

Introduction

Human rights are rights a person possesses simply because he or she is a human being; they are the basic entitlements or minimum standards to be met for individuals to live with dignity.¹ In addition to being inherent in the very nature of human beings, human rights are also legal rights enshrined in various international legal documents especially the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The UDHR, adopted in 1948, is the first complete and detailed codification of human rights containing civil, political, economic, social and cultural rights however it is non-binding in international law being a declaration of the General Assembly. Shortly after the adoption of the UDHR, attempts were made to translate these rights into a legally binding document however as a result of ideological differences between the capitalist west and socialist east fostered during the Cold War, “intense debates concerning the perceived differences between economic, social and cultural rights (ESC rights), and civil and political rights (CP rights), as well as disagreement over the means of implementation for ESC rights, erupted”.² This led to the division of the rights in the UDHR and the subsequent adoption in 1966 of two separate legal documents, the ICCPR and the ICESCR, embodying different categories of rights.

Human rights are based on the principles of universality, indivisibility and interdependence; it is stated that ‘all human rights have equal status and cannot be positioned in a hierarchical order’. A lot of controversy exists on whether there is a hierarchy of rights in international law as most governments regard CP rights as superior to ESC rights. An attempt shall be made to critically analyse this statement focusing on the debate around the ICCPR and ICESCR. The first part of this essay will give a brief overview of the ICCPR and ICESCR, the second part will explore the arguments around both covenants and the third part will briefly examine the question of non-derogable rights.

1. Overview of ICCPR and ICESCR

The ICCPR came into force in 1976; it is the most comprehensive codification of civil and political rights. These rights are identical to Arts.1-21 of the UDHR albeit set out in greater detail. The ICCPR is divided into six parts:

Part I sets out the right to self determination as enshrined in the UN Charter.

Part II establishes the obligation of State Parties to respect and ensure to all, the rights recognized in the covenant without distinction of any kind. Each State Party is required to take ‘necessary steps’ to adopt measures that are necessary to give effect to the rights recognized in the covenant.³ It also makes provision for derogation of rights when there is a “public emergency which threatens the life of the nation and the

¹ What are Human Rights? The Nature and Sources of Human Rights available at: <http://www.siaonline.org/?q=programmes/commentary/what-are-human-rights-the-nature-sources-human-rights>

² Justin Pettit, ‘Economic, Social and Cultural Rights’ in *Essex Internet Encyclopaedia of Human Rights*. Available at http://www.essex.ac.uk/human_rights_centre/publications/EIHR/E.aspx#E

³ See Art.2

existence of which is officially proclaimed”, clearly stating the rights that cannot be derogated from.⁴

Part III deals with the substantive rights guaranteed by the covenant. These include the right to life,⁵ freedom from torture,⁶ right of peaceful assembly,⁷ equality before the law,⁸ etc.

Part IV establishes the Human Rights Committee which is responsible for the implementation of the covenant.⁹ Its functions include considering periodic reports from States,¹⁰ receiving inter-state complaints where the parties have made declarations recognizing the competence of the Committee to do so etc.¹¹

Part V subjects the provisions of the covenant to the UN Charter, the constitutions of UN specialised agencies and the ‘inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources’;¹² while Part VI relates to procedural matters such as ratification,¹³ entry into force,¹⁴ and amendments.¹⁵

The ICESCR, like the ICCPR, came into force in 1976; it deals with the protection and realization of ESC rights without making any distinction between these rights. The ICESCR is divided into five parts:

Part I, in identical wordings to the ICCPR, sets out the right of peoples to self determination.

Part II establishes the legal obligation of parties and places each State party, irrespective of political, economic and cultural systems and practices, under a duty to move progressively towards full realisation of ESC rights to the maximum of its available resources.¹⁶

Part III, which spans across Articles 6-15, sets out the substantive rights guaranteed by the covenant such as the right to work, right to education, right to health etc.

