PROBLEMS OF COMPLIANCE: INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A CASE STUDY OF INDIA

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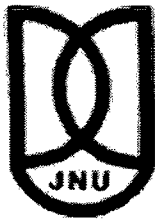

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CERTIFICATE

This is to certify that the dissertation entitled **"Problems of Compliance: International Covenant on Economic, Social and Cultural Rights: A Case Study of India"** submitted by **Omprakash Dash** in partial fulfillment of the requirements for the award of the degree of **Master of Philosophy** of this University is his original work according to the best of our knowledge and may be placed before the examiners for evaluation.

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Dedicated

To

My Parents

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Omprakash Dash

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CONTENTS

ABBREVIATIONS

CESCRC	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
DPSP	Directive Principles of State Policy
ECOSOC	Economic and Social Council
HRC	Human Rights Committee
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee on Red Cross
IJIL	Indian Journal of International Law
ILO	International Labour Organisation
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission
OHCHR	Office of the UN High Commissioner on Human Rights
SWG	Sessional Working Group
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Educational and Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
WHO	World Health Organisation

PREFACE

The twentieth century witnessed many land-marking break-throughs in the field of human rights movement. It not only succeeded in establishing internationally agreed standards on a broad range of human rights, but also created certain set of institutional arrangements under the UN auspices, for monitoring the compliance with those standards.

However, there are major challenges confronting the UN human rights treaty regime, particularly in the area of economic, social and cultural rights. The problems are mostly emanating from the declining support for multilateralism and deep-seated ambivalence on the part of many governments when it comes to the strengthening of mechanisms with the apprehension that it would enhance their accountability for compliance with their international human rights obligations.

Though widely ratified, the ICESCR is made partially defunct due to the drastic silence of the state- parties to their reporting obligations. With the proliferation of increasingly detailed and technical human rights instruments, the preparation, presentation and consideration of periodic reports have become a burdensome if not impossible task for many states. This task is particularly problematic for countries that do not always have the resources they need to prepare reports that meet the

quality standards demanded by the treaty bodies. As a result there is a huge backlog of periodic reports to be submitted by the state parties. And the situation is quite disheartening in the case of ICESCR.

The problems are manifold. In Philip Alston's view, these larger issues include, the wholly inadequate funding of the system, the reluctance of most governments to increase the effectiveness of the procedures, the use of reservations in an effort to ensure the domestic marginality of the treaties, the lack of expertise and the questionable independence of some committee members, and the inadequate secretariat follow-up after the 'concluding observations'.

However, the present study does not restrict itself to detecting the causes of the reporting problems only, fairly it tries to give a holistic approach to the 'problems of compliance'. Here, I have tried to encompass as much factors as possible to look into the problems from all possible sides. The study has analyzed both- the problems in the UN system, as well as that of the state-parties. As far as the structure of this volume is concerned, chapter- I briefly overviews the evolution of UN human rights standards, where as chapter – II analytically details the ICESCR and its Committee. Chapter- III and IV discuss the problems of implementation of the Covenant and also suggest some possible solutions keeping in view the limitations that exist.

The protection and promotion of the economic, social and cultural rights are highly desirable because without it all other human rights become meaningless. In the third generation of human rights movement, with the Right to Development as sole target, the common mass of the world-family wait to see that the fuller implementation of all human rights will mark the achievement of the 21st century.

CHAPTER – I

AN OVERVIEW OF THE EVOLUTION OF THE UN HUMAN RIGHTS INSTRUMENTS

INTRODUCTION

Before the establishment of the United Nations, there were some significant developments in the field of human rights, in individual countries and in the world at large. The most prominent among them were Magna Carta of 1215, Pitition of Rights (1628), Bill of Rights (1689), French Declaration of the Rights of Man and of the Citizen (1789), American Bill of Rights (1791), The Treaties of Westphalia (1648), Congress of Vienna (1815), The Treaty of Washington (1862), The Declaration of Paris (1856), Geneva Conventions (1864 and 1906), Hague Conventions (1899 and 1907), The Virginia Declaration of Rights (1776), Declaration of St. Petersberg (1868), International Slavery Convention (1926) etc.[1] Moreover, the creation of the International Committee on Red Cross (ICRC) in 1864, and International Labour Organization in 1919, gave the human rights movement institutional base at an international level.[2]

EFFORTS UNDER THE AUSPICES OF THE UN:

Despite all this positive development in the pre-UN era, Human Rights Law did not emerge. The totalitarian regimes established in the 1920s and 1930s grossly violated human rights in their territories.

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[1] Leah Levin, *"Human Rights: Questions and Answer"*, NBT, India and UNESCO Publishing, 1998.
[2] *"Basic Facts About the UN"*, UN Department of Public Information, New York, 1998.

The Second World War brought about massive abuse of human life and dignity, and attempts to eliminate entire groups of people because of their race, religion on nationality. Thus it became clear that international instruments were needed to codify and protect human rights, because respect for them was one of the essential conditions for world-peace and progress.

This conviction got rightly reflected in, and reinforced by the charter of the United Nations signed on 26th June 1945. In the very preamble, the charter members express their determination to... "save the succeeding generation from the scourge of war..." and "... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of the men and women".[3] Not only this, Article-1 of the charter states that one of the aims of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' , thus enshrining the principle of non-discrimination.

Article 55 expresses a similar aim and by Article 56, all members of the UN 'pledge themselves to take joint and separate action in co-operation with the organisation, for the achievement of the purposes set forth in Article-55.[4] It was the result of the constant and determined lobbying of some 40 NGOs representing women, trade

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[3] *"Charter of the United Nations and Statute of the International Court of Justice"*, Department of Public Information, United Nations, New York – 10017, 1997. p. 3.
[4] Ibid, pp. 37-38.

unions, ethnic organisations and religious groups joined by the delegates, at the San Francisco Conference of 1945 that the human rights provisions got incorporated into the charter of the UN laying the foundation for the post-1945 era of international law making. The provisions of the charter have the force of positive international law, because the charter is a treaty and therefore a legally binding document.[5]

However, the charter does not specify the contents and scope of human rights, nor does it define any standard setting norms for this purpose. It also does not establish any specific mechanism to ensure the implementation of basic human rights in the member-states. So the early UN diplomacy keeping the need for proper mechanism and specification of human rights in view, the ECOSOC, under the provision of Article-68 of the UN Charter,[6] established in it's first session, the Commission on Human Rights in 1945.[7] The Commission was given the mandate of submitting proposals, recommendations and reports to the council (ECOSOC) regarding:

(i) An International Bill of Rights

(ii) International declarations on conventions on civil liberties, the status of women, freedom of information and similar matters.

(iii) The protection of minorities.

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[5] "Basic Facts about the UN", op. cit., pp. 217-218.
[6] Ibid, p. 44.
[7] *"The UN and Human Rights, 1945-1995"*, Department of Public Information, UN, New York, p.13.

(iv) The prevention of discrimination on grounds of race, sex, language and religion.

(v) Any other matter concerning human rights not covered by the other items.[8]

The first and foremost task before the Commission was to prepare an International Bill of Rights. And a major step in this regard was realized on 10th December 1948, when the General Assembly adopted the Universal Declaration of Human Rights (UDHR) as a common standard of achievement for all peoples and of all nations. The fundamental principles on which the declaration was based were:

- Human rights are based on the inherent dignity of every human-person.
- This dignity, and the right to freedom and equality which derives therefrom are inalienable and imprescriptable.
- They have precedence over all powers, including that of the state, which may regulate but may not abrogate them.
- The dignity of human person exists and should be recognized without distinction of any kind.
- Human rights are, by nature, universal, acquired at birth by all members of the human family, whatever the political, jurisdictional on international status of the country on territory which a person belongs.

[8] Ibid, p. 14.

The passing of the Declaration by 48 votes to none (with 8 abstentions) was itself a step forward in a great revolutionary process. However, since the UDHR was adopted in the form of a general assembly resolution, so, in principle it is not legally binding. It does not have a direct impact on government machinery. It's preamble deals for the most part with 'peoples' and 'individuals', and it's inspiring message provides only encouragement (and not relief on protection) to the excluded and the prosecuted in their daily struggles.[9]

Nonetheless, the frequent references to the authority of the UDHR in almost all multilateral debates in the United Nations and elsewhere, and the fact that it has been mentioned as a fundamental source in many international treaties and in the growing legislative and judicial practice in many states, it can be said that the Declaration, at least in some of it's articles, has been a powerful factor in the establishment of more rapid advancement of customary international human rights law.[10] The UDHR, together with the UN Charter served both as on inspiration and a means for the millions of people under colonial rules to achieve self-determination in the 1950s and 1960s. Many countries incorporated the provisions of the UDHR in their national constitutions. The UDHR is one of the very first international instruments to recognize the ethical and juridical value of economic, social and cultural rights and to re-affairm their equal

[9] Ibid, pp. 24-28.
[10] Ibid, p. 27.

and interdependent relationship with civil and political rights, that's why it is rightly called the "Magna Carta" of the world.

In the period from 1945 to 1950, apart from UDHR, four other substantial instruments were established in the field of human rights. They were:

(a) The Commission on the status of women – Feb. 1946.

(b) The Sub-commission on Prevention of Discrimination and Protection of Minorities – 1949.

(c) The Sub-commission on Freedom on Information and of the Press – 1947.

(d) The Convention of the Prevention and Punishments of the Crime of Genocide.[11]

FROM UDHR TO INTERNATIONAL COVENANTS:

After the adoption of the Universal Declaration, the Commission on Human Rights, beginning in 1949, attached the highest priority to drawing up the two covenants on human rights.[12] This task prevented it from creating any substantial drafts in other major dimensions of human rights. Nevertheless, during this period, the other bodies like General Assembly and ECOSOC conducted many conferences and conventions there by establishing minimum standards for many of the areas of human rights not covered by the UDHR. They were:

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[11] Ibid, pp. 15-23.
[12] Ibid, p. 29.

(1) With a view to stop slavery and similar practices, in 1949, the UN adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution and others. By reinforcing the earlier instruments of the League of Nations, it adopted the 1926 slavery convention to the UN institutions through the protocol of 23rd October 1953. In addition, a supplementary convention, which was broader in scope and more restrictive in it's injunctions, was concluded in 1956 against slavery, slave trade and institutions and practices similar to slavery.

(2) The commission on the status of women drew up many international norms concerning women's rights, on the basis of which the General Assembly adopted some important conventions. They were:

- Convention on the Political Rights of Women – 20th December 1952.
- Convention on the Nationality of Married Women – 29th Jan. 1957.
- Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages – 7th November 1962.

And on 1st November 1965 – the minimum age for marriage was fixed at 15 years.

(3) On 20th Nov. 1963, the General Assembly adopted the UN Declaration on the Elimination of All Forms of Racial Discrimination. And on 21st December 1965, it adopted the International Convention on the Elimination of All Form of Racial Discrimination, which entered into force on 4th January 1969.[13] It was the first UN human rights instrument to set up an international monitoring system, including procedure for individual petitions.

Later on 10th July 1969, the Committee on the Elimination of Racial Discrimination was established.

(4) In 1950, the General Assembly authorized the convening of the UN Congress on the Prevention of Crime and Treatment of Offenders, every five years. The first such Congress was held in Geneva in 1955 where, the Standard Minimum Rules for the Treatment of Prisoners was adopted, and the ECOSOC approved it on 31st July 1957.[14]

(5) In 1951 the office of the United Nations High Commissioner for Refugees was established which initiated the following steps:-

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[13] *"Basic Facts about the UN"*, Department of Public Information, the UN, New York, 1998, p. 234.
[14] *"The UN and Human Rights"* op. cit., p.31.

- The Convention Relating to the Status of Refugees – 28th July 1951.
- The convention relating to the status of stateless persons – 28th Sept. 1954.
- The convention on the reduction of statelessness – 30th Aug. 1961.
- The protocol relating to the status of Refugees – 1967.[15]

(6) On 20th November 1959, the UN adopted the Declaration on the Rights of Child. The year 1979, later on, was declared as the International Year of Child.

THE TWO INTERNATIONAL COVENANTS:

The most significant breakthrough in the UN human-rights movement took place when the General Assembly, on 16th December 1966, adopted the international covenant on Economic, Social Cultural Rights, and the International Covenant on Civil and Political Rights, the latter with an Optional Protocol. The ICESCR came into force on 2nd January 1978 and the ICCPR on 23rd March 1976. These Covenants took the provisions of the UDHR a step further by translating them into legally binding commitments and setting up of bodies to monitor the compliance of states-parties. Later on the Human Rights Committee (for ICCPR) and the Committee on

[15] Leach Leavin, op. cit., pp. 39-41.

Economic, Social and Cultural Rights were established to monitor the implementation of the rights enshrined in these two covenants.

THE TEHRAN CONFERENCE:

The General Assembly, in order to mark the 20th anniversary of the adoption of UDHR, decided to designate the year 1968 as the International year of Human Rights. It convened the International Conference on Human Rights in Tehran from 22nd Apr. to may 13th of 1968. The Conference adopted 29 resolutions along with a proclaimation, and transmitted 18 other resolutions to the competent bodies of the UN. The most important thing of this conference was that it claimed interdependence, indivisibility and complementarily of 'civil and political rights' and 'economic, social and cultural rights'.[16]

THE OTHER STANDARDS

In early 1970s, a process of taking additional conventions and declarations started, with the hope of establishing systems for monitoring the UN standards. These conventions and declarations restated and developed a number of principles defined in the international covenants, which deserved special attention. Each dealt with one specific type of right and articulated it in more detail than possible in the Covenants, the preventive measures and sanctions to which the contracting parties should have recourse.[17] They were:

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[16] *"Basic Facts about the UN"*, op. cit., p.229.
[17] *"UN and Human Rights"*, op. cit., p. 71.

