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by
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I. INTRODUCTION

Socio-economic rights include the rights to access food, water, housing, health care, education and social security — what might approximate the basic goods and services to secure dignified existence.¹ The role of courts in the adjudication of socio-economic rights remains an issue where the rhetoric has masked the actual contours of this judicial exercise. So much so, that the rhetorical assertions are often cited as the substantive content of the enforceable socio-economic rights.² While normative debates consider what it means to have a social right, courts may ultimately understand rights very differently.³ This is because the realm of normative debate can afford to be prescriptive so far as the content of these rights are concerned but the courts will have the challenge to fix the content of these rights while adjudicating, if it wants that the orders passed by it travel beyond the rhetoric and bring some actual change on the ground. However, the implementability of the orders of the court cannot be the sole criterion for the courts to decide on the enforceable content of the socio-economic rights, as it has to be




cognizant of the permissibility of the same in a democratic set-up, wherein, issues of governance are not to be usurped by the judiciary from the executive. The task of drawing the line, whereby, the enforceable content of the socio-economic rights is identified in a manner which is reconcilable with the democratic conception of judicial role and yet the enforceable content is real and not a mere rhetoric is a challenge which every court setting out to adjudicate socio-economic rights will have to necessarily grapple with.

II. SOCIAL JUSTICE BENCH

On 3rd December 2014, the Chief Justice of India H.L. Dattu constituted a 'Social Justice Bench' in the Supreme Court of India to adjudicate on the issues of socio-economic rights of the citizens of India.⁴ However, it is not the case that the Supreme Court was not adjudicating socio-economic rights earlier but a designated bench with the name 'Social Justice Bench' was perhaps an important milestone in the long journey of the constitutionalisation of the socio-economic rights in a manner not envisaged by the framers of the Indian Constitution, for whom, most of the socio-economic rights fell exclusively within the realm of executive governance, thereby, prohibiting judicial excursions into this territory. The Supreme Court of India in its press release⁵ about the constitution of the Social Justice Bench has enumerated the following as the illustrative example of issues that are relevant for adjudication with a view to secure the constitutional goal of social justice: release of the surplus food grains lying in stocks for the use of people living in the drought affected areas; to frame a fresh scheme for the distribution of food grains; to take steps to prevent the untimely death of women and children for want of nutritious food; providing hygienic mid-day meals besides issues related to children; to provide night shelter to destitute and homeless; to provide medical facilities to all the citizens irrespective of their economic conditions; to provide hygienic drinking water; to provide safety and secured living conditions for the fair gender who are forced into prostitution etc.

However, the Supreme Court has not given anything about the mode of adjudication that the court would adopt in the process of realization of the constitutional goal of social justice. In this paper, an attempt is made to ascertain the mode of adjudication that the court has adopted so far in the socio-economic rights adjudication and evaluate the same from the point of view of its coherence, democratic legitimacy and effectiveness. Some examples from the South African Constitutional Court in adjudicating socio-economic rights have also been alluded to for this purpose, as the


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South African Constitution expressly makes certain socio-economic rights enforceable in the court of law.⁶

III. STRONG AND WEAK FORM JUDICIAL REVIEW

Associated closely with the issue of the effectiveness and legitimacy of socio-economic rights adjudication is the issue of nature of socio-economic rights adjudication. Feasibility of the implementation of the binding orders passed by the court has a direct bearing on the effectiveness of such a judicial exercise; lack of binding orders or passing of mere declaratory orders will open such adjudication to the charge of being ineffective and on the contrary the underlying coercion in binding judicial orders forcing the executive to perform certain acts, apparently takes such judicial exercise proximate to the territory of illegitimacy. Strong articulation of rights and remedies in the area of economic and social right may bring courts into disrepute and instigate a popular backlash within civil society against the very interests that the rights purport to protect.⁷ This is mainly because such a conception of socio-economic rights will raise serious questions about its democratic legitimacy. Therefore, it appears that effectiveness and legitimacy are inversely proportional to each other, when it comes to socio-economic rights adjudication. This only adds to the conundrum of socio-economic adjudication.

