

“Justiciability of Economic, Social and Cultural Rights”¹

Jordan Daci, PhD

Advisor to Head of Supreme Court of the Republic of Albania

Wisdom University, Tirana, Albania

Abstract

Human Rights are natural rights that nature has given to all human beings and are inseparable, undividable and inalienable from human beings. They are vital, necessary and indispensable to a modern society, which without them would be unable to function and cannot be developed.² From another perspective, “*human rights are indivisible rights on individuals, based on their nature as human beings; they protect these potential attributes and holdings that are essential for a worthy life of human beings*”.³

Human Rights in general and especially ESCR would be just illusory if they wouldn't be justiciable. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential.⁴ Regrettably, the contrary assumption is too often made in relation to ESCR.⁵ This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions⁶, but is rather a result of states' attempts to justify their failure to perform their obligations under ICESCR.

Keywords: Justiciability of ESCR; ICESCR; *Pacta sun Servanda*; Right to Effective Remedy; Judicial enforcement of Human Rights; Self-executing Human Rights.

Introduction

Human beings have fought throughout history since at the beginning of the existence of the human society for fundamental human rights and freedoms. Indeed, the need to better secure inalienable human rights was the main reason why people created the state which is nothing more than the human society, in which human beings are tied to “membership”⁷ of each of them into the state and so they are interdependent. At the end, the scope of people to enter in human society was to better secure their natural rights and freedoms what were under permanent threat of the others

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² Jordan Daci. “*Te Drejtat e Njeriut*”. Botimi III. Julvin 2, Tirana 2011, pp 35.

³ P.I.O.O.M., Alex P.Schmid. “Research on Gross Human Rights Violation”. P.I.O.O.M. P. Leiden 1989, pp 6.

⁴ General Comment No.9 “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights” of the Committee on Economic, Social and Cultural Rights (hereinafter as CESCR). E/C.12/1998/24, par.10.

⁵ Ibid.

⁶ Ibid.

⁷ Tony Honore. “*Making Law Bind*”. Oxford University. USA, 1987, pp. 129.

unlimited natural rights and freedoms. Plato also in his book "The Republic", *inter alia* explains that human beings entered into society and constituted the state to secure the exchange between each-other.⁸ Meanwhile, Kant explained, *the human beings in order to be related in a mutual relation with each other must get out from the State of Nature where everyone have respect only for his or her interests and their own fantasy*⁹. Furthermore, *human society's basic principles such as freedom, justice and peace cannot exist without inalienable human rights of all the members of the human family*¹⁰, because *the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights and freedom*.¹¹ From this perspective, human rights as whole are indispensable for a modern society and they are universal and strongly interrelated. All human rights are fundamental and inalienable which come to existence together with the birth of human being and die together with him.

The division of human rights into generations or groups has never been justified based on reasonable grounds, but rather historical, political and for the purpose to justify state failure to secure certain rights. This argument lays also *inter alia* on the fact that certain rights such as the right to private property and the right to education etc; cannot be clearly classified into one single group. Nevertheless, we must admit the fact that even scholars have made some distinction between human rights based on the so-called 'Justiciability'. In fact, the discussion on justiciability has gone so far as denying the status of human rights for ESCR, considering them as solely political principles¹². However, Human Rights in general and especially Economic, Social and Cultural Rights (hereinafter ESCR) would be just illusory if they wouldn't be justiciable. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential.¹³ Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights.¹⁴ This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant (on ESCR) provisions¹⁵, but is rather a result of states' attempts to justify their failure to perform their obligations under the UN International Covenant on Economic, Social and Cultural Rights. One of the most generally used excuses is based on the assumption that ESCR are not legal rights,

⁸ Plato. The Republic, pp 36.

⁹ Michele Averchi. "Il rapporto Cittadino-Stato nel Leviathan di Hobbes". www.dialettico.it.html. Accessed on 26.11.2002.

¹⁰ Preamble of the United Nations International Covenant on Economic, Social and Cultural Rights (hereinafter as ICCPR).

¹¹ Ibid.

