Himachal Pradesh National Law University, Shimla (India)

A UGC CARE Listed Journal

Journal Articles | *ISSN:2582-1903* | *Shimla Law Review*

Volume: VI (2023)

ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS: Re-thinking the 'Right' Model in a Liberal Democratic State

Swaril Dania

https://doi.org/10.70556/hpnlu-slr-v6-I1-2023-02

Contents

Volume VI | *ISSN: 2582-1903* | *April 2023 - March 2024*

ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS: Re-thinking the 'Right' Model in a Liberal Democratic State

Swaril Dania*

[Abstract: *Despite the widespread acknowledgement of the indivisibility of human rights and the significance of socio-economic rights for the realization of civil and political liberties, socio-economic rights have continued to remain relegated to a lower rung in the corpus of human rights. Though these figure in the constitutions of most nations across the globe today, they mostly occur in the form of judicially unenforceable, positive directives for the state. Considerable unease surrounds the discussion on judicial enforcement of socio-economic rights. Holding steadfast to their reverence for the doctrine of separation of powers, constitutional law scholars have objected vehemently against judicial intervention in matters of realization of socio-economic guarantees. The present work seeks to engage with these objections and counter-objections against constitutional entrenchment and judicial enforcement of socio-economic rights. It attempts to initiate discussions beyond the traditional discourse to exhort a questioning of the conventional understanding of concepts such as democratic legitimacy and separation of powers, which are often cited as the main arguments against the role of judiciary in the project of realizing socio-economic guarantees in a state. Further, the paper explores the links between social justice and the idea of transformative constitutionalism. The model of transformative constitutionalism seeks to dismantle the existing power hierarchies in socio-political set up, to put in place a more democratic, egalitarian and participative social ordering. The paper suggests the adoption of transformative approaches for the realization of the goal of social justice. It advocates the fostering of synergistic inter-institutional cooperation between the organs of the state, use of dialogic judicial review, widening of access to justice and enhancement of democracy in order to facilitate the cause of socio-economic justice.*]

Keywords: *Socio-economic rights, transformative constitutionalism, separation of powers, social justice, judicial review etc.*

* *Dr. Swaril Dania* is Assistant Professor, School of Law, Bennett University, Greater Noida, U.P. (India). *Email:* swarildania@gmail.com

I

Introduction

> "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".
>
> *- Vienna Declaration and Programme of Action, World Conference on Human Rights, 25 June, 1993*

More than five decades have passed since this unequivocal assertion of the indivisibility and 'equal moral worth' of all human rights was made.[1] This idea of inseparability and the fundamental unity of rights has permeated the international human rights discourse.[2] Notwithstanding this widespread acknowledgement of the inter-linkages between different sets of rights and the significance of social and economic guarantees for full realization of political equality, treatment of socio-economic rights at par with civil and political rights, continues to be elusive in most of the jurisdictions.[3]

Socio-Economic Rights, *hereinafter* 'SER', also described as 'welfare rights', 'positive rights' or 'second generation' rights, refer to the umbrella of rights which make provisions for "the protection of the dignity, freedom and well-being of individuals through guarantees of state-supported entitlements to education, public health care, housing, living wage, decent working and living conditions, right of workers to form trade unions, social security schemes and other such social and economic

---

1 Vienna Declaration and Programme of Action, 1993 *available at*: https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action (last visited on Dec. 18, 2024)

2 *See* James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights*, 30 HUM. RTS. Q. 984 (November 2008), Ernst-Ulrich Petersmann, *On 'Indivisibility' of Human Rights*, 14 EUR. J. INT'l L. 381 (April 2003), Ariel Zylberman, *The Indivisibility of Human Rights,* 36 LAW & PHIL. 389 (August 2017).

3 For instance, the socio-economic rights are placed under Part IV of the Indian Constitution, which has been kept as judicially unenforceable, while the civil and political rights are placed under Part III as fundamental rights. In the study conducted by Courtney Jung and Ran Hirschl based on the Toronto Initiative for Economic and Social Rights (TIESR) dataset of 195 countries, they note, "roughly one-third of the countries identify all of their economic and social rights as justiciable, another third identify some ESRs as aspirational and some as justiciable, and the remaining third is split more or less evenly between those constitutions containing only aspirational ESRs and those containing fewer than two". *See* Courtney Jung, Ran Hirschl, *et. al*., *Economic and Social Rights in National Constitutions* 62(4) AMERICAN JOURNAL OF COMPARATIVE LAW 1043-1094 (2014). Constitutions such as of Malaysia and Singapore make no mention of any socio-economic rights, other than the right to education.

goods."[4] Examples include rights contained in articles 23-26 of the Universal Declaration of Human Rights (UDHR)[5], articles 19-13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) ,[6] Part IV of the Constitution of India[7] and articles 26-29 of the Constitution of the Republic of South Africa.[8]

Most countries have incorporated these rights in their legal systems. Analyzing the constitutions of 195 nations, Courtney Jung, Ran Hirschl and Evan Rosevear have identified the different models for inclusion of SER in the legal framework of different nations.[9] In their study, they have coded these rights as either being *absent*, *aspirational*, or *justiciable*.[10] While a *justiciable* right implies existence of a legal remedy for enforcement of the specific socio-economic right in courts, the *aspirational* model provides no legal recourse to courts in case of the failure of state to guarantee the particular right. However, the constitution enumerates the right as a guiding principle that must inform policy-making and governance by the state. Further, in case of no mention of the right in the constitution at all, it has been coded as *absent*. The study suggests that significant differences exist across jurisdictions in relation to the relative importance of the different socio-economic rights. E.g., the

---

4 Social and Economic Rights, Primer on Constitution Building, IDEA (International Institute for Democracy and Electoral Assistance), https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf (Last visited on Sept. 14, 2024).

5 UDHR, 1948 provides the following socio-economic rights: Right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment (Art. 23), right to rest and leisure, including reasonable limitation of working hours and periodic holidays (Art. 24), right to a standard of living adequate for the health and well-being of himself and of his family (Art. 25), right to education (Art. 26).

6 ICESCR, 1966 provides a plethora of these rights including right to work (Art. 6), fair wages and just and favourable conditions of work (Art. 7), right to form trade unions (Art. 8), right to social security (Art. 9), protection and assistance to family and special protection to mothers and children (Art. 10) right to adequate standard of living (Art. 11), highest attainable standard of physical and mental health (Art. 12), right to education (Art. 13).

7 INDIA CONSTITUTION, Articles. 36 to 51.

8 The Constitution of the Republic of South Africa, 1996 provides a set of justiciable socio-economic rights which include: Right to housing (Art. 26), right to health care, food, water and social security (Art. 27), rights of children (Art. 28) and right to education (Art. 29).

9 Courtney Jung & Ran Hirschl, *et. al.*, *Economic and Social Rights in National Constitutions* 62(4) AMERICAN JOURNAL OF COMPARATIVE LAW 1043-1094 (2014).

10 Courtney Jung & Ran Hirschl, *et. al.*, *Economic and Social Rights in National Constitutions* 62(4) AMERICAN JOURNAL OF COMPARATIVE LAW 1049 (2014).

right to education appears as practically universal whereas rights such as right to food and water are rare to find in the constitutions of the nations.[11]

The SERF index (Social and Economic Rights Fulfilment Index) developed by the Economic and Social Rights Empowerment Initiative, University of Connecticut, also merits a mention here. It measures the extent of fulfillment of the obligations under the ICESCR by the different nations.[12] SERF Index indicates that despite the wide acknowledgement of the essentiality of SER, severe disparities exist in the extent of their realization between different regions and across the different legal systems.[13]

Also, major disagreements remain as to the appropriate model for their realization.[14] The prospects for successful realization of SER, appear to rely largely on the type of model that has been adopted by the state to accord protection to them. Thus, the quest as to finding the most appropriate model for effectuation of the promise of socio-economic justice continues and academic debates about the constitutional entrenchment and justiciability of SER continue to engage the academic community.

The present work undertakes an analysis of the arguments and counter-arguments in relation to the judicial enforcement of SER and suggests the adoption of transformative approaches as a desirable model for their effective implementation.

---

[11] *Id*., at 1046.

[12] Economic and Social Rights Empowerment Initiative, The SERF Index Overview, https://serfindex.uconn.edu/overview/ (Last visited on September 18, 2024). The Index provides a quantitative yardstick to measure the fulfilment of the substantive obligations of the nations, pertaining to the right to adequate food, the right to housing, the right to education, the right to social security, the right to health, and the right to decent work.

[13] For a detailed analysis of the SERF index and the impact of factors such as presence of justiciable/aspirational model, prevalence of structural inequalities, presence of democratic governance mechanisms etc. on the performance of different countries in the SERF index, *see generally* Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, FULFILLING SOCIAL AND ECONOMIC RIGHTS (2015).

[14] For a discussion as to the different models for realization of socio-economic rights, refer, Paul O'Connell, VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES. *Also See*, Helena Alviar Garcia, Karl Klare, *et. al. (eds.)* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 28 (2014). For a discussion on varying standards of judicial review for judicial enforcement of socio-economic rights, *See* Rosalind Dixon, *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited* 5 *ICON* 391–418 (2007).

