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# What is Justiciability?

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Justiciability sets the boundaries of judicial review and the rule of law.<sup>1</sup> A justiciable issue is that which is appropriate within a judicial forum.<sup>2</sup> That is, where an "independent and impartial body" can remedy rights violations of identifiable claimants, the issue before it is justiciable.<sup>3</sup> If it falls beyond what is judicially determinable, it is 'non-justiciable'.<sup>4</sup> The principle is not fixed, as it does not permanently set the boundaries of that which is appropriate for judicial determination. Rather, it evolves "from context to context," and expands and narrows along what falls within judicial competencies at a particular time.<sup>5</sup> On an elementary level, it is distinct from jurisdiction, as it establishes boundaries of subject matter on policy or constitutional grounds, whereas jurisdiction is grounded in established legal rules.<sup>6</sup> However, questions of jurisdiction can be subsumed under broader questions of justiciability.<sup>7</sup>

In Constitutionalism, justiciability is guided by set rules that distinguish spheres of judicial expertise from that of other State organs.<sup>8</sup> Historically, controversies deemed non-justiciable by UK courts have varied widely, with particular decision-making deference paid on matters related to domestic resource apportionment to the executive and/or legislature.<sup>9</sup> Justiciability separates the *political* from the *judicial*, defining subject matter outside of judicial function and within the reserve for democratically designated decision-makers.<sup>10</sup> Thus, it is a threshold determination in any particular case, whereby decision-making on the 'non-justiciable' is avoided altogether.<sup>11</sup> This places an issue beyond judicial decidability in entirety; or, requires it be excised from those deemed judicially determinate.<sup>12</sup> Categorically, UK jurisprudence has deemed the acts and laws of a sovereign 'non-justiciable', either domestically or extra-territorially.<sup>13</sup> These have included political matters, acts of foreign states, interpretation of international law, foreign affairs, and national security matters.<sup>14</sup>

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<sup>1</sup> Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59(4) ICLQ 981

<sup>2</sup> *ibid* 983

<sup>3</sup> Theo Van Boven, 'Categories of Rights', in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2017) 142

<sup>4</sup> *McGoldrick* (n 1) 983

<sup>5</sup> *ibid*

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*, citing *Tasarruf Mevduati Sigorta Fonu v Demirel* [2007] 2 All ER 815 [62]

<sup>8</sup> *ibid* 984

<sup>9</sup> *ibid* 984-985

<sup>10</sup> *ibid* 985-986

<sup>11</sup> *ibid*

<sup>12</sup> *ibid* 987

<sup>13</sup> *ibid*

<sup>14</sup> *ibid* 990-1014

Since the advent of the ICESCR, member states are obligated to set policy towards achieving socio-economic rights<sup>15</sup> through "progressive realization"—a vague normative delineation of what State goal-setting ought to incorporate to harmonize with under the Covenant's mandate.<sup>16</sup> There remains no true ICESCR enforcement mechanism on an international level, though the CESR was established to achieve just that.<sup>17</sup> It is under-resourced however, and is often met with intractable political resistance from non-compliant states when issue is made.<sup>18</sup> At best, member state cooperation in the few cases the CESR hears can be characterised as miniscule.<sup>19</sup>

Intranational justiciability of socio-economic rights are controversial, as it is thought an unrealistic expectation for judiciaries to ensure that States satisfy positive-rights obligations (such as: "adequate housing, health care, food, water, social security, and education"<sup>20</sup>).<sup>21</sup> These are more so considered aims or the 'aspirational', and therefore beyond *concrete* judicial decision-making.<sup>22</sup> Judges are considered incapable of wielding "largescale bureaucratic institutions"<sup>23</sup> to act towards achieving socio-economic aspirations. In sum, socio-economic-rights enforceability goes beyond judicial expertise,<sup>24</sup> as it requires the rationing and/or apportioning judicially-immeasurable State resources.<sup>25</sup> Further, it otherwise violates established separation-of-powers doctrine by allowing judicial encroachment onto the domain of a democratically-elected State organs.<sup>26</sup>

Constitutional inclusion of directives is considered a workable alternative by some,<sup>27</sup> where legislative socio-economic policy aspirations are given a textual place among other written guarantees. This

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<sup>15</sup> Albie Sachs, 'Social and Economic Rights: Can They Be Made Justiciable' (2000) 53 SMU L Rev 1383