¹² "Economic, Social, and Cultural Rights": A textbook edited by Asbjorn EIDE, Catarina Krause and Allan Rosas. Kluwer Academic Publishers, Martin Nijhoff Publishers in Netherlands 1995. pp. 17.

¹³ General Comment No.9 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" of the Committee on Economic, Social and Cultural Rights. E/C.12/1998/24, par.10.

¹⁴ Ibid.

¹⁵ Ibid.

they are not self-executing human rights, but sole 'programmatic rights'¹⁶. Certainly, this assumption and all other excuses cannot undermine the obligations of state to enforce ESCR recognized under ICESCR. These obligations should be considered under the light of the principle of international law '*Pacta sun servanda*' embodied in the Article 27 of the Vienna Convention on the Law of Treaties and under the light of the principle of the right to effective remedy recognized in many international treaties. Thus, a state seeking to justify its failure to provide to domestic legal remedies for the violation of ESCR needs to prove either such remedies are not "appropriate means" within the terms of Article 2 of ICESCR or that in view of the other means used, they are unnecessary.¹⁷ In addition, we should always remember the fact that according to Geneva Convention of 12 August 1949, ESCR in time of war are all legally binding and completely justiciable in favor of war prisoners and other persons, but we still dare to consider them as non justiciable rights in peace time.

Therefore, the main purpose of this paper would be to emphasize that ESCR are fundamental human rights just as civil and political rights and to prove that most of ESCR are capable of immediate implementation *inter alia* using their essential interrelation with civil and political rights. In addition any effort of states seeking to justify their failure to provide domestic legal remedies for the violation of ESCR by considering them unnecessary in the view of other means used, would be inconsistent with the function and the nature of judicial remedies which guarantee that such '*other means used*' would not be rendered ineffective.

ESCR as human rights and their relation with CPR

The year 1948 has been the start of a new epoch for human rights with the Universal Declaration of Human Rights adopted by the General Assembly of United Nations. It was the first international "legal" document recognized by a large number of states. This document contains the whole range of human rights with a consolidated text¹⁸ and it can be consider a continuance of other historical documents on human rights starting from British Magna Carta and Bill of Rights to French Declaration of Human and Citizen Rights as well as American Declaration of Independence and other international treaties which also have contained the whole range with a consolidated text. In fact the legal division between civil and political rights and ESCR dates back in 1966 when the United Nations have adopted two separate international covenants on "Civil and political Rights" and the "Economic, Social and Cultural Rights". This division

¹⁶ Henry J. Steiner & Philip Alston. "*International Human Rights in Context: Law, Politics, and Morals*". Oxford. Fourth Cluster Reader, ERMA 2002/2003, pp. 245.

¹⁷ General Comment No.9 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" of the Committee on Economic, Social and Cultural Rights. E/C.12/1998/24, par.3.

¹⁸ Eds. Asbjorn EIDE, Catarina Krause and Allan Rosas. "*Economic, Social, and Cultural Rights*". Kluwer Academic Publishers, Martin Nijhoff Publishers in Netherlands 1995. pp. 22

was merely a result of divergences between the two Cold War sides and had a clear artificial nature, since, historically civil and political rights have been claimed and recognized as a whole and 'were joined with economic, social and cultural rights'¹⁹.

Nevertheless, it is true that both groups of rights were put into separate covenants, but still each opens with the same preamble, recognizing the importance of both sets of rights for everyone, that all human beings can enjoy "*freedom from fear*" and "*freedom from want*".²⁰

There are many arguments against the idea that classifies ESCR as political principles and not as human rights, denying in fact their real status. Some of these arguments are as follow:

- Both covenants have a joint preamble, which the recognition of an inherent human dignity is laid down, as the common source of all human rights²¹.
- Also they have an identical Article 1, providing for all the people the right to self-determination.²²
- They include identical formulae on non-discrimination.²³
- They have the same legal character.²⁴

Additionally, there are also many other links including the existence of the same rights, especially between freedom of association and right to establish trade unions. This characteristic is more evident in case of some rights such as the right to private property and right to education that cannot be classified as part of one single group as they have a clear comprehensive nature.