II

Constitutional Entrenchment of Socio-Economic Rights: An Overview

The debate about desirability of judicial enforcement of SER has raged on for decades.[15] Further, the idea of *constitutional entrenchment* of these rights has gained considerable acceptance over the years. Constitutional entrenchment refers to the process of incorporation of the provision formally in the written text of the constitution. Entrenchment 'signifies a legal rule that makes it more difficult for a body to change the law in an area that, but for the entrenching rule, would fall within its jurisdiction, and be alterable under the default rules of legal change.'[16] Thus, through constitutional entrenchment, the provision is partially insulated from the workings of majoritarian politics and temporary fluctuations in opinions in every-day political processes. Constitutionally entrenching a provision renders the law more stable and certain. It also indicates which areas are regarded by the state as essential and signals about their significance.

Cecile Fabre asserts, 'turning a moral right into a constitutional right means that the interest protected by the moral right is important enough to legally disable citizens and members of the legislature from enacting laws which violate these moral rights, that is from changing people's legal situation by forbidding them by law to do certain things, or by not giving them certain things by law.'[17]

Apart from insulating these rights from the impact of the routine political push and pull, constitutionalization is also sought to provide a formal motivation for policymakers to work towards their realisation. Other reasons for constitutional entrenchment of SER include,[18] *first*, that SER are as essential to human well-being as the civil and political rights and thus deserve equal status in the constitution. *Second*, constitutional entrenchment displays a firm resolve/promise of state

---

[15] *See* Frank Michelman, *The constitution, social rights, and liberal political justification* 1 ICON INT. J. CONST. LAW 13 (2003). *See also* D.M. Davis, *The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles* 8(4) SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 475–490 (1992).

[16] N.W. Barber, *Why Entrench?* 14 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 327 (2016).

[17] Cécile Fabre, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 101 (2004).

[18] These reasons are discussed in detail in the Primer on Social and Economic Rights developed by the International Institute for Democracy and Electoral Assistance (International IDEA) *available at:* https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf (Last visited on Sept. 14, 2024).

responsibility for improvement of socio-economic conditions of the citizenry. Such a promise in the constitution itself makes it more responsive to popular demands and allows greater legitimacy to the constitution in the eyes of the citizenry. *Third*, constitutional entrenchment is favored in countries with oppressive historical legacies where transformation of the social landscape is the major priority. Post-conflict, transitional states may also benefit from constitutional entrenchment of these rights. *Fourth*, such entrenchment is effective in prevention of regressive judicial activism which may lead the courts to strike down progressive or redistributive legislation.[19] Finally and *fifth*, it provides channels other than the political processes to vulnerable groups such as women and minorities who are disproportionately disadvantaged in their access to social and economic goods and thus tend to be more dependent upon state assistance and less adept at utilizing the political machinery for advancing their claims.

However, constitutional entrenchment of these rights is far from being a sure-shot guarantee for their efficient realization. Despite some agreement as to the desirability of constitutional entrenchment of SER, certain arguments have also existed against their constitutionalization. These include,[20] *first*, constitutionalization of SER would imply entrenchment of promises that are extremely difficult to fulfill because of the resource and capacity constraints of the state. The same could lead to a culture where promises remain only on paper, thus, harming the public trust in the constitutional system. *Second*, ideological objections have also been raised, which rely on arguments against excessive state intervention in market mechanisms and the realm of individual liberty. *Third*, constitutionalizing these rights may result in reduction in democratic responsiveness with respect to them. Placing them outside the constitution would allow formulation of policies for their realization dependent upon the needs and demands of the people and thus allow more flexibility in their delivery. *Fourth*, apprehensions also exist about the enhanced role of judiciary and potential clashes between the judiciary and the elected branches of the government.

Most of these arguments made against the constitutional entrenchment of SER, are also commonly made in the discussions against the idea of making SER judicially

---

[19] Examples may be taken of decisions such as *Lochner* v. *New York* 198 U.S. 45 (1905) wherein the state law regulating maximum working hours was struck down by the US Supreme Court. The decision initiated a period, now referred to as *Lochner* Era, during which a series of such judgments were passed by the courts (on the pretext of protection of individual liberties and freedom to contract) against legislations passed by the state to protect worker's rights and other such measures.

[20] *See Social and Economic Rights: Primer on Constitution Building*, IDEA (INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE) *available at*: https://www.idea.int/sites/default/files/publications/social-and-economic-rights-primer.pdf (Last visited Sept. 14, 2024).

enforceable. Though judicial enforcement of SER has received sharp criticism at the hands of constitutional law scholars, in a study conducted utilizing the SERF index, researchers have found a strong positive correlation between enforceable socio-economic law provisions in a state's constitution and its performance on the overall SERF index, particularly, the rights to education and food.[21] Moreover, such a positive correlation could not be established between aspirational provisions (directive principles) and the SERF outcomes.[22] The strongest and most robust relationship was found in the case of the right to health.[23] Thus, in studies examining the relationship between justiciability status and SERF index scores, it has been found that "countries that have a legally justiciable guaranteed right tend to do a better job of fulfilling that right".[24]

However, despite the statistical evidence about the desirability of judicially enforceable provisions for better realisation of the socio-economic goals, opponents of the justiciable rights model continue to raise several arguments which are discussed in the next section along with an account of responses to such arguments.

III

Objections against Judicial Enforcement of Socio-Economic Rights

Ideological objections: Why care for socio-economic rights at all?

The first objection is a general objection regarding the desirability of SER itself. The conception of SER has often been opposed on the ground that such welfare provisions privilege the lazy over the responsible, hardworking and more deserving, thus dis-incentivizing people from undertaking work. These are also opposed by those who stress upon the sanctity of property rights and market mechanisms and on the ground of resource constraints of the state.[25]

Certain ideological assumptions about the idea of 'justice' and about how benefits and burdens must be arranged in a society, underlie these arguments.[26] In any

---

[21] Elizabeth Kaletski & Lanse Minkler, *et. al.*, *Does Constitutionalizing Economic and Social Rights Promote their Fulfillment?* 15 JOURNAL OF HUMAN RIGHTS 433 (2015).

[22] *Id.*

[23] *Id.*

[24] Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, FULFILLING SOCIAL AND ECONOMIC RIGHTS 140 (2015).

[25] *See* Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 SAN DIEGO L. REV. 773 (2011).

[26] For a discussion as to the idea of justice, *See* Mritunjay Kumar, *Episteme of Justice: A*

Contd…

society, the arrangement of the benefits and burdens among the people is determined to a great extent by the economic, social and political institutions and the legal framework. The structuring of these social, political, economic and legal frameworks remains dependent upon a variety of factors including the socio-political history of any nation. Constitutions, which lay down the superstructure of the political organization of the state and the frame for the regulation of the state-citizen relationship, often embody a vision of the particular kind of distributive justice that is to be effectuated in the state.[27]

There are varying conceptions of distributive justice theory, differing on the basis of the units (income/ opportunities/ utility/ welfare), the subject of the recipients (individuals/classes) as well as on the basis of the principle of distribution (equality, maximization of welfare/utility).[28]

Among these models, the simplest remains *strict egalitarianism*, which prescribes for equal allocation of all material goods among all members of the society. However, this principle starkly ignores the socio-economic and political inequities that plague most societies. The idea of welfare rights/minimum core rights can be better defended through the use of 'Rawlsian' conception of justice that specifically provides for the 'difference principle', based on the central premise that *each person has equal moral worth*. (Though the theory has not been originally in the context of socio-economic rights, scholars such as Jeremy Waldron have attempted to show how the same may be useful in furthering the case for minimum welfare provisions.)[29]

According to the difference principle as contained in Rawlsian 'Theory of Justice',[30]

> Social and economic inequalities are to satisfy two conditions:
> (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and

---

Genealogy of Rationality, II SML. L. REV. 1 (2019). *Also See* Julian Lamont and Christi Favor, *Distributive Justice* in Edward N. Zalta *(ed.)*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter, 2017) *available at*: https://plato.stanford.edu/entries/justice-distributive/ (last visited Dec. 18, 2024).

27 For reference, a discussion on the inclusion of the conceptions of distributive justice in the Constitution of India can be found in Menaka Guruswamy, *Distributive Justice: "Of Nozick, Rawls and Indian Constitutional Law Jurisprudence"* 9 NATIONAL LAW SCHOOL JOURNAL 109 (1997).

28 For a discussion on the different theories of distributive justice, see Julian Lamont and Christi Favor, *Distributive Justice* in EDWARD N. ZALTA (ED.) THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter, 2017) *available at*: https://plato.stanford.edu/entries/justice-distributive/ (last visited Sept. 24, 2024).

29 Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 SAN DIEGO LAW REVIEW 773 (2011).

30 *See generally* John Rawls, A THEORY OF JUSTICE (1971).

(b) they are to be to the greatest benefit of the least advantaged members of society.

