CHAPTER II: CONCEPT AND DEBATE

1. Introduction

The justiciability of social and economic rights is a much debated issue, one with regard to which differences arose even before the Universal Declaration of Human Rights (UDHR) was adopted. Critics have sought to demonstrate that these rights are different in nature from civil and political rights, and the judiciary lacks the legitimacy and institutional competence to enforce them, making them non-justiciable. On the other hand, proponents contend not only that these differences on account of the nature of the two sets of rights may not be as pronounced as supposed, but also that the interdependence and indivisibility of all human rights makes it impossible to effectively protect one set of human rights without extending similar protection to the other. Justiciability as understood in terms of judicial enforceability is important from the perspective of rights-holders as this provides a forum for claiming their rights, and redress for violations. The debates on the justiciability of social and economic rights can be said to have lost some of their relevance in the light of these rights having become justiciable (in the common understanding of the term) in the international and some domestic human rights systems, as well as to varied extents in regional systems, as will be discussed in Chapter III. However, they do identify various issues which may need to be addressed by any system that provides remedies for these rights so as to be effective, and enforceable and acceptable in practice. In this light, it is helpful to be aware of these debates and the specific arguments raised in them, both by those opposed to recognising these rights as justiciable and those in support. However, before going into the debates on justiciability, it is also important to understand what the term signifies, and what questions and aspects are looked into to determine whether an issue is or is not justiciable.

The present chapter focuses on the expression justiciability, examining its meaning, and thereafter, justiciability in the specific context of socioeconomic rights. The second section looks
into the concept and definition of justiciability, considering its common and alternative meanings. The determination of whether an issue is justiciable, even in the commonly understood sense of adjudication by courts is not a straightforward concept in practice, and involves consideration of many questions and components, ranging from the subject matter, to the appropriate authority for determination of an issue, to the person or entity bringing the action (standing). The next section considers whether enforceability or justiciability (in terms of adjudication by courts) is an essential component of a "right", with many arguing, that this would be a very narrow view of the concept and would exclude many "rights" in the modern context from the definition. Section four considers more specifically justiciability in the context of social and economic rights. Numerous arguments have been raised by commentators as to why social and economic rights cannot be seen or treated as justiciable. These include for instance, vagueness, their nature as "positive" rights as opposed to the "negative" civil and political rights, inadequacy of the judiciary as an institution to enforce these rights, enforcement of these rights being contrary to the separation of powers, and the high costs involved, among others. Some of these relate to the definition and facets of justiciability. The section considers these and other issues, as well as arguments in favour of the justiciability of these rights such as, the interdependence and indivisibility of all human rights, which calls for all human rights to be enforceable. The fifth section, starting with the adoption of the UDHR, discusses the trajectory of economic and social rights over the years. These rights have been marginalised for long but their importance has once again been realised, with various developments strengthening their protection. However, some new challenges have also been thrown up in a globalised world. The concluding section highlights the main findings of the chapter.
2. Justiciability: Definition and Concept

Justiciability of an issue is commonly understood as implying that the issue is liable to be tried or considered by a court. It is in this sense that many dictionaries have defined the term. Many commentators too have understood "justiciability" in these terms. For instance, Summers for whom justiciability means "peculiarly suited to judicial solution", and Scott and Macklem, who writing in the context of social and economic rights, define the term as "the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfil a person's right". Scott and Macklem's definition incorporates the "respect–protect–fulfil" typology, in accordance with which international and regional human rights bodies have elaborated on the obligations of state parties on socioeconomic rights. For the purpose of the present study, it is in this sense that the term will be understood. However, the concept of justiciability is not restricted to this question but has also been defined in other terms, and interpreted as including various elements. It would be useful to discuss these meanings as well as some of the principles referred to as "justiciability rules" in the American context as many of these are the grounds on which objections to the justiciability of socioeconomic rights have been raised.

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2 Robert S. Summers, "Justiciability", 26 Modern Law Review 530, 530 (1963). However, for him, discussion of whether some disputes are or are not suitable to judicial solution would be pointless unless settlement by courts is in some way unique. Id. at 531.

3 Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" 14(1) University of Pennsylvania Law Review, 17 (1992). Some other commentators too have either defined or taken note of the definition of justiciability in these terms. Dennis and Stewart, for instance, define it as "subject to the possibility of formal third party adjudication, with remedies for findings of non-compliance". Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?", 98 American Journal of International Law 462, 463 (2004). Woods, writing on socioeconomic rights, also refers to the element of remedies and confines her definition to constitutional rights, observing that "[j]usticiability refers to the ability of a court to adjudicate a dispute and order remedies for constitutional violations". Jeanne M. Woods, "Justiciable Social Rights as a Critique of the Liberal Paradigm" 38 Texas International Law Journal 763, fn19 (2003). In A.K. Kaul v. Union of India, AIR 1995 SC 1403 (Bench Strength: 2), it was observed that "[j]usticiability relates to a particular field falling within the purview of the power of judicial review" (¶12).
Some dictionary meanings as well as those given by commentators, for instance, are centred on the basis of the decision rather than the deciding authority. For instance, the Merriam Webster Dictionary defines it as "capable of being decided by legal principles or by a court of justice", while according to the Concise Oxford Dictionary, it means "liable to legal consideration". Bendor's understanding is somewhat similar. He writes, "justiciability deals with the boundaries of law and adjudication", with its concern being "the question of which issues are susceptible to being the subject of legal norms or of adjudication by a court of law". This second meaning set out by the Merriam Webster dictionary as well as Bendor's observations seem to suggest that where an issue is capable of decision on legal principles or legal norms, it would be justiciable, whether or not by a court of law. These definitions can thus be interpreted to include consideration by authorities other than courts so long as it is on legal principles or norms. This view appears to also be supported by Summers, who in his critique of Marshall's essay on justiciability notes that one of the principal functions of a legal system is providing methods for the resolution of disputes; and this in the case of Anglo-American legal systems can be done by not only courts but also legislatures, administrative tribunals, ministers, and local government units.

A similar interpretation has been given to the expression "enforceability", arguing that it need not necessarily be associated with enforceability by courts alone but could include other authorities. Jheelan observes that while "legal enforcement" is commonly understood to mean enforcement through courts, it does not have to be so restricted and could include action by other institutions vested with the power to enforce them; he, however, distinguishes the term from "justiciability" which in his understanding is confined to judicial enforcement.

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4 See Merriam Webster Dictionary, supra note 1.
7 Summers, supra note 2 at 530.
In this interpretation of the term “enforceable”, any bar on consideration by the judiciary would not make the right in question “unenforceable” if other branches of state could enforce the same. On this understanding, the directive principles, for instance, could be said to be enforceable as the state is under an obligation to “apply these principles in making laws”. They cannot, however, be said to be “justiciable” in the commonly understood sense and perhaps also not so in the second sense, as the constitutional provisions speak of application of the principles but not remedies. The position of the directive principles could, perhaps, be better explained with reference to the notion of “constitutional commitment” and the political question doctrine discussed below, whereby the implementation of the principles is the responsibility of a different branch of the state.

A third definition of the term is concerned with the result of the adjudication process rather than the question of whether an issue can be adjudicated upon. For Dennis and Stewart, “a more substantive approach to justiciability looks to the nature of rights and obligations in question and whether complaints about their violation are susceptible to a rational and meaningful resolution by a duly empowered decision-maker” or in other words, not whether the matter can be adjudicated but whether such adjudication will generate a practical, meaningful solution, one that parties could respect and implement.\(^9\)

Bendor goes on to distinguish two meanings of the term—“normative justiciability”, which involves the consideration of “whether there exists a legal answer for every legal question” and “institutional justiciability”, which considers whether the court or the legislature or executive is the appropriate authority to determine a legal question.\(^10\) There may be questions that are normatively justiciable but whose institutional justiciability is limited by doctrines such as the political question doctrine and likewise, those that may be institutionally justiciable though not normatively so.

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9 Dennis and Stewart, supra note 3 at 474–75.
10 Bendor, supra note 6 at 315–16.
though in the latter it will be narrower than that of those with full normative justiciability.¹¹ Institutional justiciability becomes relevant from the perspective of social and economic rights as it is concerned with the question of the appropriateness of the court as an institution to resolve certain questions. This may further involve looking into whether it is appropriate for the court to adjudicate the subject matter of the dispute, and whether it is appropriate for the court to "rule on the legality of actions taken by the body against whom the petition has been brought", or its "material" and "organic" aspects, respectively, as Bendor terms them.¹² Normative justiciability can be seen as touching on the issue incorporated in the second meaning of justiciability discussed above.

With regard to what is termed by Bendor as institutional justiciability, in the context of social rights, Scott and Macklem identify two dimensions of justiciability relevant in arguments against their inclusion in a bill of rights, one the legitimacy dimension,¹³ and two, institutional competence referring to the competence of the judiciary to adjudicate matters involving such rights, that is, whether a matter is capable of being made the subject of judicial review.¹⁴ The argument on institutional capacity is discussed in more detail later. Both dimensions as Scott and Macklem note, interact with each other “to create a powerful web of resistance to the proposition that social rights ought to be included in the judicial constitutional discourse”.¹⁵

While many, as discussed have defined and attempted to define justiciability in terms of the deciding authority, basis of decision, and even result, some have questioned whether the term has a specific definition, and even whether it exists at all. Klein finds the definition of justiciability, that

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¹¹ Id. at 377.
¹² Id. at 338.
¹³ The legitimacy dimension involves questioning whether it would be legitimate to confer constitutional status on these rights due to their nature and character; it can be "refined by reference to a distinction between 'conservative' and 'progressive' visions of social justice", the former viewing constitutionalisation as illegitimate as it entails redistribution of wealth and state intervention in market economies, while the latter may have concerns about the legitimacy of empowering the judiciary to overrule popular will expressed through legislatures. Scott and Macklem, supra note 3 at 21–22.
¹⁴ Id. at 20–21, 23.
¹⁵ Id. at 23.
is, “a question is justiciable when it is apt for judicial solution”, to be circular. Scott and Macklem also find the term deceptive, as contrary to its implications, it is variable with context and its content; it is contingent and fluid depending on assumptions about the role of the judiciary at a given place and time, and its changing character and evolving capability. McCormack, on the other hand, contends that “there is no such thing as justiciability”, and when it is said a case is not justiciable, it implies the person approaching the court has no legal right, which in turn involves the interpretation and application of law. For him, like other decisions of courts, it is “a label that expresses a decision on the conflicting interests of the parties and the constraints that operate on each”. He argues that in every case, the court decides an important constitutional issue “but pretends that ‘it has not heard the case’” but even the decision that a matter falls within the responsibility of another branch, involves exercise of judicial review. Even a refusal to decide, amounts to a denial of relief as in the case of denial on merits, though in the former, the right is seen as existing, though unenforceable. The United States Supreme Court in its decision in Flast v. Cohen too, acknowledged the uncertainty of both the meaning and scope of justiciability, and viewed it as “a term of art employed to give expression” to a “dual limitation placed on courts” requiring one, that the business of courts be limited to “questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process” and two, that they “not intrude into areas committed to the other branches of government”. These are comparable to the elements mentioned by Bendor, particularly the meaning he attributes to institutional justiciability, and touch upon both the capability of a dispute being resolved by a court and the principle of separation of powers. The principle of separation of powers, as will be

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17 Scott and Macklem, supra note 3 at 17; also quoted in Klein, id. at 359.
19 Id. at 596.
20 Id. at 633–34.
21 Id. at 597.
22 392 US 83 (1968).
discussed later, is one of the grounds on which the justiciability of socioeconomic rights is objected to. Additionally, the first element identified by the court of the issue being “in a form historically viewed as capable of resolution through the judicial process”, affirms that custom or tradition has a role in determining whether an issue is viewed as justiciable. However, it may be stated that just because an issue has not been historically resolved by the judiciary is not of itself an argument to exclude the issue from the ambit of justiciability. Moreover, the requirement of the existence of an “adversarial” dispute as a precondition to justiciability (which can be said to be a traditional view) may no longer be true, when we consider, for instance, public interest litigation (PIL) which is viewed as not being an adversarial but rather an inquisitorial process, and resolution in which whose resolution is cooperative.

In the context of the capability of a dispute to be resolved through the judicial process, some argue that it is difficult to identify any set of criteria to measure whether a process is judicial.\(^{23}\) There are, however, some general criteria such as impartiality of the tribunal, adversarial analysis of the dispute, etc. equally applicable to administrative tribunals, but for Summers the “distinctiveness” of court settlement may not be restricted to “procedure or ‘method’”.\(^{24}\) Some benefits and characteristics of judicial settlement may include freedom from “‘short run’ political pressures”; “valuable ‘legal proficiencies’” of judicial officers, for instance, interpreting and applying complex statutes; and the elaborate system of procedures and rules of the judicial system.\(^{25}\) Some disputes are observed to be “inherently justiciable” or more suited to settlement in court than by other modes such as legislative or ministerial action.\(^{26}\)

From a practical standpoint and simplistic view of the actual process of adjudication of cases, justiciability is seen as the first stage of a suit or proceeding wherein a court will determine

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\(^{23}\) Summers, supra note 2 at 531 [quoting Marshall who argues that it is not possible to construct from judicial materials, a “single set of reasonably unambiguous criteria for calling a procedure ‘judicial’”]; Klein, supra note 16 at 559.

\(^{24}\) Summers, supra note 2 at 531–32. This of itself, for Summers, does not make judicial methods so imprecise as to make the discussion of the suitability of some disputes to court solution futile. Ibid.

\(^{25}\) Id. at 533.

\(^{26}\) Id. at 532–33.
whether or not a dispute is justiciable before ruling on merits.\textsuperscript{27} In the adjudication process, justiciability is analysed by Galloway as involving consideration of the "what" (actual case: that is, dispute between parties and justiciable issue); the "when" (ripeness, mootness, and necessity) and the "who" (standing).\textsuperscript{28}

Various justiciability doctrines, mostly developed by courts themselves are applied to determine justiciability and the provisions of some constitutions too, specify what rights can be enforced judicially.\textsuperscript{29} For instance, a relevant aspect of justiciability in the context of the present discussion is that the issue (the "what" aspect in Galloway’s analysis) must not involve what is referred to in the American context as a political question or be subject to extra-judicial review.\textsuperscript{30} Such issues are not justiciable on account of involving such a question or being amenable to review by other agencies.

According to the “political question doctrine”, some issues including legal issues are “political”, whose resolution is within the ambit of the legislative or executive branches of the government and “external to the judiciary”, such as those of foreign policy and national security.\textsuperscript{31} The term “political” in this regard refers not to politics as generally understood but to a collection of rules set out by Justice Brennan in Baker v. Carr,\textsuperscript{32} namely constitutional commitment of the issue to another branch of government,\textsuperscript{33} that the issue cannot be resolved by judicially manageable standards or on the basis of data available to the court, and that the political questions notion is essentially one of judicial discretion, prudential judgments that some issues

\begin{footnotesize}
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\item Klein, supra note 16 at 360.
\item Galloway, supra note 28 at 914.
\item Bendor, supra note 6 at 313, 328. It has also been noted that courts may also “duck” political issues which are seen as likely to harm the judiciary. Galloway, supra note 28 at 916–17.
\item 369 US 186 (1962).
\item However, in considering whether there are any questions not suitable to determination by courts despite no explicit prohibition by the Constitution, Bendor points out that even the political question doctrine and its practical application by the courts provides no clear cut answers. Bendor, supra note 6 at 376.
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ought not to be decided by courts on account of being too controversial or non-enforceable among others.\textsuperscript{34}

These aspects of the political question doctrine include issues on which objections to the justiciability of socioeconomic rights are raised, specifically that of applicability of judicially manageable standards and availability of data.\textsuperscript{35} As will be discussed in the fourth section of this chapter, as far as availability of information or evidence is concerned, the Indian judiciary has adopted some innovative steps such as the appointment of fact-finding commissions or reference to reports of expert committees in this regard, which may help overcome this objection. Issues that are subject to extra-judicial review/reversal would be seen as not justiciable.\textsuperscript{36} This is relevant in the Indian context, as the directive principles of state policy incorporating most socioeconomic rights can be said to be “constitutionally committed” to the other branches.

Related to political questions, the reasonableness of certain political actions such as the weight given by the government to reasonable considerations is also an issue not seen as justiciable but Bendor argues that while this view may contain some truth, reasonableness requirements are found in a number of areas of substantive law, and lack of “expertise” in a given field is insufficient by itself to make “reasonableness” non-justiciable.\textsuperscript{37} In administrative law, (where reasonableness provides a basis for judicial examination\textsuperscript{38}) it may involve the consideration

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\textsuperscript{34} Galloway, supra note 28 at 914–15. In A.K. Kaul v. Union of India, supra note 3, it was observed that “during the course of exercise of the power of judicial review it may be found that there are certain aspects of the exercise of that power which are not susceptible to judicial process on account of want of judicially manageable standards and are, therefore, not justiciable” (¶12).

\textsuperscript{35} As to the availability of data, the view is that if the evidentiary procedures available to the court do not “provide sufficient information to permit sound judgment on the issue”, it may not be suitable for determination by the judiciary. Galloway, supra note 28 at 916. Summers too observes that issues that may lead to social change which the court is to decide only on facts presented by parties raise questions as to judicial capacity. Summers, supra note 2 at 536.

\textsuperscript{36} Galloway, \textit{id.} at 917.

\textsuperscript{37} Bendor, \textit{supra} note 6 at 330.

\textsuperscript{38} \textit{id.} at 330.
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of all relevant factors and no non-relevant ones, and courts would refrain from overturning administrative decisions unless there are meaningful standards on which they can rely.\textsuperscript{39}

Another category of issues seen as not "justiciable" are matters of policy. For Marshall, questions that "turn on issues of policy", are "non-justiciable" as some policies "cannot be 'set out in a sufficiently detailed objective way'" and "some decisions 'are best controlled by elected persons'; and 'some rights are best protected by a predominantly political process rather than a predominantly judicial one'".\textsuperscript{40} This argument once again touches upon the doctrine of separation of powers, and the justiciability of socioeconomic rights as these are seen as issues best addressed by democratic institutions such as the legislature.

Other issues not suitable to judicial determination may be those that require experimentation,\textsuperscript{41} those requiring judicial supervision for the complete solution of a problem (such as desegregation of schools), decisions involving highly controversial or disruptive social issues, those that may overwork the judiciary, or whose important consequences may be unforeseeable, besides those requiring technical expertise, among others;\textsuperscript{42} these include issues termed by Summers as "factors of non-justiciability".\textsuperscript{43} The need for follow up action and polycentricity identified by Summers are also issues on which objections to the justiciability of socioeconomic rights are raised. The example of supervision (as was the case of availability of information discussed above) is particularly relevant in the context of social and economic rights, and as in the former case, the monitoring of implementation through commissions and "continuing mandamus" may be seen as overcoming these objections.

