ADJUDICATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMPARATIVE ANALYSIS OF THE REASONABLENESS REVIEW STANDARDS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

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A Thesis submitted to the Graduate School of Social Sciences and Humanities for the degree of

LL.M. in Public Law

Koç University

Spring 2019

FORM NO: 8a

KOÇ
ÜNİVERSİTESİ

SOSYAL BİLİMLERİ ENSTİTÜSÜ

YÜKSEK LİNANS TEZ SAVUNMA TUTAĞI

Öğrencinin Adı ve Soyadı : Elif Korca Tunagür

Öğrenci No. : 0050814

Anabilim Dalı : Kamu Hukuku

Tezin Başlığı (Lütfen İngilizce olarak yazınız) : Adjudicating Economic, Social and Cultural Rights: A Comparative Analysis of the Reasonableness Review Standards of the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities

Yukarıda Adı ve Soyadı verilen öğrencinin Yüksek Lisans Tez Savunması 20/09/2019 tarihinde yapılmış ve öğrencinin tezi Jüri tarafından ☑ **oybirliği** / ☐ **oyçokluğu** ile;

☑ başarılı bulunmuştur

☐ başarısız bulunmuştur

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20/09/2019
Tarih

Program Koordinatörü

İmza

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Enstitü Yönetim Kurulu Karar No:

Tarih

Prof. Dr. Aylin Kuntay
Enstitü Direktörü

İmza

Acknowledgements

I would first like to thank my thesis advisor, Professor Başak Çalı. I am grateful for her continuous support and invaluable advice throughout the LL.M. programme and the writing process of this thesis.

I also would like to thank the Koç University School of Law and Dean Bertil Emrah Oder for their guidance throughout my time and studies at the Institution. My special thanks are also extended to Dr. Zeynep Oya Usal Kanzler for her encouragement and being so supportive.

The writing process of this thesis was not easy for me. I am indebted to my best friend and husband, Enes, for truly believing in me, when I needed it most. Also, I cannot thank him enough for brewing the best coffees at the right times.

I owe much gratitude to my Mum and Dad, Nurten and Yekta, for their unwavering support and love.

And finally I greatly appreciate the help of Sam, who kindly proofread the whole thesis at such short notice.

Abstract

The development of the economic, social and cultural (ESC) rights adjudication at domestic and regional levels has been followed by the creation of new avenues for ESC rights adjudication within the UN human rights treaty bodies. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) was adopted in 2008, which has created an individual communications procedure. Around the same time the adoption of the OP-ICESCR, the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (OP-CRPD) entered into force. The CRPD's equality norm, including the duty of reasonable accommodation, is an important facilitator of ESC rights.

This thesis seeks to provide a comparative analysis of the ESC rights adjudication before these two UN human rights treat bodies, the Committee on Economic, Social and Cultural Rights (CESCR Committee) and Committee on the Rights of Persons with Disabilities (CRPD Committee), to understand what they offer for ESC rights adjudication at the UN level and to see possibilities for cross-fertilization. It makes a two-fold argument. First, the CESCR's reasonableness review framework gives due account to dignity and provides an avenue for some substantive equality considerations. Furthermore, it seeks to provide effective remedial justice for ESC rights violations. This contrasts with the CRPD, which locates its unique inclusive equality consideration at the centre of its reasonableness review, but has limitations with respect to remedial justice. At the end, a discussion of the strengths and limitations of both treaty bodies is provided in a comparative manner, based on the criteria that the two Committees have provided to date with respect to the assessment of states' compliance with the principles enshrined in the Conventions and it is argued that the case law of these Committees can be complementary to each other and there is much opportunity for cross fertilization.