Prof. Mark Tushnet in his paper⁸ has thrown light on what he calls a twentieth century invention of weak form system of judicial review.⁹ In strong form judicial review, the courts have general authority to determine what Constitution means and the court's interpretation are authoritative and binding on other branches of the government, at least in short to medium


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run.¹⁰ The mark of weak form review is not that the scope of judicial review is narrow.¹¹ Courts in weak form systems have the power to evaluate all legislation to determine whether it is consistent with all of the Constitution's provisions without exception.¹² Rather, the mark of weak form review is that the ordinary legislative majorities can displace judicial interpretation of the Constitution in the relatively short run.¹³ Tushnet argues that weak form judicial review tries to address the criticism that the strong form judicial review allows the courts with an "attenuated democratic pedigree"¹⁴ to trump the decisions taken by bodies that have stronger democratic pedigree. However, according to Tushnet, weak form review raises another important concern by reducing constitutional provisions to ordinary legislative provisions alterable at the wish of legislative majorities.¹⁵ However, this is based on the assumption that judicial review must involve coercive orders.

Weak form judicial review also has the bearing on the content of right. A legal right theoretically is the one which is constituted owing to strong form judicial review by enabling courts to pass coercive orders. However, weak form judicial review cannot be relegated to the extent of it being treated at par with the system of non-justiciability of rights. A strong and vibrant democracy will certainly take judicial declarations about breach of rights seriously, despite the fact that the declarations are not accompanied by concomitant remedies, legally obligating the government to fulfill its constitutional commitments. Such rights therefore, are not necessarily undermined by weak form review; rather it can be a tool to assert that the right needs urgent attention of the political class because of its significance. This appears to be the reason why the countries like Canada, United Kingdom and New Zealand have the system of weak form review even for the enforcement of first generation of rights, i.e., civil and political rights.¹⁶

IV. SOCIO-ECONOMIC RIGHTS ADJUDICATION

Explicit inclusion of socioeconomic rights within the ambit of Article 21 of the Constitution of India came from the Supreme Court of India in *Francis Coralie Mullin v. UT of Delhi*¹⁷. In this case, the Supreme Court had to determine whether a detainee held in preventive detention has the right to meet with his lawyer and family. While the case only raised this narrow issue, the Court, led by Justice Bhagwati, saw an opportunity


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to further expand the meaning of Article 21. It held that the right to life includes a broader right to live with human dignity.¹⁸ The court added that this includes the access to bare necessities of life such as adequate nutrition, clothing and shelter.¹⁹ Human dignity for the Supreme Court would even encompass facilities for reading, writing and expressing one-self in diverse forms and freely moving about and mixing with fellow human beings.²⁰ The Court, however, was cognizant of the fact that economic capacity of the State is central to achieving this form of human dignity and thereby acknowledged the same but at the same time asserted that in any view, however, it must include right to the basic necessities of life and to perform such activities which constitute the bare minimum expression of human self.²¹ This was an ideal assertion of the normative content of the socio-economic rights. Court's understanding of the enforceable socio-economic rights may, however, be very different from the normative content of these rights.²² The reason being, that the normative standards of socio-economic rights as espoused by the Supreme Court in *Francis Coralie Mullin* emphasizing a minimum core, non-derogable content of human dignity in Article 21 makes the task of socio-economic rights adjudication very onerous for the courts and at the same time an endeavour to carry out this onerous task will invariably expose the courts to the charge of acting contrary to the premise of democratic ideals by usurping the domain of other organs of the State. Therefore, the conceptualization of a social right often contrasts sharply with the theoretical framework within which the constitutional lawyers presently operate.²³

FORMS OF SOCIO-ECONOMIC RIGHTS ADJUDICATION

Madhav Khosla²⁴ has argued that the adjudicatory model of socio-economic rights adjudication in India is conditional social rights adjudication. He has also identified two other models of socio-economic rights adjudication which according to him are not prevalent in India, namely, the individualized remedial or minimum core form and the reasonableness form of adjudication. These two forms of adjudication in relation to the

adjudication of the socio-economic rights have also been identified by Prof. David Bilchitz.²⁵


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A. Minimum Core form of Adjudication

This is the traditional conception of a systematic social right which focuses on minimum core standard and therefore, it emphasizes individualized remedies at par with any judicially enforceable civil and political right. This conception of judicial role for socio-economic rights directly corresponds to the normative standard of socio-economic rights as judicially enforceable, by reading it implicit in Article 21 of the Constitution of India. Therefore, as a logical corollary, since Article 21 provides for individualized remedy, hence, anything which is read as part of Article 21 has to be provided by way of individualized remedy. This logical consistency, though, would be extremely difficult to be realized in practice. This precisely is the reason why the conceptualization of socio-economic rights for the purposes of enforcement differs with the normative standards of the socio-economic rights. Nevertheless, the advocates of the minimum core form of adjudication seek to elevate socio-economic rights at par with the civil and political rights for the purposes of judicial enforcement of these rights.

