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BREAKING THE GENERATION THEORY OF HUMAN RIGHTS: Mapping the Scope of Justiciability of Economic, Social and Cultural Rights with Special Reference to the Constitutional Guarantees in Nepal

Geeta Pathak Sangroula¹

‘Though the human rights can be classified in accordance with their nature however, in essence, it is not reasonable to think as co placement and irresponsibility, that by making the essence of human rights secondary; by making one immediately useable and the other opposite to it.’²

Prelude

Human life cannot be imagined if the inherent nature and inalienable and indivisible characters of human rights are not intrinsically connected with every individual irrespective of any grounds, status or acquired conditions. The intrinsic value of human rights necessitates respecting each and every individual's dignity and worth simply by virtue of being human. Deprivation of human rights results in disadvantageous condition rendering human life subjected to injustice. The idea of advantages is associated by and large with that of right including claim. The condition of human life is objectively shaped. Human rights are thus objective phenomena rather than perception or assumptions.³ This proposition surrounds within individual as subject attached with objective entitlements. Human rights are not granted by anyone but inherited by nature and thus are not the choice of rulers. Justice P.N. Bhagawati rightly pointed out that ‘human rights are as old as human society, for they derive from person’s need to realize his/her essential humanity. They are not ephemeral, not alterable with time, place and circumstances. They are not the products of the philosophical whim or political fashion’.⁴ Unfortunately, the

¹ Author is a Professor at Kathmandu School of Law.

² *Prem bd. Khadka v. Nepal Governement of Nepal* WN 2064/0719 (2008) (Ratio).

³ Dias, *Jurisprudence* (5th edn, New Delhi Aditya Books 1994) in Yubaraj Sangroula, *Comparative Analysis of Human Rights Concepts and Principles at Concepts and Evolution of Human Rights: Nepalese Perspectives* (Kathmandu School of Law 2005) 1

⁴ *Ibid* 3

drafters of international human rights instruments while codifying the norms and mechanisms did not consider the empirical testaments but are seen highly influenced by earlier western philosophical whims and international politics that considered only civil and political rights as human rights. The vertical normative development of international human rights standards also gave rise to the assumptions- based analogy of ‘generations of human rights’ discussed below.

This article makes a profound challenge to the historically flourished typology of generation theory that largely undermined the principle of indivisibility or horizontally complementary character of human rights. The classification of human rights was confined merely “to those rights that transcend, and are protected against, the exercise of political power”⁵. Breaking the generation theory, therefore, is an outburst on behalf of large number of people who sleep with empty stomach and compelled to die. The following is one out of numerous sad stories:

Shiva Devi, a mother of three years old daughter, committed suicide killing her daughter first. She was five months pregnant. She had no food as the three days’ general strikes kept her out of daily wages work. Starvation left nothing for her but to end her life along with her daughter. Her husband went India for work three months ago, but could send nothing to support his family.⁶

This article represents a number of stories of victims who have lost their life in search of food and other minimum threshold conditions of life and such cases are ignored by the State and non-state actors. The significant portion of writing is argumentative to defend the socio economic rights as “justiciable human rights”, nevertheless, proposes the convergence of all human rights as essential methodological bridging tool to justify the right to life with dignity as quality of life including adequate standard of living.

Historical Antecedents

The human rights movement developed after the world war. Although the term human rights was not explicitly coined by the League of Nations, its contribution in the development of human rights mainly on the rights to/ at work and right against slavery is remarkable. The first global human rights

⁵ Johan D. van der Vyver, ‘Foundations of Law: Morality, Human Rights, and Foundations of the Law’ (2005) *Emory Law Journal*, 188.

⁶ Cited at Yubaraj Sangroula, ‘Right to an Adequate Standards of Living, Development and Social Respect and Dignity, (Paper presented at International Residential School on Economic, Social and Development Rights organized by Kathmandu School of Law, 2008)

institution, the International Labour Organization (ILO)⁷, has guaranteed workers' rights in a broader compass of human rights since 1919. Its Constitution recognises that 'universal and lasting peace can be established only if it is based upon social justice'.⁸ In 1919, social justice at work was of central importance because widespread social unrest threatened the peace established at the end of World War I and made urgent the task of improving working conditions. The preamble also recognizes that one nation's failure to improve working conditions not only harms its own people but also prevents other nations from succeeding in their efforts to improve conditions.⁹ The expansion of first world welfare model to include the "right to work, right to development, right to social service, right to adequate health were taken suspiciously as socialist agenda and thus was avoided for political reasons. Nevertheless, the ILO framework proved landmark in taking initiatives to promote and protect rights to and at work. Despite the initiatives taken at various levels¹⁰, it took momentum in recognizing 'economic, social and cultural rights (ESCR) as human rights'. The Charter of the United Nations, though in state-centric framework, following the principles of human rights¹¹, founded the Economic and Social Council (ECOSOC) that is mandated to establish mechanisms for the protection and promotion of human rights. Still, the concept of human rights incorporated in article 55 seems detached from socio-economic rights.¹²

The Universal Declaration of Human Rights (UDHR)¹³, a 'common standard of achievement'¹⁴, regarded as an International Bill of Rights, eventually, stood first

⁷ ILO was founded in 1919 at the end of World War I, the ILO is the oldest of the UN's specialized agencies

⁸ See Preamble to the Constitution of the International Labour Organization. 'Constitution of the International Labour Organization' (ILO 1919)

<<http://www.ilo.org/public/english/about/iloconst.htm#pren>> accessed 12 May 2012

⁹ Declaring that the Organization and its members will implement the ILO's constitutional mandate based on the four strategic objectives of the Decent Work Agenda toward the universal aspiration for social justice; See also ILO Declaration on Social Justice for a Fair Globalization (adopted 30 June 2008) ILO Conference Session 97.

¹⁰ For example, Roosevelt, in his 1944 State of the Union address, advocated that "we have come to clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men'. People who are hungry and out of job are the stuff of which dictatorships are made." For details of this Statement by Roosevelt, See P. Alston, 'US Ratification of the Covenant on the Economic, Social and Cultural Rights: The need for an entirely New Strategy' (1990) 84 *American Journal of International Law* 365, 365-393 in Eide (ed), *Economic, Social and Cultural Rights as Human rights as Human Rights" in Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 2011) 11.

¹¹ See generally the preamble and the purpose under Article 1 of the Charter of the United Nations.

¹² UN Charter, article 55.

¹³ Universal Declaration of Human Rights (adopted 10 December 1948) GA Res 217A.

to recognize the individual's rights, including duty¹⁵ with the explicit 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'¹⁶ followed by the contents of economic, social and cultural rights and civil and political rights. The inclusion of social and economic rights in the UDHR was novelty at that time. It has been argued that this was a result of pressure from Eastern Europe and, in particular, the USSR. The Soviet bloc participated very actively in discussions on social and economic matters, while the United States sought to exclude economic rights from the binding documents. This is how the international community agreed to include these rights in the Declaration.¹⁷ The UDHR includes the ESC rights as¹⁸

- the right to work, to just and fair conditions of employment, and to protection against unemployment
- the right to form and join trade unions
- the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and social services, as well as security in the event of loss of livelihood, whether because of unemployment, sickness, disability, old age or any other reason
- the right to education, which shall be free and compulsory in its "elementary and fundamental" stages

Article 25 of the UDHR is landmark and has not only recognized a guarantee to the basic means of subsistence, but also provides a scope for social justice through the entitlements to the special care and assistance to motherhood, childhood and widowhood respectively.¹⁹

Unlike the 'economic and social rights' the notion of 'cultural right' however is seen more complex. Nevertheless, Article 27 of the UDHR contains the elements: the right to take part in cultural life, the right to enjoy the benefits

¹⁴ The phrase 'A common standard of achievement' was incorporated in the preamble of the UDHR signifies the universal character of human rights with the notion of "the rights everywhere of all countries". See, Gudmunder Alfredsson & Asbjorn Eide, *The Universal Declaration of Human Rights, A Common Standard of Achievement* (Martinus Nijhoff Publishers 1999) 3.

¹⁵ The provision of 'duty' under the Declaration is complementary to the 'rights' by which only the free and full development of human personality is possible. See UDHR, article 29.

¹⁶ UDHR, preamble, para 1

¹⁷ See, Asbild Samney, 'Origins of the Declaration' in Gudmunder Alfredsson & Asbjorn Eide (n 14) 11.

¹⁸ Article 22-27 of UDHR included ESC rights. Article 25 (1) provided a broad framework: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (emphasis added).

¹⁹ UDHR, article 25(2).

of scientific progress and its application, the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author, and the freedom indispensable for scientific research and creative activity. This also holds a close nexus with other rights such as the right to education that could be used as a tool for creative participation in society. The underlying concepts of culture as capital accumulated material heritage of humankind, and as creativity justifying a total way of life²⁰ and is thus, essential to achieve the spirit of ESCR on the whole.

One of the important aspects of cultural rights is the right to preserve the cultural identity of minority groups.²¹ Although the term 'group' is seen plural in nature, the rights are equally available to each and every individual belonging to the minority, including 'cultural minority'.²² The right to science and culture also finds recognition in two international treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (Children's Convention). These instruments create legally enforceable rights claims against those nations that have signed and ratified the treaties.

The Generation Theory and Dichotomy of Human Rights

The tripartite typology of generation theory of human rights created dichotomy of human rights by categorically presenting civil and political rights as first generation, economic, social and cultural rights as second generation and the collective or solidarity rights as the third generation of rights. Although the

²⁰ See for detail, Radolfo Stavenhagen, 'Cultural Right: A Social Science Perspective' in Asjborn Eide & Alan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge* in Sangroula (n 3) 87-91.

²¹ See for example Article 27 of the International Covenant on Civil and Political Right (ICCPR) and Article 30 of the Convention on the Rights of the Child (CRC). The rights of the minorities has further been expanded by the See the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' adopted by General Assembly resolution 47/135 of 18 December 1992. In addition, the Cultural Rights are also referred to in numerous international instruments as well as in several UNESCO Conventions and recommendations. See the Declaration of the principles of International Cultural Co-operation, proclaimed by the General Conference of UNESCO on 4 November 1966.

²² The case of *Sandra Lovelace v. Canada* (CCPR/C/13/D/24/1977) is landmark. Lovelace was born and registered as 'Maliseet Indian' in Canada but has lost her rights and status as an Indian in accordance with Indian Act, after having married a non-Indian on 23 May 1970. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status. The Committee found the said provision discriminatory on the grounds of sex and contrary to articles 2 (1), 3, 23 (1) and (4), 26 and 27 of the ICCPR. With regard to the individual rights, the Committee further gave view that "statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole.

notion of three generations has been said firstly put forward by Karel Vasak in 1979 and is followed by many others, this is an outcome of historical western legacy of different degree and concerns dividing human rights into a vertical or asymmetrical order. His divisions follow the three watchwords of the French Revolution: Liberty, Equality, and Fraternity.²³ The notion of civil rights - those that are fundamental to the existence of the individual within the body politic and which derive their substance from the station in life of a person as a citizen of the state - was introduced into the paradigm of human rights thinking by the French legal philosopher, Jean-Jacques Rousseau (1712-1778). Rousseau argued that the individual, by entering into a political community, actually forfeits his or her natural rights (life, liberty, and equality) in exchange for a bundle of civil rights (liberty, equality, life, and property).²⁴ Not only the French revolution, all most all western classical documents were based on these elements. The core contents under the Magna Carta (great charter of England), 1215²⁵, Petition of Rights 1628²⁶, English Bill of Rights, 1689²⁷, American Declaration of Independence, 1776²⁸ and French Declaration on Man

²³ See Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights* (UNESCO 1977); Eide & Rosas (n 19) 4.

²⁴ It should be noted that the natural rights of life, liberty, and equality take on a different form within the body politic; the right to private ownership which, according to Rousseau, would inevitably lead to the destruction of the state of nature, now becomes a 'sacred' right of the citizen. See der Vyver (n 5) 190.

