CHAPTER I: INTRODUCTION

1. Background
Social and economic rights, can be defined as rights associated with the basic necessities for a life with dignity, and lay the foundation for an improved standard of living. They are expressed in terms of basic needs and well-being, or more comprehensively, as underpinning human development and the effective enjoyment of freedom, and of civil and political rights.1 As such, they should be “conceptualised as entitlements to be equal as humans and to be equal as members of society”.2

The process of defining and elaborating on the content of social and economic rights is seen to be ongoing and dynamic.3

Prof. Amartya Sen identifies as a primary feature of his concept of well-being, “how a person can function” which includes the elements that we would associate with basic needs for a life with dignity, for example, “states of existence” such as nourishment, freedom from malaria, “not being ashamed by the poverty of one’s clothing or shoes”.4 The basic necessities of life include at least, rights to adequate nutrition, health, shelter, education, work, and environment, which “provide foundations upon which human development can occur and human freedom can flourish”.5

While social and economic rights as a whole may be conceptualised in the above terms as related to well-being, and as providing a foundation for development, the classification of these

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1 Stark states that, “[e]conomic, social, and cultural rights refer to a range of affirmative obligations of a state to its own people, from the assurance of basic needs, such as food, shelter, and health care, to access to education and decent jobs”. Barbara Stark, “Economic, Social, and Cultural Rights: International Covenant on Economic, Social, and Cultural Rights”, in David P. Forsythe (ed.), Encyclopaedia of Human Rights, Vol. 2 88 (Oxford University Press, New York, 2009). Kothari, who defines social rights in terms of basic necessities, observes, “[s]ocial rights refer to those rights that protect the basic necessities of life or rights that provide for the foundation of an adequate quality of life”, and may also be defined as “claims against the State to have certain basic social and economic needs of life satisfied”. Jayna Kothari, “Social Rights and the Constitution”, 6 SCC (Jour) 31, 31 (2004).
2 Kothari, supra note 1 at 32.
5 Kothari, supra note 1 at 32. Another commentator notes, “ESC rights are those which a more just and equitable society would provide its citizens to guarantee a life that has quality and is more than animal nature”. Sarna, supra note 3 at 17.
rights as “social”, “economic”, or “cultural”, lacks clarity, with their being some variation between commentators on the categorisation, and some simply ignoring the distinction.\(^6\) Steiner, Alston, and Goodman point out that the “original drafting rationale” as concerns these rights “was essentially a bureaucratic one” with rights of concern to the ILO being considered economic [Articles 6–9, Universal Declaration on Human Rights], those relevant to UN agencies such as the Food and Agricultural Organisation and the World Health Organisation being treated as social [Articles 10–12], and those falling within the sphere of the UNESCO being designated as cultural [Articles 13–15].\(^7\) These distinctions have, however, been noted to be “difficult to maintain” in practice, as one right can be classified in more than one category; for instance, education can be classified as belonging to all three categories—economic, social, and cultural, besides civil and political.\(^8\)

While human rights have been commonly classified as civil or political and economic, social, and cultural or in Karel Vasak’s categorisation of “generations” of rights,\(^9\) it becomes important when considering these rights to look into their impact on one another and on the quality of human life as a whole, as no one category of rights is sufficient in this regard. Basic needs for a life with dignity must be available “to have autonomy and to be able to exercise choice”, socioeconomic rights being a means of enabling civil and political rights to exist”.\(^10\) “Equal access to


\(^7\) *Ibid.* For Riedel, et al., who consider it logical to distinguish the three categories, economic rights cover guarantees and claims to “participation in the economic life of the community”; social rights are concerned with aspects of employment and “the conditions under which people live”; and cultural rights include the right to education, participation in the cultural life of the community, etc. Eibe Riedel, Gilles Giacca, and Christophe Golay, “The Development of Economic, Social, and Cultural Rights in International Law” in Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* 8–9 (Oxford University Press, Oxford, 2014).

\(^8\) Steiner, Alston, and Goodman, *supra* note 6 at 276. Vasak makes a similar observation on cultural rights noting that they are associated with civil and political rights and social and economic rights, sometimes appearing in both categories in documents produced by the same organisation. Karel Vasak, “A 30 Year Struggle”, *The Unesco Courier* 30, 32 (1977).

\(^9\) Vasak, *id* at 30.

and delivery of socioeconomic rights brings empowerment necessary for transformative or social justice, and the enjoyment of civil and political rights.\footnote{Madeleine Rees and Christine Chinkin, “Exposing the Gendered Myth of Post-conflict Transition: The Transformative Power of Economic and Social Rights”, 48(4) International Law and Politics 1211, 1219 (2016).} Their role has also been stressed in the context of vulnerable groups or situations of vulnerability.\footnote{For instance, Rees and Chinkin, id. at 1211 in the context of post-conflict situations; and Charlotte Bunch and Samantha Frost, “Women’s Human Rights: An Introduction”, in Routledge International Encyclopedia of Women: Global Women’s Issues and Knowledge (Routledge, 2000) in the context of women’s rights.} These instances highlight the relevance of socioeconomic rights to empower and ensure a life with dignity, a core value underlying all human rights.

This interrelationship between the various human rights is also apparent in the concept of the right to development, making it relevant in the context of socioeconomic rights protection. The right to development is a comprehensive concept encompassing various facets of human development, defined by the 1986 Declaration on the Right to Development (DRD) as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy, economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized”.\footnote{Article 1, the UN Declaration on the Right to Development, 1986. Although viewed as a “third generation” right in the 1970s and 80s, with the adoption of the DRD, it began to be located as “an economic, political, cultural, and social process, rooted in self-determination and aiming at the improvement of populations across the world”. Sarna, supra note 3 at 20. Prof. Baxi, writing in the same years as the DRD was adopted observed that development must mean, “people will be given the right to be and remain human”. Upendra Baxi, “From Human Rights to the Right to be Human: Some Heresies”, 13 (35.4) India International Centre Quarterly 185, 187 (1986).} As is apparent from its definition, it does not speak of any division or categorisation of rights but reaffirms the interdependence and indivisibility of all human rights.\footnote{As Sengupta writes, the right to development “integrated economic, social, and cultural rights with civil and political rights” as envisaged “at the beginning of the post-World War II human rights movement”. Arjun Sengupta, “The Right to Development as a Human Right” (Francois-Xavier Bagnoud Centre for Health and Human Rights, 2000).} The notion of development finds mention in Article 1(1) of the ICESCR, while article 6(3) of the DRD recognises the failure to observe...
economic, social, and cultural rights (besides other rights), as an obstacle to development. The DRD views economic, social and cultural rights as both a condition and object of development, these rights thus being pre-requisites to development.

Ensuring socioeconomic rights is associated not only with basic needs but provides a basis for a life with dignity. As observed by the South African Constitutional Court in Grootboom, “[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality, and freedom”. In the absence of protection of the rights flowing from dignity such as an adequate standard of living, and minimum claim rights pertaining to work, education, and healthcare, a mere “survival kit” setting a “minimum existence protection standard” makes the protection of human rights incomplete, particularly vis-à-vis the disadvantaged and vulnerable. The language of rights enables, even forces the demands of the poor to take on terms identifying what is universal about their interests, identify a common target of protest thereby distinguishing “the rights discourse from mere demands to satisfy basic needs or development goals through charity, benevolence, or self-interest”.