As mentioned above, one of the justiciability factors set out in \emph{Flast v. Cohen}, was of the dispute being historically considered justiciable. Custom and tradition have been argued to play a

\textsuperscript{39} Id. at 358–59. For instance, in \textit{Sachidananda Pandey v. State of West Bengal}, AIR 1987 SC 1109, the court observed that it would consider whether relevant factors have been taken into account and irrelevant ones excluded but not the process of "balancing" of relevant factors by the government.
\textsuperscript{40} Summers, \textit{supra} note 2 at 535.
\textsuperscript{41} Id. at 536.
\textsuperscript{42} Id. at 536–37.
\textsuperscript{43} Id. at 538.
role in determining whether a dispute is justiciable, with the result that while questions such as
those of criminal justice, traditionally considered to be within the province of courts, are seen as
justiciable, as Bendor writes, less commonly presented ones such as denial of a respirator to a child
in a coma suffering an incurable illness are not; instead these are “political” within the ambit of
other authorities.44 However, as he further argues, this dichotomy between “political” and “legal”
is “without foundation”, and “based on a view that regards them as if they were two distinct and
self-exclusive categories”; a view equally applicable to the common classification of questions such
as foreign policy, microeconomics, and national security among others as political questions.45 But
issues can equally have a legal and political aspect, each not negating the other.46

Custom or the traditional view of disputes as justiciable or non-justiciable is, however, only
one factor in this regard. There may be as Summers concludes numerous conflicting factors
involved in the decision of whether a dispute is or is not justiciable, requiring a balancing process
which would not be infallible.47 Moreover, in view of the “fluid” nature of the concept, it is variable
in accordance with context, time, and assumptions on the role of the judiciary (which themselves
may be questioned) as well as is seen as having a changing character and evolving capacity.48 Thus,
as Nolan, Porter, and Langford observe, “[o]ur understanding of the role of courts must evolve with
our changing understanding of fundamental rights and respond to new challenges and problems in
relation to accountable governance and human rights”.49

On the question of the authority that determines justiciability, for Marshall, justiciability
must be determined by the legislature, a view that appears to be supported by Goldstone.50

44 Bendor, supra note 6 at 332–33.
45 Id. at 333.
46 Id. at 334.
47 Summers, supra note 2 at 538.
48 Scott and Macklem, supra note 3 at 17; Aoife Nolan, Bruce Porter, and Malcolm Langford, “The Justiciability of
15, NYU School of Law 3 (2007).
49 Nolan, Porter, and Langford, ibid.
50 Summers, supra note 2 at 538; Richard J. Goldstone, “A South African Perspective on Social and Economic Rights”
13(2) Human Rights Brief 4 (2006). Goldstone writes in the context of socioeconomic rights that while it is a political
question whether a constitution must include or not these rights, the interpretation and enforcement is judicial.
Justiciability or judicial enforcement is key for right-holders as this is an important avenue for obtaining redress when a right has been violated or remains unenforced. Non-justiciability of rights would imply for holders that there is no avenue for them to seek a hearing or remedy when there is a violation, or that the government cannot be held accountable, nor would “rights enforcement” “take any shape”, in the absence of “case-law” and domestic enforcement.

However, the absence of justiciability does not deprive the rights of value. As Young argues in the context of socioeconomic rights specifically, even in the absence of judicial enforcement, these rights remain meaningful and can exert pressure in the form of directive principles, guide statutory interpretation, executive policy-making, and other legal actions or actors, with institutions other than courts such as legislatures, agencies, and independent commissions becoming important. The “decentring of courts” she feels “also opens the scene of action” to other actors including private and informal actors such as non-governmental organisations and social movements, besides market actors.

3. Is Enforceability an Essential Component of Rights?
Despite their recognition by international instruments as human rights, socioeconomic rights are seen by many to be non-justiciable and inferior to civil and political rights, some even to the extent of viewing them as aspirations rather than rights, particularly on the ground that they are not capable of being enforced. While to an extent this objection no longer has much weight as far as international human rights law is concerned, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) having now a communications procedure, it is still useful to consider the question of whether enforceability is an essential component of a right or rights.

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52 Nolan, Porter, and Langford, supra note 48 at 3.
55 Ibid.
For some, such as Kelsen, this is the case, and the power bestowed on an individual to bring an action against the non-fulfilment of an obligation is an essential element.\textsuperscript{56} Alston and Quinn note that even where the argument is not taken as far as Kelsen's, it is frequently argued that to be a human right, a claim must be enforceable\textsuperscript{57}

Tripathi argues that the question of whether enforceability is or is not an essential element of a legal right depends on how "law" is defined; if law is viewed in terms of its enforceability by courts, "right" would have to essentially include enforceability.\textsuperscript{58} In his view, however, enforceability being the essence of law is a narrow view of the term and if followed, in modern times, would exclude a considerable body of rules from the law.\textsuperscript{59} This narrow view of rights not judicially enforceable not being "rights", is seen as one "largely restricted to the United States" and, as Young writes, a "position wholly foreign to the aspirational documents of many other constitutional systems".\textsuperscript{60} She notes however, that the "past fifty years" have seen an increasing trend towards the judicial enforceability of rights, with a consequent increase in judicial power relative to other branches.\textsuperscript{61}

The broader view of law is also taken under the German and French systems where it is not only justiciable or court-enforceable rules that are relevant. As pointed out, "[f]or a French or for a German lawyer, the law has become something similar to dharma for a Hindu"; it "comprises all rules which aim at the organisation and smooth running of society and not only these, amongst

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\textsuperscript{56} Hans Kelsen, \textit{The Pure Theory of Law} 133-34 (Max Knight trans., University of California Press, Berkeley, 1978). He writes: "For the essential element is the legal power bestowed upon the latter by the legal order, to bring about by a law suit, the execution of a sanction as a reaction against the non-fulfilment of the obligation". Also: "That an individual is obligated to behave in a certain way means that in case of the opposite behaviour, a sanction ought to take place; his obligation is the norm that commands the behaviour, by attaching a sanction to the opposite behaviour. If an individual is obligated to render a performance to another, then the performance to be received by the other constitutes the content of the obligation;...". \textit{Id.} at 127. Also cited in Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", \textit{9 Human Rights Quarterly} 156, 169 (1987).
\textsuperscript{57} Alston and Quinn, \textit{ibid}.
\textsuperscript{60} Young, \textit{supra} note 54 at 12.
\textsuperscript{61} \textit{ibid}.
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such rules, those that may be invoked before a court or enforced by the courts.”62 In other words, both rules invoked before courts and those that cannot be so invoked are seen as law, and therefore enforceability by courts or justiciability, is not an essential element of these rights.

In this context, the classification of rights as perfect and imperfect rights may be discussed as the latter category is recognised as being a “right”, though not enforceable, while the former imposes “correlative duties” and can be judicially enforced.63 A common instance of the latter is a claim barred by limitation, which is valid in other respects but cannot be enforced and is an exception to the rule of ubi jus ibi remedium.64

In the context of international human rights law and the specific case of socioeconomic rights too, justiciability is not seen as an indispensable element as observed in the discourse and practice.65 In fact, the preparatory work for the ICESCR showed that judicial remedies were not seen as an indispensable element for the obligation under article 2(1).66

This view, as is the case with alternative meanings of justiciability and enforceability as not restricted to judicial enforceability, shows that rights can be enforced by “a number of institutional

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63 Tripathi, *supra* note 58 at 245.
64 *Ibid*.
66 For Saul, Kinley, and Mowbray, in the context of socioeconomic rights, as demonstrated by discourse and practice, “judicial enforceability is not the litmus test of what is truly ‘law’ in this field of rights”. Ben Saul, David Kinley, and Jacqueline Mowbray, “Introduction”, in Ben Saul, David Kinley, and Jacqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, Materials* (Oxford University Press, Oxford, 2014). Dennis and Stewart who wrote opposing an international adjudicatory mechanism on socioeconomic and cultural rights (prior to its adoption), however, support the view that these rights are rights, justiciability not being an indispensable element or defining characteristic of a human right. Dennis and Stewart, *supra* note 3 at 514.
67 Leckie (writing in the context of socioeconomic rights) in fact argues that non-availability of remedies does not imply the non-justiciable nature of a given norm, the failure to provide remedies being the result of an incomplete view of human rights. Scott Leckie, “Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights”, 20(1) *Human Rights Quarterly* 81, 118–19 (1998).
68 Alston and Quinn, *supra* note 56 at 170.
mechanisms” including “by a mobilized civil society”; a nation’s constitutional culture, perhaps reinforced by court decisions, “can give particular rights, a ‘feeling’ of strength or weakness”.

A similar line of arguments and counter-arguments is seen with regard to the requirement of institutionalisation, it being asserted in the context of socioeconomic rights that without institutionalisation, there is no right; the relevant instruments must show what connects the right-holder to the obligation-bearer. Prof. Amartya Sen, however, points out that obligations can be both perfect and imperfect, for civil and political rights, as well as for economic, social, and cultural rights and while Institutions are important for the realisation of the latter, “the ethical significance of these rights provides good grounds for seeking realization through their work in pressing for, or contributing to, changes in institutions as well as social attitudes”, through for instance, agitation for new legislation. He emphasises that “[t]o deny the ethical status of these claims would be to ignore the reasoning that fires these constructive activities, including working for institutional changes of the kind that O’Neill would like...to have for the realization of what the activists see as human rights”.

Imperfect rights and international human rights continue to be viewed and treated as rights irrespective of justiciability of institutionalisation. As argued by various commentators discussed in this and previous sections, judicial enforceability is not an essential element of rights, the ethical claims of which cannot be denied.

From this perspective, the directive principles which contain many of the socioeconomic rights can be viewed as rights, as they are recognised by the Constitution even though stated to be not enforceable by courts. They can, as noted even be seen as “enforceable” in the wider understanding of the expression as they are intended to be implemented by the state even if not

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69 Sen, *id.* at 383.
70 *ibid.*
by courts. Moreover, rights are seen as requiring corresponding duties, which in the case of the directive principles can be said to have been defined. It can be said that in the international human rights context, this discussion can be said to have lost some of its relevance somewhat with the introduction of a complaints mechanism under the ICESCR, making socioeconomic rights “justiciable”. Similarly, in the Indian context, the discussion may be of limited relevance as, one, statutes on many socioeconomic rights have been enacted by the legislature, many of which provide for judicial or other remedies, and two, in a practical sense, courts have read many of the socioeconomic rights in the directive principles into the provisions of the justiciable fundamental rights, particularly the right to life, making them effectively justiciable.


Socioeconomic rights have been argued by many to be non-justiciable, not to be enforced by courts but to be left to the other organs of the state to achieve in accordance with resource and other considerations. They are seen as being of a different nature to the “negative” civil and political rights which merely call for government non-interference for their realisation, although this is not the case as both categories of rights have negative and positive elements and require resources as will be discussed further in this section. Woods, in fact, finds that the perceived dilemma of non-justiciability of these rights is traceable to the classic view of rights as individualistic, adversarial, and negative, and therefore susceptible to a private judicial remedy.\(^\text{71}\)

When considering the issue of justiciability or non-justiciability of these rights, it is also important to note as Nolan, Porter, and Langford point out, that by denying protection to economic and social rights, it is not merely one category of rights that is being excluded from protection, as civil and political rights have economic and social rights aspects and vice versa, and thus a critical dimension of all human rights would be excluded, with implications for the extent to

\(^{71}\text{Woods, supra note 3 at 766.}\)
which civil and political rights will be protected, particularly for disadvantaged groups.\textsuperscript{72} The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 9 has also viewed the "rigid classification" of socioeconomic and cultural rights, putting them beyond the realm of court-settlement as "arbitrary and incompatible with the principle" of the indivisibility and interdependence of the two sets of rights.\textsuperscript{73}

The "normative premise" that "a just society should respect and sustain the human dignity of every member" is seen as the "dominant thread of justification" for these rights.\textsuperscript{74} However, irrespective of justifications (political or moral) for these rights, they must be viewed as a matter of consensus,\textsuperscript{75} a shared articulation of justice and common good making judicial review less problematic.\textsuperscript{76}

A number of arguments have been raised against the "justiciability" of social and economic rights. These range, as mentioned, from their supposed vagueness and complexity, to their enforcement being seen as involving high costs and being beyond the legitimate role of the judiciary in a democracy,\textsuperscript{77} to others such as polycentricity. Nolan, Porter, and Langford find that these arguments broadly flow from three assumptions relating to, the nature of economic and social rights including vis-à-vis civil and political rights, the legitimacy of the consideration/adjudication of these rights by courts, and lack of institutional capacity of the courts

\begin{itemize}
\item \textsuperscript{72} Nolan, Porter, and Langford, \textit{supra} note 48 at 5.
\item \textsuperscript{74} Tara Usher, "Adjudication of Socio-economic Rights: One Size Does Not Fit All", 1(1) \textit{UCL Human Rights Review} 154, 156 (2008). Fabre puts forth another argument in this regard. Emphasising on autonomy as an "essential characteristic of all human beings", she contends that in view of the importance of autonomy for human beings, rights that protect it become especially important and these include not only civil and political rights but also social rights. Cécile Fabre, "Constitutionalising Social Rights", 6(3) \textit{The Journal of Political Philosophy} 263, 264–65 (1998).
\item \textsuperscript{75} \textit{Ibid}.
\item \textsuperscript{77} Klein, \textit{supra} note 16 at 353.
\end{itemize}
to adjudicate and enforce these rights,\textsuperscript{78} many arguments under and across these categories being interlinked and not separate. Differences between the two sets of rights on their nature, for instance, are sought to be drawn on account of the rights being positive/negative; vague/relatively precise; resource-intensive/cost-free, and deeply ideological/non-ideological, respectively.\textsuperscript{79} Many of these "supposed fault lines", particularly relating to the negative/positive and justiciable/non-justiciable argument have been observed to be overly "simplistic and deterministic".\textsuperscript{80} Many have shown that civil and political rights too can have cost implications, require interpretation of the constitution, as well as require the government to take positive action.\textsuperscript{81} An examination of these arguments has been likened by Trispiotis to "opening Pandora's Box" on account of the pluralism it involves.\textsuperscript{82} At the same time, he argues that these are just "political constraints and ideologies...unsuccessfully camouflaged under theoretical and complex legal arguments", a disguise which collapses when "we take into account the role and character of human rights norms" and the cautious stance the courts have been applying for these rights; which calls for "brave substantive political will".\textsuperscript{83} The discussion below examines these arguments as well as arguments raised by those who support the justiciability of socioeconomic rights, on account, inter alia, of the interdependence and indivisibility of all human rights.

It may be mentioned here that there remains a mixed view as to whether the debate about the justicability of economic and social rights stands resolved or remains an open question. Some do contend that this debate has been resolved in view of more than ample evidence to suggest

\textsuperscript{78} Nolan, Porter, and Langford, \textit{supra} note 48 at 6. Scott and Macklem, on the other hand, classify these arguments into two dimensions—legitimacy covering the nature and character of social rights and the question of whether it would be legitimate to include these rights as constitutional guarantees; and institutional competence which deals with the nature and character of the judiciary and its institutional competence or capacity to adjudicate on these rights. The former is further classified into a conservative vision which sees any constitutionalisation of social rights as illegitimate, and a progressive vision which may not question the legitimacy of the values underpinning social rights but may still have concerns on empowering the judiciary in this regard. Scott and Macklem, \textit{supra} note 2 at 21–22.

\textsuperscript{79} Alston and Quinn, \textit{supra} note 56 at 159–60.

\textsuperscript{80} Saul, Kinley, and Mowbray, \textit{supra} note 65.

\textsuperscript{81} Klein, \textit{supra} note 16 at 361; Saul, Kinley, and Mowbray, \textit{id}.

\textsuperscript{82} Ilias Trispiotis, "Socio-economic Rights: Legally Enforceable or Just Aspirational?", 8 Opticon1826 1 (2010).

\textsuperscript{83} \textit{id}. at 8.
that they are judicially enforceable, as well as vis-à-vis arguments as to the institutional capacity and democratic legitimacy of courts adjudicating these rights.\textsuperscript{84} Others, however, have argued that both the debate on the similarities and differences between the two kinds of rights, as well as the relegation of economic and social rights to a secondary position still persist,\textsuperscript{85} and that the justiciability issue remains unresolved.\textsuperscript{86}

\textit{Nature of Socioeconomic Rights}

\textbf{(a) Vagueness/Lack of Conceptual Clarity}

One criticism levelled at social and economic rights, particularly, as set out in international instruments is their vagueness or lack of clarity on the concepts incorporated therein, which according to critics makes them unenforceable. Neier writes that when a constitution provides a certain amount of legislative specificity, using the judicial mechanism to enforce one's rights is certainly appropriate but broad assertions such as “right to shelter or housing” or “right to education” appearing in the UDHR or the South African Constitution take us “into territory that is unmanageable through the judicial process and intrud[e] fundamentally into an area in which the democratic process ought to prevail”.\textsuperscript{87} For him, while civil and political rights have to mean exactly the same thing in every place, social and economic rights are inevitably going to be applied differently in different places, with the issue of resource allocation coming into play.\textsuperscript{88} The issue of how judicial enforcement or absence thereof of these rights impacts the democratic process, gives rise to what Klein terms the ”SER enforcement paradox”, that is of democratic participation being

\begin{footnotesize}
\textsuperscript{87} Aryeh Neier, “Social and Economic Rights: A Critique” 13(2) \textit{Human Rights Brief} 1 (2006). It may be relevant to note here as Scott and Macklem point out that constitutional guarantees are by nature vague and indeterminate. Scott and Macklem, \textit{supra} note 3 at 136.
\textsuperscript{88} Neier, \textit{id.} at 2. The allegations of vagueness and imprecision are linked to the “positive rights” argument as these rights are thought to be imprecise on account, for instance, of not being liable to immediate implementation/rectification. Scott and Macklem, \textit{id.} at 45.
\end{footnotesize}
denied to people if they are denied basic needs on the one hand, while on the other, as Neier argues, of judicial enforcement interfering with democracy by taking policy-making out of the people's hands.  

Contrary to Neier’s view, Jheelan contends that the argument on vagueness does not stand up to scrutiny as it is the judiciary that has to define the scope and extent of rights; even civil and political rights such as the right to vote may not have been defined in the constitution but have been given meaning by courts. The specific shape and contours of any right emerge after repeated application of practical reasoning over years, thereby giving rise to the argument that imprecision does not imply that a right should not be entrenched; non-entrenchment may well be the reason behind the imprecision. Civil and political rights such as privacy or dignity have also been noted to be open-textured, with there being “strong arguments” favouring such framing so as to provide flexibility and enable courts to “respond adequately to individual circumstances and historical developments concretizing their meaning over time”.

On the other hand, Churchill and Khaliq reject the non-justiciability argument as an oversimplification, pointing out that some socioeconomic rights such as equal pay for equal work are sufficiently precise to be enforced immediately and that too, through judicial remedies, while others can become so over time, and that nothing inherent in these rights prevents judicial determination.