It rests on the premise that all individuals are morally equal and the factum of one's birth into conditions of poverty or abundance, as a female, male or other gender, as a member of a particular racial group/community etc. is *morally arbitrary*. [31]Thus, one's share of entitlements to primary goods must not be dependent upon these accidents of birth since the distribution of natural endowments is in itself, undeserved.

For the determination of the principles of just ordering of the social institutions, Rawls proposes the thought experiment of the 'original position' and the 'veil of ignorance'[32]. The citizens shall reach a consensus about the principles of justice which should order the political and social institutions since they are under the 'veil of ignorance' and thus, completely unaware of their endowments in life. In such a situation, no person shall press for agreement on principles that will arbitrarily favour any particular citizen since they would not know their own specific attributes.

Thus, the state assumes a role in creating conditions for a just distribution of goods such as education and healthcare so that each individual regardless of his morally arbitrary natural endowments, can have access to the same. The difference principle, thus, allows existence of inequality, given that it is to the greatest benefit of the worst-off.

Though widely hailed as a revolutionary theory, invocation of Rawlsian theory in the context of socio-economic rights has remained contentious. Criticism of the proposition stems from the belief of *desert theorists* that people *deserve* certain economic benefits in light of their actions and from the libertarian preference for non-interference of state with the market mechanisms and individual's liberty in the private sphere. Libertarians argue that redistributive policies may result in unacceptable infringements on liberty, property rights, or self-ownership.[33] The abolition of the fundamental right to property in India is a case in point here.[34] 'Desert theorists as well as libertarians also argue that the explanation

---

[31] John Rawls, *Id.*, at 14.

[32] John Rawls, *Id.*, at 118.

[33] Traditional libertarian objections to Rawlsian conception of justice include the entitlement theory by Robert Nozick. *See* Robert Nozick, ANARCHY, STATE, AND UTOPIA (1974). *Also see* Jeppe von Platz, *Rawls's Underestimation of the Importance of Economic Agency and Economic Rights* in Jon Mandle and Sarah Roberts-Cady *(eds.)*, JOHN RAWLS: DEBATING THE MAJOR QUESTIONS (2020).

[34] Originally a fundamental right placed in Part III of the Constitution of India, the right to property was stripped of its status as a fundamental right by way of The Constitution (Forty-fourth Amendment) Act, 1978.

of how people come to be in more or less advantaged positions is morally relevant to their fairness'.[35]

Similar to the desert theorists' approach which considers the actions of the individuals to be morally relevant for distributive justice goals, is the luck egalitarian theory (also referred to as the 'level playing field' ideal).[36] It claims that distributive inequalities can only be considered just if they result from one's voluntary choices or from factors for which one can reasonably be held responsible. While the difference principle of Rawls is sufficient to establish formal equality of opportunity by ruling out discrimination on grounds of race, ethnicity, age or gender, there would still remain many factors which are beyond the control of people but which have the potential to affect their socio-economic conditions. Dworkin's classification of people's actions as based on one's *ambitions* and on the basis of one's *endowments*, presents another conception which he describes as, resource egalitarianism.[37] By *ambitions*, Dworkin refers to the realm of one's voluntary choices and what results from our choices, such as the choice to work hard or to save. On the other hand, one has no control over the *'endowments'* such as one's genetic inheritance, or unforeseeable bad luck. Dworkin proposes that inequalities that are derived from those circumstances of people that have not been voluntarily chosen by them are unjust and therefore they should be compensated for the same. According to the luck egalitarian ideal, the 'fundamental aim of equality is to compensate people for undeserved bad luck such as being born with poor native endowments, having difficult family circumstances or suffering from accidents and illness'.[38] Individual's personal responsibility for any disadvantage is relevant for determinations of questions of justice and equality. The question that may be posed here is, devoid of the provision of the basic requirements of life, whether people can be considered capable of making free choices? Therefore, ideologically, *the case for provision of SER gets stronger once we realise that the potential to make meaningful choices remains severely constrained if one is not provided with the core necessities of life as a matter of right*.

---

[35] Julian Lamont and Christi Favor, *Distributive Justice* in Edward N. Zalta *(ed.)*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter, 2017 Edition) *available at*: https://plato.stanford.edu/entries/justice-distributive/ (Last visited Sept. 24, 2024).

[36] For arguments against the idea of luck egalitarianism, *See generally* Elizabeth Anderson, *What Is the Point of Equality?* 109 ETHICS 287-337(1999).

[37] *See generally* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

[38] R.J. Arneson, *Luck Egalitarianism: Interpreted and Defended*, 32(1) PHIL TOPICS 1-20 (2004) as cited in Ekmekçi, Perihan Elif, and Berna Arda, *Luck Egalitarianism, Individual Responsibility and Health* 32(3) BALKAN MEDICAL JOURNAL 244-54 (2015).

A strong case for protection of SER is also made if one looks at the 'capabilities' approach developed by Amartya Sen and Martha Nussbaum.[39] Discussing how individuals differ in their abilities to convert the same set of resources into valuable 'functionings', Sen proposes the capabilities approach, sensitive to the varying needs of the people dependent upon a 'variety of factors such as health, longevity, climatic conditions, locations, work conditions, temperament, and even body size.'[40] It goes beyond the idea of Rawlsian 'primary goods' and emphasises upon 'the freedom to achieve well-being or the freedom to lead the kind of life you have reason to value" which is the core idea of 'capability'. Thus, going by the capabilities approach, for an 'ambition-sensitive' distribution to be just, it is essential first to ensure that the differences in set of 'capabilities' are also taken into account.[41]

Further, being subjected to the harsh circumstances/oppression over time, people may develop *adaptive preferences*. People might adapt to certain unfavourable circumstances and their evaluation of what they deserve or what they can expect to achieve can be distorted so much that their actions are affected.[42] The possibility of the adaptive preferences impairing the ability of individuals to pursue their 'ambitions' and work towards their realization, presents a challenge for 'ambition-sensitive' allocative principles. Therefore, the provision of core necessities of life through state supported entitlements that enable formation of 'capabilities', which in turn, allow for meaningful choices in life becomes crucial.

The separation of powers challenge: Issues of legitimacy and competence

Ideological objections aside, allowing courts to adjudicate matters of 'positive' rights entails running into the perennial questions about the institutional legitimacy and competence of judiciary over legislature in the realm of policymaking and allocation of the state resources. Legitimacy concerns are raised on the grounds of infringement of the democratic decision making in the state, while issues of competence focus on the lack of expertise of the judiciary to formulate policies for

---

[39] Amartya Sen, *Equality of What?* in Sterling McMurrin *(ed.)*, THE TANNER LECTURES ON HUMAN VALUES 195 (1980), Martha Nussbaum, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011).

[40] Amartya Sen, *Id.* as cited in Christopher Lowry, *Sen's Capability Critique* in Jon Mandle and Sarah Roberts-Cady *(eds.)*, JOHN RAWLS: DEBATING THE MAJOR QUESTIONS 165 (2020).

[41] For a discussion on factors that affect the ability of individuals to convert the resources into 'functionings', (described as conversion factors), *See* Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 JOURNAL OF HUMAN DEVELOPMENT 99 (2005). *Also see* Christopher Lowry, *Id.*

[42] The idea of adaptive preferences has been examined and developed in detail by Amartya Sen and Martha Nussbaum in their work on Capabilities Approach. *See* Amartya Sen, *Development as Capability Expansion*, 19 JOURNAL OF DEVELOPMENT PLANNING 41-58(1989); Amartya Sen, RESOURCES, VALUES AND DEVELOPMENT, (1984); *See generally* Martha Nussbaum, WOMEN AND HUMAN DEVELOPMENT, 2000).

efficient governance. Both these arguments are rooted in the solid conception that adherence to 'separation of powers' is crucial for maintaining the legitimacy of constitutional order in the state. The following section discusses these in detail.

The separation of powers doctrine: Formalist and functional approaches

The relationship between the courts and the legislature has remained contentious when the issue about the realization of SER is considered. While dealing with the doctrine of separation of powers, it is pertinent to remember that the actual rationale behind the theory has been the avoidance of concentration of power and tyranny and not merely a formal separation of functions between the three organs and hence, emphasis on any rigid/pure separation must be eschewed.[43] The purely formalist conception places strict focus on the distributional integrity of the tripartite theory. The formalist inquiry is directed at investigating the nature of the function at hand and classifying it as legislative, executive or judicial and then allocating the task to the respective organ of the state. Such an approach runs into difficulties of indeterminacy in the determination of three distinguishable functions of the branches.[44] A categorical, water-tight compartmentalization of the different functions is often seen as a questionable premise.

Rather than emphasizing on a strict demarcation of the three realms, focusing on the actual function that the doctrine claims to perform in a constitutional system, is required. Advocating for a re-conceptualization of the theory, Bruce Ackerman writes, '…institutional arrangements serve as concrete expressions of ultimate ideals.'[45] Thus, it is essential that we realize that the utility of the allocation of discrete areas of operation in the doctrine is purely a functional choice, to serve particular substantive ends and is not an end in itself. The end here is the preservation of the delicate inter-institutional balance.