From this perspective, it becomes important to view the significance of these rights in the context of the high levels of poverty, the ever increasing gaps between rich and poor, among and within countries, and in the context of global priorities (expenditures on entertainment, drugs, military expenses, etc. in contrast with those for realisation of economic, social, and cultural

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15 Sarna, supra 3 note at 20.
16 Id at 20–21. There may, however, be situations where socioeconomic rights, and what is seen as development may clash, one such case being large dam projects where the benefit of the general population vis-à-vis the rights of an affected population must be considered. Id at 22.
17 Government of the Republic of South Africa v. Irene Grootboom, (2001) 1 SA 46 (CC), ¶44. In fact, the court has observed that “[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society are denied those who have no food, clothing or shelter”. Id at ¶23.
18 Riedel, Giacca, and Golay, supra note 7 at 6.
20 In the context of addressing poverty, a human rights based approach to development is seen as including participation (concerned with access to decision-making) in and transparency of decisions; accountability; non-discrimination, and empowerment through human rights. Law Commission of India, Need for Ameliorating the Lot of the Havenots: Supreme Court’s Judgments 16 (Government of India, Law Commission of India, 2009).
If seen as essential for protection of human dignity and realisation of social justice, it would be of little importance whether these rights are positive or negative. However, the focus on individual liberties while ignoring the other material causes of deprivations of human rights has led to restraining the notion of human dignity for the world’s population, and has also hindered the “meaningful enjoyment” of civil liberties. Protecting social rights requires “going beyond the individual as the unit of analysis”, and it is only “when social rights are added to civil and political rights, we start to move from treating human beings as things to be bought and sold to a consideration of their essential humanity, and its sustenance and development.” Reference here may once again be made to the South African context, with regard to which it has been noted that first generation rights were not thought to be of great concern to individuals who did not have a roof above their heads, enough food to eat or money to send their children to school; rather to be relevant to the citizens, the Constitution would have to contain “third” generation rights such as the right to housing, healthcare, and education. In other words, ensuring socioeconomic rights implies treating human beings as “human” rather than “commoditising” them.

There are enormous disparities in people’s enjoyment of economic, social, and cultural rights. Consequences of not adequately protecting socioeconomic rights include destruction of livelihoods, homes, and social networks in situations of forced displacement which can also have devastating psychological effects; large numbers of lives claimed due to lack of safe drinking water;

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22 See “The Relevance of Economic, Social, and Cultural Rights”, supra note 10. It may be mentioned here, however, that while socioeconomic rights are often seen as “positive” in contrast with civil and political rights which are seen as “negative”, in practice both categories of rights impose positive and negative obligations, and thus cannot be simply categorised as one or the other. This point is discussed in more detail in chapter II.
23 Kjellin, supra note 21 at 36.
violation of other rights due to lack of social and economic rights, such as lack of education hindering efforts to find work; and social and economic inequalities affecting access to public life and to justice. Disparities between the rich and poor are noted to be on the rise with several consequences ranging from exacerbation of conflict to increased use of drugs.

There is, moreover, a political argument of democratic principle in favour of protecting these rights. Social and economic rights are an important means of achieving a just form of democracy, being designed to help disadvantaged sections in society improve their situation through affirmative action, and to hold governments accountable. Amartya Sen writes, “[t]he inclusion of second-generation rights makes it possible to integrate ethical issues underlying general ideas of global development with the demands of deliberative democracy, both of which connect with human rights, and quite often with an understanding of the importance of advancing human capabilities.”

However, despite their clear relevance for human well-being and a life with dignity, for long they have seen insufficient protection and a position “inferior” to civil and political rights with critics even arguing that they are “aspirations” rather than rights and should only form part of the political process.

**Protection of Social and Economic Rights: Legal Frameworks**

The adoption of the United Nations Charter and thereafter the Universal Declaration of Human Rights (UDHR) in the wake of the devastation caused by the second world war, marked the establishment of the modern international human rights regime. The UDHR, which recognised the

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28 Law Commission of India, supra note 20 at 11.

29 Wiles, supra note 10 at 49. See also Ilias Trispiotis, “Socio-economic Rights: Legally Enforceable or Just Aspirational?”, 8 Opticon1826 3(2010).


“inherent dignity” and “equal and inalienable rights of all human beings” included civil and political rights, and economic, social and cultural rights in its text drawing no distinction. However, differences, inter alia, as to the nature of the two sets of rights and the enforcement mechanisms required for each led to the adoption of separate instruments for the protection of civil and political rights (the International Covenant on Civil and Political Rights or ICCPR), which imposed immediate obligations on states parties, and economic, social, and cultural rights (the International Covenant on Economic, Social and Cultural Rights or ICESCR), requiring only progressive realisation besides having weaker enforcement mechanisms and no separate monitoring body, as available for the former. This “unequal” position and protection for the two sets of rights continued for long with only the recent adoption of the optional protocol to the ICESCR in 2008 bringing the protection at par in the international bill of rights. Other positive developments such as the introduction of a collective complaints mechanism under the European Social Charter (ESC) in 1995, establishment of the Committee on Economic, Social, and Cultural Rights (CESCR) in 1986, and adoption of socioeconomic rights provisions in constitutions had taken place prior to this development, contributing to making these rights justiciable and strengthening the protection available to them.

On the one hand, the inclusion of socioeconomic rights in constitutions is objected to on account of constraints on democratic decision-making in various areas involving the allocation and distribution of resources such as taxation, trade, education, etc. (the “democratic” objection), and on the ground that as socioeconomic rights are indeterminate, a constitution containing them cannot be regarded as a “legitimate basis or democratic rule” (the “contractarian” objection). On the other, it is also acknowledged that there is value in including socioeconomic rights in a constitution, even if kept away from judicial oversight as this would create pressure on citizens and

representatives to consider these principles in their deliberations and policy decisions. Moreover, it is argued that the omission of enforceable socioeconomic rights from national bills of rights creates a structural imbalance which has a direct impact on rights-based case law, even in countries with highly developed welfare infrastructures.

The preamble to the Indian Constitution envisions inter alia, a socialist, democratic, republic where all citizens will be secured justice—social, economic and political. This goal has been sought to be achieved through the provisions of part III which includes the fundamental rights (that is, most civil and political rights) and part IV which contains the directive principles of state policy, including most social and economic rights. The status of social and economic rights in India may be compared to the International Bill of Rights, when initially adopted, as only the civil and political rights were justiciable but not social and economic rights. However, in practice, with the creative interpretation given by the judiciary to the constitutional provisions, particularly, the right to life and personal liberty guaranteed by article 21, and interpretation of the relationship between the directive principles and fundamental rights, many social and economic rights have become enforceable as a part of the “fundamental rights”.

