

# **An Integrated approach to the Enforcement of Socio-Economic Rights: Enforcing ECOSOC Rights through Civil and Political Rights**

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Abstract

*Nearly three decades have elapsed since the International Covenant on Economic Social and Cultural Rights (ICESCR) has been adopted and entered into force. However, the lack of clarity in the wordings of the document coupled with the weaker terms of obligation it puts on states parties and the concomitant confusion as to the legal status of socio-economic rights have contributed to the weak record in the implementation of the rights in the real life of societies in the respective states parties to the covenant. This short article is intended to explore the possibilities of enforcing socio-economic rights by integrating them with civil and political rights which enjoy relatively good level of protection. I will argue that while the integrated approach has its own inherent limitations and cannot be the ultimate solution to the problem of non-enforcement of socioeconomic rights, it has also immense potential for the enforcement of socio-economic rights as illustrated by the work of some national, regional and international judicial and quasi-judicial organs.*

## **I. Introduction**

Three decades have elapsed since the International Covenant on Economic and Cultural Rights (ICESCR) that comprehensively deal with economic, social and cultural rights has been adopted and entered in to force. There are as well other international and regional instruments that embody a myriad of economic, social and cultural rights. Practical implementation by states parties, however, remains unsatisfactory and fraught with obstacles. In order to accommodate the position of the various states parties with different ideologies and traditions, the instruments, particularly the ICESCR, are drafted in too general, vague and imprecise terms. Furthermore, unlike the International Covenant on Civil and Political Rights (ICCPR), the wording chosen for state obligation under Art.2 (1) of the ICESCR, the most comprehensive document on socioeconomic rights, is weaker. The lack of clarity in the wordings of the ICESCRs coupled with the weaker terms of obligation it puts on states parties and the

concomitant confusion as to the legal status of socio-economic rights have contributed to the weak record in the implementation of the rights in the real life of individuals apart from the important economic reason that interwoven the implementation of same.

One important way to get out of this predicament is to look for the enforcement of economic, social and cultural rights through civil and political rights. The idea is that if we look through the prism of civil and political rights we can also reach at economic, social and cultural rights. The practice has already been set by some treaty bodies and national courts, for example in the Council of Europe, the Inter-American System, India and South Africa. The Indian Supreme Court, for instance, has in a number of cases interpreted the right to life as to include the right to basic necessities like adequate nutrition, shelter, health care, education, etc.

It is, therefore, the purpose of this article to explore the possibilities of enforcing economic, social and cultural rights through civil and political rights which have enjoyed relatively good level of protection. The writer will first highlight the evolution of and international standard setting on socio-economic rights followed by an exploration of the problems surrounding implementation of same. An exposition of the integrated approach as an alternative solution to the problem of enforcement and exploration of salient practices in this regard will constitute the main body of this article, followed by concluding remarks.

## **II. Origin, Development and Nature of Economic, Social and Cultural Rights under International Law and the Problem of Enforcement: An Over View**

### ***A. An Over View of the Evolution of Economic, Social and Cultural Rights***

The idea of economic, social and cultural rights relates to the conditions necessary to meet essential human needs such as food,

shelter, education, health care, and gainful employment which are vital for the dignified existence of human beings. They include the right to adequate food and nutrition, water, highest attainable standard of health, clothing, adequate housing, the right to education, the right to work and rights at work, right to social security, as well as the cultural rights of minorities and indigenous peoples. Generally, these are social welfare rights meant to ensure the highest attainable standard of living for every individual human being.<sup>1</sup>

The historical origin and development of these set of rights, just like their current state of enforcement, is obscure and controversial. However, we can speak with certainty that they are no younger than civil and political rights, although they have not enjoyed the necessary domestic and international protection which civil and political rights have enjoyed to a certain extent.

Perhaps the original concern for human existence with dignity has its roots in the tradition of the various religions whose teaching promote care for the needy and for those who cannot look after themselves.<sup>2</sup> Almost all of the major religions have concern for the oppressed and indigents.<sup>3</sup>

The issue of social welfare which socio-economic rights represent has also been a subject of philosophical analysis and political theory in the 18<sup>th</sup> and 19<sup>th</sup> centuries by various thinkers like Karl Max, Immanuel Kant and John Rawls.<sup>4</sup> Later the Great Economic Depression that hit the Western world in the 1930s has made imperative the need

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<sup>1</sup> Trubek, David M., Economic, Social and Cultural Rights in the Third World: Human Rights and Human Needs Program, in, Meron, Theodor(ed.), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford, 1984, p.205

<sup>2</sup> Steiner, H. And Alston, P. *International Human Rights in Context: Law, Policy and Morals*, Second Edition, Oxford University Press, New York, 2000, p.242.

<sup>3</sup> Shupack, M., The Churches and Human Rights: Catholic and Human Rights Views as Reflected in Church Statements, *Harvard Human Rights Journal* (6) 1993, p. 127.

<sup>4</sup> See Steiner, H. And Alston, P., *Supra* note 2, p. 242.

to focus on social protection turning the liberal state based on Adam's *laissez Faire* to welfare state.

