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Social and Economic Rights as Part of Rule of Law

NAVDEEP KUMAR[1]

ABSTRACT

The social and economic rights are unlikely to resemble its past. Neglected within the human rights movement, avoided by courts, and subsumed within a conception of development in which economic growth was considered a necessary (and, by some, sufficient) condition for rights fulfilment, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. Yet today, under conditions of immense poverty, insecurity, and social distress, the rights to education, health care, housing, social security, food, water, and sanitation are increasingly at the top of the human rights agenda. Economic and social rights are now present in most of the world's constitutions, most of the main human rights covenants, and are often given an explicit justiciable status. At the same time, as different legal traditions and regions embrace this shift, their highly integrated economies face a profound reckoning with economic justice. The future cannot be predicted; but neither can it be ignored. This project incorporates a detailed examination of constitutions, courts and international mechanisms of accountability of social and economic rights as part of rule of law.

I. INTRODUCTION

The first modern constitutions defined rights primarily in terms of procedural or substantive limits on the exercise of state power, intended to protect individuals from arbitrary interference — the rule of law, the right to a fair trial, personal liberty and the freedoms of speech, assembly, association and religion. These rights are now variously known as 'first generation', 'negative', or 'civil and political rights'.

Because only civil-political rights were protected, these early constitutions were seen as embodying a narrowly individualist version of freedom, blind to social and economic disparities: this narrow view of equality before the law, in the words of the 19th-century French writer Anatole France, 'prohibited rich and poor alike from sleeping under bridges, begging in the streets, and stealing loaves of bread'.

[1] Author is a LL.M. student At Chanakya National Law University, Patna, India

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Many reformers from the middle of the 19th century onwards believed that civil and political rights, without improvements in social and economic conditions, offered little hope to ordinary people whose lives may be blunted by long working hours, low pay, harassment of union organizers, dangerous working conditions, vulnerability to arbitrary dismissal and cyclical or chronic unemployment, slum housing and a lack of access to education and health care.

In the United States, in particular, the Constitution was widely regarded as a guarantor of a highly individualist form of freedom. As such, it was an obstacle to progressive legislation that was often annulled by the courts on constitutional grounds. Infamous cases include *Lochner v.New York* in 1905 (which struck down a state law regulating maximum working hours) and *Adkins v. Children's Hospital* in 1923 (which struck down minimum-wage legislation). If constitutional government was to respond to so-called 'social question', and to demands for a more active state and a more positive concept of liberty, then constitutions would have to change.

From the late 19th century onwards, and in particular in the new democratic constitutions that followed the World Wars I and II, more emphasis was placed on rights that protected workers against their bosses and on rights that were defined in terms of positive entitlements, such as the right to education and health care. These rights are variously known as 'socio-economic rights' (sometimes 'social, economic and cultural rights') or 'second-generation rights'. In older literature, they were sometimes called 'positive rights', since they promoted a positive view of liberty as 'opportunities for flourishing or well-being', as contrasted against a negative view of liberty simply as non-interference.

The social and economic rights are unlikely to resemble its past. Neglected within the human rights movement, avoided by courts, and subsumed within a conception of development in which economic growth was considered a necessary (and, by some, sufficient) condition for rights fulfilment, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. Yet today, under conditions of immense poverty, insecurity, and social distress, the rights to education, health care, housing, social security, food, water, and sanitation are increasingly at the top of the human rights agenda. Economic and social rights are now present in most of the world's constitutions, most of the main human rights covenants, and are often given an explicit justiciable status. At the same time, as different legal traditions and regions embrace this shift, their highly integrated economies face a profound reckoning with economic justice. The future cannot be predicted; but neither can it be ignored. This project incorporates a detailed examination of constitutions, courts and international mechanisms of accountability of social and economic rights as part of

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rule of law.

(A) Meaning of Social and Economic Rights

In international law scholarship human rights are often divided into three classifications or "generations." Civil and Political rights are referred to as first generation rights, economic, social and cultural rights as the second generation rights; and group rights including the right of people to self determination and minority rights are known as third generation rights.

The second generation of rights relate to substantive equality and address primarily the social and economic needs of individuals. The three generations also refer to a certain hierarchy of rights in terms of political preference, first generation being the most preferred, followed by the second and third generation rights respectively.