²⁵ King John of England was forced to sign this charter in 1215. The king agreed that in the future he would not deprive freemen of their lives, liberties, or properties unless it was required by a legitimate law, and then, only pursuant to fair and proper procedures. King John died in October 1216. After his death his nine years old son Henry III succeeded. 1215's Magna Carta was amended several times. Chapter 29 of the 1225 charter broadened and replaced Chapter 39 of King John's charter and provided: 'No freeman shall be taken, or imprisoned, or be diseased of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.'

²⁶ It is called a second greatest constitutional charter of the liberties of England. Clauses 1, XI were related to the rights and freedoms of the citizens. These rights and freedoms include trial by court/jury. This provided that no tax without permission of the representatives of people and unnecessary search and seizure were restricted.

²⁷ Another important document from the early history of human rights is English Bill of Rights from 1688, an act declaring rights and liberties of citizens. It was a tremendous step towards the development of a true limited government. Among other things, the English Bill of Rights prohibited the king from forming armies without authorization from parliament, (By raising and keeping a standing army within this K in time of peace without consent of parliament, and quartering soldiers contrary to law.(emphasis added)), It also provided the 'suspending laws without the consent of parliament is illegal, election of members of parliament ought to be free, and Freedom of speech ought not to be impeached or questioned.'

²⁸ In 1776, most of the British colonies in North America proclaimed their independence from the British Empire. Life, liberty and pursuit of happiness were the essence of the Declaration.

and Citizen. The concept of rights declared in both American and French societies were found formulated by the social contract theorists giving importance to the individuals and their freedom to pursue their own ends and desires. The philosophy of individual rights and freedoms and the existence and power of the state discussed in the social contract theories in fact were far from the discourse of socio-economic rights of the peoples.

The critics of the generation theory also hit upon the philosophic writings of political thinkers and came in to conclusion that theoretically, 'the first generation of human rights was shaped by liberalism, exemplified in the writings of Rousseau, Locke, and Kant, though rooted much more deeply in the thought of Aristotle. The second and third generations of rights were in contrast influenced by Marx, Engels, Lenin, and Mao'.²⁹ These ideological misgivings negatively contributed in classification of human rights into the generation theory.

According to the generation theory, the first twenty articles of the UDHR: free speech, religious liberty, the right not to be tortured, the right to a fair trial, the right to vote, and so forth related to civil and political rights inherited later by ICCPR³⁰ are called as first generation rights, from article 22-27 of the UDHR listed as socio-economic rights such as the right to work, the right to fair pay, the right to food, shelter and clothing, the right to education etc as second generation rights and the collective or solidarity rights such as right to self determination and right to development the third generation rights. The third generation rights are rather vague and broad as Group and collective rights such as right to self determination and rights to development, environment, and natural resources and so on.

Talking about the third wave of human rights, Vasak categorises as third generation of human rights as group or solidarity rights, thereby, he included the right to development of disadvantaged sections of a political community or,

²⁹ The second generation of rights arose during the industrial revolution and was contemporaneous with the political revolutions circa 1848-1870. Human rights were then seen, increasingly, as no longer merely negative rights to freedom from state interference, but rather as affirmative, substantive social claims to state resources. Second-generation rights were seen as the consequence of dialectical class struggle and thus, to some extent, as collective rights. See Eric Engle, 'Universal Human Rights: A Generational History' (2006) 12 Annual Survey of International & Comparative Law Golden Gate University School of Law 219 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020464> accessed 20 February 2013.

³⁰ The UN Commission on Human Rights (replaced by Human Rights Council since 2006) drafted the International Bill of Human rights, the International Covenant on the Economic, Social and Cultural Rights, The Covenant on the Civil and Political Rights (ICCPR), and the First Optional Protocol to the ICCPR adopted by General Assembly in 1966 and entered in to force in 1976. The two Covenants distinguish between implementation of these two sets of rights. See David Weissbrodt (ed), *Civil and Political Rights at Encyclopedia of Human Rights* (Oxford University Press 2009) 309.

in the international context of developing countries, the right to nature conservation and to a clean and healthy environment, the right to share in the common heritage of humankind, and so on with the following characteristics:³¹ (1) the emphasis of solidarity rights is no longer on the individual because beneficiaries of the rights are collectively perceived, either in the sense of humanity as a whole, a particular political community, or a distinct section of the population within the body politic; (2) the beneficiaries of solidarity rights include future generations; and (3) solidarity rights in most instances cannot be adequately protected within the confines of municipal bills of rights and their effective implementation consequently requires international cooperation on the global or regional scale (for example, pollution). The Vasak's categorization placing right to development as third generation is already proved wrong as the Declaration on the Right to Development clearly stipulates that both group right and individual rights are inalienable human rights within the meaning of free, active and meaningful participation.³² 'Development is a holistic concept. It has to be culturally compatible, socially just, ecologically viable, and politically participative. Earlier, the concept of development did not probe the linkages between individual and its environment. As a matter of fact, individual well-being is related to many things and they are interrelated. Sustainable development seeks to address those linkages with a new vision'³³ Similarly, the right to environment is also related to individual rights closely connected with number of individual rights. In the case of *Lopez Ostra vs Spain*³⁴ complained before the European Court of Human Rights (ECHR), a demand was placed challenging Spain for failing to protect the home, private life and family life of one citizen. The case was filed because of Spanish State's failure to take measures against smell, noise and contaminating smokes caused by a solid and liquid waste treatment plant violating her right to physical integrity and respect for the home and private life as guaranteed under article 17 ICCPR). The Court accordingly decided in favour of the claimant with the view that 'the state had incurred in a violation for respect of home and private life'.³⁵ Although, this case was a strategic intervention to claim socio-economic rights through civil and political rights, it ultimately justified civil and political rights as dominant. This kind of dichotomy of entitlements widened the gap by confining civil and political rights entitlements to the individual including protection safeguards where as the provisions associated with economic and social rights are often not immediately enforceable but may make allowance, as a matter of state policy, for progressive implementation subject to the available means at the disposal of the state to provide the services, facilities, or support required for their

³¹ Vyver (n 5)191.

³² See United Nations Declaration on the Right to Development (1986), preamble.

³³ Tapan Biswal, *Human Rights Gender and Environment* (1st edn, Viva Books 2008) 14.

³⁴ ECtHR, Communication Number.16798/90 (1990).

³⁵ Ibid.

meaningful enjoyment.³⁶ The ICCPR basically concerns two types of rights: those pertaining to the physical integrity of the person, such as execution, torture and enslavement, and those pertaining to legal proceedings, to the legal status of persons and to intellectual rights, such as the right to hold and communicate one's ideas and beliefs. The first category is concrete and substantive: when these rights are violated, individuals suffer concrete, physical harm; and there are no formal procedures which can legitimize these acts. The second category is quite different. For those rights concerned with the form of judicial and political proceedings, as long as there is due process and free elections, the outcome by definition cannot constitute a violation of one's rights. Those rights concerning speech, press and religious expression involve abstract entities--ideas, beliefs, information and the exchange or dissemination of these".³⁷ The above features and characters denote not only the dichotomy between ICCPR and other Instruments but also create intra level dichotomy between civil and political rights within the same.

The concept and the contents enshrined in the UDHR are conventionally reaffirmed by the subsequent instruments, however in uneven political manner. Ultimately, the intense ideological cleavages of the time led to the adoption of two separate covenants, one on economic, social and cultural rights and the other on civil and political rights. Differing approaches were taken in each. It is often criticized that the contents of implementation guaranteed by the ICCPR are far better than of ICESCR as the latter even lacked having its monitoring body at the very outset.³⁸ Moreover, out of all principal treaties, only the monitoring body for ICCPR is named as 'Human Rights Committee' (hereinafter HRC) as if other issues are not human rights. Unlike HRC, it took decades for the Committee on Economic, Social and Cultural Right (here in after CESCR) even to adopt the Optional protocol for the recognition of competence to receive complaints of violation of rights under the covenant.³⁹ Nevertheless, since 1990, the Committee on Economic, Social, and Cultural Rights started its work for the possibility of drafting an Optional Protocol to the ICESCR. At its fifty-second session, the Commission on Human Rights took note of the measures taken by the Committee on Economic, Social and Cultural Rights towards the elaboration of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights granting the

³⁶ Ibid 191.

³⁷ Joy Gordon, 'The Concept of Human Rights: The History and Meaning of Its Politicization' (1998) Brooklyn Law School, Brooklyn Journal of International Law, 708.

³⁸ Article 16 of the ICESCR provided the initial mandate to the ECOSOC. The committee of ICESCR was established by the resolution of ECOSOC in 1985.

³⁹ Since 1990, The Committee on Economic, Social, and Cultural Rights started its work for the possibility of drafting an Optional Protocol to the ICESCR. The Committee on ESCR finalized a draft Optional Protocol that was presented for consideration to the Commission on Human Rights in 1997. The draft was still not adopted for many years. See UN Doc E/CN.4/1997/105.

right of individuals or groups to submit communications concerning non-compliance with the Covenant, as recommended by the World Conference on Human Rights,⁴⁰ and requested the Committee to submit a report on the matter to its fifty-third session⁴¹. The following misconceptions were raised against the adoption of Optional Protocol to the ICESCR:⁴²

1. Economic, social and cultural rights are not capable of being applied by judicial bodies. They are not justiciable and, as a result, cannot be the object of an individual complaint procedure.
2. Economic, social and cultural rights are too vague to be applicable to a case-based complaint procedure;
3. Economic, social and cultural rights involve questions of resources allocation and public policy that should not be dealt with by courts;
4. Judicial remedies are not effective in realising economic, social and cultural rights;
5. A complaint procedure for economic, social and cultural rights would imply a huge financial burden for States;
6. A complaint procedure for economic, social and cultural rights creates obligations for States ;
7. A complaint procedure for economic, social and cultural rights would compete or conflict with other complaint procedures.

The above misconceptions are also the production of generation theory or vice versa. In the same line, the assumptions of generation theory may be summarized in the following points:

Civil and Political Rights: 1st Generation	Economic, Social and Cultural Rights: 2nd Generation
Fundamental Rights with remedies	State Policies and no effective remedies
Negative rights and negative obligation	Positive Rights and Positive Obligation

⁴⁰ Vienna conference was the second global conference held in 1993 to focus exclusively on human rights, with the first having been the International Conference on Human Rights held in Teheran, Iran, during April–May 1968 to mark the twentieth anniversary of the Universal Declaration of Human Rights

⁴¹ The Committee's report on a draft optional protocol for the consideration of individual complaints to the ICESCR (Doc. E/CN.4/1997/105) was submitted to and considered by the former United Nations Commission on Human Rights (replaced by the Human Rights Council through General Assembly's Resolution in 15 March 2006). ESCR Res 1996/16 (1996) para.10.

⁴² See 'Section 8: Challenging Misconceptions around the OP-ICESCR' <<http://www.escr.net>> accessed 13 May 2013.

Immediate implementation through law, including remedies	Progressive realisation and programmatic in nature achieved through state policies
Not dependent on availability of resources	Highly dependent on availability of resources
Therefore, CPR is justiciable rights	Therefore, ESC rights are non-justiciable

Breaking the Generation Theory

Rights without remedies and legal enforceability are not rights but the above assumptions do not consider the so-called second and third generation rights as rights at all. The World Conference on Human Rights opposed the distinction between civil and political rights and economic, social and cultural rights that proclaimed ‘all human rights are universal, indivisible, interdependent and interrelated’⁴³. More specifically, the conference adopted that ‘there must be a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels.’⁴⁴ Despite this commitment, the generation theory of human rights continued both in understanding and application.

