the struggle has been supported or carried on by civil society, such as the right to food case in India and Treatment Action Campaign in South Africa. Also, in South Africa, pressure from civil society groups has led to reconsideration and even alteration of policies by government. In fact, in the South African context, it has been observed that strong civil society groups can use the reasonableness review jurisprudence to challenge programmes of the government, which are not responsive to the needs of the poor.

A distinctive feature of the remedies adopted by the South African judiciary is that of meaningful engagement. In decisions such as Olivia Road and Malan, both concerned with evictions, the authorities were required to engage with the affected parties and identify/discuss possible solutions. This makes the process participatory, and ensures that the concerns of affected parties are actually taken into account, besides making the process of realisation of rights cooperative rather than adversarial, as well as democratic.

A recent trend in judicial decisions, discussed in Chapter II, seen in various courts across the globe including those of India and South Africa is of their holding in line with “development” and neoliberal principles to the detriment of the protection of socioeconomic rights, as illustrated in

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82 Pillay, supra note 27 at 351.
83 Ibid.
Narmada Bachao Andolan in India, and Mazibuko in South Africa.\textsuperscript{86} Possible conflicts have been taken note of between the rights articulated in the People’s Union of Civil Liberties (right to food) decision and the new economic policy which promotes liberalisation, and privatisation; in fact the two are noted to directly collide.\textsuperscript{87} The decision in BALCO,\textsuperscript{88} where the employees’ right to be consulted in the government divesting its shareholding to a private employer, was not recognised is again linked to the impact of policies accompanying liberalisation.\textsuperscript{89} A similar observation in the South African context, has been made with regard to the dissenting view in Maphango.\textsuperscript{90} On the other hand, courts have also adopted pro-social rights approaches in many other cases.

Another point of difference pertains to an issue not confined to socioeconomic rights alone. The Indian judiciary has been criticised on account of there being lack of certainty in their decisions, with conflicting decisions or different viewpoints sometimes emerging from different benches. In this regard, the South African Constitutional Court which sits as a whole (as the Indian Supreme Court did in the past, before the volume of litigation led to the setting up of multiple benches) is seen to have more advantages from the perspective of certainty and authority.\textsuperscript{91}

\textsuperscript{86} O’Connell, supra note 40 at 550. Another illustration in the Indian context is the slum demolition in Delhi which is argued to have been made possible only due to the procedural departures possible under PIL including appointment of amicus curiae, extending the coverage to the entire city, and rendering the original petitioner irrelevant. In instances, government failure to provide facilities like sanitation was resolved by clearing the slum rather than ensuring the provision of facilities, with the slum-dweller’s petitions being rejected on the ground of their being unauthorised occupants. Even the requirement of relocation/ providing alternative sites (as given in the slum policy) was rejected on the ground that it would encourage the property-developing mafia to promote squatting (Wazirpur Bartan Nirmata Sangh v. Union of India, 103 (2003) DLT 654; Okhla Factory Owners Association v. Government of National Capital Territory of Delhi, 108 (2002) DLT 517). See detailed discussion in Anuj Bhuwania, Courting the People: Public Interest Litigation in Post Emergency India (Cambridge University Press, 2017). A similar approach in Bombay has been discussed by Muralidhar where evictions were allowed and expedited even before completion of allotment of alternative sites and the slum dwellers were not consulted, they merely being allowed to access a grievance redressal committee rather than the court (Bombay Environmental Action Group v. A.R. Bharati, WP 305/95). Moreover, the burden of proving wrongful exclusion from electoral rolls (the criteria used for eligibility for alternative accommodation) was on the slum-dweller. He also raises the concern that appointing amicus curie may result in the petitioner losing control over the case giving rise to misgivings. Muralidhar, supra note 37 at 113–14. Somewhat more sensitive observations are seen in Sudama Singh v. Government of Delhi, supra note 68.

\textsuperscript{87} Birchfield and Corsi, supra note 64 at 732, 763.

\textsuperscript{88} BALCO Employees Union v. Union of India, (2002) 2 SCC 333.

\textsuperscript{89} Muralidhar, supra note 37 at 112.


\textsuperscript{91} Pillay, supra note 27 at 354.
Thus, despite the difference in constitutional provisions, and broadly in the approaches of the respective judiciaries towards enforcing socioeconomic rights, in practice, there are many similarities observable in the two, and each could adopt certain aspects from the other, for instance, monitoring and fact finding in South Africa, and meaningful engagement in India, which may strengthen or better the mechanisms currently in place.