B. Reasonableness Form of Adjudication

The reasonableness form of adjudication of socio-economic rights comes mainly from South Africa in the famous decision of the South African Constitutional Court in Govt. of Republic of South Africa v. Irene Grootboom²⁶. The Constitution of the Republic of South Africa, 1996 in its Bill of Rights under Chapter II of the Constitution explicitly provides judicially enforceable right of housing²⁷, health care, food, water and social security²⁸. In Grootboom, a group of extremely poor people (the respondents) have moved onto a vacant land privately owned and earmarked for formal

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low cost housing. Eviction proceedings were successfully instituted against these people, and the resulting court order was implemented in a manner reminiscent of the apartheid style evictions²⁹ by destroying the property whatever little they had in the process. Thereafter, the respondents landed up on the Wallacedene sports field with only plastic sheets with them which provided very little protection in winter rains. Next day, the respondent's attorney wrote to the municipal authorities demanding that the municipality must fulfill its constitutional obligation and provide shelter to the respondents. Not satisfied with the response of the municipal authorities they instituted legal action against the government, demanding that the municipality must fulfil its constitutional obligations towards them, which according to them ensures at least basic shelter. The High Court ordered some relief to be granted to the respondents. The government then appealed against the decision to the Constitutional Court. The respondents plea was based on sections 26 and 28(1)(c)³⁰ of the South African Constitution which according to them obligates the government to provide them with basic shelter. The South African constitutional Court in its certification judgment³¹ had already declared that the socio-economic rights contained in the Bill of Rights of the South African Constitution are justiciable in the court of law. In

Grootboomcase considerable weight was given to the fact that the United Nations Committee on the interpretation and application of the International Covenant on Economic, Social and Cultural Rights has held that socio-economic rights contain a 'minimum core obligation' that must be fulfilled by State parties. The Constitutional Court without rejecting the minimum core obligation argument flowing from the Covenant concluded that it is not necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right.

Instead, the Constitutional Court speaking through Yacoob, J. held³² that the real question in terms of our Constitution is whether the measures taken by the State to realize the right afforded by section 26 are reasonable? However, the court added that considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been spent better. It is necessary to recognize that the State has a wide range of options before it to give effect to its constitutional duty. But, a programme undertaken by the State that excludes a significant section of the society cannot be said to be reasonable. Applying this principle to the facts of the case Yacoob, J, found



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that the State has instituted an integrated housing development policy and medium and long term objectives of the policy are appreciable. However, the housing programme lacked any component for those in desperate need. He found that the absence of such a component was unreasonable and thus concluded that the nationwide housing programme falls short of obligations imposed upon national government by section 26(2) of the Constitution to the extent it fails to recognize that the State must provide for relief for those in desperate need of access to housing.

Interpreting section 28(1)(c) of the Constitution, the court held that the right to shelter for children under this provision is applicable to those who are not in the care of their parent/guardian, i.e. in some alternative care or abandoned. In this case, since the children were in the care of their parents section 28(1)(c) is not applicable. The reasonableness approach adopted by the Constitutional Court in this case is known as the reasonableness form of adjudication of socio-economic rights, which is an offshoot of weak form judicial review. This approach scores heavily on the parameter of legitimacy but the effectiveness of this approach is highly suspect because the same is solely dependent upon the fostering of respect for judicial declarations owing to the absence of the concomitant binding judicial order along with the declaration of unreasonableness.

