Analysing the Justiciability of Social and Economic Rights

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In unravelling the intricate discourse on human rights, the issue of social and economic rights (SERs) emerges as a crucial frontier, raising profound questions regarding their full recognition and the extent to which they are legally enforceable. These rights encompass a diverse spectrum of the most basic yet fundamental human needs, representing the bedrock of daily necessities required for survival that guarantee individuals entitlements such as adequate food, education, housing, health care, and overall adequate standard of living.[1] However, a lingering concern lies in the fact that when a state fails to protect these rights, individuals are unable to seek legal recourse to uphold them as they are said to be non-justiciable—meaning they cannot be enforced in a court of law.[2] This essay will critically analyse the above proposition from a theoretical perspective and take a legalistic approach to examine whether they are truly seen as human rights. It will then delve into the arguments for and against justiciability and assess whether they should be placed on a par with fundamental rights or provided for in legislation.

Legalistic Approach

Historical Context and Theoretical Underpinnings

Although the majority of early constitutions emphasised the nexus between civil and political rights and SERs, at least within theoretical and polemical contexts, their predominance of protecting CPRs led to the perception that they were embodying a narrow individualistic concept of freedom unheedful to social and economic discrepancies. Afterwards, following the traumatic events of WWII, the Universal Declaration of Human Rights[3] was adopted in 1948 in response to the endeavour to restore justice and afford individuals comprehensive protection of human rights.[4] Had it not been for this establishment, which allowed the enforcement of rights through legal proceedings, rights would have remained inferior, underscoring the legalistic approach to human rights[5] that will be discussed in relation to SERs.[6] Initially, the Declaration contained both Civil and Political rights (CPRs) and SERs on an equal footing.[7] However, due to its non-binding nature, the United Nations Commission on Human Rights (UNCHR) sought to render those rights legally enforceable.[8] The question of whether there should be one or two covenants was turned to the General Assembly, which adopted a resolution declaring there should only be one covenant.[9] Nevertheless, since the Western states were highly resistant to incorporating SERs,[10] placing a one-sided emphasis on CPRs,[11] they were able to reverse the decision of the GA and the rights were split into two separate covenants: The International Covenant on Civil and Political Rights (ICCPR)[12] comprising of CPRs, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) containing SERs.[13]

Despite the international rhetoric that maintains all human rights are interdependent, indivisible, and deserve equal respect[14]—meaning they cannot exist in isolation from each other[15]—the reality is that SERs were viewed as being ‘the Cinderella of the international human rights corpus’,[16] honoured more in violation than fulfilment.[17] Still, nevertheless, the UN acknowledged the imperative to stress that SERs were indeed human rights. As such, in 1968, the Proclamation of Teheran declared that “the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible”.[18] This then rather suggests that human rights should be viewed holistically, implying that in order to ensure all rights (especially SERs) are effectively respected and protected, it is essential that they gain legal recognition and enforceability.

To put it into context, the ICESCR imposes three core obligations on states, namely, the duty to respect, protect, and fulfil the rights contained therein.[19] The aforementioned point relates closely to the duty to respect, which is a passive obligation that prevents states from interfering with the enjoyment of rights.[20] It was also proclaimed during the Tehran Conference that achieving long-lasting progress in human rights implementation hinges on the meticulous formulation of national and international policies regarding SE development.[21] Viewing this from a legalistic lens—in that matters of legal regulation ought to be conducted in adherence to clear predetermined rules, which expect government actions to respect the rights, duties, powers, and immunities defined by such rules[22]—denotes that governments must adopt thorough approaches to address both sets of rights via appropriate policy initiatives, legislation, and resource allocation.[23] Again, this aligns with the duty to protect, which requires states to implement effective measures to secure the preservation of SERs.[24] Hence, this presupposes the concept that to amplify their importance, governments must adequately uphold SERs through robust legal mechanisms.