There is no categorical basis for preference for one nomenclature over others by various scholars in relation to socio-economic rights; preference tends to be conditioned by the geographical and disciplinary reasons. The commentators from United States prefer the term welfare rights, British commentators and social philosophers in general prefer social rights and those who are more influenced by the terminology of International Law prefer economic, social and cultural rights. All this refers to the same set of rights, namely "right to meeting of needs, amongst which the most important are the right to a minimum income, the right to housing, the right to health care, and the right to education", but these are the different ways of referring to these rights. One of the reasons for generally not referring to cultural right connotes the fact that, though significant, cultural rights are not the concern of study aimed at studying the aforesaid rights.

(B) Research Questions:-

(1) Whether socio-economic rights should be incorporated into a constitution.
(2) What form their incorporation should take, i.e. as justiciable rights or directive provisions?
(3) What other design features of a constitution would complement the promotion of these rights?

II. SOCIAL AND ECONOMIC RIGHTS AS PART OF RULE OF LAW

(A) The Concept of Social and Economic Rights:

Economic and social rights are an essential part of the normative international code of human

rights. They have their place in the UDHR[2], in universal and regional general conventions on human rights and in the network of human rights treaties aimed at the eradication of discrimination and the protection of certain vulnerable groups. The Universal Declaration of Human Rights recognizes two sets of human rights: the traditional civil and political rights, as well as economic, social and cultural rights. In transforming the Declaration's provisions into legally binding obligations, the United Nations adopted two separate International Covenants which, taken together, constitute the bedrock of the international normative regime for human rights.

The realisation of ESCR depends fundamentally on the respect to the rule of law. In 1993 the UN World Conference on Human Rights in Vienna underlined that principle of the rule of law and the protection and promotion of human rights are inseparable. Realisation of ESCR means to give effect to the provisions of ESCR in order to make them real and effective.

The subsequent division of human rights into two main categories resulted from a controversial and contested decision made by the UN General Assembly in 1951, during the drafting of the International Bill of Human Rights. The General Assembly decided that two separate human rights covenants should be prepared, one on civil and political rights and another on economic, social and cultural rights. Civil and political rights were considered to be absolute and immediate, whereas economic, social and cultural rights where held to be programmatic, to be realized gradually and therefore not a matter of rights.

Both in the literature and the international practice, Economic, Social and Cultural Rights are generally regarded and discussed as a single category. In discussing them, reference is usually made to Articles 22-27 of the Universal Declaration of Human Rights, where these rights are grouped together.

It has been Asserted that Economic, Social and Cultural Rights constitute a second generation of human rights, the first generation being civil and political rights, and a later on a third generation of solidarity rights has been added, such as the right to self-determination and the right to development. This notion of three generations, which was first put forward by Karel Vasak in 1979, appeared quite suggestive and has been repeated by many. The two covenants came to reflect the diverging opinions of the debate, constituting a compromise between those in favour of one and those in favour of two documents. On the one hand, the countries declared their dedication to the interdependence principle; meaning that the two sets of rights are interdependent and interrelated, thus can neither logically nor practically be separated and

[2] Articles 22-25 of the UDHR.

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should be respected and promoted just the same. On the other hand, a formal imbalance between the two sets of rights appears in favour of the civil and political rights.

A further categorization might be made as follows. Economic rights relate to guarantees and claims to participation in the economic life of the community in order to gain advantage from (professional) activities undertaken. An example is the right to property, although this is not included in the International Covenant on Economic, Social and cultural Rights, but is included in the Universal Declaration of Human Rights (Article 17), the first Protocol to the European Convention on human Rights (Article 1), the American Convention of Human Rights (Article 21) and the African Charter on Human and People's Rights (Article 14).

The Covenant on Economic, Social and cultural Rights and the Covenant on Civil and Political Rights create binding legal obligations for the states parties. Therefore, as between them, issues relating to compliance with and the enjoyment of the rights guaranteed by the covenants are matters of international concern and thus are no longer exclusively within their domestic jurisdiction.

The covenants have a number of common substantive provisions. Two of this deal with what might be described as people's or collective rights. Article 1(1) of both Covenants proclaims that "all peoples have the right to self-determination by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Both instruments recognize in article 1(2) that all peoples have the right to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. And that, in no case, may a people be deprived of its own means of subsistence.[2]

Economic and social and rights have become part and parcel of international human rights law, not only at the universal but also to the regional level. They are contained in the European Social Charter, in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and in the African Charter on Human and Peoples Rights.