While the directive principles have expressly been stated not to be enforceable, they are “nevertheless fundamental in the governance of the country”, a duty being imposed on the state “to apply these principles in making law”. Tushnet identifies the Indian Constitution as an example of “early social democratic constitutions”. Many pieces of central legislation such as the

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35 Abeyratne, id. at 50.
36Wiles, supra note 10 at 60. In this regard Wiles cites the decision in Wilson v. Medical Services Commission of British Columbia in which new regulations restricting the authorisation of doctors from practising unless there is a demonstrable medical or community need in the area were considered. The regulations were ruled unconstitutional based on the right to liberty under the Charter but Wiles observes that the outcome may have been differently decided if health needs of disadvantaged members of society with compromised access to a doctor was weighed into the balance. Id. at 61.
37 In Valsamma Paul v. Cochin University, (1996) 3 SCC 545 (Bench Strength: 2), it was observed that social and economic justice set out in the preamble and elaborated on in the fundamental rights and directive principles seeks to make the quality of life of the poor, disadvantaged and disabled sections of society meaningful.
38 Article 37, Constitution of India.
Minimum Wages Act, 1948, the Payment of Wages Act, 1936, the Equal Remuneration Act, 1976 etc., formulated to ensure that workers receive adequate wages and benefits, and are not unduly deprived of the same; the Maternity Benefits Act, 1961, Workmen’s Compensation Act, 1923, Trade Unions Act, 1926, and Factories Act, 1948, which seek to protect the rights of workers and ensure just and humane working conditions; the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1979 and the Bonded Labour (Abolition) Act, 1976, etc., which seek to protect the disadvantaged sections against further exploitation and oppression, are reflective of rights enshrined in the directive principles as are those in the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA) and National Food Security Act, 2013.

The Constitution of the Republic of South Africa 1996 specifically incorporates several social and economic rights including healthcare, food, water, social security, housing, education, as well as various rights in respect of children, and makes them justiciable.40 Many of these provisions require the State to take reasonable legislative and other measures within available resources to achieve progressive realisation of each of the rights.41 Unlike classical liberal constitutions, more recently adopted constitutions such as the South African Constitution tend to include second generation rights without distinguishing them from classic liberal rights.42 At the time of framing of the Constitution, there was much debate regarding inclusion of these rights but the inclusion was ultimately supported by all political parties and much of civil society, these rights being considered essential to redress the socioeconomic deprivation experienced under colonial and apartheid rule, for effective enjoyment of civil and political rights and to build a transformed society based on

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41 Sections 26(2), and 27(2), Constitution of the Republic of South Africa.
42 Tushnet, supra note 39 at 177–78.
social justice. The Constitutional Court, which was to approve the draft constitution before final adoption, rejected arguments against their justiciability, approving the inclusion of these rights.

The South African situation is unparalleled in international constitutional jurisprudence and its role in the social rights adjudication debate is seen as revolutionary and heroic by its proponents, but irresponsible and doomed by detractors. The model adopted by the South African Constitutional Court in the enforcement of social and economic rights is of “reasonableness review” wherein the question asked is whether the measures taken by the State towards progressive realisation of the rights are reasonable. In South Africa also, besides the Constitutional provisions, a number of statutes have been enacted to give effect to social and economic rights such as the National Water Act, 1998; Basic Conditions of Employment Act, 1997; the Housing Act, 1997; Special Pensions Act, 1996; Employment Equity Act, 1998, etc.

The advantage of the approach in India of inclusion of socioeconomic rights as non-enforceable directive principles is that courts will not be “entangled” in administrating social programmes; however, without judicial enforcement there is a “risk” that the constitutional provisions will be no more than “parchment barriers”, having little meaning in practice. On the other hand, while the method followed by the South African Constitutional Court is a flexible, context-sensitive model for review of socioeconomic rights claims, and there are indications that these rights are making a contribution to deepening democracy and socioeconomic

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45 Christiansen id
transformation, it has been criticised for lack of an appropriate supervisory element, and failing to sufficiently engage with the content of the rights.  

2. Review of Literature

**Economic, Social, and Cultural Rights**


This chapter discusses various issues relating to human rights which as the author notes provide a powerful basis for an ethical critique of international politics and policy. It is observed that “second generation” rights “recognize that certain basic goods should be equally available to all people: that a certain set of political and economic circumstances are needed for human flourishing. Included are rights to basic levels of economic subsistence, education, work, housing and health care, among others.” These rights are referred to as “positive rights” due to their requiring providers to “act” rather than refrain from interference but this distinction is subject to criticism.

The author feels that “understanding the history and philosophy of human rights is essential to being able to navigate complex political debates surrounding the desirability and normative content of human rights reform in the international system.”


Hunt highlights the attention being given to social and economic rights in different parts of the world, at the international and regional levels as well as within the domestic laws of different countries. Civil society groups all over the world have realised that all human rights, that is, civil and political rights as well as economic, social and cultural rights, together are tools for tackling unfairness and disadvantage. He points out, however, that one inescapable difference between the two is that while there is a vast jurisprudence developed on civil and political rights, the case is not...
the same for economic, social and cultural rights. Another point highlighted by him is that in addition to the judicial approach in protecting economic, social and cultural rights, “it is vital that human rights processes are brought to bear on policy making processes including those for the reduction and elimination of poverty”. He notes that “the policy approach demands new human rights skills, techniques and approaches”. The need, sooner or later, to develop human rights impact assessment tools is also emphasised.


The author notes that the consensus that has emerged regarding socioeconomic rights is that they are properly included in modern constitutions and are enforceable to the same extent as first generation rights to political participation, equality, etc. Recently adopted constitutions tend to include the "second generation" rights without distinguishing them classic liberal rights. On the objections raised to the judicial enforceability of socioeconomic rights, it is noted that while there may be differences in the rights to be provided with regard to criminal trials and those for second generation rights, the distinctions are not the sharp ones required by separation of powers objections; and enforcement of first generation rights also involve comparable costs. There are various forms of enforcement such as individual remedial actions, negative injunctions, structural or positive injunctions as well as new remedial forms such as evolved by the South African Constitutional Court—dialogue between the executive, legislature, and judiciary, or dialogues between the executive and plaintiffs. While experience has shown that second generation rights are enforceable, the extent of effectiveness will depend on particular circumstances. A point of concern highlighted is that the positive impact of the judiciary in enforcing social and economic rights has been primarily in cases which benefit those who are relatively better off and not the poorest in a nation.

This article examines the arguments on non-justiciability of social and economic rights (vagueness, redistributive nature of remedial measures, issue of resources, separation of powers and unreasonable expectations on part of the poor) as well as the philosophical premises of liberalism that inhibit our conception of social rights. The author notes that liberalism recognises collective rights only to the extent that they “support the formation of autonomous individuals, to be able to compete equally in economic markets”; in the individual rights paradigm, human persons are defined by their differences, not commonalities. It is noted that African traditions more fully encompass the social dimensions of persons, and that the South African experience in this regard has profound implications for the international community at large, and the discourse “promises to transform our normative understandings of human rights and freedom, democracy, the role of state and the relationship between the individual and the community.” Judicial review of social rights checks political branches to ensure their responsiveness to the constitutional rights of the least privileged in society, and that policy makers do not lose sight of their suffering in the inevitable political games of compromise and horse-trading. The author feels that in order for the human rights discourse to evolve in the twenty-first century, the eighteenth century fiction of natural, self-evident rights must give way to the realisation that all rights are social constructs and the product of collective struggles.


The author of this article is of the opinion that while there must be fairer distribution of the world’s resources, efforts in this regard must take place through the political process and not through assertions of rights. He argues that while enforcement of civil and political rights does have economic ramifications, it would not involve the broad redistribution of resources. He feels that broad assertions of economic and social rights such as in the UDHR, take us into a territory
unmanageable through the judicial process. When the Constitution sets out the level of legislative specificity, for instance, free education up to the secondary level, it may be appropriate to use the judicial mechanism for enforcement. Public security and allocation of resources ought to be debated by everyone in the democratic process. A court may not be in a place to engage in negotiation and compromise which is at the heart of the political process. He feels that while civil and political rights mean the same thing everywhere, social and economic “rights” are inevitably going to be applied differently in different places. He stresses the importance of strongly enforcing civil and political rights noting that they are often crucial in dealing with social and economic rights.


