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Socio-Economic Rights and Judicial Review

SHEHEEN MARAKKAR[1] AND ANILA K.[2]

ABSTRACT

Socio-economic rights are an integral component of human rights that ensure basic needs, such as housing, health, education, and employment, are met for all individuals in society. While some countries have constitutional provisions that guarantee these rights, enforcing them can be challenging due to their non-justiciable nature. Judicial review is one mechanism that can be used to enforce socio-economic rights. It allows for the review of legislative or executive decisions that impact these rights and can lead to a court order to enforce them.

However, judicial review of socio-economic rights is not without controversy. Some argue that it infringes on the separation of powers doctrine, while others argue that it places an undue burden on courts. Additionally, there are questions about the appropriate remedies for socio-economic rights violations.

Despite these challenges, the use of judicial review to enforce socio-economic rights has gained acceptance in many countries. It has been used to address issues such as inadequate housing, lack of access to education, and discrimination in employment. The use of judicial review has also contributed to the development of socio-economic rights jurisprudence, which can guide future decisions.

In conclusion, while the enforcement of socio-economic rights through judicial review can be complex, it remains an important tool for promoting human dignity and social justice. As such, it is important for courts to balance the need for enforcement with respect for the separation of powers and other legal principles.

Keywords: *Socio economic rights, Judicial Review, Public law.*

I. INTRODUCTION

In international law scholarship human rights are often divided into three classifications or generations. "Civil and Political rights are referred to as first generation rights, economic, social and cultural rights as the second-generation rights and group rights including the right of people to self-determination and minority rights are known as third generation rights[3].

The second generation of rights relate to substantive equality and address primarily the social

[1] Author is a LL.M. student at School of Legal Studies, Cochin University of Science and Technology, India.
[2] Author is a LL.M. student at School of Legal Studies, Cochin University of Science and Technology, India.
[3] Natsu Taylor Saito, "Beyond Civil Liberties: Considering "Third Generation" Human Rights Law in United States" 28 *Miami Inter American L. Rev.* 387 (1996, 1997) at 389.

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and economic needs of individuals. The three generations also refer to a certain hierarchy of rights in terms of political preference, first generation being the most preferred, followed by the second and third generation rights respectively. There is no categorical basis for preference for one nomenclature over others by various scholars in relation to socio-economic rights; preference tends to be conditioned by the geographical and disciplinary reasons.

The commentators from United States prefer the term welfare rights, British commentators and social philosophers in general prefer social rights and those who are more influenced by the terminology of International Law prefer economic, social and cultural rights.

All this refers to the same set of rights, namely "right to meeting of needs, amongst which the most important are the right to a minimum income, the right to housing, the right to health care, and the right to education", but these are the different ways of referring to these rights.

For Katharine G. Young socio-economic rights, sometimes also called social rights include the rights to access food, water, housing, health care, education and social security – what might approximate the basic goods and services to secure dignified existence[4].

Amartya Sen includes within the fold of welfare rights "entitlements to pensions, unemployment benefits and other special public provisions aimed at curtailing certain identified economic and social deprivations, and the list of deprivations to be covered can be extended to include illiteracy and preventable ill health, he further puts it that for the proponents of welfare rights it is seen as "important second generation rights, such as a common entitlement to subsistence or to medical care". Certain minimum need is necessary for an individual to lead a life of respect.

Shue identifies the core as unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal public health care[5].

Social and economic rights cannot be examined in isolation from other forms of rights claims. They form an integral part of the vocabulary of rights. The fact that they are sometimes termed 'second generation' rights afford luminous support for this argument and, at the same time, it points to differences to first-generation rights. While these differences will be canvassed, it will be argued that their existence and justification are inextricably linked to the first generation of human rights, being civil and political rights.

[4] Katharine Young, *Constituting Economic and Social Rights* 142 (Oxford University Press, Oxford, 2012) .
[5] Shue, *Basic Rights* 23(Princeton University, Princeton, 1996).

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II. FIRST AND SECOND GENERATION RIGHTS

The nature of first-generation rights was heavily influenced by the French and the American Revolutions which left an indelible imprint upon their nature and scope. Revolutionaries in both countries proclaimed that human rights, which they proclaimed, were sourced in the values of civilization. These rights were claimed in the name of all free men (and later women) and were not to be limited by geographical considerations. The first generation of rights were conceived negatively, being 'freedoms from' as opposed to imposing positive 'entitlements upon'[6]. This generation of rights included freedom of opinion, conscience and religion, freedom of expression, of the press, of movement, the right to due process of law and hence protection against arbitrary detention or arrest, and the right to property.