We have also actual case where activists of social justice and social welfare tried to realize and disseminate the same idea. The introduction of social insurance schemes in 1880s by Chancellor Bismarck in Germany was a land mark instance in this regard.<sup>5</sup> Personalities such as Robert Owen of England and Daniel le Grand of France in the early 19<sup>th</sup> century urged for the necessary measures to be taken to safeguard the health and interest of the working class and even took the initiative by their own.<sup>6</sup>

Although legislations relating to the protection of workers began to be issued as early as 1802 in England and in France in 1841<sup>7</sup> a major breakthrough in the development of socio-economic rights took place in 1919 when the International Labour Organization was established by the Treaty of Versailles with the responsibility of achieving social justice, not just out of concern for human dignity but only to bring lasting peace.

The first formal recognition of economic, social and cultural rights per se at the international level happened in 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights(UDHR)<sup>8</sup>, an instrument that contain all the gamut of human rights. However, it was with the adoption of the International

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<sup>5</sup> Ibid; See also Eide, A., *Economic, Social and Cultural Rights*, in, Symonides, J., (ed.), *Human Rights: Concepts and Standards*, UNESCO Publishing, Aldershot, Burlington USA, Singapore, Sydney, 2000, p. 114.

<sup>6</sup> Eide A., *Supra* note 5, p. 114; See also Servais, J. M., *International Labour Law*, Kluwer Law International, The Hague, 2005, pp. 21-22.

<sup>7</sup> Servais, J. M., *Supra* note 6, pp. 21-22

<sup>8</sup> Universal Declaration of Human Rights, 1948, reprinted in Brownlie, I., and Goodwin-Gill, G.S., (Editors), *Basic Documents on Human Rights*, 5<sup>th</sup> ed, Oxford University Press, Oxford, New York, 2006, pp. 24-28.

Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>9</sup> in 1966 that we have an internationally legally binding (only for states who ratify) instrument concerning socio-economic rights. It is important, however, to note that normative statements concerning economic, social and cultural rights are not limited only in the text of the 1966 ICESCR. In addition to the ICESCR, the Convention on the Rights of the Child (CRC)<sup>10</sup>; the International Convention on the Rights of Migrant Workers and Their Families (ICRMWF)<sup>11</sup>; the Convention on the Elimination of All Forms of Racial Discrimination (CEARD)<sup>12</sup>; Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)<sup>13</sup>; and even the International Covenant on Civil and Political Rights ICCPR<sup>14</sup> (on rights of the child and family rights) embody various socioeconomic rights. In addition to this universal instruments, regional instruments like the American Declaration of the Rights and Duties of Man<sup>15</sup>; the American Convention on Human Rights<sup>16</sup>; the Additional Protocol to the American Convention on

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<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 348-357.

<sup>10</sup> Convention on the Rights of the Child, 1989, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 429-447.

<sup>11</sup> International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 1990, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 462-495.

<sup>12</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 400-404.

<sup>13</sup> Convention on the Elimination of All forms of Discrimination Against Women, 1979.

<sup>14</sup> International Covenant on Civil and Political Rights, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 375-378.

<sup>15</sup> American Declaration of the Rights and Duties of Man, 1948.

<sup>16</sup> American Convention on Human Rights, 1969, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 933-954.

Human Rights in the Area of Economic, Social and Cultural Rights<sup>17</sup>; the African Charter on Human and Peoples' Rights<sup>18</sup>; and the European Social Charter<sup>19</sup> as revised in 1996 incorporate a myriad of social, economic and cultural rights.

As pointed out in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>20</sup>, just like other human rights, the economic, social and cultural rights incorporated in the various instruments impose three fold obligations on states parties to the respective instruments: the obligations to respect, protect and fulfill.<sup>21</sup> Accordingly, the state has to refrain from acting to the prejudice of the free enjoyment of socio-economic rights; has to protect the enjoyment of the rights from interference by third parties and fulfill all what is necessary to enable the full enjoyment of economic, social and cultural rights. As indicated in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights<sup>22</sup> and well explained in General Comment 3<sup>23</sup> of The Committee

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<sup>17</sup> Additional protocol to the American Convention on human Rights in the Area of Economic, Social and Cultural Rights, 1988, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 955-962.

<sup>18</sup> African Charter on Human and Peoples' Rights, 1981, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 1007-1020.

<sup>19</sup> European Social Charter, 1961, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 645-661.

<sup>20</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Reprinted in *Human Rights Quarterly* (20), 1998, p.691.

<sup>21</sup> See also Nowak, M., *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden/Boston, 2003, p. 48

<sup>22</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, Reprinted in *Human rights Quarterly* (9), 1987, pp.122-135, Para. 17.