Justiciability of economic, social, and cultural rights and in particular, the methodology that can be applied in the adjudication of these rights is the focus of the present article which also analyses the main arguments against a global complaints mechanism for ESCRs. The author points out that efforts at deducing meaningful legal guidance from the provisions of the ICESCR are complicated due to loose formulations; freedom in choosing means of implementation; relativity; and progressive implementation, common to many articles. However, the CESCR has adopted a number of interpretative measures including enumerating specific normative contents; utilisation of indicators and benchmarks; identifying divergent types of state obligations (duties to respect, protect, and fulfil); and identifying divergent time frames for implementation, which have significantly concretised obligations, and provide potential background for judicial review. The complaints of violations of social rights received by the European Committee of Social Rights (ECSR) demonstrate the workability of the complaints mechanism, support the justiciability of ESRs, reveal methodological choice which facilitate the adjudication of these rights, and reaction of the Committee of Ministers to the same also supports political acceptability of this jurisprudence. Recent developments in domestic constitutional law also support judicial adjudication of ESCRs,
notably that of South Africa. In the context of the optional protocol to the ICESCR regarding the complaints mechanism, the author recommends that the Committee is better suited to reviewing negative obligations; in reviewing positive obligations, it should distinguish between core and non-core rights and must focus on procedure and methodology rather than evaluating outcomes.


This article examines article 8(4) of the Optional Protocol to the ICESCR, a “hard-won consensus” which introduced the criterion of “reasonableness”, not present in the text of the Covenant, and developed in response to debates on the justiciability of socioeconomic and cultural rights. The South African Constitutional Court’s jurisprudence in Grootboom was drawn on in this process. Also, the concept of reasonableness was emerging at the international level such as by its incorporation in the text of the CRPD. He notes that while the Committee is not bound to follow the South African jurisprudence on reasonableness, certain principles are helpful to consider such as that dignity being affirmed as the foundation of reasonableness review, and reasonableness viewed a guarantee of rights and not a restraint. The Committee in its general comments and observations on state reports has indicated requirements for compliance which may inform its approach to reasonableness. These include the requirement that reasonableness strategies must be informed by an equality framework prioritising the needs of the disadvantaged, and strategies for realisation of rights must be based on rights. He notes that while reasonableness under the protocol would be developed as an independent standard consistent with the covenant’s purposes, there is likelihood of cross-referencing among treaty bodies when considering similar issues, and in this regard emerging jurisprudence under the CRPD is especially relevant.

This article discusses the issue of obligations of multinational corporations in the context of social, economic, and cultural rights protection. The author points out that the traditional tools that are state centric are no longer sufficient to protect social and economic rights. Though multinational corporations have great financial influence and in turn influence a wide range of issues including international politics as well as generate massive profits, they do not take into account the social needs of the country in which they operate. This in turn impacts the social and economic rights of the people and may also affect the civil and political rights as is demonstrated by the example of the activities of Shell in Nigeria in the mid-nineties. He is of the view that multinational corporations, on account of their profits and conversance with ground realities are the only entity able to contribute towards building stability from the realisation of social and economic rights.


In this article, the author considers the issue of economic, social, and cultural rights in the context of the right to development. He notes that basic human needs have to be met by all irrespective of a state’s development status. It is noted that social, economic, and cultural rights form part of development, and social factors are becoming increasingly important in the composition of the word development. Discussing the case of transnational corporations, the author points out that their activities can be both beneficial to socioeconomic rights and also detrimental, and are able to affect both economic growth and respect for human rights. It is observed that economic growth is necessary for realisation of development and higher levels of socioeconomic rights but what is required is rights-based economic growth. An important issue that must be considered with regard to transnational corporations is that their power and ungovernability puts them beyond the sanction of human rights.
Economic, Social, and Cultural Rights: India

Joseph Minattu, "The Unenforceable Directives in the Indian Constitution", (1975) 1 SCC Jour 17

This article examines the issue of “non-justiciability” of the directive principles of state policy as the author observes that “nothing which leads to such a conclusion can be found in the Constitutional document”. In the author’s opinion, the words used in article 37 do not preclude recourse to courts for a mere declaratory judgment. He feels that if a defendant acts contrary to the declaration, recourse can be had to the court for enforcement of rights or damages for loss suffered. He points out that there can be no difference of opinion with the proposition that a law violative of a directive principle will be unconstitutional. It is noted, however, that there are certain directive principles that do not lend themselves to easy implementation. Despite these infirmities, “one may not be far too wrong to assume that a declaratory decision by a superior court will be accorded great respect and disarming effect by public authorities.”


This article analyses the object and purpose of the directive principles and their implementation by the government and the judiciary in the first fifty years of independence. The authors note that despite the directive principles being like “commandments”, they have not been followed in letter and spirit and it is only the judiciary that has played a pivotal role in the implementation of these principles as compared to the executive. The fact that these principles have been couched in general terms gives them an adaptability ensuring their survival in a world the authors never knew. They are of the view that the judiciary has maintained the harmonious balance between preserving civil liberties and raising the economic level of the people, that has been presented by the Constitution.

The author considers the question of whether the time has come to make the directive principles of state policy, justiciable. He takes note of the difficulties faced by farmers, cases of farmer suicides etc. and in this background considers the directive principles. The author feels that while efforts have been made towards the implementation of these principles, they are inadequate. He argues that the time has come for the directive principles to be made enforceable, specifically mentioning the need to made rights to work, education, and public assistance in certain cases of undeserved want which in his view must be made enforceable in this era of globalisation and liberalisation.


This article essentially examines the interpretation given to the directive principles of state policy by the judiciary at different periods of time and the changes in the relationship between the fundamental rights and directive principles in the light of the judicial trends. Taking note of the objects of the directive principles, the author observes that the fundamental rights and directive principles are looked on as two sides of the same coin and are to be harmoniously construed. Though there is some difference between the two, on a broader outlook, it can be seen that the aims of both are one and the same. The author concludes in the light of the recent trends that it is very difficult to draw a line between the fundamental rights and directive principles. Even the consequences of failure by the government to discharge its duties under the directive principles which earlier had no consequences beyond political criticism may now lead to invalidity of the legislation or executive action.


In this article, the author essentially considers the role played by the judiciary towards the implementation of the directive principles, pointing out that judicial intervention has been
necessitated by the absence of measures by the legislature which has not taken sufficient steps in this regard despite the constitutional mandate to implement these principles when the time is ripe with regard to the social, economic and political conditions of the country. Noting that the objective of the directive principles is securing social, economic and political justice to the citizens, the author points out that on reading the provisions of part III and IV of the constitution, it is clear that the constitution framers did not envisage that the fundamental rights would remain as they are or that the directive principles would remain non-justiciable forever. However, it is the judiciary that has played the most important role towards implementation of these principles. He observes that including some of these rights as fundamental rights instead of implementing them as part of Article 21, would both reduce the burden on the courts and also result in more effective implementation of the directive principles. He concludes however by observing that unless the legislature also actively takes steps towards implementation of the directive principles, judicial activism alone may not be sufficient to enforce these principles.