In consideration of all these arguments, it is clear that economic, social and cultural rights are human rights and they do form "*an integral part of internationally recognized catalogue of human rights*"²⁵. *The pre-existence of ESCR before the adoption of the two covenants is the best arguments to negate that they are "modern" rights, rights of "second or third generation" or worse, rights of the West. Paine underlined that: "Man do not enter society to become worse than he was before surrendering his natural rights, but only to have them better secured"*²⁶. Thus, ECSR as human rights are not

¹⁹ Allan McChesney. *Promotion, defending Economic, Social and Cultural Rights. A Handbook*. American Association for the Advancement of Science. USA 2002. Available also in Internet: <http://sh.aaas.org/escr/handbook> accessed on 11.04.2003.

²⁰ Supra note 12.

²¹ Tadeusz Jasudowicz. Eds. Krzysztof Drzewicki, Catarina Krause & Allan Rosas. *"Social Rights as Human Rights": A European challenge*". Institute for Human Rights, Abo Akademy University, in Abo 1994. pp. 31.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Matthew Craven. *"The International Covenant on Economic, Social, and Cultural Rights": A Perspective on its Development*. Clarendon Paperbacks, Fourth Cluster Reader, ERMA 2002/2003. pp. 7.

²⁶ Jeremy Waldron. *Theories of Rights*". Oxford University Press INC. New York, USA 1984.

new human rights, but only natural and universal rights as well as equal with CPR. Nevertheless, while CPR are 'negative' rights and their fulfillment requires no active actions to be taken from the state, the ESCR are 'positive' rights and their fulfillment requires resources and active actions from the state.

Concerning this argument, President Roosevelt has emphasized the links between ESCR and CPR in his 1944 State of Union Address, when he advocated the adoption of an "Economic Bill of Rights"²⁷. In his statement, he said that people and governments have understood that "true individual freedom or as today are called as civil or political right cannot exist without the economic security and independence"²⁸. For Roosevelt "necessitous men are not free men" and people who are hungry and out of job are stuff of which "dictatorships are made"²⁹.

From this perspective, it is clear that all human rights are interrelated and the protection of one group impacts on the enjoyment of other group. No one can enjoy fully civil and political rights without enjoying economic, social and cultural rights; also, civil and political rights are depended by economic, social and cultural rights. Furthermore, in 1993 at Vienna Declaration and Program of Action was underlined that: "All rights are indivisible and interdependent and interrelated"³⁰. *How somebody who needs food, water, house, or without education, etc, can be expected to fully exercise his civil and political rights such as the right to vote, or the right to freedom of association? Indeed, none can exercise his political rights fully or some time at all without the enjoyment of ESCR. The same goes also for ESCR; they cannot be protected and enjoined without enjoying CPR. In addition, this idea became more accepted as ESCR include a major concern over the protection of vulnerable groups, such as the poor, the handicapped and indigenous people³¹.*

The Minister of Development Co-operation of Netherlands made a similar statement saying that: "all human rights are universal, indivisible and interdependent and interrelated and they must be treated in a fair and equal manner, on the same footing, and with the same emphasis".³² "So far the arguments have been that the guarantee of economic and social rights is necessary to democracy in order to ensure a minimum equality of access to civil and political rights for all citizens"³³.

²⁷ Eds. Asbjorn EIDE, Catarina Krause and Allan Rosas. "Economic, Social, and Cultural Rights". Kluwer Academic Publishers, Martin Nijhoff Publishers in Netherlands 1995. pp. 28

²⁸ Ibid. pp. 29.

²⁹ Ibid.

³⁰ Henry J. Steiner & Philip Alston. "International Human Rights in Context": Law, Politics, and Morals. Oxford. Fourth Cluster Reader, ERMA 2002/2003. pp. 268.

³¹ Eds. Asbjorn EIDE, Catarina Krause and Allan Rosas. "Economic, Social, and Cultural Rights". Kluwer Academic Publishers, Martin Nijhoff Publishers in Netherlands 1995. pp. 19.

³² Fons Coomans, Fried Van Hoof in co-operation with Kitty Arambulo, Jacqueline Smith and Brigit Toebes. "The Right to Complain about Economic, Social and Cultural Rights". Netherlands Institute for Human Rights. Utrecht 1995. pp. 2.