Moreover, as Claire-Michelle Smyth stated, the division of the two sets of rights marked their divergent trajectories, with CPRs being prioritised over SERs, relegating the latter to a subordinate status.[25] The downgrading of SERs to second-class status, among other factors, had a detrimental impact on individuals' ability to advocate for their effective implementation at both the international and domestic levels.[26] As Barak-Erez and Gross noted, while there is continuous consensus about the interdependence of rights, the combination of global political shifts,[27] coupled with the ongoing hostility towards protecting SERs by domestic courts, have ensured they retain their second-class status.[28] Additionally, the general scepticism towards affording SERs equal protection stems from what Craig Scott described as "implementation-based reasons".[29] Essentially, it relates to the perceived demarcation line between the two sets of rights' that differentiates them in their normative character[30]: CPRs are classified as negative rights, abstaining states from interfering by restricting their actions, whereas SERs are positive, requiring high levels of investment from states for their execution.[31] This goes without saying as CPRs were the first set of rights to obtain proper accentuation and codification (first-generation rights), whereas SERs evolved based on the principles of social justice, adapting to the change in socio-economic dynamics (second-generation rights). In other words, CPRs are subject to immediate implementation without significant costs, as opposed to SERs, which are source-demanding and subject to progressive realisation.[32] He argues that this distinction renders the latter susceptible to different implementation procedures from the former, underpinning the assumption that they are non-justiciable.[33]

On one hand, Aryeh Neier staunchly advocated for the uniform interpretation of CPRs worldwide.[34] In juxtaposition, he argues it is inescapable that SERs will be applied distinctively across different regions. For instance, the significance attributed to the right to healthcare will vary substantially between a country with ample resources and a relatively poor one. That said, the duty to fulfil, which is regarded as the most contentious duty,[35] becomes evident. Thus, since CPRs are seen as justiciable freedoms with identifiable violations, while SERs are entitlements contingent on resource availability,[36] some have contended that SERs are not even entitlements but mere aspirational goals for which no one can be held accountable for breaching.[37] For example, Vierdag stated that the "implementation of economic, social, and cultural rights, is a political matter, not a matter of law, and hence not a matter of rights".[38] In turn, proponents of the 'positive/negative' dichotomy emphasise that SERs are not articulated as individual rights.[39] Ideologically, SERs are mostly viewed as pertaining to social policy and welfare rather than being recognised as legal entitlements; therefore, their inadequate enforcement tends to be a matter of social injustice and rather than rights infringement.[40] In light of this programmatic view, SERs may be discounted as lacking coherence and precision,[41] leading some to deduce that they are inherently non-justiciable,[42] thereby undermining the very essence of having rights safeguarded and taken seriously.

Martin Scheinin underlines that the persisting issue concerning the legal nature of SERs is not their validity but rather their applicability.[43] Similarly, Matthew Craven describes the ICESCR as "a poor relation to the ICCPR, suffering in particular from a weaker implementation procedure".[44] It must be noted, however, that while the application of the ICSER relies on the principle of progressive realisation, the obligation to implement minimum core rights is immediate.[45] The issue, however, is that the minimum core obligation accords states wide discretion due to its undefined parameters.[46]

Arguments for and Against Justiciability

Characterisation

One of the most common objections to legalising SERs relates to their ambiguous content and lack of specificity.[47] They supposedly pose a challenging hurdle for courts when making decisions and inherently carry positive obligations, which mandates states to spend money to vindicate them.[48] This is easy to dispute, as generally any so-called 'vague' law can always be clarified and made precise through interpretations, determinations, and interactions. As Melish noted, SERs are not, in fact, vaguer than CPRs.[49] However, the notable distinction is grounded in the reality that CPRs have benefited from far more authoritative interpretation over the past decades than SERs and because SERs are not adjudicated, it could perhaps be said they are vague.[50] Thus, the process of gaining clarity through interpretation is not unique to SERs. Additionally, as Cavallaro and Schaffer indicated, both categories of rights include positive and negative elements and impose on states a spectrum of obligations.[51] For instance, SERs can, in many aspects, be protected in the negative, such as preventing state interference from trade union freedoms, the right to work, or even the removal of shelters.[52] Likewise, CPRs can be positive, requiring infrastructures such as a functioning court system, legal aid, and impartial judges for the right to a fair trial, or even training police officers for protection against torture.[53] Needless to say, as Holmes and Sunstein pointed out, all rights are positive in the sense that they have budgetary implications.[54]

Legitimacy

Another prevalent criticism is that judicial enforcement of SERs might violate the democratic principle of the separation of powers and overstep judicial boundaries.[55] Critics argue this on grounds that their realisation depends on budgetary decisions by the legislature, and courts lack the constitutional power to dictate how legislatures should allocate public funds.[56] Aryeh Neier advances these arguments by contending that judicial interference with SERs or resource allocation would be an intrusion into an area meant to be addressed through democratic decisions and according to states' available resources.[57] Similarly, Michelman notes that this creates a situation where judges will be in charge of decisions that actually belong to the competences of the legislative.[58]