The standard notion of human rights brought by the dominant concept of generation theory did not include socio-economic rights, such as the right to employment, housing, food and medical care. Joy Gordon, the professor of philosophy, claims that ‘If by “human rights” we mean those elements which constitute the minimal conditions for human existence, then freedom from torture or death would certainly be included; but food and shelter would be as well’.⁴⁵ Professor An Na'im provides more critical note that ‘the persistence of the classification of human rights into civil and political rights and economic, social and cultural rights is not only detrimental to the human rights quality of latter group of rights, but also undermines the universality and practical implementation of all human rights’. Citing the case of *Airey v Ireland*⁴⁶, Lord Lester in the same line also makes clear that ‘this strict categorization ignores

⁴³ See Vienna Declaration and Program of Action (1993) part 1, para 5.

⁴⁴ Ibid, part II, para 98.

⁴⁵ Joy Gordon, ‘The Concept of Human Rights: the History and Meaning of its Politicization, Brooklyn Journal of International Law’ (1998) 23 Brooklyn J. Int'l L. 689, 697.

⁴⁶ This case upheld the right to legal aid as an element of the civil right of access to justice; require the courts to examine the socio-economic condition, put stress that human rights can not be boxed into separate watertight compartment. See Yash Ghai & Jill Cottrell (eds) *Implementing Economic, Social and Cultural Rights* (2004) 18.

the considerable degree of blurring and overlap between two sets of rights, both as regards their nature and their enforceability'.⁴⁷

The issue of legal enforceability has been the primary obstacle impeding the development of socio-economic rights since their inception in the UDHR. The Civil and political rights, which have not met with the same resistance, have almost universally been promoted to an enforceable status in national law. Yet it may be, as many commentators have recently suggested, that "problems with enforcing socio-economic rights have been overstated and have even been used to mask ideological misgivings. Such suggestions are supported by an increasing body of case law emerging from a number of jurisdictions, which has arguably put the issue of legal enforceability "beyond question." Without legal enforceability, it is widely believed that socio-economic rights will remain ineffectual as legal entities. The arguments provide the valid reasoning that the "different treatment" of rights might be the result of 'ideological differences' rather than 'differences between the rights themselves'.⁴⁸ These all arguments prove the so-called generation theory as politicization of rights.

These arguments continue to be made by number of commentators in the field of human rights. Marc Bossuyt, for instance, writes that

civil rights require from the State essentially--but not exclusively--an abstention. Consequently, they must be observed immediately, totally and universally. On the contrary, social rights require an active intervention from the State. As a result, they may be implemented progressively, partially and selectively. It is precisely because observance of civil rights merely requires abstention that States have no excuse for not respecting human rights of everyone within its jurisdiction. On the other hand, because the implementation of social rights requires an active intervention by the State to the extent of its available resources--a State can be allowed to set priorities in the realisation of social rights.⁴⁹

The assumptions listed above are erroneously imposed and wrongly concluded the ESCR as non-justiciable. If it is an outcome of international politics prioritising the civil and political rights, either from the perspectives of instrumental guarantees or the implementation mechanisms, this cannot be accepted as a valid justification by any means.

⁴⁷ Ibid, 19.

⁴⁸ See Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996) 53-54 in Ibid 38.

⁴⁹ Marc Bossuyt, *International Human Rights Systems: Strengths and Weaknesses, in Human Rights in the Twenty-first Century at Irwin Cotler, Human Rights as the Modern Tool of Revolution, in Human Rights in the Twenty-first Century* (Kathleen E. Mahoney & Paul Mahoney eds., 1993) 52.

The lack of 'availability of resources' has been overwhelmingly dragged to justify the generation theory which is very much random. Some people have argued that economic rights had a place in the international human rights regime longer than civil and political rights. American President Franklin D. Roosevelt characterized the 'economic rights' as the "freedom from want", which includes the right to useful remunerative job, the right to earn enough to provide adequate medical care and the right to adequate protection from the economic fears of old age, sickness, accident, unemployment and the right to good education.⁵⁰ Moreover, ESC rights contain not only the economic rights but also the social and cultural rights that require 'social guarantees' without looking much on 'material resources'. Even the 'economic rights' could be made 'justiciable' by 'taking reasonable steps' following three approaches of production, storage and distribution with all necessary interventions at domestic level.⁵¹ In the use of available resources, due priority shall be given to the realisation of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provisions of the essential services.⁵²

The assumptions that civil and political rights are negative rights and negative obligation erroneously challenged the enforceability by creating dichotomy of State obligation drawing a conventional hypothesis that 'Socio-economic rights are 'positive rights'. This requires the state to expand resources to provide a remedy, whereas civil and political rights are 'negative rights,' which simply require the state to refrain from unjust interference with individual liberty'.⁵³ It is to be noted that no human rights are purely negative or positive but amalgamation of both. Even the enforcement of civil and political rights requires resource expenditure, and as such, these rights are equally positive. For instance, the right to a fair trial can only be attained by the maintenance of an expensive court system. The case of *Airey v. Ireland* mentioned above,⁵⁴

⁵⁰ Eleventh Annual Message to Congress on 11th January, 1944 (cited at Fred L. ed., 1966)

⁵¹ The case on right to food observed by the Supreme Court of India is worth mentioning in a later discussion..

⁵² Limburg Principles, paras 25-28.

⁵³ Similarly, the words 'achieve progressively' have been misinterpreted. While the concept of progressive realization requires reading this phrase in the light of overall objective which is to establish clear obligations for state parties to move as expeditiously as possible towards the realization of these rights.⁵³ See Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) American University International Law Review, Washington College of Law, American University, 46.

⁵⁴ This case was about the judicial separation where there was difficulty to have a lawyer so the Court concluded why the applicant herself was present to represent herself, was a clear case of access to aid of counsel as positive right. See *Airey v. Ireland*, Eur. H.R. Rep 305, 315 (1979).

highlights this point, as it suggests⁵⁵ that the right to a fair trial goes so far as to constitute a right to legal aid services.⁵⁴ The example is clear that it is not the subject of the case but the objective requirement where positive rights or negative rights or both may be applied on a piecemeal basis as the basis for regular assessment of the applicability of a legal concept or doctrine.⁵⁶

Similarly, the notion 'achieve progressively' has been misinterpreted. While the concept of progressive realisation requires reading this phrase in the light of overall objective which is to establish clear obligations for state parties to move as expeditiously as possible towards the realisation of these rights.⁵⁷ The progressive realisation requires proactive measures to make the state responsible and accountable to fulfill its obligation by taking reasonable steps as illustrated in number of places of this article. The case of *Grootboom*⁵⁸ strongly defied the mere non-enforceability approach of progressive realisation as assumed by generation theorists. The *Grootboom* case clearly laid down that progressive realisation is a firm obligation of governments and forms the basis of justiciable rights claims including adjudication of substantive economic, social and cultural rights claims. The Constitutional Court ordered government to "devise, fund, implement and supervise measures to provide relief to those in desperate need"⁵⁹ stating

The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.⁶⁰

In response to the assumption that compliance with civil and political rights was cost-free, whereas the realisation of social rights posed an economic burden on the State is not justified with valid reasoning as security

⁵⁵ Holding that although the Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly provide for a right to free legal assistance in civil cases, in some circumstances Article 6.1 may require the states to provide free legal assistance when such assistance proves indispensable for securing an effective access to court). *Ibid.* at 314-16.

⁵⁶ MARGIT COHN, Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems, *The American Society of Comparative Law, Inc.* 59 *Am. J. Comp. L.* (2011), 675, 676

⁵⁷ See for detail General Comment No. 3 (1990) and the Report of the Committee on ICESCR, UN Doc. E/1991/23, 83-87.

⁵⁸ 10 BHRC 84, DN 11 May 2000 (High Court); 4 October 2000 (Constitutional Court).

⁵⁹ *Ibid.*, para 95.

⁶⁰ *Ibid.*, para 45.

management and administration is costly, for example military expenses, than many ESC related rights. The cost of election, especially for parliamentary, elections require huge amount of money, may in fact be extremely expensive, while there are many social issues, for example, preventive measures against untouchability and all other forms of discrimination can be implemented at very low cost.⁶¹ Significantly, the human life with dignity should not be compared with materialistic cost but should be equated with human development including full and equal enjoyment. The World Bank believes that “creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being—especially the poorest—at the very foundation of its approach to development, the Bank helps people in every part of the world to build lives of purpose and hope.”⁶²

The assumption of non-justiciability is also flourished by the domestic Constitutions that have placed ESC rights not within the ‘fundamental rights framework’ but under the Directive Principles and State Policies (DPSP). The legalists believe that Courts have no jurisdiction to enforce something that is not clearly established by the law as a legal right that further escalated the assumptions of generation theorists mentioned above that:⁶³

- socio-economic rights are merely general interest of people which are not capable of enforcement by the courts.
- rights are products of law, thus their existence is dependent on States’ consent or choice to enforce.
- socio-economic interests of people are development concerns of society instead the matters for judicial intervention.
- socio-economic rights are collective interests of the people, so that would be impossible for a single individual to assert or enforce them.

In response to the above arguments, professor Ghai invites for a genuine discussion on the theory of rights and pragmatic approaches of implementation, particularly focusing the issue of justiciability.⁶⁴ The discussion is further supported by Martin Scheinin that ‘the problem relating to the legal nature of social and economic rights does not relate to their validity but rather to their

⁶¹ Dilys M. Hill, *Human Rights and Foreign Policy: Theoretical Foundations*, in *Human Rights and Foreign Policy* 6 (Dilys M. Hill ed., 1989) 68.

⁶² World Bank. *Development and Human Rights: The Role of the World Bank*. (Washington, D.C.: 1998), 4 available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module27.htm>, accessed 15 Feb. 2012

⁶³ Yubaraj Sangroula, (n. 6)

⁶⁴ Yash Ghai & Jill Cottrell (n 46) 6.

applicability'.⁶⁵ The validity of rights perhaps could be justified by the title and the general guideline contained in the ICESCR mentioned above, but the question of 'applicability', due to the 'generations', still remains vague and vogue and is made isolated from the possibility of applicability. Therefore, the Committee on Economic, Social and Cultural Rights (CESCR) further has indicated that a number of articles in the Covenant are capable of immediate implementation, including article 3⁶⁶, article 7, subparagraph (a) (i), article 8, article 10, paragraph 3, article 13, paragraphs 2 (a), 3 and 4, and article 15, paragraph 3. It has also stressed, with respect to the right to adequate housing, for example, that 'instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law'.⁶⁷

This principle of applicability is well addressed by the 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (hereinafter referred as Limburg Principles)⁶⁸ with special emphasis on the elements of state responsibility enshrined in Article 2 of the ICESCR under which the obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. The language of 'available resources' refers to both the resources within a State and those available from the international community. The Limburg Principle is further advanced by the 'Maastricht

⁶⁵ *Martin Scheinin*, 'Economic, Social Rights as Legal Rights at Economic, Social and Cultural Rights' in Asbjorn Eide (n 10) 29.

⁶⁶ Article 3 of both ICCPR and ICESCR provide the same principle of 'equality of men and women' and also the General Comments 16 and 28 respectively as the comprehensive guidelines for the effective implementation of the provision.

⁶⁷ See, the Committee on Economic, Social and Cultural Rights Introduction, *Fact Sheet No.16* (Rev.1).

⁶⁸ The necessity of implementing the provisions of the Covenant through domestic legislation is consistent with article 27 of the 1969 Vienna Convention on the Law of Treaties, which states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Indeed, the Covenant often requires legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights emphasize that "States parties shall provide for effective remedies, including, where appropriate, judicial remedies" (principle 19). Because there does not yet exist an individual complaints procedure under the Covenant, the full implementation of the rights which this instrument contains is all the more dependent on the provision of appropriate laws and remedies at the national level. The Principle required interpreting ICESCR in good faith, taking into account the object and purpose in accordance with the Vienna Convention on the Law of Treaties, 1969. UN doc. E/CN.4/1987/17, Annex; (1987) 9 Human Rights Quarterly 122, 122-135.

Guidelines⁶⁹ that provides a practical guideline in understanding the violation of ESCR and the responses required. This principle justifies the power and duty of the courts to mediate constitutional and human rights disputes and way to resolve such disputes by making authoritative and binding decisions. This is a gate way for invoking the rights indeed.