³³ David Beetham. "Democracy and Human Rights". Blackwell Publisher Ltd. Malden USA 2000. pp. 98

As a conclusion it is clear that the interdependence and indivisibility of the two sets of human rights not only exist in theory, but has been also affirmed inter alia in the preamble to the Covenant on ESCR.³⁴ Thus, interdependence and indivisibility can be successfully used to make all ESCR justiciable although they might be considered partially as not self-executing rights or not directly justiciable.

The justiciability of ESCR

The central obligation in relation to the Covenant on ESCR is for States parties to give effect to the rights recognized therein.³⁵ By requiring Governments to do so *"by all appropriate means"*, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.³⁶ However, this *"flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place"*.³⁷ Otherwise, there are no reasons to consider international law in general and especially ICESCR legally binding. In addition, under Article 26 of the Vienna Convention on the Law of Treaties (hereinafter VCLT), *a treaty in force is binding upon state parties to it and must be performed by them in good faith*. Also Article 31 of VCLT provides that *the interpretation of a treaty shall be done in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose 'pacta sun servanda'*. Therefore, based on these two very important principles of international law, the ICESCR cannot be interpreted in a manner that could render it into an ineffective legal instrument having sole a declaratory nature since this is not in the line with its object and purpose. Certainly, accepting the idea that ESCR are not justiciable violates these two principles and all State parties that would support this idea would be considered acting in *mala fide*. Furthermore, Article 27 VCLT foresees that, *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"*. Hence, the behavior in *mala fide* of State parties regarding ESCR would commit a manifest violation of international law. Additionally, the obligation of the State parties to promote and cooperate is also an obligation arising from the articles 55 and 56 of the United Nation Charter. Indeed, if we consider that ESCR are not justiciable, this

³⁴ CESCR General Comment 3. (General Comments). The nature of States parties obligations (Art. 2, par.1); 12/14/1990, par.8.

³⁵ General Comment No.9 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" of the Committee on Economic, Social and Cultural Rights. E/C.12/1998/24, par.1.

³⁶ Ibid.

³⁷ Ibid. par.2.

means also that they would not be legally binding to States parties, which is something entirely against the light of the object and the purpose of ESCR.

Under these circumstances, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not “appropriate means” within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary.³⁸ It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.³⁹

While it is true that the ICESCR provides in the Article 2 the obligation of the state to take step to achieve full realization of relevant rights may be fulfilled progressively and in itself, is not qualified or limited by other considerations, still State parties are required to take deliberate, concrete and targeted steps as clearly as possible towards meeting the obligations recognized in the Covenant within a reasonably short time after the Covenant’s entry into force for the States concerned.⁴⁰ Steps under Article 2 include such legislative or other measures as may be necessary to give effect to the rights recognized in the ICESCR. The expression ‘other measures’ has been interpreted by the Committee of Economic, Social and Cultural Rights (Hereinafter CESCR) as including, but are not limited to, administrative, financial, educational and social measures.⁴¹ However, the CESCR recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures.⁴² In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.⁴³ Nevertheless, as CESCR has emphasized, the adoption of legislative measure is by no means exhaustive or the obligations of States parties, but rather the phrase “by all appropriate means” must be given its full and natural meaning.⁴⁴ The CESCR has recognized that in addition to legislation the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The provision of judicial remedies is considered to be case by

³⁸ General Comment No.9 “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights” of the Committee on Economic, Social and Cultural Rights. E/C.12/1998/24, par.3.

³⁹ Ibid.

⁴⁰ CESCR General Comment 3. (General Comments). The nature of States parties obligations (Art. 2, par.1); 12/14/1990, par.2.

⁴¹ Ibid. pars 2, 7.

⁴² Ibid. par.3.

⁴³ Ibid.

⁴⁴ Ibid. par.4.

case the most effective remedy. In fact, the prohibition of discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and the right to equality under the Article 2 and Article 3 of the ICESCR requires by virtue from the States parties to ensure that any person whose rights are violated shall an effective remedy. In addition, ESCR states that there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems.⁴⁵ Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.⁴⁶ From this perspective, since these rights are considered to be justiciable, States parties shall ensure as final obligation the right of action for any person or groups which would allow any person to invoke the realization of ESCR before the courts.