Let us turn to the second generation of rights. The conventional wisdom is that they were sourced in the development of twentieth-century struggles and institutions. Their historical pedigree goes back much further. In the eighteenth century in Bavaria and Prussia, the state was viewed as an 'agent of social happiness' responsible for caring for the needy and for the provision of work for those who lacked the means and opportunities to support themselves. Similarly, the French Constitution of 1793 included the obligation on the state to provide public assistance for the needy[7]. In the nineteenth century, Bismarck introduced social legislation which covered income-related insurance in cases of unemployment, accident, and illness, as well as pension and compensation schemes and a residual category of welfare. The Weimar Constitution of 1919 recognized the importance of these rights, including labour rights.

In 1919, the establishment of the International Labour Organization triggered an attempt to establish certain international labour standards, and a second generation of human rights was introduced into the legal discourse, characterized by an express obligation upon a state to intervene rather than merely abstain from encroaching onto the private domain of the citizen. Rights to decent working conditions, to social security could not be attained without positive obligations being imposed upon the state.

Apart from Germany, the Mexican Constitution of 1917 included social rights in the text as did the Soviet Constitution of 1936, Part 7 of which contained a comprehensive list of socioeconomic rights including the right to work, the right to health care, education, and housing. The Irish Constitution of 1937 also recognized these rights but in a far weaker form, being contained in directive principles of state policy designed to guide the government in its

[6] German Presidency Conclusions: European Council, Brussels, 21–22 June 2007.
[7] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2007 OJ (C 306) 01.

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choice of policy and the judiciary in its interpretation of all rights. But it was after the Second World War that a number of countries adopted or amended their constitutions to include social and economic rights[8]. The development of a human rights jurisprudence which was initially powered by the United Nations gave great impetus to the expansion of these rights in national and international texts[9]. The wider recognition of social and economic rights was coupled to the idea that these rights were part of the concept of

citizenship.

In 1948, the Universal Declaration of Human Rights recognized both civil and political rights as well as economic and social rights[10]. By the year 1952, it became clear that the increasing ideological disputes in the wake of Cold War between east and West prevented the adoption of a unified treaty, comprising all rights contained in the Universal declaration of Human Rights (UDHR). By the so-called resolution of 1952, the Commission of Human Rights separated the UDHR guarantees into two separate draft treaties. This fundamental divide between the categories of right took more than 40 years to be settled.[11]However, ultimately the proponents of a unified treaty had to give up and accept two separate treaties, adopted together on 16 December 1966 and both entered into force in 1976. At the level of implementation, the Covenants exhibited marked distinctions, reflecting the ideological divide. While the International Covenant on Civil and Political Rights (ICCPR) provided for three monitoring mechanisms at the global level, namely state reporting, individual communications, and State complaint procedure, the ICESCR only included a state reporting procedure. Further entrenching the divide, the ICESCR did not establish a separate supervisory committee in the text, but gave that task to the Economic and Social Council (ECOSOC). The Committee on Economic Social and Cultural Rights (CESCR) was only set up later by a resolution of ECOSOC and commenced working with independent experts from 1987. Since then, CESCR in principle receives one comprehensive report per Member State in every five years.

Most national constitutions, which were drafted after the Second World War, guaranteed a range of social rights, the key provisions being a right to housing, medical care, education, employment, and nutrition, all of which were in addition to the protection of first-generation

[8] Alexander Somek, 'Postconstitutional Treaty' (2007) 8 *German Law Journal* 1121.
[9] See eg Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (2010).
[10] For a fuller discussion of the approaches brought to the Convention, see Neil Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' (2005) 3 *International Journal of Constitutional Law* 211, 225–31.
[11] Eibe Riedel, Gilles Giacca, and Christophe Golay, "The Development of Economic, Social, and Cultural Rights in International Law" in Eibe, Riedel *et. al.* (eds.), *Economic, Social and Cultural Rights in International Law* 6 (Oxford University Press, New York, 2014).

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rights, traditionally considered to be negative rights. Unlike first-generation rights, social rights were considered to be controversial and, even more so when courts were granted the power to render them enforceable. It is here that the key argument against the legal nature and hence the recognition of social rights is to be found. Two key arguments are raised against the enforceability of second-generation rights. Firstly, it is argued that courts lack the capacity to translate a general claim to social welfare rights into the equivalent of an enforceable first-generation right. Secondly, judicial enforcement of social rights is considered to constitute a major intrusion into the function and scope of a democratically elected legislature. In particular, the enforcement of social and economic rights holds significant implications for the government budget. Therefore, in adjudicating upon disputes based on these rights, the judiciary plays an extensive and indeed undemocratic role in major distributional questions which on should be left to democratically elected arms of state.