The principles of applicability through justiciability could be a viable tool especially to address the poverty driven countries. For example, Nigeria where about 70 percent of the populations is widely regarded as poor, disadvantaged, and vulnerable,⁷⁰ the issues justiciability of socio-economic rights, including judicial activism in restoration of rights are highly under priority. A prominent Nigerian constitutional scholar defines justiciability as ‘a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of law.’⁷¹ Justiciability, in this regard, implies determining whether a particular issue is appropriately resolvable by the courts and this involves procedural and substantive considerations.⁷²

In relation to the civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. It was also argued that ‘because civil and political rights only entail that the state abstain from action, it is reasonable to expect complete and immediate compliance; while such an expectation would not be reasonable regarding social and economic rights, which require the state to affirmatively undertake certain actions’.⁷³ Deplorably, the contrary assumption is made in relation to economic, social and cultural rights. The Committee on ICESCR, however, has made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation or self executing, for example, the principle of equality as cardinal to all kinds of human rights irrespective of civil, political, economic, social and cultural rights or any other field.

Growing Judicial Trend of Justiciability:

The justiciability of socio-economic rights now has been one of the most popular emerging concerns of judiciary in many parts of the world. The Office

⁶⁹ See ‘the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 Human Rights’ Quarterly, 691-705.

⁷⁰ Ayesha Kadwani Dias & Gita Honwana *Justice for the Poor: Perspectives on Accelerating Access* (Oxford University Press 2009), 209.

⁷¹ Benjamin obi Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government 21 century* (1977). In the South African context, Loots has suggested that justiciability implies determining whether a particular issue is appropriately resolvable by the courts and that this involves procedural and substantive considerations. See also generally, ‘Access to Courts and Justiciability, in *Constitutional Law in South Africa*, I (Matthew Chaskalson et al. eds., 1996)

⁷² See generally Shadrack B. O. Gutto, ‘Beyond Justiciability’ (1998) 4 Buffalo Human rights law Review 79, 82.

⁷³ See Dias & Honwana (n 70) 230.

of the High Commissioner for Human Rights organized a workshop of South Asian Judges on 17th November 2001, where the judges reaffirming the world conferences held in Teheran (1968) and Vienna (1993), explicitly recognized that human rights are indivisible and interdependent, and the rights enshrined in the ICESCR contained in some national Constitutions provided guidelines for legal obligations of the States. Similarly, the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women adopted by Apex Court Judges' conference in 1994 noted that⁷⁴

All too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. They stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.

The above declarations of judges implicitly support the idea of breaking the generation theory and treat all human rights as remedial by making them justiciable especially in order to protect the human rights of socio-economically marginalised and vulnerable groups like women, minorities, indigenous people, and person with disabilities, children.

The justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate all over the world. Hence, the worth of 'ESCR' should be proved by the 'contents' either with explicit or implicit 'application or interpretation' made by the courts or both. Following are some of the best practices of court cases including aftermath successes as outcome or impact of the case as result indicator:

Issue	Decision/Ratio	Outcome
Issue: Housing ⁷⁵ Mrs Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement. They then illegally occupied nearby	The Constitutional Court of South Africa decided that "Section 26 of the Constitution obliges the state to devise and implement a coherent, co-coordinated housing programme and that in failing to provide for those in most desperate need the government had failed to take 'reasonable measures, within available resources.'" The Court ordered that the various	The Court's approach in <i>Grootboom</i> laid the foundation for the subsequent claims in the "Treatment Action Campaign". Insistence on the rationality of state actions to a model that requires the state and its agencies to act reasonably to discharge

⁷⁴ See paragraph 2 of the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1996

⁷⁵ *Government of South Africa & Ors. v. Grootboom & Ors.* 10 BHRC 84, DN 11 May 2000 (High Court); 4 October 2000 (Constitutional Court).

Issue	Decision/Ratio	Outcome
land earmarked for low-cost housing but were forcibly evicted: their shacks were bulldozed and burnt and their possessions destroyed. The forced eviction violated the South African Constitution; ⁷⁶	governments 'devise, fund, implement and supervise measures to provide relief to those in desperate need.' The ruling established that 'progressive realisation' is a firm obligation of governments and forms the basis of justiciable rights claims. It places the adjudication of substantive economic, social and cultural rights claims within a familiar framework to courts in all jurisdictions, a review for 'reasonableness'.	their constitutional obligations with respect to social and economic rights. All municipalities now have a 'Grootboom allocation' in their budget to address the needs of those who are homeless. ⁷⁷ The Legal Resources Centre has been retained to represent the applicants in enforcing the remedy ordered by the Court.
Issue: Enforceability of ICESCR ⁷⁸ Petition for Prohibition; Jurisdiction of the	Supreme Court of the Philippines upheld the petitioner's contention by citing The adverse ruling appears to delimit the CHR's powers as to which "human rights" are to be given attention in a manner that is inconsistent with	Application of ICESCR and General Comment No. 10, of the Committee on ICESCR Development of jurisprudence of 'indivisibility' of CPR

⁷⁶ The South African Constitution was adopted by the Constitutional Assembly on 8 May 1996). Despite the fact that South Africa has yet to ratify the ICESCRs its constitution includes key ESCRs including the right of access to adequate housing (section 26(1)), to health care, food and water, and to social security (section 27 (1)). Also protected is a range of children's rights to basic nutrition, shelter, basic health care services and social services (section 28(1) (c)). Except for the latter, the general socio economic right provisions are subject to internal limitations. They require the state to only take reasonable legislative and other measures within its available resources to progressively realise them (section 26(2)) and section 27(2)). The Constitution with the realization of respect and protect the inherent dignity (Article 10), clearly stipulates the ESC Rights under the 'Bill of Rights' such as Freedom of trade, occupation and profession, Labour relations, environment, property, including equitable access to natural resources, Housing, Health care, food, water, and social security, child right, education, language and culture, particularly addressing the cultural, religious and linguistic communities etc. See South African Constitution, chapter 2, Bill of Rights.

⁷⁷ "Although the Grootboom case centred on the right of access to housing, it emphasised that socio economic rights are interrelated and interconnected and that in order for a government policy to pass the test of reasonableness as elaborated upon in the Grootboom judgement case, a policy aimed at providing access to a right cannot be aimed at long-term statistical progress only but it should benefit the targeted people (poor households).", See Shivani Verma, 'Justiciability of Economic Social and Cultural Rights relevant case law, International Council on Human Rights Policy ICHRP commissioned this document as a Working Paper. (2005), para 9

⁷⁸ *Brigido Simon et al. v. Commission on Human Rights* (5 January 1994)

Issue	Decision/Ratio	Outcome
Commission on Human Rights; Human Rights; interdependence; civil and political rights vis-a-vis economic, social and cultural rights; adjudicative, investigative powers and contempt powers; quasi-judicial authority.	the ICESCR and the recognition of interdependence of civil and political with economic, social and cultural rights crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.’ (para.3).	and ESCR
Issue: Food Safety and Right to Life/Health ⁷⁹ A consignment of powdered milk imported by a respondent company exhibited a radiation level above the acceptable limit that violated the constitutional right to life	The Supreme Court of Bangladesh considered Indian Supreme Court decisions and held that the right to life is not limited to the protection of life and limb but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being	The Court made specific Directions to the Government for the better implementation of radiation standards
Issue: Forced Eviction ⁸⁰ In Dhaka city, a large number of inhabitants (informal settlements,) were evicted without notice.	The Supreme Court of Bangladesh decided ‘while such State policies were not judicially enforceable (Article. 15 is only a directive principle), the right to life implied the right not to be deprived of a livelihood and shelter.’ the court ordered that:	The Supreme Court recognised that such inhabitants are often the victims of misfortune and natural calamities, The Government has occasionally made land temporarily available for evictees, for example,

⁷⁹ *Dr Mohiuddin Farooque v Bangladesh & Ors* 48 DLR(1996) (HCD) 438; (1996) 2 CHRLD 107

⁸⁰ *Ain o Saalish Kendra]and ors v Government of Bangladesh and ors* Supreme Court of Bangladesh, (Writ Petition No. 3034 of 1999); (1999) 2 CHRLD 393

Issue	Decision/Ratio	Outcome
<p>Their homes were demolished with bulldozers. The petitioners alleged that implementing the project, without proper notice or provision of alternative housing, would violate the fundamental rights to equality, life, liberty and livelihood (Arts 27, 31 and 32 of the Constitution)</p>	<ul style="list-style-type: none"> · The Government should develop master guidelines, or pilot projects, for the resettlement of the slum dwellers; · The plan should allow evictions to occur in phases and according to a person's ability to find alternative accommodation; · Reasonable time is to be given before the eviction, and · For security reasons, slums along railway lines and road sides should be cleared, but inhabitants should be resettled elsewhere according to the guidelines. 	<p>when it had an urgent need for squatters' land for a building site. But it remains limited to getting temporary protection. After getting the first judgement, whereby the court recommended that rehabilitation programmes should be made available, the judges suggested that we pursue the executive branch of the government: they're the ones that will give you land⁸¹</p>
<p>Issue : Environment/ right to life ⁸² Petitioners claimed electricity grid station had potential health hazards - constitutional right to life includes right to live in a clean environment</p>	<p>The Supreme Court of Pakistan gave verdict that "lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"</p>	<p>Ordered government to investigate newspaper claims of nuclear waste dumping along the coast on the basis that such dumping would violate the right to life. The Court also found that Pakistan's economic policy should be informed by a policy of sustainable development</p>
<p>Issue: Education ⁸³ The main issue was whether there is a 'right to education' guaranteed to the people of India under the</p>	<p>Supreme Court of India laid down that "the right to education flows directly from the right to life. The right to life under Art. 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education."</p>	<p>The Court granted the petition and struck down the payment of a capitation fee as a condition for entry into any educational institution.</p>

⁸¹ See for detail, Litigating Economic, Social and Cultural Rights- Achievements, Challenges and Strategies- ESC Rights Litigation Programme, Centre for Housing Rights and Evictions (COHRE), Geneva 2003. Available online at: www.cohre.org/litigation, accessed 13 Jan. 2011

⁸² *Shela Zia v WAPDA* PLD 1994 SC 693

⁸³ *Mohini Jain v. State of Karnataka* SC 1992 AIR (1858).

Issue	Decision/Ratio	Outcome
Constitution and whether the charging of capitation fees violates this right.	Education is much too important in life and culture of India that its deprivation amounts to an arbitrary action which violates Article 14 (equality clause) of the Constitution.	It held that the capitation fee makes education beyond the reach of the poor.
<p>Issue: Right to Work and Trade Union⁸⁴</p> <p>Petition filed under article 32 of the Indian Constitution; enforcement of the policy of 'equal pay for equal work for both men and women' (Article 39(d)), listed under the Directive Principles of State Policy.</p>	The Supreme Court of India held: although the principle of "equal work for equal pay" is not stated as a fundamental right, it complements the fundamental rights provisions on equality. Therefore, when all relevant considerations are the same, persons holding identical posts may not be treated differently in the matter of pay merely because they belong to different departments.	The Court granted petition and directed respondents to fix the salary scale of driver-constables of the Delhi Police Force to be at least on the same level as that of drivers of the Railway Protection Force.
<p>Issue: Adequate Standard of Living⁸⁵</p> <p>This case involved an undertaking, on behalf of a private builder, to construct 17,000 houses for 'weaker sections' in exchange for an exemption from state acquisition of his land. A petition was brought after the builder violated the conditions of the exemption by refusing to accept as legitimate,</p>	The Supreme Court of India reaffirmed Article 21 of the Constitution, which guarantees the 'right to life' is intended to ensure the equality of the weaker segments of society; a reasonable residence is indispensable for fulfilling the constitutional goal of the development of individuals. The difference between the need of an animal and the human being for shelter has to be kept in view. For the animal it is the bare protection of body; for a human being it has to be a suitable accommodation that would allow to grow in every aspect physical, mental and intellectual.	The Court ordered Government to provide clear guidelines for the implementation of conditions applicable to any exemption under the Act This decision was subsequently relied on in a strong affirmation of the right to adequate housing as a component of the right to life, in <i>Chameli Singh</i> ⁸⁶ which created a benchmark for "right to shelter when used as an essential requisite to the right to live guaranteed as a fundamental right

⁸⁴ *Randhir Singh v. Union of India*, 1982) A.I.R. 1982 S.C. 879

⁸⁵ *Shantistar Builders v. Narayan Khimalal Totame and Others* Civil Appeal No. 2598 of 1989.