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89 Klein, supra note 16 at 374.
90 Jheelan, supra note 8 at 147–48.
91 Scott and Macklem, supra note 3 at 72.
Not entirely dismissing the concerns on vagueness and the open-textured nature of socioeconomic rights, Wiles argues while they arise initially due to differences between states and regions on poverty thresholds and conceptions of adequate standards of living, they have been substantially rebutted “institutionally, in scholarship, and in practice”, through the general comments issued by the CESCR supporting the capacity of many socioeconomic rights for interpretation, the adoption of a minimum core standard, and by requiring states to take all reasonable steps to realise the standard set of rights.94 The development and adoption of the respect–protect–fulfil typology in respect of obligations on socioeconomic rights has further added a degree of precision and specificity.95 Countries have different approaches to these rights under national law, such as the minimum core approach in Brazil and Venezuela, and reasonableness in South Africa, but neither has posed conceptual difficulties that the judiciary could not surmount.96 Thus, as Scott and Macklem note, the lack of conceptual precision is not as much a problem in the context of social rights as made out by critics, and certainly one that can be resolved in multiple ways, and with inter alia, repeated judicial application.97

(b) Positive Rights
Social and economic rights are often categorised as “positive” rights as opposed to the “negative” civil and political rights, and it is asserted that the former require large investments of resources and state intervention in order to be given effect to. This argument, like that on vagueness falls within the first category identified by Nolan, Porter, and Langford, related to the supposed differences in the nature of socioeconomic rights, vis-à-vis civil and political rights. The “positive rights” criticism has been traced to “a conservative ideological view” of “the belief in the powers of

94 Wiles, supra note 93 at 51.
95 Scott and Macklem, supra note 3 at 76. Imprecision increases as we move from primary towards tertiary obligations. What critics are doing is comparing first level obligations in civil and political rights with third level obligations on socioeconomic rights. Scott and Macklem, ibid. The typology and obligations it entails will be discussed in more detail in Chapter III.
96 Wiles, supra note 93 at 51.
97 Scott and Macklem, supra note 3 at 84.
free and self-regulating markets”, fears of state intervention, and of "opening the floodgates" of redistribution.⁹⁸

The negative–positive rights distinction, noted to be an "intuitive" one,⁹⁹ presents/raises a "false dichotomy", there being doubts as to its feasibility or utility; all human rights have positive and negative dimensions, with the assumed dichotomy merely blurring the “true dilemma" posed by social rights for the “liberal paradigm”—“that rights implicating the redistribution of resources are collective in character and rooted in the common needs of human beings in society”.¹⁰⁰ Many others, similarly, have questioned this distinction, also pointing out that all rights have both positive and negative dimensions.¹⁰¹

In *Prithipal Singh v. State of Punjab*, the Supreme Court of India elaborated on the two dimensions of the “right to life” (usually classified as a “civil and political right”) which has been characterised as “supreme” and “basic”, noting that it includes both so-called negative and positive obligations for the state. The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that [the] State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths. The State must protect victims of torture, ill-treatment

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⁹⁸ Wiles, *supra* note 93 at 45; Albrecht, *supra* note 53 at 10. Scott and Macklem point out that the "positive" criticism is often an umbrella term for institutional inability of courts to determine issues that are seen as complex, involving costs, and time for realisation. Scott and Macklem, *supra* note 3 at 44.
⁹⁹ Trispiotis, *supra* note 82 at 2.
¹⁰⁰ Woods, *supra* note 3 at 764–65. Social rights essentially relate to the provision of resources necessary to live a “minimally decent life”, and this "positive" "label" takes away from "this fundamental nature of their content". Wiles, *supra* note 92 at 48.
¹⁰¹ See Alston and Quinn, *supra* note 56 at 172 [They write, "[t]he suggestion that realization of civil and political rights requires only abstention on part of the state and can be achieved without significant expenditure is patently at odds with reality"]; Jheelan, *supra* note 8 at 149 [For instance, in *Airey v. Ireland*, (1979) 2 ECHR 305, the government was required (in the context of the right to fair trial) to extend legal aid to civil cases.]; Nolan, Porter, and Langford, *supra* note 48 at 7. See also Fabre, *supra* note 74 who highlights some of the complexities in this classification and also points to both social and political rights being positive. The positive/negative distinction and that of "includability" of these rights in a theory of human rights is also discussed by Prof. Baxi analysing Sen’s writings. See Upendra Baxi, *Human Rights in a Post Human World* (Oxford University Press, New Delhi, 2009).
as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically.\textsuperscript{102}

Even earlier, the Supreme Court had taken note of the link between various human rights. In \textit{Maneka Gandhi v. Union of India},\textsuperscript{103} it observed drawing from the preamble, that the various fundamental rights were not separate but “parts of an integrated scheme in the Constitution”, whose waters must mix to constitute that grand flow of unimpeded and impartial justice (social, economic, and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual and the unity of the nation).

Commentators have illustrated how rights falling within the category of civil and political rights also involve resource commitments and “positive action” by the state. Goldstone points out for instance, that most court decisions, even those seeking to protect “negative rights” involve expenditure of public money, for instance, improvements in prison conditions.\textsuperscript{104} He identifies the hurricane Katrina tragedy in the United States as demonstrating the false distinction between “positive” and “negative” rights as the government inevitably would have to invest in the region and provide for citizens to rebuild the area, and argues that there must be “some duty” on behalf

\textsuperscript{102} Prithipal Singh v. State of Punjab, (2012) 1 SCC 10, ¶7 (Bench Strength: 2).

\textsuperscript{103} (1978) 2 SCR 621.

\textsuperscript{104} Goldstone, \textit{supra} note 50 at 4. See also a detailed discussion of how civil and political rights involve positive dimensions. Scott and Macklem, \textit{supra} note 3 at 48–71.
of the government to spend the requisite resources, appropriately and in accordance with due process and equal protection.\textsuperscript{105}

Hunt similarly illustrates with the instances of "inhuman treatment" and the "right to shelter" that both types of rights may have positive and negative facets. While inhuman treatment may sometimes require a court to simply say "no", i.e., order stoppage of the mistreatment; it sometimes also may require an order with fiscal implications, for instance, improvement in detention conditions. Likewise, shelter may sometimes also require a court to only say "no", such as, an order against evicting a tenant, while in other cases, it may require an order that has fiscal implications.\textsuperscript{106} The respect-protect-fulfil typology has also been relied on to support this argument, the duty to respect being a "negative" obligation; the duty to protect, an obligation vis-à-vis third parties (which may again simply involve an order directing non-interference); and the duty to fulfil, a "positive" obligation.\textsuperscript{107} In Hunt's view, while both kinds of rights may have various elements, a "sleight of hand" takes place when one element of one right is compared with a different element of the other.\textsuperscript{108} Similarly, from the perspective of review, the view that socioeconomic rights require the review of state "inaction" as opposed to the review of state action in case of civil and political rights has been termed a "gross oversimplification", as examples of inaction can well be recast as those of action; it is the effect of the law or policy in question that should be considered in assessing a claim of rights-infringement, not whether it is the result of action or inaction.\textsuperscript{109} In this understanding of the two sets of rights as comprising both elements, aspects of socioeconomic rights merely requiring "negative" action or non-interference would raise

\textsuperscript{105} Goldstone, \textit{id.} at 7.
\textsuperscript{108} Hunt, \textit{supra} note 106.
\textsuperscript{109} Nolan, Porter, and Langford, \textit{supra} note 48 at 10. See also Scott and Macklem, \textit{supra} note 3 at 46.
fewer concerns of costs, legitimacy, and capacity, though this is not the case for all negative aspects of these rights.\textsuperscript{110}

Socioeconomic rights may require greater state action for their realisation than civil and political rights, but this is rather a question of degree than kind of action, a conclusion that the texts of both covenants support implicitly and explicitly (for instance, article 2 of the ICCPR requires parties “to respect and to ensure” covenant rights; the right to fair trial (article 14) requires the establishment of a judicial system), with the extent of state involvement dependent on the nature of the right and not the covenant in question.\textsuperscript{111} Moreover, economic and social rights, despite being positively framed are argued to be capable of enforcement.\textsuperscript{112} Feasibility of implementation is not in Sen’s view necessary for enforcement, as if it was, “all rights...would be nonsensical, given the infeasibility of ensuring the life and liberty of all against transgressions”; the non-realization of a right does not make a right a non-rather, instead motivating further social action.\textsuperscript{113} In other words, merely that these rights may contain positive obligations, or may be sought to be progressively realised, or may require social change is no impediment to their implementation; they do not become less "rights". As Sen writes, like utilitarians, advocates of human rights “want the recognized human rights to be maximally realized” (emphasis original), “[t]he viability of [which] approach does not crumble merely because further social changes may be needed at any point of time to make more and more of these acknowledged rights fully realizable and actually realized”.\textsuperscript{114} Rather, denying the ability to make claims on these rights effectively implies that a forum to recognise or remedy injustices is foreclosed for people; constitutionalising only civil and

\begin{footnotes}
\footnote{Klein, supra note 16 at 367–68. An instance of the latter that she gives is a decision with regard to the government decreasing dependence on state funds by reducing welfare and replacing the same with a welfare to work programme, on which the court may lack information and expertise despite the decision requiring a mere “no”. This may lead to a case-by-case approach refusing to give relief where the implications are far-reaching, resulting in haphazard protection of socioeconomic rights. Klein, \textit{id.} at 368.}
\footnote{Nolan, Porter, and Langford, \textit{supra} note 48 at 7–8; Alston and Quinn, \textit{supra} note 56 at 184.}
\footnote{Jheelan, \textit{supra} note 8 at 149. He notes by reference to the case of Shreeram Fertilizers (M.C. Mehta v. \textit{Union of India}, [1986] 2 SCC 176) that even a right such as the “right to environment” is capable of enforcement as in this case measures to curb pollution by a chemical plant were directed by the Supreme Court which also set up committees for monitoring the same.}
\footnote{Sen, \textit{supra} note 68 at 384–85.}
\footnote{\textit{Id.} at 384.}
\end{footnotes}
political rights “projects an image of truncated humanity”, would entrench only a particular “vision of the human and social self”, and marginalise those who do not fit in.\textsuperscript{115}

Moreover while distinctions are sought to be drawn between the two sets of rights as discussed on grounds of their nature (impacting the question of enforceability), it must also be noted that there are some commonalities in the two, such as a common genealogy in enlightenment thought; both being concerned with vindicating key human interests such as autonomy, dignity, and equality; common structural elements; and both imposing similar types of normative obligations on state and non-state actors with the result being that the two sets cannot be clearly demarcated.\textsuperscript{116} Even where distinctions are sought to be drawn as seen in this and subsequent sections, when examined more closely, both sets of rights are seen to share the same characteristics, for instance both have positive and negative aspects, gain precision through interpretation, and have resource implications.

\textbf{(c) Costs}

The justiciability of socioeconomic rights is also opposed on account of the huge resources believed to be required for their realisation, an argument related to the assumed distinction in the nature of the two sets of rights, and the previous discussion on the positive–negative dichotomy. The non-availability of resources to the same extent across the globe is also raised in this context.

While critics raising this objection do accept that civil and political rights too, require resources for realisation, they argue that the degree of resources required are far higher and the implications thereof are much more far-reaching in the case of socioeconomic rights.\textsuperscript{117}

\textsuperscript{115} Scott and Macklem, \textit{supra} note 3 at 28–29, 86.
\textsuperscript{117} For instance, Neier argues that the enforcement of certain civil and political rights also have economic ramifications but these do not involve a broad redistribution of society’s resources or economic burdens. Neier, \textit{supra} note 87 at 1.
Supporters of the justiciability of socioeconomic rights, stress not only on the fact that civil and political rights too, have resource implications, but also that they may have unseen costs. Instances of resource requirements in civil and political rights enforcement include investigation of suspicious deaths or killings, provision of a fair trial, and taking positive measures to protect the right to life. Moreover, in enforcing civil and political rights too, judges take decisions that affect economic policy. The implementation of civil and political rights may involve “hidden” costs, such as the increased risk of disorder in society caused by demonstrations, the costs moreover being diffused across society as a whole making them “invisible”; also the necessary structures for civil and political rights enforcement are already in place. Not only that, civil and political rights being viewed as “fundamental”, the costs of enforcing them are not always questioned. Thus, unlike as argued by Neier, even first generation rights may involve higher costs for their enforcement than may initially seem.

On the other hand, socioeconomic rights enforcement may not necessarily require expending resources or determination of the manner of spending, with the court merely pointing out that a violation has occurred and directing inquiry or provision of a remedy deemed appropriate by the concerned authority. Many social rights may involve expenses no more than those required to enact and enforce legislation (as in some cases of civil rights) such as a law on

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118 For instance, McCann v. United Kingdom, (1995) 21 EHRR 97. This case involved the killing of three persons (terrorists) suspected to be involved in a planned bombing. The action would found by the majority to be disproportionate to the objectives. (also cited in Jheelan, supra note 8 at 151.

119 Oneryildiz v. Turkey, [2004] ECHR 697. In this case, a methane explosion in a rubbish dump caused a landslide engulfing some slums below the site killing 39 persons. The ECtHR recognised a positive obligation of the state under article 2 of the ECHR to take preventive operational measures to protect the individuals as the authorities had set up and authorised the site and were aware of the risk it posed. See https://www.ecolex.org/details/court-decision/oneryildiz-v-turkey-66f8dcb4-f385-4641-9c3e-0a9f79c68c1/ (last visited 05 September 2017).

120 Trispiotis, supra note 82 at 2. He points out that the cost implications of civil and political rights can partly be attributed to judicial evolution. id. at 1.


122 Nolan, Porter, and Langford, ibid.

123 Wiles, supra note 92 at 46. For instance, in Cruz del Valle Bermudez v. Ministry of Health and Social Action, Case no. 15.789, Decision no 916 (1999), where the issue considered was whether people affected by HIV AIDS had the right to medicines free of charge, a positive duty of prevention at the core of the right to health was identified and the Ministry directed to conduct a study looking into the minimum needs of those with HIV/AIDS to be presented for consideration in the budget in the following year. Wiles, id. at 47.
working conditions (work hours, safe and healthy working conditions, etc.) with in some cases there being only a duty not to interfere such as, allowing workers to form and join trade unions.\textsuperscript{124}

Even where resource constraints may be an issue, socioeconomic rights can still be enforced through “soft enforcement” such as awareness creation both amongst the public and the authorities.\textsuperscript{125} The requirement of resources thus again depends on the nature of the obligation, not classification of rights, and while some socioeconomic rights may more likely involve costs than civil and political rights, the difference may of one of degree.\textsuperscript{126}

The judicial scrutiny of resources is also opposed by critics of justiciability on account of intervention in policy issues but, as commentators have noted, resources are not always involved in socioeconomic rights cases. Even where resources are involved, the approach taken by the court may easily be one of deference leaving the actual determination to the legislature and only requiring justification for the steps taken.\textsuperscript{127} The example of the South African Constitutional Court’s approach has been cited to argue that in practice, courts have demonstrated sensitivity to their role, not authorising large expenditure unless absolutely necessary and enforcing these rights so as to reduce the “immediate and immediately visible” costs.\textsuperscript{128} There thus appears to be an effective answer to this objection too, in practice.

\textsuperscript{124} D.J. Harris, “Collective Complaints under the European Social Charter: Encouraging Progress?”, in K.H. Kaikobad and M. Bohlander (eds), \textit{International Law and Power: Perspectives on Legal Order and Justice}, Essays in Honour of Colin Warbrick 17, 23–24 (Koninklijke Brill NV, the Netherlands, 2009).
\textsuperscript{125} Jheelan, \textit{supra} note 8 at 151.
\textsuperscript{126} Wiles, \textit{supra} note 92 at 46; Nolan, Porter, and Langford, \textit{supra} note 48 at 8.
\textsuperscript{127} An instance is \textit{Cruz del Valle Bermudez v. Ministry of Health and Social Assistance}, \textit{supra} note 123, where it was held that people inflicted with HIV who lacked the money to pay for essential drugs had a right to be provided the drugs. The Court also suggested a number of ways to raise the budget but left the choice of how to do so to the government. See Jheelan, \textit{supra} note 8 at 152. A deferential standard of review sees courts give “credence to the democratic authority and epistemic superiority of, and textual conferral of tasks to the legislative and executive branches”. This had the benefit of addressing criticism on account of legitimacy and competence. Katharine G. Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review", \textit{8 I.CON} 385, 392 (2010).
\textsuperscript{128} Wiles, \textit{supra} note 92 at 47; Tushnet, \textit{supra} note 120 at 180.
Institutional Capacity of the Judiciary and Legitimacy Concerns

(d) Judiciary

A number of issues have been raised by critics of justiciability of socioeconomic rights in the context of the judiciary, ranging from the argument of the nature of these rights making them unenforceable by the judiciary to the issue of the complexity of these rights, and lack of training and requirement of discretion on part of the judiciary to handle cases of social and economic rights, to justiciability of these rights opening the "flood gates", considerably increasing the already burgeoning workload of the judiciary. These arguments relate to both legitimacy and institutional capacity.

In an argument related to the issue of vagueness discussed above, Neier asserts that broad assertions of shelter or economic resources require processes of negotiation or compromise which cannot take place in court; such claims as entitlement to certain types of health care or education over others are not questions resolvable by a judicial process.\(^{129}\) For critics, courts also lack the high degree of discretion required to implement programmes to protect economic and social "interests".\(^{130}\) They also allege that courts are not competent to adjudicate these rights due to "deficiencies in skill, education, training, or procedure, or because the adjudication of social rights touches on the complex intersection of issues involving institutional design, policy choice, and contested political aspirations".\(^{131}\) Lack of competence to assess competing claims to resources with wider implications, and separation of powers were grounds on which the court declined to consider travellers’ claims to provision of basic sanitation facilities for protection of their dignity.

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\(^{129}\) Neier, supra note 87 at 2.
\(^{130}\) Tushnet, supra note 120 at 178.
\(^{131}\) Scott and Macklem, supra note 3 at 23. Dennis and Stewart, for instance, argue that these issues raised by economic, social, and cultural rights are of greater complexity and scope and require different information and greater expertise than civil and political rights. Dennis and Stewart, supra note 3 at 496.
and freedom, in the Irish case of O’Reilly v. Limerick. The entrenchment of “new enforceable rights” is also seen as likely to add to the workload of an already stretched judiciary.  

The argument of complexity of socioeconomic rights issues is questioned by commentators who point out not only that such complexity does not necessarily arise in all socioeconomic rights cases but also that judges are trained to deal with issues of varying complexity and may competently do so where requisite information is available. In fact, the adjudication of complex issues of economic rights under trade and investment agreements with resource distribution implications are vigourously being promoted, demonstrating courts’ competence in dealing with highly complex issues in another context with similar implications. The adjudication of complex socioeconomic rights issues may merely require the availability of requisite information and/or the development of specific methodologies which can effectively address this objection.  

Moreover, the task of courts reviewing socioeconomic rights issues may not be very different from their classic role of carrying out judicial review for which people approach courts, they being required to apply interpretative techniques such as parsing the language of provisions, looking into legislative history and intent, the background and history of the community, and relationship of the provisions to other norms to define constitutional norms. Further, Goldstone notes, while the decision as to whether a country’s constitution should make provisions for social and economic rights is a political one, the task of interpreting and enforcing these rights is undoubtedly judicial.

