Interrogating the Realization and Enforcement of Social Rights during Economic Crisis

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Abstract: This paper examines the nature and possible realization of social rights in developing economies and in economic crisis in developed economies. The paper examines four sets of issues relating to social rights: the nature of such rights; the cost implication of its realization during economic crisis; their justiciability, and alternative methods for their realization in times of crisis. Part I examines the nature of social rights. It investigates the obstacles to the realization of these rights and examines whether the realization and enforcement of these rights is predicated on economic buoyancy of a state. The paper posits that some social rights though hugely dependent on economic variables for its realization, are realizable even in times of economic crisis. It comparatively examines the emerging jurisprudence in developing and developed economies. In part II various approaches to the realization of social rights are explored, and, in particular, a workable alternative to their present classification and status is proposed in the form of a reformulation of some social rights as civil and political rights, enabled in part by reason of the fact that they lend themselves to enforcement than other social rights in times of economic crisis. Part III examines some of the practical problems that may impair the effectiveness of the judicial processes. The paper argues that this situation can be improved in a number of ways. The paper concludes by making practical proposals for the better realization of social rights in times of economic crisis. Overall, it is shown that governments across the globe must re-order their commitments to reflect certain non-derogable social rights in times of economic crisis.

Keywords: social rights; second generation rights; national engagement and economic crisis

1. Introduction

In 1965 the UN Commission on Human Rights proceeded to draft two treaties: the International Covenant on Civil and Political Rights (ICCPR) and its optional Protocol, and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2]. Together with the Universal Declaration, they are commonly referred

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[2] Officially, three main reasons, all hinged on differences in implementation strategies, have been adduced to explain the decision to produce two covenants out of the UDHR: (1) Economic and Social rights are objectives to be achieved progressively; therefore a much longer period of time is contemplated for the fulfilment of the objectives. For civil and political rights, States ratifying the covenants will immediately be subjected to an obligation to give effect to the rights.

to as the International Bill of Human Rights (Steiner, Alston & Goodman, 2007, p. 137). The ICCPR focuses on such issues as the right to life, freedom of speech, religion and voting. The ICESCR focuses on social rights such as food, education, health, and shelter. It is generally agreed that civil and political rights are being protected and enjoyed across the globe, while same cannot be said of social rights. Against this background, this paper examines the nature of social rights. It investigates the obstacles to the realization of these rights and examines whether the realization and enforcement of these rights is predicated on economic buoyancy of a state. The paper posits that some social rights though hugely dependent on economic variables for its realization, are realizable even in times of economic crisis. It comparatively examines the emerging jurisprudence in developing and developed economies.

1.1. The Nature of Social Rights

This paper relies on the General Comments of the CESCR to analyse the general nature of social rights and the nature of State Parties' obligations with a view to determining how social rights may be realised and enforced. The General Comments confers tripartite obligations on the State Parties in respect of each of the social rights protected under the ICESCR: the obligation to protect, the obligation to respect and the obligation to fulfil.[1]

The obligation to respect imposes on the State Party the responsibility to abstain from interfering in the enjoyment of the protected rights under the ICESCR. This confers negative obligations in respect of each protected right on the state parties (Eide, 1995, pp. 89-105). Thus, the right to housing in the ICESCR is violated if the State engages in arbitrary forced evictions. The obligation to abstain from closing private or religious schools, the obligation to allow academic freedom in schools, the obligation to abstain from forced labour and the obligation to refrain from discriminatory practices in allocation of limited resources for the protection of social rights are typical examples of the obligation to respect (Eide, 1995, pp.

(2) The enactment of legislation is generally sufficient to effect the enjoyment of civil and political rights, while legislation is not sufficient for the attainment of socio-economic rights. Very much depends on the economics of the State. (3) The machinery of complaint, the Committee on Human Rights envisaged for civil and political rights, is not a suitable body for the dealing with economic and social rights, since they can only be achieved progressively as obligations of members with respect to them are not as those for the other set of rights.

[1] CESCR's General Discussion 3rd Session 1989: E/C.12/1989/SR.20 Eide's Presentation.

89-105). This paper agrees no less and contends that in times of economic crisis, the obligation is easily amenable to enforcement.

The obligation to protect imposes on State Parties the obligation to prevent non-state actors from violating the rights protected under the ICESCR. State Parties are required to protect the enjoyment of social rights from being violated by third parties. For example, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work and a violation of the right to just and favourable conditions of work. State Parties are to ensure that transnational companies do not pollute the environment;[1] State Parties are to set standards and regulate private education providers. This paper contends that economic crisis does not pose a threat to the ability of state parties to protect.

The obligation to fulfil requires State Parties to take positive steps to progressively improve on and realise the protected rights under the ICESCR. The States Parties are to take steps that are beyond the individuals. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realisation of such rights. Economic meltdown may have severe implications for the realization of the obligation to fulfil.