III. OBJECTIONS TO SOCIO ECONOMIC RIGHTS

Cass Sunstein contends that in transitional countries, which have moved from a planned to a market economy, social and economic rights would conflict with the objective of creating a relatively unregulated free market in which the market produces the key distributional outcomes rather than state regulation or indeed court adjudication. In other words, the inclusion of social and economic rights in the constitution would interfere with a flexibility which the transitional country would require to develop an economy which best meets the expectations of that country's citizens. A variation of the criticism of the inclusion of socio and economic rights in any constitutional instrument turns on an argument of under enforcement.

Expressed differently, these criticisms constitute what Amartya Sen has described as comprising both an institutionalization and feasibility critique. The institutionalization critique suggests that if social and economic rights are to be considered rights they must be institutionalized; if not they cannot be described as rights. If they are institutionalized, then courts are given powers which they are not capable of implementing, given the nature of the competing distributional demands posed by such claims. The feasibility critique suggests it may not be feasible to arrange for the realization of economic and social rights, whereas traditional, political, and civil rights are not difficult to implement, in that, at core, they require governments essentially to leave citizens alone. Social and economic rights impose significant economic burdens on countries, many of which cannot be reasonably called upon to fund a meaningful application of these rights.

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IV. ENFORCEMENT: THE SCOPE FOR RELIEF

Throughout the previous examination of the justification for social and economic rights, there is either an express or implied view that social and economic rights are not susceptible to a strong form of review. With strong forms review, the decision of a court is final. Accordingly, the tension between this form of judicial review of a constitutional text and the decisions of a democratically elected government are exacerbated. By contrast, weak forms of judicial review seek to engage constructively with the tension between rights and democracy or, expressed differently, with the counter-majoritarian dilemma. Underpinning the concept of weak review is the idea that rights, which are contained in a constitution, are best conceived as a means to facilitate dialogue between the three arms of the state. Within the context of socio-economic rights, this model envisages a constitutional dialogue between the judiciary, legislature, and executive as well, arguably, as powerful private actors, which requires all of the latter to give serious and reasoned consideration to the claims of those litigants who lack access to basic economic and social resources. In addition, engagement should ensure a transparent justification for the implementation of a particular right or the failure to achieve its realization.

V. WEAK REVIEW OF SOCIO-ECONOMIC RIGHTS

There are different forms of weak review which can give rise to different and not always predictable results. The experience of South Africa is illustrative. The inclusion of socio-economic rights into the Constitution of the Republic of South Africa 1996 represented one of the boldest moves taken by a young democracy towards the transformation of its legal system.

South African Constitution of 1996 is known for its progressive outlook primarily because of the inclusion of socio-economic rights expressly within the judicially enforceable bill of rights and courts have a wide discretion to grant what is "just and equitable"[12]. The preamble of the South African Constitution is also significant in this regard which emphasises on recognising "the injustices of our past" and therefore honouring them "who suffered for justice and freedom in the past". It also asserts to "improve the quality of life of all citizens and free the potential of each person".

Early in the development of its socio-economic rights jurisprudence, the Constitutional Court in *Government of the Republic to South Africa v Grootboom and others* developed a reasonableness model of review which was sourced in administrative law. The Court refused to define social and economic rights in terms of its content and scope. Instead, it insisted that any

[12] See, Section 172 of the Constitution of the Republic of South Africa Act, 1996.

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programme developed by government to implement a constitutional obligation

imposed upon the state in respect of a particular socio-economic right was required to commence with addressing the conditions of the poorest of the poor. In this way, the Court looked at the reasonableness of the programme but eschewed the development of a substantive interpretation of the right in question. In other words, the rights were not to be given a minimum core, by which standard each rights claim would be assessed.

The landmark cases that have laid the foundations of the constitutional court's jurisprudence in are *Soobramoney* v. *Minister of Health, KwaZulu-Natal*[13], *The Government of Republic of South Africa* v. *Irene Grootboom*[14] and *Minister of Health* v. *Treatment Action Campaign*[15].

Soobramoney was the first major constitutional court case to consider the enforceability of socio-economic rights. The applicant an unemployed man suffering from renal failure wanted the cost of his medical treatment including dialysis to be borne by the provincial hospital as he cannot afford the cost of the treatment. Without this the applicant would die because of his medical condition. He relied on section 11 (right to life) and section 27(3) (right to emergency medical treatment of the South African Constitution. The application was dismissed by the High Court and was subsequently taken to the Constitutional Court. The Constitutional Court held that the right to medical treatment should not be inferred from right to life in section 11 since the right to access health care services is being entrenched in section 27. It further held that right to emergency medical care under section 27(3) is limited to sudden "catastrophes", which require immediate medical attention and not the treatment of chronic illnesses meant for prolonging the life of the patients. Regarding the qualified right to access medical health care under section 27(1) and 27(2) of the Constitution, the Court held that the applicant has not shown that the guidelines set by the hospital authorities are unreasonable nor was it suggested that the guidelines were applied irrationally and unfairly. The Court also observed that inclusion of such right to expensive medical treatment will increase the budget on health and thereby may dramatically prejudice the other priorities of the State.