⁸⁶ *Chameli Singh & Ors. State of U. P. & Anr.* (1996) 2 SCC 549.

Issue	Decision/Ratio	Outcome
applications for housing from individuals and families.		to residence, dignity of person and right to live itself.”
Issue: Health ⁸⁷ The petitioner in this case requested the implementation of strict regulations to ensure the quality and standards of approved drugs.	Court stressed the importance of the right to health, as guaranteed under Article 21 of the Constitution of India and stated that the ‘improvement of public health and the prohibition of drugs injurious to health [is] one of the primary duties of the state.’	The Court commended the petitioner for bringing the issue to the attention of the Court and ordered that the Ministry of Health and the Central Government remunerate him for costs incurred as a result of his bringing the petition.
Issue: Food ⁸⁸ PIL filed against Food Scarcity despite having 50 million tons of food stocks failed to make available the minimum food requirements of the vast drought-stricken population.	The court observed the areas of immediate concern ‘to see that food is provided to the aged, infirm, disabled, destitute women and men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their member do not have sufficient funds to provide food for them.’	State administrative machinery responds to the people's needs and acts in an accountable manner; and Empowering democratic institutions at the village level to manage and control food supplies and seek answerability of the government for failure to provide basic minimum food requirements.
Issue: Reproductive Rights ⁸⁹ The occurrence of uterine prolapse and its failure to distribute effective free reproductive health services	Court justified the ‘right to reproductive health and other rights are deemed to be important in the eyes of economic and social justice, and this right has been provisioned in the Therefore, the Court said that the state should develop necessary approaches and create satisfactory and conducive	Considering Art. 20 of the Interim Constitution 2007, the Court further said that ‘reproductive health is a right, mere recognition of which in the Constitution is not sufficient, rather physical facilities

⁸⁷ *Vincent Panikurlangara v. Union of India and Others* (1987) SCC 990.

⁸⁸ *Peoples' Union for Civil Liberties v. Union of India* in S. Muralidhar, *Economic, Social and Cultural Rights: an Indian Response to the Justiciability Debate*, 29-31.

⁸⁹ *Prakash Mani Sharma and Others v Government of Nepal* (2008) 8 NLR 956 .

Issue	Decision/Ratio	Outcome
Failure of execution of reproductive rights guaranteed by Article 20(2) of the Interim Constitution of Nepal, 2007	environment for the exercise of such rights’.	should also be made available for the enjoyment of this right Following the Court’s order, the Government of Nepal mainly the Ministry of Health developed policies to provide some services
<p>Issue: Reproductive health⁹⁰</p> <p>An extreme example of a socio-cultural evil practice against women had a direct impact on the reproductive health of women, especially on their maternal mortality and morbidity.</p>	<p>The Supreme Court issued an order of <i>mandamus</i> to the concerned government authorities to take pro-active intervention, including creation of awareness, to eliminate the practice of <i>Chhaupadi</i> in society. At the same time, the Court also issued a directive order to the Government for the enactment of necessary legislation to prohibit such practices against women as soon as possible.</p>	<p>The cabinet decision has declared <i>Chhaupadi</i> as the worst form of malpractices. Similarly, the MWCSW with a three year pilot project (supported by Save the Children Norway), conducted programs such as -generating awareness through different type of media, health checkups and safety measures including sanitation under which separate toilet with sanitary napkins, infirmary, are made available., vigilance cell formation comprising community old women and male members to put pressure against such malpractices.</p>
<p>Issue: Socioeconomic rights of the badi community⁹¹</p> <p>Demanding the enforcement of rights concerning</p>	<p>Supreme Court issued an order of <i>mandamus</i> to the legislature to provide citizenship to children of unknown fathers, and to take the necessary steps for the reduction of socio-economic and sexual exploitation of <i>Badi</i> women.</p>	<p>Interim Constitution included the provision and also incorporated in the National Plan of Action</p>

⁹⁰ *Dil Bahadur Bishwokarma and Others v HMG decided on 2062-01-19 B.S. (01-05-2004*

⁹¹ *Tek Tamrakar and Others for Pro Public v. Office of Prime Minister and Council of Ministers and Others (2005) 6 NLR 680.*

Issue	Decision/Ratio	Outcome
citizenship and birth registration, arrangement of alternative employment opportunities, vocational trainings, free education, and health care facilities		
<p>Issue: Employment⁹²</p> <p>The government of Nepal violated the right to employment to be protected equally as other fundamental rights.</p>	<p>The Court issued the writ stating "Among all the ESCR, the right to employment is important and it is important also for successful utilization of civil and political rights. So its importance can not be lessened by putting it in a class that state gradually implements them according to the State's resources and means"</p>	<p>This case has brought a clear conceptual jurisprudence of ESCR that Fundamental rights are interdependent with each other.</p> <p>So no right can be underestimated by forming hierarchy of fundamental rights</p>
<p>Issue: Right to Food⁹³</p> <p>The rampant food scarcity in 32 Districts out of total 75 Districts in Nepal. 16 Districts are extremely aggravated because of lack of food violated Article 18(3) of Interim Constitution 2007 and the international human rights Standards</p>	<p>The Court issued the writ petition with the following important ratio highlighted below:</p> <ul style="list-style-type: none"> -The right to freedom can not be realised unless the right to food is achieved -A dignified right to live is based on human value, norms and honour -It is the duty of the State to ensure access to food and its availability -The State must take each and every possible steps as much as the resources allow it. 	<p>Apart from article 11 (1) (2) of the ICESCR and its General Comment 12, the Court explicitly cited other human rights provisions as authorities such as Article 25 of UDHR, Article 12 (2) of CEDAW, Art. 27(3) of CRC, Articles 1 and 2 of the Universal Declaration on the Eradication of Hunger and Malnutrition.</p> <p>The Court also cited number of provisions under the State Policies and cases of India and other jurisdiction.</p>

⁹² *Prem bd. Khadka v. Nepal Governement of Nepal* WN 064/0719 (2008).

⁹³ *Prakashmani Sharma v. Nepal Government* WN. 0149/ 065 (2009); DN 19 May 2010 in *Some Decisions of the Supreme Court Nepal* (2012) 284

Issue	Decision/Ratio	Outcome
<p>Issue : Special care and Protection of Person with Disability⁹⁴</p> <p>The PIL was filed for the contending the failure in fulfilling the Constitutional as well as legal duties and also the obligation under the Convention on the Rights of the Persons with Disability (CRPD)</p>	<p>The Supreme Court decided the case with the ratio that “people with disability are entitled to receive extra and special care from the home and state both. Disable-friendly access to government offices and easy transportation facility has been the major issues of the day.</p>	<p>The impact of the judgment yet to be seen however it has applied the CRPD to which Nepal is a party</p>

The above judicial trends are the examples of both 'independent' and 'dependent' interpretation of invoking the socio-economic rights as justiciable rights⁹⁵ For example, the jurisprudence rendered by the South African Constitutional Court seems not dependent on other provisions other than the provisions of ESCR guaranteed under the 'Bill of Rights' framework, while the country like India that has placed ESC issues under the DPSP as listed on the above columns, is developing the ESC jurisprudence relying on one or more provisions under the fundamental right converting ESCR under DPSP into justiciable rights mainly from two dimensions.

- First, civil and political rights having socio-economic dimensions to extend the right to non-discrimination and equality into the socio-economic arena. (Equality related jurisprudence).
- Second, ESCRs themselves have been directly derived from civil and political rights (e.g. the right to life implies the right to water and food).

The latter jurisprudence is most evident in South Asia (particularly India) and in the decisions of international human rights bodies. The conversion approach established a nexus with 'fundamental rights' particularly the provision of right to life or liberty. The “right to life”, is seen mainly intended

⁹⁴ *On behalf of Disability Human Rights Center and his own Advocate Sudarshan Subedi* WN 2068-WO-0188. See also, for English translation, *Some Decisions of the Supreme Court Nepal* (2012) 407.

⁹⁵ See 'Interrights' (Commonwealth Case Law Database) <www.interrights.org> accessed 26 Feb 2010.

to guarantee or ensure the equality of the weaker segments of society. For example, The Supreme Court of India has rendered ESC jurisprudence (housing, food, Health, education etc.) under the DPSP in connection with the rights to life guaranteed under Article 21 of the Constitution. The right to life-based ESC jurisprudence has been largely followed by number of countries as judges may use high degree of margin of appreciation while interpreting meaning and essence of right to life as seen above.

The case of Nepal is mixed in character where a number of ESC rights have been kept under the fundamental rights but not in equal footing as fundamental guarantees to the civil and political rights. Nevertheless, the existing constitutional provisions as mentioned below provide greater scope of interpreting justiciability of ESCR complementary to civil and political rights.

Some of the countries have gone ahead in the realisation of ESC rights as essential. The case of Philippines is praiseworthy. The *Manila Prince Hotel*⁹⁶ standard established by the Philippine Supreme Court, all provisions of the 1987 Constitution are presumed to be self-executing. Before a socio-economic right could be characterized as precluding actionability, the Court should prudently engage in normative investigations on constitutional text, structure, intent, ethos, ideology, and precedents.⁹⁷ The concept of 'actionability' provides greater scope to explore and interpret the constitutional framework and render socio-economic rights as justiciable rights.

Although, the Courts are seen progressively observing the cases related to ESC rights establishing a nexus with 'fundamental rights' particularly the provision of right to life⁹⁸ or liberty⁹⁹, the implementation of judicial

⁹⁶ *Manila Prince Hotel v. Gov't Serv. G.R. No. 122156* (SC 3 Feb 1997) (en banc) <<http://sc.judiciary.gov.ph/jurisprudence/1997/feb1997/122156.htm>> accessed 12 June 2006.

⁹⁷ See Diane A. Desierto, 'Justiciability of Socio-economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' (2009) University of Hawaii Asian-Pacific Law & Policy Journal, 136.

⁹⁸ The Supreme Court of India has rendered the range of ESC jurisprudence including housing and food under the DPSP in connection with the rights to life guaranteed under Article 21 of the Constitution for examples *Olga Tellis v. Bombay Municipality Corporation* (1985) 1 SCC 81. In the *Olga* Case, the Supreme Court also laid down that this could be done only after arranging alternative accommodation for them. The court ordered that (i) sites should be provided to residents presented with census cards in 1976 (ii) slums in existence for 20 years of more were not to be removed unless land was required for public purposes and, in that case, alternative sites must be provided (iii) high priority should be given to resettlement.

⁹⁹ The Constitution of Nepal 1990 does not provide the explicit guarantee to the right to life, however, the Supreme Court has observed a number of cases mainly of environment in conjunction with Article 12 that provides 'right to freedom or liberty. See for example the cases of *Surya Prasad Dhungel v Godawari Marble Industries* (DN 30 October 1995) NLR 2052, 168); *Bhojraj Iyer on Behalf of Pro-Public v HMG, Ministry of Water resources* (WN 3305/2056 (1999) DN 27 September 2001; *Prakash Mani Sharma et al v HMG* (Bagmati Pollution) (DN 17 May 1999).

decisions is far from being achieved and is proved a myth of success. Nevertheless, the judicial activism in ESCR, no matter through the 'paper promise', is bridging a gap between the enforceability and non-enforceability framework in the constitution and have been proved largely contributory to justify the rights-based approach of ESC rights discussed below.