C. Conditional Social rights Adjudication

In conditional social rights model, the court strives hard to emphasize the importance of socio-economic guarantees. But once we have moved beyond the rhetoric, we notice that the court does not protect any systematic social right, be it weak or strong.³³ Conditional adjudication simply represents the adoption of a weak remedial model in which the court declares that a right has been violated but recognizes that it can only provide a limited remedy.³⁴ The existence of violation of an enforceable right is conditional upon State action. A violation can only occur when the State after having undertaken an obligation does not fulfill it. This undertaking of obligation need not necessarily flow from legislation rather even if a government programme is launched and it is not fulfilling its desired purposes in its entirety, then the actual beneficiaries of those schemes can seek the enforcement of their rights being the actual beneficiaries of the programme. So, if a housing scheme is launched


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

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petitioner, get the desired relief. The petition can originally be also filed by a public spirited person or an organization in the form of public interest litigation on behalf of the actual beneficiaries of the scheme who have been denied their rightful claim under the scheme.

This, however, is different from a minimum core form of adjudication where the court would entertain individual petitions from homeless persons claiming a right to shelter, as being without shelter; compromises human dignity. Likewise, this form of adjudication would also not engage with the issue as to whether, the different legislations, programmes or schemes launched by the government are reasonable or not, as it would happen in case of reasonableness form of adjudication. Therefore, the grant of this individual remedy by the courts is conditional upon State after having already undertaken an obligation under some legislative or executive scheme, is not fulfilling it; this, however, is different from an individualized remedy being granted without there being any such obligation undertaken by the State, obligation being purely constitutional, flowing from the right to human dignity as envisaged under the Constitution. However, in some cases individualized remedy is granted but this is not by adhering to the minimum core approach of adjudication but because of the fact that the petitioner happens to be the beneficiary of the application of conditional social rights adjudication. Therefore, despite there being a need for more houses to be built by the government to cater to the housing requirements of poor, the fact is that the government is not under an enforceable constitutional obligation to ensure that everyone has access to shelter. This is the reason why despite the fact that the Supreme Court in *Olga Tellis v. Bombay Municipal Corpn.*³⁵ declared that the right to life includes a right to livelihood which in this case was in issue owing the order of government to deprive slum and pavement dwellers of their humble abode, millions of people in India are still without shelter and they do not have an enforceable right to shelter, whereby, they could be ensured access to shelter.

Prof. Cass R. Sunstein has argued that the reasonableness approach has enormous promise for it requires priority setting on reasonable grounds but ultimately defers to State on how priorities should be outlined and structured.³⁶ In a strange way, the conditional social rights approach does the opposite: it requires no priority setting but once priorities are set it plays an important role in their structuring and implementation.³⁷

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V. ADJUDICATION OF SOCIO-ECONOMIC RIGHTS UNDER THE INDIAN CONSTITUTION

The adjudication of conditional socio-economic rights adjudication in India appears

to be weaker than the minimum core approach and reasonableness approach of socio-economic rights adjudication but at the same time it travels beyond the right-remedy paradigm.³⁸ However, since the conditional socio-economic rights adjudication is more likely to operate in poorly governed nations, courts would be far more responsive to the legislative and executive inertia paving the way sometimes for stronger remedies.³⁹ But the same should not be confused with the systematic socio-economic form of adjudication. This is also very different from asking the courts to scrutinize the reasonableness of the measures adopted by the State to address the issues of socio-economic rights. But a complete account of judicial intervention in India in the realm of socio-economic rights adjudication gives a very chequered description of the approach adopted by the Supreme Court. It includes varied instances, such as, providing stronger remedies beyond what could have been provided in a right-remedy paradigm, making socio-economic rights conditional on legislative or executive initiation of a policy addressing these rights, instances of retreat from enforcing socio-economic rights and even some glimpse of minimum core form of adjudication.

STRONGER REMEDIES BEYOND THE RIGHT-REMEDY PARADIGM

In *Rakesh Chandra Narayan v. State of Bihar*⁴⁰ the Supreme Court converted a letter addressed to the Chief Justice of India by two citizens from Patna narrating the absolutely abysmal state of affairs prevailing in a Government run Ranchi Mental Hospital by treating the same as writ petition.⁴¹ The Court being moved by the inhumane conditions in which the patients were living in the Mental Hospital and complete apathy of the administration towards it constituted a new committee to manage the affairs of the hospital comprising the Health Secretaries of three stake holder State governments namely Bihar, West Bengal and Orissa along with Station Officer, Ramgarh Area, Ranchi, Commissioner of Ranchi Division, Deputy Commissioner of Ranchi, District Judge Ranchi, Principal of Ranchi Medical College and Superintendent of the Mental Hospital.⁴² The Court also decided to monitor the progress of the work of the committee and for the same ordered the case to be treated as pending before it and gave



freedom to the committee and the petitioners to move the court from time to time.⁴³