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133 Wiles, supra note 92 at 40.
134 Id. at 54. For instance, in Finlay v. Minister of Finance, Canada, the Court held that excess welfare amounts paid in error in previous cheques could not be deducted as this would bring the recipient below the level of minimum need. The Judges unanimously agreed that they were capable of determining the scope of this need and level of benefits needed to maintain it despite relying on a liberal interpretation of an agreement between the Federal government and provinces. Wiles, id. at 54. Moreover, as Leckie points out, while examining violations of economic, social, and cultural rights will be cumbersome and require a combination of common sense along with some legal and other dilemmas, the case is the same with civil and political rights. Leckie, supra note 65 at 89–90.
135 Nolan, Porter, and Langford, supra note 48 at 6.
137 Woods, supra note 3 at 772; Nolan, Porter, and Langford, supra note 48 at 15.
138 Goldstone, supra note 50 at 4.
Judicial review of socioeconomic rights issues involves ensuring that the government is responsive to the needs of vulnerable or disadvantaged sections and derives legitimacy from the need to protect their rights.\(^{139}\) In Woods’ view, at the heart of this debate on justiciability is essentially the redistributive nature of remedial measures as resource-allocation is typically deemed the province of the legislature, and a power of judicial review to override such decisions raises accountability concerns.\(^{140}\)

However, in Davis’ opinion, conceiving of social democracy solely in terms of the provision of goods and services by the state machinery fails to take into account the lessons from the problems encountered by social democracy over the past five decades, and “suggests an obliviousness to the need for strengthening the capacity of the individual to reshape the state” by way of political and economic struggle through civic associations, and not by viewing state institutions as a panacea for attaining social justice, this only resulting in an overwhelming centralized power unchecked by constraints of politics or the judiciary.\(^{141}\)

In fact, as noted, influential arguments against the justiciability of socioeconomic rights are often based on a scepticism of judicial review generally as an undemocratic process, unsuited institutionally to resolve disputes on complex moral issues, a view that is also unrealistic about the legislative and electoral process.\(^{142}\)

The practical experiences of courts enforcing socioeconomic rights or adjudicating on such issues have demonstrated their ability to successfully do so, as well as overcome specific objections raised by critics of justiciability. The most oft cited, is of course the instance of the South African

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\(^{139}\) Woods, supra note 3 at 773; Nolan, Porter, and Langford, supra note 48 at 10. See also Scott and Macklem, supra note 3 at 77, who note that courts can well determine the adequacy of fulfilment, including at the basic level of protecting vulnerable sections in light of evidence and expert testimony.

\(^{140}\) Woods, supra note 3 at 772.


\(^{142}\) Anashri Pillay, “Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement”, 10 I.CON 732, 735 (2012). Scott and Macklem are of the same view observing that dangers associated with judicial review equally apply to the review of civil and political rights. These include one that law operates in a technical and specialised realm, and courts can thus be accessed by those mastering these technicalities or in an economic position to be able to employ some such person; two, progressive constitutional language cannot foresee future interpretations and is always vague; and three that judicial review opens to challenge the legitimacy of democratic institutions. Scott and Macklem, supra note 3 at 136–37.
Constitutional Court which is seen to have successfully balanced the enforcement of provisions with state interest, even though it has faced the task of weighing the critical needs of citizens against legitimate budgetary considerations, a task argued to be both impossible and undesirable.\(^{143}\) Separation of powers objections may also be said to have been to an extent addressed with the adoption of new forms of remedies such as dialogic remedies (discussed in more detail in this section below) which enable the judiciary to address issues in a democratic manner and without entering the domain of other branches too far.\(^{144}\)

Another objection related to the availability of information and institutional competence has been overcome in the Indian case, through the appointment of socio-legal commissions empowered to investigate conditions allegedly infringing economic and social rights, and assisting in efficient and accurate fact finding, besides other areas such as monitoring implementation.\(^{145}\) The ability of courts to relate expert evidence to real life circumstances may in fact, provide new dimensions to information, not available to legislatures.\(^{146}\) In the context of availability and assessment of information, besides commissions and monitoring bodies, suggestions have also been made for the development of specific methodologies for assessment, and measures to ensure access to justice.\(^{147}\) In the Indian experience, besides commissions and expert bodies for fact-finding and monitoring, the PIL mechanism enables better access to justice.

The issue of resource allocation, as discussed, is one that gives rise to much concern, and in fact as has been noted, courts may be reluctant to intervene where the content is unclear based on

\(^{143}\) Goldstone, *supra* note 50 at 4.
\(^{144}\) O’Cinneide, *supra* note 116 at 307.
\(^{145}\) Jheelan, *supra* note 8 at 159; Scott and Macklem, *supra* note 3 at 144.
\(^{146}\) Nolan, Porter, and Langford, *supra* note 48 at 15.
\(^{147}\) Wiles, *supra* note 92 at 63–64. Wiles makes the following suggestions: (i) there should be a commission, ombudsman or similar monitoring body to produce relevant statistics and reports, conduct impact assessment studies, and monitor progress in implementation, which could involve a forum process to assess what constitutes minimum basic need within the national context towards determining the scope of the rights and setting benchmarks; (ii) there should be development of specific methodologies for the judiciary to assess these rights including formulation of structural remedies, connected to the output of the commission; (iii) measures should be taken to ensure and ameliorate access to justice including a role for the commission in communicating with such groups; and (iv) there should be judicial means of protection acting in conjunction with administrative systems of protection. Wiles, *ibid*. 
the constitution, legislation, precedent, etc., and will have consequences on allocation; or where large-scale allocation is involved; or complex allocation schemes could be disrupted.\textsuperscript{148} However, where programmes have been designed by the government or fewer resources are called for, courts may intervene as a gap filling exercise, and where resources have been committed, the court may still take issue with the means.\textsuperscript{149}

Fears of entrenched socioeconomic rights opening the floodgates, and inundating the state with resource demands too have been argued to be unfounded, it being pointed out that countries with entrenched socioeconomic rights such as Sweden, have very little litigation and strong welfare systems; the need for minimal litigation does not invalidate the need for legal enforcement mechanisms for protection.\textsuperscript{150}

Judicial discretion, another issue raised, is also involved to a significant extent in the enforcement of first-generation rights, not only at the implementation stage but also at the rights specification stage.\textsuperscript{151}

While judicial enforcement is essential for the effective protection of social and economic rights, it is not sufficient of itself to do so. Litigation is, as noted, only one restricted approach to the contestation of distribution.\textsuperscript{152} Both judicial remedies and policy measures have a role to play towards the effective realisation of these rights. Enforcement of social and economic rights through the judiciary and relevant policy making processes are seen as intimately related and mutually reinforcing.\textsuperscript{153}

\textsuperscript{148} Klein, supra note 16 at 366–67; O’Cinneide, supra note 116 at 313–14.

\textsuperscript{149} Klein, id. at 366, 369 (2008). Treatment Action Campaign ((2002) 5 SA 721 (CC)) may be cited as an example here.

\textsuperscript{150} Wiles, supra note 92 at 40, 48.

\textsuperscript{151} Tushnet, supra note 120 at 179.

\textsuperscript{152} Davis, supra note 141 at 709.

\textsuperscript{153} Hunt, supra note 106.
(e) Separation of Powers

The judicial adjudication of these rights is also opposed due to the impact their adjudication is argued to have on the separation of powers. Proponents of justiciability argue, however, that there is no strict separation of powers in reality as this would prevent the effective protection of rights, and in practice, the judiciary works within the limits of its competence as shown in decisions such as *Olga Tellis*, and *Grootboom*. In *Grootboom*, the Court took care not to encroach on executive territory, noting that it would not inquire whether money could have been better spent or more desirable measures adopted. A similar approach was adopted in the Indian decisions in *Ram Lubhaya Bagga*, and *Sachidananda Pandey*. Moreover, Tushnet finds the separation of powers objection, which focuses on the programmatic nature of economic and social rights, turned out to be less forceful once courts began to enforce second generation rights, the distinction between the two sets of rights being found to be not as sharp as required by the separation of powers.

The object of the separation of powers is the prevention of dominance “by any faction or group from its enclave in a specific organisation”, achieved as Gauri notes, “by opening certain

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155 Jheelan, supra note 8 at 154. He notes that in India, where the High Court did overstep the line pressuring the government to enact legislation, the action was checked by the Supreme Court (State of Himachal Pradesh v. Parent of A Student of Medical College, Simla, (1985) 3 SCC 169.) ibid.


157 In *State of Punjab v. Ram Lubhaya Bagga*, (1998) 4 SCC 117, it was held not to be 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. In *Sachidananda Pandey v. State of West Bengal*, supra note 39, it was held that while the court may look into whether appropriate considerations have been borne in mind and irrelevant ones excluded but the court would not look into the balancing of relevant considerations, which was the government’s task.

158 Tushnet, supra note 120 at 178–79.
government tasks to competing competences and concurrent powers of review".\textsuperscript{159} The review of
government decisions, etc. by the judiciary for compliance with fundamental rights is seen as
involving a "flow of power" to the judiciary that is part of the very notion of balance of powers in
democracies based on human rights"\textsuperscript{160} while excluding socioeconomic rights from judicial review
would have the effect of allocating the judicial role to the legislative branches, distorting the
traditional separation of powers.\textsuperscript{161} Rather, a constitutional dialogue between the judiciary and
legislature is seen as an important means of achieving the right balance between judicial
intervention and executive and legislative direction of policy.\textsuperscript{162}

While the judiciary is criticised for policy-making, Wiles avers that both, arguments of judicial
policymaking and judicial conservatism, indicate a distrust of the judiciary as an institution and
constitutional review in general, and also apply to civil and political rights issues.\textsuperscript{163} Mehta in fact
points out that "[p]olicy-making has become a routine part of the judicial role in many contexts,
and adjudication likewise belongs in many countries and in many ways to the realm of
administrative functioning".\textsuperscript{164} The Indian Supreme Court, for instance, is seen to have given up
"formal pretence" to the separation of powers doctrine, and transformed itself into a "significant
policy-making institution".\textsuperscript{165} While courts stepping into the legislative role to fill in the gaps, has
led them to face "passionate criticisms" stemming from fears of judicial dictatorship, the judiciary

\textsuperscript{159} Varun Gauri, "Public Interest Litigation in India: Overreaching or Underachieving?", Policy Research Working
\textsuperscript{160} Nolan, Porter, and Langford, supra note 48 at 11.
\textsuperscript{161} Id. at 13.
\textsuperscript{162} Wiles, supra note 92 at 48. Scott and Macklem too take note of constructive interbranch dialogue for judiciaries
to engage in defining and enforcing positive rights. Scott and Macklem, supra note 3 at 65.
\textsuperscript{163} Wiles, supra note 92 at 43.
according to Sathe, in fact, that judges only find interpret law and do not make law is a myth to immunise them
from responsibility for their decisions. S.P. Sathe, "Judicial Activism: The Indian Experience", \textit{6 Journal of Law and
\textsuperscript{165} ibid.; Rehan Abeyratne, "Socioeconomic Rights in the Indian Constitution: Towards a Broader Conception of
Legitimacy", \textit{39 Brooklyn Journal of International Law} 1, 50 (2014). Deva too notes that since its inception, the
Supreme Court has been delivering various far-reaching judgments including determination of public policy and
establishment of rule of law and constitutionalism. Surya Deva, "Public Interest Litigation in India: A Critical
“sees itself participating in, and shepherding social transformation” and as checking, balancing, and correcting failures of other branches, their approach receiving legitimacy from popular support.\textsuperscript{166}

\textbf{(g) Polycentricity}

Polycentricity is essentially concerned with the unforeseen consequences or impacts of a decision or policy change; for instance, the impact of a change in the price of aluminium on demand for steel or plastic which illustrates the institutional limits of the adjudicative power of the courts as such problems can be addressed only through simultaneous resolution of multiple issues.\textsuperscript{167} Socioeconomic rights, in particular, those relating to rationing of resources or standards for environment protection, are seen as polycentric due to their complex and many times, unforeseen implications for numerous parties,\textsuperscript{168} the argument being based again “on rights classification theories”.\textsuperscript{169} It is, however, argued that these concerns are not taken into account in civil and political rights matters, where courts may decide equally complex issues with resource allocation implications, as these are seen as indisputably justiciable.\textsuperscript{170} This argument thus touches on two of the assumptions identified by Nolan, Porter, and Langford, that of institutional capacity, and the perceived distinction in the nature of the two sets of rights.

Liebenberg is of the view that the mere fact that an issue may have far-reaching or unforeseen consequences should not of itself lead the court to abdicating its primary responsibility of upholding the constitution.\textsuperscript{171} Moreover, as commentators note, practical experience has shown that courts, such as the South African Constitutional Court, are sensitive to and have (for instance, by merely constraining governments’ policy options to a certain range) overcome these concerns;

\begin{itemize}
  \item \textsuperscript{166} Zachary Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations", 19(2) Indiana Journal of Global Legal Studies 555, 570–71 (2012).
  \item \textsuperscript{167} Paul Nolette, "Lessons Learned from the South African Constitutional Court: Towards a Third Way of Judicial Enforcement of Socio-economic Rights", 12 Michigan State Journal of International Law 91, 95–96 (2003). Another instance could be impacts of a decision on closure of a factory for environmental reasons on workmen (right to work, livelihood), competitors, and the market.
  \item \textsuperscript{168} Usher, supra note 74 at 158.
  \item \textsuperscript{169} Trispiotis, supra note 82 at 3.
  \item \textsuperscript{170} ibid.
  \item \textsuperscript{171} Nolan, Porter, and Langford, supra note 48 at 16.
\end{itemize}
the judicial process sometimes being more suited to address multiple and competing concerns, particularly of those who cannot access political decision-making processes. Moreover, legislatures cannot be presumed to be always more competent in this regard than courts.

In other words, while polycentricity is a matter of concern, it is once again not one limited to any one set of rights, nor is it by itself a sufficient reason to preclude action on part of courts. It is not necessarily the case that any one institution is better suited to addressing polycentric issues than others but even if this is so, courts have in practice, demonstrated their sensitivity to and ability to overcome these concerns.

**Arguments “in Support” of Socioeconomic Rights Enforcement**

**(f) Human Beings as Social Beings**

The social rights context also requires the consideration of human beings as social beings, being part of the community which is a human need. “Human needs” provide a more comprehensive framework to theorise social rights, with social rights claims being indispensable to the full development of people. The discourse of social rights asserts collective claims to share in the “abundance of our interdependent global civilization”, collectiveness taking into its sweep human beings as socially constituted beings for whom community is a human need, with human need being the source of rights, rights being claims (not against society but as being part of it) to communally produced resources (resources for satisfying the minimum core of social rights seen as necessary and available), the duty bearer being society, and remedies collective.

The value of “solidarity” which is one of the values underlying the European Social Charter (ESC) (and elaborated in ESC jurisprudence as a value supporting inclusion and protection against
vulnerability), is seen as “express[ing] the essence of what is often distinctive about economic and social rights” and “emphasis[ing] the social nature of human beings.”

Here the African concept of Ubuntu, roughly translating to shared solidarity and humaneness and humanity, which holds that a person can only be a person through others, is of relevance. African traditions more fully encompass the social dimensions people and salience of human need in the construction of fundamental social norms, with the concept of personhood in the African worldview having a normative content that expresses the relationship between social rights and duties. The influence of this worldview, resulted in South African jurisprudence embracing a rights discourse that accommodates the social nature of the human person and normative claims flowing therefrom, including the economic, social, and cultural rights that are the needs of human beings in their social groupings.

The solidarity concept is also associated with the idea of progressive implementation (linked to socioeconomic rights), and besides requiring a balance to be struck between individual and collective rights or between community and solidarity and freedom and dignity of individuals, which was, for instance, sought to be done in the case of Soobramoney, discussed in detail in Chapter V. The goal of the rights discourse is furthered through the recognition of both negative freedoms and positive freedoms to fulfil one's basic needs thus embracing the totality of one's human condition.

The classical liberal conception, on the other hand, where rights are seen as having an individualistic character and human beings defined based on their differences and not shared

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178 Woods, supra note 3 at 778.
179 Id. at 779. The traditional African values were reaffirmed due to the continent-wide struggle against European colonialism and they also stand codified more recently in the African Charter on Human and People’s Rights which incorporates the collective concept of peoples. Ibid.
180 Cullen, supra note 176; Woods, supra note 3 at 779.
181 Woods, id. at 774.
commonalities, emerges from the historical origins of the rights discourse, presumes an adversarial relationship between the individual and society, and creates a jurisprudence of rights that is cannot accommodate claims of community rights.\textsuperscript{182} The collective nature of social rights contradicts and challenges this liberal conception, socioeconomic rights being more socially oriented, better reflecting our experience of human existence, reflecting a concern for community welfare, and adding a more participatory and duty-based element to the idea of human rights.\textsuperscript{183}

Moreover, economic and social rights also as Young notes "challeng[e] the assumption that rights are demanded as they are held: individually"; rather, they are demanded through collective action of social movements, NGOs, and involve market participation.\textsuperscript{184} However, while collective efforts, particularly in the case of marginalised groups may have greater impact, it is also important that individuals retain the potential to claim against violations of socioeconomic rights, vital also for the groups they belong to, if they are not easily organised or mobilised.\textsuperscript{185}

Lehmann argues that in the arena of human rights it is the individual’s interest that trumps, and not the collective.\textsuperscript{186} but this may not be the entirely correct view as far as social rights

\textsuperscript{182} Id. at 768. As per the classical concept, the greater the detachment from the community, the freer the individual is seen as being, which restricts the ability to imagine and create communities where well-being of one is seen as linked with that of others. A further impediment is the moral neutrality of the state required by individual autonomy. The “individualist norm” “in its postmodern incarnation”, glorifies self-centeredness, and greed, exemplified by various corporate scandals. Id. at 769–70. As Prof. Baxi observes, the classical Western liberal tradition characteristically ignored “the entire problematic of basic needs”. Upendra Baxi, “From Human Rights to the Right to Be Human: Some Heresies”, 13 (3&4) India International Centre Quarterly 185, 186 (1986). Similarly, Keane writes: “It is only by going beyond the individual as the unit of analysis that we can embrace the notion of social rights”, which “leads us into the collective responsibility for promoting the development of human development”. Martin Keane, Social Rights: A Literature Review (Combat Poverty Agency, July, 2000). Keane refers to E. Meehan, Citizenship and the European Community (Sage, London, 1993) to note in this regard that if we see human beings as political beings, we can entertain the notion of social rights as being part of citizenship while if we see them as economic beings, they must remain free to participate in markets, and deal with things on an individually-oriented rational basis. Id.

\textsuperscript{183} Woods, id. at 765. Wiles, supra note 92 49–50.

\textsuperscript{184} Young, supra note 54 at 13.


enforcement is concerned. Thus perhaps, what is required for effective rights enforcement is a balance between the protection of individual interest as well as that of the collective.

(g) Indivisibility, Interrelationship, and Interdependence of All Human Rights

A strong argument in support of justiciability of socioeconomic rights is the principle of interdependence and indivisibility of all human rights, one reiterated on several occasions since the adoption of the UDHR, which would be called into question, if only a selected set of human rights is enforced. Not only can the two sets of rights not be distinguished clearly, they dovetail each other, for instance, the rights to health and housing being impacted without the right to work, or effective exercise of the right to vote without the right to information and education, and the boundaries are permeable and blurred with courts adjudicating social rights through civil and political rights.

The interrelationship and interdependence has been recognised, for instance, in the interpretations of civil and political rights in the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR), whereby civil and political rights provisions have been interpreted to protect socioeconomic rights as is discussed in detail in Chapter III, and also by the Supreme Court of India which has interpreted many of the provisions of the fundamental rights in part III of the Constitution, particularly the right to life, to protect socioeconomic rights like food, shelter, education, etc. as discussed in detail in Chapter IV.

Press, New York, 2008). In cases such as Grootboom where only systemic relief was ultimately granted, a possible alternative approach could be granting individual relief through interim remedies (to protect against irreparable harm) and systemic relief after hearing the petition on merits. Two-track remedies of this nature have been applied by the Inter-American Court in cases involving the rights of indigenous communities (immediate order for non-infringement and longer-term for demarcation and titling of lands). They “underline that traditional remedies such as compensation and interim and preventive injunctions can in some cases help advance the goals of a more equitable distribution of resources provided they are not the exclusive remedies employed”. Roach, id. at 56–57.