(1) The International Convention on the Suppression and Punishment of the Crime of Apartheid – 18th July 1976.

(2) The Convention on the Elimination of All Forms of Discrimination Against Women – 3rd Sept. 1981.

(3) The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief, 1981.

(4) The Convention Against Torture and other Inhuman on Degrading Treatment on Punishment – 1984.

(5) The Declaration on the Right to Development – 1986.[18]

(6) The Convention on the Rights of Child – 1989.

(7) The Declaration on the Rights of Persons Belonging to National on Ethnic, Religious on Linguistic Minorities – 1992.

NEW MECHANISMS:

For better monitoring of the implementation of UN human rights instruments, the Centre for Human Rights was established in 1982. In 1993, an Assistant Secretary General was appointed as it's Director.

The establishment of the office of the UN High Commissioner on Human Rights is another major achievement. This OHCHR, created in

[18] "*Human Rights Today: A UN Priority*", Department of Public Information, United Nations, New York, 1998, pp. 22-24.

1993, is now operating as the pivot of all human rights instruments of the UN.[19]

THE VIENNA WORLD CONFERENCE:

Forty-five years after the adoption of the UDHR and twenty-five years after the Tehran Conference, the United Nations convened another landmarking World Conference on Human Rights in Vienna from 14th to 25th June 1993.[20] Here it was emphasized that action for the promotion and protection of economic, social and cultural rights is an important as action for civil and political rights. The conference adopted the Vienna declaration and programme of action with 171 states which marked historic new steps to recharge the efforts. These steps were.

(a) It declared that all human rights are universal, indivisible, interdependent and interrelated.

(b) It reaffairmed the Right to Development and the inextricable relationship between human rights and developments.

(c) It urged for the Universal ratification of the human rights treaties and set target dates of 1995 and 2000 for ratification of the convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, respectively.[21]

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[19] *"Basic Facts About Human Rights"*, op. cit., p. 225. (Also see UN and Human Rights, op. cit.)
[20] Ibid, p. 229.
[21] *"The UN and Human Rights"*, op. cit. pp. 92-100.

(d) It supported the appointment of a Special Rapporteur on Violence Against Women.

(e) It called for more resources to be provided to the UN human rights activities.

(f) It recommended the General Assembly to proclaim an international decade of the world's indigenous people and a decade for human rights education.

Thus the Vienna Declaration was a major break-through in the UN struggle for human rights of the people of the world family.

The bed-nock on which these fundamental human rights norms governing all aspects of human rights could be established, is the respect for human personality and it's absolute worthiness without any discrimination relating to caste, creed, colour, race, religion, region, language, sex, age so on and so-forth. These rights are the essentialities for the progressive development of the human personality and happiness of all human beings. Nonetheless if we turn the pages of history of mankind, undeniably neither the non-discrimination has been absolutely practiced amongst human beings nor the universality of the human rights has been accepted without affacing certain indelible marks. Assuring all peoples of their human rights is still a big challenge that requires global partnership.[22]

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[22] For evaluation, Sec. Alton and Donnelly in Steirer and Alton (ed.), *"International Human Rights in Context Law, Politics, monals"*, Clanenden Press, Oxford, USA, 1996, pp. 448-453.

CHAPTER – II

ORIGIN, SCOPE, PROVISIONS AND FUNCTIONS OF ICESCR

It is quite often argued that there is a lack of clarity with regard to the contents and scope of the International Covenant on Economic, Social and Cultural Rights.[1] There have been lot of ambiguities as to what exactly constitute the economic, social and cultural rights and how they are different from civil and political rights. In fact there are also some common elements (rights) in both the set of rights (ICESCR & ICCPR).[2] The common people as well as the experts, thus face difficulties while fighting for the realization of economic, social and cultural rights. And this characteristic of the ICESCR is accused to be one of the factor for the ineffective implementation of the covenant.

Keeping this in mind, it is pertinent, here, to define the constituents of the economic, social and cultural rights. This chapter is devoted to analyzing the origin, definition, scope, provisions and functions of the ICESCR. It will try to detail the whole system and procedures established for the implementation of the Covenant.

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[1] Audrey. R. Champman, *"A New Approach to Monitoring the International Covenant on Economic, Social and Cultural Rights"* in P.H. Parekh, "Human Rights Year Book", International Institute of Human rights Society, New Delhi – 1997, p. 38.

[2] See the texts of ICCPR and ICESCR in Appendix-III in K.P. Saksena *"Human Rights: Fifty Years of India's Independence"*, Gyan Pub. House, New Delhi, 1999.

ORIGIN:

The broadest legally binding human rights agreements negotiated under the auspices of the United Nations are the two International Covenants: one on Economic, Social and Cultural Rights (ICESCR) and the other on Civil and Political rights (ICCPR), the latter with two Optional Protocols.

The legislative history of the Covenants (both ICCPR & ICESCR), which goes back to the early years of the Organization (the UN), is complex and relatively long, but certainly interesting. After the adoption of the Universal Declaration of Human Rights, the Commission on Human rights, beginning in 1949, attached the highest priority to drawing up the to covenants on Human Rights. In fact the Universal Declaration of Human Rights (UDHR) was the first part of this objective of creating an International Bill of rights as assigned to the Commission on Human Rights (CHR). The second part of this objective was designed to elaborate the contents of the provisions of the UDHR. It was understood by the international community that since the UDHR was adopted in the form of a declaration, it was not legally binding on the members of the United Nations. So these two covenants were to take the provisions of the UDHR a step further by translating them into legally

binding commitments and setting up bodies to monitor their compliance by the member countries.[3]

However, the task was not an easy one. There were lengthy and fierce debates on the issues of harmonization of the two strategies, 'declaration' and 'treaty'; and number of covenants to be adopted: one or two. There was severe controversy on whether to give the economic, social and cultural, rights legally binding treaty status, along with the civil and political rights.[4] Many western countries particularly the United States argued that they are having multi-cultural societies in their country, and as the economic, social and cultural rights are difficult to be defined, it was not desirable to adopt a special covenant on these set of rights.

But it was the time, when with the spectacular success of decolonization and the increase in the number of newly independent states, the membership of the United Nations was undergoing a significant change. By mid 1960s, developing countries represented a majority in the General Assembly. Together, these Third World Countries developed a strong voice in the various decision-making processes of the United Nations, particularly on the issue of economic and social development.

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[3] *"The UN and Human Rights : 1945-1995"*, UN Department of Public Information, The UN, New York, 1995. pp. 38-39.
[4] Ibid. p. 39.

The debate on the need for a covenant was also equally intense. Whereas the General Assembly and the Economic and Social Council envisaged a general 'instrument' or 'charter' on human rights; the Commission on Human Rights emphasized that in addition to a declaration there should be a binding multilateral treaty on human rights. And on the issue of the harmonization of the two strategies 'declaration' and 'treaty' it was finally concluded that the two strategies were complementary to each other and that adoption of the Covenants would not in any way rule out the possibility of drawing up non-binding instruments that might perhaps deal with broader areas.[5]

After a prolonged and constant efforts made by the CHR in collaboration with other organs and agencies of the UN like the ECOSOC, UNHCR, ILO, WHO, UNESCO and many NGOs, the drafts of the Covenants were prepared. On 16th December 1966, finally the General Assembly adopted the two covenants: ICCPR and ICESCR and an Optional Protocol to the Covenant on Civil and Political Rights.[6] In the preambles both the covenants stressed their common view regarding the inherent dignity of the human person and of the inalienable rights to freedom and to equality. Ten years after being originally opened for signature, the ICESCR and ICCPR entered into force on 3rd Jan and 23rd

[5] Ibid, p. 39.
[6] The UN and Human Rights, 1945-1995, Dept. of Public Information, United Nations, New York, 1998.

March 1976, respectively, thus making the International Bill of Rights a reality.

SCOPE AND CONTENTS OF THE ICESCR:

Together the covenants constitute the most extensive corpus of international treaty law on the subject, both in terms of the areas covered and also in term of their geographical scope. As on 31st December 2000 the ICESCR has 142 member parties and the ICCPR, has 144, where as the first and second optional protocols have 95 and 43 state parties respectively. [7]

The ICESR consists of a total of 31 articles, out of which 15 contains normative provisions. As the title suggests the rights enshrined here can broadly be divided into three categories:

(a) Economic Rights

Article – 6 - Right to work, Vocational Guidance and Training.

Article – 7 - Right to just and Favorable Condition ofWork.

Article – 8 - Right to form and join Trade Unions, Right to Strike.

Article – 11 - Right to adequate standard of living including Food and Shelter.

[7] UN Document, Department of Public Information, United Nations, New York, 2000.

(b) ***Social Rights***

Article – 9 - Right to Social Security.

Article –10 - Right of the Family, Mothers and Children.

Article –12 - Right to Physical and Mental Health.

(c) Cultural Rights

Article –13 - Right to Education

Article –14 - Right to Compulsory Primary Education

Article –15 - Right to Participate in Cultural activities and to Enjoy Scientific Progress.[8]

THE IMPLEMENTATION SYSTEM:

As laid down in Article –2, each state panty to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of it's available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.[9] They also, undertake the guarantee that these rights will be exercised without discrimination of any kind and to ensure the equal right of man and women to their enjoyment.

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[8] N.R Madhava Menon, "State of Socio-Economic Rights", in K.P. Saksena, ed., "Human Rights: fifty years of India's Independence" Gyan Publishing House, New Delhi , 1999, p. 148.

[9] Article 2 of the ICESCR.

And Article –16 details the state parties responsibility. It asks the signatories to report periodically on the measures they have adopted and the progress made in achieving the enjoyment of the rights, recognized in the covenant. The reports of the state parties, and reports submitted by the specialized agencies concerned, are directed to the Secretary-General who transmits them to the ECOSOC. It was recognized that the reports have to be submitted in accordance with a *'programme'*to be established by ECOSOC within one year of the entry into force of the Covenant.[10]

Consequently, on 11th May 1976, the ECOSOC adopted a resolution (1988-LX) by which it was decided that reports will be submitted in three stages at two years intervals:

- Stage –1 to cover Articles 6 to 9 consisting of right to work, working conditions and social security, and rights of trade unions.
- Stage –2 to cover Articles 10 to 12 consisting of family rights, and right to an adequate standard of living and health.
- Stage –3 to cover Articles 13 to 15 consisting of right to education and culture.

These reports, to be submitted to the Secretary-General, were also to indicate factors and difficulties affecting the degree of fulfillment of their obligations under the Covenant. The reports on the first stage were set due on 1 September 1977, and the reports on the subsequent stages

[10] Article 17 of the ICESCR.

at biennial intervals thereafter.[11] The Specialized Agencies were also required to submit to ECOSOC reports on the progress made in achieving the observance of the provisions of the Covenant falling within the scope or jurisdiction of their activities.[12]

The resolution also decided that a Sessional Working Group (SWG) of ECOSOC members should be established, to assist in the consideration of reports whenever reports on the implementation of the Covenant were due for consideration. Consequently on 3rd May 1978, a SWG was created which consisted of 15 members that were members of the Council and parties to the Covenant, as well as observers from other states and the Specialized Agencies. It was decided that only state parties to the Covenant be included in SWG hoping that it would be in tune of the international law. Regarding it's working methods the delegates agreed that the SWG should review reports collectively on a global level i.e. article – by article, rather than country-by-country. It was also agreed that the SWG should take it's decisions by consensus, and not through voting.[13]

This reporting procedure was supplemented by a three-tier system of international security and recommendations: firstly, the Specialized Agencies would report to ECOSOC on the progress they have made in

[11] Abdulrahim P Vijapur, *"The United Nations at Fifty: Studies in Human Rights"*, South Asian Publishers, New Delhi, 1996, p. 79.
[12] Article – 18 of the ICESCR.
[13] Abdulrahim P. Vijapur, op.cit. p. 80.

achieving the observance of rights of this Covenant (Article – 18); secondly, ECOSOC may transmit to the CHR for study and general recommendations or as appropriate for information, the reports submitted by state parties (Article-19); and thirdly, ECOSOC may report to the General Assembly (Article –21).[14]

In its first session, the SWG, discussed the procedures for consideration of the state reports and whether attention should be confined to the state report themselves or whether the group could also take into consideration reports from the Specialized Agencies. It was decided to follow the practice of Human Rights Committee and consider the state reports individually, including the possibility of oral presentation by representatives of the counties concerned. The initial days of the functions of the SWG was full of hurdles and controversies. For example the role of Specialized Agencies. Although their right to participate in the debates of the Working Group is clear, there were repeated efforts to exclude them. This matter took a serious turn in the second session of the SWG (April 1980). When the representatives of ILO sought the permission of the chairman to make a statement on the consideration of the report of Ecuador. The Soviet and Romanian delegates objected for making a statement on particular country.

[14] Dr. S. Subramanian, *"Human Rights: International Challenges"*, vol-I, Manas Publications, New Delhi, 1997.