This article looks into the issue of basic needs in the background of the predicament of the poorest sections who have to face penury and starvation deaths. Noting that the satisfaction of basic needs is a widely accepted characteristic of any just society, the author observes that the identification of social, learnt or acquired needs is problematic as such needs are strongly influenced by ideological considerations and closely associated with subjective preferences and abilities. The author points out that the idea of prioritising human needs has assumed a special significance in the wake of widespread hunger and starvation. In the context of the different treatment of the two sets of rights through the fundamental rights and directive principles, it is noted that the view treating the fundamental rights as superior accords with Ronald Dworkin’s distinction between “background” rights (mere justification for political decisions) and “institutional rights” (concrete rights). The
basic needs of the people are likely to be better ensured in a socialist democracy than in a capitalist or liberal one. The role of the judiciary in this regard is considered and the uncertainty regarding identification and definition of relevant needs is discussed. The author finds that despite certain progressive trends, it is not possible to infer a clear and undiluted commitment of the courts for the basic needs.


The author looks into the issue of social rights in the Indian context and specifically examines certain aspects of social rights, namely the right to food, health, education, shelter and forced evictions. He argues that judicial enunciation of social rights is not sufficient and public policies, political planning—truly designed for social empowerment, and public participation are also required for effective realisation of rights. The author feels that while the orders of the Supreme Court in the right to food petition have a positive impact of demonstrating that courts can in fact direct the state to take positive action, at the same time, not much has been achieved in terms of implementation which is evident from the fact that orders are still being issued on the petition. Note is taken of the contributions of civil society to the right to food movement. The author is of the view that Sen’s capacities approach provides a “stimulating conceptual framework” for the realisation of social rights and the advantage of thinking of human development in terms of capacities is that “it addresses the problems of malnutrition, hunger, premature mortality, illiteracy and social exclusion”. The author analyses the approach of the Supreme Court towards certain social rights and finds that while the Court has recognised justiciability of many social rights, the implementation is still left to the state. He feels that if there are public policies, social welfare schemes and legislation, it is open for anyone to move the court seeking their implementation. He feels that recognition of rights by the Supreme Court can” be used as a legal resource to mobilise a public campaign and public action to force the state to realise social rights and make the courts a
site of struggle”. In the context of forced evictions of slum dwellers, etc., the author is of the view that the Supreme Court has leaned towards public property rather than the protection of human rights of the dwellers. In the context of evictions from areas under development projects, he contrasts such an approach of the Supreme Court with that of the South African Constitutional Court in *Grootboom*. He points out that the realisation of human rights in India is closely linked with the notion of human development which involves expansion of capabilities.


In this article the author considers arguments of several scholars, most importantly the work of Dieter Conrad and Cecilé Fabre on social rights noting that socioeconomic rights are in fact indispensable preconditions for enabling equal participation of persons in society and some socioeconomic rights, such as education are essential even for a democracy to count as such, and that we must move from policy to rights. The author examines in detail the judicial approach and response in India regarding certain socioeconomic rights observing that though the courts have made declarations on these rights, this has not brought about immediate change. Judicial activism in this regard has proceeded on the credo that it is essential in a developing society to ensure participative justice. He is of the opinion that the Indian example shows that social rights can be made justiciable and a system such as public interest litigation (PIL) can be an effective instrument of social change. He however, points out that implementation of these social rights decisions is a cause for concern, the reasons behind which are historical, social, cultural, political, economic and global. He concludes that only through the active participation of state can a truly dignified life for people be ensured.

The author examines the approach of the Indian courts to social rights adjudication, which he terms as “conditional social rights” adjudication which in his view is “a rare private law model of public law adjudication”. He observes that the courts’ conceptualisation of social rights often contrasts sharply with the theoretical framework within which constitutional lawyers presently operate. Both the individualised remedial “minimum core” form and the non-individualised remedial “reasonableness” model are forms of systemic social rights adjudication. The “conditional social rights approach” adopted in India focuses on implementation rather than the inherent nature of measures taken; also courts strive hard to emphasise the importance of socio-economic guarantees. An important feature of this approach is that a violation would occur only when the state undertakes an obligation but does not fulfil it. It involves the courts being far more proactive in responding to legislative and executive inertia. He argues that this conditional social rights model contains a far more intense form of judicial review than the systemic social rights one. The conditional approach is far weaker as there is no systemic right, and guarantees no standard for any social right, but is stronger in some respects such as grant of an individualised remedy in many cases, and operates in poorly governed nations. The author notes that one consistent theme in the social rights jurisprudence that it is posited that the violation of social rights results in violation of civil political rights and the latter cannot be realised without realisation of the former. He observes that the Supreme Court’s rhetoric seeks to move beyond the directive principles framework, not by making such guarantees enforceable but through reminding the state that ignoring these principles is a violation of a right.

The author points out that it is the broad powers of judicial review along with far-reaching legislation that has been critical in the judicial enforcement of economic, social, and cultural rights in India. One issue discussed by the author is the nature of orders passed by the courts in PILs which he classifies into declaratory orders which require acceptance by the State before
implementation and mandatory orders which are specific and time-bound. Some important features of PILs such as the courts being concerned with the importance of the issue as well as building into its directions forewarning as to consequences of disobedience are also identified. The author points out that there has been a discernible shift in the approach of the courts towards social and economic rights in the last two decades; explicit adaptation of international standards has been sporadic and decisions in the areas of the right of work and shelter show that courts have deferred to executive policy. The efforts of courts at overcoming law and policy barriers in petitions seeking enforcement of social and economic rights have been inconsistent and at times ineffective. Its positive impact thus far nevertheless underscores the need for court intervention. One issue that needs to be addressed by international and domestic standards is the liability of the corporate sector for violation of economic and social rights.


The author argues that the record of the Supreme Court of India as far as economic, social, and cultural rights are concerned is deeply unsatisfactory; it is patchy and getting worse. He is of the view that this changed attitude of judges towards about rights cannot be divorced from the changed socioeconomic context of liberalisation and privatisation. He feels that the court's decisions are increasingly characterised by an "urban and elitist bias against the poor and the countryside". The author states that due to the court’s assumption of the governance function, its approach is determined by its congruence with the ideologies of statism and developmentalism which remain dominant ideas of governance. He argues that for enforcing socio economic rights, excessive reliance must not be placed on the judiciary as in such a situation systemic problems would remain unaddressed. Some issues and challenges highlighted by him are the need to reconceptualise norms of private law, impact of non-state actors such as transnational corporations, and increasing incompatibility between fundamental human rights norms and
aspects of international law that promote globalisation. Comparative constitutional adjudication, constitutionalisation of rights; regional jurisprudence (for instance, the European Court of Human Rights (ECtHR)); and social movements are encouraging trends in the area of social and economic rights. He feels that the “Court’s legitimacy will to a large extent depend on its ability to offer support to social movement struggles which are primarily focussed on the realisation of economic and social rights at a time of economic liberalisation and globalisation.”