(A) Various Types of Social and Economic rights:-

The list of recognized socio-economic rights varies between countries. They can be considered under various headings:

Rights to universal public services: The right to education, health care and other public

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services that everyone is entitled to and that it is primarily the responsibility of public authorities to fund, provide or otherwise support.

Rights supportive of decent living conditions: In less developed economies, these may take the form of specific rights to food, water etc. (subsistence rights). In industrial and post-industrial economies, decent living conditions are more frequently delivered through redistributive transfer payments in the form of welfare benefits, unemployment assistance, disabled and veterans benefits, old-age pensions etc. These differ from universal public services in that they tend to take the form of cash payments and are usually targeted at specific in need groups.

Rights of workers: Labour rights defend workers against exploitative working conditions. They may include entitlements to days of rest and holidays, maximum working hours, a minimum wage, the right to form and join trade unions, workplace 'co-determination' rights (i.e. giving workers a voice in the management of enterprises), protections against arbitrary dismissal and prohibition of workplace harassment and rules for the protection of workers' health and safety.

Rights of particular social groups: Socio-economic rights may often be specifically applied to particular social groups. For example, a constitution may specifically refer to the position of women, people with disabilities, young people, the elderly or members of ethnic or linguistic minorities who are differentially affected by (and, perhaps, especially dependent upon) socio-economic rights. For example, a constitution may specifically seek to protect the reproductive rights of women or the rights of disabled people in access to education and work.

Rights to natural resources: The right of access to clean water, to the natural environment and to the land. In addition, special provision may be made to protect the traditional land rights, hunting and fishing rights or grazing rights of indigenous communities.

Property rights: The right to private property is usually regarded as a first-generation right rather than a socio-economic right. However, the framing of property rights—particularly, the recognition that the right to property is not absolute, that it may be limited by social needs and may carry with it responsibilities—can have important socio-economic consequences. Article 43 of the Irish Constitution, for example, recognizes that property rights 'ought, in civil society, to be regulated by the principles of social justice', and allows the state, by law, to 'delimit the exercise of [property rights] with a view to reconciling their exercise with the common good'.

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(B) The relationship between the Two Sets of Rights:-

The two covenants came to reflect the diverging opinions of the debate, constituting a compromise between those in favour of one and those in favour of two documents. On the one hand, the countries declared their dedication to the interdependence principle; meaning that the two sets of rights are interdependent and interrelated, thus can neither logically nor practically be separated and should be respected and promoted just the same. On the other hand, a formal imbalance between the two sets of rights appears in favour of the civil and political rights.

The formal imbalance embedded in the two documents is described in this section.

The first imbalance has to do with the nature of the obligations of the parties. The general obligation of the ICCPR requires member states to undertake: to"...respect and to ensure..." the rights of the covenant, whilst the obligation in the socio-economic covenant requires states to "…take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.". Looking at the specific obligations, the rights of the civil and political charter are presented in terms such as "everyone has the right to…" or "no one shall be…", while the socio-economic rights are presented with terms like "State Parties recognize the right of everyone to…" These formulations have been subject of critique, as the convent on civil and political rights calls for immediate implementation and compliance by all states while the convent on economic, social and cultural rights calls for progressive realization and since the realization of social economic rights depends on the availability of resources.

When it comes to implementation mechanisms and judicial enforcement, another imbalance appears, as the covenant on civil and political rights requires states to "develop the possibility of judicial remedy" (art 2(3b)) while there is no equivalent provision in the covenant on socio-economic rights. However, article 8 of the Universal Declaration states that

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.", which arguably applies to socio-economic rights as well as civil and political rights. The covenant of socio-economic rights says that governments must use "all appropriate means" in order to put them into effect, and does not specify the meaning of this other than that it includes "particularly the adoption of legislative measures" (art 2(1)). Even so, this provision could reasonably be interpreted as requiring the provision of judicial remedies.

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The covenant on civil and political rights and the covenant on socio-economic rights are equally authoritative legal instruments. Thus, it is the Universal Declaration together with the covenant on civil and political rights, as well as the covenant on socio-economic rights which constitute the International Bill of Human Rights.