However, preserving this institutional balance, also requires defining first, what is the ideal 'institutional balance' which is sought to be preserved. What should be the parameters to assess the relative institutional strength of the three organs? Thus, the problem of definitional indeterminacy arises in relation to both the 'formalist' conception as well as the 'functionalist' conception of the theory.[46]

---

[43] *See* Bruce Ackerman, *The New Separation of Powers* 113 HARVARD LAW REVIEW 633 (2000); *Also See* Eric Barendt, *Separation of Powers and Constitutional Government*, PUBLIC LAW 606 (1995).

[44] Eric Barendt, *Separation of Powers and Constitutional Government*, PUBLIC LAW 606 (1995) as cited in Paul O'Connell, VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES 170 (2012).

[45] Bruce Ackerman, *The New Separation of Powers* 113 HARVARD LAW REVIEW 633 (2000).

[46] For a discussion on the problem of definitional indeterminacy in relation to the doctrine of separation of powers, *See generally* Eoin Carolan, THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE (2009).

A possible solution could be to look at this balance in the light of the ultimate objectives of the theory of separation of powers. The institutional balance would be preserved if it is in consonance with the fundamental objectives of the theory. Conventionally, the objectives of the theory of separation of power have been to prevent tyrannical rule by any one organ/entity (protection of rule of law); supervision of the three branches by each other (each acting as a counterweight in the system of checks and balance); increase in efficiency through division of labour; rule against bias through separation of personnel so that partiality and self-interest may be prevented from creeping into the system and to ensure accountability through representative mechanisms.[47]

The different objectives which underlie 'separation of powers' have been described by Aziz D. Huq and Jon D. Michaels as constituting a plural normative framework. They identify four major norms, i.e., rule of law, liberty, efficiency and democratic accountability and use the term 'normative pluralism' to refer to them.[48] In this plural framework, the norms may also come into conflict with each other and there is a contestation that plays out between the different values/norms. While the idea of separation of powers is aimed at prevention of tyrannical rule by any one entity, it is also essential to ensure that there must not be a tyranny of a particular norm.[49] The current discourse appears to have been overshadowed by the clamor for democratic accountability, and scant regard is paid to the other norms which may be equally significant for ensuring that the doctrine of separation of powers is not breached. The counter-majoritarian difficulty and the tension between democratic law making by the legislature and judicial review tends to play out in a more acrimonious fashion when the issue is about SER.

In the context of the goal of realization of social justice through effectuation of SER, one must be careful about the particular norm underlying the doctrine, to which our allegiance is due.

In the words of Jeanne M. Woods:[50]

> Separation of powers as a normative principle is not an end in itself – it is a means of keeping the government in check in order to ensure the protection of preferred rights. In the case of social rights, judicial review serves the function of checking the

---

[47] Aziz Z. Huq, Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence,* 126 YALE LAW JOURNAL 381 (2016).

[48] Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence* 126 YALE LAW JOURNAL 381 (2016).

[49] *Id*.

[50] Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm* 38 TEXAS INTERNATIONAL LAW JOURNAL 773 (2003) as cited in Paul O'Connell, VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES 172 (2012).

> political branches to ensure they are responsive to the constitutional rights of the least privileged in society, and that policymakers do not lose sight of their suffering in the inevitable political games of compromise and horse-trading.

Hence, the objective of having the separation of powers at play in relation to the goal of democratic social justice is to ensure that each organ is alive to its responsibility towards its realization. The responsibility of the realization of social justice lies on all the three organs. While the legislature is expected to provide the socio-economic guarantees to the citizens through welfare legislations, the judiciary must also have a role in the vindication of these rights in case the legislature fails in ensuring the same due to the majoritarian politics of the day. The compliance with the doctrine too must be judged in the light of the roles that the organs are expected to play in the pursuit of this particular goal. Having issued this caveat as to the need to maintain balance between the different norms underlying the doctrine and not losing sight of the actual objectives of the tripartite theory, one must turn their attention to the idea of democratic accountability and its intersection with the broader idea of constitutionalism and social justice.

Legitimacy, democratic accountability, and conceptions of advanced democracy:

The discourse around 'democracy' and the need for democratic accountability has largely centred around the existence of electoral politics and law making by elected representatives.[51] Thus, legitimacy of state action is equated with the idea of democratic accountability and the electoral process is seen as the *sine qua non* of the institutional legitimacy. However, democratic constitutionalism requires a more substantive conception of democracy which is not confined to the casting of preferences at the ballot box, rather which positively effectuates the core values/aspirations of autonomy, equality and self-determination, which underlie the basic idea of democracy itself.

Democracy can be justified as an instrumental as well as an intrinsic good. As an instrumental good, democracy is valuable for it produces good laws and policies and 'better protects subject's rights or interests because it is more responsive to their judgments or preferences than competing forms of government.'[52] Other instrumental arguments posit that democracy promotes character formation of the subjects. Since the subjects are given a share in political decision making, they are incentivised to think more rationally and prudently and to pay regard to the views

---

[51] *See* Finlay Malcolm, *The Purpose and Limits of Electoral Accountability*, 24 J. ETHICS & SOC. PHIL. 258 (2023). *Also see* Tom Christiano & Sameer Bajaj, *Democracy* in Edward N. Zalta *(ed.)*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2021). https://plato.stanford.edu/entries/democracy/ (Last visited Dec. 18, 2024).

[52] Christiano, Tom and Sameer Bajaj, *Democracy* in Edward N. Zalta *(ed.)*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2021) *available at*: https://plato.stanford.edu/entries/democracy/ (Last visited Sept. 20, 2024).

of others who have the same status as them in terms of political equality.[53] Thus, they become active rather than passive citizens, more cognizant of their autonomy.

Among the arguments for the intrinsic worth of democracy, the prominent ones include relying on the values of liberty and equality that are inherent in the concept. The principle of one vote, one value and universal adult franchise is rooted in the idea of autonomy of the individual and equality in political life. Political equality in the form of equal voice in the voting process carries the mark of autonomy over one's decisions about the larger socio-political environment in which one lives. 'The vote of each and every citizen is a badge of dignity and of personhood.'[54]

Noteworthy among other justifications is the idea of 'deliberative' democracy, based on the principle furthered by Jurgen Habermas. Habermas proposes that law could only be legitimate if it has been made after a free and inclusive democratic process of opinion and will formation. Habermas places emphasis on deliberative forums (institutions such as the parliament) as well as informal communication in public sphere.[55] Deliberative democracy is valuable intrinsically because it is rooted in the conception of decision making through public justification and consensus. However, for the effective realisation of equal voice in the political process and meaningful participation by all, in the formation of public opinion and will, something more than just formal equality is required. For democracy to be valued, it must be capable of producing the outcomes for which it is considered as instrumentally beneficial. Further, it must strengthen the underlying values of equality, autonomy and liberty. Mere guarantees of political equality may not be sufficient to support these intrinsic values. Meaningful conceptions of democracy demand democratic participation by the citizenry. Such participation requires the existence of substantive equality, liberty, autonomy and opportunities for self-realisation as a pre-requisite. The guarantees of these aspirations/values remain unfulfilled in most societies, more so in societies which have gone through strife and conflict, have been under colonial rule, transitional states and societies where institutional oppression has been prevalent.

---

[53] *Id*.

[54] Albie Sachs J. in *August* v. *Independent Electoral Commission* 1999 (3) SA 1 (CC) para 17 as cited in David Bilchitz, *Are Socio-Economic Rights a Form of Political Rights*, 31 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86 (2015).

[55] *See generally* William Rehg *(trans.)*, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996). (Originally, Jürgen Habermas, FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS, (1992). Habermas writes, "Deliberative politics thus lives off the interplay between democratically institutionalized will-formation and informal opinion-formation", William Rehg (trans.), BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 308 (1996).

Thus, plain democracy without these rights, has been opposed on the ground that the citizenry may not be able to effectively participate in the system owing to the lack of a conducive set up which fosters the actual democratic spirit.

Further, it is also argued that the citizenry may not be adept at the task of voting because of their ignorance and lack of expertise. "Epistocracy", which is based on the premise that rule must be of experts and not common men since they lack the wisdom and moral character for good rule has been put forward as an alternative to democracy since the time of Plato who had argued for rule by the 'philosopher king'.[56] Moreover, democracy deficits may arise even in representative legislative processes if they are marred by corrupt practices. Jason Brennan in his book, Against Democracy, discusses how democracy fails in guaranteeing to the citizens a right to competent government, and in fact subjects them to incompetently made decisions by irrational, corrupt, immoral decision makers.[57] Such a harsh critique of democracy may be unwarranted but it is necessary to appreciate that democracy is a *relative* good and may not have intrinsic worth if the values that it is built upon are lost sight of.