Nonetheless, budgetary implications cannot bar SERs, radically, from the standpoint of justiciability because, as previously discussed, CPRs may also impose substantial public expenditures, such as the right to vote, which requires the establishment and maintenance of an electoral system.[59] Additionally, the U.N. Committee for SERs has stated that courts are generally already equipped to handle a considerable range of matters that entail resource implications.[60] Hence, embracing a strict classification would curtail the courts' ability to safeguard the rights of the disadvantaged and vulnerable members of society, such as the homeless.[61] Most importantly, at its core, the separation of powers doctrine was created to avoid the concentration of power in one branch by, in theory, having three branches that exercise separate functions but in practice, they work in tandem to facilitate the notion of checks and balances, acting as an oversight mechanism.[62] Furthermore, given that the progressive realisation of SERs is heavily reliant on governmental policies, the importance of the judiciary's role in reviewing these policies to ensure they align with constitutional principles becomes clear-cut.[63] On this note, judicial engagement in policy review, distinct from policymaking, does not exceed constitutional boundaries.[64] Therefore, excluding an entire set of rights from the courts' jurisdiction defeats the underlying purpose of the doctrine. According to Schutter, attributing all the power to one entity means less authority for others.[65]

Capacity

This argument centres on the court's lack of capacity to handle cases related to SERs, mainly because of their polycentric and far-reaching nature.[66] In other words, they have a significant knock-on effect, which postulates that if one individual successfully litigates a certain issue, the precedent set will not just implicate that claimant but also all subsequent cases brought forth. Yet again, this can be easily rebutted, as judges are particularly well-versed at interpreting generalised norms and giving them legal effect.[67] Additionally, although judges are not necessarily specialists in policymaking, courts can seek the expertise required to guide them in applying legal reasoning during their decision-making process—an approach which can be taken for SERs as well.[68] Lastly, Fuller and Winston conceded that generally, all disputes brought before courts encompass polycentric effects either explicitly or implicitly.[69] Despite this, litigation remains intact and valid, and does not become illegitimate; indeed, one could

argue that similar to SERs, CPRs are also polycentric in nature, which waters down this argument.[70]

On Par with Fundamental Rights or Provided for in Legislation

Among the numerous advocates for their incorporation, O'Connell provided two main reasons for elevating the protection of SERs to a constitutional level as opposed to a legislative one.[71] Firstly, he argues that embedding SERs into legislation, which can be subject to revocation, represents a superficial gesture towards the disadvantaged and echoes antiquated notions of charity towards the deserving poor.[72] On the other hand, enshrining them in the constitution signifies an affirmation of society's essential needs and guarantees them as actual rights to be enjoyed equally by all community members, rather than as mere acts of charity.[73] This is particularly significant because, unlike ordinary legislation, constitutions are not easily amended and often remain unchanged even following a change in government. Secondly, statutory rights are often considered inferior in the hierarchy of rights and can be altered or abolished on the grounds of expediency, which ultimately erodes their value.[74] Furthermore, Eide and Rosas asserted that those fundamental interests safeguarded by SERs ought not to be vulnerable to the whims of changing governmental policies but rather firmly established as undeniable entitlements.[75] In line with this, the Irish jurisprudence recognised this in the case of *The People (DPP) v. Healy*, where Finlay CJ argued that, for instance, to classify a person's right of access to a legal advisor as merely legal and not constitutional would essentially undermine its importance and its protection as a whole, which the courts are responsible for upholding.[76] Moreover, according to Scheppele, court decisions on SERs can empower elected politicians' to resist international financial institutions that constantly preach about 'market fundamentalism', thereby bolstering public support for genuine democracy.[77] That said, the significance of incorporating SERs into constitutions and making them justiciable cannot be overstated, as it has proven to uplift their status and make them effective when justiciable, evident in jurisdictions including South Africa, Canada, and India.[78] It is also noteworthy to mention that the COVID-19 outbreak prompted governments worldwide to implement urgent measures to mitigate the impacts of the pandemic on the affected population and safeguard access to public health, highlighting the indispensable role of SERs in times of crisis.[79]