This paper examines through empirical study of PILs in the Supreme Court whether the criticisms of the same, on the ground of intervention in the functions of legislative and executive spheres and also of their now addressing the rights and concerns of the middle classes as opposed to the poor and disadvantaged sections are justified. It is pointed out that policy formulation by courts is to some extent inevitable as judicial review of any sort requires a commentary on laws and policies including guidelines on their proper content. The author is of the view that the reason that courts have not traditionally been active in the sphere of social and economic concerns may be responsible for the resistance to PILs rather than any “judicial dictatorship”. Although reluctance of the judiciary towards accountability is problematic from the point of view of democratic theory but expansion of judicial activity in the area of socioeconomic rights catalyses rather than restricts executive and legislative activity. The author also points out that despite the occasional hyperbolic claims of critics, the courts are not being used as a staging ground to threaten the Indian state and even in some cases such as SCOARA where the court assumed powers not delineated by the constitution, it restored constitutional balance where the legislature and executive were engaging in extra constitutional activities. In the context of the criticism that the objective of PILs has been lost, the author concludes from his empirical study that PILs do not comprise a very high percentage of the overall litigation in the Supreme Court; concerns regarding inequality are
validated by quantitative data on fundamental rights cases; the rate of increase of PILs has been the same for both marginalised and advantaged sections though win rates are significantly higher for claimants from advantaged social groups rather than from marginalised groups. This constitutes a social reversal from both the original objective as well as win rates in 1980s.


In this article, Justice Anand, discussing the issue of PIL in protecting human rights, notes that the basic objective of the Constitution mandates that all the three branches of the state work harmoniously towards realising the objectives contained in the fundamental rights and directive principles. It is also pointed out that there is an increasing realisation that fundamental rights can have no meaning for a large number of people in India unless a new socioeconomic order is raised on the foundation of the directive principles. The author observes that while the Constitution contains various provisions for the benefit of the underprivileged sections, and laws have been enacted and administrative measures taken but implementation of the same with vigour and creativity is required. The innovation by the Supreme Court by relaxation of locus standi and PILs is an important step towards ensuring access to justice to the weaker sections. While courts are criticised on the ground of usurping the functions of other organs of the state, the author feels that it is legitimate for them to intervene where executive refuses to carry out the legislative will or thwarts it and when the Court is aware of gross violations of human rights, it cannot look the other way or prevaricate or procrastinate. The author is of the view that judicial activism reinforces the faith of the common man in the law and the strength of democracy.

Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India (Cambridge University Press, New Delhi, 2017)

The book examines some areas in which the PIL mechanism has worsened rather than enhanced the situation of the poor, contrary to its original purpose. The author highlights the growing
influence of PIL in Delhi which he found had become “ubiquitous in everyday discourses”, the city of Delhi in fact being "remade by means of PILs”. The mechanism had enabled the courts to "micromanage" and monitor various aspects of the city's governance. He discusses specifically, inter alia, the case of slum demolitions or clearance which was responsible for rendering homeless almost a million people through the mechanism of PIL. In these cases, even the requirement of relocation or alternative sites was rejected. Another instance is that of the de-industrialisation of Delhi which has adversely impacted on poor who were not even heard by the court even though passing far-reaching orders. He also discusses the problem of courts appointing amicus curiae to assist it in PIL matters, resulting in "displacing the petitioners".


This article considers the issue of whether the right to food is protected in India under the fundamental rights. The recognition given to the right to food in various international instruments is analysed noting that according to General Comment 12 of the ICESCR, States have a core obligation to take necessary action to mitigate and alleviate hunger, and States can no longer avoid responsibility to provide adequate food; rather a positive obligation has been cast of them to adopt a strategy to ensure food and nutrition security. Note is taken of the pro-people stand of the Supreme Court with regard to the right to food and the efforts of the Right to Food Campaign and it is noted that by recognising the right, the Court had opened doors for discussion of the issue at the legislative and executive level and for consideration of this right as a fundamental right of the citizens of the country.


The author considers the problem of lack of adequate housing and shelter of a large section of the world population and in this background looks into the right to shelter. He takes note of the
acknowledgement of the right to shelter in the UDHR which was a “new feature”, and other measures at the international level with regard to this right including the declaration of the International Year of Shelter, a programme of action acknowledging that the poor would build the housing they require with their own hands. In the Indian context, the author considers the policy measures as well as steps taken under the five-year plans by the Government with regard to housing and also examines the constitutional provisions noting that the right to shelter flows from article 21 read with article 19(1)(e). He is of the opinion that socioeconomic justice is inextricable woven with the right to shelter for a meaningful right to life. He observes that shelter is not merely protection of life and limb but all infrastructures necessary for persons to develop as human beings. The duty of the state is to ensure availability of opportunities and facilities to build houses. The issue of urban poor who provide support services to city dwellers and also of those affected by natural and other disasters must be addressed. He points out that existing programmes of the state have achieved little success as there is no integration between the “hardware” and “software” aspects.

_Economic, Social, and Cultural Rights: South Africa_


This paper discusses the issue of whether socioeconomic rights must be constitutionally protected and their relationship with citizenship and democratic deliberation in light of the decision of the South African Constitutional Court in _Grootboom_. The author observes that the distinctive virtue of the approach in South Africa is that the Court is respectful of democratic prerogatives and of the limited nature of public resources, though it requires special deliberative attention to those whose minimal needs are not being met. He points out that even conventional individual rights like free speech and property require government action. In the context of the Indian position of socioeconomic rights, the author is of the opinion that the advantage of the same is that it ensures
that courts will not be entangled with administration of social programmes but the disadvantage is that without judicial enforcement, there is risk that the constitutional guarantees will be merely "parchment barriers", meaningless or empty in the real world. As to the South African position, it is observed that the provision alone does not create or disable judicial enforcement. What is striking about Grootboom is the distinctive and novel approach to socioeconomic rights, requiring not shelter for everyone but sensible priority setting, with particular attention to the plight of those who are the neediest. The author points out that what the Constitutional Court has done is to adopt an administrative law model of socioeconomic rights. It is noted that a certain minimum guarantee of socioeconomic rights can be justified on the ground that democracy requires a certain independence and security for all its citizens. This approach shows that a democratic constitution even in a poor country is able to protect these rights without undue restraint on resources.


The author discusses in detail the experience under the South African Constitution of the protection of socioeconomic rights. She points out that the concern of the South African Constitution, unlike others is not merely to restrain state power but to facilitate a fundamental change in the legacy of injustice produced by over centuries of colonial and apartheid rule. These rights were included in the Constitution, inter alia, as they were regarded as integral to building a transformed society and their being essential for effective enjoyment of civil and political rights. She notes that the Court felt that it lacks relevant information to supply the minimum core of the right and instead adopted the reasonableness test "in which the key question is whether the measures the state has taken towards the progressive realisation of the relevant rights are reasonable". The criteria for assessing reasonableness were laid down in the case of Soobramoney taking into consideration factors such as comprehensiveness and coherence of the programme; financial and human resources allocated; etc. She feels that while the concepts of progressive
realisation and availability of resources provide the State with a potential justification for failing to ensure access to socioeconomic rights, they can also support a finding of unreasonable acts or omissions by the State. It has addressed concerns over courts' role in adjudication of such rights and as to whether these rights would undermine participatory democracy.