8. Conclusion
South Africa has adopted a constitution with justiciable socioeconomic rights, while India’s constitution incorporates them as non-enforceable directive principles. Yet, socioeconomic rights have been protected and enforced in both countries, their courts taking on a more restrained or more active role as the case may be. When the specifics of measures taken in both countries in terms of legislation or schemes and programmes, or by their respective judiciaries are compared, one can find that although different, there are also a number of similarities, the protection of the rights in the two countries thus not being entirely at variance. Rather on a number of issues from socioeconomic indicators and challenges to implementation of schemes and programmes, and court decisions, both countries can be described as having a mixed position.

While South Africa is an “upper” middle income country compared to India, classified as a “lower” middle income country, both fall within the “middle” category as far as human development is concerned, which can be said to reflect the position of enjoyment of socioeconomic rights. As demonstrated by the indicators in both countries, while each country is in a better position on some socioeconomic indicators, the difference between the two in some cases (for instance, improved access to sanitation in urban areas) is not significant, and on a number of indicators including in the area of health (for instance, life expectancy, infant mortality, maternal mortality, access to sanitation, etc.), poverty, etc. both countries need to ensure further improvements, as these remain far below that of the developed world, even though much has been achieved towards bettering the position.
The challenges faced by these countries towards better human development thus are of effective availability of socioeconomic rights, as hundreds of thousands lack adequate employment, education, basic needs, effective participation in society, and thereby, opportunities for improved standards of living or even for a life with dignity. A number of these challenges are common to both countries and include poverty, a situation wherein particularly, socioeconomic rights denial is of significance though the enjoyment of civil and political rights is also impacted. Additionally, lack of adequate sanitation and in fact more broadly basic services, to a large section of the population; issues related to education (in the form of enrolment, availability of materials, skill development geared to the job market, etc.), and health (improvements in maternal and infant mortality, availability of physicians, and healthcare expenses) plague both countries. There are also challenges that are more severe for each country such as unemployment and the HIV/AIDS pandemic in South Africa, and hunger and malnutrition in India.

Some of these socioeconomic problems and inequalities faced by the two countries are also related to another common aspect of their past, India’s emergence from colonial rule and South Africa’s from the apartheid regime at which time (though decades apart) similar problems and issues were faced by the populations of the two countries, and sought to be addressed by the framers of their new constitutions. The framers of both constitutions saw socioeconomic rights as important but their approach in incorporating them differed in terms inter alia of justiciability. There are also differences in the content of rights incorporated in the South African Bill of Rights and the Indian Directive Principles (for instance, the former speaks of food, healthcare, water, and trade union rights, and the latter of nutrition, and public health, not specifically mentioning water or trade union rights but recognises the right to work, not recognised by the former which has a narrow set of socioeconomic rights incorporated). However, some aspects are also comparable such as the right to primary/basic education in the two constitutions, both of which are not subject to qualifications, except that in the case of India, the right of children alone between specific ages
is guaranteed, while in the South African Constitution, basic education is not limited to persons by age. In most cases, though the language differs, basic socioeconomic rights as set out in the ICESCR are enumerated in both constitutions. Moreover, both constitutions treat differently civil and political rights, and socioeconomic rights, the Indian Constitution making only the former justiciable (though the distinction does not exist in practice) and the South African making both justiciable, but the latter subject to limits of “available resources” and “progressive realisation” as under the ICESCR. Comparable limitations in the form of considerations on resources, and level of development, which implies a progressive realisation standard are also seen in article 41 in the Indian Constitution. Similarities and differences can also be seen in the provisions on the rights of children in the two constitutions. Some provisions in the Indian Directive Principles (for instance, uniform civil code, village panchayats, organisation of agriculture) are specific to conditions in the country. Both constitutions thus do have similarities and both have sought to transform the socioeconomic situation in their respective countries.

Both countries have also enacted legislation giving effect to the socioeconomic rights recognised in their constitutions, most of which set out penalties for non-compliance or offences and provide mechanisms for claims or disputes arising thereunder, though these may not always be court enforced. Some have incorporated alternative dispute resolution mechanisms as well. While legislation in most areas compared (work and workers’ rights, social security and social assistance, standard of living, and health) cover similar subject matter (for instance, wages and conditions of work in the Factories Act, Mines Act, etc. in India, and Basic Conditions of Employment Act, and Mine Health and Safety Act in South Africa), also reflecting rights recognised in the ICESCR, there are differences in specific standards and provisions. Both countries have not enacted legislation on all socioeconomic rights aspects, for instance, India does not have specific legislation on the right to housing or health (though there are various pieces of legislation on related issues or specific issues such as the Mental Health Act), South Africa does not have specific
legislation on the right to work or on food. Legislation where it is in place, however, gives effect to constitutional and international obligations, including that of the state to protect (for instance in the area of work, or social insurance imposing obligations on employers) and provide (providing employment, food, or grants and pensions). Similarity is also seen in some cases in the principles on which the legislation is based, for instance, in the Water Act and Water Framework law, the principles of water as a public trust and sustainability.