<sup>23</sup> Committee on Economic, Social and Cultural Rights: Report on Fifth Session, Supp. No.3, Gen. Comment 3, U.N. Doc. E/1991/23 (1990), at WWW <<http://www.ohchr.org/english/bodies/cescr/comments.htm>> (Consulted 16 Nov. 2008)

on Economic, Social and Cultural Rights (CESCR), in discharging these obligations states have to use all appropriate means, including legislative, administrative, judicial, economic and educational measures as appropriate depending on the nature of the right. Thus obligations of conduct and obligations of result are called of the state for the full realization of socio-economic rights. An obligation of conduct refers to a specific action/omission required of a state, whereas an obligation of result obliges a state to take action/omission, whichever is appropriate, in order to achieve a specific result vital for the enjoyment of socioeconomic rights.<sup>24</sup>

Despite the existence of adequate international standards on economic, social and cultural rights actual enforcement, however, remains unsatisfactory and fraught with obstacles. The main problem to the implementation of socioeconomic rights seem to emerge from the reactionary and unwitting attitude that economic, social and cultural rights are not enforceable legal rights, which prevailed for a long time among scholars, commentators and national governments.<sup>25</sup> As result it was widely held that socio-economic rights are non justiciable or no judicial vindication of those rights was possible, thus estranging them from the principal means of enforcement in times of violation. There are various arguments that are forwarded to show that indeed economic, social and cultural rights are not enforceable legal rights.

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<sup>24</sup> Weissbrodt, D., Fitzpatrick, J., and Newman, F., *International Human Rights: Law, Policy, and Process*, 3<sup>rd</sup> Edition, Anderson Publishing Co., Cincinnati, Ohio, 2001, pp. 89-90.

<sup>25</sup> Nowak, *Supra* note 21, p.81; Also Eida, *Supra* note 5, p.112; Tinta, M.F., Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond traditional Paradigms and Notions, *Human rights Quarterly*(29), 2007, pp. 432-433; Kunnemann, R., A Coherent Approach to Human Rights, *Human rights Quarterly*(17), 1995, p. 333.

The first point forwarded to explain that socioeconomic rights are not enforceable legal rights is that these rights are merely aspirational or programmatic principles without any serious obligation and as such they are not human rights properly speaking.<sup>26</sup> This argument is based on Article 2(1) of the ICESCR which provides for 'progressive realization' of the rights provided for in the covenant.<sup>27</sup> This phrase, and indeed the whole of Article 2(1) of the ICESCR has led many to hold the position that economic, social and cultural rights do not impose an immediate obligation but are guidelines for state action in areas of social welfare.

Even in the event that their legally binding nature is admitted it is maintained that they impose positive obligation on the state which oblige the state to carryout costly activities.<sup>28</sup> This means it will be in the discretion of the state to identify priorities and take action within the means available at its disposal, which in effect, means that it would not be possible to demand enforcement in the event of violation of these rights.

The other argument that is forwarded to show that socio-economic rights are not enforceable legal rights is the alleged indeterminate and vague content of the rights. This point in part has to do with the general way in which the rights are stated in the ICESCR. It is also often stated that "they are by nature, open-ended and indeterminate, and that there is lack of conceptual clarity about them."<sup>29</sup> It is often asserted that it will be difficult for judges to decide when such rights have been violated.<sup>30</sup>

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<sup>26</sup> Kunnemann, *Supra* note 25, p.333; Also Nowak, *Supra* note 21, p.81.

<sup>27</sup> International Covenant on Economic, Social and Cultural rights, *Supra* note 9.

<sup>28</sup> Tinta, *Supra* note 25, p. 433.

<sup>29</sup> Dennis, M.J., and Stewart, David, P., Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing, and Health? Cited in Wiles,E., Aspirational



These and other arguments are made to show that economic, social and cultural rights are not enforceable legal rights. Although, it is not the purpose of this short essay to dig exhaustively in to these arguments and show their pitfalls, it is possible to point out that they are based on an artificial classification of human rights and misunderstanding of the nature of obligations that human rights give rise to the state.

There is this traditional artificial classification of human rights in to civil and political on the one hand and economic, social and cultural on the other hand. This tradition of classifying human rights in to two groups goes back to the time of the drafting of the ICCPR & ICESCR. At the time when the world started to recognize human rights in 1948 all the rights were spelt out in a single document- the UDHR- reflecting the natural interdependence and indivisibility of human rights. Later as the world proceed to set out the details of the rights and the corresponding obligation of states in the form of covenant, a decision was made to divide them in to two sets. While civil and political rights were made to form one group, a separate set of rights called economic, social and cultural rights were put in to a separate document. In fact the classification was not watertight. Some human rights (eg. The rights of minorities) are found in both covenants, while typical social rights (eg. Family right & the right of the child) are found incorporated in the ICCPR. The division which has complicated reasons behind<sup>31</sup> has affected the way the world looked at and worked towards the implementation of human rights in the second half of the 20<sup>th</sup> century.

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Principles or Enforceable Rights? The Future for Socioeconomic Rights in National Law, *American University International Law Review* (22:35), 2006, p.50.

<sup>30</sup> Wiles, *Supra* note 29, p. 50.

<sup>31</sup> Trubek, *Supra* note 1, p. 211.