Part IV, which is made up of Articles 16-25, deals with the implementation of the covenant. It establishes a reporting system which requires State parties to submit “reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized by the covenant”.¹⁷ This reporting system was monitored by the Economic and Social Council until 1987 when this function was transferred to the newly established Committee on Economic, Social and Cultural Rights (CESCR). The CESCR however does not have the competence to receive inter-state complaints; it merely monitors the implementation of the ICESCR and provides technical support to States on legislative and policy issues related to the ICESCR.¹⁸

⁴ See Art.4

⁵ Art.6

⁶ Art.7

⁷ Art.21

⁸ Art.26

⁹ Art.28

¹⁰ Art.40

¹¹ Art.41

¹² Arts.46-47

¹³ Art.48

¹⁴ Art.49

¹⁵ Art.51

¹⁶ Art.2

¹⁷ Art.16

¹⁸ See UN OHCHR Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights.

Part V deals with ratification, entry into force and other procedural matters.¹⁹

2. Debates surrounding the ICCPR and ICESCR

According to the Vienna Declaration and Programme of Action,²⁰ “all human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”. In spite of this declaration and repeated assertions by human rights bodies that all rights are equal and cannot be placed in a hierarchical order, there exists a disparity between CP rights and ESC rights. In practice, CP rights are commonly regarded as first class rights and superior to ESC rights; they have “in many respects received more attention, legal codification and judicial interpretation and have been instilled in public consciousness to a far greater degree than ESC rights”.²¹ “States and the international community continue to tolerate breaches of ESC rights which, if they occurred in relation to CP rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action ... violations of CP rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of ESC rights”.²²

The debate on whether there is a hierarchy between CP rights and ESC rights has existed for several years and has to a large extent affected the way ESC rights are perceived in modern times. A number of arguments have been made to support the classification of ESC rights as second class rights thereby inadvertently creating a hierarchical order of rights with CP rights on top of the ladder contrary to the principle of indivisibility of rights. These arguments shall be discussed under two headings: (a) Justiciability and (b) nature of obligations.

(a) Justiciability:

The most common argument against ESC rights as enshrined in the ICESCR relates to the justiciability and enforcement of these rights. It is widely argued that ESC rights are not readily justiciable as “claims to a remedy when a violation has occurred are not amenable to adjudication by Courts or quasi-judicial bodies, they cannot be invoked in Court or applied by judges or other mechanisms that seek to protect rights unlike CP rights which are readily justiciable and capable of enforcement”.²³ In support of this argument, some have opined that ESC rights are not rights as such but are at most “a statement of aspirations or goals”.²⁴ They are “programmatic, involving complex and difficult policy decisions, often concerning budgetary and resource allocations. As such, they are a matter of politics, the judgment of which is best left to the legislature and executive branches of government where the necessary technical

¹⁹ Arts 26-31

²⁰(Part 1, para.5), adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF. 157/24 (Part1), chap.III).

²¹ Ibid note 18

²² Per UN Committee on Economic, Social and Cultural Rights, Vienna World Conference of 1993: UN Doc. E/C.12/1992/2, p.83.

²³ Ibid note 1

²⁴ David Beetham, ‘What Future for Economic and Social Rights?’ 43 *Political Studies* (1995) p.41

expertise and knowledge of resources, as well as an understanding of implementation, are concentrated".²⁵ Maurice Cranston²⁶ argues that ESC rights are not genuine rights. In his opinion, for a right to be a genuine right, it must satisfy three conditions:

(i) It must be practicable. Genuine human rights must entail duties and it must be clear who has the duty to uphold or implement such rights. CP rights such as right to life are practicable in all societies whereas ESC rights like the right to adequate standard of living will not be practicable in emerging economies considering the economic conditions of such countries.