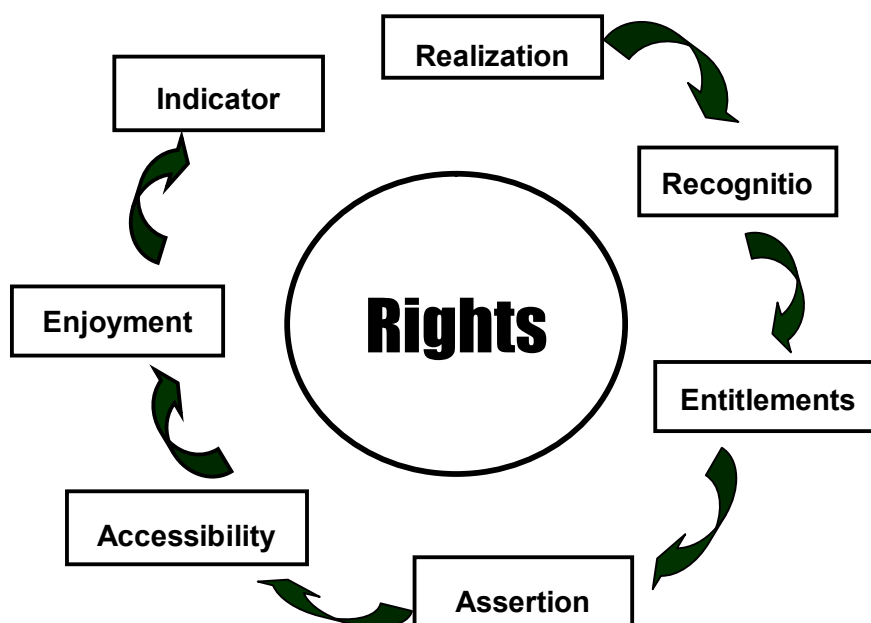
Rights-based approach: A safe landing for ESC Rights as Justiciable Human Rights:

Despite the term 'Rights' contained explicitly in the title of the ICESCR, the question remains ambiguous when these rights are not considered as 'rights in actual sense'. Even where the courts have rendered the 'ESC jurisprudence', these are generally decided in connection with the CPR. In this situation the questions arise whether the idea invoking the ESC rights through the progressive interpretation from the court will sufficiently provide social justice or not. Whether the judges applying the principles and the norms guarantee the rights for all in uniform manner or not? If not, what would be the best model to ensure ESC rights within the framework of guarantees or legal entitlements? These questions need to be resolved from 'multi-dimensional' perspectives.

Professor Yash Ghai observes the 'rights-based approaches to development' in the light of 'qualities' and the 'functions' of rights that hold worth of 'bindingness', particularly focusing the affirmative action to ensure the 'rights' of marginalized section of the society¹⁰⁰. Indeed, the 'rights-based approach' is an effective tool that makes an attempt to justify the 'functional character' of ESCR to be accomplished through a package of state responsibilities encompassing a systematic conceptual and methodological process as shown in the following 'rights diagram',¹⁰¹

¹⁰⁰ See, Ghai (n.46)

¹⁰¹ The rights-based approach presented in the vicious circle is an outcome of my own experience of providing pro bono legal service (legal aid) to a number of cases of poor, marginalised and indigent community in Nepal. Right to have lawyer upon his/her choice is guaranteed only for those who can afford the expenses but there is no choice for haves not people and the concept of legal aid is yet to be realized and recognized as rights-based approach of consumers of justice.



The above diagram is conclusive to the 'rights-based approach' or 'human rights-based approach'. The approach firstly requires a critical analysis of 'realisation' of rights. Until and unless the ESC Rights are not fully realised as 'indispensable' to the human rights, they are not perceived as rights at all. This is what exactly the 'Limburg principles' analysed and interpreted. Any one making arguments in support of so-called 'generation theory' should firstly know the inherent value of rights. They should realize that human rights be justified by the concept of 'inherent or inalienable dignity' not the acquired or granted or charity. It should also be realized the relationship between and interconnectedness of rights mutually complementing each other. For example, the relationship between poverty and poor health, especially among the rural poor of low income countries, and the underlying lack of food security. As discussed above, just as the contents of rights have evolved with historical development, conceptions of who is entitled to claim a right have also evolved. The conception of who is entitled to claim a right has evolved from an understanding of the holder of legal rights. The ability to hold a right is ignored in the traditional generational view, which focuses on what right is held, rather than on who holds the right. This must be pointed out, however, in order to escape from the hierarchical, and patriarchal, origins of human rights seen in Aristotle's thought,¹⁰² leading to unjust inequalities. So, the tension between different generations of rights also

¹⁰² Aristotle even recognizes that his arguments for natural slavery and the natural inequality of men and women are flawed, and tries to meet the objections. He clearly believed that some people were inherently destined for slavery. 'Aristotle, Politics, Book I, VI, pt XIII' <<http://classics.mit.edu/Aristotle/politics.mb.txt>> accessed 24 June 2007.

reflects a number of contradictions. That is why perhaps the Vienna Declaration, even after recognizing the 'significance of national and regional particularities and various historical, cultural and religious backgrounds', duly considered 'the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'¹⁰³ In this regard, the role of state stands as a facilitator of human rights and there is no question of them making the law 'granting rights' as per their choice.

Human rights are inherently the matter of 'recognition'. As right to recognition is attached with the notion of 'legitimacy'¹⁰⁴, rights must be recognized with guarantees, irrespective of the status of person and the nature of rights of any kind.

Similarly, 'entitlements' secure the essential human entitlements, including a claim for particular guarantees. For example, if state recognized ESCR, including all entitlements (food, housing, education etc.) as constitutional guarantees, it must provide adequate remedies to ensure these rights.

The 'assertion' provides insurance to the entitlements. If state is not found asserting the ESCR, it can be concluded that state has not respected the rights as such. The assertion should be better reflected in the state enforcement or implementation mechanisms. The directive principles, State policies, national plan, programme and budget are the process indicators to map the initiatives towards assertion. The approach has been well discussed by the Constitutional Court of South Africa in the landmark case of *Grootboom* that

"The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."¹⁰⁵

The term 'accessibility' is one of the most crucial elements of rights-based approach that denotes a substantive measure for 'actualization of rights' through

¹⁰³ The World Conference on Human Rights was held by the United Nations in Vienna, Austria, on 14 to 25 June 1993. See Vienna Declaration and Programme of Action (1993), Part I, para 5.

¹⁰⁴ Article 6 of the UDHR stipulates, 'Everyone has the right to recognition everywhere as a person before the law.'

¹⁰⁵ *Grootboom*, (n 58), para 42

the transformation of the theory of 'human rights into reality. Access, followed by the principle of non-discrimination and equity, is an effective tool to achieve human justice. This has to be analysed in terms of methodologies either from immediate or the development perspectives. The United Nations Development Programme in the same line states that

“Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent. Access to justice is also closely linked to poverty reduction since being poor and marginalised means being deprived of choices, opportunities, access to basic resources and a voice in decision making”¹⁰⁶

The human rights-based approach conceptualises access to justice as the concept of 'centrality of human person'. The 'enjoyment' enhances the 'applicability' of rights discussed above. In order to achieve the result of full and equal enjoyment, the ICESCR provides the frameworks related to right to equality to eliminate discriminatory laws and practices (including acts of omission as well as commission) affecting the enjoyment of ESC rights¹⁰⁷ and more importantly, '*de facto* discrimination (discrimination in practice) occurred as a result of the unequal enjoyment of ESC rights, on account of a lack of resources or otherwise, should be brought to an end'.¹⁰⁸

Finally, the 'indicator' of rights, as placed at the end of the diagram, provides an 'objective assessment' of full and equal enjoyment. Indicators, if properly extracted,¹⁰⁹ justify all elements of rights, from realisation to the enjoyment, providing valid justifications about why, what and how in adequate manner. The "human rights indicators" refers to specific information on the state of an object, event, activity or an outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.¹¹⁰ Nepal has identified structural, process and

¹⁰⁶ 'UNDP Access to Justice Practice' < www.undp.org/governance/docs/A2J> accessed 1 May 2013.

¹⁰⁷ See UN doc. E/CN.4/1987/17 Annex; (1987) 9 Human Rights Quarterly, Vol.9 (1987) 37.

¹⁰⁸ Ibid, para 38.

¹⁰⁹ The term 'properly' is used here with a valid expectation of quality data analysis. For example the increasing ratio of literacy rate is recorded not on the basis of 'actual literacy'. Rather the literate people are counted, including those who can simply write *or* read their names. Similarly, most of the data are not extracted from /with the actual place and person respectively.

¹¹⁰ See HRI/MC/2006/7, para.7). In Report of the United Nations High Commissioner for Human Rights, Substantive session of 2011, Geneva, 4–29 July 2011, Item 14 (g) of the provisional agenda, Social and human rights questions: human rights (E/2011/90), Para 2

outcome indicators as a tool to monitor economic, social and cultural rights¹¹¹. Structural indicators focus on the nature of domestic laws and their compatibility with international standards, the institutional mechanisms and also the policy framework.¹¹² ” The process indicators in terms of a concrete cause-and-effect relationship, the accountability of the State to its obligations can be better assessed. At the same time, these indicators help in directly monitoring the progressive fulfillment of the right or the process of protecting the right”¹¹³ And the “Outcome indicators capture attainments, individual and collective, that reflect the status of realisation of human rights in a given context”¹¹⁴ Looking into the context, the working group on ESCR indicators of Nepal has selected the rights to food, shelter, health, education and work for indicators to monitor these rights. For example, the food indicator is more focused on time frame and coverage of national policy on nutrition, food safety and consumer protection, food availability and accessibility, time frame and coverage of national policy on land reform as essential structural indicators and proportion of participation of the marginalised groups and communities in the total production, distribution and consumption of food, targeted groups and vulnerable population benefited from public supported programmes on food through awareness programmes conducted by the government and civil societies for the change of food habits as process indicators followed by outcome indicators to monitor the full and equal enjoyment of right to food.¹¹⁵

On the whole, the rights-based-approach, carrying the asymmetric equality emphatic to the equitable measures, provides adequate room for affirmative action for socio-economically marginalized sections of the society by addressing the ‘needs’ and the ‘measures’ to improve the quality of life through the transformation of ‘needs’ into rightful ‘claims’. To this end, the enjoyment could be made possible through special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection in order to ensure equal enjoyment of rights.¹¹⁶ This analysis is very much relevant in the case of most marginalized indigenous communities of Nepal like *Chepang*¹¹⁷, one of the marginalized indigenous communities, who are far from being achieved their right to self-determination to both CPR and ESCR. In this situation, a rights-based approach to development could only be achieved if the nation-state at all level agrees to embrace and celebrate

¹¹¹ See for detail, Monitoring Economic, Social and Cultural Rights in Nepal: Human rights Indicators as a Tool, (March 2011, Kathmandu).

¹¹² Report on indicators for monitoring compliance with international human rights instruments/ HRI/MC/2006/7 in *ibid*

¹¹³ *Ibid*

¹¹⁴ *Id*

¹¹⁵ *Id*, Chapter 4

¹¹⁶ *Ibid*, para, 39

¹¹⁷ This is one of the ethnic communities who are highly marginalized. Total 52,237 (0.23%) are recorded from the community according to CBS Nepal, 2001.

diversity following its responsibility to respect, protect and fulfill its obligation to implement and enforce the rights mentioned above.

In a nut shell, the following are some of the points may be helpful to make a critical appraisal of overall objectives and the contents under ICESCR as justiciably applicable human rights and thus equally important as civil and political rights:

- ESC rights derive from the inherent dignity of the human person.¹¹⁸
- Freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy economic, social and cultural rights, as well as civil and political rights.¹¹⁹
- Individual, having duties to other individuals and to the community to which the person belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the Covenant.¹²⁰
- All peoples have the right of self-determination.¹²¹ By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹²²
- In no case may a people be deprived of its own means of subsistence.¹²³
- ESC rights are non-derogatory in nature and are customary rights to be implemented without restriction.¹²⁴
- The principle of equality is cardinal to the covenant, under which the ESC rights are required to be implemented by the state parties 'without distinction' of any kind.¹²⁵ Moreover, the Covenant noticing the prevailing sex discrimination, additionally, required guarantees to ensure the equal right of men and women to the enjoyment of all ESC rights set forth in the present Covenant.¹²⁶

¹¹⁸ ICESCR, Preamble, para 2.