Today, there is an increasing volume of scholarly opinion against this classification of human rights.<sup>32</sup> It is now widely upheld that such classification is against the very nature of human rights which are indivisible, interdependent, and interrelated. After all, it should be noted that, as outlined in the preamble to both covenants, the moral foundation of human rights is the human dignity inherent in all human beings. So it does not make sense to create differentiation and division of the norms derived there from. Indeed as Tinta has succinctly put it “as human beings exist in reality as a whole, [human] rights are intertwined and interwoven, existing as living organisms.”<sup>33</sup> And it is that same fallacy that defied this truth that is denounced at the Vienna Declaration and Program of Action.<sup>34</sup>

Dividing the undivided, interrelated and interdependent was not the only problem. Once human rights were classified in to civil and social they were ascribed different nature and legal character. It is said that civil and political rights impose negative obligation on the state requiring simply refraining from interfering in the exercise of the rights. Thus it was held civil and political rights are immediately applicable legal rights.<sup>35</sup> On the other hand economic, social and cultural rights are considered as imposing positive obligation requiring the state to take positive action. This led to the denial of the fact that economic, social and cultural rights are legal rights.<sup>36</sup> Instead it was taken for granted that socio-economic rights are merely

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<sup>32</sup> Tinta, *Supra* note 25, p. 435; Kunnemann, *Supra* note 25, pp. 325-331; Koch, I. E., Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective, *The International Journal of Human Rights*(10), 2006, p. 406.

<sup>33</sup> Tinta, *Supra* note 25, p. 435.

<sup>34</sup> World Conference on Human Rights: Vienna Declaration and Programme of Action, 1993, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 138-163.

<sup>35</sup> Tinta, *Supra* note 25, pp. 432-433.

<sup>36</sup> *Id.* P. 432.

aspirational principles for progressive realization subject to resource availability. This has served as pretext for government ambivalence.

This discourse, however, is based on a misunderstanding of the nature of the obligation that human rights give rise to. In legal theory it is well accepted that human rights indivisibly give rise to obligation to *respect, protect and fulfill*<sup>37</sup> which, speaking in the language of positive/negative means that all human rights impose positive as well as negative obligation. Yes it is true that there are socio-economic rights whose realization requires time and the adoption of policies and programs, but there are also a lot of them that can be guaranteed for citizens immediately.<sup>38</sup>

To sum up, the artificial separation of human rights in to civil and social and the different characterization they are given has been the central problem in the implementation of socioeconomic aspect of human rights. The conceptual confusion in this area is now getting cleared up by activists and commentators to some extent alleviating the problem. This is evident from the developing jurisprudence in the area of socio-economic rights adjudication in national and international (regional) judicial bodies. Apart from a direct invocation of socio-economic rights, addressing socio-economic issues through civil and political rights has become an important strand in the endeavour to address the problem in the implementation of economic, social and cultural rights. An examination of the plausibility and efficacy of this kind of approach will follow.

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<sup>37</sup> Nowak, *Supra* note 21, p.48.; Koch, *Supra* note 32, p. 406.

<sup>38</sup> The list of these rights is available at General Comment 3 of the Committee on Economic, Social and Cultural Rights, *Supra* note 23, Para. 5.

### **III. An Integrated Approach as an Alternative Solution to the Problem in the Implementation of Socio-economic Rights**

#### ***A. Nature of the Integrated Approach***

The integrated approach is all about integrating (bringing into) socio-economic rights in the interpretation and application of civil and political rights. The integrated approach requires using the dynamic process of interpretation and judicial activism in delineating the scope of civil and political rights in a fashion that would be inclusive of economic, social and cultural rights.

The validity of this approach lies in the indivisible, interrelated and interdependent nature of human rights. The implication of the notion of indivisibility of human rights is that we cannot dissect the right to life from the right to health or the right to food. It does not give sense to say a person that you will not be tortured but wait starved. Political and civil rights cannot be consumed or at best cannot make sense without education or means of survival. The nature of human rights is such that it is difficult to address a single right in isolation without having implication or repercussion on other rights. The most striking truth in relation to this is that the various rights appear interrelated in real cases. This creates good opportunity to approach the cases from the perspective of civil and political rights rather than from the point of the contentious economic, social or cultural right.

An important point worth noting, as revealed from the jurisprudence of national courts and treaty bodies, is the fact that the various socio-economic rights seem to be more akin to the right to life. If an economic or social right is discussed in a civil and political rights forum, almost invariably it is done in relation to the right to life. This

may be because of the fact that the right to life “is the right from which all other rights flow.”<sup>39</sup>

Although far from being adequate, there are important developments in integrating socio-economic rights in to civil and political rights. Treaty bodies as well as national judicial organs are increasingly giving effect to economic, social and cultural rights through interpretation of civil and political rights. Surprisingly, this is happening in many parts of the world including the developing world where the issue of resource availability (management?) is often mentioned as a problem for the realization of socio-economic rights. The writer will now turn to examine the developing jurisprudence in this area. It is just an illustrative approach to show how it works and how useful it is.

### *B. The Integrated Approach in Action*

#### *Lesson from the Works of the Human Rights Committee (HRC)*

The Human Rights Committee (hereinafter referred to as HCR) was established by Article 28 of the ICCPR to monitor the implementation of the Covenant. The Committee is composed of 18 experts in the field of human rights who are nominated by and elected in the meeting of states parties to the covenant but who act in an independent capacity.<sup>40</sup>

The HRC performs a number of activities with a view to discharging its responsibility of monitoring the effective implementation of the covenant. The most important of these activities are the consideration of periodic reports submitted by states parties to the Covenant;<sup>41</sup> the adoption of General Comments that serve as an

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<sup>39</sup> Jayawickrama, N., *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, p.243.

<sup>40</sup> ICCPR, *Supra* note 14, Arts. 28 & 30.