It should be noted that while Article 2 of the ICCPR provides for States parties an immediate obligation to respect and ensure all rights contained therein, the Article 2 of the ICESCR provides an obligation for progressive realization of ESCR to the maximum of its available resources and to be realized individually and through international assistance and co-operation, especially economic and technical. Nevertheless, the CESCR emphasizes that the works progressively should not be misinterpreted, but must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question⁴⁷. For these reasons, ICESCR provides for a minimum core obligation for States parties to ensure at the very least, minimum essential level of each of the rights is incumbent upon every State party that in order to discharge itself from international responsibility shall prove that every effort has been made to use all available resources in an effort to satisfy its minimum obligations.⁴⁸

The justiciability of rights in general and especially of economic, social and cultural rights is related and depended on the process of positivization⁴⁹ of ESCR that consist of the adoption of laws or other legal normative acts at the national level. "The transformation of ESCR into positive law, whether in constitution or in statutory law, is, however, not enough"⁵⁰. Nevertheless, the direct incorporation of ICESCR provisions in domestic law is desirable and avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation

⁴⁵ Ibid. par.5.

⁴⁶ Ibid.

⁴⁷ Ibid. par.9.

⁴⁸ Ibid. par 10.

⁴⁹ Eds. Asbjorn EIDE, Catarina Krause and Allan Rosas. "Economic, Social, and Cultural Rights". Kluwer Academic Publishers, Martin Nijhoff Publishers in Netherlands 1995. pp. 30.

⁵⁰ Ibid.

of the Covenant rights by individuals in national courts.⁵¹ Although, the possibility of States parties to choose the adequate way to perform their obligations under ICESCR, leads us to the conclusion that these obligations are 'obligation of results' rather than 'obligation of conduct'.

Nevertheless, all the discussion about the justiciability of economic, social and cultural rights is also accompanied with absurdities. It is an absurdity to say that economic, social and cultural rights are not justiciable in time of peace where the conditions are better. The provisions of the "Geneva Convention of 12 August 1949 constitutes a solid base for the protection"⁵² of ESCR. In Articles I, II, III and IV of the convention, an adequate protection of many rights are provided, such as the Right to health, right to adequate food, right to work in time of war, adequate standard of living, right to water, clothing, free medical supplies, and cultural rights. All these provisions are legally binding for the authorities of occupation state or for any other forms of authority that have control over territory. *"International law of armed conflict in condition of war or occupation"*⁵³ held all the states responsible in ensuring these rights. *It is very rational and significant to think how an enemy state has the duty to protect and ensure these rights in such extend and not to be better protected by our own state in time of peace.*⁵⁴ *It is clearer that ESCR are always justiciable, but good will is needed from states parties. The conclusions reemphasize the justiciable and legally binding character of economic, social and cultural rights.*

*As it was mentioned above, most of the economic, social and cultural rights are justiciable and only a small number are not directly justiciable, but this doesn't mean that they are not justiciable. The practice of states and general comments of the CESCR have given a wider approach for their justiciability through the interpretation of rights and making links with fundamental civil and political rights based on interdependence between these two sets of rights.*⁵⁵ *For examples according to the general comments of the committee, right to life has been too often narrowly interpreted*⁵⁶. *The committee underlines the wider sense of the right to life to include many other economic, social and cultural rights as essential to enjoy right to life as the most important right. For the committee, right to life requires also right to adequate food, access to water, housing, health, etc. There are also many other examples when the argument of interdependence together with a broad interpretation of the right to life can be used to make some ESCR justiciable.*

⁵¹ General Comment No.9 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" of the Committee on Economic, Social and Cultural Rights. E/C.12/1998/24, par.8.

⁵² Eds by Krzysztof Drzewicki, Catarina Krause & Allan Rosas. "Social Rights as Human Rights": A European challenge. Institute for Human Rights, Abo Akademy University, in Abo 1994. pp. 37.