In contrast, some critics favour incorporating SERs into legislation rather than the constitution, arguing that it could lead to a specific standard of living.[80] They stress that this standard might become impossible to maintain in the face of continuous fluctuations in the economic and financial circumstances, and their inclusion may render it inappropriate to address future situations as they are based on current social conditions.[81] Additionally, Sunstein suggested that enshrining them within constitutional frameworks interfere might and impede with the development of a stable market society.[82] He also argued that due to their complexity and potential adverse consequences, courts might be reluctant to enforce them, which could lead citizens to perceive the entire constitution as unenforceable, thereby threatening its fundamental relevance.[83] Furthermore, even if SERs were incorporated into the constitution—though a significant step forward in recognising these rights as justiciable—it would not automatically guarantee their serious consideration. For example, in the landmark case of *TD v Minister for Education*, the Irish courts limited the scope for the judicial enforcement of SERs, even those recognised in the constitution.[84] Therefore, while placing SERs in the constitution could yield a positive pivotal impact, the extent to which they will be given the weight they deserve, alongside other fundamental rights, will ultimately depend on the court's willingness to hold the state accountable for not taking the appropriate steps and their impartiality in interpretating them with utmost care.

Conclusion

In summing up all points discussed, it becomes evident that the assertation of making SERs justiciable to ensure they are taken as seriously as human rights is not merely a scholarly debate but also an embodiment of a moral imperative that demands urgent attention. Nevertheless, as observed, the reality remains that SERs, although gaining more legal recognition in modern times, continue to face a multifaceted array of challenges that narrow their scope by robbing them of their egalitarian potential and hampering individuals' ability to enjoy their rights and access essential services. This undermines SERs to nothing more than hollow promises. Additionally, the general hostility against the justiciability of SERs—on grounds of their 'costly' nature, vagueness, incapacity of courts, and intangibility—has proven counterproductive and misguided to say the least. Every argument against their justiciability

can be readily dismissed and contradicted. Moreover, incorporating SERs into constitutions underscores and reinforces the notion that they are indeed justiciable, deserving of adequate protection and implementation on par with other fundamental human rights. Finally, from a broader perspective, in the absence of genuine justiciability of SERs, of what value is the freedom of speech (a CPR) to, for example, a homeless individual facing the imminent threat of death due to deprivation of basic rights such as food, housing, and health care? This then raises the question of whether the agonising experiences of WWII, which the Declaration aimed to overcome, are merely written in history books or are slowly becoming a present-day reality. After all, without taking more positive steps to prioritise these rights as seriously as human rights, to quote Julie McDowall, "it will be hard to stand on your own two feet when your bones are softened with rickets and you're wheezing with asthma from the black blobs of dampness on the spongy bedroom wall".[85]

Notes

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[2] Surya Deva, *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China* (1st edn, Taylor & Francis 2015) 212.

[3] United Nations, Charter of the United Nations, 24 October 1945 1 UNTSXVI.

[4] Gordon Brown, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book Publishers 2016) 29.

[5] Claire-Michelle Smyth, 'Social and Economic Rights: The Struggle for Equivalent Protection' in Jean Quataert and Lora Wildenthal (eds.) *The Routledge History of Human Rights* (1st edn, Taylor and Francis 2019) 142.

[6] Reference will be made to Social and economic rights as SERs and Civil and Political Rights as CPRs.

[7] Zehra Arat, 'Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights' (2006) 48 Human Rights Quarterly 416, 417.

[8] Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Allan Rosas, Asbjørn Eide and Catarina Krause (eds) *Economic, Social and Cultural Rights: A Textbook; Second Revised Edition* (Brill 2001) 3.

[9] Ibid.; General Assembly Resolution 421 (V) of 4 December 1950.

[10] Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 Human Rights Quarterly 316, 318. However, see the counterargument in Daniel Whelan & Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29 Human Rights Quarterly 908 and the chapter by Charles Henry, 'Introduction: On Building a Human Rights Culture' in Kenneth Hunter and Timothy Mack (eds) *International Rights and Responsibilities for the Future* (Bloomsbury Academic 1996).

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[12] 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 /6 ILM 368 (1967), adopted on 16 December 1966 and

entered into force on 23 March 1976.