Furthermore, in accordance with the interdependence principle and fundamental to the human rights doctrine, all human rights are interdependent and interrelated, must be treated with the same emphasis and shall be respected and promoted just the same. The covenants necessitate one and other, which means that there can be no civil and political rights without socio-economic rights and vice versa.

Some of the critique of socio-economic rights even go as far as saying that it is an insult to insist on socio-economic rights as being human rights when there is no realistic prospect of them being upheld, as hundreds of millions of people on the planet suffer from malnutrition and vulnerability to disease and starvation. Even those rights which seem more fundamental, such as nutrition, health care and sanitation cannot be defined legally; at what level should these rights be considered as violated? While it is reasonable to require from states not to torture their citizens, it is not obvious that we can require them to guarantee them all livelihood, adequate housing and a healthy environment.

The response to such critique is that human rights most urgently need to be asserted and defended, both theoretically and practically, where they are most denied. The argument that socio-economic are less justifiable since they require state expenditures is not persuasive, as the maintenance of all rights does depend on financial means.

The state is responsible for the protection and promotion of all rights. Neither civil and political rights, nor socio-economic rights are free of costs or self-generating; they need legislation, promotion and protection which all require resources.

(C) The Protection of Economic and Social Rights

The approaches to implementation and enforcement of socio-economic vary, but some methods are for instance the application of non-enforceable directive principles of state policy, constitutional entrenchment in a bill of rights, protection of socio-economic rights through civil rights guarantees and enforcement at the state level in a federal system[3].

[3] Woods, J: "Emerging Paradigms of Protection "Second Generation" Human Rights", 6 Loy. J Pub. Int. L. 103 2004-2005, p 104.

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The United Nations system for the protection of human rights does include certain possibilities for individual complaints in the case of economic, social and cultural rights being violated.

The Procedure established by the Commission on Human Rights and Article 14 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD) make no distinction of the right in question. Still, the role of these procedures for the creation of institutionalized lines of legal interpretation has remained limited and, therefore, attention must be devoted to the International Covenant on Civil and Political Rights (CCPR) and the CESCR and to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

On the international plane, a number of cases decided by the UN Human Rights Committee or the supervisory organs of the ECHR are used to illustrate the so-called integrated approach, the possibility of the treaty bodies in question to protect or at least to take into account social and economic rights through their task to afford international protection to those rights explicitly covered by the treaties in question.

The UN Committee on Economic, Social and Cultural Rights has emphasized the importance of judicial remedies for the protection of the rights recognized in the CESCR. It considers that, in many cases, the other „means" could be rendered ineffective if they are not reinforced or complemented by judicial remedies. The inclusion of economic and social rights as justiciable rights in a country's constitutions provides a great deal of scope for developing effective judicial remedies for these rights.

The Committee on Economic, Social and Cultural Rights has also commented as follows:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society[4].

III. REASONS FOR CONSTITUTIONALIZING SOCIAL AND ECONOMIC RIGHTS

(A) Social and Economic rights are essential to human well-being:-

Some argue that the distinction between first- and second-generation rights is false and artificial, that both generations of rights are indivisible and interdependent. Both are necessary

[4] Sandra Lienberg, "*The Protection of Economic and Social Rights in Domestic Legal Systems",* In E. Asbjorn, C. Crause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook,* Second Revised Edition, Dordrecht: Martinus Nijhoff Publishers, 2001. p. 57.

for a 'good life' and for human flourishing: to live well, we need both freedom from tyranny and freedom from want or toil. To include civil and political rights in a constitution without including socio economic rights is to leave the job half done and to provide the framework only for a hollow, superficial 'bourgeois' freedom.

Crucially, the effective enjoyment of first-generation rights depends on the realization of second-generation rights: one needs certain resources in order to effectively exercise freedom in the civil and political sense. What use, for example, is freedom of the press if someone is illiterate because their parents could not afford to send them to school? What use is freedom of association if someone cannot get to a meeting because they are working 14 hours a day in a call centre or garment factory?

According to this view:

(a) human beings are to be treated with equal worth/importance;

(b) there are necessary preconditions to ensure protection for that worth: these involve protections for freedom and the well-being of individuals;

(c) socio-economic rights protect these important elements of human freedom and well-being and therefore require recognition and enforcement;

(d) the most effective way to recognize and enforce these rights is to include them in the constitution (and make them justiciable).