⁵³ Ibid. pp. 39.

⁵⁴ Ibid.

⁵⁵ Ibid. pp. 53

⁵⁶ Ibid.

*It is a false impression that ESCR are not justiciable and therefore they cannot be claimed in front of court. In fact, we must make the distinction between jurisdiction and competence. It is always confusion between competence and jurisdiction. These two concepts are completely different, although they seem similar. Courts' jurisdiction to consider a particular issue doesn't depend only upon the nature of the issue itself, but also upon their constitutional role⁵⁷ that is variable in different states. Courts can always find their legal basis to ensure and protect ESCR, because "each right include a duty of non-interference; right to housing for example include a right to not be arbitrary evicted from one's home"⁵⁸ etc. The European Court of Human Rights has already used the interdependence and interrelation of ESCR with CPR as a legal mean to make ESCR justiciable in case of *Zander v. Sweden*, 1993, concerning the pollution of the drinking water of a well and in case of *Lopez Ostra v. Spain* concerning the pollution of the environment by a leather processing factory in which, the court stated that "serious pollution of the environment may impact negatively to the welfare of individuals and to deprive them from the enjoyment of their homes in such manner as to negatively impact to their private and family life". By doing so, the Court recognized the right to adequate environment, regardless that the European Convention for the Protection of Human Rights and Freedoms doesn't provide for such right. As such, the right to water includes the right to have access to drinking water and in consequence the right to water for free of charge"⁵⁹. On this ground, the right to water is protected under national legislation. E.g. Flemish part of Belgium in the Article 3 of a Decree dated December 20, 1996, reads that: "Every customer has the right to a minimum and uninterrupted supply of electrical power, gas, and water per inhabitant with the purpose o living in dominant standards. Since January 1997, each inhabitant is entitled to be supplied with 15 meter square of water for free of charge".⁶⁰ Therefore, the use of interdependence and interrelation between CPR and ESCR is not sole a theoretical possibility, but has been successfully applied by international judicial bodies as well as national judicial and quasi judicial bodies.*

As a very important conclusion, the right to effective remedy imposes to States parties the obligation to provide to individual judicial remedies as necessary remedies to made ESCR fully effective. Also it is important to be able distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration).⁶¹ The fact that ICESCR is considered to be a legally binding international

⁵⁷ Matthew Craven. "The International Covenant on Economic, Social, and Cultural Rights": A Perspective on its Development. Clarendon Paperbacks, Fourth Cluster Reader, ERMA 2002/2003. pp. 28.

⁵⁸ Ibid.

⁵⁹ UN Doc E/CN.4/Sub.2/2002/10, par. 22.

⁶⁰ Ibid. Pika 31, faqe 12.

⁶¹ General Comment No.9 "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" of the Committee on Economic, Social and Cultural Rights.. E/C.12/1998/24, par.9.

treaty does not support any approach which would not accept minimum justiciable dimensions. This means also that any attempt to consider ESCR as non justiciable rights would be incompatible with the notion of indivisibility and interdependency of ESCR and CPR. Such approach would also disarm the judiciary from the power to protect human rights and secure rule of law. Additionally based on the *travaux préparatoires* (French: "preparatory works") of the ICESCR, attempts to include a specific provision in the Covenant to the effect that it be considered "non-self-executing" were strongly rejected.⁶² It is important to remember that one of the main tasks of a judiciary is to ensure rule of law that would not exist without full respect of international human rights. Thus, any legal norm that would limit the ability of judiciary to rule on the realization of the ESCR would not comply with States parties' obligations under ICESCR.