Also, the limits to democratic authority merit some discussion. By limits, we refer to the constraints upon the operation of democratic mechanisms in certain situations such as when the mechanisms operate to attack the very root of the democratic process itself such as taking away of basic political rights of forming associations, freedom of speech etc. through 'democratic' law making by the elected government. Another challenge that demands for some limits on the democratic conception is that of the problem of persistent minorities.[58] The nature of democracy is such that in societies where there is a particular problem of minority groups, then due to the consistent preference patterns of the members belonging to the majority and minority groups, the minority preference would always end up as the losing side. This can create the problem of majoritarian tyranny.[59] Sufficient safeguards need to be put in place against this tendency so that the minorities may also get their equal chance at influencing the decision making in the state.

Thus, certain values/rights which are a pre-requisite to the functioning of democracy itself as well as those which if violated, would run counter to the democratic

---

[56] For a critique of Epistocracy, *See* David Estlund, *Why Not Epistocracy*, in Naomi Reshotko *(ed.)*, DESIRE, IDENTITY, AND EXISTENCE: ESSAYS IN HONOR OF T.M. PENNER 53–69 (2003).

[57] Jason Brennan, AGAINST DEMOCRACY (2016).

[58] For a discussion on limits on democratic authority, *See generally* Tom Christiano & Sameer Bajaj, *Democracy* in Edward N. Zalta *(ed.)*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2021) *available at*: https://plato.stanford.edu/entries/democracy/ (Last visited on September 20, 2024).

[59] The idea of tyranny of majority has been discussed by Alexis de Tocqueville in his seminal work, Democracy in America, an influential account, originally written in French in 1835.

principle of meaningful participation and political equality, must operate as limits upon democratic authority. These values must be placed beyond the push and pull of daily politics and deserve protection. This, as explained in the second part of this work, is the underlying rationale for constitutional entrenchment of the fundamental rights and the availability of the provision of judicial review in case of their violation. At this stage, we resume the discussion as to social justice and SER, and pose the following questions as to the relationship between social justice and democratic accountability: *first*, whether social justice is essential to promote values underlying democracy? If yes, does the objection against judicial enforcement of SER on account of democracy deficit, stands nullified? And *second*, whether democracy itself holds the potential to promote outcomes that support social justice? If yes, what is the need for constitutional entrenchment/judicial enforcement of the guarantees? Further, beneath these two questions, runs the larger question of whether SER may operate as a justified limit on political authority?

To understand the significance of social justice for realisation of political equality, the following observation by Dr. B.R. Ambedkar in relation to the adoption of the Constitution of India finds relevance:[60]

> …the third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it, social democracy…On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value.

How socio-economic inequities constitute a denial of the principle of one vote one value can be understood if the problems with representative democracy are taken note of. Representative democracy though holds the promise of responsive government, yet there often exists a representation gap in societies where large groups live in extreme poverty and the interests of the poorest communities fail to attract attention by the elected officials. David Bilchitz points out three major reasons behind the phenomenon:[61]

> a) The widely diverse interests of people and failure to amalgamate the diverse concerns into a strong, distinct political interest group, is the primary reason behind the representation gap. The absolute lack of financial and material resources further denies the poorest group any chance at either political organisation or any adequate monitoring of elected officials.

---

[60] Speech of Dr. B. R. Ambedkar, 25th November, 1949, XI Constituent Assembly Debates at 979.

[61] David Bilchitz, *Are Socio-Economic Rights a Form of Political Rights*, 31 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86 (2015).

b) The lack of identity of interests between the voters and the elected representatives further widens the representation gap.
c) Lack of multi-party politics also results in skewed democratic politics. Strong one-party domination is common in countries with colonial pasts where a single party had led the liberation struggle for the country. It has been observed that development of a robust multi-party system in these states takes a fairly long time, thus denying any real choice of representatives to the voters. Such a system restricts the true operation of representative democratic politics.

Participative democracy and not merely representative democracy is necessary for realisation of constitutional ideals. Thus, it is essential that meaningful opportunities for participation are provided and people's abilities to take advantage of those possibilities is strengthened. To promote such participation, public consultations must be held. However, even when public consultations are held, social and economic backwardness of people may restrain them from expressing their opinion. Lack of basic education or language barriers may impede the understanding of marginalised groups about laws that may have far-reaching impact on their lives. Further, barriers to access such forums of collective deliberation due to social exclusion of groups may also exist owing to discrimination based on caste, race, gender or religion. The same distinctions may further divide the groups, thus preventing them to form a strong lobbying group because of the varying sectional interests of the different sub-groups. While discussing about community consultations in South Africa, Dugard, Madlingozi and Tissington observe, 'In most cases, community 'consultation' takes place long after decisions have been made and is more like a public relations exercise than participatory democracy. While elite interests are certainly accommodated within municipal development planning, poor communities and especially residents of informal settlements are typically shut out from meaningful participation in the processes.'[62]

What emerges herein is that SER constitute a necessary pre-condition for democratic participation of the poor. Alleviation of material conditions of people is the necessary first step in facilitating their meaningful political participation. The constitutionalization of guarantees for socio-economic goods helps the society to move towards participation by the marginalised as equals and as full partners in social interaction.

Conversely, Amartya Sen has argued that democracy is essential for development and enriches lives through more freedom, 'provides political incentives to rulers to respond positively to needs and demands of people and the process of open debates and dialogues that democracy allows, helps in formation of values and priorities'

---

[62] Jackie Dugard, Tshepo Madlingozi & Kate Tissington, *Rights-compromised or rights-savvy? The use of rights-based strategies to advance socio-economic struggles by Abahlali baseMjondolo, the South African shack-dwellers' movement* in Helena Alviar Garcia, Karl Klare, *et.al. (eds.)*, SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 28 (2014).

and this 'constructive function of democracy' can be very important for justice and equity as well as efficiency.[63] This relationship stands proven even as per the statistical research. 'Analysis of the SERF Index shows that there is a clear empirical relationship between democratically accountable governance and the fulfillment of social and economic rights.'[64] The performance of countries at SERF index shows a positive correlation with democracy, political competition, rule of law and government accountability.[65]

Thus, it emerges that democracy and social justice are mutually constitutive. In fact, while stressing on the essential links between SER and democratic representation in a state, David Bilchitz has proposed that SER should partially be conceived as a species of political rights.[66] The relationship of mutual reinforcement between the conception of democracy and that of SER comes across as natural and obvious in the light of the fact that both rest on the same rationale, that is, of the fundamental moral equality of individuals. The idea of political equality which is contained in the principle of 'one vote, one value' is rooted in the premise of each individual having equal moral worth and the same drives the conception of social justice.

Going back to the questions that we had raised, we may now answer them in the following manner: *first*, social justice is indeed essential to promote values underlying democracy. Thus, the argument of judicial enforcement of SER running counter to democratic accountability stands considerably weakened, even if not nullified in entirety. *Second*, democracy holds the potential to promote outcomes that support social justice. However, representative democracy alone may not be sufficient for the realisation of SER. A more potent conception of democracy entailing the creation of structures and institutions that allow people to experience self-determination in all phases of their lives is required.

Democracy is not compatible with steep inequalities/ injustice.[67] The institutional design of democracy must be such that it promotes 'participation', 'deliberation' and 'dialogue' so that the value of individual's agency is recognized and meaningful engagement with the political process is enhanced. Karl Klare thus, posits the idea of 'advanced democracy' which he describes as including substantive egalitarianism, renovation of legal infrastructure (transformation of customary law

---

[63] *See generally* Amartya Sen, *Democracy and Social Justice* in Farrukh Igbal, Jong-II You *(eds.)*, DEMOCRACY, MARKET ECONOMICS AND DEVELOPMENT: AN ASIAN PERSPECTIVE (2001).

[64] Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, FULFILLING SOCIAL AND ECONOMIC RIGHTS 129 (2015).

[65] *Id*., at 132.

[66] David Bilchitz, *Are Socio-Economic Rights a Form of Political Rights*, 31 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86 (2015).

[67] Karl Klare, *Critical perspectives on social and economic rights, democracy and separation of powers* in Helena Alviar Garcia, Karl Klare, *et.al. (eds.)*, SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 28 (2014). *Also see*, Amartya Sen, *Supra* note 63.

and legal culture), participation, deliberation, mutual interdependence, multiculturalism and even sustainability.[68]

The positive nature of rights, progressive realization and resource constraints:

SER are usually described as 'positive' and 'resource intensive'. The positive-negative distinction is premised on the assumption that protection of certain rights 'require other people to act positively—to 'do something'—whereas another kind of rights (the negative ones) require other people merely to refrain from acting in certain ways—to do nothing that violates the rights.'[69] Henry Shue in his seminal work, Basic Rights, presents arguments against this positive-negative dichotomy by taking example of the right to physical security (regarded as a negative right traditionally).[70] He argues that 'it may be possible *to avoid violating* someone's rights to physical security yourself by merely refraining from acting in any of the ways that would constitute violations. But it is impossible *to protect* anyone's rights to physical security without taking, or making payments toward the taking of, a wide range of positive actions.'[71] He refers to the positive actions needed to provide physical security in terms of the provision of the entire criminal law machinery, courts, police etc. Thus, the protection of negative rights also requires positive measures and the artificiality of the positive-negative dichotomy becomes apparent.