In *Consumer Education & Research Centre v. Union of India*⁴⁴ once again the Supreme Court adopted the strong remedial approach.⁴⁵ Right to health of worker, while in employment and after the employment was held by the Supreme Court to be the fundamental right under Article 21 of the Constitution of India, read along with articles 39(e), 41, 43 and 48A of the Constitution.⁴⁶ The Court in this case found the remedies provided to the workers by the legislations to be inadequate to deal with the health concerns of workers in the Asbestos industries because these legislations do not address the needs of workers after the cessation of employment and only provide for compensation while in employment in case of injury or death.⁴⁷ The court incorporated the rules of International Labour Organization (ILO) as applicable to these industries. The court ordered the initial payment of one lakh rupees payable by such factories or industries to the workers, if after cessation of employment he is suffering from occupational health hazard attributable to the industry.⁴⁸ The State of Gujarat was instructed to check the health conditions of such workers to verify their actual health conditions for the further compensations to follow.⁴⁹ In a futuristic move the court also ordered the industries to "maintain and keep maintaining the health record of every worker upto a minimum period of 40 years from the beginning of employment or 15 years after retirement or cessation of the employment whichever is later."⁵⁰ This

appears to be a case of enforcing beyond what was promised by the State by way of legislations and therefore goes beyond the mandate of conditional socio-economic adjudication but if law has to address health hazard of workers as a whole then it must do so by ensuring protection even after the cessation of employment and if wholesome right to health is the promise, enforcement of such right appears to be covered within the promise.

In *Paschim Banga Khet Mazdoor Samity v. State of W.B.*⁵¹ denial of emergency medical treatment by several government hospitals on account of non-availability of beds to a person who after falling from the train had suffered serious head injuries was taken very seriously by the Supreme Court in a petition filed under Article 32 of the Constitution. The Court held the denial of emergency medical treatment to be the violation of fundamental



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right as guaranteed under Article 21 of the Constitution of India and ordered the Government of West Bengal to pay rupees 25,000 as compensation to the person.⁵² The Court at the same time ordered certain measures to be taken by the government to improve the efficiency of the hospitals. It was also emphasised by the court that financial constraints cannot be the excuse to not improve the state of affairs prevailing in the government hospitals.⁵³

CONDITIONAL SOCIO-ECONOMIC ADJUDICATION

The Supreme Court in *Olga Tellis* made it quite clear that there was no positive obligation on the state to provide people with shelter or an adequate means of livelihood to the slum and pavement dwellers. Given the fact that the court was relying on the directive principles and not on a justiciable right, this level of restraint was understandable. However, the court also accepted that the state could demolish dwellings without notice to affected parties in urgent cases. In respect of the pavement dwellers, their eviction was not made conditional on the provision of alternative accommodation. The Supreme Court in this case enforced a government circular of 1976 which stated that the slums which were in existence for long time would not normally be demolished unless the same land is required for public purposes.⁵⁴ The government had also given census cards to certain hutment dwellers promising alternative accommodation. The Supreme Court said that such assurances must be made good.⁵⁵ Therefore, it held that persons who were censused or who happened to be censused must be given alternative accommodation, however, the court did not make this arrangement a condition precedent for their removal.⁵⁶ In relation to those slums that are existing for twenty years or more the Court held that the same will not be demolished except when the land is required for public purpose and in such case the alternative accommodation by way of resettlement must be provided for the residents.⁵⁷

In *Ahmedabad Municipal Corpn. v. Nawab Khan Gulab Khan*⁵⁸ the Supreme Court again, in a way reiterated what it had said in *Olga Tellis* by holding that being provided with alternative accommodation by the Municipal Corporation in all cases cannot be made the precondition for the ejection of pavement dwellers.⁵⁹ The court, however, recognised that the



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right of being given a hearing to the long time encroachers of public land before their ejection.⁶⁰ The court finally ordered that such pavement dwellers that are otherwise eligible for alternative accommodation as per the schemes of the government be offered such accommodation. The court even clarified that it is not encouraging people to abuse the judicial process to avail such remedy by encroaching public property.⁶¹