(ii) It must be universal i.e. it must be "ascribed to all individuals by virtue of their humanity rather than as a result of their position or role in society"²⁷ or level of development of a State. Thus Art.7 ICESCR, which provides for periodic holiday with pay, can only be claimed by people who are working and is therefore beneficial to only a specific group of society. Consequently, it does not qualify as genuine human rights neither does Art.11 nor other similar articles which are only obtainable in developed States. In contrast, CP rights like right to life, right to liberty and security of persons etc are available to all regardless of status or level of development and are therefore genuine human rights.

(iii) It must be fundamental and of paramount importance i.e. it must "protect the means to a minimally decent, rather than maximally comfortable, life. The seriousness of this purpose is compromised if the list of rights confuses the essential with the merely desirable".²⁸ ESC rights are arguably of less importance to CP rights; of what use is a right to holiday when there is no right to life?

Closely linked is the argument that the language used in both covenants shows that ESC rights cannot be claimed against a State in the same way as CP rights. ESC rights as laid out in the ICESCR are said to be expressed in broad and general terms, ill defined and normatively vague therefore making it difficult for judges to determine when a violation has occurred.²⁹ E.W Vierdag³⁰ argues that "the formulas used in the relevant ICESCR provisions stipulate that State Parties 'undertake to take steps', 'undertake to guarantee', and 'undertake to ensure' the various rights laid down. Another formula appears in the articles granting rights; this prescribes that the State Parties to the ICESCR 'recognize the right'. The question immediately arises as to what this formula means: what is it to 'recognize' a right? What is the right without the recognition? Is 'recognizing' a right the same as 'ensuring' it; does this imply a duty to 'guarantee' it? It seems that this is not the case. It appears from the instrument as a whole that 'recognition' is exactly what this word means, and nothing more; that an eventual 'assurance' and 'guarantee' are dependent on steps that must first be taken". In contrast, CP rights are expressed in clearer and more direct terms, State Parties 'undertake to respect and to ensure' the various rights laid down in the covenant. Terms like 'violation', 'effective remedy' and 'determined by competent judicial administrative or legislative authorities' are used. Thus, "no special

²⁵ Ibid note 1

²⁶ Maurice Cranston, 'Human Rights: Real and Supposed', reprinted in Patrick Hayden, *The Philosophy of Human Rights, Paragon Issues in Philosophy*, Paragon House 2001, p.163-168

²⁷ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford University Press 1995, p.6

²⁸ Beetham, p.46

²⁹ Ibid note 1

³⁰ 'The Legal Nature of the Rights Granted by the International covenant on Economic, Social and Cultural Rights' 9 *NYBIL* (1978), p.80

legislation is needed to amend their wording or to specify their meaning; no special funds are needed to finance their implementation. Violations of them can be judged to have occurred, or to be occurring, by courts of law or similar bodies which are also able to provide effective redress. The violations will consist of actions or omissions by officials or private persons which can be declared void, or lead to the payment of compensation for damage”.³¹

(b) Nature of obligation

In addition to the arguments on the justiciability of ESC rights, scholars have criticized the nature of obligations under the ICESCR. CP rights are said to be “directed against wrongs committed by the State”,³² they entail mostly negative obligations thus States are only required to abstain from activities that would interfere with or violate these rights. State parties to the ICCPR are obliged to take ‘*necessary steps*’ for the realisation of the rights therein. ESC rights on the other hand entail positive obligations; such obligations require States to provide protection and assistance to individuals. These rights require active participation and intervention by States and cannot be realized without such intervention.³³ The rights in the ICESCR are supposed to be realised through ‘progressive’ mechanism; “State parties are obliged to undertake steps individually or collectively, and through technical assistance and cooperation with the view to *progressively achieving* and making full realisation of the rights therein”.³⁴ Thus, ESC rights are regarded as capital and resource intensive and constitute no more than long term aspirational goals to be achieved progressively over a period of time subject to resources available to the State.³⁵