This article assesses the “reasonableness” standard of review adopted by the South African Constitutional Court with regard to compliance with Constitutional obligations on social and economic rights. Coomans emphasises that the aim of overcoming Apartheid and achieving a more humane, just and equal society has been explicitly recognised by the Constitution. He points out that while the differences in the Constitutional Provisions in South Africa and those in the ICESCR may seem trivial, the court has given a different meaning and interpretation to some elements. The challenge before the Court was finding a method of scrutiny which acknowledges that policy choices and decisions as to budgets are within the competence of the legislature. The reasonableness approach fits in well with the system of separation of powers, because it requires a court to defer to the other branches of government in matters of policy choices and decisions on spending. The main advantage of the approach is that it provides a flexible tool for assessing the realisation of social and economic rights that takes into account the domestic situation and local context. However, it disappoints as it fails to provide adequate protection to those most in need. The author is of the opinion that reasonableness review may become a useful tool for human rights bodies when they monitor the realisation of social and economic rights and has the potential to become an appropriate tool for judicial bodies.

In this article, the author considers the issue of to what extent rights-based litigation brings about an improvement in social justice through considering the example of litigation pertaining to medical care rights in prisons in South Africa. He observes that the South African example illustrates that the domestic pursuit of social justice may benefit from the constitutionalisation of such rights and challenges assumptions that such rights are ill suited for adjudication. He is of the view that if socioeconomic rights are purposefully interpreted and consistently enforced, they are capable of making invaluable contributions to the pursuit of social justice. They compel societal awareness of and political sensitivity to the needs and experiences of society's vulnerable and marginalised sectors; enhance participatory democracy; and tangibly alleviate hardships by awarding affirmative remedies, and consistent pursuit of these rights can create a space for more meaningful structural transformation. Though litigation may not be the sole mode of achieving socioeconomic justice, it is a potentially invaluable tool for the construction of an ultimately more just society. The author finds that the presence of an enforceable constitutional right to medical needs at state expense is empowering in that it allows prisoners to draw attention to their vital medical needs by enabling them to insist on justification for non-fulfilment.


This paper looks into the position of socioeconomic rights in South Africa, tracing the process of inclusion from the stage of the debates, and goes on to examine four primary cases before the Constitutional Court on social and economic rights and the approach adopted therein. Providing a detailed background of the Constitutional Assembly, the author outlines the position of political parties on inclusion of social and economic rights in the Constitution such as the importance attached to inclusion of these rights by the ANC and opposition on traditional arguments against justiciability by the National Party. The interim constitution contained few social rights, and
principles guiding the framing of the final constitution also did not mention them. Ultimately the desire to provide hope to those that lived without hope prevailed and the final constitution saw the inclusion of various social and economic rights which were made specifically justiciable. The author emphasises that the court’s socioeconomic rights jurisprudence must be understood in the context of the court as a uniquely powerful institution under the Constitution with broad constitutional and moral authority to advance the human rights goals of post-Apartheid South Africa. From an analysis of various decisions of the Constitutional Court, the author culls out certain principles; one, that the position on justiciability is settled and the Constitution obliges the state to give effect to social and economic rights; two, judicial review of negative elements of social rights is not subject to internal limitations clause but may be reviewed against the general limitations clause; three, the positive aspects, while enforceable, give rise to complications and traditional justiciability concerns; four, the heft of adjudication of socioeconomic rights is the assessment of the reasonableness of the government action or inaction when the right is viewed in context; and fifth, the remedy chosen and its manner of implementation are particularly important issues. In conclusion, the author observes that the jurisprudence of the Court is both more radical (as it incorporates a viable model of social rights adjudication) and less so (the jurisprudence norms implicit in the theoretical critique of such adjudication) than argued by commentators.


This article considers the South African approach to enforcement of socioeconomic rights, evaluates the important decisions of the Constitutional Court, and analyses how the court has created a “third way” of judicially enforcing socioeconomic rights which is both workable and sensible. The author begins by considering the approaches to socioeconomic rights in the United States and Hungary which represent two extreme approaches to such rights, namely no judicial enforcement, and judicial enforcement without limitation, respectively. The South African
Constitution was framed in the background of the people’s struggle to move beyond Apartheid. The author notes that the appeal in *Grootboom* gave the Court the opportunity to specify how the socioeconomic rights specified in the Constitution could be enforced while respecting the limitations on grounds of reasonableness, resources, and the requirement of progressive realisation. While it imposed a judicially enforced obligation on the state to come up with a comprehensive and coordinated programme to progressively realise the right to adequate housing, it qualified its decision by leaving the precise allocation of budget for the government to decide.

The approach in *TAC* was a continuation and amendment of the *Grootboom* jurisprudence. The author is of the view that the approach of the Constitutional Court is both feasible and workable providing a way for South Africa to rise beyond its Apartheid past as well as providing a workable model for the rest of the world. It is pointed out that the limitations and constraints established provide a third way toward enforcement of these rights. These include limited number of rights being enumerated in the Constitution and lack of specificity; difference in the language of the Constitution with regard to access to rights and the rights themselves which is a way of delineating boundaries of the role of the court; limitation on account of available resources; the progressive realisation provision; reasonableness provision; and rejection of the minimum core argument (which does not take into account particular requirements of the country, and forces courts to take on the role of policy maker). The South African approach emphasises the importance of the judiciary working with the legislature and executive to formulate the best possible solutions for reaching the Constitutional goals.


This article examines some decisions of the South African Constitutional Court on social and economic rights, some criticisms of its approach, and some responses to the critics. The author notes that the Court employed the reasonableness model in *Grootboom*, and showed that placing
socioeconomic rights in the Constitution did not entitle every individual to assistance on demand. Also, the “minimum core” approach has not been adopted. The author goes on to note that some South African scholars feel that the Court has not gone far enough as far as protection of social and economic rights is concerned. The author however, argues that the criticisms are mistaken as one; the court treats socioeconomic rights with the same reverence as it does civil and political. He feels secondly that the minimum core which in effect amounts to the argument that the needy have an immediate right to demand assistance, claims too much. The drafters of the Bill of Rights never intended to create an individual right of demand. Thirdly, critics have pointed out questions that need not have been resolved. Also, he is of the view that Courts should only issue broad rulings when that is what is required. Fifthly, he notes that the fact that the members of the Court may not agree on whether a minimum core is required or what that could be is ignored by critics. He agrees however, that the court’s pragmatic approach has only provided limited guidance to the government for subsequent cases and that it could have been more aggressive in retaining supervisory jurisdiction. The rulings in Grootboom and TAC are major human rights victories which have improved the situation of many. He endorses the view that in the long run, it is the political branches that should be the primary engines of social transformation. Concern is expressed over the government taking the opposite position on socioeconomic rights which it once championed.


In this article, the author evaluates the approach of the South African Constitutional Court in three of its important social and economic rights decisions, namely Soobramoney, Grootboom and TAC, criticisms of the approach, responses to the same as well as sets out some criticisms of the minimum core approach. The author points out that scholars, activists, and the poor have felt disappointed with the Constitution not realising its promise of transforming lives of South Africa’s poor and have criticised all three branches of government in this regard. The judiciary has faced
criticism for failure to hold the other branches sufficiently to account for their failures; missing the opportunity to act as a more effective agent of social change, and not giving a concrete meaning to individual socioeconomic rights in the Constitution which would have helped the executive have a clearer understanding of the constitutional requirements. The author feels, however, that these criticisms are not justified and that the minimum core approach was rightly rejected as it is an inappropriate tool of judicial decision-making. Looking into the concept of minimum core of rights, the author notes that the Committee and scholars are not always clear as to whether their conception of right is an absolute or relative one. The parameters, for instance in General Comment 14 provide benchmarks against which the overarching reasonableness of a national health strategy may be evaluated but not the exact parameters of a minimum core. The author questions how the minimum core advocated by committee and human rights scholars is any less vague than the reasonableness standard. The author feels that the true difficulty about socioeconomic rights is not the inability to define the scope and content of particular rights through judicial interpretation but that state's failure to provide these rights is excused on account of non-availability of resources. She argues that the minimum core standard is flawed and would result in the shift from spending on less urgent social goods to more urgent ones, and help some poor but may do so at the expense of other poor. She feels that if it is disproportionate spending on defence that is hurting the homeless, jobless, adequate water, etc., then it is this that should be challenged and the courts’ refusal to accept such challenges that should be criticised.