<sup>16</sup> Ellen Wiles, 'Aspirational Principles or Enforceable Rights - The Future for Socio-Economic Rights in National Law' (2006) 22 Am U Int'l L Rev 38

<sup>17</sup> *ibid* 39

<sup>18</sup> *ibid*

<sup>19</sup> *ibid*

<sup>20</sup> Eric C. Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2007) 38 Columbia Human Rights L. Rev. 322

<sup>21</sup> *Sachs* (n 15) 1384 and 1390

<sup>22</sup> *ibid*

<sup>23</sup> Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2001) 124 John M. Olin Program in Law and Economics Working Paper 3

<sup>24</sup> *Sachs* (n 15) 1386

<sup>25</sup> *ibid* 1389

<sup>26</sup> *ibid*

<sup>27</sup> See Cass R Sunstein, 'Against Positive Rights' (1993) 2 E Eur Const Rev 35

provides for socio-economic aims to be adopted without being made into enforceable entitlements.<sup>28</sup> This provides for interpretive guidance on policy-aims for judges, but fall short of creating justiciable socio-economic rights.<sup>29</sup> This approach was adopted as the 'Directive Principles of State Policy' in India's Constitution.<sup>30</sup> This is said to keep the Indian judiciary from being ensnared in governmental program administration that requires navigation of complex implementation strategies that elevated socio-economic qualities of life often require.<sup>31</sup> Arguably, placing socio-economic aspirations beyond judicial enforceability has made realisation of the rights mere puff for the majority of Indians.<sup>32</sup>

It is not suggested that this approach is an accepted alternative to socio-economic rights enforceability by those who believe that India has benefited from it. Purists insist that any judiciary is "inherently reactionary,"<sup>33</sup> and therefore the wrong forum, as its approach is devoid of the "radical debate"<sup>34</sup> necessary to mobilize effective implementation of socio-economic rights (rather, judicial deliberation is characterised as "piecemeal and short-term"<sup>35</sup>). Further, judicial *interference* into socio-economic rights implementation facilitates the "redistribution of wealth" via State free-market manipulation—a notoriously "conservative ideolog[y]"<sup>36</sup> typically characterisation as inappropriate judicial resource-control unique to 'positive rights' enforcement.<sup>37</sup> This has been largely debunked however, even by former believers, as it is now plain that both 'positive' and 'negative' rights require State resource apportionment.<sup>38</sup>

The separation-of-powers argument relies on situating positive rights implementation beyond judicial expertise as well, adding that judicial enforcement otherwise lacks democratic legitimacy,<sup>39</sup> as it does not comport with foundational Constitutional norms that establish a State's structure as originally

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<sup>28</sup> *Sachs* (n 15) 1385

<sup>29</sup> *ibid*

<sup>30</sup> Part IV, *The Constitution of India*, 26 January 1950, available at: <https://www.refworld.org/docid/3ae6b5e20.html> [accessed 31 January 2021]

<sup>31</sup> *Sunstein* (n 23) 3

<sup>32</sup> *ibid*; See also World Economic Forum, 'The Global Social Mobility Report 2020 Equality, Opportunity and a New Economic Imperative' (2020) 24

<sup>33</sup> *Wiles* (n 16) 43

<sup>34</sup> *ibid*

<sup>35</sup> *ibid* 43-44

<sup>36</sup> *ibid*

<sup>37</sup> See *Sunstein* (n 27)

<sup>38</sup> *Sunstein* (n 23) 5

<sup>39</sup> Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20:3 South African Journal on Human Rights 385

intended at that profound moment of state-craft via the drafting of a juridical document.<sup>40</sup> Separation-of-powers is considered doctrine, and is evocative of a *pillar* of legitimacy, sometimes rendering the debate on justiciability characterizable as profane.<sup>41</sup> Enforcement of socio-economic rights suggests judicial action without accountability, and therefore amounts to overreach that runs afoul of a basic democratic tenet.<sup>42</sup> Judicial discretion is ought to include zealous awareness of its limitations, being the gatekeeper of democratic legitimacy responsible for identifying overreach by other State organs.<sup>43</sup> Making socio-economic rights justiciable purportedly imperils such notions.<sup>44</sup> Thus, very little caselaw on socio-economic rights justiciability exists, therefore rendering them implicitly non-justiciable for some.<sup>45</sup>

