

ABSENCE OF DICHOTOMY BETWEEN ICESCR AND ICCPR WITHIN
INTERNATIONAL HUMAN RIGHTS LAW

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Abstract

The perception that there is any kind of split between ICESCR and ICCPR is false. The perception emerged due to the historical division between Socialist and Western blocs. Both ICESCR and ICCPR reinforce each other and the presence of one is essential for the existence of the other. Therefore, the focus on ICESCR should be at par with the focus on ICCPR. For this purpose, some structural issues which hamper post – colonial countries must be solved to fully execute the foundations of a welfare state and to comply with the requirements enumerated within International Human Rights Law.

Keywords: International Human Rights Law, International Covenant of Economic, Social and Cultural Rights, International Covenant of Civil and Political Rights

Introduction

In the recent past, the global discourse included an emphasized focus on the importance of race and gender to highlight discrimination. The global elite including Multinational Corporations and Western development organizations increased their interest in the importance of civil and political rights. In the human rights discourse, there is a general perception that civil and political rights (“CPRs”) take precedence over economic, social, and cultural rights (“ESCs”). Therefore, the impression created was that governments ‘must’ ensure implementation of CPRs before the realization of ‘optional’ ESCs. It was also construed that the governments should refrain from interfering with the exercise of CPRs while they should actively strive to provide ESCs.

These perceptions gave the impression in the legal discourse that there was an intrinsic dichotomy between ESCs and CPRs. This impression was further solidified when CPRs and ESCs were codified separately in the International Covenant on Civil and Political Rights (“ICCPR”) and International Covenant on Economic, Social and Cultural Rights (“ICESCR”) respectively. However, the historical facts suggest that this presumed separation emerged only due to the ideological differences of approach towards human rights between the Western bloc and Socialist bloc. The Western bloc preferred the primacy of free market and focused on CPRs while the Socialist bloc was more concerned with the implementation of ESCs.¹

Hence, there is no inherent historical primacy of CPRs over ESCs and the past record demonstrates that codification of ESCs preceded CPRs.² Subsequent conventions such as the Convention on the Elimination of all forms of Discrimination against Women (“CEDAW”) and the Convention on the Rights of Children (“CRC”) further supported this argument as these conventions merged both CPRs and ESCs with each type entailed both positive and negative obligations on the state.³ Article 1 of the Declaration on Right to Development 1986 also reflected a negation of this dichotomy as it accorded a right to every person to enjoy cultural, economic, political and social development.

¹ Asbjorn Eide, *Economic, Social and Cultural Rights: a Textbook* (Martinus Nijhoff Publishers 2001) 111

² Asbjorn Eide, *Economic, Social and Cultural Rights: a Textbook* (Martinus Nijhoff Publishers 2001) 116

³ Asbjorn Eide, *Economic, Social and Cultural Rights: a Textbook* (Martinus Nijhoff Publishers 2001) 164

In light of this historical background, which negates any dichotomy between ESCs and CPRs, this essay shall explore the elucidations of both ICCPR and ICESCR so that it could be ascertained with authoritative proofs that there is no legal separation in the ‘form’ or ‘implementation’ of these rights. Moreover, this essay shall also peruse cases of both regional and national courts as the operation of human rights law on novel conditions further manifests the inter - dependence of all human rights. Lastly, this essay shall argue that there is a clear and present infringement of ESCs.

Therefore, a holistic and practical approach in relation to the implementation of these rights must be executed to remedy the problems. This approach shall attempt to remove the structural traps within societies which deter the sustainable application of human rights by giving the impression that ESCs and CPRs are mutually exclusive.