3. Statement of the Problem
Socioeconomic rights are of significance for the enjoyment of basic needs, and in the context of high levels of poverty and inequalities persisting in society.

1. In the Indian context, despite the reduction in percentages of poverty, a large proportion of the population continues to live in poverty, deprived of socioeconomic rights, also impacting their enjoyment of civil and political rights.
2. In India, socioeconomic rights have been incorporated as guiding principles in the Constitution in the form of the directive principles of state policy which are not enforceable by courts.

3. Steps have been taken by the government to enact legislation as well as introduce various schemes and programmes towards the realisation of these rights but there are problems with effective implementation.

4. The judiciary has also played a role towards making such rights justiciable both through its interpretation of the relationship between directive principles and fundamental rights as well as by interpreting provisions of the fundamental rights to include the directive principles, in particular article 21, but also equality provisions and article 19.

5. The judicial intervention has, however, not in all circumstances resulted in the actual realisation of these rights for concerned parties with many judgments remaining unimplemented.

6. Moreover, the intervention of the judiciary has given rise to questions on the legitimacy of such intervention and impact on the separation of powers. The selective intervention of the judiciary, which has stepped in on some socioeconomic rights issues but not others is also questioned.

7. On the other hand, South Africa has incorporated justiciable socioeconomic rights in its constitution and has developed a model of enforcement that is deferential but in line with separation of powers concerns, level of economic development, and available resources.

8. The South African model is thus seen as realistic and constructive in light of resource concerns, while in India, where PIL essentially highlights unacceptable standards of welfare and creates pressure on concerned authorities to address the same, the time and resources spent on the process are seen as not well spent.49

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49 Usher, ibid.
4. Scope and Objective
The present study examines the legal status of social and economic rights in India and South Africa with the objective of identifying the approach most suitable to ensuring these rights in the Indian context. As such, the scope of the study includes an assessment of the current status of social and economic rights in India and South Africa and a comparison of the two country-specific approaches to their enforcement. This is done in the background of the concept of justiciability, position and standards with regard to these rights in international and regional human rights systems, and the socioeconomic position and challenges in the two countries.

While the expression “social and economic rights” covers a vast range of rights, this study will not attempt to assess the status or approach to protecting each individual right, but will focus on ensuring effective protection of social and economic rights in general. Specific rights would, however, be referred to by way of example.

5. Research Questions
1. What is the scope and relevance of justiciability?

2. What is the position of socioeconomic rights in international and regional instruments, and what measures thereunder for improved protection, if any, may be adopted at domestic levels?

3. What is the current position of social and economic rights in India and South Africa?

4. How does the status of socioeconomic rights in India, and the approach of the judiciary to their enforcement compare with that in South Africa?

5. Are the current provisions/approach in India sufficient for these rights to be effectively available?

6. What further steps, if any, are required in India for their effective availability?
6. Hypotheses

It is hypothesised that:

1. The South African approach to ESR is more effective than the approach to enforcement of ESR in India.

2. The effectiveness of the Indian approach is largely dependent on the existence of an informed and activist judiciary, and is thus likely to fluctuate.

3. Safeguards may be necessary to ensure a standard approach to ESR issues.

7. Methodology

The study is based on doctrinal research. Primary materials relied on include the Constitutions of India and South Africa and relevant statutes. As concerns statutes, by way of example, legislation in the areas of work and workers’ rights, social security and social assistance, standard of living, and health in the two countries have been looked into. The discussion is not exhaustive but confined to some important enactments in these areas. Further, the ICESCR and other relevant international human rights instruments (for instance, the UDHR, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, etc.) are referred to. Indian and South African case law, and decisions of the CESCR, ECSR, ECtHR, and other human rights bodies have been examined. Additionally, secondary materials including commentaries, scholarly articles, reports, and studies (by individuals and organisations) are relied on.

8. Chapter Scheme

The present study comprises six chapters in addition to this chapter. Chapter II, Concept and Debate, sets out the background to the topic of study examining the definition and components of justiciability; whether enforceability is an essential element of rights; the arguments for and against the justiciability of socioeconomic rights; and the how the status of these rights has evolved over time from marginalisation to being recognised as justiciable rights. The questions considered for
determination of justiciability and facets of justiciability include aspects relevant in the context of justiciability of social and economic rights, and grounds on which opponents term these rights as non-justiciable. It is seen that many objections to the justiciability of these rights are based on differences vis-à-vis civil and political rights, which are not so distinct in practice, and some objections have been addressed by courts.

Chapter III, *International and Regional Legal Regime*, studies the justiciability issue in the international and regional human rights context. After providing a brief overview, it examines in more detail, the protection of socioeconomic rights under the ICESCR, and the ESC and European Convention on Human Rights (ECHR) in the regional context. The ESC is one of the first international instruments on socioeconomic rights and introduced a collective complaints mechanism in 1995, while the ECtHR has interpreted the ECHR to recognise the interrelationship of all human rights giving effect to certain socioeconomic rights through its interpretation of the civil and political rights in the convention, an approach comparable to that of the Indian Supreme Court.

Chapters IV–VI focus on the protection of socioeconomic rights in India and South Africa, considering the position of these rights and the steps taken by various organs of the state, namely, the legislature, government, and judiciary towards the protection of these rights. Chapter IV, *Justiciability of Social and Economic Rights in India*, examines the situation in India, looking into the socioeconomic position and challenges in the country, as well as the legal status of socioeconomic rights under the Constitution and legislative provisions. These rights are not justiciable under the Constitution but a number of statutes have been enacted giving effect to various facets. Further a brief overview of schemes and programmes of the government towards the realisation of these rights is also provided. This is followed by a review of the approach adopted by the judiciary which has given effect to these rights through interpretation of the fundamental rights, making them justiciable in effect.
Chapter V, *Justiciability of Social and Economic Rights in South Africa*, makes a similar study of South Africa considering the protection of these rights by the legislature and government, besides the approach adopted by the judiciary in its interpretation of constitutional provisions on socioeconomic rights. The judiciary has adopted the "reasonableness review" approach to assess social and economic rights cases, which is in line with the separation of powers showing due deference to the competence of other branches and also takes in account financial constraints.

Chapter VI, *Justiciability of Social and Economic Rights in India and South Africa: A Comparison*, makes a specific comparison of the status of these rights in the two countries and standards of protection and review. The chapter finds that there are comparable aspects in the social and economic situations in the two countries, with similar challenges faced, though there are also challenges specific to each country. It also finds that despite the difference in formal justiciability of the rights in the two countries, and approaches taken by their judiciaries, there are various similarities between them.

The concluding chapter highlights findings on each of the research questions, and examines whether social and economic rights can be said to have become justiciable.