Moreover, it has been argued that both generations of rights place both positive and negative burdens and obligations on the state, whether those are to provide a court system to realize the right to a fair trial, to provide hospitals to realize the right to health care or to prohibit arbitrary evictions in order to protect the right to housing. This means that there is no difference *in kind* between the two sets of rights, only a difference *in degree*.

(B) Responding to Popular Demands:-

When citizens engage in constitution-building processes, the desire to improve their economic condition and social circumstances is often at the forefront of their minds. Many people wish to see a firm (and preferably enforceable) promise, in the constitution, that their needs and priorities will be addressed by the state. When the overwhelming majority of public submissions to a constitutional consultation process is about the need for adequate food, health care, etc, it is hard not to address the issues directly. To say that a strong and responsive government is the answer is unlikely to satisfy people, especially those who are fed up with corrupt politicians. This popular demand may, in itself, be a compelling reason for the inclusion

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of socio-economic rights. Not to do so could alienate support and cause the constitution as a whole to forfeit its legitimacy.

(C) Entrenching a Progressive Social Economic vision:-

In certain countries, there may be a consensus to pursue a particular socio-economic vision of society—for example, a Keynesian social-market economy with a welfare state. This consensus may arise from a previous economic shock, such as an economic depression, that fundamentally tilts the social consensus in favour of a more active and interventionist state with a more extensive role in promoting the material well-being of citizens. In such cases, a constitutional statement of what the community stands for, in terms of decency and the humane treatment of citizens (and what it will not stand for, in terms of poverty, exclusion and exploitation), may form part of the nation's social contract in a way that transcends ordinary politics. Such recognition may provide political legitimacy for policies supportive of this vision and delegitimize political reaction, thereby helping to protect people's hard-won social rights.

(D) Overcoming Historical Legacies:

Some countries may adopt a new constitution as a transformative document that is intended to overcome a past in which particular groups were excluded or discriminated against, and to provide a blueprint for an equitable future. As such, there may be a general appetite for incorporating constitutional provisions that seek to legally transform society by widening access to power and economic resources.

South Africa is a paradigm case: it was argued that the apartheid system could not be separated from the problem of persistent social and economic deprivation. In the end, the 'argument for socioeconomic rights was irresistible, in large part because such guarantees seemed an indispensable way of expressing a commitment to overcome the legacy of apartheid – the overriding goal of the new Constitution'.[5]

Similarly, in India, with its history of caste-based discrimination, there remains a group of marginalized, lower-caste people regarded as 'untouchables'. To remedy historical discrimination against these groups, the Indian Constitution specifically provides that 'the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation' (Constitution of India, Part IV).

[5] (Sunstein 2001: 4).

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(E) Preventing Regressive Judicial Activism:-

If socio-economic rights are not specified or recognized in the constitution, then courts may take a very narrow view of the state's responsibility, preferring civil and property rights over social, economic and cultural concerns. This may cause the courts to strike down progressive or redistributive legislation.

The presence of socio-economic rights in the constitution—even if the rights themselves are directive and not judicially enforceable—may incline the courts toward a more expansive interpretation of the state's responsibilities and a more communitarian understanding of rights. India takes this further: the 25th Amendment to the Constitution of India (Article 31-C) provides that legislation intended to further certain socio-economic principles stated in the Constitution cannot be annulled solely on the grounds that they infringe other fundamental rights.

(F) Gender Equality and Protection for Marginalized and Minorities Groups:-

Many socio-economic rights have a disproportionate effect on the lives of women and of marginalized and minority groups, who may—depending on the social mores, economic situation, and political culture and institutions—be both:

(i) more reliant on state support or assistance to realize their social and economic needs; and

(ii) less well equipped to ensure their needs are met through political channels.

A strong culture of socio-economic rights, embedded in justiciable (or otherwise effective and binding) constitutional provisions, can help to ensure that these groups are entitled to a fair share of national resources and are able to enjoy the material conditions necessary for their dignity and well-being.

IV. THE IMPLEMENTATION OF SOCIAL AND ECONOMIC RIGHTS

(A) The Implementation of the Rights: State Obligations-

The ICESCR represents a legal instrument to implement ESCR universally. It requires States "to take steps, individually and through international assistance and cooperation, especially economic and technical" towards the realization of the rights under the Covenant (Art. 2(1)). Article 2(1) is the key to the ICESCR. It identifies the steps the government must take in order to realise each substantive right.