[13] 993 UNTS 3 / [1976] ATS 5 / 6 ILM 360 (1967), adopted on 16 December 1966 and entered into force on 3 January 1976.

[14] The World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/CONF.157/23, UN General Assembly, 12 July 1993, para. 5; for more insight see Manfred Nowak 'Indivisibility of Human Rights' in Rhona Smith and Christein anker (eds) *The Essentials of Human Rights* (Hodder Arnold 2005) 178.

[15] Bernadette Rainey, *Human Rights Law Concentrate: Law Revision and Study Guide* (4th edn, OUP 2018) 12.

[16] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 2.

[17] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (OUP 2007) 2.

[18] United Nations Specialised Conferences, *Final Act of the International Conference on Human Rights,* Tehran, United Nations, 13 May 1968, Article 13; Mónica Pinto, 'International Covenant on Economic, Social and Cultural Rights' (United Nations Audiovisual Library of International Law) (December 1996) 1 <https://legal.un.org/avl/ha/icescr/icescr.html> accessed 2 April 2024.

[19] International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (26 January 1997), 20 Human Rights Quarterly 691, para. 6. Asbjorn Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 Human Rights Journal 36-51. See William Drake and Rikke Jørgensen 'Introduction' in Rikke Jørgensen (ed) *Human Rights in the Global Information Society* (MIT Press 2006) 45.

[20] Adam McBeth, *International Economic Actors and Human Rights* (Taylor & Francis 2009) 44

[21] United Nations Specialised Conferences (n 18); C. Raj Kumar, 'International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution' (2004) 12 Tul J Int'l & Comp L 237, 262.

[22] Neil MacCormick, 'The Ethics of Legalism' (1989) 2 Ratio Juris 184, 184.

[23] Kenneth Roth, 'Defending Economic Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26 Human Rights Quarterly 63, 66.

[24] McBeth (n 20) 45.

[25] Smyth (n 5) 143.

[26] Bülent Algan, 'Rethinking "Third Generation" Human Rights' (2004) 1 Ankara Law Review 124, 125-131. Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context' in Fons Coomans (Ed) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006) 2.

[27] Paul O'Connell, 'On reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7 Human Rights Law Review 483, 486; David Beetham, 'What Future for Economic and Social Rights?' in David Beetham (ed) Political and Human Rights (Blackwell Oxford 1995) 43.

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[29] Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 Osgoode Hall Law Journal 769, 794.

[30] Ibid.

[31] Elif Çamur, 'Civil and Political Rights vs. Social and Economic Rights: A Brief Overview' (2017) 6 Journal of Bitlis Eren University Institute of Social Sciences 205, 206-207; Youcef Bouandel, *Human Rights and Comparative Politics* (Dartmouth Publishing 1997) 24.

[32] Ida Koch, *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 7. For a comprehensive analysis on progressive realisation of social and economic rights see Padraig McAuliffe, 'Programmatic Approaches to Realising Socio-Economic Rights: Debates, Definitions and Trends' (2021) 22 Melb J Int'l L 24.

[33] Scott (n 29) 794.

[34] Aryeh Neier, "Social and Economic Rights: A Critique" (2006) 13 Human Rights Brief 1, 2-3

[35] Anne Smith and Eithne McLaughlin, 'Delivering Equality: Equality Mainstreaming and Constitutionalisation of Socio-Economic Rights' (2010) 61 N Ir Legal Q 93, 108-111; Ida Koch, 'The Justiciability of Indivisible Rights' (2003) 72 Nordic Journal of International Law 3, 12.

[36] Louise Arbour, 'Economic and Social Justice For Societies in Transition' (2007) 40 Journal of International law and politics 1, 11.

[37] Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 OUP 427, 430-431; Lucy Williams, 'The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study' (2010) Constitutional Court Review 141, 182-183.

[38] See E.W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69, 103.

[39] Koch (n 32) 7.

[40] Christine Chinkin, 'The Protection of Economic, Social, and Cultural Rights Post-Conflict' (2008) (Report commissioned by the Office of the High Commissioner for Human Rights (OHCHR)) at p.8 available at <https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> accessed 5 April 2024.

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[44] Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 352.

[45] Smyth (n 5) 146.