Finally, the Working Group decided to permit the Specialized Agencies to make only a 'general comment' after members of the SWG had spoken.[15]

So it was only in the second session that the working group began to examine reports of states parties submitted under the first stage. But the problems never ended. Because here also, in the first examination of reports, the Soviet representative seem determined to prevent any questioning of the parties' performance under the Covenant. As a result, the report of the SWG just described the work carried out and contained no conclusion or recommendations. Even the second session of the Group's consideration of individual reports took the form of questions and answers, without recommending any action, which could help ECOSOC in exercising its functions in the implementations of the Covenant.

It was observed that in it's whole life of eight years of functioning (1979-1986), the SWG, only reviewed the report of the state parties. Initially, states parties were reluctant even to include experts in their delegations to the SWG. Though the ECOSOC in 1981, had urged them to send "experts", the request went unheeded. Barring the Soviet Union and Norway, all states were represented by members of their permanent missions who had not previously taken part in the work of the Group. As

[15] A.P. Bijapur, *"The UN at Fifty: Studies in Human Rights"*, South Asian Publisher, New Delhi, 1996, pp. 80-81.

a result, the performance of the members of the group was very poor. They just asked superficial questions and were unable to submit proposals for conclusions or recommendations on the consideration of reports. However, lately, the states parties agreed to send 'experts' to the SWG. Both the ECOSOC and the State Parties realized that the Group's functioning was not effective like that of the Human Rights Committee of ICCPR. Therefore, finally the ECOSOC decided, in 1985, to create the Committee on Economic, Social and Cultural Rights.[16]

THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

On 28th May 1985, the ECOSOC established the Committee on Economic, Social and Cultural Rights for better implementation of the rights enshrined in the ICESCR.[17]

Composition:

The Committee consists of 18 members, all of them having a high moral character and of recognized competence in the field of human rights. Unlike the Human Rights Committee (the treaty-monitoring body of the ICCPR) where the members are nominated only by the state parties to the Covenant, here all members of the ECOSOC may vote in elections of the members whether on not they are parties to the Covenant. Those who vote to elect members to the Committee must give consideration to

[16] Ibid.
[17] Edward Lawson, "Encyclopedia of Human Rights (Second Edition), Tayler & Francis, Washington D.C.

the fact that it can include not more than one national from one state. They are also to see that the membership to the committee must represent the different forms of civilizations and the principal legal systems as well as equitable geographical distribution. To this end, the system provides that fifteen seats will be equally distributed among the regional groups, while the additional three seats will be allocated in accordance with the increase in the total number of States Parties per regional group. The members of the Committee are elected by the Council by secret ballot for a term of four years, from a list of persons nominated by states parties to the Covenant.[18]

Sessions:

The Committee holds one session per year, at the United Nations office in Geneva or at the United nations headquarters in New York. As authorized by ECOSOC resolution 1988/4, each session is preceded by meetings of a pre-sessional working group composed of five of it's members of the Committee. The principal purpose of the working group is to identity in advance the questions which might most usefully be discussed with representatives of the reporting states. This is done with the aim of improving the efficiency of the system and facilitating the task of States' representatives by providing advance notice about the principal issues which might arise in the examination of the reports. The working

[18] Ibid., p. 280.

group allocates to each of it's members initial responsibility for undertaking a detailed review of a specific number of reports and of putting before the group a preliminary issues. The list of issues revised and supplemented on the basis of observations by the other members of the group, are transmitted to the permanent missions of the States concerned.[19]

FUNCTIONS: How it works?

The first session of the Committee was held in Geneva from 9 to 27 March 1987. Here the Committee considered the previous three-stage reporting programme to be unduely burdensome upon states and to reflect an excessively compartmentalized approach to the rights recognized in the covenant. Therefore it introduced a new reporting cycle which requires state parties to submit an initial report dealing with the entire Covenant, within two years of the Covenant's entry into force for the state concerned. Thereafter, every five years, a single, comprehensive periodic report is required.[20]

At each session, the Secretary-General shall notify the committee of all cases of non-submission of reports. In such cases the committee may recommend to the Council to transmit to the state party concerned, through the Secretary-General, a reminder concerning the submission of such reports. If even after the reminder, state party does not submit the

[19] Ibid. p. 280.
[20] Resolution no. 1988/4 of the Committee on Economic, Social and Cultural Rights.

report, the committee shall so state in the annual report which it submits to the Council.

The initial report must provide detailed background information, inter alia, on the nature and structure of domestic law and on the population (size, ethnic composition etc), and must also give an overview of how the Government puts each of the treaty's provisions into practice.[21] Since the basic purpose of the reporting system is to provide as complete a picture as possible of the human rights situation in a given country, the reports may not merely list the constitutional provisions, laws and regulations in force. They must also specify how the text is implemented in practice and describe the country's actual situation.

Representatives of the reporting states are entitled to be present at the meetings of the Committee when their reports are examined. Such representatives should be able to make statements on the reports submitted by their states and reply to questions, which may be put to them by the members of the committee.[22] The guiding principle underlying the reporting system is that of *'constructive dialogue'* between the treaty body and the representative of state whose report is examined.

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[21] See Edward Lawson, *"Encyclopedia of Human Rights"* op.cit
[22] Edward Lawson, op.cit., p.280.

Thus the review process is not intended as a forum for accusing or criticizing Governments.[23]

The Committee may make suggestions and recommendations of a general nature on the basis of it's considerations of the reports submitted by state parties and those by Specialized Agencies in order to assist the Council. Each time while preparing the report, the states parties may provide a general update of the previous reports, indicating what changes have taken place in the country's legislation, practice or situation, or they may focus on only a few of the rights dealt with in the relevant treaty. The Committee determines it's preference in this regard. Importantly it may also request additional information from a state anytime, even before the date on which the next periodic report must be submitted.

The ICESCR contains a series of rights that, for the most pant, reflect more recent concepts of rights for which legislation, practice and theory are much less developed. Therefore the Committee on Economic, Social and Cultural Rights has the onerous task of defining the normative content of the rights recognized in the covenant. However the committee has introduced an innovation of it's own, a day of general

[23] *"The UN and the Human Rights,,* 1945-95", Department of Public Informations, United nations, New York, 1998, P. 55. .

discussion devoted to a particular right on group of rights to be decided upon in advance.[24]

The committee has tried to elaborate a dynamic, rather than mere procedural, process for considering reports by states.[25] This evolution has occurred naturally by virtue of the inherent distinctress of the mandate of the committee whose members contribute varying viewpoints and experiences. The evolution is also resulted from the innovative and dynamic approach to the system of monitoring adopted by the committee to question representatives of states regarding national legislation, practices and policies described in the periodic reports and to request that states provide more specific details when answers are incomplete. This has made it possible to enrich the consideration of reports submitted by states parties to a defense that the degree of the covenant (ICESCR) had perhaps never imagined.[26]

The Committee has also shown tremendous patience and courage in confronting the daunting problems like: imprecision of the covenant's terms; lack of jurisprudence to clarify obligations; lack of broad and sustained governmental interest in the subject matter; paucity of national and transnational organisations interested in socioeconomic

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[24] Ibid. p.50.
[25] See David P. Forsythe, *"Human Rights in International Relation"*, Cambridge University Press, U.K., 2000, p.77.
[26] On the Committee on ICEPCR, see M. Craven, *"The International Covenant on Economic, Social and Cultural Rights: A Perspective on it's Development"*, Oxford, 1995.

and cultural rights as rights and not as aspects of development; and lack of, inter alia, relevant information's for arriving at judgments?[27]

The greatest advantage of this new committee is that it functions directly under the supervision of the ECOSOC. And since ECOSOC is empowered to consider reports on economic, social cultural rights, it has the unique opportunity to integrate other human rights with the economic, social and cultural questions in general.[28]

This is how the covenant on economic, social and cultural rights as well as it's treaty-monitoring body were developed in the United Nations. Certainly in took a long time for the United Nations to evolve such universal standard and system for the promotion and protection of economic, social and cultural rights.. Now that we have the system, what is needed is to see that it works successfully and realize the enjoyment of the rights enshrined in the covenant, by all members of the world-family.

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[27] David P. Forsythe, *"Human Rights in International Relations"*, Cambridge University Press, U.K., 2000, p. 77.
[28] Abdulrahim P. Vijapan, op. cit., p. 81.

CHAPTER – III

THE PROBLEMS OF COMPLIANCE: ICESCR A COMPREHENSIVE ANALYSIS

The biggest problem, which the United Nations Human Rights treaty regime is confronted with, is the problem of non-compliance: by the state parties. This has made the whole system partially ineffective. It is common knowledge that not all the members of the United Nations are signatories to the major UN treaties on human rights. Even if a good number of them have acceded to various human rights instruments, they are not complying with the norms and procedures laid down for the implementation of those instruments. Most of the governments are indifferent to their reporting responsibilities required under the various Covenants and Conventions. Even if some of them are reporting, ofcourse sporadically, in most of the cases, the reports are very much superficial and appear to be designed to come out at large rather than to reveal the real picture, the problems and the inadequacies. And this is happening mostly in the case of the International Covenant on Economic, Social and Cultural Rights, and Covenant, currently under our study.

As on 31st December 2000 the ICESCR has 142 member parties. And as on 1st December 1998, the number of state parties are 138 out of

which 97 are with overdue reports.[1] Since this reporting system forms the backbone of the implementation of the ICESCR, it needs to be viewed seriously. These periodic reports are the only way to monitor the treaty implementation by the governments. It's the only way to continue the dialogue between the Committee (CESCRC) and the state parties. If this is the real picture that more than half of the members are not submitting any reports, then, how can the system work?

There are numerous factors responsible for this poor compliance of the ICESCR. The problems are both genuine and artificial. Shortcomings are there in the UN system itself as well as the states parties. Anne Bayefsky amply identifies seven 'unfortunate details' of the system:-

(i) non- reporting and late reporting by states

(ii) the existence of a large backlog of reports awaiting examination by the treaty bodies.

(iii) the ineffectual working method used by the treaty bodies

(iv) problems of publicity and accessibility

(v) lack of the fact-finding capacities of the system.

(vi) The inadequacy of measures to follow up on the work of the treaty bodies.[2]

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[1] James Crawford, *"The UN Human Rights Treaty System A System in Crisis"*, in Philip Alston and James Crawford (ed.), *"The Future of UN Human Rights Treaty Monitoring"*, Cambridge University Press UK, 2000, p. 5.

[2] Philip Alston, *"Beyond Them and 'Us': Putting Treaty Body Reform into Perspective"* in Philip Alston and James Crowford (ed.), *"The Future of UN Human Rights Treaty Monitoring"*, Cambridge University Press, UK, 2000, p. 504.

However this is not the whole picture of the problem. There are also many more significant factors responsible for this indifferent attitude of the member states to the observance of the ICESCR. The present chapter will try to touch on all possible sides of the problem. It will not only detect the inherent structural and methodological defects in the UN system, but also explain the various dilemmas and difficulties faced by the states-parties. Accordingly, the chapter is broadly divided into two parts. Part I will look into the problems in the UN system, whereas part –II will deal with the views of the state parties. Here a case study of India has been taken to make the picture specifically clear.

Part –I
PROBLEMS IN THE UN SYSTEM

This section can again be subdivided under three headings: such as (a) Problems in the Approach (b) Problems in the Methods (c) Problems in the Structure.

(a) Problems in the UN Approach Towards the ICESCR:

Despite it's commitment to protect all human rights, the United nations in reality has promoted civil and political rights much more than economic, social and cultural rights in the last fifty years.[3] This imbalance is well reflected in the Universal Declaration itself. Eightæn

[3] *"Human Rights Today"*, UN Department of Public Information, New York, 1998, p. 20.

articles deal in great deal with economic, social and cultural rights. In fact, the main thrust of the UDHR was on civil and political rights.[4]

The United Nation was so much concerned about civil and political rights that very little attention could be put to the other set of rights. After the ICESCR came into force in 1976, the UN took full two years to come with any monitoring mechanism to be put in place.

Thus the ICESCR has always been the step-child of the international human rights movements. Certain states while speaking in the General Assembly or any other political forum, may give it some prominence in order to deflect attention away from violation of civil and political rights to this Covenant. Same is the picture when it comes to implementation.[5]

This discriminatory approach towards the economic, social and cultural rights is well evident if one look at the legislative history of the origin of these covenants i.e. ICESCR & ICCPR (previous chapter). In it's resolution 30.31 (XI), the ECOSOC asked the General Assembly to take a basic decision on the desirability of including economic, social and cultural rights in the proposed International Bill of Rights.[6] After deciding to have also a covenant on economic, social and cultural rights,

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[4] Ibid. p. 20.
[5] *"The United Nations and Human Rights (1945-1995)"*. Department of Public Information, United Nations, New York, 1998, p. 42.
[6] *"The United Nations and Human Rights 1945-1995"*, Department of Public Information, United Nations, New York, 1998, p. 42.

it proposed that both the covenants should include as many similar provisions as possible, so that they might be approved while opened for signature. There was intense debate and ununanimity as to how many covenants to be taken one or two. "Those who favoured two covenants contended that civil and political rights could be protected through courts, where as economic, social and cultural rights were not or could not be so protected; that the former rights were immediately applicable, where as the latter were to be established gradually; and that in general, the former corresponded to the individual's rights vis-a-vis unlawful and unjust action by the state, whereas the latter represented rights which the state would be called upon to promote through positive action. They further argued that since civil and political rights, and economic, social and cultural rights were different in nature, as were the obligations of the state in relation to those rights, two separate instruments were desirable".[7]

The question of whether there would be one on two covenants was closely linked to the question of monitoring "In general, civil and political rights were considered to be within the realm of positive law. Economic, social and cultural rights, on the other hand, were viewed rather as

[7] Ibid, p. 43.

practical objections more suited to monitoring on the loss of periodic reports".[8]

Accordingly, the ICCPR was provided with an Optional Protocol where as no such provision was laid down for ICESCR. Thus from the very beginning, economic, social and cultural rights were neglected.[9]

And it continued till mid 1960s. It was only in the Tehran Conference that the international community for the first time realized and recognized the interdependence and indivisibility between economic, social and cultural rights and civil and political rights.