Social rights are seen as different from civil and political rights in that they are supposed to be implemented progressively, or over time, rather than immediately. Article 2(1) of the ICCPR

requires States Parties to "respect and ensure" the rights set forth in that Covenant. The ICESCR, by contrast, requires States Parties to "take steps…to the maximum of available resources" to realise its rights.

The third General Comment, adopted by the Committee, deals with the nature of the obligations imposed on States party under Article 2(1) of the ICESCR A State Party should act quickly once the Covenant enters into force for that State with a view to take measures as required by Article 2(1).

The States must respect, protect and contribute to the realization of all ESCR, such as the right to health, to food, to water and to adequate housing, nationally and in other countries.

A better way to conceive of the obligations under the Covenant and human rights obligations in general, is that they include three types of obligations.

The obligation to respect requires the State not to do anything that would actively interfere with the realisation of the right (e.g. banning unions, forced evictions). The obligation to protect requires the State to ensure that individual's rights are not violated by private non-state actors, such as corporations, landlords or paramilitaries (e.g. refusing to enforce labour laws, illegal expropriations of land). The obligation to fulfil the State to take positive steps to ensure the realization of the right in question, which may include "... legislative, administrative, judicial and other measures towards the full realization of such rights".[6]

A progressive obligation under the Covenant is an obligation to implement the right over time, to the maximum of available resources. It reveals that a Government is required to do at least three concrete things to implement its obligations progressively. First, it must take specific steps, and cannot do nothing. Second, the steps must be expeditious and effective. Third, the steps must be "deliberate, concrete and targeted as clearly as possible...".

It is clear that progressive obligations must be acted on immediately, and thus contains sub-obligations that are of immediate effect. The difference between a progressive obligation and an immediate obligation appears to be that all of the elements of a specific immediate obligation must be realised at once or as a matter of first priority. A final point about progressive obligations is that they impose equally onerous obligations on rich countries. Since the obligation is to promote the rights to the maximum of available resources, rich countries must also spend heavily to respect, protect and fulfil the rights of the people living on their territory.

[6] Jeff. K, *An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights,* Law and Society Trust, March 2003, p.39.

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State Parties to the present Covenant has also immediate obligations. For example, if a State has an immediate obligation to adopt a plan of action for primary education, merely commencing the plan will not suffice. It must adopt a completed one. If it does not, it violates the Covenant. If it has a progressive obligation to adopt a plan of action for higher education, commencing the plans implementation in an expeditious manner will suffice.

Other examples of immediate obligations include the obligation to take steps under the Covenant, to guarantee all of the rights on a non-discriminatory basis, to monitor for instance the housing rights situation, and to adopt a national plan of action in respect of certain rights.

The Committee also feels that every State Party to the Covenant has a basic obligation to assure its own subjects of a minimum level of enjoyment of every right. That is to say, every right possesses a certain *minimum core* content without which that right becomes meaningless.

In its General Comments on rights as well as in numerous recommendations to states, the Committee applied the notion to define the scope of some rights. Other Human Rights bodies, such as the Inter-American Commission and the Inter-American Court of Human Rights, have also used this tool. The Inter-American system has used the notion of essential core or minimum core on various occasions, though this usage is not limited to economic and social rights. For instance, in the Street Children case, the Inter-American Court of Human Rights said that the right to life includes a right to a dignified existence, thus, it established a minimum content of a civil right and linked it with general minimal conditions to be guaranteed on the ESC realm.

The minimum core concept maintains that there are some (part of) rights – especially in ESCR – that should be immediately attended and implemented, i.e., that generate an immediate obligation for results instead of being subjected to progressive implementation and; therefore, should receive priority over other (parts of) rights.

(B) National Implementation of Social and Economic Rights-

Social and Economic Rights have also been developed at the national and regional level. The Limburg Principles on the Implementation of the ICESCR state that at the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

Three basically modalities of ESC-rights realization have been chosen by states:

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They either provide specific constitutional provisions on ESC rights, but usually only in a haphazard and ancillary manner, as compared with civil and political rights formulations in the constitutional texts. Constitutions that have been formulated or changed after 1970 tend to contain more express ESC rights than older constitutions.