1.2. The Minimum Core Obligations[2]

This is the obligatory minimum standard below which no state party is allowed. It is the minimum essential level permitted for a state. The CESCR observes that the core content of any social right is the minimum core obligation and that the core content of every right protected under the ICESCR is enforceable at all times, even during economic crisis. The CESCR observes that the core content of the right to food will include 'availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.'[3] There is a presumption that every State Party is able to meet the minimum core obligation

[1] The African Commission on Human Rights found Nigeria liable for failing to ensure that Shell did not violate socio-economic rights by polluting water and air *SERAC V Nigeria*, Communication N0. 155/96, Ref ACHPR/COMM/A044/1M(2002) pp. 44-77.
[2] UN Doc HRI/GEN/1/Rev1 45. Para 10 (1990).
[3] CESCR: General Comment 12, *The right to adequate food,* U.N. Doc E/C.12/1999/95 (Twentieth session, 1999) 6.

which has been generally agreed as the "floor", irrespective of the economic condition of the state.

2. Impediments to the Realization of Social Rights

Article 2(1) of ICESCR, provides for progressive realization of social rights. The progressive element in the definition of social rights is one of the major impediments to their realization in times of economic crisis. The lack of precise definition has made it easy for some State Parties to ignore social rights in times of economic crisis or economic meltdown. Other inhibiting factors include:

(a) *Proliferation of Human Rights*

The continuing expansion of human rights has become part of the problems of justice rather than an instrument to ameliorate suffering. The whole system of human rights has become complex and difficult to understand by the very people that it should be protecting. The effectiveness of human rights does not lie in the number of times it has been inserted in various treaties. The text is not the engine of effectiveness but the means of achieving the effectiveness. For example, the right to education, the rights relating to work and the rights to non-discrimination are protected by more than one UN bodies. The following bodies have overlapping jurisdiction: UN Human Rights Committee; CESCR; Committee on the Right of the Child; United Nations Educational, Scientific and Cultural Organisation (UNESCO); and the International Labour Organisation. Education is also protected by other legal instruments. This kind of scenario will not promote rich and uniform jurisprudence on the international level. The jurisprudence will produce fragmented outcomes on human rights decisions. In times of economic meltdown this will be perceived by state parties as unnecessary duplication of efforts.

(b) *Corruption and Inept Leadership*

The root of most problems besieging the developing countries is the result of outright disregard of social rights, misplacement of priorities, corruption and armed conflicts. In particular, corruption among the leadership of the developing countries constitutes a major impediment to the realisation of social rights. In a climate where poverty, starvation, and underdevelopment are induced by corruption, evidence suggests that the enforcement and protection of social rights become a mirage. There is total breakdown of educational infrastructure; no access to water, energy and housing; several millions of people are rendered homeless and become

destitute. Little that is available in times of economic crisis is stolen by the elites in power.

(c) *Wars and Internal Conflicts*

While it has been established that deprivation and violation of social rights is one of the many factors that lead to internal armed struggle and rebellion, it is also the case that when conflicts break out there are massive violations of social rights; either way the majority of the people suffer deprivation. Aside from food shortages, schools are shut for indefinite period of time, industries are closed down, children are turned into soldiers, women raped and there is a general break down in the provision and enjoyments of social rights. These problems are more pronounced in Africa.

(d) *Poor Quality of State Reports under the ICESCR Article 16 (1) of the ICESCR.*

This has remained the only means of implementation until recently when a Protocol for a complaint mechanism was adopted by the General Assembly in December, 2008. However, State Parties have failed in filing their reports promptly; there have been instances where 14 State Parties have failed to file any report for a decade, while 72 reports are outstanding from State Parties, all of which are not encouraging.

3. Giving Effect to Social Rights in Economic Crisis: Experiences and Lessons from three Jurisdictions

Social Rights Jurisprudence in India

In recent times the courts have given wide and robust interpretation to Directive Principles[1], in order to make them enforceable so in times of economic crisis. The courts have creatively expanded the civil and political rights with a combination of directive principles to give effect to the implementation of social rights through legal adjudication (Macklem & Mundlak, 2004).

[1] *State of Madras V Champakam Dorairajan* (1951) SCR 525 It was held that 'the directive principles have to conform to and run subsidiary to the chapter on fundamental rights (1973) 4 SCC 225.