O’Cinneide, id. at 304; Albrecht, supra note 53 at 10.
The interdependence, indivisibility, and interrelationship between all human rights implies that in terms of enforcement, distinctions cannot be drawn between the two sets of rights, else even if civil and political rights are claimed to be justiciable rights, they would not be available to the fullest extent as those aspects of these rights which are socioeconomic, would not be enforced. Moreover, all fundamental rights are critical to democracy.\textsuperscript{189} As both sets of rights seek to protect “key human interests”, the courts have a role in protecting them.\textsuperscript{190}

However, it must be considered, as Tripiotis points out, that indivisibility does not imply that all human rights be adjudicated based on the same model, or that inapplicability of the civil and political rights “model” to economic and social rights renders the latter not justiciable.\textsuperscript{191} Thus effective protection of human rights would imply the justiciability of all human rights, even if different models or kinds of remedies are employed towards their realisation.

\textit{Some Other Issues}

\textit{(h) Remedies}

Appropriate remedies for the effective enforcement of socioeconomic rights is a significant issue, and, in fact, “crafting meaningful remedies” is seen as one of the challenges towards the full recognition of these rights.\textsuperscript{192} As the realisation of these rights is seen as requiring social changes,

\textsuperscript{189} Young, supra note 54 at 6. Rees and Chinkin raise a related argument in the more specific context of post-conflict justice to note that survivors and victims of war-time atrocities are less likely to participate in truth commissions or court proceedings without access to social and economic entitlements; the case is the same for participation in the peace process. Madeleine Rees and Christine Chinkin, “Exposing the Gendered Myth of Post-conflict Transition: The Transformative Power of Economic and Social Rights”, 48(4) \textit{International Law and Politics} 1211, 1219 (2016).

\textsuperscript{190} O’Cinneide, supra note 116 at 305.

\textsuperscript{191} Trispiotis, supra note 82 at 4.

\textsuperscript{192} Roach, supra note 186 at 46. There are various tensions that the question of remedies gives rise to: between corrective and distributive justice; immediate relief and systemic reform; compensation and future compliance among them. Some of these make the enforcement of socioeconomic rights better suited for the political process. However, not only are traditional remedies sometimes suitable for socioeconomic rights enforcement, corrective justice is seen to be inadequate for many civil and political rights, thus highlighting that the difference sought to be drawn between the two sets of rights on this account too may not be as pronounced as is made out. Civil and political rights may equally have distributive implications for instance, ensuring speedy trial may also require reforms in the system of trials. \textit{id.} at 46, 49.
they are not considered immediately implementable, making them distinct from civil and political rights that are seen as capable of being realised immediately.

However, as has been pointed out, this is once again not the case in practice. Various socioeconomic rights that can be immediately realised have been identified by the CESCR in its general comment 3. While this may not be the case for all socioeconomic rights, which may at times involve remedies not straightforward or which are time-consuming, these are challenges that can be addressed with appropriate mechanisms, such as adoption of structural remedies with time limits or supervision mechanisms, in appropriate cases. In this context, it is relevant as Young points out that there are varied conceptions of constitutional rights, as "enforceable by a counter majoritarian institution such as a court, as optimization principles for legislative and administrative decision-making, or as a reference point for inter-branch dialogue".

Approaches of courts towards socioeconomic rights' enforcement, and remedies provided are often classified as "strong" and "weak"; "strong" courts being those that take a prescriptive approach and "weak", those that are deferential; and "strong" remedies being time-sensitive and coercive, and "weak", open-ended, with strong courts adopting strong remedies, and weak courts weak though this may not always be so. It is also not necessarily the case that any one approach

193 Wiles, supra note 92 at 55.
194 For instance, articles 3 (equal right of men and women to ICESCR rights), 7(a)(i) (fair wages and equal remuneration for work of equal value), 8 (trade unions), etc. See Committee on Economic, Social and Cultural Rights, "General Comment 3: The Nature of State Parties' Obligations (Article 2, para 1 of the Covenant)", (5th Session, 1990), ¶5.
195 Wiles, supra note 92 at 55–56. Supervision mechanisms, among others fall with what Young classes as “managerial review” as are “suspended declarations”. Young, supra note 127 at 402.
196 Young, supra note 54 at 3.
197 Murray Wesson, "The Emergence and Enforcement of Socio-economic Rights" in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds), Reasoning Rights: Comparative Judicial Engagement 282–83 (Hart Publishing, Oxford and Portland, 2014). "Weak" remedies include declarations, development of plans by government which "hold out some promise of eliminating the constitutional violation” within reasonably short time periods, and may involve lighter oversight and encouragement of negotiations in the development of plans but examples of effective deployment of weaker remedies are fewer in number while mandatory injunctions setting out in detail what a government must do, with deadlines for the achievement of goals, and periodic reporting requirements would qualify as a "strong remedy" approach. Tushnet, supra note 67 at 248–49. Young describes "strong" courts as those that "tend toward" "muscular remedies", greater degrees of scrutiny, and "rulelike" interpretations of rights while "weak" courts on the contrary, issue declaratory or tentative remedies, have more relaxed standards of scrutiny, and contextualised standards for interpreting rights. Young, supra note 127 at 390. Courts may use one or more (of peremptory, managerial, deferential, conversationalist, experimentalist) forms of review. Young, id. at 419.
is more valid than the other and the weak form of review can well “produce more rights-
protecting”, positive results based on various contextual factors such as the legal and constitutional
culture, effectiveness of the other branches (legislature and executive), vitality or influence of
social movements or civil society, and the timing of the jurisprudential development. 198

A number of possible remedies have been discussed by various commentators that are being
and can be applied towards socioeconomic rights enforcement, including both traditional remedies
and innovative ones based on cooperation between the parties and different branches of state so
as to ensure amicable resolution and more effective implementation, besides being participatory
and enhancing democracy. Some of these include negative injunctions; structural or positive
injunctions; dialogue between the courts, legislature, and executive; damages; supervisory
jurisdiction; or “reading in” of additional protections in a legislative scheme to protect against
unlawful exclusion. 199

Direct individual actions, as Tushnet highlights, can have benefits in the context of outcomes
as these may pose difficulties for bureaucrats to operate and thus induce reform, the incentive
being bureaucratic interest in easier day-to-day functioning; as well as the possibility of judicial
intervention for enforcement of decrees through contempt sanctions on recalcitrant bureaucrats,
though judges may not always have the fortitude to do so. 200

Another possible remedy is negative injunctions. These have been resorted to, for instance,
for relief against eviction by squatters but would be restricted to cases where the person has

198 Katharine G. Young, "Proportionality, Reasonableness, and Economic and Social Rights", Research Paper 430,
199 Nolan, Porter, and Langford, supra note 48 at 18. Roach too points out that a range of remedies from "soft and
prospective" to injunctions including supervisory jurisdiction of the court may be required for the meaningful
enforcement of these rights, besides "two-track" strategies to bridge the gap between individual and group
remedies. Roach, supra note 186 at 47. He also refers to the remedy of reading words into a statute where
supported by legislative purpose and the constitution to cure a defect or employ delayed invalidity declarations in
the absence of clarity but notes that the latter to be effective would require lobbying and engagement with the
legislature. Roach, id. at 55 The remedy of “reading in ‘curing words’” has been used by the South African
Constitutional Court. Young, supra note 127 at 390. An instance for her was the decision in Khosa v. Minister of
Social Development, (2004) 6 SA 505 (CC), Young, id. at 408.
200 Tushnet, supra note 120 at 185 An instance is the reformulation of lists of drugs made available through the
public health system in Brazil due to the cumulative effect of individual actions. Ibid.
something the government seeks to take away, and can only prevent inadequate status quo from generating.  

Structural remedies on the other hand, can have the effect of eliminating the constitutional violations but have been quite controversial in the United States (whose courts pioneered their use) due to close judicial oversight, are costly, and seen as diluting the judicial components due to delegating authority to officials supervised by judges or drawing on experts.  

These are argued to be most appropriate for and “define the contours of” systemic social welfare rights.

One of the newer forms of remedies which are more creative and less adversarial are dialogic remedies, which have two variants—between courts, legislatures, and executive officials or different branches of the state; and between executive officials and plaintiffs—and seek to promote “healthy partnerships” between courts and governments, and achieve systemic reforms.

The approach in Grootboom, where the court directed the government to develop a plan for the most vulnerable sections, and encouraged cooperation towards enforcement, is seen as implicitly dialogic, leaving open the option to return to the Court challenging the plan (if required), while also recognising the value of monitoring (though not by the court itself). In such a case, remedies could be structured in different ways, such as development of a plan by the government which the plaintiff may decide to challenge (though this would impose costs on the plaintiff which

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201 Id. at 182, 185.
202 Id. at 182–83.
203 Id. at 185.
204 Dialogic or “social conversation” accounts of judicial review, Pillay points out, are looked to by those attempting a reconciliation of rights protection by courts and democratic legitimacy, viewing the judiciary as an actor in dialogue with others such as the legislature, to protect rights as best as can be done. Pillay, supra note 142 at 736. Roach points out that courts’ turning to the dialogic or reiterative process would be viewed in the received tradition as them descending into politics with the use of negotiation and bargaining rather than authoritative adjudication. Roach, supra note 186 at 49.
205 Tushnet, supra note 120 at 183–84; Roach, supra note 186 at 52. Dialogic remedies are argued to be more increasingly acceptable in states whose bills of rights contemplate interactions between courts and governments through limitations clauses and derogation provisions. Roach, ibid. They are based on the faith that governments are able and willing to act in compliance with the courts’ orders and promptly. Roach, id. at 58 The approach involving inter-branch dialogue is termed by Young as “conversational review”, citing as an instance the Treatment Action Campaign decision. Young, supra note 127 at 395.
206 Tushnet, id. at 183; Klein, supra note 16 at 403–04.
they may lack the resources for) or by requiring the government to prepare a plan to be presented to the court, with repeated stages of the plan resulting in a remedy resembling a structural remedy but with greater participation by parties.  

The second dialogic remedy, which also involves engagement but between executive officials and plaintiffs, was also developed in a case relating to squatting, *Occupiers of 51 Olivia Road*, wherein before proceeding with evictions, the city was to engage in a dialogue with the squatters to determine whether the safety issues necessitating the eviction could instead be resolved. Such “meaningful engagement” with occupants/squatters has also been directed in other decisions. While Tushnet cautions that such dialogue may not always practically generate any “real” progress (it did so in *Olivia Road*), he believes nonetheless that remedies based on dialogue and negotiation rather than confrontation hold out some promise of actual accomplishment, more so than structural or other forms of relief in some settings.

In the Indian context, the PIL mechanism, which again focuses on cooperation, has been seen as providing an opportunity to civil society to participate in governance, highlighting issues more quickly than through social campaigns alone. This could question the objection to justiciability on account of interference with democratic functioning (as it provides both an avenue for claims and involvement of all parties). This is comparable with meaningful engagement which ensures the involvement of all parties towards seeking a more democratic solution.

Klein notes that systems involving the participation of all concerned parties in defining goals and measuring the enforcement of economic and social rights are termed experimentalist, wherein

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207 Tushnet, *id.* at 183–84.
210 Tushnet, *supra* note 120 at 184. Albrecht finds that “engagement” which involves consultation with the affected parties, broad assessment of issues of city planning, and cost analysis, “directly meet[s] the contact point between juridical decisions and policymaking”. *Albrecht*, *supra* note 53 at 15.
211 Deva, *supra* note 165 at 31.
courts may ensure that there is consultation, reporting, and adoption of best practices.\textsuperscript{212} There are no "one-and-for-all solutions", but superintendence of procedures by "detecting potential threats to constitutional values" and "assessing whether the state is engaging in the appropriate deliberative processes" with courts asking what was done towards looking for solutions rather than considering the aptness of the solution; the system provides citizens information to hold institutions accountable without the courts' involvement in substance, their role being one of superintendence.\textsuperscript{213} For her, such mechanisms as best suited to the enforcement of socioeconomic rights, both as they require demonstration of progress by governments and consideration by the government of inputs by stakeholders.\textsuperscript{214}

Another commonly advanced model of judicial enforcement, such as the South African reasonableness review approach, is classed by Klein as the "administrative review" approach where the court sets out the broad boundaries of the right giving the government a margin of appreciation to enforce the right; these also being intended to promote cooperation between the legislature and the judiciary, and addressing concerns of separation of powers and judicial overreach.\textsuperscript{215}

Courts, for instance, in Canada have preferred to issue declaratory orders setting out the broad content of the right, with injunctions issued only where the government is found to have

\textsuperscript{212} Klein, \textit{supra} note 16 at 355. Tushnet too finds the exercise of weak form of substantive review of socioeconomic rights if worked out suitably, could "approximate the experimentalist remedial form". Tushnet, \textit{supra} note 67 at 249. Experimentalist review sees the court willing to engage in a more vigorous analysis of the policy or legislation in question and order remedies of a limited structural form. Young, \textit{supra} note 127 at 398.

\textsuperscript{213} Klein, \textit{id.} at 396–97. See also Wesson, \textit{supra} note 197 at 287.

\textsuperscript{214} Klein, \textit{id.} at 356. The "experimentalist vision", she notes, views all constitutional rights as imprecise and evolving, and leads to the content of the right being developed through a democratic process, there being processes of determination and redetermination which would address to an extent, objections on grounds of vagueness, the limited role of the courts, and separation of powers. However, they do not provide answers to the steps to be taken if these approaches fail to yield results in line with the judge’s sense of constitutional requirements. Other concerns are the realisation being limited by the level of popular commitment, and the homogenisation the adoption of best practices leads to, being contrary to experimentation. Klein, \textit{id.} at 356, 397, 421. Young classifies the "meaningful engagement" adopted by the South African Constitutional Court in eviction cases in the experimentalist approach. Young, \textit{supra} note 127 at 400.

\textsuperscript{215} Klein, \textit{id.} at 375–76.
dragged its heels.\textsuperscript{216} Declaratory relief, however, may not always be appropriate such as where a government is unwilling or incompetent, in which case stronger and more detailed injunctions may be called for.\textsuperscript{217}

Another form of remedy seen in countries such as Canada, and recognised constitutionally in South Africa (section 172) and through legislation in the UK (section 4 of the Human Rights Act) is delayed declarations of invalidity, which declare that a legislation would be invalid but would remain valid for a specified period to allow the legislature time to either enact a suitable legislation or modify the existing legislation,\textsuperscript{218} which again can be said to take separation of powers concerns into consideration.

An array of remedies is employed in different jurisdictions for the enforcement of socioeconomic rights, including both traditional remedies and “new” forms of dialogic remedies. Experience has shown, as Tushnet notes, that enforcement of second generation rights (not in any way less effective than that for first generation rights) is possible though its extent and effectiveness would depend on circumstances, and while there may be difficulties, they cannot be generalised to say that structural remedies or new forms of relief can never be adequate.\textsuperscript{219} Not all socioeconomic rights call for major social changes for effective implementation; rather many aspects of these rights are immediately implementable. Dialogic remedies which involve cooperation between various branches of government and affected parties, that is, those who seek redress, have been found to provide a democratic and amicable resolution with a limited judicial role. Moreover, the involvement of the parties in seeking a solution, with the judiciary focusing on

\begin{itemize}
\item \textsuperscript{216} Id. at 384–85. For instance, in Doucet-Bourdeau v. Nova Scotia, \cite{Doucet-Bourdeau_v._Nova_Scotia} 575 APR 246 (QL), the court relied on previous jurisprudence on the government’s constitutional duty to build French language schools, and merely directed the government to make best efforts to comply, but within specified deadlines and with a supervisory element of reports on progress. \textit{i}b\textit{id}.
\item \textsuperscript{217} Roach, supra note 186 at 54.
\item \textsuperscript{218} Id. at 50.
\item \textsuperscript{219} Tushnet, supra note 120 at 180, 184–85. One cause for concern, is however, that cases where something significant towards enforcing second generation rights has done are seen to have primarily benefitted not the poor but the relatively better off such as the middle-classes, as they have better access to lawyers and thus would be able to take steps even in the case of structural remedies. Tushnet, \textit{id}. at 185.
\end{itemize}
obtaining information, accountability, and broadly setting out the scope of the right leaving the specifics to the government, addresses many of the objections raised by opponents of justiciability besides providing a democratic solution in accordance with the available resources and level of development.

(i) Access to Justice

Access to justice is relevant in the context of justiciability, both due to “standing” being an element of justiciability, and access being relevant for vulnerable sections which lack socioeconomic rights but cannot voice their claims due to their disadvantaged position and its consequences. Traditionally, standing requires that only a person with interest (one whose right has been violated or stands unenforced) in an issue may bring an action before the court. Much of the time, disadvantaged sections of society lack the knowledge, ability, or resources to voice issues affecting them, and may also suffer reduction in the overall amount of resources as a result of judicial decisions, which would be antithetical to the objectives of social justice. Rights, a “legitimate vehicle of claim-making” provide a partial corrective in this regard.

In order to provide access to justice to such sections of society that are vulnerable and deprived as regards their basic human rights but cannot approach the courts themselves, in the Indian context, an innovation was made in the form of the mechanism of PIL developed by the higher judiciary. The expression “public interest litigation” describes litigation brought before the courts usually by a publically spirited person, who is espousing the cause of others, ordinarily those who are unable to approach the courts themselves due to their disadvantaged social or economic situation. As observed in S.P. Gupta v. Union of India.

220 Wiles, supra note 92 at 56. As Young points out, the poor are often not able to gain a perspective on the causes of the everyday indignities faced by them, which “lack of information results in a skewing of the perspective that will ‘shape their grievances, establish...the measures of their demands, and point to the targets of their anger’”. Young, supra note 54 at 14.

221 Young, ibid.


where access to justice [is] being restricted by social and economic constraints, it is
necessary to democratise judicial remedies, remove technical barriers against easy
accessibility to justice and promote public interest litigation so that the large masses
of people belonging to the deprived and exploited sections of humanity may be able
to realise and enjoy the socio-economic rights granted to them and these rights may
become meaningful for them instead of remaining mere empty hopes.

Further it was observed that the rule of locus standi must be liberalised "in order to provide judicial
redress for public injury arising from breach of public duty or from other violation of the
Constitution or the law", else it would promote disrespect for the rule of law.\textsuperscript{224} Prof. Baxi prefers
in this regard the use of the expression "social action litigation".\textsuperscript{225} For Justice P.N. Bhagwati, who
with Justice Iyer prepared the groundwork for PIL,\textsuperscript{226} it represents "a sustained effort on the part of
the highest judiciary to provide access to justice for the deprived sections of Indian humanity", and
is concerned with “immediate as well as long term resolution” of the problems of the
disadvantaged”.\textsuperscript{227}

Some of the key factors contributing to its growth were modification of traditional rules of
locus standi, acceptance of epistolary petitions, and taking suo motu cognizance of issues of public
interest through newspaper reports, etc. The court has also evolved new remedies such as
appointment of committees/commissioners, etc. to monitor steps being taken, for instance, in the
“Right to Food” petition.\textsuperscript{228} Much of the litigation brought through this mechanism relates to
fundamental rights or human rights of the persons affected.\textsuperscript{229} Wiles finds such a proactive

\textsuperscript{224} id., ¶¶ 19, 19A. Also, Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 384.
\textsuperscript{225} Singh, supra note 222 at 288.
\textsuperscript{226} Deva, supra note 165 at 19.
\textsuperscript{227} P.N. Bhagwati, “Judicial Activism and Public Interest Litigation”, 23 Columbia Journal of Translational Law 561
(1985).
\textsuperscript{228} People’s Union of Civil Liberties v. Union of India, CWP 196/2001.
\textsuperscript{229} For instance, the plight of undertrials in Kadra Pahariya v. State of Bihar, AIR 1981 SC 939 (Bench Strength: 2).
approach “crucial to realise the benefit of socio-economic rights for those who are most in need of them”.