In the famous decision of the South African Constitutional Court in the case of *The Government of Republic of South Africa* v. *Irene Grootboom* the Constitution of the Republic of South Africa, 1996 in its Bill of Rights under Chapter II of the Constitution explicitly provides judicially enforceable right of housing, health care, food, water and social security. In *Grootboom*, a group of extremely poor people (the respondents) have moved onto a vacant land

[13] Available at http://www.constitutionalcourt.org.za/Archimages/1617.PDF.
[14] Available at http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases.
[15] Available at http://www.constitutionalcourt.org.za/Archimages/2378.PDF.

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privately owned and earmarked for formal low-cost housing. Eviction proceedings were successfully instituted against these people, and the resulting court order was implemented in a manner reminiscent of the apartheid style evictions by destroying the property whatever little they had in the process. Thereafter, the respondents landed up on the Wallacedene sports field with only plastic sheets with them, which provided very little protection in winter rains. Next day, the respondent's attorney wrote to the municipal authorities demanding that the municipality must fulfil its constitutional obligation and provide shelter to the respondents. Not satisfied with the response of the municipal authorities they instituted legal action against the government, demanding that the municipality must fulfil its constitutional obligations towards them, which according to them ensures at least basic shelter. The High Court ordered some relief to be granted to the respondents. The government then appealed against the decision to the Constitutional Court. The respondent's plea was based on section 26 and 28(1) (c) of the South African Constitution which according to them obligates the government to provide them with basic shelter. The South African constitutional Court in its certification judgement had already declared that the socio-economic rights contained in the Bill of Rights of the South African Constitution are justiciable in the court of law. In *Grootboom* case considerable weight was given to the fact that the United Nations Committee on the interpretation and application of the International Covenant on Economic, Social and Cultural Rights has held that socio-economic rights contain a "minimum core obligation" that must be fulfilled by State parties. The Constitutional Court without rejecting the minimum core obligation argument flowing from the Covenant concluded that it is not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right.

Instead, the Constitutional Court speaking through Yacoob, J. held that the real question in terms of our Constitution is whether the measures taken by the State to realize the right afforded by section 26 are reasonable? However, the court added that considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been spent better. It is necessary to recognize that the State has a wide range of options before it to give effect to its constitutional duty. But a programme undertaken by the State that excludes a significant section of the society cannot be said to be reasonable. Applying this principle to the facts of the case Yacoob, J, found that the State has instituted an integrated housing development policy and medium- and long-term objectives of the policy are appreciable. However, the housing programme lacked any component for those in desperate need. He found that the absence of such a component was unreasonable and thus concluded that the nationwide housing programme falls short of obligations imposed upon

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national government by section 26(2) of the Constitution to the extent it fails to recognize that the State must provide for relief for those in desperate need of access to housing. Interpreting section 28(1) (c) of the Constitution, the court held that the right to shelter for children under this provision is applicable to those who are not in the care of their parent/guardian, i.e., in some alternative care or abandoned. In this case, since the children were in the care of their parent's section 28(1) (c) is not applicable. The reasonableness approach adopted by the Constitutional Court in this case is known as the reasonableness form of adjudication of socio-economic rights, which is an offshoot of weak form judicial review.

In *Treatment Action Campaign* limited number of measures adopted by the State to prevent the transmission of HIV from mother to child was challenged as violative of the qualified right to have access to healthcare services given under section 27(1) and 27(2) of the Constitution of South Africa. The Constitutional Court asked the government of South Africa to make available a drug called Nevirapine which inhibits the transmission of HIV/AIDS from pregnant mothers or nursing mothers to their child from about 12 to 25 percent. The government was resisting this claim, not because of budgetary constrain for the cost of medicine but for the accompanied counselling program which was necessary according to it. Another concern was that the widespread use of the drug might actually lead to development of drug resistant virus. Negating the contentions of the government the Court ordered it to make the drug available to everyone without a counselling program as the drug in itself would be beneficial. Regarding the argument of growth of drug resistant virus, the Court stated that the risk is well worth running. In this case the distribution of drugs was to be done by the company manufacturing the drug; therefore, the decision despite being clubbed as an instance of strong social and economic rights is actually having no budgetary implications.