SUBJUGATION OF SOCIO-ECONOMIC RIGHTS

Between eighties and nineties the Supreme Court had already begun perceiving the encroachers as a symbol of illegality, thereby justifying demolitions and forceful rehabilitation of the slum dwellers.⁶² In *Almitra H. Patel v. Union of India*⁶³ the Supreme Court came down very heavily on the municipal authorities for allowing squatting of public properties in first place. The writ petition in this case was related to addressing the problem of solid waste management in the city of Delhi. The Court observed that establishment of slums appears to be an organized business and this cannot happen without the passive or active connivance of land owning agencies or the municipal authorities.⁶⁴ The Court deviating clearly from the spirit of the earlier decisions of the court stated that "rewarding an encroacher of public land with a free alternative site is like giving a reward to a pickpocket."⁶⁵ The court, though, uttered these lines because the same results in waste being strewn on open land in and around slums⁶⁶ but this clearly appears to be a retreat from enforcing socio-economic rights which can be contrasted with any form of socio-economic rights adjudication.

*Aravali Golf Club v. Chander Hass*⁶⁷ is another example of the Supreme Court's insistence on being oblivious to the cause of executive or legislative inactions for the cause of reverence towards the doctrine of separation of powers. The court speaking through Markandey Katju, J. came down very heavily on the courts including the Supreme Court for exercising impermissible activism. The Court observed that if the executive or the legislature is not doing its job properly, then it is not for the courts to correct it. The people of India will hold them accountable in the next elections and vote for



candidates who will fulfill their expectations.⁶⁸ This is not only for the sake of fostering respect for the principle of separation of powers but also due to the fact that judiciary neither has the expertise nor the resources to perform these functions.⁶⁹ Though, these observations were not relevant for the decision of the case and therefore, at the most can only be treated as obiter remarks. At the same time, such strong observations from the Supreme Court definitely cast a shadow of doubt as regards the legitimacy and efficiency of socio-economic rights adjudication.

PUCL Case and the Glimpse of Minimum Core Form of Adjudication

In a landmark interlocutory opinion in *(PUCL) v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001 interim opinion), handed down on November 28, 2001, the Indian Supreme Court directly addressed food security in the Indian context and explicitly established a constitutional human right to food in India.⁷⁰ PUCL stands as one of the few instances of effective national adjudication on the right to food, despite the global food, financial, and environmental crisis that currently make food availability and the right to food increasingly urgent topics.⁷¹ The case was filed under Article 32 of the Constitution in the year 2001 on account of the failure of the government in ensuring adequate drought relief and failure of the government to give subsidized food grains to eligible beneficiaries. The petition which was initially filed against the Government of India, Food Corporation of India and six State Governments

for their alleged failure in proper distribution of food-grains, today includes all State Governments and covers the larger issues of hunger, unemployment and food security.⁷² The Court in this case affirmed the right to food as necessary to uphold Article 21 of the Constitution of India.⁷³

The Court decreed that all the Public Distribution Shops (PDS) if closed, shall be opened.⁷⁴ The Food Corporation of India was ordered to ensure that the food grains are not wasted.⁷⁵ The responsibility of the States in the implementation of the several schemes like Mid-Day Meal Scheme, National Benefit Maternity Scheme for Below Poverty Line (BPL) Pregnant



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Women, National Pension Scheme for destitute persons of over 65 years, Annapurna Scheme, Antyodaya Anna Yojana etc. was reiterated and a serious endeavour of ensuring effective implementation of these schemes was made by the court by telling the governments the ways and means of doing it.⁷⁶ For instance, the Court instructed state governments "to complete the identification of BPL (below poverty line) families, issuing of cards and commencement of distribution of 25 kilograms grain per family per month latest by 1st January, 2002."⁷⁷ Additionally, it directed the central and state governments to provide "every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days."⁷⁸ The case is pending in the Supreme Court for more than 14 years now and in the meantime 427 affidavits and 71 interlocutory applications have been filed by the petitioner and respondents.⁷⁹ The Court also has passed several interim orders in its quest to realize the constitutional right to food. As of 2005, the Court had issued 44 interim orders⁸⁰ and appointed two Commissioners⁸¹ charged with monitoring and reporting to the Court on the implementation by the respondents of the various welfare measures and schemes.