In the South African context, such a mechanism is part of the constitutional provisions, specifically section 38 which enables a person to bring an action in respect of any provisions of the bill of rights, inter alia, on behalf of any other person who cannot act in his own name, to act in the interest of a group, as well as to act in public interest. This is also the case in the Optional Protocol to the ICESCR which recognises in the context of its communications mechanism in article 2, that communications may be brought by or on behalf of individuals or groups, with consent where they are on behalf of individuals or groups, unless the person bringing such communication can justify acting without consent. Such mechanisms may help overcome access to justice barriers faced by poorer and disadvantaged sections of society.

5. Trajectory of Social and Economic Rights
As mentioned earlier, despite assertions of interdependence and indivisibility of human rights at the international and other levels and the placement by the UDHR of social and economic rights at par with civil and political rights, social and economic rights have largely been marginalised at international, regional, and national levels, and have been treated as “secondary” to the first

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230 Wiles, supra note 92 at 57–58.
231 Setalvad argues that the UDHR shows that the “right to social justice is as much a part of human rights as the more traditional rights such as the right to personal liberty”. 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 232 (Oxford University Press, New Delhi, 2000).
generation civil and political rights for long.\textsuperscript{232} This is the case also with research, scholarship, and advocacy,\textsuperscript{233} not protection and enforcement alone.

Even before the adoption of the final text of the UDHR, controversy had arisen as to the relationship between the two sets of rights, a consequence of the cold war.\textsuperscript{234} These disputes prevented agreement on any treaty on human rights, and a non-binding but standard-setting instrument was first formulated. Despite the disagreements, the UDHR incorporated both sets of rights in one instrument without any distinction between them.\textsuperscript{235} Although in 1950, the General Assembly had rejected the view of the distinctions between the two sets of rights and insisted on the drafting of a single covenant containing both, also instructing the Commission to consider a complaints procedure, cold war politics increasingly began to impact on the issue and in 1951, it was requested to reconsider its position.\textsuperscript{236} In 1952, by a "separation resolution", the UDHR guarantees were split into two draft treaties.\textsuperscript{237} A major issue that arose at the time of drafting the International Bill of Rights related to implementation, it being argued (besides arguments as to the different nature of the rights, and justicibility of socioeconomic rights) that the measures required for the implementation of civil and political rights were entirely different from those required for

\textsuperscript{232} Leckie, among others, notes that despite formal assertions of interdependence and indivisibility of all human rights, substantive and procedural responses to violations of economic, social and cultural rights have paled in comparison to the seriousness with which civil and political rights are dealt with, despite obdurate and frequent violations of the ICESCR. Leckie, supra note 65 at 81–82. On the contrary, D’Souza finds civil and political rights in the UN system were not given the same authority as socioeconomic rights, the latter given a site in the form of the ECOSOC where global institutions give effect to the development project given shape by the Bretton Woods Institutions. Radha D’Souza, "The Third World and Socio-legal Studies: Neoliberalism and Lessons from India’s Legal Innovations", 14(4) Social & Legal Studies 487, 499 (2005).

\textsuperscript{233} S. Hertel, "Why Bother? Measuring Economic Rights: The Research Agenda", 7(3) International Studies Perspectives 215, quoted in Wade M. Cole, "Strong Walk and Cheap Talk: The Effect of the International Covenant on Economic, Social and Cultural Rights on Policies and Practices", 92(1) Social Forces 165, 167 (2013). An instance is quoted by Leckie of an academic calling for greater attention to "basic" civil and political rights on "securing and implementing" which "so much progress remains to be made", "that we may have to be somewhat skeptical about other rights claims that may tend to divert attention and energy from these basic rights". Leckie, supra note 65 at 84 quoting Anthony D’Amato, "Letter from the Chair, Human Rights Interest Group", 5 American Society of International Law Human Rights Interest Group Newsletter 1 (1995).

\textsuperscript{234} Steiner, Alston, and Goodman, supra note 65 at 264.


\textsuperscript{236} Tara J. Melish, "Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 48 ILM 256 (2009).

\textsuperscript{237} Riedel, Giacca, and Golay, supra note 235 at 6.
the implementation of economic, social, and cultural rights and having two different mechanisms in a single covenant would be like having “a covenant within a covenant”. Thus, ultimately two covenants came to be drafted, namely the ICCPR and the ICESCR. The differences in the mechanisms for enforcement of the two sets of rights, were as Churchill and Khaliq note, “the results of political compromise and the categorization of rights was hardly an exact science”.

Although political and ideological differences between the United States and Soviet Bloc have been identified as one of the reasons behind the division of rights into two covenants, ideological differences as an explanation for this separation has been challenged by commentators who point to Western countries’ efforts to establish extensive welfare systems at the time the ICESCR was being adopted. There are, in fact, a variety of theories concerning the “political and legal motivations” behind this separation of the two sets of rights.

The two covenants impose different obligations, civil and political rights to be immediately implemented and economic, social, and cultural rights to be progressively realised (and to the maximum available resources), with divergent monitoring mechanisms, monitoring under the ICESCR being entrusted to the ECOSOC, a political body (until the CESCR was created in 1986), while that under the ICCPR to an independent body (the Human Rights Committee). Moreover, the mechanisms for implementation also differed with only periodic reporting envisaged for socioeconomic rights but inter-state communications, as well as an individual complaints mechanism for civil and political rights. The monitoring function and the changes it has undergone

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238 Steiner, Alston, and Goodman, supra note 65 at 245. See also Daniel McGoldrick, The Human Rights Committee: Its Role in the Development of the ICCPR (Oxford: Clarendon Paperbacks, 1996). Besides the arguments on the differences on the nature of these rights vis-à-vis civil and political rights, the former were also seen as novel and less familiar compared to the latter which were known to national constitutional and legal traditions in many countries. Saul, Kinley, and Mowbray, supra note 65.

239 See Churchill and Khaliq, supra note 93 at 419.

240 Wiles, supra note 92 at 38; Riedel, Gicca, and Golay, supra note 235 at 7.

241 Cole, supra note 233 at 168; Dennis and Stewart, supra note 3 at 476.


will be discussed in more detail in the next chapter. Patterns of ratification of the two covenants have, however, been noted to be nearly identical.\textsuperscript{244}

Despite both sets of rights being seen under the UDHR as fundamental preconditions of a dignified human life, the latter remained marginalised in the human rights discourse.\textsuperscript{245} The separation of the two sets of rights and drafting of two covenants was not intended to “up- or downgrade a particular class of rights”,\textsuperscript{246} though this has been its effect. In fact, the two covenants share a common preamble (with only a reversing of the order of relationship between the two sets of rights), and starting point (self-determination), and reaffirm the interdependence principle, the separation being brought on by pragmatic considerations of the competence of the judiciary in their adjudication.\textsuperscript{247}

Despite efforts by the UN to “realign” approaches to the covenants, negative attitudes to socioeconomic rights persisted, and were also reflected in the protection of these rights in national jurisdictions, with reluctance to “mandate such rights through intergovernmental organizations” shown even by states with legally enforceable socioeconomic claims, reflecting concerns about “supranational policing” of the provision of these rights.\textsuperscript{248} In fact the distinctions drawn between “enforceable” civil and political rights and “non-enforceable” socioeconomic rights, and the review of the former being seen as permissible are noted to be “still widely accepted in many parts of the democratic world” with key actors assuming the distinction to be “a necessary and inevitable

\textsuperscript{244} Cole, supra note 233 at 169.
\textsuperscript{245} Woods, supra note 3 at 764.
\textsuperscript{246} Albrecht, supra note 53 at 7. This position is also taken note of by Dennis and Stewart writing an argument against the adoption of a complaints procedure for economic, social, and cultural rights, though they assert that these rights were defined in aspirational terms from the outset and the difference was one of practical difficulties in implementation. Dennis and Stewart, supra note 3 at 465.
\textsuperscript{247} Scott and Macklem, supra note 3 at 90; Albrecht, supra note 53 at 8.
feature of the modern constitutional state". One reason behind their continued marginalisation is "outdated philosophical assumptions about their substantive content".

Siegell discusses in detail instances of the right to social security and right to work as dealt with by international organisations illustrating their marginalisation and inadequate protection. Writing in the mid-1980s, he noted that while social security is protected more forthrightly than the right to work reflecting its longer history and greater consensus concerning its necessity, there was a "growing political challenge to various aspects of social security", during the previous decade with the high costs and other aspects of its provisions being alleged to reduce "economic competitiveness of various advanced states". Similarly, despite recognition of the right to work in numerous instruments under global and regional intergovernmental organisations, the global community was quite restrained regarding its assertion, member-states rebuffing efforts to strengthen the right by the ILO in 1984, and even the expression "right to employment" being avoided in ILO documents due to which until 1984, it could be ignored in reviews of conventions and recommendations.

Classical liberal perspectives of rights, as discussed, do not adequately accommodate conceptions of socioeconomic rights. They are seen as providing "pauses" rather than "long-term trends" and have "blunted" drives promoted by various intergovernmental organisations to advance basic needs approaches for third world states, that tend to parallel early welfare state developments in Europe and elsewhere. The classical liberal view of rights seems also to have impacted the common perception of socioeconomic rights. People are seen to hold the state

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249 O’Cinneide, supra note 116 at 301–02.
251 Siegel, supra note 248 at 258.
252 Siegel, id. at 259. He further observes that this committee’s (which helped with review of country reports relating to the right to work under the ICESCR) approach, fully consistent with the language of ICESCR, supported the contention that most social and economic rights are preferably dealt with by intergovernmental organisations in terms of equal protection and government interference with individual liberty. They are very rarely dealt with in a regulatory or promotional context by passing international judgment on alleged denials of the rights of individuals to subsistence, work, or other basic needs. Id. at 259.
253 Id. at 265–66.
responsible when the right to free speech is restricted, but death due to hunger or thirst or mass eviction of the poor from their homes is attributed to “economic and developmental forces or the simple inevitability of human deprivation” as well as the victims themselves.\textsuperscript{254} A reason for this is lack of or insufficient awareness of these rights forming part of international or regional treaties.\textsuperscript{255}

The agency or body responsible for monitoring socioeconomic rights internationally has also impacted the focus on and developments related to these rights. Initially monitoring of reports under the ICESCR was carried out by a working group comprised of government representatives, and then of government appointed experts\textsuperscript{256} but these mechanisms were criticised. The establishment of the Committee on Economic, Social and Cultural Rights (CESCR) in 1986 provided a fresh impetus to the protection of these rights. This has led to an improvement in monitoring, issuance of general comments defining the content of the rights and obligations of states, and the involvement of organisations such as NGOs to obtain information. These developments will be discussed in more detail in Chapter III.

The adoption of the Limburg Principles at a meeting of twenty-nine international law experts in Maastricht, which stressed on economic, social, and cultural rights being an integral part of international human rights law and the need to give attention and urgent consideration to the implementation, protection, and promotion of both categories of rights, marked another important development,\textsuperscript{257} though even after their adoption, alarming deficiencies in the protection of social rights were noted.\textsuperscript{258} In 1993, the Vienna Declaration and Plan of Action, adopted at the World Conference of Human Rights, reaffirmed the universality, interdependence, interrelationship, and

\begin{itemize}
\item \textsuperscript{254} Leckie, \textit{supra} note 65 at 82. International NGOs such as Amnesty International and Human Rights Watch too have been noted to focus on civil and political rights violations and have only more recently shifted to a more integrated human rights approach. M. Rodwan Abouharb and David Cingranelli, \textit{Human Rights and Structural Adjustment} 138 (Cambridge University Press, Cambridge, 2007)
\item \textsuperscript{255} Albrecht, \textit{supra} note 53 at 5.
\item \textsuperscript{258} Albrecht, \textit{supra} note 53 at 12.
\end{itemize}
indivisibility of all human rights, and stressed the need for concerted efforts to ensure the recognition of economic, social, and cultural rights at all levels.  

But such "ritualistic affirmations were followed by near silence regarding specific issues or concerns".  

At the regional level, the ESC of 1961 was the first international instrument on socioeconomic rights. In 1995, an additional protocol to this charter brought in a collective complaints mechanism. In other regional systems, earlier in 1981, the African Charter of Human and Peoples’ Rights was adopted in Banjul covering both civil and political rights as well as economic, social, and cultural rights while the year 1988 saw the adoption of the San Salvador Protocol to the American Convention on Human Rights covering various economic, social, and cultural rights, but with a complaints mechanism limited to some rights alone.  

A meeting of experts in 1997, saw the adoption of the Maastricht Guidelines ten years after the Limburg Principles were adopted. According to these guidelines, economic, social, and cultural rights imposed on parties the obligation to respect, protect, and fulfil, each of which contains elements of obligations of conduct and result. These principles will be discussed in more detail in the next chapter. This conceptual development has been noted to have played a role in viewing human rights as a single category rather than in terms of generations. The 1980s and 1990s thus saw several steps which defined the content of and obligations imposed by socioeconomic rights, sought to improve monitoring, as well as contributed to the jurisprudence in the area.  

The Millennium Development Goals, a major initiative concerned with socioeconomic rights, were a set of eight goals sought to be achieved by 2015, ranging from eradication of extreme poverty to primary education.

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260 Chapman, supra note 73 at 26–27. For instance, the agendas of the Copenhagen Declaration on Social Development and Programme of Action using the language of development, rather than rights, marginalising the ICESCR further. Id at 26.
261 See Principles 4 and 5, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997. The obligations of conduct and result, for Leckie, must be "seen as forming an inseparable and mutually inclusive way of understanding the nature of state obligations under the ICESCR in addition to providing a tool for discerning violations". Obligations to respect, protect, and fulfil consist simultaneously of both these dimensions. Leckie, supra note 65 at 92.
262 Cullen, supra note 176.
poverty to combating of diseases including HIV/AIDS and malaria, to equality between men and women.\textsuperscript{263} While concerned with these rights, these goals were not rights-based.\textsuperscript{264} The final report found, inter alia, reduction in poverty from 1.9 billion people to 836 million between 1990 and 2015; 40 percent reduction in new HIV infections (between 2000 and 2013); 45 percent decrease in maternal mortality worldwide since 1990; and improved access to sanitation for 2.1 billion people.\textsuperscript{265}

Commentators have noted a shift in the status of these rights over the past two decades, with the rights having emerged from the margins, and being increasingly accepted as fundamental and having practical application, "no longer a proxy for the ideological stand-offs of the Cold War".\textsuperscript{266} Courts, nationally, internationally, and at regional human rights forums have adjudicated on a wide range of social rights issues, in cases of intrusion and inaction by the state and non-state actors, the "orthodox assumption" of these rights not being enforceable by courts being called into question increasingly.\textsuperscript{267} Young, in fact, points out, courts around the world have been developing,
in dialogue with each other, “a jurisprudence on economic and social rights that is becoming as sophisticated as more traditional constitutional jurisprudence such as free speech or privacy”\textsuperscript{268}

Scholars and advocates are increasingly taking interest in these issues resulting in “an impressive development of tools and resources at national, regional, and international level, as well as the consolidation of doctrine on ESC rights”.\textsuperscript{269}

Various positive developments identified in this regard including the establishment of the European Committee on Social Rights monitoring compliance with the ESC and since 1995, also receiving collective complaints, leading to a rich body of case law; the seamless integration of the two sets of rights by the Convention on the Rights of Persons with Disabilities (CRPD); the adoption of the optional protocol to the ICESCR in 2008 introducing a communications mechanism; the Inter-American Commission and African Regional Human Rights systems taking ESC rights more seriously; the appointment by the UN of Special Rapporteurs on various economic and social rights (such as housing, health, food, etc.) to help better promotion and protection; reliance by civil society groups on human rights including economic, social, and cultural rights as "tools for tackling unfairness and disadvantage"; the idea of interconnectedness of rights beginning to filter into new and emerging human rights standards; besides the spurt in academic interest in the area, demonstrate that the "orthodox position" of distinctions between the two set of rights are increasingly “out of sync” with international human rights law.\textsuperscript{270}

Besides the judicial enforcement of rights, national policies and action plans are also playing a part in their advancement, in addition to increased attention being focussed on their achievement in the international community's preoccupation with economic development, making

\textsuperscript{268} Young, supra note 266 at 487.
\textsuperscript{269} Riedel, Giacca, and Golay, supra note 235 at 3.
\textsuperscript{270} O’Cinneide, supra note 116 at 306; Oliver de Schutter, "Economic, Social and Cultural Rights as Human Rights: An Introduction", CRIDHO Working Paper 2013/2 8–9 (Université Catholique de Louvain); Saul, Kinley, and Mowbray, supra note 65 at 8; Hunt, supra note 106; O’Cinneide, supra note 250. The increased academic interest as well as heightened level of NGO engagement with social rights issues are seen as driven by the "social rights problematic". O’Cinneide, supra note 116 at 308. Instances of NGOs that are concerned with socioeconomic rights alone include the Centre on Housing Rights and Evictions (COHRE); Center for Economic and Social Rights (CESR); and Food First International Action Network (FIAN). Leckie, supra note 65 at 85.
them “central to the mainstream of international development activity”; the notion of human development encompassing the full range of indicators—civil and political, as well as economic, social, and cultural.271

This change in the position of social and economic rights is attributed to the new wave of constitutionalism combining features of US Constitutionalism with features of German and other non-court-centric models; new models of enforcement of positive obligations that enhance democracy; and three, the rights being led in the global south (bill of rights in countries such as India, South Africa, Colombia, etc., being centred on matters of distributive justice, as distinguished from "Northern Bills of Rights" focusing on negative freedoms).272

This “emergence” of socioeconomic rights is thus seen as “reflect[ing] broader shifts in constitutionalism”, away from the protection of only a core set of basic liberties towards “a core comprehensive vision of a socially just society”, the omission of socioeconomic rights in older constitutions, being “increasingly viewed as constituting a defect or lacuna within a national constitutional order”.273

While there have been many positive steps towards recognising and protecting economic and social rights, some commentators also note a trend which gives rise to some concern. This is reflected in recent decisions of apex courts in countries including South Africa and India, which

271 Saul, Kinley, and Mowbray, supra note 65; Young, supra note 54 at 4–5.
272 Young, supra note 266 at 486; Wesson, supra note 197 at 285. Wesson takes note of another explanation in literature distinguishing the “dominant philosophical account of fundamental rights” which views rights as covering a limited domain, protecting only certain “especially important” interests imposing essentially “negative” obligations, not between private citizens, and the “global model of constitutional rights”, which regards rights as “premised on the value of ‘positive freedom’ or ‘autonomy’”, and “embrac[ing] a model of rights that includes rights inflation, positive obligations and socio-economic rights, horizontal effect, and proportionality”. Wesson, id. at 284–85.
273 Wesson, id. at 284–85; O’Cinneide, supra note 116 at 308. For a “national constitutional order” to be “legitimation-worthy”, the participation of everyone in the political, social, economic, and cultural life of their community must be protected, a principle which is effectuated by legally enforceable social rights. O’Cinneide, id. at 305. Fabre who argues that social rights too protect autonomy, writes that since it is autonomy that is a reason behind why civil and political rights are valuable and protected by constitutions, the same argument would be true for social rights. Fabre, supra note 74 at 267. For Young, “a constitutional legal framework protective of rights to food, water, health care, housing, and education is one which establishes processes of value-based deliberative problem solving, rather than one which sets out the minimum bundles of commodities or entitlements”. Young, supra note 54 at 6.
have been issuing “judgments fundamentally at variance with the meaningful protection of socio-economic rights”, instead having “engaged in a de facto harmonisation of domestic constitutional law, with the effect of entrenching principles of neo-liberalism.” Interpretations of fundamental rights privileging neoliberal interests take the form of viewing constitutional rights as liberty interests, "guaranteeing at best, procedural protection of socio-economic rights", or where there is textual commitment or prior judicial practice of protecting socioeconomic rights, "embrac[ing] a deferential standard of review". In India, this trend of interpretations began to take place, at the same time as when stronger pronouncements on socioeconomic rights were also being made, calling into question "the commitment of the Indian court to the rights of the poor and the constitutional imperative of creating an egalitarian socialist republic." Similarly, South Africa has seen support for commodification of water and decisions such as Mazibuko, which are viewed as validating the neoliberal approach and "narrow[ing] the horizons of the possible in terms of socio-economic rights litigation". Between the narratives of progress and addressing the effects of apartheid; and privatisation, deregulation, and global economic competition bringing in its own

274 O’Connell, supra note 154 at 532, 534. For him neoliberalism “posits a binary opposition” between public and private power, represented by the state and the market respectively, with the state being viewed as inefficient and to be restrained or limited while the latter promoted as it encourages individual freedom and maximisation of wealth. Ibid. Cole too notes that the idea of individual possessing “fundamental economic and social rights” is at variance with the “market-based policies and principles that underlie economic liberalization”. Cole, supra note 233 at 165. Benelhocine writing a review on fifty years of the ESC also questions whether socioeconomic rights may be sacrificed at the altar of economic growth, in view of the background of free-market economics and globalisation now prevalent. Carole Benelhocine, The European Social Charter 111 (Council of Europe Publishing, Council of Europe, 2012). Pillay too notes the trend of opinion that social change is to be achieved through marked-based economic growth, which line is also followed in judicial decisions. Anashri Pillay, "Judicial Activism and the Indian Supreme Court: Lessons for Economic and Social Rights Adjudication", in Liora Lazarus, Christopher McCrudden, and Nigel Bowles (eds), Reasoning Rights: Comparative Judicial Engagement 353 (Hart Publishing, Oxford and Portland, Oregon 2014).