Further, it remains widely acknowledged in the international human rights discourse that all human rights impose three levels of obligation: the responsibility to respect, protect and fulfill. Thus, they warrant a bundle of both positive and negative obligations.

Another argument that is usually made is based on the concept of progressive realisation. It has been recognised in international instruments as well the constitutions of most countries that the obligation of the state to take measures for realisation of SER has to be in accordance with the principle of progressive realisation. This allows the state to have some margin of discretion in choosing the course of action that it wishes to take according to the availability of resources. Thus, it has been argued that judicial intervention in this realm of discretion available to the state, is not warranted.

However, while discussing about progressive realisation, it is instructive to note the 1987 Limburg Principles on the Implementation of the ICESCR[72] and the

---

[68] Karl Klare, *Id.*

[69] Henry Shue, BASIC RIGHTS (2nd ed., 1996).

[70] Henry Shue, *Id.*

[71] *Id*; *Also see*, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability, Human Rights and Rule of Law Series: No. 2*, INTERNATIONAL COMMISSION OF JURISTS 11 (2008).

[72] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987.

1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. [73] The Maastricht Guidelines provide:[74]

> The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the 'progressive realization' provisions in article 2 of the Covenant as a pretext for non-compliance.

Similarly, with respect to the argument of resource availability it has been mandated by the Maastricht Guidelines:[75]

> …as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

In the light of these guidelines also, it becomes clear that a complete denial of judicial role in assessing the compliance of the state with its obligations is not tenable.

The competence argument (Vagueness of the rights):

Judicial enforcement of SER is also objected to, on the ground that the content of these rights is vague, imprecise and thus not suited for judicial determination. However, some scholars have pointed out the inherent circularity in the argument.[76] By preventing the judiciary from engaging with these rights, there is a denial of the opportunity for development of sound jurisprudence and principles for their adjudication. It is only when the judiciary would engage with the adjudication of these rights that the contours of these rights would be developed and refined. The refusal of the judiciary to enter into discussions about the principles that should be followed while dealing with SER, has in fact led to the area remaining nebulous, thus leaving the space for criticism for the subjective manner in which the cases are often dealt with.

---

[73] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997 *available at*: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMKYgDHGeM4eb%2Fvmh1NJnScp6T3BosYRqSYXz3sDfa0covOvgEcSteaA8YgTJVHa2t4VbO7oSBPVBs0AKsbv2hNU (last visited Sep. 10, 2024).

[74] Maastricht Guidelines, *Id.*

[75] Maastricht Guidelines, *Id.*

[76] Paul O' Connell, *Supra* note 14 at 8. *Also see* Christian Courtis, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY, HUMAN RIGHTS AND RULE OF LAW SERIES: NO. 2, 16 (2008).

The competence argument (Lack of expertise of judiciary):

It is often argued that judges are not economists/policymakers and decisions regarding the provision of SER have long term implications for budgetary allocation and fiscal policy making. These functions, it is contended, must be left to the state's discretion. Blanket orders directing the state to take actions that require substantial expenditure and declarations about state's responsibility to fulfil SER, regardless of their financial status, have many a time imposed onerous obligations on the state.[77] Courts may not possess the technical know-how for designing economic policy. Therefore, the decisions rendered by the judiciary might lead to the distribution of resources according to the interests of certain preferred groups. This is in contravention of the principles of neutral market-based resource allocation.

However, arguments for the superiority of market-based outcomes have conventionally served the neo-liberalism rhetoric, which rests on the idea that 'market solutions' enhance and improve human welfare. While government intervention in markets may have some distortionary effects but the fault-lines in the neo-liberalist policies are also very well-exhibited. In fact, it has been noted by some scholars that neo-liberalism is at its core fundamentally incompatible with the SER.[78] Hence, this argument of market-based allocation being the most optimal one and thus warranting no intervention by judiciary has a preference about a particular economic model, underlying it.

Of late, there is an increasing acceptance of the need for fiscal and economic policy making to be more responsive to the concerns of human rights. The Principles for Human Rights in Fiscal Policy as formulated by the Centre for Economic and Social Rights (CESR),[79] seek to challenge unjust economic policies that systematically undermine rights enjoyment and thereby fuel inequalities. The guidelines are based on the realisation that fiscal policy is itself a 'crucial tool for guaranteeing human rights.' The document specifically mentions: 'Human rights principles are fully applicable to fiscal policy, and they must be implemented in the entire policy cycle - from budget preparation and tax codes or expenditure allocation through to

---

[77] *See* Lucy Williams, *Resource Questions in Social and Economic Rights Enforcement: A Preliminary View* in Helena Alviar Garcia, Karl Klare, *et. al. (eds.)*, SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 43 (2014) for a detailed analysis of how courts treat budget considerations and resource limitations in cases pertaining to socio-economic rights.

[78] Paul O'Connell, *The Death of Socio-Economic Rights*, 74 MODERN LAW REVIEW 532 (2011).

[79] CESR is an international, non-governmental organization working for the cause of promotion of social and economic justice.

monitoring and evaluation of outcomes.'[80] The guidelines document provides fifteen principles which include the following:[81]

> Principle 1: The realization of human rights must be a fundamental objective of fiscal policy.
> Principle 2: The obligations to respect, protect and fulfil human rights demand a proactive role for the State and impose limits on the discretion of the State in relation to fiscal policy.
> Principle 3: States must ensure that their fiscal policy is in line with the pursuit of social justice.

These developments point out how calls for state responsiveness to the requirements of social justice have been gaining force in the wake of globalization and rising neo-liberal agendas of the state governments. Allowing a complete freehand to the legislature and the executive therefore, can seriously impede the realization of the goals of socio-economic equity.

Trade-offs between the different rights:

State governments face trade-offs in the allocation of scarce resources for fulfillment of the different rights and thus it is expected that emphasis on improvement in the sphere of one right must necessarily imply neglect of the other rights. Therefore, this exercise of choosing between trade-offs must be undertaken by the democratically elected governments rather than the judiciary. However, this stands disproved in the light of the SERF study that has been conducted wherein the researchers clearly found rights to health and education positively correlated with right to food.[82] Thus, the finding clearly supports that good performance with regard to fulfilling one right does not come at the expense of good performance on other rights. This stands in line with the principles that have now been recognised in the Vienna Declaration and Programme of Action, 1993 about the "indivisibility and interdependence" of rights.

Access to Justice:

Judiciary may play a positive role in relation to the realisation of SER, however one major challenge which seriously impairs the possibility of meaningful resource redistribution through adjudication is the problem of access to justice. It is widely evident that it is only people with means who are able to bring claims for SER before the judiciary.[83] Therefore, it is essential that efforts to increase access to justice for

---

[80] *The Principles for Human Rights in Fiscal Policy*, CENTRE FOR ECONOMIC AND SOCIAL RIGHTS, (May, 2021) *available at*: https://www.cesr.org/principles-human-rights-fiscal-policy

[81] *Id.*

[82] Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, Fulfilling, SOCIAL AND ECONOMIC RIGHTS 166 (2015).

[83] *See generally* Varun Gauri and Brinks *(eds.)*, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (2008).

marginalised and vulnerable population are undertaken so that the challenge of 'elitist takeover' of issues before the judiciary can be tackled. Improving access to the judicial system would democratize the system and allow marginalised sections to bring claims about their needs. As David Bilchitz writes, 'access to justice is a core capability citizen need to realize substantive claims to socio- economic rights'.[84]

IV

Transformative Approaches for Realising Socio-Economic Rights

'Transformative Constitutionalism', an approach proposed by Karl Klare, envisages the Constitution as a document with a 'revolutionary' potential. Originally associated with the South African Constitution, it has been described as 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'[85] In the transformative approach, the constitution is viewed as embodying the collective aspirations of people to establish a new political and moral foundation for societies and as a tool to effectuate radical change in the socio-political set up of the state.

It seeks to undo the past failures of the system to uphold the democratic virtues and the basic rights of people who had hitherto remained victims of the oppressive societal structures and tyrannical political regimes. Social rights, substantive equality, affirmative state duties, horizontal rights and participatory governance are given a prominent place in the model. The normative commitments to the goals of social justice and substantive equality figure as its central pillars which make it worthwhile to explore the potential of the model in addressing the question of realisation of SER.

Transformative constitutionalism is marked with a historical consciousness and the realisation that the marginalisation and systemic oppression of certain sections of people, throughout the years, leads them to vulnerabilities and socio-economic disadvantages, which have to be remedied.[86] These disadvantages are attached to these people as a result of their birth as a particular gender, in a particular race/caste/community etc. and have persisted perennially. In order to nullify the effects of such entrenched oppression, it is essential that access to the basic social

---

[84] David Bilchitz, *Are Socio-Economic Rights a Form of Political Rights*, 31 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86 (2015).

[85] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 146 (1998).

[86] *Id.*, at 155.

and economic goods is made available to them through the constitutional/statutory framework.