Legal Indivisibility between ESCs and CPRs

It is observed in the human rights discourse that rights enumerated in the legal instruments are primarily a mixture of three fundamental principles: existential security, participation in the life of the community and cultural identity. Existential security, for instance, reflects itself in the form of the right to life. The true ‘form’ of this right is not possible to exercise without some sort of cultural identity. Cultural identity is manifested, *inter alia*, in the rights accorded to minorities and right to have freedom of thought. Interestingly, the cultural rights are also essentially dependent for their realization on the principle of participation in communal life. Therefore, it can be noted that all human rights are united in its core principles and are produced from the womb of the same fundamental areas in different shades to capture diverse situations.⁴

The indivisible nature of ESCs and CPRs, as well as the presence of both positive and negative obligations, attached to both types of rights are best manifested in Article 6 of the ICCPR. This article recognizes the inherent right to life of every human being. Human Rights Committee (“HRC”) elucidated this right as a pre-requisite to the enjoyment of all other human rights and whose content can be informed by other human rights. The negative obligation on the state *inter alia* is that no person shall be arbitrarily deprived of his or her life. Moreover, the

⁴ Rolf Kunnemann, “A Coherent Approach to Human Rights” (1995) 17 Human Rights Quarterly 323, 326

state parties are also obliged to respect and ensure that the right to life is preserved through legislative and administrative measures.⁵

These measures include the duty to take appropriate measures to protect a person from the situations that may give rise to direct threats to life. The HRC included degradation of the environment, deprivation of land of indigenous peoples, prevalence of life-threatening diseases, widespread hunger, and homelessness as a direct threat to life. Hence, this interpretation on the part of HRC is a quintessential example of the convolution of CPRs with ESCs. HRC's elucidation also debunks the myth that right to life is a negative right as HRC enjoins the state to protect the right to life from all factors which may directly or incidentally cause deprivation of life.⁶

Article 26 of the ICCPR also illustrates a similar attitude in its provision and forbids discrimination of any kind. Moreover, it also endows the state to provide equal protection of the law. Article 26 reflects both positive and negative rights as the state must ensure that all people are treated according to the law and should not be discriminated on prohibited grounds. The HRC eloquently and expansively defined discrimination as any distinction which has the purpose or effect of nullifying or impairing the recognition on an equal footing of all human rights including political, economic, social, and cultural or any other field of public life. However, the committee excluded any classification among people on the principle of affirmative action from the ambit of discrimination as this classification itself aims to reduce the structural inequalities which cause innate discrimination among people.⁷

The HRC's interpretation of Article 26 is especially interesting; not only did it recognize that discrimination could have an effect on all facets of human rights, it also excluded any effort from the purview of discrimination which aims to integrate society and to end 'reproduction of privilege'. Implicitly, this interpretation recognizes that plain reading of the law may be ineffective unless circumstances are analyzed in a dynamic way, and this shall naturally involve political, cultural, economic and social rights which need to be accorded. The General Comment ("GC") on Article 3 of the ICESCR also supported this assertion that rights should be analyzed from the perspective of diverse human experience.⁸

⁵ United Nations Human Rights Committee, "General Comment No. 36: Right to Life" (*Refworld*) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement>> accessed January 30, 2023

⁶ *Ibid*, Para 26

⁷ United Nations Human Rights Committee, "CCPR General Comment No. 18: Non-Discrimination" (*Refworld*) <<https://www.refworld.org/docid/453883fa8.html>> accessed January 31, 2023

⁸ United Nations Human Rights Committee, "CCPR General Comment No. 28: Article 3" (*Refworld*) <<https://www.refworld.org/pdfid/45139c9b4.pdf>> accessed January 31, 2023

The Committee on Economic, Social and Cultural Rights (“CESCR”) noted that equal political rights between different segments of society cannot be enforced unless economic and social rights are also balanced. Therefore, the CESCR Committee summarized that substantive equality must be differentiated from formal equality as laws made on the basis of the latter may even perpetuate inequality because they shall not take account of existing economic, social, and cultural inequalities.⁹

The GCs interpreting various articles of ICESCR further establishes the link between CPRs and ESCs. These elucidations also neutralize this theory that ESCs are always in the shape of positive obligations imposed upon the state. Article 6 of the ICESCR guarantees the right to work including the right of everyone to gain an opportunity to earn his living. CESCR observed that there is an inherent relation of right to work in ICESCR and the right to be treated with dignity reflected in Article 10(1) of ICCPR. This is primarily due to the fact that a person’s work not only ensures the survival of a person but also symbolizes his development in community. It must be mentioned that the right to work also includes the right not to be forced for compulsory labour as reflected in Article 8(3)(a) of ICCPR as only free exercise of work ensures the dignity of a person.¹⁰