The Supreme Court of India often relies on international instruments as a guide in its jurisprudence.[1]

The provisions of Article 12 on the right to health have been interpreted as forming an integral part of the right to life. In giving content to the right to life, the judiciary in India has adopted a creative and expansionist approach. The right to life became a vehicle for various social rights in India; right to development;[2] right to water;[3] right to food; right to clothing;[4] and right to health.[5] In *Maneka v Union of India,*[6] right to life was creatively interpreted as 'the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about mixing and commingling with fellow human beings'.[7]

A creative judicial reasoning was also adopted in the case of, *Unnikrishnan J.P v State of Andrah Pradesh*[8] the court held that the 'right to education is implicit in and flows from the right to life guaranteed under Article 21... a child (citizen) has a fundamental right to free education up to the age of fourteen years... we cannot believe that any state would say it need not provide education to its people even within the limits of its economic capacity and development.' In *Paschim Banga Khet Major Samity v State of West Bengal,*[9] government hospitals failed to admit a man that had fallen from a moving train by reason of lack of beds in the hospitals. The Court held this to be a breach of Article 21- right to life, failure to preserve human life. The state was directed to pay damages and the government was also directed to formulate emergency health care policy. Article 43 of the Constitution enjoins the State to secure a living wage. In *Banduha Mukta Morcha v Union of India*[10] there was a challenge of deplorable conditions of work by bonded workers. The Court held that the right to live with human dignity as entrenched in Article 21 derives its life breath from the Directives Principles of State Policy.

[1] See *Jolly George Varghese v. Bank of Cochine*, (1980) 2 SCR 913; *Vellore Citizens' Welfare Forum v Union of India,* (1996) 5 SCC 647; *People's Union of Civil Liberties v. Union of India*, (1980) 2 SCR 913 and *Vishaka v. State of Rajasthan*, (1997) 3 LRC 361; *Dr. Chandra Prakash v. Ministry of Health*, AIR 2002 Delhi 188.
[2] *Municipa Counci, Ratlam v Vardhichand* AIR 1980 SC 1622: (1980) 4 SCC 162.
[3] *M C Mehta v India* AIR 1988 SC 1037.
[4] *M/S Shantistar v Builders v Narayan K. Totame* (1990) 1 SCC 520.
[5] *CERC v India* (1995) 3 SCC 42.
[6] (1978) 1 SCC 248.
[7] *Francis Coraline Mullin v The Administrator, Union Territory of Delhi* (1981) 2SCR 516 529.
[8] (1993) 1 SCC 645, 730 37.
[9](1996) 4 SCC 37.
[10] (1984) 3 SCC 161.

However, the Supreme Court recognised the limit of justiciability of social rights to health in *State of Punjab v Ram Lubhaya Bagga,*[1] wherein the workers had lodged a complaint about reduction in their entitlements to medical care. The court held that, no State or country can have unlimited resources to spend on any of its projects. That is why it only approves its project to the extent it is feasible. The same holds good for providing medical facilities to its citizens, including its employees. Provisions on health facilities cannot be unlimited. It has to be to the extent finances permit.

In *Mohini Jain v Karnataka*[2]and *Unni Krishnan v A. P.,*[3] the Supreme Court held that the right to education; particularly the right to primary education forms an integral part of right to life. In the latter case, there was a challenge to the State regulation of fees that can be charged by private medical and engineering schools. The schools claimed it was a violation of their right to run their businesses and that in any case directive principles are not enforceable in court. The Court ruled that the State is entitled to regulate the fees being charged by the schools because of the essential nature of the right to education.[4] The right to education was initially under under the directive principles, but the decisions in *Mohini Jain, and Unni Krishnan* have led to the insertion of the right to education under Part III as Article 21A which provides for Free and Compulsory education to children aged 6 to 14.

Social Rights Jurisprudence in South Africa

The uniqueness of the South African Constitution has rendered the argument that enforcement of social rights will intrude on legislative duty irrelevant, by reason of the fact that such power is derived from the Constitution. However, realization and enjoyment of social rights is still problematic. Among these are the adverse effects of social rights on the limited resources available to the State, the inherent inadequacy of remedies available to the court for enforcement, and the predominant illiteracy among the populace. In *Soobramoney v Minister of Health, Kwazulu-Natal,*[5] *Soobramoney* was a terminally ill diabetic patient and unemployed. He sought treatment to prolong his life under the State-funded health

[1] (1998)4 SCC 117.
[2] AIR 1992 SC 1858.
[3] (1993) 1 SCC 645.
[4] In contrast the Nigerian Supreme court in Council of Trust of Corona Schools held that being a private school the management of the school is free to determine and review tuition payable at its absolute discretion.
[5] 1998 (1) SA 765 (CC) 8 (S.Africa).

care. The court held that life-prolonging treatment does not qualify as emergency medical treatment. The Court's decision was based on the limited economic resources available to the State for such purposes, as recognised by Section 27(2). This judgment has brought certain undisputable realities into focus. The realization of certain social rights is conditioned on the availability of resources[1].