Thus, there is a fundamental contradiction in principle and practice underlying in the International Human Rights Regime. Despite the endorsement of the principle that all human rights are equal and indivisible, economic, social and cultural rights tend to be overlooked and are treated more as aspirations and goals than as fundamental rights. The international community including the UN has treated civil and political rights as more significant, and consistently neglected economic, cultural and social rights. Thus the principle of indivisibility and equality of human rights have been more honoured in the breach than in the observance.[10]

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[8] Ibid, pp. 43-44.
[9] On Optional Protocol see Steiner and Alston, *"International Human Rights in Contexts: Law, Politics, Morals"*, Clarendon Press, Oxford, 1996, pp. 535-536.
[10] Philip Alton, *"Aprising the UN Human Rights Regime"*, in Steiner and Alton, op. cit., p. 448.

(b) Problems in the methods of implementation:

The ICESCR carries a rudimentary form of implementation in recognision of the fact that these rights are in a stage of progressive development in many countries and can only be achieved gradually. It stops short of providing any implementation machinery and does not extend beyond prescribing an obligation to submit periodic reports to the economic and social council on the measures adopted and the progress achieved towards the realization of these rights.[11] There is no International Court of Human Rights, nor a mechanism to address individual complaints or inter-state complaints about alleged violations of the rights enshrined in the Covenant on Economic, Social and Cultural Rights. The reporting guidelines have no legal force and are merely recommendations concerning the reporting procedures![12] The UN is still to take a final decision, about the proposed optional protocol to ICESCR.

In case of ICCPR, the states parties are legally bound to comply with the provisions of the Covenant. But in case of ICESCR, the signatories do not undertake to ensure immediately, the rights set forth in it. They simply commit to take steps, individually and through international assistance and co-operation to the maximum extent of their

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[11] S.L. Bhalla, *"Human Rights: An Instrumental Framework for Implementation"*, Dacta shelf publication, Delhi, 1991, p. 35.

[12] Fore more on this discrimination, see G.J.H. Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights", in Steiner and Alston, op. cit., pp. 279-283.

available resources to achieve progressively the full realization of the rights recognized in the covenant. Thus, in term of implementation also, the UN system sharply discriminate the ICESCR by viewing it as different from and rather inferior to the ICCPR.

Governments, the Committee on Economic, Social and Cultural Rights (CESCRC) and the NGOs have all been hampered by these fundamental methodological problems inherent in monitoring economic, social cultural rights.[13] Systematic monitoring of the degree to which countries have implemented these rights has five methodological pre conditions:

(1) Conceptualization of the specific components of each enumerated right and the concomitant obligations of state parties.

(2) Delineation of performance standards related to each of these components, including relevant indicators.

(3) Collection of relevant data, appropriately disaggregated by sex and a variety of other variables.

(4) Development of a computerized information management system for processing these data and

[13] Audrey R. Chapman, "A new approach to monitoring the International Covenant on Economic, Social and Cultural Rights", in P.H. Parekh (ed), *"Human Rights: Year-Book 1997"*, International Institute of Human Rights Society, Tilak Marg, New Delhi, p. 37.

(5) Analysis of these data so as to be able to ascertain the performance of a particular country. For reasons which will be discussed below, none of these five preconditions are currently being met.[14]

The source of many of these methodological problems is that the standard for evaluating the performance of state parties to date is 'progressive realization' rather than the identification of violations. Evaluating progressive realization within the context of "the maximum of it's available sources" considerably complicates the methodological requirements outlined above this standard assumes that valid expectations and concomitant obligations of state parties under each enumerated right are not uniform on universal but instead relative to levels of development and available resources. This necessitates the development of a multiplicity of performance standards to fit the many social, developmental, and resource contexts appropriate to specific countries.[15]

Also the ICESCR suffers from conceptual underdevelopment. And this lack of intellectual clarity does effects monitoring of these rights![16] The standard of progressive realization cannot be used as a measuring tool for evaluating compliance without gaining clarity as to what the

[14] Ibid, pp. 37-38.
[15] Ibid, p. 38.
[16] On these problems see Philip Alston, *"The Committee on Economic, Social and Cultural Rights"*, in Philip Alston (ed.), *"The UN and Human Rights: A Critical Approach"*, Clarendon Press, Oxford, 1992, pp. 490-491.

phrase maximum of it's available resources entails in specific circumstances.

However, in 1986, a group of distinguished expertsin international law met in a seminar convened by the International Commission of jurists, the faculty of law of the University of Limburg and the Urban Morgan Institute for Human Rights of the University of Cincinnati. Out of this, emerged was the *'Limburg Principles'* on the nature and scope of the obligations of State Parties to the ICESCR. Importantly, it defined a violation as a failure by a state party to comply with an obligation articulated therein.[17]

The Committee (CESCRC) while acknowledging the constraints imposed by limitations on available resources, interprets progressive realization as requiring state parties to move expeditiously and effectively toward the goal of full realization of the constituent rights. However the committee has not yet defined what moving expeditiously and effectively cntails. The committee therefore lacks concrete standards for evaluating the performance of governments and their compliance with the covenant. In determining what amount to a failure to comply, it must be borne in mind that the Covenant affords to a state party a margin of discretion in selecting the means for carrying out it's objects, and that factors beyond

[17] *"The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", Human Rights Quarterly*, Vol. 9, May 1987, p. 131.

it's reasonable control has adversely affected it's capacity to implement particular rights.[18]

Evaluating the progressive realization of economic, social and cultural rights requires the availability of comparable statistical data from several periods in time in order to assess trends. Measuring progressive realization requires an assessment not only of current performance but also of whether a state is moving expeditiously and effectively towards the goal of full implementation.[19] Because of the Committee's concern with the status of vulnerable and disadvantaged communities, the list with regard to the adequate food specifies that detailed information, including statistical data broken down in terms of different geographical areas, also be provided for landless peasants, marginalized peasants, rural workers, rural unemployed, under unemployed, urban poor; migrant workers, indigenous peoples, children, elderly people, and other especially affected groups.[20]

Thus, a thorough evaluation would require complicated analysis of enormous quality of data. Many governments do not have appropriate data of good quality for this type of analysis, and those which do have the data generally do not make them available to the United nations or to

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[18] Edward Lawson, *"Encyclopedia of Human Rights (second Edition)"*, Taylor & Francis, Washington, D.C., USA, 1991, p. 403/

[19] Audrey R. Chapman, op.cit. pp. 39-40.

[20] Philip Alston, *"The International Covenant on Economic, Social and Cultural Rights"*, in Manual on Human Rights Reporting (New York: United Nations Centre for Human Rights and United Nations Institute for Training and Research, 1991), p. 60.

non-governmental organisations. Additionally, the Committee lacks regular access to relevant statistical data collected by the other organs of the UN system. Thus there is an urgent need to rethink upon the present approach to ICESCR and also it's implementation methods. The Committee has to define more precisely the contents of the specific rights, including the immediate core obligations of state parties to ensure the satisfaction of, at the very least, minimum essential levels of each of these rights. The Committee also has to identify the immediate steps to be taken by state parties to facilitate compliance with their logical obligations toward the full realization of these rights, including the duty to ensure respect for minimum subsistence rights for all.

(c) Structural and Operational problems in the committee (CESCRC):

The Committee has been entrusted with assisting the Economic and Social Council in the substantive tasks assigned to it by the Covenant. In particular, it's role is to consider states parties reports and to make suggestions and recommendations as to fuller compliance with the Covenant by state parties.

In general, many members of the UN treaty bodies have given dedicated, and largely unremunerated service. But the electoral process is haphazard and takes limited account of qualifications. Vote trading between unrelated UN bodies is so common as to be unremarked. This is

of course part of a broader problem. UN electoral processes are no doubt irreducibly political. But there has been no efforts to distinguish between the political properly so-called and the purely venal. Some form of scrutiny of the members for minimum qualifications could bring great dividends in terms of the quality of membership.[21]

This uneven quality of membership of the committee represents a formidable defect of the system. Although committee members are meant to serve in their personal capacity and to be 'experts with recognized competence in the field of human rights', both the terms 'personal' and 'expert' have been flexibly interpreted. Membership of UN treaty bodies is loaded with foreign ministers, serving or retired ambassadors and other officials. Yet, these monitoring bodies are meant to represent the cornerstones of the UN human rights system. To be effective the Committee should consist of independent experts with longterm appointment rather than political representatives concerned to secure re-election or avoid displeasing their fellows at home. If national supreme courts were staked with persons who had worked their entire professional lives for the government, questions would be raised as to their independence, impartiality, objectivity and as to the values

[21] James Crawford, *"The Human Fights Treaty System: A System in Crisis"*, in Philip Alston and James Crawford (ed.), "The Future of UN Human Rights Treaty Monitoring", Cambridge University Press, Cambridge, U.K., 2000, p. 9.

underlying the separation of powers. It's time these question were put at the international level.[22]

Another such problem is the undersupply of staff in the Committees to carry on implementation business. Currently only seventeen persons are entrusted with all secretarial, administrative, support and research tasks associated with all six treaty bodies. They are expected to provide detailed back-up support to each of the treaty bodies and to have access to information about compliance with the particular treaty by all state parties.[23] In the case of the Committee on Economic Social and Cultural Rights, the Covenant for which has been ratified by 142 states, the 'secretariat' consists of one professional staff person working half-time, supplemented in 1999 by one additional professional funded by voluntary contributions by a few governments. By contrast, the monitoring system under the European Social Charter, with only twenty-two ratifications, has a staff of ten.[24] So if the international community is serious about securing compliance with and proper monitoring of the human rights treaties, massive reinforcement of the staff allocated to the treaty bodies is required.

Financial inadequacies are also hindering the work of the committee. There is no computerized data system, or any Internet facility

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[22] Scott Leckie, *"The Committee on Economic, Social and Cultural Rights: Catalyst for Change in System needing Reform"*, Philip Alton and James Crawford (ed.), op.cit., p. 132.
[23] Ibid., pp. 132-133.
[24] James Crawford, *"The Human Rights Treaty System: A System in Crisis?"* op.cit, p. 7.

for the members. Lack of specialized web sites proper documentation and less staff have made the system rudimental in working.

There are also procedural and operational problems faced by the Committee. There are a good number of reports pending to be considered by the Committee. The underlying fact is that none of the committee has received any sustained increase to it's regular meeting time. It is difficult to make use of intersessional time, because committee members are not paid for intersessional work. Moreover problems of communication and lack of internet access for many members make intersessional work difficult and cumbersome.[25]

A system based on 'constructive dialogue has to allow time forthat dialogue even if the state is generally in compliance with the treaty, State representatives who have traveled to the meeting of a committee to discuss a report are entitled a degree of attention.[26]

It needs to be stressed that these unacceptable delays are occurring at a time when many reports are overdue. If all states were to report on time, the delays in dealing with reports would become extreme. It is not too much to say that the system, established to oversee state compliance, depends on it's continued functioning on a high level of state default.

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[25] James Crawford, op.cit, p. 5.
[26] James Crawford, *"The Human Rights Treaty System: A System in Crisis ?"*op.cit., pp. 5-6.

There are no doubt inherent problems with a system for human rights protection based essentially on self-criticism and good faith. The system encourages states to view compliance only in the context of a rather sporadic reporting procedure, with a lack of follow-up mechanism for the periodic reports. On the other hand a more selective approach by the committee focusing only on serious breaches which are suspected or have come to notice, would give rise to complaints of selectivity. Scott Leckie notes that there is a continuing concern not to alienate state parties whose co-operation is assumed and is necessary for the idea of constructive dialogue to work.[27]

Thus, we saw that the problems of compliance is a complexed one and it is coming from within in term of implementation. The enforcement procedure is not rigorous enough and is often nullified by it's own voluntary nature. The promotional and programmatic nature of the state parties obligation is also equally responsible. So it's not at all surprising that states have found interpretation of ICESCR and it's system, favourable to them and somehow managed to escape from their international responsibility.

[27] Ibid, p. 8.

PART II

PROBLEMS OF STATE PARTIES: A CASE STUDY OF INDIA

Now we shall look at the other side of the problem the problems of the state-parties. This part of the chapter will address four issues; such as the debate on universalism vs. contextualism, debate on whether human rights are matters of domestic jurisdiction on international jurisdiction, the problems of national legislation and the problems of resource constraints and technical assistance.