The positive and negative obligations of the state include the element of *availability* of specialized services to assist and support individuals for employment; element of *accessibility* to labour market without any discrimination; elements of *acceptability and quality* which enjoins the state to provide the workers just, safe and favorable conditions of work including right to form trade union.¹¹ Thus, the rights which are inherent in right to work also overlap with the right to form and join trade unions reflected in Article 22 of the ICCPR. The realization of the right to work in all its manifestations with the understanding of various provisions attached to it is very important especially in the context of South Asia. In India and Pakistan, practices such as debt bondage and exploitation of domestic workers are frequently reported.¹² All of these practices have underlining in economic and political contexts and the example of

⁹ UN Committee on Economic, Social and Cultural Rights, “General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)” (*Refworld*) <<https://www.refworld.org/publisher,CESCR,GENERAL,,43f3067ae,0.html>> accessed January 30, 2023

¹⁰ CESCR, “General Comment No. 18: The Right to Work (Art. 6 of the Covenant)” (*Refworld*) <<https://www.refworld.org/publisher,CESCR,GENERAL,,4415453b4,0.html>> accessed January 30, 2023

¹¹ CESCR, “General Comment No. 18: The Right to Work (Art. 6 of the Covenant)” (*Refworld*) <<https://www.refworld.org/publisher,CESCR,GENERAL,,4415453b4,0.html>> accessed January 30, 2023

¹² CESCR, “General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)” (*Refworld*) <<https://www.refworld.org/publisher,CESCR,GENERAL,,43f3067ae,0.html>> accessed January 30, 2023

South Asia in relation to right to work highlights the urgent requirement of dynamic understanding of the ESCs.

Article 13 of the ICESCR reflects the right to education. CESCR notes that it is a primary vehicle for economically and socially marginalized adults and children to lift themselves out of poverty. It also enables a person to participate effectively in a free society and helps to efficiently utilize the political right to vote, office and civil right of freedom to expression, thought and conscience.¹³ These inter-connections between the right to education and the ICCPR was also reflected in the interpretation of Article 25 of the ICCPR. There, the CESCR emphasized that positive measures must be taken to overcome specific difficulties such as illiteracy and poverty for effective realization of political rights.¹⁴ Like other ESCs, there are both positive and negative obligations on the state related to this right which also relate with CPRs. These obligations include the *availability* of quality education to students; *accessibility* without discrimination; *acceptability* in relation to the form as well as substance of education and *adaptability* so that it conforms to the needs of changing societies.¹⁵

Right to health is reflected in Article 12 of the ICESCR which demonstrates the greatest relation with civil and economic rights and imposes upon the state both positive and negative obligations. The right to health is dependent upon ESCs through right to food, right to housing, right to work and right to life. Right to health also has a relation with CPRs through right to non-discrimination, right to equality, and laws prohibiting torture. The right to health imposes a negative obligation on the state to provide accessibility to health services without discrimination but also to protect citizens from any private discrimination as well as to ensure availability through functioning of public health care. The state must respect, protect and fulfil this obligation to execute right of health in all its colors.¹⁶ A recent example of the inter-connection of the right to health and civil right of non-discrimination can be observed in the instances of the denial of testing of COVID-19 to the people of colour in USA.¹⁷ In these cases, the US government has clearly failed to fulfil its positive obligation to protect the people of

¹³ CESCR, “CESCR General Comment No. 13: The Right to Education (Art. 13)”, (Refworld) <<https://www.refworld.org/docid/4538838c22.html>> accessed January 30, 2023

¹⁴ HRC, “CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service” (Refworld) <<https://www.refworld.org/docid/453883fc22.html>> accessed January 30, 2023

¹⁵ CESCR, “CESCR General Comment No. 13: The Right to Education (Art. 13)”, (Refworld) <<https://www.refworld.org/docid/4538838c22.html>> accessed January 30, 2023

¹⁶ CESCR, “General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)” (Refworld) <<https://www.refworld.org/publisher,CESCR,GENERAL,,4538838d0,0.html>> accessed January 30, 2023

¹⁷ Mariya Mosley, “Beloved Brooklyn Teacher, 30, Dies of Coronavirus after She Was Twice Denied a COVID-19 Test” (2020) <<https://abcnews.go.com/Health/beloved-brooklyn-teacher-30-dies-coronavirus-denied-covid/story?id=70376445>> accessed January 30, 2023

colour from discrimination which has resulted in considerable deaths within the black community of USA.