In *Government of South Africa v Irene Grootbom and others*[2] S.26 of the Constitution came up for interpretation. It provides:' everyone has the right to have access to adequate housing'. The State is required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.''[3] Every child has the right to '...basic nutrition, shelter, basic healthcare services'[4] *Grootboom* is the case of squatters who became homeless when ejected from unauthorised occupation of a squatter settlement. The Constitutional Court reviewed the circumstances of the plaintiffs and the overall government policy on housing and concluded that the government had not taken adequate steps to realize the rights offered by S. 26 of the Constitution. The Court was of the view that there should be a broad policy in place which pays particular attention to the most vulnerable in the society. The Court held that the government owes a duty to desist from preventing or impairing the right of access to adequate housing.

In *Treatment Action Campaign v Minister of Finance*[5] Treatment Action Campaign Campaign (TAC) challenged a government pilot policy limiting the distribution of Nevirapine to certain parts of the country as part of the pilot scheme. Nevirapine is a drug that facilitates the prevention of transmission of HIV from mother to child. The *TAC* argued that such a policy is a breach of the right of affected women and children to healthcare. Medical personnel outside the pilot area are prevented from administering this drug which the manufacturer was ready to make freely available. The Court held that the government was 'constitutionally obliged ... to plan and implement an effective, comprehensive and progressive programme for the prevention of mother to child transmission of HIV throughout the country'[6] The Court ordered that Nevirapine be made immediately available throughout the country.

[1] It is unfortunate that two days after the judgement *Soobramoney* passed on.
[2] CCT 11/00.
[3] Ibid.
[4] Ibid.
[5] CCT 8/02; 2002 (4) BCLR 356 (T).
[6] Ibid.

In *Khosa v Minister of Social Development*[1] the question before the court was a determination of the validity of the South African statutory provisions exempting non-national from the enjoyment of social security payment. The claimants are Mozambican who would otherwise have qualified for the social security payment if they are South-African citizens. The court held that the statutory provisions should be amended to include non-nationals with permanent status. In this particular case the court ruled in favour of the applicants because they had been discriminated against.

Social Rights Jurisprudence in the United Kingdom

In *R (on the application of Roger) v Swindon*[2] Roger was seeking a review of the Administrative Court's decision dismissing her application to review a NHS trust decision refusing to fund her treatment. Roger suffered from a kind of breast cancer that could not be funded by the NHS for being outside its funding list. Roger sought and had private medical treatment on two occasions, incurring a bill of £3, 900; there remained a further treatment at a cost of £1, 950 which she could not afford. Roger's application to be considered for treatment by the NHS was again refused. The Administrative Court held that the decision by the NHS to refuse her treatment was not unlawful, as Roger's case did not fall within the category that could benefit from NHS funding. The court found that Roger's case did not necessitate the giving of exceptional treatment. On appeal to the Court of Appeal, the decision of the Administrative Court was reversed, by reason of the fact that the formulation of NHS policy was unlawful. The policy ought to have targeted individuals in the circumstance of Roger, though the Court of Appeal made it clear that a right to healthcare is to a great extent dependent on availability of resources.

This case goes to show that the right to adequate health care cannot be enforced through a complaint mechanism. There is a qualification based on availability of limited resources. Everyone suffering from breast cancer cannot be treated at the same time on NHS funding. Right to healthcare is subjected to qualifying criteria. NHS can refuse treatment on the ground of cost. It is for this reason that this paper will argue that since there is no absolute right to healthcare and since everyone in a given society cannot access healthcare at the same time on government funding, except there is a violation of Article 3 of the Covenant, which prohibits

[1] Ibid. 54.
[2] (2006) EWCA Civ 392.

discriminatory practices. It is more appropriate to lodge claim for discriminatory practices.

In the earlier case of *R v Cambridge Health Authority, Ex Parte B (Re B)*[1] the Court of Appeal refused to follow the Indian creative approach and rather stuck to its decision in *Wednesbury* not to upset an administrative decision that is neither *ultra vires* or in breach of natural justice: provided an administrative body exercises discretion within its margin of appreciation, the court will not offer a review. In this instance the health authority has refused further treatment to a 10 year old suffering from leukaemia, by reason of limited resources. The Court of Appeal refused to accept that an administrative body should be required to justify their action. Lord Bingham MR ruled: "*difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment that the court can make. In my judgement it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court*".[2]

4. Challenges of Judicial Intervention in the Realization of Social Rights: Alternative Methods must be considered

Some of the practical problems that may impair the effectiveness of the judicial processes where litigation has initially been successful include the difficulty inherent in the nature of social rights, the court orders, and the difficulty of crafting effective remedial orders, and financial and legal constraints, fragmented and delayed enforcement as witnessed in some of the cases discussed above, For example, despite the court upholding Grootboom's right to housing she died in destitution and homeless about eight years after the judgment. This situation can be improved in a number of ways by improving the realization of these rights independently of the courts.