(a) Universalism vs. Contextualism:

Many scholars and state have contended the view that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm setting, bearing in mind the significance of national and regional particularities and various historical, cultural and social background. Especially the set of economic, social and cultural rights enlisted in the ICESCR are not considered by many countries as universal. They argue that the nature and characteristics of human rights vary at great degree in the context of different socio-economic foundations of societies. So there can not be any universal standard which can be applied to all nations of the world?[28]

The world is a vast archipelago of cultures, each possessing it's own internal logic and values, and which can exclusively be understood

[28] For more on this debate see *"Universalism and Cultural Relativism"*, in Steiner and Alston, op. cit., pp. 192-225.

in it's own unique terms. Variations in morality, custom and traditions were thus regarded as evidence of people's ability to adapt to the most variable environments and to shape their existence in a multitude of ways. It is emphasised that there was no 'objective' standard available for evolutionary ranking of cultures or the moral evaluation of actions. Value is defined from within. This cultural relativism or socio-cultural contextualism or also called historical particularism do not accept any universal standard and applicability of human rights. It says that there is no universal morality, because the history of the world is the story of the plurality of cultures, and the attempt to assert universality, or even the procedural principle of 'univerilazability' as a criterion of all morality, is a more or less well-disguised version of the imperial routine of trying to make the values of a particular culture. In this regard, documents like UDHR, ICESCR and others passed by the United Nations are futile proclamations, derived from the moral principles valid in one culture and thrown out into the moral void between cultures.[29]

This perception of human rights by many countries is often expressed in many occasions. Here are some examples: when the commission of experts overseeing compliance with ICCPR found Jamaica to have violated the treaty through it's administration of death penalty, Jamaica responded by withdrawing from the ICCPR provision that allows

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[29] *"Culture, Wisdom, Religion and Human Rights"*, Indian Institute of Human Rights, New Delhi-30, pp 3 & 35.

individuals to make complaints to the commission (optional protocol). Jamaica's defense in that case was typical: respect our culture, our unique problems. When it comes to the treatment of our own people, we want sovereignty, not globalism. However, government seeking to preserve their sovereignty are not the only ones offended by the UN call for the enforcement of global values. Some cultures perceive the global human rights cannon as a threat to their very identity. The Taliban might have brandished national sovereignty as a shield, but they also saw themselves as militant guardians of a religion and culture that should be exempted from a 'Western' system of human rights that is inimical to Islam as they practice it. Other government's notably Singapore's, have similarly advanced their claim as exceptionalism by referring to "Asian Values" that are supposedly antithetical to Universal on Western norms.[30]

In 1997, Malaysian Prime Minister Mahatir bin Mohammad urged the UN the mark the fiftieth anniversary of the UDHR by revising on, better, repealing it, because it's human rights norms focus excessively on individual rights while neglecting the rights of the society and common good. He claimed that Human Rights were an western import and so inconsistent with the Asian values. Recently Australia's former prime minister Malcolm Fraser has dismissed the UDHR as reflecting only the

[30] Thomas M. Frank, *"Ane Human Rights Universal"*, *Foreign Affairs*, Vol. 80, No. 1, Jan-Feb. 2001, pp. 192-194.

views of the Northern and Eurocentric states that, when the Declaration was adopted in 1948, dominated the General Assembly. Former German Chancellor Helmut Schmidt, too, says that the Declaration reflects the philosophical and cultural background of it's Western drafters and has called for a new balance between the notions of freedom and of responsibility, because the concept of rights can itself be abused and lead to anarchy.[31]

The point of third world criticism of western concept of human rights is that international human right standard were conceived and formulated largely by westerners, and reflect cultural values that are alien to non-Western traditions and that a blanket application of western principles to non-western condition is un-justifiable?[32] The problems of human rights in Asian and African countries, in fact, one quite different from that in the West. In Western countries, the role of human rights is to fine-tune the administrative and judicial system and fortify rights and freedoms that are largely uncontroversial. In countries of Asia and Africa, on the other hand, human rights have a transformative potential. They are a constant challenge to vested interests and authorities in societies driven by enormous disparities of wealth and power, with traditions and authoritarianism, and the helplessness of the disadvantaged

[31] Ibid, p. 196.
[32] See *"Contemporary Debate between the West and some Asian States"* in Steiner and Alston, op. cit., pp. 226-239.

communities, of militarization and the conjuction of corrupt politicians and predatory domestic and international capital?[33]

Developing countries object the Western undue emphasis on civil and political rights. They feel that hungry masses in their countries are too much concerned with feeling their stomachs to concern themselves with civil liberties and political freedoms. Further, developing countries must sacrifice freedom temporarily to achieve the rapid economic development that their exploding population and rising expectations demand. Thus one of the most strident objections made by third world countries against the UN human rights regime is that it lays greater emphasis on civil and political rights than on economic, social and cultural rights. The balance of UDHR, according to critics is somewhat upset, because it does not properly examine economic, social and cultural rights. Similarly, in the developed western countries the emphasis has always been on civil and political rights. It is believed in many third world countries that it was on the insistence of the United States that, originally proposed as one document, the International Covenant on Human Rights had to be split into two because the US did not want to see the same force given to implementing economic and social rights. Hence more stringent monitoring and implementation procedures were agreed for civil and political covenant (ICCPR), including

[33] Sankar Sen, *"Human Rights in India"*, in Nawaz B. Mody & B.N. Mehnish, *"India's role in the United Nations"*, Allied Publishers Ltd., Bombay, 1995, p. 77.

an Optional Protocol which provides international machinery for individuals to use in making a complaint about the violations of any of the rights covered in ICCPR. But unfortunately no such mechanism was tried to ensure the implementation of economic and social rights which needed more for third world countries like India.[34]

Thus we see that the protection of economic and social rights compared to the civil and political rights at both national and international levels has been weak and irregular. Very often social and economic rights are considered as aspirational and non-justiciable. The reason for western underemphasis on civil and political rights seems to be that they have attained such a fairly high stage of development in material and economic resources that socio-economic rights do not preoccupy their attention. But to the contrary, the socio-economic condition in the third world countries is totally reverse and so their priority is different from the west. Majority of the developing countries are reeling in extreme poverty, ignorance, illiteracy, mal-nutrition, disease and suffering and in the prevailing situation civil and political rights loose much of it's relevance. However the west's unwillingness to recognize and give proper weight to economic and social rights is itself a distortion of universal human rights.[35]

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[34] *"Indivisibility and Interdependence of Human Rights"* in *"Introduction to Human Rights"*, Indian Institute of Human Rights, New Delhi-110030.
[35] Ibid, p. 125.

Thus the universality of the UN human rights instruments in general and the ICESCR in particular, is questioned by the developing countries on two grounds. One is that their socio-economic and cultural back-grounds have to be equally considered while implementing these rights. And secondly they are not satisfied with the politics played by the western countries in the name of human rights. The partisan and discriminatory approach of the West to ICESR is violations of the basic principle and spirit of Universal human rights that is indivisibility, interdependence and complementarily.[36]

(b) The problems of Resource Constraints:

As we have seen that unlike the ICCPR, the ICESR does not ask the state parties for any immediate implementation. Rather it asks the state party to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of it's available resources, with a view to achieving progressively the full realization of the rights recognized in it. As this language indicates, by ratifying this covenant, a state does not undertake to give immediate effect to all rights it enumerates. Now the question is, what accounts for this differences in the approaches and methods of implementation adopted in the two covenants? As a general proposition, the protection of most civil and political rights requires few, if any,

[36] For more on it, see *"The Challenge of Economic and Social Rights"*, in Stiener and Alston, op. cit., pp. 267-270.

economic resources, with minor exceptions little more is required of a government than legislation and a decision not to engage in certain illegal practices, not to torture people, not to imprison them arbitrarily etc.[37]

But the burden tends to be heavier and the task more complicated when economic, social on cultural rights are involved. In general, their enjoyment cannot be fully ensured without economic and technical resources, education and planning, the gradual reordering of social priorities, and in many cases international co-operation. These considerations are well-reflected in the 'progressive' and 'programmatic' obligations the state parties owe to the ICESCR. Even, from the very beginning, in 1966, it was emphasized that the ECOSOC should bear in mind the gradual nature of the obligations of states and take duly into account the constraints imposed by the resources available to each state.[38] Also in 1977, the Commission on Human Rights stressed the duty and responsibility of all members of the international community to create the necessary conditions including resource mobilization and proper means of distribution of the gains of scientific and technological development, for the full realization economic, social and cultural

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[37] *"Human Rights: Real and Supposed"*, in D.D. Raphael (ed.), *"Political Theory and Rights of Man"*, 1967, pp. 43-51.

[38] *"The UN and Human Rights: 1945-1995"*, UN Department of Public Information, New York, 1995, p. 47.

rights.[39] But still, the international community has invested little attention and few resources to the realization of the economic, social and cultural rights.

The prevailing economic condition of the Third World countries does not create necessary pre condition for the real implementation of the ICESCR. The state parties are hardly in a position to comply with the responsibility of full realization of these rights. According to the UN statistics the world's total population is about 5.7 billion, with 4.9 billion living in developing countries and about 1.3 billion living in hunger. Poverty has been one of the most potent cause of the violations of human rights in third world countries. Poverty undermines human dignity and without human dignity there is no human right.[40] If unprejudiced, one can easily understand a simple argument: one can enjoy human rights only after one manages to live on. When there is a grim struggle for existence, many of the principles of human rights appear to be impractical and devoid of merit. When employment itself is scarce, insistence on payment of minimum wages, abolition of child labour, abolition of bonded labour etc. appear to be constraints in getting employment. For a poor man, if his child could earn any amount, it is an addition to his income and will keep the pot boiling. He is unable to see

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[39] Edward Lawson, *"Encyclopedia of Human Rights"* (Second Edition), Tayler and Fransis, Washington D.C., USA, 1991, p. 405.

[40] D.D. Raphael, op. cit./ Also see Jean Dreze and Amartya Sen, *"Hunger and Public Action"*, in Steiner and Alston, op. cit., pp. 270-271.

any merit in the virtues of universal education and prevention of child labour. If human rights are really universal, it implies entitlement of world's resources to satisfy, to start with, the most basic want of hunger. Normatively suffering on this account anywhere in the world should be the concern of whole world community everywhere.[41]

But irony of the situation is that, if million of peoples are dying in many states of third world due to hunger, many rich countries of the west are dumping huge quantities of food grains into the sea as a price-stabilization measure and huge amount in these countries are spent on nutritional needs of dogs and cats. Are the lives of the masses of the third world are more worthless than cats and dogs of the west? Similarly, the current emphasis on environmental problem is shared worldwide. But there appear to be some deliberate attempts to compel the already poor third world countries to invest on environmental protection measures, so that the affluent countries do not suffer in term of competition on account of such investment in their countries.[42] For example see India: India – the largest democracy of world and the upholder of human rights and democratic values has earned the dubious distinction of having the largest illiterate population in the world. Around

[41] *"Emerging Dimensions of Human Rights"*, in *"Introduction to Human Rights"* op. cit., pp. 120-129.
[42] Ibid, p. 125.

half of it's population is illiterate i.e. do not have access to even primary education.[43]

And it's not that the government on the peoples themselves are not willing to have basic education. The problem is lack of resources and proper infrastructure. In a poor country like India and having a population of above one billion, it is quite difficult to provide all with educational facilities. And almost same is the situation in the other developing countries.[44]

Thus the problem of resource constraint is emanating from three factors. First: there is a genuine resource scarcity in front of the developing countries. Second: Neither the UN nor the international community of developed world providly any sustainable solution for the improvement of their economic condition.[45] And third: the western – developed countries are rather trying to disrupt the development process of the third world countries. These realities also explain, why as a practical matter, the standards by which to measure compliance under the ICESCR is different from those meant for ICCPR. Since each states invariably faces different problems and since no two states are likely to have the same "available resources", different criteria will have to be

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[43] Census Report of India, 2001. Also see, Manfred Nowak, *"The Right to Education"*, in Asbjorn Eide (ed.), *"Economic, Social and Cultural Rights: A Text Book"*, 1994, pp. 189-196.
[44] *"The Relevance of Resource Constraints"* in Steiner and Alston, op. cit., pp. 287-297.
[45] On the issue of International assistance, see *"Is there an obligation to Assist?"* in Steiner and Alston, op. cit., pp. 1132-1140.

applied to different states in determining whether they are living upto their treaty obligations.[46]

(c) Human Rights: Domestic Jurisdiction Vs International Jurisdiction

Quite often, a question is raised as to whether human right is a subject matter of domestic jurisdiction on international jurisdiction. Because though the UN has set universal standard for various kinds of human rights and has assumed the responsibility for their protection, finally it is the state authority who is to implement them in practice. And as discussed earlier, socio-economic cultural context and resource problems are the pretexts on the part of individual nation-state to interpret the UN standard as favourable to them.[47]

The desirability of a measure of international control is reflected in the very solemnity attached to the UDHR and other international covenants. Still there is always a fear on the part of states of the loss of certain amount of sovereignty by submitting to international control. There is also the question whether a world organisation can adequately deal with human rights problem arising in a state with it's own cultural

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[46] *"System for Protection of Human Rights"*, Indian Institute of Human Rights, New Delhi-30, p. 25.
[47] A.P. Vijapur, *"No Distant Millennium: The UN Human Rights Instruments and the Problem of Domestic Jurisidction"*, IJIL, Vol. 35, 1995.

distinct and peculiar tradition and culture.[48] The same thing has been reintegrated by governments on many occasions.