In these the Constitutional Court of South Africa has developed what is called the reasonableness model of constitutional socio-economic rights adjudication. The Court has explicitly rejected an individualised form of relief[16]. In *Grootboom* the Court favoured a weak remedial approach in the form of reasonableness inquiry. The Court gave a declaratory relief without fixing the timeline for implementation of the requisite measures. Largely similar approach was adopted by the Court in *Treatment Action Campaign.* The lack of supervisory role for the courts makes the declaratory order weak. The tardy implementation of the declaratory order in *Grootboom* is blamed upon the lack of exercise of supervisory jurisdiction

[16] Sandra Liebenberg, "Adjudicating Social Rights Under a Transformative Constitution" in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* loc. 4120 (Cambridge University Press, New York 2008).

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by the Constitutional Court. The Court should therefore shed its reluctance and supervise its declaratory orders in order to bring out structural changes needed to realise the socio-economic rights in the bill of rights.

VI. STRONG REVIEW OF SOCIO-ECONOMIC RIGHTS

Columbia provides a rich source of research for the implications of a stronger form of review. For example, in 2008, the Constitutional Court of Columbia handed down a decision that ordered the state to dramatically restructure the countries health system.

In 2008, the Constitutional Court was confronted with a number of cases where there were restrictions on access to medical care that flowed from an inappropriate transfer of administrative costs on to patients and a failure to provide effective access to medical care, for example, not catering for the transportation needs of patients. The Court went even further and examined the nature of the benefit plans which were inherent in the applicable

legislation. The Court directed the National Commission for Health Regulation immediately and, thereafter on an annual basis, to update the benefits which were to be provided, pursuant to a subsidized scheme. It also ordered the appropriate executive agencies to unify the multiplicity of plans which had been introduced throughout the country, pursuant to the adoption of the relevant legislation, initially for children, later for adults and in a latter case, taking into account of financial sustainability as well as the epidemiological profile of the population.

In a further development, the Court ordered the government to adopt deliberate measures progressively to realize universal medical coverage by 2010, together with various compliance deadlines which have taken place between 2008 and 2009.

The approach of the Colombian Court has been to implement the right to health within a framework set out by the United Nations Committee on Economic Social and Cultural Rights. However, the Court has gone on to specify the multiple obligations which have to be carried by the state, pursuant to the constitutional right to health, further declaring that the state was responsible for adopting the deliberate measures to achieve the progressive realization of the right to health and further that the state is required to adopt a transparent approach and provide access to information in respect of its health coverage.

The Court heard another case in October 2009 in which it set out definitive guidelines for the provision of an abortion service. In this case, the Court held that a woman, who sought a legal therapeutic abortion from a health-care provider as a result of serious foetal malformation that

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made it unviable, had a right to choose freely whether she would have an abortion or continue the pregnancy without coercion, duress, or any type of manipulation. It confirmed that abortion services should be available throughout the country and called upon the

Ministries of Education and Social Protection to implement a plan within three months of the decision, to promote the sexual and reproductive rights of women, which must include information about the grounds of which abortion was legal in the country. The Court also listed the services that are prohibited with regard to provision of abortion.

The relatively strong right/strong remedy approach adopted by the Columbian Constitutional Court may arguably be explained in terms of a more interventionist civil law culture. But while legal culture manifestly influences jurisprudence, it is an argument that need not detain us because there are illustrations of a similar approach adopted by courts which function in common law jurisdictions.

Take, for example, the Indian Supreme Court, whose jurisprudence has briefly been mentioned and which court system was inherited from the British colonial power. India has a written constitution which provides for fundamental rights for its citizens. However, it did not include, as justiciable rights, any of the social and economic rights with which we have been engaged in this chapter. In Part IV of the Indian Constitution there is provision for directive

principles of state policy which are required to be followed by the state when it develops its social and economic policies. Thus, Article 38 requires the state to secure a social order for the promotion of the welfare of the people, in which justice social, economic, and political shall inform all institutions of national life. Similarly, Article 39 provides that the state shall direct its policy towards securing that 'the citizens—men and women equally—have the right to adequate means of livelihood'.

These provisions are not couched as rights but rather as principles which should guide the state in the formulation and implementation of its policy but without giving a litigant the ability to demand that any of these principles be enforced as of right by way of a judicial order. The courts, however, have made creative use of these directive principles of state policy, reading them together with some fundamental rights. Thus, in *Olga Tellis and others v Bombay Municipal Corporation and other*, the applicants were living on Bombay pavements or slums in the vicinity of their workplace. They were then forcibly evicted and their dwellings demolished by the municipality. They challenged their eviction on the basis that it violated their constitutional rights; in particular the right to life which was enshrined in Article 21. The Court held that the right to livelihood was to treated as being part of the constitutional right to life and

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hence, by depriving a person of his or her means of livelihood, this action would effectively deprive the person of his right to life. On this basis, therefore, the Court thus placed an obligation upon the Bombay Municipality to provide shelter for the applicants.