The second modality is to lay down *constitutional structural principles* like the human dignity clause linked to the social state principle under the German Basic Law, serving an umbrella function. ESC rights are thereby included, as far as the existential minimum; the survival kit of every individual is concerned. If, for example, a fundamental social right belonging to survival requirements were not covered in a National Assistance Act, then the individuals concerned would retain an immediate claim right before the German Federal Constitutional Court.

The third modality is that of the realization of the ESC-rights entirely to the *ordinary statutory level.* Numerous laws exist dealing with ESC rights, but ultimately, the doctrine of the supremacy of Parliament as in the United Kingdom requires that the democratically elected members of Parliament should remain free in making their policy choices regarding these ESC policies.

(C) Justiciability of Social and Economic Rights:-

1. Judicially Enforced Rights-

The strongest form of constitutional recognition is to list socio-economic rights as judicially enforceable rights in a manner similar to that in which civil and political rights are usually enforced. About a third of the world's constitutions take this approach.

The United Nations promotes constitutional incorporation as 'one of the strongest national statements' regarding such rights, claiming they provide 'valuable tools for those wishing to enforce them. The widespread commitment to social and economic rights in international law, their inclusion in a constitution is now the norm rather than the exception.

2. Extent of Provision and Modes of Enforcement-

If a constitution guarantees rights to well-being, food, housing and other social and economic goods, how extensive should this provision be? If people have a right to food, do they have a right to at least one meal a day or three? If people have a right to fresh water, do they have a right to 24-hour running water in their home or a right to access a water pipe a kilometre from their home for two hours a day? If people have a right to health care, do they have a right to a basic clinic or to expensive specialist care?

Recognizing that resources are limited, various approaches to these questions have been

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formulated and recognized. The principle of *progressive realization*, embodied in the ICESCR, is one such approach.[7] Progressive realization places a duty on the state to act within its capacity to meet social and economic needs—as capacity increases, so the level of provision must increase. This does not mean that states can postpone the implementation of social and economic rights until they have reached a certain level of development: all states, even the poorest, have an immediate duty under ICESCR to 'move as expeditiously and effectively as possible' to realize socio-economic rights to the maximum extent possible. Another principle derived from ICESCR is that of a *minimum core*: states have a duty to secure a basic minimum of provision with respect to each right that must be given immediate priority. Progressive realization then proceeds from this minimum as state capacity increases. A third principle is that of *non-regression*: states may not go backwards by reducing their social and economic rights provisions except in cases where they are forced to do so by a demonstrable lack of resources.

3. Judicial Culture and Process-

Latin American experience suggests the importance of judicial culture in securing the implementation of socio-economic rights. For example, an important difference between Brazil, where social rights have been commonly enforced but have not had a transformational role, and Colombia, where social rights have been commonly forced and perhaps moved towards a transformational role, is that the Colombian judiciary is much more creative and willing to try structural or dialogical remedies. The Brazilian judiciary tends to prefer individual methods of enforcement and is hostile to structural cases.

4. Directive Principles of State Policy:-

Socio-economic rights can be incorporated into a constitution in the form of directive principles that are not binding on the state in a legal-juridical sense but are binding in a political and moral sense. The legislative and executive branches are expected to take steps to realize these directive principles, and to give effect to the socio-economic rights derived there from, in the enactment and implementation of laws. The rights are thus recognized in a way that directs, inspires and legitimates legislative decisions.

Directive principles typically make elected politicians, rather than judges, responsible for dealing with socio-economic issues, thereby avoiding some of the potential problems of legitimacy and competence associated (as discussed above) with judicial rulings in this area.

[7] (Chenwi 2013)

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Inclusion of socio-economic rights in the form of directive principles is relatively common in countries whose constitutional tradition derives from English common law, including Ghana, India, Ireland, Malta, Nigeria and Papua New Guinea. Typical provisions defining directive principles include the following:

Constitution of Ireland: 'The principles of social policy set forth in this Article are intended for the general guidance of the Parliament. The application of those principles in the making of laws shall be the care of the Parliament exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.'

Constitution of Malta: 'The provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws.'

Constitution of India: '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 and it shall be the duty of the State to apply these principles in making laws.'