<sup>41</sup> ICCPR, *supra* note 14, Art. 40.

interpretative instrument in the application of the Covenant by states parties to the Covenant;<sup>42</sup> and the consideration of individual communications on alleged violation of the Covenant under the procedure established by Optional Protocol 1 to the ICCPR.<sup>43</sup> The HRC has used these major tasks as an opportunity to expound the contents of the rights contained in the ICCPR. In this way the HRC has developed an important body of jurisprudence that has an important direct effect to the enforcement of socio-economic rights.

The HRC in its two general comments<sup>44</sup> it issued on the right to life under Article 6 of the ICCPR has emphasized that the right to life should not be interpreted narrowly. The HRC in its General Comment 6 pointed out that<sup>45</sup>

*“[t]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures [...] especially[...] adopting measures to eliminate malnutrition and epidemics.”* (Emphasis added)

This gives even more sense when we realize the fact that ‘more and more people die on account of hunger and disease than are killed’.<sup>46</sup> Moreover, as it is widely accepted that the right to life is more than mere existence,<sup>47</sup> it is appropriate to read into this right an

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<sup>42</sup> ICCPR, *Supra* note 14, Art. 40(4)

<sup>43</sup> Optional Protocol to the International Covenant on Civil and Political Rights, 1966, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 375-378.

<sup>44</sup> Human Rights Committee, *General Comment 6, Article 6* (sixteenth Session, 1982) and *General Comment 14*(Twenty – third Session, 1984), at WWW

<<http://www.ohchr.org/english/bodies/hrc/comments.htm> > (Consulted 26 November 2007).

<sup>45</sup> General Comment 6, *Supra* note 44, Para.5.

<sup>46</sup> Dinstein, y., *The Right to Life, Physical Integrity and Liberty*, in Henkin, L.,(Editor), *The International Bill of Rights*, Colombia University Press, New York, 1981, p.115.

<sup>47</sup> Jayawickrama, *Supra* note 39, pp. 256-260.

entitlement to basic human needs like those covered by socio-economic rights.

Another set of rights under the ICCPR which the HRC considers as having economic, social and cultural dimension are the rights of the child under Article 24. In its General Comment 17 the HRC noted that the measures necessary to ensure that children fully enjoy the other rights enunciated in the ICCPR economic, social and cultural such as economic or social measure to reduce infant mortality and to eradicate malnutrition.<sup>48</sup> In the same General Comment the HRC has indirectly indicated the intimacy between cultural right and freedom of opinion and expression when it remarks that<sup>49</sup>

*“...every possible measure should be taken to [...] provide them [children] with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression...”*

In its concluding observation of the fourth periodic report of Canada the HRC pointed out that “homelessness has led to serious health problems and even to death” and recommended the state party “to take positive measures required by Article 6 to address this serious problem.”<sup>50</sup>

In *E.H.P v Canada* which concerned a claim that disposal of radio-active nuclear waste in Port Hope, Ontario, causes cancer and genetic defect threatening the life of present and future generation of

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<sup>48</sup> Human Rights Committee, General Comment 17, Article 24(thirty-fifth Session, 1989), para. 3, at WWW

<<http://www.ohchr.org/english/bodies/hrc/comments.htm> > (Consulted 27 November 20 07).

<sup>49</sup> *Ibid*

<sup>50</sup> Human Rights Committee, *Concluding Observation on Fourth Periodic Report of Canada* (1999), Para. 12, at WWW

<<http://tb.ohchr.org/default.aspx>> (Consulted 27 November 2007).

residents, the HRC in its admissibility decision noted that “the present communication raises serious issues with regard to the obligation of states parties to protect human life”<sup>51</sup> implying that the protection of the right to life cannot be meaningful without the protection of the right to health of the individual human beings.

It may be because of the fact that individual complaint under the Optional Protocol is “a deficient mechanism to address socio-economic deprivation”<sup>52</sup> the instances where the HRC addressed socioeconomic issues under the individual complaint procedure are rare. Instead the HRC has addressed the socio-economic dimension of the right to life in the several of the Concluding Observations it made on states parties periodic reports.<sup>53</sup> One thing, however, is clear from these illustrative works of the HRC: socio-economic rights are an integral part of civil and political rights and that it is possible to give effect to socio-economic rights through the interpretation of civil and political rights.

### *Lesson from the Inter-American System for the Protection of Human Rights*

The Inter-American Court of Human Rights and the Inter-American Commission of Human Rights are the principal institutions of the Inter-American Human Rights System. These institutions address issues of human rights violation in their contentious procedure under the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.

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<sup>51</sup> Human Rights Committee, *E.H.P V Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984), at WWW

<<http://www1.umn.edu/humanrts/undocs/html/67-1980.htm> > (Consulted 28 November 2007).

<sup>52</sup> Joseph, F. et al, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2<sup>nd</sup> edition, Oxford University Press, Oxford, New York, 2004, p.186.

<sup>53</sup> *Ibid*



In a number of their decisions they rendered on issues of violation of human rights and compensation thereof, both the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights have demonstrated the justiciability of economic, social and cultural rights. And a lot of this is done through creative interpretation of civil and political rights putting in full light the original indivisible, interdependent and interrelated nature of human rights.