More recently, in *Peoples Union for Civil Liberties v Union of India and others* the Supreme Court was faced with various interim orders which had been passed, from time to time, directing governmental authorities to see that food was provided to aged, infirmed, disabled, destitute men who were in danger of starvation, pregnant and lactating women, and destitute children. This class had insufficient funds to live free of malnutrition.

The Court framed the dispute by way of the following question:

Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families?

The Court then ordered that nutritious food had to be provided for those undernourished or malnourished applicants and further directed that an integrated child development scheme be implemented through various government centres, first to supply nutritious food and supplements to children, adolescent girls, and pregnant and lactating women under a scheme which so provided for 300 days in a year.

In this case the Court, operating broadly within a common law tradition inherited from the United Kingdom, and adjudicating within the context of a constitution which had no express judiciable social and economic rights, interpreted various provisions of its Constitution to create amongst other rights, a basic right to housing and the right to food. A strong right/strong remedy was developed from reading the implications of the constitutional text.

VII. CONCEPTUALISING SOCIO-ECONOMIC RIGHTS UNDER THE INDIAN CONSTITUTION

The contemporary understanding of the socio-economic rights under the Indian Constitution is very different from what it was at the time of commencement of the Constitution and this is primarily because of the judicial morphing led by the Supreme Court of India. Therefore, it is only appropriate that the socio-economic rights are categorised for its better conceptualisation into two heads:

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

(ii) Present conception as morphed by the judicial pronouncements

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VIII. THE CONCEPTION AT THE TIME OF COMMENCEMENT OF THE CONSTITUTION

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

Part IV of the Constitution starting from Article 37 to 51 constitutes the provisions which embody these fundamental principles. These provisions cover a number of areas of governance ranging from securing and protecting a social order, minimising inequality among different groups of people, promotion of non-concentration and distribution of wealth, right to an adequate means of livelihood, equal pay for equal work for both men and women, health of workers, freedom and dignity of children and youth, free legal aid, organisation of village Panchayat, Right to work, Right to education, Right to public assistance in cases of unemployment, old age, sickness and disablement, just and humane conditions of work and maternity relief, living wage for workers, participation of workers in management of the industries, uniform civil Code for the citizens, promotion of educational and economic interests of scheduled castes, scheduled tribes and weaker sections, raising the level of nutrition and the standard of living and improvement of public health, organisation of agriculture and animal husbandry, protection and improvement of environment and safeguarding of forests and wild life, protection of monuments and places and objects of national importance, separation of judiciary from executive, promotion of international peace and security.

IX. THE CONCEPTION AS IT WAS WITH THE MEMBERS OF THE CONSTITUENT ASSEMBLY

The discussion that took place with the framers of the Indian Constitution who were the members of the Constituent Assembly having the onerous task of framing the Indian Constitution is rather insightful. In the Assembly there was general acceptance of DPSPs as

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fundamental principles of governance, however the opposition only came from those who wanted it to be justiciable in the court of law. B. N. Rau was of the view that whether a law made or action taken for the realization of DPSPs shall be invalid for violating the justiciable fundamental rights must also be considered in relation to having an express provision in this in the Constitution itself. K. M. Munshi, K. T. Shah and B. R. Ambedkar wanted DPSPs or an even more rigorous social programme to be justiciable. Ambedkar's proposal for social schemes, however were rejected on several occasions in the Assembly on the pretext that such schemes should be left to legislations and should not be embodies in the Constitution and therefore, from this position Ambedkar retreated to DPSPs.

The drafting of justiciable rights and non-justiciable principles was equally difficult, for example the right to equality was earlier put in the non-justiciable rights but later on included in the justiciable right whereas, the right to free primary education for children was earlier put in the category of justiciable rights but later on included as non-justiciable rights. So, with this hope that the accountability for the realisation of the principles contained in the DPSPs would be ensured by the people during every election, the DPSPs were finally made non-justiciable.