Keywords: justiciability, ESC rights, socio-economic rights, reasonable accommodation, inclusive equality, progressive realization, reasonableness review

Özet

Ekonomik, sosyal ve kültürel (ESK) haklara ilişkin yargılama konusundaki ulusal yahut bölgesel hukuk düzeyindeki gelişmeleri takiben, Birleşmiş Milletler İnsan Hakları Sözleşme Organları düzeyinde de ESK haklara ilişkin yeni yargılama yolları yaratılmıştır. ESK haklara ilişkin bireysel başvuru yolunu getiren BM Ekonomik, Sosyal ve Kültürel Haklara İlişkin Uluslararası Sözleşmeye Ek İhtiyari Protokol 2008'de kabul edilmiştir. Bu Protokol'ün kabul edilmesiyle aynı dönemde, Engellilerin Haklarına İlişkin Sözleşme ve İhtiyari Protokol'ü yürürlüğe girmiştir. Engellilerin Haklarına İlişkin Sözleşme'deki makul uyumlaştırma yükümlülüğünü de kapsayan eşitlik ilkesi, ESK haklar bakımından önemli bir kolaylaştırıcı rol üstlenmektedir.

Bu tez, her iki Sözleşme organının (Ekonomik, Sosyal ve Kültürel Haklar Komitesi ve Engelli Hakları Komitesi) BM düzeyinde ESK hakların yargılanması konusunda neler vadettiklerini anlamak ve Komiteler arası etkileşim için olasılıkları gözlemleyebilmek için karşılaştırmalı bir analiz sunmayı amaçlamaktadır. Bu tez ilk olarak Ekonomik, Sosyal ve Kültürel Haklara İlişkin Uluslararası Sözleşme'nin makul olma kriterinin insan onuru kavramını merkeze aldığını, maddi eşitliği sağlamaya ilişkin yorumlara olanak sağladığını ve ESK hak ihlallerine yönelik etkili hukuki çareler sunduğunu savunmaktadır. Diğer yandan, Engellilerin Haklarına İlişkin Sözleşme'nin kapsayıcı eşitlik kavramını makul olma kriterinin merkezine aldığını fakat hukuki çareler bağlamında daha sınırlı olabildiğini savunmaktadır. Çalışmanın sonunda, Sözleşme organlarının şimdiye dek devletlerin Sözleşmelerle uyumluluğunu denetlerken dikkate aldıkları kriterlere dayanarak, güçlü ve zayıf yönlerine dair karşılaştırmalı bir değerlendirmeye yer verilmekte ve Sözleşme organlarının içtihatlarının birbirleriyle etkileşim içinde olabileceği ve birbirini tamamlayabileceği savunulmaktadır.

Anahtar Kelimeler: yargılanabilirlik, dava edilebilirlik, sosyal ve ekonomik haklar, sosyal haklar, makul uyumlaştırma, kapsayıcı eşitlik, aşamalı gerçekleştirilebilirlik, makul olma

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Introduction

All human rights are universal, indivisible, interdependent and interrelated. This principle has been referred[1] to since the decision was taken to separate the Universal Declaration of Human Rights (UDHR) into two covenants, International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). The unavoidable question that usually arises when the issue of indivisibility, interdependence and interrelatedness is discussed relates to the justiciability[2] of human rights.

While it is generally accepted that judicial remedies for violations of civil and political (CP) rights are essential, the justiciability of economic, social and cultural (ESC) rights[3] is usually questioned and sometimes even denied.[4] ESC rights, viewed traditionally as requiring active state measures involving resource allocations, are subjected to progressive realization.[5] This has led ESC rights to be excluded from the adjudicative processes for long time.

However, in the last two decades, ESC rights 'have emerged from the shadows and margins of human rights discourse and jurisprudence to claim an increasingly central place'.[6] Whilst the debate over the justiciability of ESC rights has not completely muted; due to the growing jurisprudence of ESC rights adjudication at domestic and regional levels, now the question is 'not whether socio-economic rights are justiciable…but how to enforce them in a given case'.[7]

The development of the ESC rights adjudication at domestic and regional levels has been followed by exciting developments in the last decade within the UN human rights protection mechanisms. The Optional Protocol to the ICESCR (OP-ICESCR) was eventually adopted in 2008, which has created an individual communications