An historically unique undertaking challenging arguments against the justiciability of socio-economic rights presented with the drafting and 1996 ratification of the South Africa's Constitution. It explicitly sets out socio-economic rights, therefore rendering them justiciable. A constitution in such a form<sup>46</sup> is said to be "transformative," as guarantees directly challenge rights lacunae absent under the prior governmental order.<sup>47</sup> South Africa's relatively recent experience under apartheid has necessitated that particular attention be paid to the lack of rights for the subjugated majority-class in the new political order under the 1996 Constitution.<sup>48</sup> Indeed, establishing socio-economic rights for all citizens is said to be the "overriding goal" of the new Constitution.<sup>49</sup>

The inclusion of socio-economic rights in South Africa's Constitution, and its transformativity, was employed to warrant against a return to the system of apartheid.<sup>50</sup> Tracing South Africa's history leading to its Constitution provides needed context for the inclusion of socio-economic-rights and its enforceability later confirmed as *supreme* law by its Constitutional Court.<sup>51</sup> Indeed, the system of apartheid is the "direct" cause for the "acute" omission of socio-economic rights for the subjugated-

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<sup>40</sup> *ibid*

<sup>41</sup> *ibid* 389

<sup>42</sup> *ibid* 385

<sup>43</sup> *ibid* 386, 388

<sup>44</sup> *Wiles* (n 16) 42

<sup>45</sup> *ibid* 53

<sup>46</sup> Sunstein defines Constitutions as "precommitment strategies, designed to ensure against myopic or mistaken decisions in ordinary politics." *Sunstein* (23) 4; See also *Sunstein* (n 27) 36

<sup>47</sup> *Sunstein* (n 23) 4

<sup>48</sup> *ibid*

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

majority under the prior regime,<sup>52</sup> and has made the new Constitutional order "unparalleled" among others.<sup>53</sup> The endeavour to enforce socio-economic rights is not simple, nor does it incorporate an approach that juxtaposes rights onto historical justiciable jurisprudence from South Africa's colonial forebearers. Rather, the judiciary has employed sophisticated decision-making by addressing "legitimacy and competenc[y]" concerns while affirmatively enforcing socio-economic rights.<sup>54</sup>

Foreseen following the Constitutional Court's decision in *Soobramoney*,<sup>55</sup> the Court set seminal precedent for the justiciability of socio-economic rights in the *Government of the Republic of South Africa v Grootboom*.<sup>56</sup> Ms Grootboom along with 899 other plaintiffs (including 510 children) lived in Wallacedene—an "informal squatter settlement" in Western Cape, eastern Cape Town, inhabited by 'Africans' ('black' South Africans), and made up of makeshift "shacks, without water, sewage, or refuse removal services."<sup>57</sup> During the apartheid regime, the area was designated for non-'Africans', but was nevertheless occupied by those deprived of housing and in search of work.<sup>58</sup> Post-apartheid, there were administrative programs implemented for meeting a largescale housing shortage, but its execution was exceedingly protracted and otherwise ineffective for those in immediate need, including the plaintiffs.<sup>59</sup>

The deplorable conditions in Wallacedene provoked a widescale move onto nearby private land dubbed "New Rust" by its new squatter-occupiers (including Grootboom), and was at the time intended for future "low-cost housing."<sup>60</sup> Eviction proceedings were initiated, resulting in an ejection order being issued by the lower court in late December 1998.<sup>61</sup> By May 1999, inhabitants were ejected "prematurely and inhumanely: reminiscent of apartheid-style evictions,"<sup>62</sup> forcing them to move onto the Wallacedene sports field, using rudimentary, plastic sheeting for shelter.<sup>63</sup> This prompted the plaintiffs, through counsel assigned to them by the lower court, to demand of the municipality that their

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<sup>52</sup> *ibid* 6

<sup>53</sup> *Christiansen* (n 20) 323

<sup>54</sup> *ibid* 322

<sup>55</sup> *Sachs* (15) 1381, referring to *Soobramoney v Minister of Health, KwaZulu-Natal*, 1997 (12) BCLR 1696 (CC)

<sup>56</sup> 2000 (11) BCLR 1169 (CC)

<sup>57</sup> *Sunstein* (n 23) 6

<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> *Grootboom* (n 56) [7]-[8]

<sup>61</sup> *ibid* [9]