[46] Due to this essay's limitation, the duty of implementing minimum core obligations will not be discussed. However, see George Kondowe, 'Implementing Economic and Social Rights in 'Domestic' Jurisdictions: Understanding the Minimum Core Obligations Approach' (2020) 0 Commonwealth Law Bulletin 1; Lisa Forman, 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2016) 47 Ottawa L Rev 561.

[47] Eric Okojie and Peace Folorunsho, 'Some Recent Developments on Justiciability of Economic, Social and Cultural Rights' (2017) 18 Dullah Omar Institute 8, 9.

[48] Ibid; Helen Hershkoff, 'Just Words: Common Law and the Enforcement of State Constitutional Social and Economic Rights' (2010) 62 Stan L Rev 1521, 1540.

[49] Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (Orville H. Schell, Jr., Center for International Human Rights 2002) 34.

[50] Jan Kratochvíl, 'Realizing a Promise: A Case for Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights' (2009) 16 WCL Journals & Law Reviews (Human Rights Brief) 30, 34

[51] James Cavallaro and Emily Schaffer, 'Justice Before Justiciability: Inter-American Litigation and Social Change' 39 International Law and Politics 345, 349.

[52] Cecile Fabre, 'Constitutionalising Social Rights' (1998) 6 The Journal of Political Philosophy 263, 281; Ran Hirschl, '"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order' (2000) 22 Hum Rts Q 1060, 1085-1094.

[53] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 30; Wade Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights Treaties' (2015) 69 International Organization 405, 414; Maša Marochini, 'Civil and Political, and Economic and Social Rights – Indivisible or Separable?' (2014) 64 Zbornik PFZ 307, 319.

[54] Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (W. Norton 2000) 48.

[55] Carol Ngang, 'Judicial Enforcement of Socioeconomic Rights in South Africa and The Separation of Powers Objection: The Obligation to Take 'Other Measures' (2014) 14 AHRLJ 655, 657-658.

[56] Melish (n 49) 37; See Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 77-78.

[57] Neier (n 34) 3.

[58] Frank Michelman, 'The Constitution, Social Rights, and Liberal Political Justification' (2003) 1 International Journal of Constitutional Law 13, 13; also see Albie Sachs, 'Social and Economic Rights: Can They Be Made Justiciable' (2000) 53 SMU Law Review 1381, 1389.

[59] Dennis Davis 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 SAJHR 475, 480.

[60] The Domestic Application of the Covenant, General Comment No. 9, U.N. ESCOR, Comm. On Econ., Soc. and Cultural Rts., 19th Sess., Agenda item 3, U.N. Doc. E/C.12/1998/24 (1998), para. 10.

[61] Geraldine Bueren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' (2002) Public Law 456, 457.

[62] Neil Parpworth, *Constitutional and Administrative Law* (12th edn, OUP 2022) 22-23.

[63] Office of the United Nations High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Right' (Fact Sheet No. 33) (December 2008) p. 30–31 <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-33-frequently-asked-questions-economic-social-and-cultural> accessed 6 April 2024.

[64] Ibid.

[65] Olivier Schutter, *International Human Rights Law* (3rd edn, CUP 2019) 823.

[66] Geoffrey Allsop, 'Socio-Economic Rights' in Geoffrey Allsop et al. (eds.) *Constitutional Law for Students* (UCT Libraries 2020) 485.

[67] Melish (n 49) 34; Deval Desai, 'Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights' (2009) 4 Interdisc J Hum Rts L 25, 36.

[68] Smyth (n 5) 149.

[69] Lon Fuller and Kenneth Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard LR 353, 398.

[70] Christopher Mbazira, 'Confronting the Problem of Polycentricity in Enforcing the Socioeconomic Rights in the South African Constitution' (2008) 23 SAPR/PL 30, 38.

[71] Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (1st edn, Taylor and Francis 2012) 9.

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[76] The People (DPP) v. Healy *[1990] 2 I.R. 73*, 81 as per Finlay CJ

[77] Kim Scheppele, 'A Realpolitik Defense of Social Rights' (2004) 82 Texas Law Review 1921, 1925; Sachs (n 58) 1390; Claire-Michelle Smyth, 'Social and Economic Rights in A Post-Neoliberal Society' in Claire-Michelle Smyth and Richard Lang (eds) *The Future of Human Rights in the UK* (Cambridge Scholars Publishing 2017) 169.

[78] Due to this essay's limitation, no comparative analysis is feasible. For more analysis see Smyth (n 5) 151-160.

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