The Inter-American Court of Human Rights has adopted creative approach in its endeavour to address the justiciability of economic, social and cultural rights through the interpretation of civil and political rights. The dynamism of the court's approach in this regard is seen from the way it applied general principles of international law on interpretation of international law in a bid to tackle the problem surrounding the justiciability of socio-economic rights. In its advisory opinion in relation to the right to information on consular assistance, the court noted that<sup>54</sup>

*"...the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article 31), but also the system of which it is part (paragraph 3 of Article 31)."*

This, in effect, and as hinted out by the Court, means that not only all the relevant instruments of the regional Inter-America System, but also other international standards like the ICCPR and other instruments has to be taken into consideration as they constitute the system within which the Inter-American System of Protection of Human Rights is inscribed.<sup>55</sup> In explaining the rationale for adopting

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<sup>54</sup> Inter-American Court of Human Rights, Advisory Opinion, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, OC-16/99, Inter-Am. Ct. H.R.(Ser.A) No.16, para.113, at WWW <<http://www.corteidh.or.cr/opiniones.cfm>> (Consulted 29 November 2007).

<sup>55</sup> Tinta, *Supra* note 25, p.443.

this kind of approach the Court noted the importance of an 'evolutive interpretation' in international human rights law as it has been instrumental in the development of this body of law.<sup>56</sup>

Having this in mind, the court had a number of occasions to address complicated cases. In one of its landmark decisions which concerned street children in Guatemala who were victims of violence, including torture and killing by state agents,<sup>57</sup> the court had the opportunity to apply its dynamic method of interpretation to give effect to economic, social and cultural rights by approaching the case from the vantage point of civil and political rights. The Court, which analyzed the case broadly in light of the American Convention on Human Rights and the Convention on the Rights of the child as well as the General Comments of the Human Rights Committee, found double transgression of the right to life. In the words of the Court:<sup>58</sup>

*"First, such states do not prevent them [the children] from living in misery [in the street], thus depriving them of the minimum conditions for dignified life and preventing them from the 'full and harmonious development of their personality, [...]'. Second, they violate their physical, mental and moral integrity and even their lives."* (Emphasis added)

In paragraph 144 of the same case the Court emphatically stated that

*"In essence, the fundamental right to life includes not only the right of every human being not to be deprived of*

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<sup>56</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, *Supra* note 54, Para. 114.

<sup>57</sup> Inter-American Court of Human Rights, Reparations and Judgements, *Villagrán-Morales et al. v. Guatemala (Case of the "Street Children")*, Judgment of May 26, 2001. Series C No. 77, at WWW

<<http://www.corteidh.or.cr/casos.cfm>> (Consulted 29 November 2007).

<sup>58</sup> *Id.*, Para. 191.

*his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.” (Emphasis added)*

The Court, which seem to have used the terms ‘dignified life’ ‘decent life’ ‘dignified existence’ and ‘decent condition of life’ interchangeably, pronounced education and health care as the core elements of the notion as it applied to children, in an advisory opinion it delivered upon a request by the Inter-American Commission of Human Rights.<sup>59</sup> In particular it highlighted on the importance of the right to education as it “contributes to the possibility of enjoying a dignified life...”<sup>60</sup>

The point that one can draw from this work of the Inter-American Court is that the right to life is not about mere existence as an organic matter. It is more than that and encompasses the right to live in dignity which requires the fulfillment of basic economic, social and cultural needs. Consequently, states have the obligation to provide and ensure the enjoyment of basic social, economic and cultural needs as part of their international obligation to ensure the right to life for their subjects.

In another important decision the Court made in the case of *Yakye Axa Community v. Paraguay*<sup>61</sup>, it interpreted Article 4(the right to life) and Article 21(the right to property) of the American Convention on Human Rights to address the economic, social and cultural rights of

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<sup>59</sup> Inter-American Court of Human Rights, Advisory Opinion, *Juridical Condition and Human Rights of the Child*, OC-17/02, August 28, 2002. Series A No. 17, Para. 80,84,86.

<sup>60</sup> *Id.* Para. 84.

<sup>61</sup> Inter-American Court of Human Rights, Merits, Reparations and Costs, *Case of the Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005. Series C No. 125, at WWW

<<http://www.corteidh.or.cr/casos.cfm> > (Consulted 30 November 2007).

the indigenous community affected by denial of access to land and basic rights on it.

In the case of *Juvenile Re-education Institute v. Paraguay*<sup>62</sup> the same Court has noted that the state “in its role as the guarantor of the right to life” has an inescapable obligation to provide individuals with “the minimum conditions befitting their dignity as a human being,”<sup>63</sup> which the Court indicated that in the case of minors under state custody it includes education and health care<sup>64</sup> which the court found unfulfilled in the particular case. The Court reiterated the point further and declared that the actions that a state is called upon to take to give effect to its obligations under Article 19 of the American Convention of Human Rights (which deals with the rights of the child) goes beyond mere civil and political rights and include economic, social and cultural aspects that form part of the right to life<sup>65</sup>.

### *Lesson from the European Court of Human Rights*

The European Court of Human Rights (ECHR) is the leading European organization for the protection and promotion of human rights in the Council of Europe. The Court is established by The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)<sup>66</sup> to ensure observance of the obligations undertaken by European states parties to the Covenant and the Protocols thereto.