The lack of judicial enforcement does not mean that directive principles are necessarily irrelevant. In helping to define the context in which politics takes place, they could have political significance that at least partially compensates for their lack of judicial enforceability. For example, direct principles may make it easier for civil society to mobilize support in the name of social and economic justice by invoking the populist rhetoric of a constitutional violation. Further, legislators can invoke directive principles to promote or ease the passage of legislation that may promote socio-economic rights, invoking the directive principles in parliamentary debates and public forums in support of their legislative initiatives.

While including socio-economic rights in the form of directive principles is designed to exempt them from judicial enforcement, some courts have used directive principles to inform their decisions. In Ghana, for example, the Supreme Court has ruled that the courts are mandated to apply the directive principles in interpreting the law. The Supreme Court of India has also recognized the constitutional significance of directive principles. It has, in several cases, asserted that directive principles are as important as the enforceable rights contained in the Constitution, and some socio-economic principles have even been rendered justiciable under the protection of the right to life. Even in Ireland, where the courts have been reluctant to intrude on the prerogatives of the legislative and executive branches, and where a strong constitutional presumption in favour of political, rather than judicial, enforcement of socio-economic rights exists, the courts have relied on the directive principles as 'supplementary to

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the interpretation of other constitutional provisions'[8].

However, a criticism of pursuing rights through directive principles is that they would only be most effective where civil society stands ready to punish legislators who depart from the constitution's requirements. Marginalized groups that lack access to political power may not be able to gather the political support necessary to pursue directive principles.

In the Indian Constitution, the social rights are not framed as rights but as directive principles of state policy. Nevertheless the Indian Supreme Court has recognized the justiciability of these particular directive principles. It has not only developed a creative interpretation of the right to life (so as to include social rights) but has also underscored that these directive principles concern issues that are crucial to a meaningful life with dignity and thus should be considered as complementary to the Constitution.

V. CONCLUSION

From all the above discussions inferences can be made that despite the existence of basic standards of living with basic human rights, the need to recognise those rights as a fundamental principle in the governance of a country is important. The basic standards of dignity, freedom, social, citizenship, and utilitarianism provide for a sound ground to basic human rights. However, there is no doubt that the second generation rights are something more than your basic human needs, and recognising those basic needs are important in today's generation. The constitution of India does not expressly provide for socio-economic rights as the fundamental rights but they are a part of the Directive Principles of State Policy which uses the expression right and which concludingly means that they are important and mandatory for the state to be taken into consideration while framing laws for the country. Articles like 21, 39(a), 41, 45, and 37 are some of the examples of these kinds of rights. Thus, an approach to be indifferent towards the obligations that are contained in the directive principles of the state policy and considering them to be fundamental in the governance of the country have resulted in the courts to take an active stand for the rights mentioned in DPSPs. This approach has reoriented the basic human needs into justiciable rights which can be enforced in the court of law.

Within the legal framework of this principle a considerable views are raised on the issue of legally binding or non-binding nature of the internationally proclaimed social and economic rights and, closely connected with it, the issue of the alleged fundamental differences between civil and political rights on the one hand and economic, social and cultural rights on the other.

[8] (Trispiotis 2010).

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The latter, in its extreme form, endorse the idea that economic, social and cultural rights differ from civil and political rights in such fundamental respects that it become impossible to escape the conclusion that these rights are inferior from the legal point of view.

The aim of this research is to argue that there is no reason to deny the social and economic rights legally binding status under international law and a black-and-white distinction between civil and political rights on one side and social and economic rights on the other is mistaken and instead a more integrated approach encompassing both sets of rights must be endorsed. However, this does not detract from the fact that they may constitute useful tools for analysis, provided that they are employed in a more flexible manner. In any event, the distinctions should not be constructed so as to result in the creation of an anti-thesis between civil and political rights versus social and economic rights.

The Indian Constitution recognizes economic, social and cultural rights as Directive Principles of State Policy which, unlike the guarantee of civil and political rights in the Indian Constitution, are not directly enforceable in the courts, but are intended to serve as guidance for government policy. The Indian law of economic, social and cultural rights has been developed incrementally by the courts, drawing on the Directive Principles as aids to interpretation of the civil and political rights which are justiciable under the Constitution, to elevate the status of the Directive Principles as constitutional rights. In particular, the Indian Supreme Court has adopted an expansive interpretation of the constitutional right to life, based on principles of human dignity, to protect certain economic and social rights, including the right to adequate nutrition, clothing and shelter, the right to medical facilities, the right to earn a livelihood, and environmental rights.

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