Furthermore, CP rights are said to involve only obligations of conduct i.e. States are required to take specific measures in order to fulfil their obligations for example to abstain from interfering with a person’s right to life or a person’s freedom of expression. On the other hand, because the realization of ESC rights is not subject to immediate implementation but rather dependent on the availability of resources, it is said to give rise to obligations of result. “An obligation of result requires that States achieve a specific result but the means by which States pursue that result is not prescribed; rather States are left a measure of discretion in deciding what methods they employ to achieve the necessary result”.³⁶

2.1 Are these arguments enough to classify ESC rights as inferior to CP rights?

In defence of ESC rights, proponents have argued that ‘of what use is the right to free speech to those who are starving?’ It is baseless to argue that the right to food for example is not fundamental and of paramount importance because food is one of the necessities of life without which no human being can survive. Given the living conditions in most of the emerging economies, access to food and other material items are of much greater importance than some CP rights such as freedom of worship.

³¹ Ibid p.78

³² Ibid p.80

³³ Ibid note 1

³⁴ Art.2(1) ICESCR

³⁵ Ibid note 1

³⁶ Ibid

All human rights entail both positive and negative obligations which work together for the full enjoyment of a right therefore to assert that CP rights entail only negative obligations is unfounded. The European Court of Human Rights (ECHR) in its jurisprudence has repeatedly emphasised that it is not sufficient for a State not to deprive a person of his rights but there is an additional positive obligation. In *Osman v. UK*,³⁷ the ECHR held that “the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted that Art.2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”. Alston and Quinn,³⁸ argue that the main difference between the rights recognized in the two covenants is that “ESC rights require relatively greater State action for their realization than CP rights. This difference separates them more in terms of degree than in kind thus the relevant question is not whether any particular kind requires positive state action but rather the extent to which it can subsist as a meaningful right without such active support. ESC rights are, on average, somewhat more dependent for their full realization on positive State action than CP rights. Some CP rights require more State involvement than others for example the right to a fair trial which requires a fully functioning judicial system to be operational. Conversely, not all ESC rights require the expenditure of the same amount of resources as others; some will require a lesser element of State intrusiveness through supervision. This suggests that the degree of State involvement required is not dependent on which covenant is involved but on the nature of the specific right in question”. As rightly argued, “the full realization of CP rights is heavily dependent on the availability of resources and the development of the necessary structures. Therefore the suggestion that realization of CP rights requires only abstention on the part of the State and can be achieved without significant expenditure is patently at odds with reality”.³⁹

Furthermore, the argument that ESC rights are programmatic and not justiciable is also unfounded. States have different approaches to different categories of rights depending on their priorities and goals. Thus an ESC right may be programmatic and unenforceable in one State but available and enforceable in another. Consequently an increasing number of cases dealing with ESC rights have been determined successfully by courts and quasi-judicial bodies for example *CESR/SERAC v. Nigeria (the Ogoni Case)* determined by the African Commission on Human and Peoples Rights.⁴⁰ The CESCR has made it clear that “it considers many of the provisions in the Covenant to be capable of immediate implementation. While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities

³⁷ Application No.23452/94, 28th October 1998 para.115

³⁸ Philip Alston and Gerald Quinn ‘The Nature and Scope of States Parties’ Obligation under the International Covenant on Economic, Social and Cultural Rights, 9*HRQ* (1987) p.184

³⁹ *ibid* p.172

⁴⁰ http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.155-96.pdf

rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of ESC rights which puts them, by definition, beyond the reach of the 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".⁴¹

3. Non-derogable rights

Apart from the ICCPR and ICESCR dichotomy, is there a general hierarchy of rights? Can some human rights claim superiority thus being "more equal" than others?

Some scholars argue that there is a difference between fundamental human rights and other rights; while fundamental rights are based on natural law and have "a parallel foundation as rules of customary law and/or general principles of law"; other human rights are treaty based.⁴² Thus "while all the rights ... are internationally recognized human rights, some rights are fundamental and intrinsic to human dignity...".⁴³ This seems to suggest that there is a hierarchy of rights.