These ways include the promotion and accommodation of regional social rights jurisprudence to meet local requirements and standards, a rewriting of part of the text of the Covenant, and indirect enforcement, national engagement[3] and a

[1] [1995] 1 FLR 1056, [1995] 1 WLR 898.
[2] Ibid. 1073 C-D.
[3] The term 'engagement' was first introduced into the South African jurisprudence in the case of *Occupiers of 51 Olivia Road v City of Johannesburg*,[3] and since then it has been applied successfully in two other cases.[3] In *Occupiers of 51 Olivia Road*, the Constitutional Court made an order that the

diplomatic and political shift in the practice and approach of the United Nations. Naming and shaming among comity of civilised nations might also be considered.

Next this paper contends that the rights to education (with particular reference to basic primary or elementary education), the rights relating to work, and the rights to non-discrimination rights that cannot be rescinded even in times of recession.. These rights have attained customary international status[1] and are binding on all civilised countries; in instances where adjudication of social rights has proved successful, they are combined with one or more of these three rights. These sets of rights are more negative in character and similar to civil and political rights; a claim for violation of any of these rights in times of economic crisis will not be inappropriate.

5. The Right to Education

Education in this context refers to the right of every child to be given a quality education that protects the child's dignity and that promotes the child's development. Education that protects the child from all forms of violence, intimidation and education that ensures the child's discipline is administered in a manner that is consistent with the child's discipline.[2] Over 140 countries of the world have given constitutional recognition to the right of education (Marlow-Ferguson & Lopez, 2001). Another unique feature of the right to education is its capacity to cut across the divide between civil and political rights and social rights. State Parties obligations on the right of access to education can be summarised as follows: Provide free and compulsory primary education; Develop forms of secondary education that are available and accessible to everyone, and introduce measures to provide free education and financial assistance in cases of need; Provide higher education that is accessible on the basis of capacity by every

parties should: engage with each other meaningfully in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.In addition to the interim order, the Constitutional Court gave a limit of one month within which the parties must report back to the court the outcome of the out-of-court settlement. The parties were able to reach an out-of-court settlement on some issues, in particular that the local authorities should provide alternative accommodation to the squatters and that the squatters should leave within a reasonable time.

[1] See 1.2.3 above for a discussion on international customary status.

[2] Also see General Comment on the aims of education by the Committee on the rights of the child on Article 29 of the CRC.

appropriate means; Provide accessible educational and vocational information and guidance; Introduce measures to encourage regular attendance and reduce drop-out rates; Provide education on the basis of equal opportunity; Ensure respect for the right to education of any kind on any grounds; Ensure an inclusive educational system at all levels; Provide reasonable accommodation and support measures to ensure that children with disabilities have effective access to and receive education in a manner conducive to achieving the fullest possible social integration; Ensure an adequate standard of living for physical, mental, spiritual, moral and social development; Provide protection and assistance to ensure respect for the rights of children who are refugees or seeking asylum; Provide protection from economic exploitation and work that interferes with education.[1]

While some state parties have adopted the right to education as contained in the international instruments into domestic laws as enforceable rights[2]others have merely recognised education as an element of directive state policy.[3]

The principle of non-discrimination in accessing education was affirmed and applied by the Argentine Supreme Court in the case of *Lifschitz, Graciela v Estado Nacional s/sumarisimo*[4] for failure to provide a disabled pupil admission in a public school: the pupil was entitled to a government subsidy to attend specialised private school. The court ruled that it is the responsibility of the government, in conformity with its obligations under relevant international treaties, to provide all inclusive education that does not discriminate against people with disabilities. It is significant that education should not only be free but also must meet the minimum national standards. In Nigeria, primary school education is free in public schools but highly substandard. Teachers are not well remunerated and trained. Education is given in dilapidated buildings that do not meet requisite health and safety standards. There is dearth of textbooks and majority of schools cannot boast of any library facilities.

Individual and Collective Claims remedies are available for victims even in times of economic crisis. In the landmark case of *SERAP v Federal Republic of Nigeria*

[1] Article 26, UDHR; articles 2, 22, 23,27, 28, and 32, Convention on the Rights of the Child; article 13, ICESCR; Article 10 Convention against Discrimination in Education 1960; article 24, Convention on the Rights of Persons with Disabilities 2006.
[2] South Africa, Finland, Canada.
[3] Ireland, Nigeria, India.
[4] (Unreported) delivered on the 15th June 2004. Available at: www.infojur.ufsc.br/aires/arquivos/rover2biblio. Accessed on 04/03/14.

and Universal Basic Education Commission[1] The claimants alleged a violation of their right to qualitative education as protected under the Nigerian Constitution and other international treaties, most of which Nigeria is a state member. After dismissing all the preliminary objections by the respondent the ECOWAS court declared that all Nigerians are entitled to education as a legally enforceable human right. This case confirms that individual and collective cases can be brought to challenge any violation of the right to education in times of economic crisis.