The petition and interlocutory applications has been central to defining a specific and enforceable right. Providing the data necessary to determine the basic nutritional necessities and expose deprivations of those minimum requisites of life, the case has been critical to setting a legal floor for nutrition and food-related entitlements.⁸² The approach adopted by the Supreme Court cannot simply be equated with the conditional socio-economic adjudication, though; the court in this case also has emphasized and tried to ensure the effective implementation of government schemes related to food security and in that sense this may be called an example of conditional socio-economic adjudication but the court in this case apart from ensuring proper implementation of these schemes has also examined the capacity of these schemes to address the cause of right to food and accordingly the court has made necessary changes to make it more effective. In order to achieve this, the court has even directed the governments to increase the budgetary allocations of its schemes. David Bilchitz has observed that the directions of the Supreme Court in this case show the promise that a



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minimum core approach to socio-economic rights can have even in contexts of massive need.⁸³ However, this is virtually judicial policy making and this sort of judicial policy making calls forth a serious democratic objection.⁸⁴ But, in the realm of

minimum core form of adjudication such an approach appears to more appropriate to address the substantive content of socio-economic rights, which otherwise is of mere rhetorical value in the adjudicatory sphere.

VI. CONCLUSION

A hierarchy in terms of the effectiveness of the different adjudicatory forms to address the cause of socio-economic rights would place the minimum core approach at the top, followed by the reasonableness approach and finally conditional socio-economic rights approach at the bottom, whereas, a hierarchy in terms of the degree of legitimacy will reverse this order. This is owing to the fact that in minimum core approach courts can go to the extent of framing policies and ensuring its compliance; in the reasonableness approach, policy prescriptions by the executive or the legislature are to be examined from the point of view of its reasonableness; whereas, the conditional socio-economic adjudication is aimed mainly at ensuring compliance of the executive and legislative policies already in operation. The degree of legitimacy is ascertained on the basis of the proximity of these adjudicatory approaches to the classical notion of the principle of separation of powers. However, even the conditional socio-economic adjudication appears to be involving the reworking of the contours of classical separation of powers in order to derive legitimacy. The principle of separation of powers cannot be envisioned as drawing boundaries between the three organs of State with absolute precision. This feature of the separation of powers principle enables the reworking of the constitutional functions between the organs of the State, which can be used as a tool to ensure that the socio-economic adjudication becomes principled and the courts do not oscillate between non justiciability of socio-economic rights to minimum core form of adjudication. This can only happen if the constitutional limits of judicial function in enforcing socio-economic rights are debated in the courtrooms as well. The arguments advanced still debate the very issue of justiciability of socio-economic rights and therefore the permissible extent of judicial intervention in the realm of these rights continues to be obscured by the 'either-or narrative' of the judicial intervention which masks the reality. The constitution of the 'Social Justice Bench'⁸⁵ by the Supreme Court provides for the perfect opportunity to address the issue of the extent of



judicial intervention permissible under the India Constitution because this is an express rejection of the narrative which was in favour of the non-justiciability of socio-economic rights and thereby dispelling the charge of illegitimacy otherwise attributable to socio-economic rights adjudication. The effectiveness of such judicial intervention has seldom been denied and it is a given fact that the judicial interventions perform the catalytic function in realising the goals underlying socio-economic rights. Let us hope that the Social Justice Bench would address the issue of making socio-economic rights adjudication, principled; with a view to strike a perfect balance between the legitimacy and effectiveness of judicial intervention in enforcing socio-economic rights.

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¹ Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 Int'l J. Const. L. 385, 386 (2010).

² See, *Francis Coralie Mullin v. UT of Delhi*, (1981) 1 SCC 608, 618-619. In this case the Supreme Court observed that this right includes the right to human dignity, which means, access to bare necessities of life such as adequate nutrition, clothing and shelter.

³ Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 Int'l J. Const. L. 739 (2010).

⁴ Supreme Court of India press release, http://supremecourtindia.nic.in/FileServer/2014-12-17_1418816381.pdf (last visited June 10, 2015).

⁵ *Ibid.*

⁶ Sections 26 and 27 of the South African Constitution, 1996:

26. Housing— (1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative or other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Healthcare, food, water and social security—(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water;

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The State must take reasonable legislative or other measures, within its available resources, to achieve the progressive realization of these rights.