As is the case of legislation, schemes and programmes have been given effect to in both countries towards generation of employment; providing nutritious meals to children and consequently improving school enrolments and attendance; grants or social assistance for vulnerable sections; health insurance; etc. which provide more directly basic levels of socioeconomic rights such as work, education, and healthcare expenses. Most of these schemes are focused on vulnerable sections ensuring a basic minimum, but the South African National Health Insurance Scheme seeks to achieve universal coverage. Some schemes in both countries (for instance, MNREGA in India, and Social Assistance in South Africa) are incorporated in statutes. Schemes and programmes in both countries have had mixed impacts achieving success in terms of job creation and better wages, improvements in health indicators, and reduction in poverty, but there are also implementation issues including problems in conception (for instance, Expanded Public Works Programme, MNREGA), corruption, administrative inefficiencies and delays, which need to be addressed in order for the objectives to be better realised.

Courts in the two countries have adopted different approaches in their enforcement of socioeconomic rights, that of India being “activist” interpreting civil and political rights provisions to protect the otherwise non-enforceable socioeconomic rights, while that of South Africa being deferential and restrained, protecting the rights within the limits of separation of powers. But when certain specific aspects are considered, despite these broad differences, certain similarities are also seen. Courts in both countries have issued in different cases “strong” and “weak” orders
although the general approach in South Africa is seen as weak, and in India, oscillating. But while in South Africa, the reasonableness review standard is applied to cases on socioeconomic rights (except in the case of “negative” rights where the general limitations in section 36 become applicable), in India, there is no clearly identifiable standard or test applicable to such cases. Both courts have recognised that issues such as whether more favourable measures could have been adopted (for instance, Grootboom) or balancing of considerations (for instance, Ram Lubhaya Bagga) are to be left to the government. Again, the conditional social rights approach can be seen as explaining the courts’ intervention or stronger orders in many cases (for instance, the right to food case, Swami Achyutanand Tirth, TAC, Khosa) in both countries, though more so in India. Courts in both countries also rely on international law in their decisions, though in the South African case, this is specifically required by the Constitution, besides from time to time also referring to each other’s decisions. The value of dignity is significant for the protection of socioeconomic rights in both countries. Implementation of decisions in both cases is seen as mixed, some cases seeing effective redressal of the issue raised and others not, the involvement of civil society in both, yielding more positive results. Judiciaries in both countries have also been noted as delivering decisions in line with neoliberal principles (such as slum demolition cases in India or Mazibuko in South Africa), a trend also seen in other parts of the globe.

Differences lie between the two in terms of an identifiable test or set of standards to evaluate socioeconomic rights cases, the issue of a minimum standard or minimum core (minimum core having been rejected by the South African Constitutional Court such as in Grootboom), availability of individual relief (a “right on demand” not being available in the South African case), monitoring and supervision, and certainty on judicial decisions (lacking in the Indian case, due to multiple benches).

It would thus appear that justiciability or non-justiciability of socioeconomic rights need not necessarily impact on their enforcement as even in the absence of justiciable socioeconomic rights,
these rights have been protected in India. However, the protection of these rights being largely contingent on an informed and "activist" judiciary, the importance of entrenchment of the rights cannot be entirely ruled out. In both countries, it is clear that what is of relevance is the implementation of court rulings on which both have had a mixed record, not always translating into availability of rights for those aggrieved. In this regard, one important aspect is that of supervision or monitoring of implementation; the experience in India of appointing commissions has been seen to have positive results and could be utilised towards ensuring better implementation in both countries, as this is an issue on which stronger measures are argued for in the South African context. Similarly, the practice of appointing commissions or relying on expert bodies to obtain relevant information is another measure that may be adopted in socioeconomic rights cases, which ensures that courts do not rely only on information presented by parties in matters that have much wider implications.

In the Indian context, it is also important from the point of view of certainty, that courts identify a specific test or set of standards for the evaluation of socioeconomic rights cases, which are consistently applied, as well as address criticisms regarding the limits of the right to life with dignity which again impacts certainty. A practice from South Africa that it may consider adopting is that of meaningful engagement. PIL, through which most socioeconomic rights are sought to be enforced, has been described as a cooperative exercise as opposed to an adversarial proceeding and thus could incorporate such a process. The concept of meaningful engagement applied in South Africa primarily in eviction cases, could be considered, as a means of involving aggrieved parties in the process of identifying solutions, making the process more participatory and democratic. The adoption of some of these measures along with strengthening the implementation of decisions can play an important role in ensuring the effective realisation of socioeconomic rights in both countries.