An aggrieved party may also bring an application before the court for any of these reliefs: Judicial Review, Injunction, Mandamus, Declaration (PIL in India)

6. The Rights Relating to Work

The right to work has at least two significant social functions: it is a source of livelihood, everyone must have access to work, and it must provide a just and favourable remuneration ensuring for them and their family an existence worthy of human dignity (Universal Declaration of Human Rights, Article 25); to be a source of self-dignity and self-realization, it must be work which a person freely chooses or accepts, and he or she must enjoy safe and healthy working conditions and equal opportunity to be promoted to appropriate higher levels, subject to no considerations other than those of seniority and competence (International Convention on Education Social and Cultural Rights, Article 7) (Eide, pp. 109-143). It should, however, be made clear from the beginning that this paper does not subscribe to the concept of a guaranteed rights to work. The rights relating to work should be understood to include the right to contribute to the progress and development of the society through work (Khan, 2001, pp. 289-382) without interference from the government. The rights relating to work place an obligation on State Party not to deprive or exclude anyone of this entitlement.

The *travaux préparatoires* and existing literature do not support the view that jobs could be guaranteed to everyone within the jurisdiction all the time.[2] It is not feasible and very unrealistic for a state to guarantee that every human being within its jurisdiction will be able to hold or be guaranteed a work every time all the time.

[1] ECW/CCJ/APP/08/08.

[2] Harvey P 'Benchmarking the Right to Work' in Hertel & Minkler (eds.) note 132 115; Holzer J *Unemployment Vacancies and Labour Markets* (Upjohn Institute for Employment Research: Kalamazoo 1989); The USSR proposal that State Parties should 'guarantee' or 'ensure' work for all was rejected see E/CN.4/AC.14/2, (1951) 3.

This is a mere illusion that tantamount to Utopian. The impracticability of the application of literal interpretation of the 'right to work' has is set out below. First, by employing the word 'recognise' in Article 6 of ICESCR, it is obvious that drafters do not intend to confer on state parties the responsibility to guarantee work for everyone all the time. Second, the *travaux préparatoires* clearly reveal overwhelming opposition of State parties to the use of "guarantee" or "ensure".[1] Third, aside from limitation of resources and dearth of jobs, it is contrary to basic logic for every state party to be able to provide work or guarantee work for everyone within its jurisdiction. I therefore posit that it is high time the wordings of Article 6 of ICESCR be reformulated to achieve its true purpose. This will make for easy embracing by State Parties. It is impracticable for any State Party, be it developed or developing, to give an unqualified guarantee that every human being within its jurisdiction will be guaranteed adequate employment.

It therefore appears that the title 'right to work' as entrenched in Article 6 of the ICESCR is misleading. It will be more appropriate to have the title 'rights at work' or 'rights relating to work'. The essence of the obligations entrenched in Article 6 is that every State Party must respect the right of every human being to freely choose where and when to work and to put in place an appropriate legislative framework to realise the rights at work or the rights relating to work.

Protection of the rights relating to work in the developing countries should be of paramount importance. Developing countries do not have adequate structures to protect and uphold workers rights. Poverty is more pronounced and widespread in the developing countries. Bonded labour and child labour are equally more prevalent in the developing countries. Hence, the urgent need for UN to ensure the protection of these rights in the developing countries. The motive behind the obligations under the rights relating to work is to prevent forced labour and modern-day slavery.

A claim may be instituted to challenge a violation of the rights relating to work and the claimant may seek for the following orders: Judicial Review, Injunction, Declaration, Damages, and Breach of Contract

[1] The proposal of the word "guarantee" or "ensure; by USSR was rejected by USA, Denmark, Egypt and Yugoslavia in E/CN.4/AC.14/2, (1951) 3; ILO does not either advocate the guaranteed right to work; CESCR General Comment 18(see n. above) E/C.12/GC/18 Para 6 states 'The right to work should not be understood as an absolute and unconditional right to obtain employment."

6.1. Non-Discrimination

The first UN instrument to offer real recognition and protection for the principles of equality and non-discrimination is the UDHR[1] A few years later the US Supreme Court decision in *Brown v Board of Education of Topeka*[2] gave life to the provisions of the UDHR. The Court held that failure to admit black children to a school being attended by white children amounts to racial segregation in public schools and does not offer equal protection before the law.