275 O’Connell, id. at 539. He further observes that such developments have “involved the jettisoning of the transformative vision of the constitution and the recasting of socio-economic rights guarantees as some form of hyperprocedural requirement, rather than a guarantee of substantive material change”. Id. at 552.


278 O’Connell, supra note 154 at 550. Moreover, its Reconstruction and Development Program, which sought to address the inequalities resulting due to apartheid was replaced in 1996 by Growth, Employment and Redistribution, aiming at sustained growth rather than redress of injustices, and adopting neoliberal paths of privatisation, liberalisation, and competition. Young, supra note 54 at 21.
rigours and leaving the management of economic life to the family, market, and street crime; lies the truth, in a country that has been described as “the world in microcosm”. 279

O’Connell is of the opinion that this era of neoliberal globalisation, which emphasises privatisation, deregulation, transformation of social relations, and commodification, poses a very “real danger” of socioeconomic rights being “fundamentally undermined and rendered nugatory”, despite the progress made both in their formal recognition and entrenchment. 280 While a “neo-liberal worldview” is alleged to be “antagonistic to the recognition and protection of socioeconomic rights, 281 Alston and Quinn writing in 1987, had argued, that both the text of the Covenant and preparatory work indicated no inherent incompatibility between economic rights and particular socioeconomic systems. 282 O’Cinneide finds that while O’Connell’s argument holds some force, it does not account for the willingness shown by courts in countries of continental Europe and Latin America to protect social rights. 283

Neoliberal market policies, global competitive pressures, and national debt crises have led to reduction in public investment in the provision of facilities towards socioeconomic rights such as education, healthcare, and welfare services but these developments have also reduced the faith in the political process for protecting these rights. 284

While international monetary institutions such as the IMF, and the World Bank began to call for “more humility in their approaches” in 2005, the global market crisis of 2008 triggered opposing

279 Young, id. at 22.
281 O’Connell, id. at 536. The idea of neoconservative rights is based on that of the “inherent justice of the marketplace” with distributive justice being a “trickle-down” effect. D’Souza, supra note 232 at 501.
282 Alston and Quinn, supra note 56 at 183.
283 O’Cinneide, supra note 116 at 311.
284 Id. at 307. Chapman too notes, obligations under the ICESCR such as on compulsory primary education are not often fulfilled, and in light of “IMT-dictated austerity plans”, both education investments and attendance in schools are seen to be declining in poorer countries. Chapman, supra note 73 at 49. Ratjen and Satija, writing more recently also note that resource constraints are often used as an excuse by states “to cut public spending and social expenditure” instead of a focus on addressing the protection of vulnerable sections. Ratjen and Satija, supra note 185 at 112.
responses, with calls for austerity and public disinvestment in areas like healthcare and education. But as Alston and Quinn have pointed out, it is precisely in periods of economic or political hardship, "when governments and their experts are ready to jettison (or 'sacrifice') concern for individual well-being in the interest of an abstraction such as 'the war against inflation' or 'increased productivity' or 'improved terms of trade' that the socio-economic rights recognized in the Covenant assume their real importance".

In this context, Navinath Pillay, the High Commissioner for Human Rights, in her 2013 report set out six human rights criteria including the existence of compelling state interest; reasonableness, temporariness, and proportionality of the measures; exhaustion of alternative remedies; and participation of affected groups and individuals in decision-making processes, as criteria to be met when austerity measures were sought to be imposed.

Persisting socioeconomic inequalities and lack of socioeconomic rights in the form of absence of decent living conditions, besides freedom and repression have in fact been noted to have given rise to protests and popular uprisings such as the Arab Spring, and Western Winter of discontent, while protecting these rights have a role in mitigating effects of crises, alleviating the "wrongs" of the market-oriented world, and avoiding collapses.

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285 Young, supra note 54 at 11–12. The global financial crisis of 2008 is a development whereby positive developments as to the holistic understandings of human rights and acceptance of the importance of socioeconomic rights are noted to have stalled, followed by the reemergence of an environment not conducive to the realisation of these rights. Ratjen and Satija, ibid. The World Bank too is noted to have taken a small step in the direction of human rights by creating a World Bank Inspection Panel and by considering itself bound by UN sanctions against Serbia, a step it had not taken in the case of apartheid in South Africa. Leckie, supra note 65 at 113.

286 Alston and Quinn, supra note 56 at 164. O'Connell too argues that counter-hegemonic movements and socioeconomic rights have a role to play "in the struggle for an alternative future to that which is promised by neo-liberalism". O'Connell, supra note 154 at 554. In fact, Abouharb and Cingranelli observe, "[t]here is a growing consensus that greater respect for certain human rights leads to economic development that benefits a broader section of society", advocating a human rights based approach to economic development. They consider "equitable economic development" as "economic growth accompanied by a relatively high level of respect for economic and social rights" which for them should be the standard for evaluating structural adjustment programmes and the appropriate measure to determine whether economic development is taking place. Abouharb and Cingranelli, supra note 254 at 29.

287 Riedel, Giacca, and Golay, supra note 235 at 36.

288 Benelhocine, supra note 274 at 111; Riedel, Giacca, and Golay, id. at 48; Young, supra note 54 at 2.
The decreasing role of the state in many areas in view of privatisation and globalisation necessitates a greater need to hold non-state actors responsible for human rights violations and accountable for harmful impacts of their economic and commercial activities, including institutions such as the World Bank.289 International monetary institutions cannot be parties to human rights instruments but are expected to promote human rights; however, they have been criticised for aggravating socioeconomic rights’ situations and impacting rights such as health, housing, and work due to imposition of structural adjustment requirements, merely paying lip service to human rights obligations.290 While the period of globalisation may have seen a reduction in poverty, for Prof. Pogge, this of itself isn’t sufficient to refute the violation of human rights caused by the imposition of this regime.291 Rees and Chinkin writing in the context of post-conflict situations, argue that by the application of economic and social rights to the manner in which international

289 Albrecht, supra note 53 at 17. In the Indian context, the impacts of the Bhopal Gas disaster and the resulting judicial decision are cited to illustrate the influence of transnational corporations, and the need for demarcating the responsibilities of the corporate sector, particularly in view of increased withdrawal of the state from welfare functions. 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 123 (Cambridge University Press, New York, 2008). This view is shared by de Feyter who argues for the accountability of “influential economic actors whose actions drive people into poverty”, and Leckie for whom “potential violators” should include “all entities capable of causing harm to the enjoyment of these rights”. See Albrecht, supra note 53 at 17; Leckie, supra note 65 at 108. According to D'Souza, “economic centralisation and political decentralisation sustained by legal mechanism have helped insulate post-war capitalism and imperialism from political and social turmoil”. D'Souza, supra note 232 at 494. Prof. Pogge in fact questions the “limitation” in human rights law of imposition of duties only on the state, as well as of the states’ obligations being only with respect to their citizens or territory. Thomas Pogge, “Are We Violating the Human Rights of the World’s Poor?”, 14(2) Yale Human Rights & Development Law Journal 1, 6 (2011).

290 Albrecht, supra note 53 at 19–20 (2012); Leckie, supra note 65 at 82. Questions have also been raised as to the human rights implications of economic sanctions adopted by the UN Security Council due to their human rights implications for the civilian population in target countries. Leckie, id. at 113. Some impacts of structural adjustment programmes are highlighted by Abouharb and Cingranelli. They note inter alia, massive lay-offs of public sector workers besides cuts in wages and retirement packages; cuts in public subsidies and increase in fees for social programmes; targeting price subsidies for gasoline, food, and public transportation provided in developing economies; privatisation of services such as water leading to increase in rates, etc., and overall worsening of governmental respect for socioeconomic rights. See Abouharb and Cingranelli, supra note 254 at 137–41. D'Souza too notes that development planning was an integral part of development finance through World Bank lending, IMF monitoring, and of bilateral and multilateral aid and investment programmes. D'Souza, supra note 232 at 501.

291 Pogge, supra note 289 at 22. “Globalization”, as he writes, “involves the emergence of complex and ever more comprehensive and influential bodies of supranational law and regulations that increasingly pre-empt, constrain, and shape national legislation”. But the processes are not transparent or democratic and only a few can exert influence. Id. at 24.
financial institutions conduct their support in post-conflict states, a fundamental change and reversal or at least mitigation of neoliberal conditions could be brought about.  

Another issue highlighted by Rees and Chinkin is that in the post-9/11 period, “the politicization of human rights has rendered the U.N. system subservient to the politics of war, counter-terrorism and extremism, and profit seeking, overwhelming the imperatives of sustainable peace” giving rise to a “compelling need to reassess the knowledge and instruments at our disposal and to reassert the primacy of human rights to effect changes to our current disorder.”

Thus while many strides have been made towards more effective protection of socioeconomic rights, there still remain challenges and causes of concern such as the developments in line with neoliberal principles, and the role of non-state actors. As Riedel, Giacca, and Golay write, while the “broad normative framework” of these rights “has attained a high degree of specificity in terms of content as well as efficacy of implementation mechanisms”, they continue to face various persistent and emerging challenges relating to their “structural approach to human rights realisation, hinged largely but not exclusively upon economic issues”. Other issues such as armed conflict, gender issues, and environment have to be factored into assessing the realisation of these rights but the relationships between them have not been articulated precisely and debates have been fragmented.

6. Conclusion
Thus justiciability, while commonly understood as the ability of courts to adjudicate on and provide remedies for an issue, can also be understood as the capability of an issue to be resolved by the

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292 Rees and Chinkin, supra note 189 at 1226. In the area of post-conflict redress, lip-service is often paid to human rights, and social and economic rights are typically discounted, leaving arrangements on economic development to international financial institutions, donor’s conferences, and foreign investors, which arrangements are often pursued in line with neoliberal assumptions. Only civil and political rights violations are essentially addressed ignoring gross economic and social rights violations which are associated with the conflict although inequalities in the distribution of the latter are often part of the root causes of the conflict. Id. at 1218–19.

293 Id. at 1214.

294 Riedel, Giacca, and Golay, supra note 235 at 4.

295 Id. at 5.
application of legal principles, and can thereby be interpreted as covering situations where remedies are provided by bodies other than the judiciary. On the other hand, some question whether the term can be defined or even the very concept. But when examined in detail, and considered from the practical perspective, the determination of justiciability involves many more questions and elements, some of which are relevant in the context of arguments by opponents of justiciability of socioeconomic rights. For instance, when the classification of justiciability into normative and institutional justiciability is looked into in the context of socioeconomic rights, normative justiciability which relates to the question of whether there is a legal answer to a legal question, would touch upon the argument of socioeconomic rights being better suited to the political process. Institutional justiciability is concerned with the elements of the legitimacy and competence of courts to address these issues.

Again, when considering components of justiciability identified from the practical perspective (the “what” and “who” components identified by Galloway, in particular), as well as the factors identified by the US Supreme Court in Flast v. Cohen, which are also related to these aspects, we find issues relevant to the justiciability of socioeconomic rights. First, as discussed, is the idea of an adversarial dispute and justiciability of the subject matter. To this is also related the commitment of the issue or area to other branches of government (an exception to justiciability), falling within the ambit of the “political question” doctrine (one of the elements identified in Baker v. Carr). As far as the notion of an adversarial dispute is concerned, it becomes somewhat relevant from the perspective of socioeconomic rights as mechanisms (for instance, PIL) through which many such issues are considered by the court do not fall within the parameters of a traditional adversarial dispute, and even their resolution including through dialogic remedies are cooperative, rather than necessarily involving, authoritative court orders. The court too does not necessarily play its traditional role in such matters. Secondly, and related to the traditional model of dispute resolution by courts is the idea of “standing” or locus standi which permits only an aggrieved party
to approach a court for remedies. This aspect has again undergone a change in PIL, for instance, where actions can be brought by any person in the public interest, on behalf of those impacted (and usually not in a position, due to socioeconomic or other disadvantage, of being able to approach the court themselves). This element of a broader interpretation of standing is incorporated in the South African Constitution [Section 38] as well as the individual communications mechanism of the Optional Protocol to the ICESCR. This is thus once again a mechanism that varies from the traditional model, but one now adopted at international and domestic levels. However, it cannot be said that traditional principles are entirely irrelevant to socioeconomic rights adjudication with elements such as a predictable legal domain, independent and impartial judiciary, and the rule of law being seen as equally essential for these rights.296

The component of commitment to other branches of the government, which makes an issue non-justiciable as part of the political question doctrine is relevant once again for socioeconomic rights, particularly when we consider the position in the Indian context; the directive principles being under the Constitution "committed" to the "State" and specifically excluded from the courts’ jurisdiction.297 This position, in fact, would support the argument against their justiciability.

The other components of the political question doctrine set out in Baker v. Carr, are also relevant to the justiciability of socioeconomic rights. The application of judicially manageable standards and sufficiency of data are part of the argument on judicial capacity raised by opponents of their justiciability. Also related are issues of the decision not being enforceable. Issues seen as "policy" matters falling within the realm of other branches would also fall within the ambit of this doctrine, and are relevant even when socioeconomic rights are justiciable as far as concerns the extent of judicial intervention.

296 Leckie, supra note 65 at 105. The obligation of states to have a legal framework in place to punish violators and provide reparation in case of collective rights was addressed by the Special Rapporteur on Impunity. [Second Interim Report on the Question of the Impunity of Perpetrators of Human Rights Violations, prepared by Mr. El Hadji Guisse, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1996/15 (1996) at 35] Failure of states to pursue violators, according to him should be seen as a violation. Leckie, id. at 121.
297 These are thus "external to the judiciary" as Bendor writes. Bendor, supra note 6 at 313.
The related term enforceability has, similar to the second sense in which justiciability is understood, been defined by some to include enforceability by other branches. On this wider understanding of both “justiciability” and “enforceability” in terms of resolution by legal principles or enforcement by other branches, the directive principles can be seen as “enforceable” as a duty is imposed on the state to “apply these principles in making laws”. Again, if justiciability is taken to mean “capable of being decided by legal principles”, where a remedy for socioeconomic rights is provided through a body other than the judiciary, the same may also be viewed as justiciable, though not in the commonly understood sense.

There are arguments both considering justiciability or enforceability by courts as an essential element of rights and those not considering this to be so, turning on whether the term law is narrowly or widely defined. As far as human rights are concerned, international human rights documents and law are evidence of the fact that enforceability by courts is not essential for human rights to be recognised as such. The UHDR, for instance, is not of itself a binding declaration; however, its substantive contents are seen and generally accepted as rights. It sets out standards for all peoples and all nations to aspire to, thereby being norm setting. It undoubtedly has moral force as a yardstick or standard setting instrument. Further, it has great persuasive value and is relied on by courts around the globe in interpreting human rights provisions in constitutions and international human rights instruments. It has also been accepted as having value as customary international law.298 This is also the case with other human rights instruments, which are seen and generally accepted as setting out “rights” even in the absence of complaints or communications mechanisms, which were in many instances introduced much after the adoption of the main instrument. Thus it may be said that justiciability or enforceability by courts is not an essential element for human rights. Such rights, or even for instance, rights classified as imperfect rights are recognised by law as such. At the domestic level, in India, the case of the directive principles of

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298 See discussion on views regarding the binding nature of the UDHR in Chapter III.
state policy is a comparable one, as discussed. The principles are not enforceable by courts (article 37) but are part of and recognised by the constitution, and part of the law of the land.

Several arguments have been raised against the justiciability of social and economic rights, and as discussed, these may be broadly categorised into those relating to the “nature” of these rights vis-à-vis civil and political rights, those relating to the legitimacy of the courts to adjudicate on these rights, and those pertaining to the institutional capacity of the courts, many arguments within and across categories being linked. As concerns the “difference” in the nature of socioeconomic rights as against civil and political rights, the former are argued to be vague, involving higher costs for enforcement, and “positive” unlike the latter which are seen as precise, less costly, and “negative” requiring only the non-intervention of the state. As discussed in this chapter in detail, none of these arguments stand entirely true with many of these criticisms equally applicable to civil and political rights, the content of the latter having been developed by courts, obligations imposed involving costs (conduct of elections to give effect to the right to vote or reforms in the system of administration of justice for speedy trial, for instance), and obligations in the case of both sets of rights including “positive” and “negative” obligations (in the case of civil and political rights, better prison conditions requiring “positive” action by the state, and in the case of socioeconomic rights, formation of trade unions merely requiring non-interference, or preventing illegal evictions merely requiring the court to say “no” ). It has in fact been argued that in the context of civil and political rights, the requisite infrastructure is already in place and the issue of costs is not taken into consideration as these are presumed to be justiciable. Other arguments such as polycentricity and the type of remedies required are also seen to be equally applicable to civil and political rights which can also be polycentric, and require a combination of traditional and innovative remedies for effective enforcement.