Other scholars have argued that non-derogable rights are superior to other human rights not only because they are core rights and all other rights are dependent on them but also because they are of utmost importance and violations of such rights are regarded very seriously by the international community. Others opine that non-derogable rights like prohibition of torture, right to life etc are *jus cogens* and obligations *erga omnes*, "they are inalienable rights which an individual cannot be deprived of and no positive law can overrule as opposed to rights bestowed by positive law which a State can give and take away".⁴⁴ Therefore they are superior to derogable rights.

However, the fact that certain rights are addressed as "being 'most fundamental' or representing a 'supreme value' does not necessarily mean that these rights prevail over other seemingly 'inferior' rights".⁴⁵ There is no consensus on the rights classified as non-derogable rights; human rights treaties like the ICCPR, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms contain different lists of non-derogable rights. Furthermore, "rights that are non-derogable under such instruments are not necessarily *jus cogens* e.g. the right not to be imprisoned merely on the ground of

⁴¹ CESCR, *General Comment 9: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 19th Session, 1998, UN Doc. HRI/GEN/1/Rev.5, 26 April 2001, para.10.

⁴² Eckart Klein, 'Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy?' 41 *ILR* (2008) p.481

⁴³ Restatement of the Foreign Relations Law of the United States (Revised) §702 comment *K* (*I* Tent. Draft No. 6, 1985)

⁴⁴ Louis B. Sohn, 'The New International Law: Protection of the Right of Individuals Rather than States' 32 *AMULR* (1982-1983) P.18, See Teraya Koji 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' 12 *EJIL* (2001) 917- 941 for a detailed discussion on non-derogable rights.

⁴⁵ Klein p.477

inability to fulfil a contractual obligation, under Art.11 ICCPR”.⁴⁶ It is therefore not conclusive to argue that “some human rights are superior to others because they must not be restricted. The lack of limitation clauses indicates the scope of the right but does not say anything with regard to other rights and how to solve a possible conflict between them ... As such, non-derogability does not contribute to a hierarchy of human rights norms. If a right is non-derogable it must not be suspended during times of emergency, but may still be restricted as in normal circumstances, according to the principle of proportionality”.⁴⁷ Moreover “the *erga omnes* character is no longer the exclusive attribute of ‘fundamental rights’, being *erga omnes* is a consequence, not the cause, of a right's fundamental character. This criterion is therefore unhelpful for characterizing rights as fundamental or ordinary”.⁴⁸ There is therefore “no accepted system by which higher rights can be identified and their content determined; nor are the consequences of the distinction between higher and ordinary rights clear”.⁴⁹

Conclusion

Although there are marked differences between CP rights and ESC rights, this is not enough to create a hierarchy of rights. All human rights are interdependent, complementary and indivisible; each set of rights aiding the achievement of the other. As a result, the “full realization of CP rights without the enjoyment of ESC rights is impossible as the achievement of lasting progress in the implementation of human rights is dependent on sound and effective national and international policies of economic development”.⁵⁰ The characterization of some rights as fundamental results largely from our own subjective perceptions of their importance.⁵¹ “The international community as a whole has neither established a uniform list of non-derogable rights nor ranked non-derogable rights ahead of derogable rights. If a derogable right conflicts with a non-derogable right, the latter will not necessarily prevail, unless, of course, its status as *jus cogens* is recognized”.⁵² It is my opinion that there is no hierarchical order of rights; all rights are of equal importance and together ensure greater respect for human dignity and wellbeing.

⁴⁶Theodor Meron , ‘On a Hierarchy of International Human Rights’ 80 *AJIL* (1986) p.16

⁴⁷ Klein p.481

⁴⁸ Meron p.9

⁴⁹ Ibid p.22

⁵⁰*Proclamation of Tehran, Final Act of the International Conference on Human Rights*, U.N Doc. A/CONF. 32/41 (1968) para.13

⁵¹ Meron p.8

⁵² *ibid* p.16