Inter-connection of ESCs and CPRs in Practical Conditions

Many cases were adjudicated in national and regional courts which reflected the interplay of ESCs and CPRs when applied on local conditions. The African Commission on Human and People's Rights case of *The Social and Economic Rights Action Center* best reflects through its facts the convolution of all types of rights. This case involved the military government of Nigeria. The Nigerian oil company while extracting the oil contaminated the environment of the *Ogoni* people. This led to the environmental degradation and health problems among that community. Moreover, numerous oil leaks occurred which contaminated the surrounding water, soil, and air. These contaminations caused many dangerous diseases among the *Ogoni* people. The Government failed to impose standard industry safety measures on the oil companies dealing in this process. Under the pretext of suppressing an anti-government movement, the Nigerian security forces also burnt and destroyed *Ogoni* villages and food supplies. The Commission ruled that Nigeria had violated the obligations relating to right to health and the right to a clean environment and there is a sufficient link between a safe environment and the quality of life. Moreover, the judges observed that there were systematic violations of the right to housing as well as right to economic, social, and cultural development on the part of Nigerian state. The most important observation in this case was that the Commission considered the right to food as inseparably linked to human dignity and is essential for the enjoyment and realization of other rights such as health, education, work and political participation. The Commission also considered Nigeria to be in violation of observing the right to life as the government spread terrorizations and killings as well as caused pollution and degradation of the environment to a level that made the life of *Ogoni* people unlivable.¹⁸

The facts and the reasoning in this case perfectly demonstrate that ESCs and CPRs are like two streams which need to merge for the flowing of a steady river which ultimately completes its course. The presence of each fully complements the other and allows it to operate effectively and the absence of one might trigger the absence of the other. The facts of the *Ogoni* case clearly reflect this phenomenon as 'life' in this case is considered all-encompassing with necessary exigencies as well as cultural environment to live with confidence. This case also gives the picture that the absence of ESCs could trigger the violations of CPRs as human beings

¹⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001)

cannot live a vegetative existence. If they are deprived of their support systems which are allowing them to live, their clash with authority shall become inevitable, which may cause a cycle of violence in which the state may commit many violations of CPRs.

The current issue of Kashmir, Palestine and historical persecution of the indigenous American Communities are good examples of this phenomenon. *Ngobe Indigenous Communities v. Panama* also manifested this phenomenon as the incidental effects of the building of dam in the territory of indigenous community resulted *prima facie* in the infringement of right to health and culture as well as a threat of displacement to indigenous people. The failure to respect the culture and health on the part of state resulted in the agitation among community which further caused violations of right to personal liberty, fair trial, and freedom of thought.¹⁹

A particular instance which demonstrates how an infringement of ESCs can explode to cause infringement of CPRs was observed in the case of *Öneryildiz v. Turkey*. The facts of this case were that there was an illegal dwelling which was constructed surrounding a household-rubbish dump in the *Ümraniye* district of Asian Istanbul. There was a methane explosion which triggered a landslide and nine of the applicants' family members were killed in the accident. The European Court of Human Rights held that the failure to adequately protect the applicant's relatives violated right to life.²⁰ Thus, a failure to fulfill right to public health ultimately led to the interference in right to life which the state failed to protect.