X. PRESENT CONCEPTION AS MORPHED BY THE JUDICIAL PRONOUNCEMENTS

In *Francis Coralie Mullin* v. *Union Territory of Delhi*[17] the Supreme Court of India expanded the ambit of article 21 by including within the purview of article a right to human dignity and not that of an animal existence. Therefore, the court held that a dignified life therefore would include the right to shelter, clothing and nutrition being the bare necessities of life. This sweeping account of right to life encompasses a wider conception of civil and political rights and attempts to obliterates the age-old distinction between civil and political rights and socio-economic rights by making the availability of socio-economic rights indispensable for the realization of any civil and political rights and in the process makes socio-economic rights relating to the right to bare necessities of life a fundamental right, which is justiciable in a court of law. This also obliterates the fundamental conception that fundamental rights are generally negatives rights based on the idea of laissez-faire and therefore the illegitimate state intervention would call for the recourse to judicial remedies on account of breach of fundamental rights. Therefore, it paves the way for "positive" fundamental rights.

Adjudication of constitutional socio-economic rights in India has come to exist through the judicial innovation both in terms of substantive and procedural aspects. The recognition of constitutionally enforceable socio-economic rights in India has got to do with the reading of

[17] (1981) 1 SCC 608.

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some of the core socio-economic rights within the ambit of Article 21 of the Constitution by the courts in India. One witnesses the absorption of socio-economic rights into fundamental rights by the Supreme Court. For instance, the principle of free legal aid to poor as provided under Article 39-A was read into Article 21 in *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra*[18]. In *Francis Coralie Mullin* v. *Union Territory of Delhi*, the Supreme Court recognised the "right to live with human dignity" and consequently the right to have access to basic needs such as food, shelter and clothing. In *Randhir Singh* v. *Union of India*[19] the objective of equal pay for equal work embodied in the DPSP was read into Article 14 and Article 16(1) of the Constitution.

The Court had followed this interpretative approach in later cases to hold that the right to life includes, inter alia, the rights to education *Mohini Jain* v. *State of Karnataka*[20], *Unni Krishnan* v. *State of A.P*[21];right to food in *PUCL* v. *Union of India*, Writ Petition (Civil) No. 196 (2001); right to shelter in *Olga Tellis* v. *Bombay Municipal Corporation*[22], *Gauri Shanker* v. *Union of India*[23]; right to health and medical care in *Paschim Banga Khet Mazdoor Samity* v. *State of W.B*[24]., *Parmanand Katara* v. *Union of India*[25]. Thus, a range of justiciable socioeconomic rights have been recognised.

XI. SUPREME COURT'S INTERPRETIVE APPROACH

The Supreme Court of India explained the relationship between the fundamental rights and DPSPs in *Minerva Mills* v. *Union of India*[26]. However, the relationship between the two has evolved over a period of time and this evolution can be clubbed under different phases based on the different interpretative approaches being preferred by the Court in relation to this issue[27]. In the first phase the judiciary was reading the text of Article 37 literally. It was doing so by putting fundamental rights on a higher pedestal in comparison to DPSPs. The Court was therefore a vocal critic of equating socio-economic rights at par with the civil and political rights. The second phase was the phase when the significance of DPSPs was asserted by the Supreme Court, particularly its role in shaping the life of an individual. Such an approach was

[18] (1978) 3 SCC 544.
[19] (1982) 1 SCC 618.
[20] (1992) 3 SCC 666.
[21] (1993) 1 SCC 645.
[22] (1985) 3 SCC 545.
[23] (1994) 6 SCC 349.
[24] (1996) 4 SCC 37.
[25] (1989) 4 SCC 286.
[26] (1980) 3 SCC 625.
[27] Uday Shankar and Amit Bindal, "Judicial Adjudication of Socio-Economic Rights: Indian Perspective", 1.2 *NULJ* 29 (2012) at 44. Also See. Parmanand Singh, "Realisation of Social Rights in Globalising India: A Critique of Law, Policy and Governance" II *JCLC* 23 (2014).

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actually utilised to save such legislations from becoming unconstitutional which apparently were violative of fundamental rights but furthering the principles contained in DPSPs. In doing so, the Court read fundamental rights as qualified by the DPSPs; as reasonable restrictions on fundamental rights. The validation of land reform legislations in the interest of „public purpose" is an ample testimony where legislations giving effect to community interest were validated despite being inconsistent with individual rights strict sense.

The third stage is the approach where the Courts emphasised that fundamental rights and DPSPs are part of the integrated constitutional scheme to attain the goal of welfare for all. The insistence therefore was on a harmonious reading of between the two, wherein, one is "fundamental" right and other is the principles which are "fundamental" in the governance. Compared to the second phase where the directive principles were read as reasonable restrictions on fundamental rights, in the third phase the directive principles were referred with a view to justify and validate legislative measures.