<sup>62</sup> *ibid* [10]

<sup>63</sup> *ibid* [11]

constitutional right to housing be satisfied.<sup>64</sup> The municipality's response was exceedingly insufficient, stating that food and shelter suitable for 80 persons had been made available at the Wallacedene Community Hall.<sup>65</sup> The plaintiffs sought relief from the High Court, submitting that the municipality had failed to meet its "constitutional obligations and provide temporary accommodation,"<sup>66</sup> relief was granted, prompting the municipality to appeal to the Constitutional Court.<sup>67</sup> The Constitutional Court decided the merits on sections 26 and 28 of South Africa's Constitution, ultimately holding that the government is required to "act positively"<sup>68</sup> to address deplorable living conditions such as homelessness; and, to "foster [the] conditions"<sup>69</sup> enabling realization of the right to housing on an equitable basis.

Under section 26 of the Constitution, "[e]veryone has the right to have access to adequate housing;"<sup>70</sup> "[t]he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right;"<sup>71</sup> and, "[n]o one may be evicted from their home, or have their home demolished, without an order of court . . ."<sup>72</sup> Under section 28, "[e]very child has the right . . . to basic nutrition, shelter, basic health care services and social services."<sup>73</sup> In *Grootboom*, the Court recalled certification proceedings, where it was argued that socio-economic rights were made justiciable for South Africans, as they were explicitly set out in the text of the Constitution.<sup>74</sup> In response, the Court held that the guarantees *are* justiciable, "at least to some extent."<sup>75</sup> Some recognition of justiciability seemed plain at the time, as the rights are set out without textual qualification. The salient issue identified in *Grootboom*, however, is the manner in which such rights could be enforced, requiring careful consideration of rights contextually, and on a "case-by-case basis."<sup>76</sup>

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<sup>64</sup> *ibid*

<sup>65</sup> *ibid* [footnote 10]

<sup>66</sup> *ibid* [4]

<sup>67</sup> *ibid* [11]

<sup>68</sup> *Grootboom* (n 56) [93]

<sup>69</sup> *ibid*

<sup>70</sup> Section 26(1), *Constitution of the Republic of South Africa* 10 December 1996, available at:

<https://www.refworld.org/docid/3ae6b5de4.html> [accessed 31 January 2021]

<sup>71</sup> *ibid* Section 26(2)

<sup>72</sup> *ibid* Section 26(3)

<sup>73</sup> *ibid* Section 28(1)(c)

<sup>74</sup> *ibid* [20], citing *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC), [78]

<sup>75</sup> *Grootboom* (n 56) [20]

<sup>76</sup> *ibid*

Contextual interpretation requires consideration of (1) socio-economic rights within the "Constitution as a whole;"<sup>77</sup> and, (2) within "their social and historical context."<sup>78</sup> The first accentuates the overlap between all Constitutional guarantees, as the values underpinning South African society are steeped in guarantees of "human dignity, freedom and equality."<sup>79</sup> These core tenets cannot be enjoyed by those without very basic needs being met.<sup>80</sup> Indeed, an entitlement to dignity is mere puff to the homeless, hungry, and/or sick individual. The second requires remembrance of South Africa's apartheid legacy, where insidious disparity was the rule in recent past.<sup>81</sup> Deplorable societal conditions were not a result of the prior apartheid regime coming to an end, but rather stemmed from and continued after apartheid came to an end.<sup>82</sup> The post-apartheid constitutional order was established to address such conditions, and is emblematic of the transformativity intended of South Africa's Constitution.<sup>83</sup>

*Grootboom* is applauded for not symbolizing socio-economic rights enforcement short of requisite judicial expertise or the violation of separation-of-powers doctrine, though it has been noted that the Constitutional prohibition on eviction without a court order not only applies to the government, but the private sector as well.<sup>84</sup> This has been characterised as inappropriately novel, as Constitutional constraints do not typically apply to private landlords.<sup>85</sup> This seems like meaningless quibbling however, as it is hardly arguable that private actors *ought* to be able to limit constitutional guarantees. Indeed, private law avails remedies in other jurisprudence, but it is acknowledged that recent Constitutions are distinguishable from older ones in quite consequential ways.<sup>86</sup> Still, the Court's daring in *Grootboom* suggests that a 'middle course' borrowing from administrative law was employed to effectuate Constitutional compliance without defying traditional notions of socio-economic-rights non-justiciability.<sup>87</sup>