In contemporary times, the principle of non-discrimination has attained the status of international customary law.[3] Non-discrimination can also be described as forming part of general principles of law (McKean, 1983, pp. 285 288).[4] This is because all the international instruments on human rights have given recognition to the principles of non-discrimination. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status. The need to ensure non-discrimination in the application and distribution of limited resources is guaranteed by these provisions.

It is worth noting that all the rights protected under the ICESCR would become enforceable if discriminatory practice could be established. The affirmation of this reasoning lies in the provisions of Article 3 of the ICESCR[5].

The right to non-discrimination has been interpreted by the CESCR to be a non-derogable right even in times of economic crisis. By the use of the words "ensure" "guarantee" it leaves no doubt that any violation of non-discriminatory right is immediately actionable. Considering the importance of this right in facilitating other rights, the position taken by the CESCR in describing this right as non-

[1] Article 1-7.
[2] 347 US 483; 98 L. Ed. 873 (1953); see affirmation of this principle in *Gratz v Bollinger* 539 U.S. 244 (2003*)*, and *Grutter v. Bollinger* 539 U.S. 306 (2003).
[3] Report of International Law Commission, adopted at its 53rd Session, 2001, UN Doc.A/56/10,207 See also (Crawford, 2002 p.188)
[4] Equality in law precludes discrimination of any kind, Advisory Opinion, Permanent Court of International Justice, 1935 Series A/B. 64.
[5] Article 3 like Article 14 of the ECHR has been described by the CESCR as not being a standalone right. It must be engaged with one of the other provisions in the Covenant Unlike article 26 of the ICCPR, articles 3 and 2, (2), of ICESCR are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed under part III of the Covenant. This approach is quite prudent. It will eliminate some of the concerns above on different types of equality.

derogable is correct. It is generally agreed that State Party obligations under the Covenant is conditioned on the availability of resources. It is good practice therefore to ensure that limited resources are distributed fairly and in a just manner. The principle of non-discrimination proffers that limited resources should be allocated on a predetermined and objective basis without any form of discrimination.[1]

In the event of a violation of the right to non-discrimination an aggrieved party may seek for such reliefs as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes.[2] The court may order a judicial review where the discriminatory practices complained of is against a public organ. In *R v Secretary of State for Employment Ex Parte Seymour-Smith*,[3] the two nurses in sought judicial review of a policy they considered as discriminatory against women, particularly their right to work and employment; the House of Lords ruled in their favour and held the women are entitled to claim the same redundancy as their male counterparts.

6.2. Reformulation of the Right to Education, the Rights Relating to Work and the Right to Non-Discrimination

It is the proposition of this paper that there is the need for a reformulation of the right to education, the rights relating to work, and non-discrimination. These are rights that can meaningfully be enforced by the courts in times of economic crisis. For example, it is generally agreed that one of the major obstacles to the enjoyment

[1] CESCR General Comment 16 and in: 'general comment No. 4 (1991): The right to adequate housing (article 11, paragraph 1 of the Covenant) para. 6; general comment No. 7 (1997): The right to adequate housing (article 11, paragraph 1 of the Covenant): Forced evictions, para. 10; CESCR, general comment No. 12 (1999): The right to adequate food (article 11 of the Covenant), para. 26; CESCR, general comment No. 11 (1999): Plans for primary education (article 14 of the Covenant), para. 3; general comment No. 13 (1999): The right to education (article 13 of the Covenant), paras. 6 (b), 31 and 32; CESCR, general comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the Covenant), paras. 18-22; CESCR, general comment No. 15 (2000): The right to water (articles 11 and 12 of the Covenant), paras. 13 and 14.'; see also The UN Committee on the Elimination of All Forms of Racial Discrimination 2004 Concluding Observations on Slovakia, 2004 Report, 2004, A/59/18 at paras 385-9, on the necessity to ensure the application of the principle of non-discrimination in the protection of the enjoyments of rights to education, employment, health and housing.

[2] CESCR General Comment 16 (note 681 above) 21.

[3](1996) All ER (E) 1.

and enforcement of social rights is the imprecise and indefinite nature of the words employed by the drafters in Article 2 (1).[1] A look at the *travaux preparatoires* will confirm that it was not the intention of State Parties to give immediate force to the rights.

The phrases "to take steps", "to recognise", "to guarantee", "by all appropriate means", "to the maximum of available resources" do not impose strict legal obligations on the State Parties. It merely reflects the intentions of the State Parties to give progressive implementation to social rights. The recommendations of the CESCR will not change State Parties' attitudes. A comparative analysis with Article 2 (1) of the ICCPR will confirm that the words of Article 2 (1) of ICESCR are carefully chosen and do not intend to impose immediate legal obligations on the State Party. This paper posits that, in order to make the realization of the provisions of the ICESCR more efficient and perhaps subject to a complaint mechanism, there has to be a reformulation of certain social rights, particularly of the three that are more amenable to judicial determination.