The intricate couplings between the idea of transformative constitutionalism and social justice can be gauged even from a cursory reading of the definition that has been given by Klare wherein he describes it is as 'long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and *egalitarian* direction'. The aspiration for egalitarian ordering of both social and political organisation is well-entrenched into the concept itself.

Fostering a more egalitarian structuring of social and political life through socio-economic entitlements is justified because of the historical legacies of injustice and oppression that had been perpetrated against some sections of people on the basis of their birth. These groups have thus come into a state of disadvantage not as a result of any personal choice/action but merely because of their birth into a group that has been systematically discriminated against. Therefore, transformative constitutions are argued to make a departure from the core tenets of liberalism. This departure has been identified as a conspicuous feature of transformative constitutions and they are often described as 'post liberal'.[87]

This idea of post-liberalism is conventionally associated with post-colonial states and the transformative model in fact is seen as a 'distinctive response to the experiences of poverty, exclusion, inequality, and historical injustice inherited from colonialism and perpetuated by the postcolonial state system.'[88] Thus, an express mandate is issued against the state to counter the power hierarchies and to 'redistribute economic and political power away from elites towards the hitherto politically powerless and economically deprived majority.'[89] The socio-economic guarantees thus assume crucial significance in this project. This section discusses some of the ways through which transformative approaches can help in the vindication of SER.

Transformative Constitutionalism as a Synergistic Inter-Institutional Approach

Transformative Constitutionalism is aimed at the production of democratic, egalitarian and participative structuring of the social and political landscape in the

---

[87] *See* Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism* in Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen *(eds.)*, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 19 (2013).

[88] Philipp Dann, Michael Riegner, and Maxim Bönnemann, *The Southern Turn in Comparative Constitutional Law: An Introduction* in Philipp Dann, Michael Riegner, and Maxim Bönnemann *(eds.)*, THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW 19 (2020).

[89] *Id.,* at 20.

state through the use of constitutional enactment, interpretation and enforcement.[90] Enforcement of the constitution is the task of all the three organs of the state and for the realization of the transformative potential of the constitution, each branch has to shoulder its share of responsibility.

The idea of using courts as the vehicles of social transformation and effectuating social-economic rights through 'transformative adjudication' has been emphasized upon by several scholars including Klare. However, the transformative model displays sufficient dynamism and flexibility in approaches for realization of social justice. Hence, we see both the judicial and aspirational templates for SER being used in the transformative constitutions of South Africa and India respectively.[91]

Regardless of the choice of the model (aspirational/justiciable), transformative techniques of interpretation and enforcement have the potential to stimulate synergistic approaches and inter-institutional cooperation which is essential for the successful working of any model. Both the models present their own set of challenges which can be dealt with better if one adopts a transformative conception about the interpretive possibilities. For instance, the South African constitution provides a justiciable set of guarantees for SER.[92] However, the mere presence of such provisions may not yield the desired results, without being accompanied by transformative practices of interpretation.

Klare has highlighted the same in his work, expressing his concern about the conservative South African 'legal culture' and excessive deference of the constitutional courts to the other institutions. He holds strong optimism about the role of courts in innovating and modelling intellectual and institutional practices appropriate to a 'culture of justification' as against a 'culture of authority'[93] and advocates a 'transformative conception of adjudicative process and method'.

The challenges and objections that arise in judicial enforcement of SER such as the increased confrontation between the legislature and judiciary, concerns about

---

[90] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 146 (1998).

[91] *See* Articles 26-29 of the Constitution of South Africa and Part IV of the Constitution of India which contains the Directive Principles of State Policy.

[92] The Constitution of the Republic of South Africa, 1996 provides a set of justiciable socio-economic rights which include: Right to housing (Art. 26), right to health care, food, water and social security (Art. 27), rights of children (Art. 28) and right to education (Art. 29).

[93] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 146 (1998). The phrase 'culture of justification' has been coined by Etienne Mureinik and has been borrowed by Klare in his seminal piece on transformative constitutionalism and legal culture. *See* Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 31(1994).

democracy deficit and problems in securing access to justice have already been discussed. Transformative approaches allow us to rethink these challenges through a re-conceptualisation of the respective roles of the organs as well as both substantive and procedural innovations to support the emancipatory, transformative project. 'Democratic, egalitarian and participatory' change necessarily calls for synergistic approaches involving the three organs rather than the supremacy of any one particular institution. Excessive reliance on any one branch to promote the *egalitarian* ideal would undermine the *democratic* and *participatory* components that constitute a core part of the transformative project. Therefore, transforming the democratic spaces to be more responsive to demands of social justice and participatory policy making is as essential as transformative adjudication.

'Dialogic' and 'Cooperative' forms of Constitutionalism

To infuse life into the textual guarantees of the constitution, judges as well as the members of the legal fraternity must utilise the 'pliability of legal materials' to deliver progressive outcomes while at the same time adhering to their duty of interpretive fidelity to law.[94] Though this might appear paradoxical, it may become possible through ingenious methods such as of dialogic systems and cooperative constitutionalism. Under the dialogic system, the role of the court in SER adjudication is understood not in terms of the 'activism/restraint' or the 'usurpation/abdication' binary. Rather, it is seen as placed on a continuum between activism and restraint.[95] Such middle-ground approaches have been advocated by scholars, such as Rosalind Dixon.[96]

Cooperative constitutionalism approaches rest on the premise that due to the problem of indeterminacy that exists in relation to the determination of the exact content of SER, these must primarily remain under the purview of the political branches. However, representative gaps remain in the political processes. Thus, the

---

[94] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 146 (1998).

[95] Amita Dhanda, *Realising the right to health through co-operative judicial review: An analysis of the role of the Indian Supreme Court* in Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen *(eds.)*, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 405 (2013).

[96] Rosalind Dixon, *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited* 5 ICON 391–418 (2007); *See also* Octavio Luiz Motta Ferraz, *Between usurpation and abdication? The right to health in the courts of Brazil and South Africa* in Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen *(eds.)*, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 375 (2013).

space for judicial intervention opens up and courts are then expected to play a complementary role through adoption of a weaker form of judicial review.[97]

A cooperative model allows for the role of courts in bringing the constitutional limits on democratic governance into focus while at the same time leaving the final decision to the elected machinery of the state. In dialogic approaches, the judicial forum is utilised as a platform for dialogue between courts, citizens, and the government. Solicitation of constitutional justification for policies formulated by the executive can reveal the short-comings in the decision-making process which may then be corrected by the elected branches. Thus, instead of engaging in any direct policy framing, the role of the court is restricted to examination of the policy through resort to seeking explanations from the government.[98]

Though weak form review is susceptible to criticism on the count that such an approach does not support the idea of parity in treatment of SER and civil-political rights, it is important to realise that innovative, transformative approaches to facilitate cooperation rather than confrontation between the institutions, are essential to resolve the impasse that has typically obstructed the goal of social justice. Some optimism must be placed in the potential of such approaches to generate more responsive policy-making from the legislature through nudges of the judiciary.

The judgment of the Columbian Constitutional Court in the matter of violation of rights of the internally displaced population (IDP), Decision T-025 of 2004,[99] can serve as an example. Over a hundred *tutela* petitions were filed by the families belonging to internally displaced population in 2003 which dealt with the government's failure to provide even the basic socio-economic rights to them. Recognising the complexity of the matter, the court delivered a balanced judgment

---

[97] Rosalind Dixon, *Id.*

[98] For an overview of the concept of dialogic review and its use in the cases pertaining to socio-economic rights, see V.G. Shreeram, "Coronavirus and the Constitution –XXV: Socio-Economic Rights and the Shifting Standards of Review", May 9, 2020 *available at*: https://indconlawphil.wordpress.com/2020/05/09/coronavirus-and-the-constitution-xxv-socio-economic-rights-and-the-shifting-standards-of-review-guest-post/ (last visited Jul. 4, 2023). *See also* Gautam Bhatia, *Coronavirus and the Constitution –XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts* (May 24, 2020) *available at*: https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/ (last visited Jul. 4, 2023). For the discussion on application of weak form review in relation to socio-economic rights adjudication in South Africa and its contrast with the strong form review in Columbia, *See* D. M. Davis, *Socio-Economic Rights* in Michel Rosenfeld & András Sajó *(eds.)*, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012).