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<sup>77</sup> *ibid* [22]

<sup>78</sup> *ibid*

<sup>79</sup> *ibid* [23]

<sup>80</sup> *ibid* [24]

<sup>81</sup> *ibid* [25]

<sup>82</sup> *ibid*, citing *Soobramoney v Minister of Health, KwaZulu-Natal*, [8]

<sup>83</sup> *ibid*

<sup>84</sup> *Sunstein* (n 23) 7

<sup>85</sup> *ibid*

<sup>86</sup> *ibid* 1

<sup>87</sup> *ibid* 12



Rather than interpreting rights under sections 26 and 28 as requirements that housing or any other positive rights be provisioned to all persons "on demand," the Court narrowly interpreted the rights to require the State to act reasonably to ensure access to housing by the poor.<sup>88</sup> This therefore addressed governmental inaction, similar to the approach employed in administrative law, rather than forcing justiciability onto socio-economic rights. This mode is applauded by those who are emphatic that socio-economic rights are non-justiciable, as the Court set the standard for measuring State compliance with certain socio-economic guarantees at 'reasonableness', removing the Court's remit from matters of State priority-setting or resource-apportionment. This facilitates State provisioning of guarantees set out in South Africa's Constitution while avoiding a controversy on justiciability. The suggestion is that if it were otherwise—if the Court had interpreted Constitutional guarantees as a demand for State distribution of resources in terms set out by the judiciary, then justiciability of socio-economic rights would remain unworkable.

Court priority-setting requiring the State to actively undertake measures to ensure all rights be fulfilled, such as providing every citizen with a home or medically treating all without indication of need, would suggest that Constitutional guarantees are 'absolute' without qualification, even if limited by available State resources. It would suggest that States are obligated to actively provision elevated socio-economic qualities, which may be limited by available resources but nevertheless remain claimable entitlements even when the State cannot meet its obligations. This designates the rights as 'absolute' in the sense that meeting elevated socio-economic quality-of-life demands would be designated as highest State priority as a matter of policy. This amounts to a clear interference into free-market economy, and is reminiscent of the failed communist aims of Eastern Europe.<sup>89</sup> Enabling a judiciary to rule against the State for falling short of achieving socio-economic ubiquity of certain qualities-of-life would therefore present judicial encroachment onto resource apportionment and present interference in traditional subject matter typically considered more appropriate under democratic deliberation—the traditional justification for designating certain rights as non-justiciable.

Not only would it be questionable whether judges are capable of delineating resource requirements for States to meet such obligations, but it would place judicial obligations within the province of the

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<sup>88</sup> *ibid* 14

<sup>89</sup> See *Sunstein* (n 27)

typically legislative and/or executive. When the justiciability of socio-economic rights is challenged, this is the result that is envisioned, having inspired jurisprudence and academic work purporting to permanently establish the quality of socio-economic rights as unenforceable and therefore non-justiciable. This however does not properly depict efforts to achieve aims in raising and sustaining elevated qualities-of-life that enable true democratic participation or enjoyment of 'citizenship'. The decision in *Grootboom* is rational in that guarantees envisioned by the State on the way out of apartheid are upheld without effectively bankrupting the State. The Court employed a contextual approach, avoiding democratic overreach or incompetence. Rather, its decision exhibited a conception of socio-economic-rights justiciability—an approach to elevating the quality of life—realisable by any State.

By ruling as it did, and the approach to the question of justiciability it employed, the Court exposed that the issue is not whether socio-economic rights are non-justiciable and therefore unrealisable; rather, it is the reverse, rendering socio-economic rights realisable and therefore justiciable. The fault in the opposing, traditional view lies in a myopic conception of justiciability, constrained by rigid conceptions of judicial competency and constitutionalism. Constitutional inclusion of socio-economic rights does not suggest State-sanctioned utopia-building. Rather, it ought to prompt State design and implementation of systematic facilitation of socio-economic-rights realisation, even where judicial reasoning is taken from administrative or other distinguishable jurisprudence. The end result is the elevation and advancement of the quality of citizenship rather than violation of traditional notions devised within legalism. Under a flexible, aim-centred conception justiciability and resulting interpretation of Constitutional guarantees, all known socio-economic rights are in fact judicially realisable, even if not immediate.