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<sup>62</sup> Inter-American Court of Human Rights, Decisions and Judgements, *Case of the Juvenile Re-education Institute v. Paraguay*, Judgment of September 2, 2004. Series C No. 112, at WWW <<http://www.corteidh.or.cr/casos.cfm>> (Consulted 30 November 2007).

<sup>63</sup> *Id.*, Para. 159.

<sup>64</sup> *Id.*, Para. 161.

<sup>65</sup> *Id.*, Para. 149.

<sup>66</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, together with Protocols nos. 1, 4, 6, and 7 as amended by Protocol no. 11, reprinted in Brownlie and Goodwin-Gill, *Supra* note 8, pp. 610-623.

Although the Convention focuses on such civil and political rights as the right to life, liberty, security of the person, privacy, freedom of conscience and religion, peaceful assembly, free association, and fair trial, the ECHR has been able to read socio-economic elements in to these rights through its doctrine of 'evolutive interpretation,' a method of interpretation that the court adopted for a long time in order to fit the Convention to new conditions occurring overtime. In this regard the Court in *Tyrer v. United Kingdom*<sup>67</sup>, *Marckx v. Belgium*<sup>68</sup>, *Loizidou v. Turkey*<sup>69</sup> among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.

The Court has utilized this approach to integrate socio-economic rights with civil and political rights. For instance in the case of *Airey v. Ireland*<sup>70</sup> the Court after noting that many of the rights contained in the European Convention on Human Rights have implication of social or economic in nature and as such there is no water-tight division separating the former from the later, decided that

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<sup>67</sup> European Court of Human Rights, *Tyrer v. United Kingdom* judgment of 25 April 1978, Para. 31, at WWW

<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3717441&skin=hudoc-en&action=request>> (Consulted 29 November 200).

<sup>68</sup> European Court of Human Rights, *Marckx v. Belgium*, judgment of 13 June 1979, Para. 41, at WWW

<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3717441&skin=hudoc-en&action=request>> (Consulted 29 November 200).

<sup>69</sup> European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objections) judgment of 23

March 1995, Para. 71, at WWW

<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3716814&skin=hudoc-en&action=request>> (Consulted 29 November 200).

<sup>70</sup> European Court of Human Rights, *Airey v. Ireland*, Judgment of 9 October 1979, at WWW

<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3722577&skin=hudoc-en&action=request>> (Consulted 29 November 200).

the state should provide free legal aid even in civil law suits (which is a social benefit, in the instant case a divorce proceeding) when it is necessary to ensure effective access to justice. The Court passed this decision despite a provision in the European Convention on human Rights which provide for free legal aid only for persons charged with criminal offence.<sup>71</sup> The idea of the Court behind this decision is that as the Convention “...is designed to safeguard the individual in a real and practical way”<sup>72</sup> on matters covered by it, it should be interpreted to that end even if that may have the effect of extending its scope into the sphere of social and economic rights. If a right has to be protected meaningfully that is the way it should be done. And that is perfectly in line with Article 31(1) and 31(2) (c) of the Vienna Convention on the Law of Treaties<sup>73</sup> which provide that the terms of a treaty must be interpreted in their context and in line with object and purpose of the treaty.

Similarly, in the case of *Lopez Ostra*<sup>74</sup> the Court had the opportunity to decide whether the measure taken by Spain to protect the right to respect for home and family (a right under Article 8 of the European Convention on Human Rights) against environmental pollution from a waste treatment plant situated twelve meters from the applicant’s house was adequate. The Court found that the state has not afforded redress for the nuisance and inconvenience to which the applicant was suffering. Here clearly the Court goes beyond a mere civil right issue under article 8 to a social sphere, that is the right to

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<sup>71</sup> European Convention on Human Rights, *Supra* note 66, Article 6(3) (c).

<sup>72</sup> Airey case, *Supra* note 70, Para. 26.

<sup>73</sup> Vienna Convention on the Law of Treaties, 1969, at WWW

<[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) >  
(Consulted 30 November 2007).

<sup>74</sup> European Court of Human Rights, *Lopez Ostra v. Spain*, Judgment of 9 December 1994, at WWW

<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3727060&skin=hudoc-en&action=request> > (Consulted 30 November 2007).

health, and this is warranted by the need to protect the right in real and practical way giving full meaning to the right.

In yet another important decision of the Court in the case of *D V. The United Kingdom*<sup>75</sup> the provision of the European Convention on Human Rights on prohibition of torture or inhumane or degrading treatment or punishment (Article 3) was extended to cover the situation of an AIDS victim person under expulsion to a country that cannot provide treatment and comfort to an AIDS patient. The effect of the decision is that the United Kingdom would have to provide the cost of treatment and comfort of the patient for the time period he has yet to live, the clear implication of which is that the fulfillment of the right to be free from inhumane treatment requires the fulfillment of social elements, like the right to health care in this particular case.