In it's white paper, "Human Rights in China', the Chinese Government stated that despite it's international aspect the issue of human rights falls by and large within the sovereign power of each state. The evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights.[49]

The same things are also pronounced by Honourable Mr. Justice P.N. Bhagwati, who was a judge in Supreme Court of India and currently is thehonorary regional adviser to Mary Robinson, the UN High Commissioner on Human Rights.[50] While defending India's non-membership to the Optional Protocol of ICCPR, he argues that, it would not be possible for non-Indian members (international jurists) of the Human Rights Committee to appreciate the socio-economic context in which certain legislative on executive actions may be taken, while

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[48] Sankar Sen, *"Human Rights in India"*, in Newaz B. Mody B.N. Mehnish, *"India's Role in the UN"*, Allied Publishers Ltd., Bombay, 1995, p. 77.

[49] *"Introduction to Human Rights"*, Indian Institute of Human Rights, New Delhi-30.

[50] "Paper on the Opening Address by Mary Robinson, UN High Commissioner for Human Rights at the Workshop for Judges on the Justifiability of Economic, Social and Cultural Rights in South Asia held in New Delhi, on 17th November 2001.

determining whether it is violative of any basic human rights. He further claims that the courts in India, familiar with the socio-economic conditions of the country, and the problems and difficulties of the people, would be in a better position to appreciate the reasonableness of any legislative on executive action for determining whether it infringes any of the basic human rights.[51]

Thus, due to the fear of loosing sovereignty in favour of any supra-national authority (the UN), and the respect to the socio-cultural context and economic condition of their people, many states are hesitant in complying with the UN instruments, even though virtually they are signatories to those standards.[52]

(d) National Legislation: ICESCR in Indian Constitution:

One of the main responsibility of the state parties to the ICESR is that they are supposed to incorporate all the rights enumerated in the covenant in their national constitution. This national legislation of ICESCR has not been taken place fully in all the state parties. However some have already had it. Some have also made some amendments. But all these are sporadic and insufficient to give them legal safeguards. National legislation is important and of acute urgency because the mere pronouncement of the human rights standards by the UN will not serve

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[51] See P.N. Bhagwati in forward to H.O. Agrawal, *"Implementation of Human Rights Covenants: with special reference to India"*, Kitab Mahal, Allahabad, 1983.

[52] Philip Alston and K. Vassal (ed.), *"The International Dimension of Human Rights (vol. 1)"*, Greenwood Press, UNESCO, 1982.

the purpose. It is the state governments who are the real actor to implement these rights. Secondly only national legislation can make these socio-economic and cultural rights legally binding on the governments.[53]

There is another problem which seems to be inherent to the UN system. Although states incorporated the principles of human right in their respective constitutions, they did not make all of them legally binding. And the pretext was that neither the UDHR non the ICESR have legal force behind them. Most of them consider the economic-social and cultural rights (of ICESCR) only as directives addressed to the states alone, to remind them of their obligations to transform them into reality in the promotion of human dignity and are therefore non-justiciable in the eyes of law.[54]

The bifurcation of human rights in the International Bill of Rights has influenced the treatment of human rights in the constitutions throughout the world. Civil and political rights are given greater importance and put in a higher pedestal in terms of enforceability and respect. Social, economic and cultural rights, on the other hand are treated as judicially non-enforceable directives or policy guidelines for the governments. Thus socio-economic rights came to be regarded as the

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[53] H.O. Agrawal, *"Implementation of Human Rights Covenants: with special reference to India"*, Kitab Mahal, Allahabad, 1983.

[54] T. Satyanarayana Sastry, *"The Structure, Functions and Powers of NHRC", Indian Journal of International Law*, Vol. 37, no. 1.

exclusive domain of the executive and legislative branches of the government with the judiciary having to do very little in terms of their enforcement.[55] The Indian constitution reflects this dual approach to human rights.

The framers of the constitution of India were also inspired by the ideals of international law of human rights and developed the constitution on the school of thought of individualism guaranteeing the rights of the individual against the acts of state. Accordingly, the justifiable and non-justiciable human rights of the UDHR were incorporated in the constitution of India as 'Fundamental Rights' (part–III) and 'Directive Principles of State Policy' (part – IV). While the former guaranteed certain rights to the individuals, the latter gives direction to the state to provide economic and social rights to it's people in specified matters. Together they roughly constitute the conscience of the constitution. However, the rights guaranteed and provided in the constitution are almost inconformity with the ICCPR and ICESCR. While part-III dealing with fundamental rights deal largely with what are called civil and political rights, part-IV incorporates socio-economic and cultural rights.[56]

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[55] Mantha Jackman, Constitutional Rhetonic and Social injustice: Reflections on the Justiciability Debate, in Steiner and Alstan, op. cit., pp. 301-306.

[56] B. De Villiens, *"The Scoio-Economic Consequences of Directive Principles of State Policy: Limitations on Fundamental Rights"*, South African Journal of Human Rights, Vol. 8, 1992.

The following table reflects how the rights enshrined in the ICESCR already exist in the Part-IV of Indian constitution.

ICESCR	DPSP	The Rights
Art 7(a) (i)	Art. 39(d)	Equal pay for equal work for both men and women.
Art. 7(b)	Art. (42)	Safe and healthy working conditions.
Art. 10(2)	Art. (42)	Provisions for maternity relief.
Art. 6(1)	Art. (41)	Right to work and right to education.
Art. 10(3)	Art. 39(f)	Rights of child to good health, development, enjoyment of youth and non-exploitation.
Art. 13(2)(a)	Art. 45	Free and compulsory primary education for all.
Art. 7(a)(ii)	Art. 43	Rights of workers to descent living standard, full enjoyment of leisure and social and cultural opportunities.
Art. 7(d)	Art. (43)	Right of workers to rest, leisure, and holidays.
Art. 7(a)(ii)	Art. (47)	Rights to good standard of living, and nutrition.[57]

As such, no legal action can be taken against the government in the count of law if it fails to follow any of these principles. The Directive principles were not made legally binding by the constitution makers, because they felt that (a) these rights are not precise or articulated and so the courts are ill-equipped to adjudicate them, (b) they involve

[57] H.O. Agarwal, *"Implementation of Human Rightscovemuts: with special reference to India"*, Kitab Mahal, Allahabad, 1983.

complex question of competiting social policies, (c) they require substantial resources, the disposition of which is beyond the capacity the state.[58]

There is an impression in society that governments are expected to provide socio-economic services free of charge to all citizens which tend to support the separation of these rights from the civil and political rights. Primarily, betterment of standard of living is the responsibility of individuals. State obligations are intended to supplement these individual efforts whenever and wherever needed and to enhance the capacity of individuals to achieve such conditions on all equal opportunity basis. Those who cannot meet basic needs and have no opportunities should be the responsibility of the state.[59]

Article 37 of Indian constitution stressing on the fundamentality of the Directive Principles says, "the provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country. It shall be the duty of the state to apply these principles in making law.[60]

But the problems remain unsolved. Because technically speaking, obligations arising from treaties are not judicially enforceable in India unless backed by legislation. In fact, in Article 253, the constitution has

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[58] B. De. Villiens, op. cit.
[59] E. Vierdag, *"The Legal Nature of the Rights Granted by the ICESCR", Netherland Yearbook of International Law*, Vol. 9, 1978, pp. 69-103.
[60] M.K. Sinha, *"Implementation of Basic Human Rights"*, Manak Publications, New Delhi, 1999, p. 187.

empowered the government to incorporate international law and provisions in national legislation. But it is not taking place.[61]

Another problem is that most of the countries who have become sate parties to the Covenant (ICESCR), have made several reservations in term of their obligation. Even India has made several reservation while signing the documents (ICESCR and ICCPR) on 10^{h} April 1979. Such as Article –I of both the ICCPR and ICESCR (Right to self-determination); Article – 9 & 13 of ICCPR; artiel 4 and 8 of ICESCR and 12, 19 (3), and 22 of ICCPR; Article –7 of ICESCR. The Indian Government said in the declarations that these provisions of the Covenants shall be applied as to be in conformity with the Constitution of India.[62] The effect of reservation is that the government is not required to take any step beyond that what is guaranteed in the constitution. Now this is a distortion of international human rights. We, in fact need a holistic approach rather than a selective one.

The Directive Principles might not be having legal sanction behind them, nonetheless they have the sanction of the people which is of utmost importance in the democracy. If they are not implemented, the opinion of the public would be adverse against the government and it is very likely that they might be ousted in the election by the public. Thus

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[61] D.D. Basu, *"Introduction to the Constitution of India"*, Prentice-hall, New Delhi, 1994.
[62] S. Subramanian, *"Human Rights: International Challenges"*, Manas Publications, New Delhi, 1997, pp. 54-55.

the extra-legal force which these principles (DPSP) carry with themselves have made them nonetheless important than civil and political rights.

Importantly, the high level of judicial activitism exercised by the Indian courts has proved that protection of socio-economic and cultural rights are also possible, even though they are not incorporated into national and municipal law.[63] The Indian courts in many significant judgments have forced the government to respect the Directive Principles as legally binding. Such as:-

Speaking on the importance of the substantive part of Article 31 (c), Justice Mathew J. Observed;

"In building a just social order, it is sometimes imperative that fundamental rights should be subordinate to directive principles... The economic goals have an uncontestable claim for priority over ideological ones on the ground that excellence comes only after existence. It is only if men existed that there can be fundamental rights".[64]

Justice P.N. Bhagwati said, "there may be a rule which imposes an obligation on an individual or authority and yet it may not be enforceable in the court of law and therefore does not give rise to a corresponding enforceable right of another person, but it would still be a legal rule because it prescribes a norm of conduct to be followed by such individual

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[63] N.R Madhava Menon, infra., p. 152.
[64] Paras Diwan and Peeyushi Diwan, *"Human Rights and the Law"*, Deep and Deep Publications, New Delhi – 27, 1996. p. 515.

or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of the mechanism of enforcement. A rule imposing an obligation or duty would not, therefore, cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite of any problem relating to it's enforcement."[65]

As a result of this judicial activism what emerged is a new human rights jurisprudence obliterating the division and prioritization of rights, and giving a fresh lease of life in honouring social, economic and cultural rights. Through this process, a number of socio-economic rights have acquired legal patronage.[66]

Importantly, the Indian government has made recently a breakthrough by making right to education as fundamental right.

Also in 1993, India enacted Human Rights Protection Act, under which National Human Rights Commission (1994) as well as states human rights commissions are established as part of creating mechanism to protect all human rights.[67] And recently, a comprehensive electronic database on development called 'Devinfo', having more than

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[65] Ibid. p. 518.
[66] N.R Madhave Menon, *"State of Socio-Economic Rights"* in K.P. Saksona (ed.), *"Human Rights" "Fifty years of India's Independence"*, Goyan Publishing House, New Delhi-2, 1999, p. 152.
[67] T. Satyanarayana Sastri, op.cit, p. 95.

500 social development indications from several official sources put together by the UN along with the Indian government has been launched on February -9, 2000 in New Delhi.

But, the mission is yet to be completed. The problems are various by nature and characteristics. The governments need to show more will power to protect human dignity and give all human rights legal coverage.

CHAPTER – IV

SUGGESTIONS FOR BETTER IMPLEMENTATION OF THE ICESCR

The discussion in the last chapter clearly indicates that, the problems of non-compliance are large in number. Numerous factors:- social. Cultural, economic, legal, methodological, perceptional etc. are responsible for the weak implementation of the ICESCR. In the light of all these discussions number of suggestions can be made for better implementation of the convenient. There are many areas, which can be reformed in order to make the system sustainably successful.

(A) Change in the methods of implementation:

'Progressive realization', the current standard used to assess the performance of State Parties, has proved to be inadequate for the effective implementation of ICESCR. In 1990, Danilo Turk, a Special Rapporteur to un recommended in his report that the UN to convene a seminar for discussion on the appropriate indicators to measure achievements in the 'progressive realization' of economic, social and cultural rights, and to offer an opportunity for a broad exchange of views among experts.[1] In January 1993, the UN Centre for Human Rights convinced such a seminar where it was concluded that far from being a short cut to defining and monitoring economic, social and

[1] The New International Economic Order and the Promotion of Human Rights, Progress Report prepared by Danilo Turk, Special Rapporteur, CHR/Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-second Session, 6-31 August 1990, E/CNG/Sub 3/1990/19 p. 31863.

cultural rights, the development of indicators requires the conceptualization of the scope of each of the enumerated rights and the related obligations of State parties. Thus it is difficult to formulate indicators to access progressive realization of these rights. Therefore, monitoring the performance of state parties in the progressive realization requires data collection, analysis, and interpretation including, in particular, a focus on the status on the poor and disadvantaged groups, as well as disaggregation for a number of variables.[2]

It also emphasized that human rights indicators are not essentially identical to statistical indicators utilized by specialized agencies to measure economic and social development. So it may be premature or inappropriate at times to apply quantifiable indicators; because not all indicators can be expressed in numerical terms, it is important to develop criteria, principles and standards for evaluating performance.