However, several cases are decided especially in the national courts which give more reverence to the economic exigencies of the state and definite laws of state rather than fluid mechanism of Human Rights Law. In *GrootBroom*, the Constitutional Court of South Africa recognized that basic necessities of life are directly connected with human dignity but the right to housing shall not be compulsory *per se* be achieved as it is a progressive realization of the right within available resources.²¹ In *Soobramoney*, the South African court again considered the right to health dependent on the limited resource and refrained to interfere in these policy matters.²²

It must be noted that the advocates of these opinions fail to consider the argument that there is no dichotomy between ESCs and CPRs as the aim is to have both rights in consonance

¹⁹ *Ngobe Indigenous Communities v. Panama* Report No.75/09 (IACHR, 5TH August 2009)

²⁰ *Oneryildiz v Turkey* [2004] ECHR 65

²¹ *South Africa v GrootBroom* [2000] ZACC 19

²² *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC)

and not to make only one type of right justiciable. Treating ESCs as only optional allow states to use the defence of economic exigency every time and they subsequently express an utter disregard to these rights with no policy. The indivisibility argument deters states from any notion of optionality in relation to ESCs and make them liable so that they exhaust all possible avenues in this realm. Thus, there is no requirement of perfection in this regard but a requirement to act in a holistic manner considering all circumstances.

Need of Immediate and Progressive Measures for Implementation

From the above discussion, it is clear that ESCs and CPRs must be read in synchronization with each other. However, the enormous presence of poverty, hunger and disease in the developing world requires certain sustained and practical efforts in pursuance of the goals mentioned both in ESC and CPRs to realize them. The lack of clean water is severely impacting the right to health and subsequently right to life especially of children around the globe. It was noted in the 2010 UN Environmental Program Report that “over half of the world’s hospital beds are occupied with people suffering from illnesses linked with contaminated water and more people die as a result of polluted water than are killed by all forms of violence including wars.”²³

Moreover, diarrheal diseases cause around 1.6 to 2.5 million deaths annually and many are children under the age of five in the developing countries.²⁴ The fear of violence is also a major constraint on the mobility which is essential to access resources and economic activity. Thus, one of the major causes of poverty are embodied in the unequal power relations in the society which are exacerbated in the absence of economic and social rights.²⁵ In the light of the above facts, it is reasonable to construe that a dynamic approach must be present at the practical level which understand the absence of socio-economic rights as a prelude to the absence of CPRs and vice-versa.

Amartya Sen’s ‘capability approach’ represents this holistic view and identifies the root causes of poverty as deprivation of capability, which is caused through factors including

²³ Ross Pink, “Child Rights, Right to Water and Sanitation, and Human Security” (*Health and Human Rights Journal* August 19, 2013) <<https://www.hhrjournal.org/2013/08/child-rights-right-to-water-and-sanitation-and-human-security/>> accessed January 23, 2023

²⁴ Ross Pink, “Child Rights, Right to Water and Sanitation, and Human Security” (*Health and Human Rights Journal* August 19, 2013) <<https://www.hhrjournal.org/2013/08/child-rights-right-to-water-and-sanitation-and-human-security/>> accessed January 23, 2023

²⁵ Rashida M, “Special Guest Contribution: Violence against Women as a Barrier to the Realization of Human Rights and the Effective Exercise of Citizenship” (2016) 112 *Feminist Review* 11,19

marginalization, deprivation of opportunity, inverse social environment, and lack of education which hampers a person's ability to meet basic necessities.²⁶ The provision of basic necessities *per se* may be impossible. However, the consistent efforts to reduce the determinants of poverty may translate into better economic, civil, and social rights which shall further replicate into effective realization of political rights. It is important to note that the removal of determinants of poverty requires building of inclusive political and economic institutions. These economic institutions ensure the preservation of economic rights through clarity of taxation systems and better labour laws as well as employment laws so that there is a level-playing field.²⁷ This must be complemented with neutralization of extractive elite class and self - serving elements of state institutions which shall require a gradual localization of political institutions. This localization shall reduce marginalization and adverse social environment as resources shall actually be invested on the people which would increase the capability of human beings and reduce poverty.