[99] Constitutional Court of Colombia, Sentencia T-025 de 2004 – Colombia. The judgment is *available at*: https://www.brookings.edu/wp-content/uploads/2016/07/colombia_t-025_2004.pdf (last visited Dec. 18, 2024).

and, in its order, declared that an unconstitutional state of affairs had indeed arisen and the state had to take steps to rectify the same. Having identified clear lapses in planning and implementation by the state, and also taking into account the problem of insufficient resource capacity, the court ordered a *creative* remedy. It ordered the national and territorial authorities to 'adjust their activities in order to achieve harmony between their constitutional and legal commitments toward the displaced, as well as the level of resources allocated and their institutional capacity to guarantee them'.[100] Further, it identified 'the minimum mandatory levels for the protection of IDPs' rights', [101] which were to be met in an effective and timely manner. It did not issue direct instructions on the manner in which the state would comply with its constitutional obligations. Rather, it only required the authorities to periodically report to the court about the actions being taken to rectify the situation. Thereby allowing the government to establish their own goals and timelines, however at the same time, mandating fulfilment of the minimum levels of protection. The approach has been described as that of exercising "judicial control over the rationality of the policy process, as opposed to the content of the policy itself."[102]

Such remedies requiring supervisory role of the courts over the government to ensure compliance with the orders are not unknown in the Indian constitutional jurisprudence. The doctrine of *continuing mandamus* has been invoked in several matters including those of SER adjudication such as the Right to Food Litigation and also in environmental law cases.[103]

Judicial Innovation and Derivative Protection Approaches

The exacerbation of tension between the legislature and judiciary is particularly severe in case where the SER are not enforceable. Devoid of any prerogative contained in the constitution to engage with these rights, judicial intervention in the arena is seen as fundamentally wrong. However, the 'aspirational' template too presents opportunities for realisation of the transformative vision of the constitution through innovative judicial practices. Despite the non-enforceable status of the Directive Principles in the Indian Constitution, the Indian judiciary has developed an expansive jurisprudence for SER adjudication through progressive

---

[100] Manuel José Cepeda Espinosa, *The Constitutional Protection of IDPs in Colombia* in Rodolfo Arango Rivadeneira *(ed.)*, JUDICIAL PROTECTION OF INTERNALLY DISPLACED PERSONS: THE COLOMBIAN EXPERIENCE 17 (2009).

[101] *Id*.

[102] *Id.,* at 27.

[103] For a discussion of the use of the doctrine of continuing mandamus, See Mihika Poddar & Bhavya Nahar, *Continuing Mandamus' – A Judicial Innovation to bridge the Right-Remedy Gap* 10 NUJS L. REV (2017).

interpretations of the fundamental rights that are contained in the constitution.[104] By treating socio-economic rights as essentially linked to the fundamental rights such as that of right to life, derivative protection has been accorded to them.

Further, courts have also relied upon the international legal framework to promote the transformative ideals. Courts have resorted to the use of international law as well as foreign precedents for interpretive guidance. Principles from international environmental law jurisprudence such as the public trust doctrine and the precautionary principle have been used to derive rights to protection of environment.[105] These derivative protection models which treat SER as integral aspects of explicitly protected civil and political rights have been described as integrated approaches.[106]

Though promising and reflective of judicial creativity and innovation, acceptance of such a 'derivative protection' model comes with some academic discomfort since relying upon one set of rights (the justiciable civil and political rights) to further the protection of SER again reeks of the allegiance to the hierarchy of rights, which has now been exposed as artificial and false. In the indivisible conception of rights, SER are deserving of protection on their own for the substantive interests that they present.

Widening of Access to Justice

The argument about the elitist takeover of the mantle for adjudication of SER claims has been discussed earlier. Transformative approaches in adjudication of SER require inclusivity and enhanced access to justice so as to ensure adequate representation of the claims from the impoverished and marginalised strata.

Procedural innovations such as the development of PIL in India has proved immensely beneficial by ushering in transformative change and facilitating access to legal remedy for a large population which remains on the periphery of the society.

---

[104] For a detailed discussion on the judicial approaches to interpretation of the non-justiciable directive principles of state policy contained in Part IV as a whole and their relationship with fundamental rights, *See* Gautam Bhatia, *Directive Principles of State Policy* in Sujit Choudhry, Madhav Khosla *et. al. (eds.)*, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016). For a comprehensive analysis of socio-economic rights adjudication in India and its grass-root impact, See Shylashri Shankar & Pratap Bhanu Mehta, *Courts and socioeconomic rights in India* in Varun Gauri & Brinks *(eds.)*, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (2008).

[105] *See M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388, paras. 23, 25, 33, 34 and 39. *Also see Vellore Citizen's Welfare Forum* v. *Union of India*, (1996) 5 SCC 647, paras. 11, 13 and 14.

[106] Ida Elisabeth Koch, *Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective*, 10 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 405 (2006).

The widening of locus standi norms through judicial innovations such as PIL and epistolary jurisdiction have contributed to the strength of transformative adjudication in India. However, though introduced as a revolutionary innovation, PIL has been susceptible to abuse and concerns about the frivolous litigation petitions overburdening the courts have emerged of late.[107] It is essential that tools such as PIL are used as an instrument for enhancing the access to justice for people rather than being monopolised by some quarters for vested interests and purposes.

Strengthening Democratic Processes

Transformative Constitutionalism envisages deliberative and participative democracy. As explained earlier, democratic processes with an obdurate focus upon electoral politics itself, may not be sufficient for realization of social justice. Thus, multi-stakeholder participation and consultative processes should form an integral part of the law-making in state. Further, advanced conceptions of democracy should be adopted so that the democratic machinery operates with transparency, accountability, responsiveness and with no corruption.

The South African constitution specifically provides for public involvement in the legislative process of passing of Bills under Section 59.[108] In *Doctors for Life International* v. *The Speaker of the National Assembly*,[109] the South African constitutional court declared that the Parliament had failed to fulfill its constitutional obligation of facilitating public involvement in the process of passing of certain bills pertaining to healthcare and consequently, the Acts so passed, were declared invalid. Thus, stressing upon the essentiality of participation by people in the legislative process which shall ensure the responsiveness of the process towards the actual needs of the people. At the same time, while rendering the judgment, the court declared that the order of invalidity shall remain suspended for a period of eighteen months. This was done so that the government may enact the statutes afresh after following the constitutional requirements within the granted time frame. The same also reflects the spirit of cooperative constitutionalism, which, as has been discussed earlier, can prove be a helpful approach in realization of SER.

Further, in Latin American nations such as Bolivia, Ecuador, Colombia and Brazil, direct democracy mechanisms such as of *referendum*, *citizen initiative* and *agenda*

---

[107] *See* Arun K Thiruvengadam, *Swallowing A Bitter Pil? Reflections on Progressive Strategies for Public Interest Litigation in India* in Oscar Vilhena Vieira, Upendra Baxi, & Frans Viljoen *(eds.)*, TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 519 (2013).

[108] Section 59: Public access to and involvement in National Assembly.-
I) The National Assembly must-
(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees;

[109] [2006] ZACC 11.

initiative exist under the constitutional scheme.[110] The constitutions of these nations contain an expansive list of rights and are often described as transformative. Direct democracy mechanisms such as of agenda initiative allow the citizens to directly propose issues for consideration before the legislative authority. Thus, citizens may organize mass movements for generating support for any issue pertaining to public interest, gather the required number of signatures supporting the issue and the issue can then be directly proposed as an agenda before the legislative authority. Thus, enabling direct participation of the citizens in the agenda-setting exercise. Such forms of direct democracy mechanisms may also be utilized for bringing attention to issues relating to provision of socio-economic goods.

V

Conclusion

Despite the widespread acknowledgement of the indivisibility of human rights and the significance of SER for the realization of civil and political liberties, SER have continued to remain relegated to a lower rung in the corpus of human rights. Though these figure in the constitutions of most nations across the globe today, they mostly occur in the form of judicially unenforceable, positive directives for the state. Holding steadfast to their reverence for the doctrine of separation of powers, constitutional law scholars have objected vehemently against judicial intervention in matters of SER. The present work has attempted to engage with these objections and counter-objections against constitutional entrenchment and judicial enforcement of SER. It has sought to initiate discussions beyond the traditional discourse to exhort a questioning of the conventional understanding of concepts such as democratic legitimacy and separation of powers, which are often cited as the main arguments against the role of judiciary in the project of realizing socio-economic guarantees in a state. An attempt has been made to question the existing discourse that places certain values and concepts on a pedestal. These include: the excessive judicial deference to other organs of state in matters of SER, the preference for market-based allocation of social goods and disapproval of redistributive policies by the state, the idea of 'positive' nature of SER and the consequent principle of their progressive realisation and the undisputed hierarchy of rights (as reflected in the generational classification of human rights). Objections based on these ideas can only be countered if we adopt a more progressive approach towards innovative

[110] For a detailed discussion of direct democracy mechanisms see INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, DIRECT DEMOCRACY: THE INTERNATIONAL IDEA HANDBOOK (2008) *available at*: https://www.idea.int/publications/catalogue/direct-democracy-international-idea-handbook?lang=en (last visited Sept. 20, 2024).

ways to think about the concepts, theories, doctrines and principles of constitutional law.

Approaches such as of transformative constitutionalism present an opportunity to rethink these principles. Thus, it is instructive to utilize transformative approaches in the context of socio-economic rights as well. With its objective of putting in place a more democratic, egalitarian and participative social structure through the instrument of constitution, transformative constitutionalism aspires to further the goal of socio-economic justice.

Transformative Constitutionalism aims at dismantling the *status quo* and existing power hierarchies in both the public and private sphere. To fully explore the possibility of adoption of transformative approaches for realisation of SER, it becomes crucial that the existing *status quo* in the academic discourse around the issue, is also challenged and the conservatism in academic scholarship gives way to more progressive, ingenious approaches.