The fourth approach is the testimony of the assimilation of socio-economic rights into fundamental rights. In this phase the courts have read various socio-economic rights which otherwise would have been the governance imperatives, into justiciable fundamental rights under Article 21. The decisions mentioned in the opening paragraph of Chapter VI clearly reflect this new interpretive approach of the Court which obliterates the literal mandate of Article 37, so far as the non-justiciability of socio-economic rights is concerned but does it by not making provisions of Part IV justiciable on its own, rather by the expansive reading of socio-economic rights as the bedrock for the realisation of the right to life and personal liberty emphasising on the attainment of human dignity for all as a guarantee implicit in Article 21.

XII. MINIMUM CORE FORM OF ADJUDICATION

This is the traditional conception of a systematic social right which focuses on minimum core standard and therefore, it emphasizes individual remedies at par with any judicially enforceable civil and political right. This conception of judicial role for socio-economic rights directly corresponds to the normative standard of socio-economic rights as judicially enforceable, by reading it implicit in Article 21 of the Constitution of India. Nevertheless, the advocates of the minimum core form of adjudication seek to elevate socio-economic rights at par with the civil and political rights for the purposes of judicial enforcement of these rights. However, minimum core form of adjudication may annihilate the doctrine of separation of powers in terms of realisation of socio-economic rights of the people.

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XIII. CONDITIONAL SOCIAL RIGHTS ADJUDICATION

Conditional adjudication simply represents the adoption of a weak remedial model in which the court declares that a right has been violated but recognizes that it can only provide a limited remedy. The existence of violation of an enforceable right is conditional upon State action. A violation can only occur when the State after having undertaken an obligation does not fulfil it.

So, if a housing scheme is launched by the government and a person eligible for house under the scheme is denied the housing facility, then, if he knocks the door of the court, the courts would ensure that he gets what he is entitled to under the scheme. In the course of adjudication, the courts may widen the scope of adjudication in order to ensure that all those similarly situated like the petitioner, get the desired relief.

However, in some cases individualized remedy is granted but this is not by adhering to the minimum core approach of adjudication but because of the fact that the petitioner happens to be the beneficiary of the application of conditional social rights adjudication. Therefore, despite there being a need for more houses to be built by the government to cater to the housing requirements of poor, the fact is that the government is not under an enforceable constitutional obligation to ensure that everyone has access to shelter. This is the reason why despite the fact that the Supreme Court in *Olga Tellis* v. *Bombay Municipal Corporation* declared that the right to life includes a right to livelihood which in this case was in issue owing the order of government to deprive slum and pavement dwellers of their humble abode, millions of people in India are still without shelter and they do not have an enforceable right to shelter, whereby, they could be ensured access to shelter.

However, since the conditional socio-economic rights adjudication is more likely to operate in poorly governed nations, courts would be far more responsive to the legislative and executive inertia paving the way sometimes for stronger remedies.

XIV. CONCLUSION

A comparative look at the developments in the field of socio-economic rights adjudication as aforesaid reveals a mix picture. The constitutional socio-economic rights adjudication is certainly at a more advanced stage in South Africa where socio-economic rights constitute part of the expressly guaranteed constitutionally enforceable rights. Ireland, presents an interesting example as despite being the main influence in enabling the insertion of DPSPs under the Indian Constitution, the Supreme Court of Ireland appears to be not inclined to the idea of recognizing constitutionally enforceable socio-economic rights.

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Lack of evolution of constitutional socio-economic rights as a facet of civil and political rights UK and USA could be attributed to the fact that, being the developed nations, perhaps it was not the felt as a need. In the field of international law, we've dealt with declaration and covenants which dealt with socio economic rights.

A hierarchy in terms of the effectiveness of the different adjudicatory forms to address the cause of socio-economic rights would place the minimum core approach at the top, followed by the reasonableness approach and finally conditional socio-economic rights approach at the bottom, whereas, a hierarchy in terms of the degree of legitimacy will reverse this order. This is owing to the fact that in minimum core approach, courts can go to the extent of framing policies and ensuring its compliance. In the reasonableness approach, policy prescriptions by the executive or the legislature are to be examined from the point of view of its reasonableness, whereas, the conditional socio-economic adjudication is aimed mainly at ensuring compliance of the executive and legislative policies already in operation.

The degree of legitimacy is ascertained on the basis of the proximity of these adjudicatory approaches to the classical notion of the principle of separation of powers. However, even the conditional socio-economic adjudication appears to be involving the reworking of the contours of classical separation of powers in order to derive legitimacy. The principle of separation of powers cannot be envisioned as drawing boundaries between the three organs of State with absolute precision. This feature of the separation of powers principle enables the reworking of the constitutional functions between the organs of the State, which can be used as a tool to ensure that the socio-economic adjudication becomes principled and the courts do not oscillate between non justiciability of socio-economic rights to minimum core form of adjudication.

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