¹¹⁹ Ibid, para 3.

¹²⁰ Ibid, para 6.

¹²¹ See, Article 1 common to both Covenants.

¹²² Ibid, article 1(1).

¹²³ Ibid, article 1(2), followed by article 11 (basic means of subsistence).

¹²⁴ Ibid, article 5(2).

¹²⁵ Article 2 (2).

¹²⁶ See, Thirty-fourth session, Geneva, 25 April-13 May 2005, Agenda item 5 of the ICESCR Committee

The framework of equality is more or less the same as guaranteed in the ICCPR.¹²⁷

- The ESC rights contained in the covenant are duly examined by its committee and issued general comments¹²⁸ on the basis of lessons generated by the state parties' report. Through its general comments, the committee has tried to inject the conceptual guidelines for adequate implementation of ESC rights at domestic level, particularly focusing for the enactment of strong and effective laws and establishment of implementation mechanisms.
- The Committee on ICESCR has minutely observed "an approach, which is sometimes referred to as 'adjustment with a human face' or as promoting 'the human dimension of development' requires that the goal of protecting the rights of the *poor and vulnerable should become a basic objective of economic adjustment.*" (emphasis added)¹²⁹
- With regard to the nature of state parties are under obligation as required by Article 2 of the Covenant, General Comment No. 3¹³⁰ is landmark in terms of providing a very practical and comprehensive guideline for the effective implementation of the rights guaranteed in the Covenant.
- The adoption of Optional Protocol to the ICESCR¹³¹ mandated its Committee to receive individual complaints of the violation of the rights guaranteed in the ICESCR,¹³² eventually proved the rights under the Covenant is 'justiciable' rights and unquestionably the enforceable human rights.

¹²⁷ ICCPR provides three frameworks 'equality'. Article 2, 3 are related with the general provision of non-discrimination, equality between men and women respectively. Article 26 is a remedial safeguard for equal and effective protection of discrimination of all kind.

¹²⁸ General Comments are authoritative, although not legally binding, interpretations of obligations under the treaty. 'Committee's understanding of state practice' <http://www.un.org/search/ohchr_e.htm> accessed 22 July 2012.

¹²⁹ See for detail, General Comment No. 2, CESCR, Session 4 (1990).

¹³⁰ The CESCR has adopted this Comment in 5th session, 1990

¹³¹ The General Assembly adopted the Optional Protocol to the ICESCR through the resolution A/RES/63/117. On 10 December 2008. The Optional Protocol came into force 5 May 2013, in accordance with Article 18(1) after meeting the 10 ratifications. As of now, there are 42 signatories. 10 States have ratified the Optional Protocol. Ecuador was the first to ratify followed by Mongolia, Spain, El Salvador, Argentina, Bolivia, Bosnia Herzegovina, Slovakia, Portugal and Uruguay. See for detail <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed 15 May 2013

¹³² The Optional Protocol mandates the CESCR to handle the case of violation of rights under the Covenant including the procedures to issue Interim order to avoid possible irreparable damage to the victim or victims of the alleged violations. Article 7 also provides a unique provision for friendly settlement, Like CEDAW, it also provides the inquiry procedure.

ESC Rights in the Nepalese Constitutional Framework

- Prior to 1948, Nepal had no formal Constitution. For the first time, the *de facto* Rana regime¹³³ enacted a written Constitution called '*Nepal Sarkarko Baidhanik Kaanoon*, B.S. 2004 (the Government of Nepal Act 1948). Although, the Act enumerated a few laudable provisions, in particular, guarantees of free education (at primary level) and equality before the law, the provisions were far from being achieved to people other than members of the Rana family. Nepali people did not have access to adequate education and other fundamental rights.¹³⁴ Moreover, it lacked the remedial provision for the violation of these rights.
- *The Interim Constitution, 1951 (2007 B.S.)* did not have separate section for 'fundamental rights'; rather, it was started with the 'Directive Principles of State Policies'. Nonetheless, it recognized the right to equality as fundamental element of governance. The provision of 'equality of all men and women over the adequate resources required for livelihood' was landmark.¹³⁵ It also promised social justice through equal opportunity to employment and appointment, and welfare schemes. The right to work and participation in politics without any discrimination had been recognized as basic rights of citizens.¹³⁶ And also, there had been provision for affirmative action for the benefit of disadvantaged classes of people, including women and children though as an exception of 'equality'. Similarly, the provision of 'maternity care with the explicit language of state responsibility for establishing justifiable and humanitarian management in the country' is seen landmark.¹³⁷
- *The Constitution of the Kingdom of Nepal, 1959 (2015 B.S)* was modeled by placing only the equality, religion, property and political freedom as fundamental rights, including remedy at the Supreme Court but lacked guaranteeing the ESC rights.
- *The Constitution of Nepal, 1962 (2019 B.S.)* stipulated right to equality, and affirmative action for women and other weaker sections as found in

¹³³ The powers of Monarch had been forcibly snatched by the first Rana Prime Minister Named Junga Bahadur Rana in 1846. These *de facto* rulers ruled in Nepal continuously for 104 years (1846- 1951). See generally DR Regmi, *A century of family Autocracy in Nepal*; (Nepal National Congress 1960).

¹³⁴ P Neupane, *The Constitution and Constitutions of Nepal* (Ratna Pustak Bhandar, 1969) 197.

¹³⁵ Interim Constitution, 1951, article 4(a).

¹³⁶ Article 15 provided: 'His Majesty's Government of shall not discriminate against any citizens on grounds of only of religion, race, caste, sex, and place of birth or any of them'. See also Article 14, 16, 17 of the Interim Constitution 1951.

¹³⁷ Ibid, article 7.

the previous Constitution¹³⁸ However, there was no provision for the judicial review of legislation if found inconsistent with Constitution, and therefore, the scope of the constitutional protection proved a myth in achieving the rights.

- *Constitution of the Kingdom of Nepal, 1990 (2047 B.S.)*¹³⁹ was promulgated as a *result of peoples revolution (Jana Andolan I)*. The preamble explicitly incorporated rule of law, democracy, human rights and social justice followed by the chapters on fundamental rights and directive principles and state policy, including constitutional remedies. However, the term 'social justice', as promised in the preamble, cannot be seen being duly transformed into the ESC entitlements for a large number of poor, indigent and marginalized people of Nepal. This Constitution fundamentally guarantee for economic and social right. Even though Article 18 stipulated the cultural and educational rights,¹⁴⁰ that also require the positive obligation of state to fulfill the 'needs', it is neither realized nor practiced within the framework of ESC rights. Although the Constitution recognized Nepal as a "multiethnic and multilingual"¹⁴¹ country, the phrase 'Hindu Kingdom' limited the scope of enjoyment provided for people other than Hindus. Moreover, the language under Article 6 is ambiguous for giving official recognition only to the 'Nepali' language spoken by the majority of people belonging to Aryan community (i.e. *Brahmin, Chettri*) as an official language of Nepal¹⁴² The Supreme Court further limited the scope of exercising the 'ethnic languages' in the official process.¹⁴³ Nevertheless, the recently drafted Interim Constitution has patched up this error by providing recognition to all mother languages spoken in Nepal, including their use in the official process at the local level.¹⁴⁴

¹³⁸ Constitution of Nepal, 1962, article 10.

¹³⁹ Although the Interim Constitution has replaced this Constitution, the contents under the Constitution need to be examined minutely as this brought a historical departure from monarchical rule to a Constitutional Monarchy including the provision to file the public interest litigation (PIL) providing greater scope. Aftermath of 1990 has been considered as PIL jurisprudence era, therefore, this article overviews the scope and limitations under the Constitutions since 1990.

¹⁴⁰ Article 18 guarantees the Cultural and Educational Right that; "(1) Each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture. (2) Each community shall have the right to operate schools up to the primary level in its own mother tongue for imparting education to its children."

¹⁴¹ Constitution of Nepal, 1990, article 4(1).

¹⁴² According to Article 6 of the Constitution, the Nepali language (*Devnagari Script*) shall be the official language. And all the languages spoken as the mother tongue in the various parts of Nepal are the national languages of Nepal.

¹⁴³ See *Chudanath v. Public Service Commission* (1997) 6 Supreme Court Bulletin 1; *Laal Bahadur Thapa et. al v Local Development Ministry and others*, WN 2931/054.

¹⁴⁴ Article 3, 5 (1) (3) of the proposed Interim Constitution.

Part IV of the Constitution incorporated the economic, social and cultural issues within the framework of DPSP carrying the so-called objectives with aspiratory language referring the essences required for welfare state. In addition to the general policies, it adopted some affirmative provisions for the advancement and empowerment of women, children and economically and socially backward groups and communities.

Limitations in the Constitution, 1990:

Unlike the fundamental rights, no remedy was available to implement the provisions contained in the DPSP as the constitution clearly states "the principles and policies shall not be enforceable in any court".¹⁴⁵ The Supreme Court, nevertheless, has made some intervention interpreting directive principles and policies can be utilized for interpreting the provision of Constitution.¹⁴⁶

Guaranteeing ESCR in the existing Constitutional Framework:

The Interim Constitution, 2007 (2063 BS) however, is seen progressive that starts with the fundamental guarantee of 'right to dignified life'.¹⁴⁷ The provisions related to ESCR guaranteed within the 'fundamental rights' such as; Right to environment and health, education and culture, including free education up to the secondary level, language and culture, employment and social security, food, property. Apart from the general guarantees, it provides room for the 'affirmative action' with the provision of right to social justice for economically, socially, and educationally backwarded or marginalized women, *dalit*, indigenous and ethnic, *madhesi*, poor farmer and workers, free legal aid to poor and indigent, rights of women, including reproductive health, against physical and mental violence against women, equal rights of son and daughter over the ancestral property, and also, the rights of children, including subsistence, basic health and social security, protection against exploitation as well as special measures for children with indigent, parentless, mentally retarded as well as victims of conflict, displaced, vulnerable, street children, prohibition of child labour in vulnerable sector, recruitment in army, police and for armed management are important in relation to the ESC rights. More importantly, this has

¹⁴⁵ Ibid, article 24 (1).

¹⁴⁶ See for example the case of *Yogi Naraharinath v. Prime Minister*, 5 S. Ct.Bull.5, 1997 (*Bhadra 1-15, 2053*) Cited at Dhungel Surya et. al., COMMENTARY on the Nepalese Constitution (DeLF, Kathmandu 1998)

¹⁴⁷ Unlike the Indian Constitution, there was no explicit provision for 'right to life'. This has been included within the heading of 'right to liberty' that was also contained in the 1990 Constitution.

respected languages and of all communities spoken in Nepal, including the right to exercise in the official process at local level.

Similarly, the Interim Constitution does incorporate the state responsibility, directive principles and the policies addressing political, economic and social transformation through social reconstruction. The provisions regarding relief measures to victims of conflict, including rehabilitation and elimination of discriminatory laws have left the positive benchmarks.

Limitations in the Interim Constitution:

Unlike, civil and political rights,¹⁴⁸ the economic, social and cultural rights are yet to be fully guaranteed in the Interim Constitution as they require laws to be enacted for the implementation and many laws are yet to be adopted. In absence of such laws, the question of “implementation in accordance with laws” remains in vacuum. It has to be internalized that the constitution as a grand norm of the country is self sufficient to provide remedy to the 'needy' without being based on any other laws. It was not necessary to give unnecessary emphasis to the laws as they are enacted in the course of normal process. The fundamental guarantees are supposed to be placed in straight-forward language providing scope for uniform and effective implementation of the ESCR.