The presence of clear economic rules shall ensure equality of law and shall channel the aspirations of people to climb the social ladder through 'creative destruction'.²⁸ Thus, economy will prosper due to innovation of 'small businesses friendly' society, progressive taxation and the inclusive government shall have enough resources to fulfill positive obligations of both ESCs and CPRs. However, the presence of structural inequality and self - serving institutions in many post – colonial developing countries might not allow building of any inclusive political and economic institutions. This shall be a vicious cycle. An example of it can be observed in apartheid South Africa where the extractive elite excluded systematically 80% of the population from the lucrative positions without realization of any of these rights. Their capability thus remained hindered, and the elite became politically more powerful.²⁹

Amartya Sen's assertion also supports this hypothesis as he states that there is an inherent connection between realization of political rights and fulfillment of economic needs. He gives examples of various countries in which famines were controlled because of stable political institutions. For instance: Botswana which had a much massive fall in food production

²⁶ Ross Pink, "Child Rights, Right to Water and Sanitation, and Human Security" (*Health and Human Rights Journal* August 19, 2013) <<https://www.hhrjournal.org/2013/08/child-rights-right-to-water-and-sanitation-and-human-security/>> accessed January 23, 2023

²⁷ Acemoglu D, "Why Nations Fail? (Keynote Video Lecture)" (2015) 54 *The Pakistan Development Review* 301,303

<<https://www.jstor.org/stable/pdf/43831321.pdf?refreqid=excelsior:c6a4bcb0f526bfe1a89c05ac52646a22>> accessed January 21, 2023

²⁸ Acemoglu D, "Why Nations Fail? (Keynote Video Lecture)" (2015) 54 *The Pakistan Development Review* 301,311

<<https://www.jstor.org/stable/pdf/43831321.pdf?refreqid=excelsior:c6a4bcb0f526bfe1a89c05ac52646a22>> accessed January 21, 2023

²⁹ Acemoglu D, "Why Nations Fail? (Keynote Video Lecture)" (2015) 54 *The Pakistan Development Review* 301,304 <<https://www.jstor.org/stable/pdf/43831321.pdf?refreqid=excelsior:c6a4bcb0f526bfe1a89c05ac52646a22>> accessed January 21, 2023

between 1979-81 avoided famine while Sudan and Ethiopia failed because of lack of accountability, one - man rule and effective political framework.³⁰ The key to achieving a holistic implementation, therefore, lies in the establishment of inclusive political and clear economically accessible institutions. If the colonial remnants through their economic, political, and cultural power do not allow this accessibility, then their neutralization through mass-mobilization of people must occur to pave the way for the happiness of ordinary citizens.

Conclusion

In summation, this essay uses three processes to debunk the dichotomy between CPRs and ESCs. Firstly, there is no legal interpretation in the GCs of different articles of ICCPR and ICESCR which affirms that there is any dichotomy between these rights. Moreover, both HRC and CESCR seems to hold the view that sustainable measures to adopt any of these rights cannot be obtained in isolation rather require *supra* three and four step processes which entail both negative and positive obligations. Secondly, the use of case-law in which these rights were adjudicated solidifies the overlap between ESCs and CPRs which may be incidental or direct when interacted in a culturally localized situation. Lastly, the solution for effective realization of these rights involves simultaneous gradual application of both types of rights. This application might end the determinants of poverty which always works as a friction to the effective realization of all human rights. However, the effective application of both ESCs and CPRs requires a clear transaction regime and inclusive political institutions that “serve the interests of all with equal chance and share equitably in its benefits with full participation of all members of societies.”³¹ These institutions shall end marginalization, increase taxes complemented with innovation and allow local investments to provide government enough means to actually synchronize the application of ESCs and CPRs. If there is resistance in applying this model, the focus should be to neutralize the power imbalance which the extractive elite and elements of state institutions can cause to twist and hamper the system.

³⁰ Amartya Sen, “Political Rights versus Economic Needs?” (*Miriam Rothschild and John Foster Human Rights Trust*) <http://www.rothschildfostertrust.com/materials/lecture_sen.pdf> accessed January 21, 2023

³¹ William Felice, “The Viability of the United Nations Approach to Economic and Social Human Rights in a Globalized Economy” (1999) 75 *International Affairs* 563,596-597