Audrey Chapman suggests that instead of attempting to evaluate compliance with 'progressive realization', it seems more fruitful and significant to focus on identifying violations of the rights enumerated in the convenient. Identification of violations entails, the elaboration, by committee, of what exactly constitute violation of the socio-economic and cultural rights. So that, the state parties would

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[2] Audrey R. Champan, "A New Approach to Monitoring the ICESCR" in "Human Rights, Year Book 1997", International Institute of Human Rights Society, New Delhi – 110001, pp. 40-42.

restraint themselves from committing anything that according to the Committee, would be treated as violations of the ICESCR. It will not only make the efforts of the NGOs substantiate but also supplement the success of the proposed optional protocol.[3]

Inter-governmental complaint procedure on the lines of the ICCPR may also yield good results. It would pressurize the state parties to take positive policies and actions to ensure the protection and promotion of socio-economic rights to their peoples. The committee has to clarify what exactly amount to the violations of these rights. Moreover it has to specify as to what exact steps the state parties are required to take.[4] Merely depending upon the state reports, which are often not available, will not work. The committee has to have the reports of the other agencies like NGOs, to have a comparative knowledge on the real status of economic and social rights. So that it is able to identify violations. These panel reports, and identified violations of rights by the state parties can be made public through all ways available, like putting it in the internet. Let the world know what exactly happening to economic, social and cultural rights world over.

(B) Change in the Discriminatory Approach

A fundamental tanet of international human rights law is that all human rights are of equal importance. In practical terms, it means

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[3] Ibid, p. 43.

[4] Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 16, 1994, pp. 693-697.

that they must be viewed correlatively and that a comprehensive and balanced approach in promoting these rights must be found. No set of rights say, cultural rights can be given pre-eminence over other human rights without distorting the principles of invisibility and interdependence.[5] But this principle is not observed.

In the Vienna World Conference, the Committee on Economic, Social and Cultural Rights stated, "The shocking reality against the background of which this challenge must be seen, is that states and the international community as a whole continue to tolerate, too often, breaches of economic, social and cultural nights, if they occurred in relation to civil and political rights, would provoke expressions to horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they are far more serious, and more potentially intolerable, than are massive and direct denial or economic, social and cultural nights.[6] This indicates the kind of approach the state parties are extending to the ICESCR. Under no circumstances or pretexts, ICESCR should be subject to discrimination. Otherwise the whole human rights movement may remain as mere shadow without substance.

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[5] "Human Rights Today – UN Briefing Papers", UN Department and Public Information, New York, 1998, p. 20.
[6] "Statement to the World Conference on Human Rights on behalf of the Committee on Economic, Social and Cultural Rights", UN Doc, E/1933/22, Annex. III, Para-5.

All human rights have to be addressed equally. The UN has to equate ICESCR with ICCPR both in terms of methods for implementation, and obligation by the state parties.[7]

What is now needed is a renewed and wider recognition of the interdependence and indivisibility of all human rights. It is certainly a matter of satisfaction that there are optimistic signs that the inter relationships between political freedoms, and economic and social development are being increasingly recognized. The Vienna World Conference on Human Rights reiterated the same thing. It set, at best, the debate on prioritization of human rights.[8] Indeed this acceptance and validity of economic and social rights and their complementarity with civil and political freedoms represents a positive sign. In simple term, the indivisibility concept is based on the simple belief that freedom and food both are essential for ensuring the dignity of person. This fact was very much appreciated in the UDHR which declares that human being, to safeguard their dignity, should enjoy freedom of speech and belief, and freedom from fear and want.[9]

However, this recognition of the concept of equality and indivisibility of all human rights has to be reflected in the approach and activities of the UN.

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[7] Joel Bakan, "What's Wrong with Social Rights", in J. Bekan and D. Schneiderman (ed), "Social Justice and the Constitution: Perspectives on a Social Union for Canada", 1992, p. 85.

[8] Bruno Simma, "The Implementation of the International Convenant on Economic, Social and Cultural Rights", in F. Matcher (ed.) "The implementation of Economic and social rights," 1991, p. 75.

[9] M. Craven, "The International Covenant on Economic Social and Cultural Rights: A Perspective on its Development", Clanendon Press, Oxford, 1995.

(C) Balancing Universal Stands with Regional Values

The globalization of human rights and personal freedoms is rarely an affront to any legitimate interest in self- preservation. Nor do human rights represent Western cultural imperialism; instead, they are the consequence of modernizing forces that are not culturally specific.[10] There is no doubt that the principle of universality concerning human rights has to be respected by all. Because the international human rights standards and norms, adopted through the UN, represent the hard won consensus of the international community and not the hegemony of any particular region or set of traditions. The international human rights instruments establish minimum standards for the range of economic, social, cultural, civil and political rights. They do not impose a single cultural standard; rather they promote a common legal standard of respect for human dignity. Within this international framework, states have the freedom to adopt human rights standards to their settings, as long as they do not contradict the norms established through international human rights treaties.[11]

However, the universality principles must be combined with concrete situation in different countries. There is no harm in accommodating different opinions, as it will also ensure unity in diversity. Because, respect and observance of human rights are

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[10] Thomas M. Frank, "Are Human Rights Universal?" *Foreign Affairs*, vol. 80, no.1, Jan. – Feb. 2001.

[11] "Human Rights Today", Department of Public Information, UN, New York, 1998, p. 20.

always conditional upon economic conditions of respective states. Moreover, since it is the states that are the main vehicles for the implementation of UN standards, their views need to be respected and considered for a greater unanimity. It is through persuasion rather than coercion that the states parties can be made to treat human rights responsibly.[12]

(D) Reinforcement of the Committee with Power and Resources:

Owing to its restricted powers, particularly when contrasted with independent national judicial and quasi-judicial institutions, the committee can only be expected to have a limited impact upon the actual enjoyment of human rights in countries over which it has occasional supervisory jurisdiction. This is true no matter how far the committee may improve its methods of work or how intensively it may strive to address serious human rights infractions. Nonetheless, it can have an effect especially where they respond openly to informations provided by NGOs within or outside the context of state reporting process. In such cases the committee can provide an impetus for the fuller realization of domestic human rights objectives. This multiplication and diversification of the sources of information will really work.[13]

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[12] "Universalism and Cultural Relativism", in Steiner and Alston, International Human Rights in Context Law, Politics, Morals Clarendon Press, Oxford, 1996, pp. 192-225.

[13] Scott Leckie, "The Committee on Economic, Social and Cultural Rights: Catylist for Change in a System Needing Reform" in Philip Alston and James Cnawfond (ed) ,"The Future of UN Human Rights Treaty Monitoring", Cambridge University Press, Cambridge, UK, pp. 129-130.

There is an acute shortage of staff for the committee. Also financial and technological resources have to be made available for the smooth functioning of the committee.

The composition of the committee has also to be reformed. It is questioned, how can it be that the procedures for securing compliance with major human rights treaties hinge upon a system that makes government entirely responsible for reporting on themselves, once every five year, subject to soft questioning for a few hours by cautious committees elected by those very governments, and with almost no likelihood of serious censure or real sanctions.[14]

What the Committee can do? It can improve guidelines on state reports, reinforce the requirements for their submission, develop procedural innovations and generally improve the reporting system.

- Determine the violation
- Urge the governments to adopt new legislations
- Urge the governments to repeal contradictory legislations.
- Encourage implementation of legislation
- Encourage preventive actions to avoid violations of the Covenant.
- Recommend the substantiate provisions of the rights enumerated in the Covenant.
- Recommend specific policy measures to create situation conducive to the enjoyment of these rights.[15]

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[14] Ibid, 131.
[15] Ibid, pp. 135-140.

The reporting system has to be digitalized with the states' reports to be submitted in electronic form. Once the states' reports are received they can immediately be entered into a UN Treaty Body Country Database on the Internet. The database would contain all relevant informations including:-

(i) Copies of all state's reports

(ii) Copies of previous concluding observations by the monitoring body involved and by other monitoring bodies.

(iii) Any other information placed in the database by independent sources, suitably acknowledged

(iv) Accessible description of the reporting process, the relevance of the treaty in question and other information for persons not already involved in the human rights field.[16]

The committee members should have access to comprehensive computer training. The committee should have its own web site which would enable a much broader range of people to submit information and alternative reports than is currently the case. Each member should have a computer set with internet on its table, so that it can get all informations of finger tip, needed for further action.[17]

Moreover, more systematic and intensive secretariat follow up actions are to take place. Scott Leckie suggests that following the

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[16] Ibid, p. 143.

[17] James Crawford, "The UN Human Rights Treaty System: A System in Crisis? In Alston and Crawford, "The Future of UN Human Rights Treaty Monitoring, Cambridge Press, UK, p. 7.

consideration of a report, each committee secretariat should prepare country follow up documents to be available within twelve months of the release of the concluding observations systematically following up previous recommendations and suggestions of the committee will insist in maintaining institutional memory and promote treaty compliance. While the committee offers detailed concluding observations, there is no apparatus for determining whether they are actually complied with. Waiting five years to discover what has or has not been done is far too long. The vagueness and generality of many of the recommendations and suggestions issued to date could be addressed through more intensive secretariat involvement. The gap between each periodic report has to be reduced from five to two years. It may enhance compliance.[18]

Issuing concluding observations certainly represents an improvement over earlier outcomes of the supervisory process. This method would have a greater impact, were it to include a sixth category entitled 'violations of the treaty' elaborating, in a more judicially oriented manner, each violations found and making specific recommendations for the steps required to redress any violations.[19]

(E) Marking ICESCR Legally Binding

As we have seen, the implementation procedure of the covenant is hardly adequate. It does not provide any system of adjudicatory

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[18] Scott Leckie, op.cit., pp. 143-144.
[19] Ibid, p. 144.

control and enforcement. With the slow and steady crystallization of human rights into substantive international law, it has become necessary to develop objective international law for implementation of such international law. The solid argument behind this proposition is that it is recognized that human rights are not merely combined to domestic jurisdiction, rather it is also a matter of grate concern for the international community. If the rights have been recognized at international plane, remedy should also be provided tot he individuals international level. Rights without remedies are meaningless.[20] It is in this context that Dr. H.O. Agarwal proposes the creation of an independent international court of Human Rights having universal jurisdiction and to which individuals and groups would have access by way of appeals, in case available domestic remedies are exhausted. He warns, that unless and until the international machinery for the enforcements of the rights is made strong and effective, states would continue to abuse the provisions of the Covenant.[21]

(F) The Option of 'Optional Protocol'

The authority and prestige of international law can be strengthened only when international jurisdiction becomes a compulsory element of the international legal order. There should be a judicial procedure and an institution to consider cases of direct violations. International judicial enforcement is an essential condition

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[20] H.O. Agarwal, "Implementation of UN Human Rights Convenants: With Special References to India", Kitab Mahal, Allahabad, 1983, pp. 51-54.
[21] Ibid, p. 54.

for the effective protection of human rights precisely because the rights of the individuals form the counterpart of, and as such are opposed to, the duties of the state.[22] The international judicial enforcement system has a potency to afford on individuals protection against the state. If the states parties violate the provisions of the covenant, remedy should be available to the victims for the protection against the state.[23]

It is in this context that the need of an Optional Protocol is felt by many actions in this field, including the UN itself. The committee on ICESCR in December 1992, noted that the Special Rapporteur had expressly recommended the preparation of an optional protocol to the Covenant that would permit individual communications pertaining to some or all of the rights recognized in the Covenant, and considered this possibility in some detail, as summarized in its report. Discussion in the committee was based upon an analytical paper prepared by the Special Rapporteur outlining the principal issues that would arise in connection with the drafting of such an optional protocol in which the following conclusions were set out:- "The overriding argument in favour of developing an optional protocol to the International Convenient on Economic, Social and Cultural Rights is that a system for the examination of individual cases offers the only real hope that the international community will be able to move towards the

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[22] K. Vasak and P. Alston, "International Dimensions of Human Right", Greewood Press, Paris, UNSECO, 1982.
[23] Ibid, p. 51.

development of a significant body of jurisprudence in this field. As the experience of the Human Rights Committee demonstrates such a development is essential if economic, social and cultural rights are to be treated as seriously as they deserve to be." The committee adopted the analytical paper at its seventh session, on 11th December 1992.[24]

Subsequently the commission on Human rights expressed its conviction that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic social and cultural nights," and its awareness that despite progress achieved by the international community with respect to the setting of standards for the realization of the rights enumerated in the ICESCR, the implementation side has not received sufficient attention within the framework of the UN system."[25]

Moreover, the rationale for drafting an optional protocol to the Covenant to permit the submission of complaints by individuals and groups pertain more generally to the advantages of adopting a violation approach as discussed above. According to the Committee (CESRC), the Optional Protocol would enhance the practical implementation of the Covenant as well as it's dialogue with state parties. In addition, it would focus public attention to a greater extent on economic, social and cultural rights bringing concrete and tangible

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[24] Edward Lawson, "Encyclopaedia of Human Rights" Second Edition" Tayler and Fransis, Washington D.C. USA, 1991, pp. 406-407.
[25] Ibid, p. 407.

issues into relief.[26] The existence of a potential 'remedy' at the international level would provide an incentive to individuals and groups to formulate economic and social claims in more precise terms and in relation to specific provisions of the Covenant. Despite the fact that the committee's view or opinion would not be binding, the possibility of an adverse 'finding' by an international committee would give economic and social rights greater political salience.[27]

(G) Greater role of NGOs and State Human Rights Commission

In this whole process a very constructive role can be played, rather required to be played by various non-governmental organisations. They will not only supplement the country reports but also pressurize the governments to be sensible and responsible to the basic human rights of their citizens. In case of Optional Protocol they will act as the real vehicle of communication.[28] The NGOs can also help the governments in preparing the country reports.