Part IV of the Interim Constitution provides three dimensions- State Responsibility, Directive Principles and Policies. On the one hand, the dimension of ‘state responsibility’ is uniquely added in the Constitution, on the other, the non- enforceability provision¹⁴⁹ further closes the scope of ‘implementation of ESC rights’. The state responsibility does mean the responsibility of three organs of state- legislative, executive and judiciary within the framework of umbrella institution. The provision of ‘non-enforceability’ does not corroborate the notion of ‘state responsibility’. This has brought confusion as to whether the state responsibility, as one of the effective tools of human rights comprising both negative and positive obligations, was sufficiently discussed while drafting the ‘Interim Constitution’? Moreover the provision is not friendly to the principle of state obligation to respect, protect and fulfill the human rights as entitlements that require guaranteeing the constitutional remedies. Nonetheless, though vaguely, the fundamental rights enumerated in the Interim Constitution is relatively better than the previous Constitution in terms of providing scope of rendering cases related to economic, social and cultural rights and issuing directive orders for the enactment and implementation of laws.

¹⁴⁸ The provision related to civil and political rights such as privacy and right to justice, including arrest, detention and torture are placed without being dependent in the language -‘in accordance with law’. See Ibid, part III.

¹⁴⁹ As in the previous constitution, the language enshrines that no question can be raised at the court about the non- enforcement of the provisions under the DPSP. Ibid.

Judicial Trend in ESCR Cases: A Comparative Appraisal

Even though, 1990's Constitution provided room for implementation with activities through laws within the limits of the resources and the means available¹⁵⁰, the courts could not observe the compliance measures in the country to see whether State has fulfilled its responsibility by taking adequate implementation mechanisms and methodologies in order to utilisation of 'maximum of its available resources' with the realisation of implementation of ESCR or not. The case of starvation¹⁵¹ is symbolic to analyse the judicial trend in this regard. The case was filed on the basis of right to equality, including special provisions under the Constitution But the Supreme Court relying on the submissions made by the respondents from the state mechanisms dismissed the writ petition laying down the ratio that "the government had already arranged sufficient food in the districts and also has expressed its commitment to fulfill its obligation. Thus, the petitioner's contention cannot be sustained.' The decision brought dilemma in application of ESC rights. The apex court failed to assess the grim reality of the people living below the poverty line and the drought-induced famine continued to wreak havoc where people equated the availability of food to a miracle.

But after the promulgation of the Interim Constitution, now the trend of judicial scenario has been changed as in case of *Advocate Prakashmani Sharma v. Nepal Government*¹⁵² mentioned above where the Supreme Court proactively replaced its previous judgments rendered in the earlier cases such as of *Madhav Basnet*.¹⁵³ The right to food jurisprudence has minutely observed a number of critical questions before reaching to the judgment that¹⁵⁴

- a. Is right to food and right against hunger a fundamental right?
- b. Shall the people have access to food as per right to food regime under Article 18(3) of the Interim Constitution of Nepal?
- c. Is the Government obliged to pay compensation in case of a person dies of hunger?

¹⁵⁰ Article 25 (2) states 'the principles and policies contained in this part shall be fundamental to the activities and governance of the State and shall be implemented in stages through laws within the limits of the resources and the means available in the country.'

¹⁵¹ The people of far western Districts of Nepal like *Humla, Jumla, Mugu, Kalikot, Dolpa, Bajhang, Bajura and Darchula* were in severe problem of starvation and are compelled to migrate in the quest of their basic means of subsistence. Being based on the information reported in the media, the public interest litigation was filed by a lawyer contending for the violation of right to food, including right to life of the people thereof. See Advocate *Madhav Basnet v. Cabinet Secretariat*, WB 3341/055, (1998) in Narendra Pathak et.al, *Supreme Court on Constitutional Disputes* (Pairavi Publications 2000).

¹⁵² *Prakashmani Sharma* (n 92).

¹⁵³ *Madhav Basnet* (n. 151)

¹⁵⁴ *Prakashmani*, (n. 92) 292

- d. What will be the role of government where there is a food crisis in different parts of the country due to geographical make up and natural disaster, every year?

The above questions were neither raised nor observed in *Madhav Basnet* case. Therefore, the existing Constitutional provisions were highly influential in providing room to justify the basic needs related rights as justiciable rights along with right to life with dignity' guaranteed under article 12 of the Interim Constitution. The cases of *Prakashmani*¹⁵⁵ and *Prem Bahadur Khadka*¹⁵⁶ could be used as justiciable tool to invoke many other ESC rights. The judicial trends in invoking ESCR as justiciable rights, especially after the promulgation of Interim constitution, have been growing in Nepal.

Accommodating ESC justice in the forth-coming Constitution

As evident, the underlying causes of armed conflict were the failures of socio-economic and political governance system and lack of legitimacy of a state built by the feudal conquerors and the exclusion and marginalization of women, *dalit*, ethnic groups and inhabitants of certain regions.¹⁵⁷ The people of Nepal hold a valid expectation from the new Constitution accommodating and managing the problems through the clear provision of State responsibility to 'respect, protect and fulfill' the economic, social and cultural rights and civil and political rights in equal footing. The South African Constitution could be influential in this regard.¹⁵⁸

As everyone agrees that, the text of the Constitution matters. Virtually, everyone would agree that sometimes the text is decisive. But some constitutional provisions are interpreted in ways that are very difficult to reconcile with the text in litigation over constitutional issues, evidence that the framers' specific intentions favored one position is at least a strong argument.¹⁵⁹ The ESCR model, in this regard, should be clearly justified by the textual understanding of constitutional framework providing effective and easy access to remedy. The universal settings of the 'rights' are textual, however, the framework also requires to formulate a 'contextual setting' of ESC rights.

¹⁵⁵ Ibid

¹⁵⁶ *Prem Bahadur* (n.91)

¹⁵⁷ Sebastian Von Einsiedel, David M. Malone & Suman Pradhan (eds), *Nepal in Transition from People's War to Fragile Peace* (Cambridge University Press 2012).

¹⁵⁸ Section 7(2) of the South African Constitution (1996) requires the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights' and the courts are constitutionally bound to ensure that they are protected and fulfilled.

¹⁵⁹ See Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 BU L Rev 204, 205; See also Thomas C. Grey, 'Do We Have an Unwritten Constitution?' (1975) 27 Stan L Rev 703, 706; in David A. Straus, 'Common Law Constitutional Interpretation' 63 U. Chi. L. Rev. 87, 882.

Although the demise of historically founded Constituent Assembly (CA) in Nepal once again pushed development of Nepal along with the hopes of Nepali people a ways back who had anticipation for having a contextually viable Constitution, nevertheless, created a platform for drafting the range of fundamental rights including the economic, social and cultural rights as fundamental rights with remedy. The draft reports of different committees especially related to fundamental rights, state policies and directive principles, marginalised groups could be reopened and put before the discourse. Such discussion will help in designing and shaping the 'model' of Constitutional framework in order to 'guarantee' the economic, social and cultural rights, not only as justifiable rights but also enforceable and applicable by making justiciable fundamental rights.

The forthcoming Constitution of Nepal must provide the safe place for ESCR incorporating entitlements in the fundamental guarantees, including judicial remedies and also incorporate the provisions of directive principles and state policies for the enforcement and mobilization of state mechanisms other than the judiciary. This model shapes the inter-relation among all three branches- executive, legislative and judiciary in order to make the state obliged to respect, protect and full fill the 'need' of people, including guaranteeing the rights with claim.

CONCLUSION

Human rights are inherent and objectively shaped by nature and thus are not the choice of rulers. All human rights are equal in essence and horizontally complementary in their worth. Regrettably, the vertical or asymmetrical development of international human rights standards treated only the civil and political rights as 'justiciable human rights' and economic social and cultural rights as mere aspiration and non-enforceable rights. This historically flourished hierarchical typology largely undermined the principle of indivisibility of human rights that gave rise to the tripartite typology of generation theory of human rights by categorically presenting civil and political rights as first generation, economic, social and cultural rights as second generation and the collective or solidarity rights as the third generation of rights. The generation theory unnecessarily created a dichotomy of human rights widening the gap by confining civil and political rights as entitlements to the individual including protection safeguards whereas the provisions associated with economic and social rights as a matter of state policy and programmatic in nature.

The lack of 'availability of resources' has been overwhelmingly dragged by the pro-generation theorists. But it was never realised that the so-called second generation of human rights contain not only the economic rights but also the social and cultural rights that can be enforced and implemented even by eliminating the discrimination and restoring 'social guarantees' without looking

much on 'material resources'. Even economic rights can be achieved through effective management and utilisation of available resources because the resource mobilisation is more important than just having resources. For example, the case of drought driven famine taking place every year mainly in number of districts of far-western region of Nepal as discussed above¹⁶⁰ requires the government to timely and effectively manage the product, storage and distribution of food as provided the guidelines by the Committee on the Economic, Social and Cultural Rights.¹⁶¹

The justiciability of socio-economic rights now has been one of the most popular emerging concerns of judiciary in many parts of the world. Principle of justiciability is a strong tool to defend the socio economic rights as enforceable human rights. The assumptions that civil and political rights are negative rights and negative obligation further created the dichotomy of State obligation drawing a conventional hypothesis that 'Socio-economic rights are 'positive rights' It is to be noted that no human rights are purely negative or positive but amalgamation of both. The assumption of non-justiciability is also flourished by the generation theorists that almost all domestic Constitutions have incorporated the socio-economic rights under the directive principles and state policies as a matter of collective interests of the people, so that would be impossible for a single individual to assert or enforce them. But the growing judicial trends shown in a number of cases from India, Bangladesh, Pakistan, Nepal and other countries mentioned in the table above¹⁶² have clearly established the inherent linkage between economic, social and cultural rights as individual rights such as right to life, liberty, equality and dignity.

The judicial trends of invoking socio-economic rights as justiciable rights are both 'independent' and 'dependent' in character. For example, South African Court can directly invoke the provisions of ESCR guaranteed under the 'Bill of Rights' in the South African Constitution, while the countries like India is developing the ESC jurisprudence relying on one or more provisions under the fundamental rights to convert ESCR related issues such as food, work, housing incorporated under directive principles and State polices in part four of the Constitution of India.

The judicial trends in invoking economic, social and cultural rights as justiciable rights in Nepal have been growing along with Constitutional guarantees. Unlike previous Constitutions, the existing Interim Constitution of Nepal provide more scope to invoke economic, social and cultural rights as justiciable rights as the Chapter on fundamental rights included number of ESC rights. However, economic, social and cultural rights are yet to be fully

¹⁶⁰ *Prakashmani*, (n. 92)

¹⁶¹ See for detail, General comment No. 12, Twentieth session (1999)

¹⁶² See the list of cases highlighted in the table above.(n. 75-93)

guaranteed as civil and political rights. A number of provisions regarding legal aid, right to food sovereignty, social security socio-economic rights may be enforced or implemented in accordance with law to be enacted by the parliament. Nonetheless, the Interim Constitution is relatively better than the previous Constitution in terms of providing scope of rendering cases related to economic, social and cultural rights and issuing directive orders for the enactment and implementation of laws.

As the textual framework of the Constitution really matters to see whether rights have been guaranteed with constitutional remedies or not, it is therefore, the developing countries like Nepal together with civil and political rights must provide the safe place for economic, social and cultural rights as justiciable rights. Justiciability is not only in terms of paper promise but should be recognised as right-based tool to respect, protect and fulfill the socio-economic justice in reality. Hence, the article proposes to break the generation theory of human rights to ensure remedies for a large number of people who have been deprived from their basic needs. The author has a strong belief that if all kinds of human rights are conversed with equal worth, no person is compelled to die with hunger, no youth is forced to leave the country in searching job who are either detained in the name of illegal immigrants or return to home country with empty hands or lost their life in hazardous work leaving old parents, wife and minor children to suffer behind.