### *Lesson from National Courts*

The integrated approach to the enforcement of economic, social and cultural rights through civil and political rights has as well been adopted by many national judicial organs. And that is exactly the mystery which enabled the Indian Supreme Court to enforce series of socioeconomic rights declared otherwise as mere Directive Principles of State Policy (DPSP) in Part IV the Indian constitution and in the face of an express constitutional provision prohibiting their justiciability.<sup>76</sup>

The Supreme Court has in a number of cases interpreted civil and political rights (particularly the right to life) in such a way as to include economic, social and cultural human needs. It was in the

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<sup>75</sup>European Court of Human Rights, *D v. The United Kingdom*, Judgment of 2 May 1997, at WWW

<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3728576&skin=hudoc-en&action=request>> (Consulted 30 November 2007).

<sup>76</sup>Constitution of India, 1950, Article 37, at WWW

<<http://indiacode.nic.in/coiweb/welcome.html>> (Consulted 2 December 2007).

famous case of *Francis Coralie Mullin* that the Court boldly declared that,<sup>77</sup>

*“The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms [...].”*

Against this ground work the Supreme Court has continued enforcing different socio-economic rights in a number of decisions it made since then through its broad interpretation of the right to life. For instance in the case of *Olga Tellis v. Bombay Municipal Corporation*<sup>78</sup> the Supreme Court held that right to life and personal liberty required that pavement dwellers be provided with alternative accommodation before eviction.

The South Africa Constitutional Court is another national judicial organ that adopted the integrated approach to address social inequality that is entrenched in the South African society. The South African Constitution incorporates a number of legally enforceable socio-economic rights together with the generic obligation that “the state must take reasonable legislative and other measures, within its available resource to achieve the progressive realization of these rights.”<sup>79</sup> The Constitutional Court has used the integrated approach to

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<sup>77</sup> Supreme Court of India, *Francis Coralie Mullin V. The Administrator, Union Territory of Delhi* (1981), at WWW

<<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=10150> > (Consulted 2 December 2007).

<sup>78</sup> Supreme Court of India, *Olga Tellis v. Bombay Municipal Corporation* (1985), at WWW

<<http://www.judis.nic.in/supremecourt/qrydisp.aspx?filename=9246> > (Consulted 2 December 2007)

<sup>79</sup> Constitution of the Republic of South Africa, 1996, Article 26(2) and Article 27(2), at WWW



set aside the argument of authorities that they are fulfilling their obligation progressively, and gave effect to socio-economic rights in specific cases. For instance in one of its land mark decisions in the case of *Government of the Republic of South Africa and Others v. Grootboom* the Court held that human dignity, freedom and equality guaranteed by the constitution requires that housing be provided immediately to the most needy in crisis situation.<sup>80</sup>

Although it is just like a droplet in the bucket in light of the problem, treaty bodies and judicial organs around the globe are using the integrated approach to give effect to economic, social and cultural rights. The cross reference to the jurisprudence of one another is striking feature of this development. It is interesting to see the Inter-American Human Rights Court and the Human Rights Committee referring to the jurisprudence of the European Court of Human Rights and the South African Constitutional Court referring to the work of the Indian Supreme Court.

This does not, however, mean that this approach has got no limitations. In the first place it does not provide a complete solution to the problem of legal enforceability of socioeconomic rights. The justiciability of socioeconomic rights through the integrated approach applies only where these rights appear as necessary fulfillment elements in civil right cases.<sup>81</sup> In other words if it cannot be show that a person's socioeconomic claim relates to some sort of civil or political right, the integrated approach cannot give a solution. However wide

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<<http://www.constitutionalcourt.org.za/site/theconstitution/english.pdf>

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(Consulted 2 December 2007)

<sup>80</sup> Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v. Grootboom*, At WWW

<<http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases>

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(Consulted 3 December 2007)

<sup>81</sup> Koch, I.E., The Justiciability of Indivisible Rights, *Nordic Journal of International Law*(72), 2003, p. 23

we may stretch civil and political rights there are socioeconomic rights that cannot in any event be integrated into it. Mention can be made of the right to take part in cultural life, protection of the family and freedom of marriage that hardly form part of fulfillment elements in civil or political right after stretching them to their conceptual limit. Even more badly, the criteria of courts for determining whether a given socioeconomic claim forms part of the fulfillment elements of a given civil or political right is not predictable.<sup>82</sup>

#### **IV. Concluding Remarks**

As pointed out in the introductory part, the purpose of this essay is to show the integrated approach as an alternative solution to the problem that thwarted the enforcement of economic, social and cultural rights embedded in international law. Accordingly, it has been shown that it is possible to enforce these set of rights by integrating them in the interpretation of civil and political rights. The fact that human rights by nature are interrelated, interdependent and indivisible lends this approach legal validity although the effective utilization of it depends on judicial activism and creativity. Practice has also shown that this approach works out properly except that it is not widely used.

It should, however, be borne in mind that while its immense potentials cannot be ignored the integrated approach has its own limitations which cannot be rectified. So, it may only help but cannot be the ultimate solution to the problem of non justiciability that interwoven the implementation of socio-economic rights.

The unavoidable limitations of the integrated approach make us to be aware that accepting socio-economic elements in civil rights cases is different from accepting socio-economic rights as such. This being the truth it is important to remember the importance of further cultivating and developing the international movements to clear up the

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<sup>82</sup> *Ibid*

confusion as to the legal nature of socio-economic rights. In this regard introducing individual and collective complaint procedure under the ICESCR will have an important effect.