A greater role has to be played by the various national human rights commissions. Starting from interpreting international provisions, they can go up to the extent of asking the governments to harmonize their national laws with that of the international ones.

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[26] Audrey R. Chapman, op.cit, p. 45.
[27] Henry Shue, "Basic Rights: Subsistence Affluence and U.S. Foreign Policy, New Jersey Princeton University Press, Princeton, 1980, p. 33, para 37.
[28] Andrew Clapham, "UN Human Rights Reporting Procedures: An NGOs perspective" in Steiner and Alston, op.cit., pp. 175-200.

Besides they have to be very much active in listening to the victims of human rights and fighting for justice for them in the domestic level.[29]

(H) Imparting Human Rights Education at all Level:

As a part of the Human Rights Training and Research Programs the governments can be asked to open Human Rights Departments in all their Universities. Also Human Rights as a general subject can be included in the curriculum of primary and higher secondary level. It will certainly make the general mass conscious of their human rights; so that they may put-forth a stranger claim in front of their governments.[30]

(I) Human Rights Council

A Human Rights Council is desirable to coordinate all the UN activities on human rights. In fact the United Nations is working in such a wide area of activities for protection and promotion of human rights, and so many commissions and committees are in operation that, there is a need to have central command. A human rights council can be created as a parallel organisation to the Economic and Social council to give a unified command and direction to the whole human rights regime of the UN.[31] In this case the UN High-Commissioner on Human Rights and his office (OHCHR) will lead the

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[29] Brian Bundekin and Anne Gallayhen, "The UN and National Human Rights Institutions;, Quarterly Review of the UN High Commissioners for Human Rights, vol. 1, no. 2, spring 1998.
[30] H.O. Agarwal, Implementation of Human Rights Convenants, op.cit.
[31] Ibid.

Council. It will, with it's increased status in terms of power and significance; work more effectively.

(J) RIGHT TO DEVELOPMENT

Now, in the third generation of international human rights movement, more emphasis is given on the Right to Development. Here, is the overall development of the human-person is given a human rights approach. It gives a comprehensive and integrated approach to human rights. The Declaration on the Right to Development stressed that promotion of one set of rights (civil and political) can not justify the denial of other human rights. It recognized that human person is the central subject of development and should be an active participant and beneficiary of the Right to Development.[32]

The UN Secretary General Kofi Annan says, 'Truly sustainable development is possible only when the political, economic and social rights of all people are fully respected. They help to create the social equilibrium which is vital if a society is to evolve in peace. The Right to Development is the measure of respect for all other human rights. That should be our aim a situation in which all individuals are enable to maximize their potential, and to contribute to the evolution of the society as a whole."[33]

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[32] Hector Gros Espiell, "The Right to Development as a Human Right" Texas International Law Journal, vol. 16, 1981. Also see Arjun Sengupta, "Development Policy and the Right to Development" *Frontline*, vol. 18, no. 4, Feb. 17 - March 2, 2001, pp. 91-96.

[33] Human Right Today, op.cit, p. 23.

This right not only encompasses all civil, cultural, economic, social and political nights, but also promotes the recognition of interdependent and indivisible ties between various human rights, permitting the individuals full participation and involvement in economically durable, politically free and socially just development. Mary Robinson says "the right to development has the potential to become the integral approach to human rights that the international community has been seeking for over five decades."[34]

Hence it can be suggested that if the UN succeeds in making this Right to Development legally binding upon all the states., then it can help in promoting better compliance to the ICESCR. Fortunately the High Commissioner on Human Rights is reorienting on it. Currently, Prof. Anjun Sengupta of Jawaharlal Nehru University, New Delhi, is working as on Independent Expert on the Right to Development at the Human Rights Commission, Geneva.

(K) RESOURCE MOBILIZATION

As we have discussed, resource constraints has been one of the factor responsible for the states negligence towards the economic and social rights. Since implementation of these rights also depends on the economic prosperity of the states, it is required that the United Nations with the help from the Developed Market Economies should

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[34] Ibid. p. 37

carry out extensive technical cooperation programmes. The developing countries need international aid and assistance for this purpose.[35]

However, this is not the whole situation. There is also a lack of proper distribution of power and wealth in these countries. The disparity of power and wealth leading to uneven rate of growth among the masses is causing denial of these nights. If at least this disparity is reduced to same extent it will be of good help.[36]

(L) NATIONAL LEGISLATIONS

If not reporting in time, the states parties, at least, can incorporate the previsions of the Covenant in their national legislations. It is important because after all it is the states that are to give the real protection to the human rights of the people. The UN has to ensure that, at least, substantial provisions of the Covenant are nationally accepted in legislations. Dr. H.O. Agarwal suggests that all these provisions should be incorporated into municipal laws. So that people in the grassroots level can claim for and enjoy it.

In the law of human rights, the individual and the state constitute the opposing subjects of rights and duties. While the former has rights, the latter has a duty to protect them. International laws have a function to see that duties are performed by the states against individuals.[37]

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[35] Robert E Robenston, op.cit
[36] "Basic Facts About the UN", UN Department of Public Information, New York, 1998, pp. 226-227.
[37] H.O. Agarwal, op.cit.

There can be no doubting that significant improvements have been made within the global human nights treaty regime. Important elements of the system, which were viewed as unrealistic only a few years ago, are now widely accepted. The system once, inaccessible and almost entirely ineffectual, has grown substantially to the point where on occasions, it can make a real difference in the lives of real people. Nevertheless, these minor successes have produced a form of counter -reaction in the form of criticism by some states and cautious attitudes by the treaty bodies. This has occurred at a time when rather than caution, sterner measures grounded in human rights law would have been a more appropriate response.

CHAPTER – V

CONCLUSION

Human rights of the individual are those conditions of social life without which no man can seek, in general, to be himself at his best. Human rights have to do with the all-round development of the human being in harmony with that of his fellow-beings, in the totality of the relations in a society. The concept of human rights is necessarily evolving in nature, apace with the evolution of human civilization in the context of a changing social, political, economic and cultural milieu. It is therefore a daunting task for anyone to assess the state of implementation of human rights in a society. The arrogance of sitting in judgement over the human rights performance of the society apart, it is a function often tainted by a preferred perception and prioritization of human rights inter se and an electric identification and impressionistic evaluation of human rights situations. The exercise usually ends up in a faultfinding judgement, without taking into account the intrinsic co-relationship of the development of the individual with the development of the society, and without addressing the question of social and economic costs of conditioning the co-relationship between the individual and societal development.

And this is quite reflective in the development situation of the third world countries. We saw it in the case of India. Resource constraints and the socio-cultural contexts in regional level are, now, the mighty obstacles in the real realization of economic social and cultural rights. But more than that is the faulty distribution system. It is also highly conditioned by the huge gap of power and wealth between the rich and the poor, within a given society. For example in India, in 1992, the top 20 percent of the population, accounted for more than two-fifth of the total consumption expenditure, while the bottom 20 percent had a share of a mere 8.5 percent of the consumption. The top ten percent spent eight times as much as the bottom 10 percent. There are parts of India such as the tribal belts of the districts of Bolangir and Kalahandi in the state of Orissa, exposed to the scourge of poverty, mal-nutrition and even starvation attributed to repeated crop failures, inhuman exploitation of the tribals and politicization of human calamities, with a state administration, unfortunately indifferent towards it's responsibility[1]

Justice P.N. Bhagwati has rightly observed that the object of fundamental rights of Indian constitution (similar to those of ICCPR) is to protect individual liberty, but can an individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is real connection between individual liberties and the shape and

[1] *"State of Human Rights in India"*, Indian Institute of Human Rights, New Delhi, p. 90.

form of the social and economic structure of the society. Can there be any individual liberty at all, for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the 'exploitative economic system'? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process get mutilated on destroyed? It is axiomatic that the real controversies in the present-day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few, which is in conflict with the liberty of the many. The Directive Principles (similar to ICESCR) of the constitution, therefore, impose an obligation on the state to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all.[2]

The emphasis here is on the implementation of human rights at the ground level, because the mere recognition and incorporation of the rights in international documents itself is not enough. What the system essentially needs is to enforce these rights in national legislation and see that in domestic jurisdiction they are implemented and fully respected. The implementation aspect is important because ultimately if these rights are not enjoyed by the large masses of people, they are merely

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[2] Paras Diwan and Peeyushi Diwan, *"Human Rights and the law: Universal and Indian"*, Deep and Deep Publications, New Delhi, 1996, pp. 517-618.

pious declarations. And implementation of, and compliance with international human rights treaties are ultimately national issues. This is also because of the fact that international and even regional human rights mechanisms are simply in accessible to the vast majority of the world's population. At the end of the day, individual rights and freedom will be protected or violated because of what exists or what is lacking within a given state or society, and not because of what is said or done within the United Nations *'Palais des Nations'* in Geneva. The ability of a state to discharge it's responsibilities in the area of human rights effectively will depend predominantly on the strength of it's domestic institutions. It is for this very simple reason that the worth of the United Nations human rights treaty system can best be measured by reference to it's ability to encourage and cultivate national implementation of, and compliance with, international human rights standards.[3]

It is in this context that the Human Rights Commissions' working at national as well as state level has a major role to play. But, again, these institutions are granted generally with limited powers. For example, National Human Rights Commission of India cannot enquire into any matter against the state if it refuses or fails to implement the non-justiciable human rights, which are addressed to the state only under the ICESCR. Since in case of a conflict of the constitutional

[3] Anne Gallagher, *"Making Human Rights Treaty obligations a reality: Working with New Actors and Partners"*, in Philip Alston and James Grawford (ed), *"The Future of UN Human Rights Treaty Monitoring"*, Cambridge University Press, UK, 2000, pp. 201-202.

provisions with those of the international treaties, it is the constitution, which will prevail. In such situation, the Commission (NHRC) is bound to interpret the provisions of the statute or constitution in harmony with the principles of the international law to the extent possible rather than to discharge it's functions freely in accordance with the covenants.

To overcome these obstacles, the commission has to resort to Blackstonian Doctrine of 'Incorporation of International Law into Municipal Law'. By adopting this theory, the commission can not only protect the interests of the individuals, but also interpret and apply the rights which are granted under treaties or covenants wherein the obligations exclusively lies on the Executive without bringing any changes in the internal law of the state to the extent permissible by the constitution.[4]

Moreover, the protection of human rights also presupposes an adequate standard of living for all persons; an impartial, accessible and independent judiciary; efficient, professional and disciplined law enforcement; a free and responsible press; and a vigorous civil society.[5]

However, the UN human rights treaty supervisory system has come a very long way in a relatively short time. As recently as 1969, there was not a single human rights treaty-body in existence. States were extremely

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[4] T. Surya-Narayana Sastry, *"The Structure, Functions and Powers of the NHRC of India"*, IJIL, vol. 37, no. 1, Jan-Mar 1997, p. 102.
[5] Anne Gallaghen, op. cit., p. 202.

reluctant to subject their human rights record to any sort of scrutiny, as we have seen in the case of the economic, social and cultural rights (Chapter-II). And thirty years latter, the system has developed so rapidly that it has problems of which, human rights proponents in earlier eras could only have dreamed. These problems are certainly considerable, but they must be viewed against the background of the historical evolution of the system as a whole and in the light of the range of other factors involved. The latter include the determined gradualism which inevitably characterizes developments in the human rights field, the reluctance of all governments to facilitate the emergence of a truly effective international human rights monitoring regime, and the shrinking resources available to the United Nations for such activities. In addition, it is inevitably difficult to achieve flexible institutional and substantial changes in the context of a regime which has it's foundations in a range of treaties, each of which was, to some extent, drafted in such a way as to limit the possibilities of dramatic change from within, by processes of interpretation and applications as distinct from amendment. There are no shortcuts to the development of an effective monitoring system and there are no magic formulae, which will transform the capacity of the system to promote compliance with human rights norms.[6] Moreover one should not be unduly worried over the slow progress of the covenant on

[6] Philip Alston, *"Beyond 'Them' and 'Us': Putting Treaty Body Reform into Perspective"* in Alston and Crawford, op. cit., pp. 522-523.

economic, social and cultural rights (ICESCR), since the rights enumerated therein are numerous, and can only be achieved in a process of gradual and progressive realization. The UN has adopted a multifaceted approach by establishing, declaratory regime, promotional regime and implementation regime for human rights.

It is encouraging to note that ICESCR has been widely ratified (143 states as an December 2000). There is now the need of creating the processes to enable the harmonization of laws and policy necessary to achieve progressive realization of economic, social and cultural rights and the right to development which will contributes to maximizing all the benefits offered by globalization. It is also heartening that the present UN High Commissioner on Human Rights, Mary Robinson is emphasizing on the Right to Development which gives a non-discriminatory approach to all human rights. Last year, in the UN Millennium Summit in New York, the International Community, 'determined to establish a just and lasting peace allover the world', committed itself to making the Right to Development a reality for all and set out a clear programme of action based on humanity's shared values of freedom, equality, solidarity, tolerance, respect for nature and shared responsibility.

Nevertheless, much more needs to be done to explore the ways in which compliance with the human rights treaty obligations can be both facilitated and encouraged through the provision of positive incentives. It

is time for government and international organisations to put their money where there mouths are by investing in the long-term future of the human rights treaty monitoring system, which they have put in place and upon which so many expectations have been placed.[7]

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat all human rights globally in a fair and equal manner on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms for all.

[7] Ibid., p. 525.

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