(3) No one may be refused emergency medical treatment.

⁷ *Supra* note 1 at 391.

⁸ Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781.

⁹ *Ibid.*

¹⁰ *Id.* at 2784.

¹¹ *Id.* at 2786.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See, The British Human Rights Act, 1998; The Canadian Charter of Rights and Freedoms in the Canadian Constitution and The New Zealand Bill of Rights Act, 1990.

¹⁷ *Supra* note 2 at 608.

¹⁸ *Id.* at 618.

¹⁹ *Id.* at 619.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Supra* note 3 at 739.

²³ *Ibid.*

²⁴ *Id.* at 741.

²⁵ DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 135 (2008). See also, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008) and CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE (2000).

²⁶ <http://www.constitutionalcourt.org.za/Archimages/2798.pdf> (last visited Aug. 10, 2015).

²⁷ **Section 26.** Housing — (1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

²⁸ **Section 27.** Health care, food, water and social security— (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.

(3) No one may be refused emergency medical treatment.

²⁹ *Supra* note 26, Yacoob, J. in para 10.

³⁰ Every child has the right to basic nutrition, shelter, basic healthcare services and social services.

³¹ *Ex parte Chairperson of the Constituent Assembly: In re Certification of the Constitution of South Africa*, <http://www.constitutionalcourt.org.za/Archimages/3626.pdf>, (last visited June 10, 2015).

³² 10 other judges of the Constitutional Court concurred with Yacoob, J.

³³ *Supra* note 3 at 749.

³⁴ *Id.* at 751.

³⁵ (1985) 3 SCC 545 at 572.

³⁶ CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 236 (2004).

³⁷ *Supra* note 3 at 765.

³⁸ *Id.* at 759.

³⁹ *Id.* at 754. See, *infra* note 40, 44 and 51.

⁴⁰ (1994) Supp (3) SCC 478.

⁴¹ *Id.* at 645.

⁴² *Id.* at 654.

⁴³ *Id.* at 655-656.

⁴⁴ (1995) 3 SCC 42.

⁴⁵ *Supra* note 3 at 754.

⁴⁶ *Supra* note 41 at 70.

⁴⁷ *Id.* at 73.

⁴⁸ *Id.* at 74.

⁴⁹ *Ibid.*

⁵⁰ *Id.* at 73.

⁵¹ (1996) 4 SCC 37.

⁵² *Id.* at 44.

⁵³ *Id.* at 48.

⁵⁴ *Supra* note 35 at 587.

⁵⁵ *Ibid.*

⁵⁶ *Id.* at 589.

⁵⁷ *Ibid.*

⁵⁸ (1997) 11 SCC 121.

⁵⁹ *Id.* at 142.

⁶⁰ *Id.* at 143.

⁶¹ *Ibid.*

⁶² B.B. PANDEY, RE-ORIENTING THE 'RIGHT' DISCOURSE TO BASIC HUMAN NEEDS in HUMAN RIGHTS AND BASIC HUMAN NEEDS: THEORY AND PRACTICE 169 (M.P. SINGH et al. eds., 2008).

⁶³ (2000) 2 SCC 679.

⁶⁴ *Id.* at 685.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ (2008) 1 SCC 683.

⁶⁸ *Id.* at 693.

⁶⁹ *Ibid.*

⁷⁰ Lauren Birchfield and Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 Mich. J. Int'l L 691, 693.

⁷¹ *Id.* at 693, 694.

⁷² <http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html> (last visited Aug. 10, 2015).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ <http://www.righttofoodindia.org/orders/interimorders.html#box14> (last visited Aug. 10, 2015).

⁷⁸ *Ibid.*

⁷⁹ *Supra* note 72.

⁸⁰ <http://www.righttofoodcampaign.in/legal-action/supreme-court-orders> (last visited Aug. 10, 2015).

⁸¹ <http://www.righttofoodcampaign.in/legal-action/supreme-court-commissioners> (last visited Aug. 10, 2015).

⁸² *Supra* note 70 at 721-722.

⁸³ *Supra* note 25 at 242.

⁸⁴ Rehan Abeyratne, *Socio-economic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy*, 30 Brook J. Int'l L. 1, 50.

⁸⁵ *Supra* note 4.

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