Methodology for the Proposed Reformulation

I The reformulation can be done by way of amendment to the ICESCR by specifically amending.[2] Articles 2, 3, 7, 6, 8, and 13 **or** by the creation of additional Protocols to supplement these articles. The Protocol will make the rights immediately enforceable and also employ the use of words that will reflect the binding nature of the Protocol.

II. By adopting the equivalent provisions in the revised European Social Charter, wherein each member is to consider itself bound by at least six of the following nine; the right to work; the right to organise; the right to bargain collectively; the right of children and young persons to protection; the right to social security; the right to social and medical assistance; the right of the family to social, legal, and economic protection; the right to migrant workers and their families to protection and assistance; the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.[3]

[1] ICESCR.
[2] See Article 29 of the ICESCR for this procedure.
[3] Part III Article 1 (b) and (c) European Social Charter (Revised) (1996).

III. It may alternatively be by way of indirect enforcement of these rights. This is the practice in some jurisdictions, particularly in India as previously discussed under the Indian jurisprudence above.

Proposal for the Reformulation of the Right to Education

The proposed reformulation will find a place within some existing statutory provisions in the UK, Europe and elsewhere in the terms set out below:

Article 13 (1) ICESCR should be reformulated by deleting the words 'the State Parties to the present Covenant recognize the right of everyone to education' and be replaced by inserting a similar provision with Article 21A of the India Constitution[1] which provides: The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.[2]

Reformulated version will read as follows: Article 13 (1) (i): *The State Parties to the present Covenant shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State Party may, by law, determine. Such education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. Education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

Proposal for the Reformulation of the Rights Relating to Work

For better protection and realization of the rights relating to work, Articles 6 and 7 should be reformulated as follows: *Article 6 (1) should be reformulated by deleting the clause 'the State Parties to the present covenant recognise the right to work'. This may be replaced by employing the words engaged by Article 15 of the ACHPR which offers a better protection for the right relating to work*. It provides: Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

The reformulated version will read as follows: Article 6 (1): *Every individual shall have the right to work under equitable and satisfactory conditions, and shall*

[1] Inserted by the 86th Amendment in December, 2002.
[2] The Indian Constitution is being put forward by reason of noticeable absence of specific provisions relating to education in the ECHR, the European Charter and other regional instruments.

receive equal pay for equal work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.

Article 6 (2) should remain without reformulation. Article 7 should be reformulated by deleting the clause "s*he States Parties to the present Covenant recognize the right of everyone*" and by inserting the clause "*every individual shall have the right to the"*. Article 7(d) should be reformulated by deleting the words "rest and leisure" and the clause "is well as remuneration for public holidays"; other parts should be incorporated in a new Article 7.

The reformulated version will read as follows: Article 7: (a) The State Parties to the present covenant undertake that no individual shall: (i) be held in slavery or servitude; (ii) be required to perform forced or compulsory labour; (b) The State Parties undertake to provide a clearly laid down regulation which provides all workers, a minimum wage and entitlement to holiday pay; State Parties shall ensure that such regulations are binding on non-state employers of labour within the State Party's jurisdiction. (c) The State Parties undertake to provide a clearly laid down regulation which provides all workers fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (d) The State Parties undertake to provide a clearly laid down regulation which provides all workers equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

Proposal for the Reformulation of the Rights to Non-Discrimination

I propose that Articles 2 and 3 be reformulated as follows

Article 2 (2) should be reformulated as follows: *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or other status*.[1]

[1] Adapted from Article21 of the Charter of Fundamental Rights of the European Union (2000).

7. Conclusion

In sum, this paper affirms the inherent dignity of every human being and asserts that the deprivation of social rights to the people amounts to deprivation of opportunities to fulfil their potentials. When people are deprived of the right to education, the right to housing, the right to health care and other social rights, they tend to lose hope about life, they become disillusioned, and in developing countries with weak institutional support to maintain law and order, it becomes easy for the army of unemployed youth to take to violence, extremism, war, and poverty. Other effects of deprivation of social rights include human trafficking, prostitution, illegal immigration and promotion of economic refugees. This accounts for rampant and continuous civil disorder, lawlessness, and extremism across many African and other states.

Overall, this paper has demonstrated that the proposals above are capable of removing some of the obstacles confronting the realization and enjoyments of social rights in times of economic crisis, and has shown as well that improving the realization of social rights by the State Parties, the regional bodies, and the UN will produce a win-win outcome for everyone. The preambles to both the UN Charter and the ECHR have affirmed that non-realization of human-rights is a threat to international peace and security. On the other hand, a more effective realization of these rights will tremendously improve the quality of life of all; make the world healthier, and less likely to be prone to conflicts, and safer for all.

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