While it is true that most of ESCR rights are directly and immediately justiciable, also the rest of ESCR can be also immediately rendered into justiciable rights *inter alia* by:

- Using the non-discrimination provision (Article 26 of CCPR)⁶³. The Human Rights Committee acting under the CCPR in three Dutch cases related to social security has settled the non-discrimination clause in article 26 of CCPR as applicable also in relation to the enjoyment of economic, social and cultural rights.
- Using the interdependence with civil and political rights and a wider interpretation of ESCR. The main argument is that ESCR are a pre-access requirement for the equality of opportunities, for the enjoyment of civil and political rights and vice versa.
- The legislative method is the main and most successful besides the other forms⁶⁴. However the *"pre-condition for making justiciable ESCR is not only the giving of a precise normative content, but also is necessary the establishment of a proper procedures"*⁶⁵. *Procedural guarantees are necessary to exercise ESCR in practice and to make remedies effective. No remedy can exist without the proper procedures; they are indivisible with the normative aspects. Domestic legislator has the possibility to create justiciable rights through the choice of domestic method of implementation.*⁶⁶. *The best and most successful examples is Finland where ESCR enjoy an equal legal status with political and civil right achieved through their incorporation into the country's constitution and other normative acts, clarifying their object and subject*⁶⁷.

⁶² Ibid.

⁶³ Ibid. pp. 44.

⁶⁴ Eds. Krzysztof Drzewicki, Catarina Krause & Allan Rosas. *"Social Rights as Human Rights": A European challenge*. Institute for Human Rights, Abo Academy University, in Abo 1994. pp. 206.

⁶⁵ Ibid. pp. 207.

⁶⁶ Ibid. pp. 85.

⁶⁷ Eds. Asbjorn EIDE, Catarina Krause and Allan Rosas. *"Economic, Social, and Cultural Rights"*. Kluwer Academic Publishers, Martin Nijhoff Publishers in Netherlands 1995. pp. 42.
Ibid. pp. 60.

Conclusions

The interdependence and the interrelation between two sets of human rights, ESCR and CPR are well proved and confirmed *inter alia* by the preamble of the ICESCR. This fact, imply to States parties a '*prima face*' obligation to make all possible efforts to ensure inalienable ESCR to all person under its jurisdiction. Regardless, of the different wording on the nature of States parties' obligations under ICCPR and ICESCR; these provisions shall to be interpreted in accordance with articles 26, and 31 of the VCLT, that require from member states to perform their obligations arising from international treaties in *good faith* and the interpretation of a treaty of States parties' obligations under an international treaty shall be done in *good faith* and in accordance with their context and in the light of its object and purpose (*pacta sun servanda*). In addition, Article 27 VCLT requires from States parties to perform their obligations arising from international treaties regardless of their domestic legislation provisions. Hence any attempt of States parties to avoid the performance of their obligations under ICESCR is inconsistent with the light of its object and purpose and would constitute a behavior in *mala fide* and would also constitute a manifest violation of international law.

From this regards, the ICESCR imposes to States parties an obligation for immediate realization of the majority of rights provided thereto especially those rights provide in articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) and at least a certain minimum degree of justiciability to the rest of rights. If we accept the idea that some rights are completely not justiciable, than we must accept also the idea that these rights would not be considered as being legally binding and would render the ICESCR into an ineffective legal instrument for the protection and assurance of these rights. Wordings used in the ICESCR such as '*progressive realization*' and to the '*max available resources*' and '*using all appropriate means*', don't discharge a state from the obligation to make all possible efforts to perform its obligations and to secure a minimum essential level of each of the rights.

The right of a state to choose all 'appropriate means' means that States parties are free to make their choices, but the practice of the CESCR shows that all appropriate means used could be render ineffective if they are not reinforced or complemented by judicial remedies. As such, under General Comment No.9 of the CESCR judicial remedies are not only an option, but are highly desirable and a final requirement for full realization of ESCR under ICESCR. Other justifications based on the wrong presumption that some of the legal norms of the ICESCR are to be considered "non-self-executing" are not based neither on the nature of these legal norms and neither on travaux *préparatoires* (French: "preparatory works").

As final conclusion, states parties in performing their obligations under ICESCR are obliged to ensure immediately the majority of the rights thereto and take all the necessary legal measures including the provision of judicial remedies in order to satisfy

their minimum core obligations and comply with the principles of *good faith, pacta sun servanda*. Certainly, there are no legal grounds, nor moral or objective factors that would justify the lack of justiciability of ESCR and *de facto* render them into political principles, since ESCR are sole basic human rights indispensable and crucial for a modern human society and to free human being from the *fear from fear* and *fear from want*.

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