Concerns have been raised regarding the institutional capacity and legitimacy of courts to adjudicate on socioeconomic rights. These include such adjudication requiring courts to consider
matters within the realm of policy contrary to the separation of powers; lack of adequate training; complexity of the issues; and lack of sufficient information or data required to decide issues of socioeconomic importance. However, socioeconomic rights do not always involve questions of high complexity, besides the fact that courts are well-equipped to deal with highly complex issues in various areas, for instance trade and investment agreements, and routinely consider complex evidence. Not only this but as has been argued, this expertise of the court may well provide new dimensions to the issue not available to legislatures. Moreover, what is expected of courts reviewing socioeconomic rights issues in not very different from what is expected of courts carrying out the function of judicial review, generally. Even though the judiciary is seen to be entering the field of policy-making in considering socioeconomic rights, policy-making is noted to have become a part of judicial functioning in many countries. In instances, this is a consequence of lack of adequate action or inaction by other branches, responsiveness being an element in determining the separation of powers. The arguments that the judiciary is not democratically elected, and thus not the proper forum to review these issues, are applicable to judicial review generally.

Socioeconomic rights issues have been considered and adjudicated upon by courts under international and regional human rights instruments, and also domestically by courts such as in India and South Africa, and the practice of these courts have addressed some of these concerns. For instance, in the context of availability of information, the practice of appointing fact-finding commissions and reliance on reports of expert committees by the Indian Supreme Court has been pointed to by commentators, which ensures that facts can be verified independently of or in addition to what is presented by parties, before a decision on merits (for instance, in Bandhua Mukti Morcha). The approach of the South African Constitutional Court (for instance, in Grootboom) is on the other hand, seen as addressing separation of powers concerns with the Court

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adopting a deferential approach identifying through its review, deficiencies in the existing programme that make it incompatible with constitutional requirements but leaving the actual policy to be determined by the government. This was also the case in the Canadian decision of *Doucet-Bordreau*;\(^{300}\) while in *Doucet-Bordreau*, the Court retained jurisdiction to monitor progress (approved by the Supreme Court);\(^{301}\) in *Grootboom*, the South African Human Rights Commission was entrusted with monitoring. In decisions regarding socioeconomic rights issues through PIL, or where dialogic remedies are adopted by courts, the process of dispute resolution is cooperative, with the courts not issuing orders "imposing" decisions in many instances. This may also be seen as in line with the separation of powers (being a consultative method), and as maintaining a balance between judicial intervention and policy.

Identifying adequate remedies is another challenge for socioeconomic rights enforcement and as discussed, what is required may be a range of remedies from "strong" ones such as injunctions to innovative dialogic remedies, to "weak" ones such as mere declarations, all of which prove effective in different circumstances. While dialogic remedies, and weaker ones such as declarations (requiring justification, information, and accountability from the government) are more in line with the separation of powers as these leave policy specifics to the government (the court at times retaining a supervisory function), stronger remedies such as mandatory injunctions may be justified where the government is not sufficiently responsive. Dialogic remedies such as "engagement" with affected parties (usually resorted to in eviction cases) have the further benefit of enhancing participation and democracy. Dialogic remedies as discussed, also do not fall within the traditional "adversarial" model of dispute resolution, and therefore, require a shift in understanding. Another important issue is the need to balance individual need for relief with systemic reform, both of which may be required in a particular case, for which a two-track


approach has been recommended. Thus, it is essentially the circumstances of the case that determine the apt remedy, as well as the role played by various actors.

A related issue is that of access to justice or to the courts, a prerequisite for effective remedies. Once again, the effective enforcement of social rights, and also more generally human rights, has been seen to require a change in the traditional understanding of access or standing so as enable access to those sections of society who by reason of poverty or other social and economic disadvantage (lack of awareness, etc.) are unable to access courts or frame the injustices suffered by them in terms of rights. Such access is enabled by PIL in India and like mechanisms in constitutions and international instruments recognising that actions may be brought on behalf of others or in public interest.

While rights are usually, and in the traditional understanding, considered from an individual perspective, theorising and understanding social rights also requires another shift in perspective, of considering human beings as "social beings", and "social rights" as claims to resources produced by the community. The value of "solidarity" is one of the values underlying the ESC while in the African context, "Ubuntu" or shared solidarity and humaneness is emphasised. This is clearly "opposite" to the idea of individuals being considered "free" and "autonomous" having an adversarial relationship with society. Social rights are, moreover, demanded collectively, not against society but as a consequence of being part of society, based on human need. The South African Constitutional Court’s approach incorporates this understanding not addressing individual need over the collective, its remedies for instance in Grootboom, providing not individual relief but steps to address the needs of society at large through often systemic reform. This was also the case in Nokotyana, where the court did not provide specific relief to the applicants before them as others not before them were in the same predicament. However, as noted, justice may require that practical responses at times address both individual need and that of society at large.
The distinctions sought to be drawn between socioeconomic rights and civil and political rights on account of differences in their “nature” have been shown to be largely a “false dichotomy”. From the adoption of the UDHR, the interdependence and indivisibility of all human rights has been emphasised and reiterated on several occasions. Not only this, it is amply clear in practice that without the realisation of one set of rights, the other cannot be completely realised. For instance, without the right to education, the right to vote cannot be effectively realised; without the right to food, the right to life cannot be said to be effectively available. Such interrelationship has been recognised by courts and human rights bodies, internationally and domestically, including the Human Rights Committee, the ECtHR, the House of Lords, and the Indian Supreme Court through their interpretations of civil and political rights to include socioeconomic rights. If the indivisibility of and interrelationship between all human rights is accepted, there is no argument for only a partial enforcement of human rights.

Despite the recognition at several fora of the interdependence and indivisibility of all human rights, the period after the adoption of the UDHR (in fact, commencing even prior to this) saw much debate on the two sets of rights having different natures and thereby, requiring different enforcement mechanisms. This lead not only to the adoption of separate binding instruments whereby civil and political rights under the ICCPR imposed stronger obligations, had several monitoring and enforcement mechanisms including individual communications, and a separate treaty body, none of which were created for socioeconomic and cultural rights, but to the marginalisation of the latter over time, such that they were considered as mere aspirations. This was despite the intention behind the adoption of two instruments not being to impact the status of either set of rights. Marginalisation was seen at the international level in, for instance, the reluctance to assert or adequately address rights to work or social security. Viewing rights from the lens of classical liberal thought added another layer of difficulty. This also impacted the common

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302 In Matthews v. Ministry of Defence ([2003] UKHL 4], the House of Lords recognised that “human rights include a minimum standard of living without which many of the other rights would be a mockery” (¶26).
perception of human rights whereby the public raised matters of violation of civil and political rights, but did not hold governments to account even for serious violations of socioeconomic rights.

A milestone in the efforts towards a change in this position can be said to have been the establishment of the CESC under the ICESCR which has contributed significantly through its issuance of general comments clarifying the content of the rights and state obligations; improving the monitoring of state reports; involving NGOs; and its efforts towards the successful adoption of the Optional Protocol to the ICESCR introducing the individual communications and other monitoring mechanisms for covenant rights. Contributions towards these areas, particularly defining the content of rights, obligations, and violations were also made with the adoption of the Limburg Principles in 1986 and of the Maastricht Guidelines ten years later. At the regional level, through a collective complaints mechanism under the ESC in the mid-1990s, and adoption of the African Charter on Human and Peoples' Rights which incorporated both sets of rights within a single instrument with a complaints mechanism, progress was made towards better protection of socioeconomic rights. In addition, improvements in the monitoring of reports were also seen both in international and regional human rights systems with NGO involvement and the development of benchmarks and more sophisticated processes. The Millennium Development Goals included socioeconomic rights issues including poverty eradication, elementary education, and health formulated as development goals, which have led to significant improvements. With the adoption of the optional protocol to the ICESCR in 2008, the unequal position of the two sets of rights in the international human rights system came to an end. Courts and adjudicatory bodies at international, regional, and domestic levels have addressed and issued decisions on socioeconomic rights issues illustrating that these rights are justiciable just as civil and political rights, and courts can approach these issues in a way not contrary to the separation of powers. Regional adjudicatory bodies such
as the ECtHR which have protected some socioeconomic rights through the interpretation of civil and political rights have even awarded compensation in some instances.

The recognition of the relevance of these rights has also led older constitutions lacking socioeconomic rights being viewed as deficient or suffering from some lacuna, a "legitimate" constitutional order having to protect both sets of rights, and the participation of everyone in the political, economic, social, and cultural life of the community. This approach reflects a “new wave” of constitutionalism led by the global south and focussing on transformation. The focus is no longer merely on the protection of basic liberties but the creation of a “socially just” society.

While on the one hand, positive developments of recognition of the importance of socioeconomic rights and their protection, justiciability of these rights through provision of remedies, recognition of “positive” obligations of states, and the aim of social justice rather than protection of liberties alone are being seen the world over, alongside there is also another trend in a direction contrary to the effective protection of these rights. This is the trend in judicial decisions in various countries in line with neoliberal and free-market principles through interpretations of fundamental rights as liberty interests and adoption, in case of prior commitment to these rights, of deferential standards of review. These approaches see social change being achieved through economic growth, and reduction of protections to mere procedural guarantees. Adoption of these principles including privatisation and deregulation hamper effective protection of social and economic interests, and are accompanied by reduced public investment towards protecting these interests, often to meet structural adjustment conditions imposed by international monetary institutions.

The global economic crisis saw austerity measures and reduction of investment in socioeconomic rights areas such as healthcare, with the High Commissioner for Human Rights issuing certain criteria to be met for the introduction of such measures including reasonableness, temporary imposition, and imposition only in case of compelling state interest. But the lack of
socioeconomic rights or persistence of inequalities is what gives rise to unrest and protests while their protection is essential in avoiding crises. It is during economic hardship that greater protection rather than austerity and reduced investment is called for.

These developments also highlight the need to consider the role of non-state actors including international monetary institutions which are seen to aggravate socioeconomic rights, and corporate entities whose role in society has widened in the wake of increased privatisation and neoliberal policies. While traditional human rights instruments may not always be applicable to such actors, with regard to corporates, for instance, alternative mechanisms such as OCED Guidelines providing standards of conduct and good practices; the “Tripartite Declaration of Principles concerning Multinational Enterprises” (1977), which expect companies to act in accordance with human rights obligations; and the UN Global Compact (2000) calling for protection and fulfilment of human rights, have been developed, although they do not refer specifically to socioeconomic rights. On this aspect too, a shift from traditional understanding of human rights as applicable to states alone is required.

Regional bodies, however, have in instances held against the state in matters concerning the actions of private actors such as in International Commission of Jurists v. Portugal, where the state was held not conforming with charter provisions on account of family undertakings employing children below the age of 15, and Marangopoulos Foundation for Human Rights v. Greece

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303 See also, P.N. Premsy, "Realisation of Socio-economic Rights and Multinational Corporations", XXXV(1&2) Cochin University Law Review 175 (2011).
304 Albrecht, supra note 53 at 18–19.
305 Leckie, supra note 65 at 111.
306 Case no 1/1998, 9 September 1999 (ECSR).
307 Complaint 30/2005, 6 December 2006. As observed by the ECSR, “as a signatory to the Charter Greece is required to ensure compliance with its undertakings irrespective of the legal status of the economic agents whose conduct is at issue (¶192). The Inter-American Court of Human Rights in Ximenes-Lopes also recognised that the state can be held liable for acts committed by private actors not attributable to the state. See Ximenes-Lopes v. Brazil, Inter-American Court of Human Rights, Judgment of 4 April 2006, ¶85. These decisions are in line with the states’ obligation to ensure compliance with international obligations by private parties. State obligations, in fact, extend to preventing impunity for violations attributable to international abuse and even force majeure. Leckie, supra note 65 at 109–10. But using the obligation to protect to address violations by private entities is for Scott insufficient as far as the mammoth transnational corporations are concerned, an issue that must be urgently
(also before the ECSR), involving a complaint on air pollution caused by lignite mining in Greece, where again the state was found liable to ensure compliance despite its argument that a private entity was responsible for the pollution. This would fall within the obligation to protect.

Despite arguments to the contrary, and the fact that the debate on the justiciability of socioeconomic rights is still considered by many to be an ongoing one, practical experience at the international, regional, and domestic levels has shown that socioeconomic rights can and are being adjudicated upon and enforced by courts, and many of the objections raised are being dealt with. This has meant however, that there is a shift in perspective on many traditions conceptions, of locus standi, types of remedies, form of adjudication (collaborative, dialogic), and even mechanisms for gathering relevant information. The consideration and recognition of these rights by various bodies has also shown that there is no one effective way to enforce these rights nor is any particular frame (such as "strong" and "weak" review) of universal validity. Instead a variety of factors determine both the nature and extent of review by courts, including for instance, the degree of the political achievement of social rights (unwillingness or failure of the state or even private actors to fulfil its legislation), the judicial culture (and perceived role) and the degree of judicialisation of human rights (jurisdictions with a robust judicial or quasi-judicial review for civil and political rights), and beyond law, how human rights are understood, valued, and embedded in a particular society, besides constitutional mandate, impact on resource allocation, and social

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308 As Usher writes, "the treatment of socioeconomic rights claims in a democratic society is not a case of one size fits all"; rather contextual factors drive what would be the most appropriate model, and these include resource availability, political consensus on wealth distribution, and the degree of legitimacy accorded to judicial rights adjudication. Usher, supra note 74 at 154. Wesson notes that perceptions of the forms for the review of socioeconomic rights "as weak or strong may not have universal validity and may instead have more to do with factors that apply in particular jurisdictions". Wesson, supra note 197 at 296. O’Cinneide also points out that different modes of review of social rights are emerging in different jurisdictions, rather than any "single ‘general model’", and it can in fact be argued that different solutions may work better in different countries. O’Cinneide, supra note 116 at 299–300. Nolan, Porter, and Langford, however, stress the role of creative responses in providing a new framework for broader strategies at three—local, national, and international—levels to address violations of socioeconomic rights in all countries. Nolan, Porter, and Langford, supra note 48 at 34.

309 Langford, supra note 84 at 9–10.
ordering, among others though how these conditions play out may vary from state to state.\textsuperscript{310} Also relevant is the source of judicial authority to engage in the review of social rights as courts, for instance, functioning under a “transformative” constitution, “often enjoy a clear mandate to play a wide-ranging ‘catalytic’, ‘systemic’ or ‘expressive’ role in reviewing how public authorities give effect to social rights”, while where they are expected to play a minimalist role, interventions will be more limited.\textsuperscript{311}

While many have recognised that different models are suitable for different jurisdictions and circumstances, there have also been certain recommendations as to the “best” models to be adopted and as to the judicial approach to their enforcement. Usher, for instance, recommends a minimum core approach combined with the reasonableness approach for “rich” countries and a “pure reasonableness” approach for poorer countries as opposed to either the minimum core model or the approach taken by the Indian Supreme Court,\textsuperscript{312} while Trispiotis sees the two approaches as forming concentric circles, the former in the core as reasonableness control cannot exist in absence of the core (state actions violating it, never being reasonable), at the same time advocating reasonableness review as the sensible long-term solution on account of its addressing both separation of powers and polycentricism concerns.\textsuperscript{313} O’Cinneide finds that while the “reasonableness review” model may be the best one, its adaptability to every legal system or effectiveness in every context is not certain, and in Europe, for instance, the German model based

\textsuperscript{310} O’Cinneide, supra note 116 at 314.
\textsuperscript{311} Id. at 313. For Young, the reasons behind courts acting in accordance with these “new modes of review” may be related to “a complex mix of constitutional design, standing rules, substantive or procedural interpretations of rights, remedial options, common- or civil-law inherited traditions, and constitutional culture”, Young, supra note 266 at 487. Trispiotis advocates judicial minimalism in the context of socioeconomic rights as conceptually valuable as the court may lack legitimacy and expertise to enter into policy decisions. Trispiotis, supra note 82 at 5.
\textsuperscript{312} Usher, supra note 74 at 155. Long-term monitoring (continuing mandamus) adopted by the Indian Supreme Court in People’s Union for Civil Liberties v. Union of India (the right to food case) (supra note 228) and other decisions is another mode whereby the obligation to realise a right progressive has been given effect to. Nolan, Porter, and Langford, supra note 48 at 31. Such remedies have also been seen in the United States and are classed as equitable remedies. Roach, supra note 186 at 51.
\textsuperscript{313} Trispiotis, supra note 82 at 8.
on dignity and denial of a minimum core or even an incremental approach may fit better as courts would perform a role similar to that in the case of civil and political rights.\footnote{118}{O'Cinneide, supra note 116 at 316. He expects that courts will essentially continue to follow the original approaches or templates that they have been following such as dignity in the German case and reasonableness review in the South African. Id. at 312. An incrementalist approach avoiding significant allocative impact is also recommended by King on account of uncertainty in consequences and concerns over worsening of functioning of welfare bureaucracies but such an approach raises its own concerns over caution being an impediment to the full potential of these rights in bringing meaningful change. Wesson, supra note 197 at 295.}

Civil and political rights have been as mentioned used to consider and provide remedies for some socioeconomic rights issues based on the interlinks between the two, and administrative law provisions, too have been used in this regard where there is, for instance, failure to consider relevant aspects.\footnote{315}{O'Cinneide, id. at 302–03. However, courts also attempt to limit the expansion of civil and political rights so that they do not acquire “an overtly social dimension” besides providing a wide margin of discretion in matters of resource allocation. Id. at 303–04. In jurisdictions that have used civil and political rights to protect socioeconomic rights, a minimum level of realisation to be achieved immediately is emphasised such as by courts in Switzerland (V v. Einwohnergemeine X und Regierungsrat des Kantons Bern (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995)) and Colombia. Where governments have access to greater resources, courts have been willing to require meeting of higher standards such as in Finland, where local authorities have been faulted, for instance for failing to take steps to secure employment for a job seeker, while in Treatment Action Campaign, availability of resources was a consideration in holding the programme on antiretroviral medications unreasonable. Nolan, Porter, and Langford, supra note 48 at 29, 31.}

Among civil and political rights provisions relied on in this regard, equality and non-discrimination clauses have been found to be a “critical vehicle" for the enforcement of socioeconomic rights of disadvantaged groups in jurisdictions lacking express protection of these rights.\footnote{316}{Nolan, Porter, and Langford, id. at 25. For instance, in Eldridge v. British Columbia, the Canadian Supreme Court held the government’s failure to provide sign language services in healthcare to the deaf as discriminatory. Id. at 26.}

However, ultimately, as Klein observes, prevalent approaches to the enforcement of social and economic rights work best when judicial efforts go alongside those by the government, the latter either following the former's lead or having already taken steps towards fulfilling their obligations.\footnote{317}{Klein, supra note 16 at 354. As Leckie writes, the adoption of policies that are “targeted, appropriate, and effective" toward the realisation of these rights, are a central component of government obligations, although states have some flexibility in determining the most effective manner. The appropriateness and consonance of the measures vis-à-vis the ICESCR can however be determined by the CESCR as far as the ICESCR is concerned. Leckie, supra note 65 at 106. Such approaches leave courts with a choice between either aggressively setting out and enforcing details of government obligations or limiting their potential to meaningfully enforce these rights when most required with the resulting haphazard enforcement being better than no enforcement for those whose rights stand violated or not fulfilled. Klein, supra note 16 at 354.}