[1] See, e.g., VIENNA DECLARATION AND PROGRAMME OF ACTION, (1993).
[2] Justiciability refers to the extent to which a matter is suitable for judicial determination whereas the term 'non-justiciable' means not suitable for adjudication.
[3] The term 'ESC rights' is principally used in this thesis to cover the broad range of rights that are not considered within the sphere of civil and political (CP) rights like the right to social security, health, education, housing, water, food and also labour rights as well as cultural rights. It should be noted that authors use different phrases for those rights, including socio-economic rights, social rights or social welfare rights depending on the jurisdiction and preference.
[4] Ida Elisabeth Koch, *The justiciability of indivisible rights*, 72 NORD. J. INT. LAW 3–39, 3 (2003).
[5] See e.g., ICESCR Article 2(1) which refers to 'achieving progressively the full realization of the rights recognized in the present Covenant'.
[6] Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* SOCIAL RIGHTS JURISPRUDENCE EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3–45, 3 (Malcolm Langford ed., 2009), https://www.cambridge.org/core/product/identifier/CBO9780511815485A008/type/book_part (last visited Jul 17, 2019).
[7] Government of the Republic of South Africa and Others v Grootboom and Others, , para 20 (2000).

procedure under which individuals or group of individuals can make complaints to the UN Committee on Economic, Social And Cultural Rights (CESCR Committee).

Interestingly, around the same time the adoption of the OP-ICESCR, the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (OP-CRPD) entered into force. The CRPD enshrines an 'inclusive model of equality', which extends and elaborates on the content of equality in a fair, redistributive dimension to address socioeconomic disadvantages.[8] It incorporates an immediately realisable duty of reasonable accommodation within its non-discrimination clause that spans all CRPD rights -including the ESC rights-, which has injected an element of immediacy into the realization of those rights.[9] That is why the inclusion of the duty of reasonable accommodation within the non-discrimination clause was controversial during the negotiation sessions of the CRPD. There was a fear among delegates, specifically the EU Presidency, that the non-discrimination norm could become 'a Trojan horse for the enforceability of more and more slices of social and economic rights'.[10]

As a new avenue for ESC rights adjudication has been created by the OP-ICESCR[11]; and the CRPD[12] incorporates its very own standard of 'reasonableness' via the duty of reasonable accommodation in assessing the realization of rights, it is important to examine both in a comparative manner to have a better understanding of their contribution to the development of ESC rights jurisprudence.

This thesis seeks to provide a comparative analysis of the ESC rights adjudication before these two UN human rights treat bodies, CESCR Committee and the Committee on the Rights of Persons with Disabilities (CRPD Committee), to understand what they offer for ESC rights adjudication at the UN level and to see possibilities for cross-fertilization. The research question I have built this thesis on is, what are the principle differences of ESC rights adjudication before the CESCR Committee and the CRPD Committee; and what opportunities are there for cross-

[8] UN Committee on the Rights of Persons with Disabilities, *General Comment No. 6, Equality and Non-Discrimination*, CRPD/C/GC/6, para 11 (2018).
[9] ANDREA BRODERICK, THE LONG AND WINDING ROAD TO EQUALITY AND INCLUSION FOR PERSONS WITH DISABILITIES: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 221 (2015).
[10] Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, Vol. 1 *in* EUROPEAN YEARBOOK OF DISABILITY LAW , 100 (Gerard Quinn & Lisa Waddington eds., 2009).
[11] OP-ICESCR was adopted on was adopted on 10 December 2008 and it entered into force on 5 May 2013.
[12] The CRPD and its Optional Protocol were adopted on 13 December 2006
and they entered into force on 3 May 2008.

fertilization, in particular with respect to the duty of reasonable accommodation?

This thesis makes a two-fold argument. First, the CESCR's reasonableness review framework gives due account to dignity and provides an avenue for some substantive equality considerations. Furthermore, it seeks to provide effective remedial justice for ESC rights violations. This contrasts with the CRPD, which locates its unique inclusive equality consideration at the centre of its reasonableness review, but has limitations with respect to remedial justice. Second, there are opportunities for cross-fertilization on both sides. The inclusive equality focus, the effectiveness assessment and the focus on the participation of right holders inherent in the CRPD's standard of reasonableness can help strengthen the protection of ESC rights of the disadvantaged people under the CESCR Committee's procedure. In addition, the dignity considerations of the CESCR Committee jurisprudence can be 'borrowed' by the CRPD Committee for prioritizing the needs of persons with disabilities in adjudicating ESC rights violations where the duty of reasonable accommodation is not applicable.

Research Methods

The analysis of the ESC rights adjudication at the UN level with respect to the doctrines of adjudication and the standards of review is an important task for various reasons. Firstly, it will provide us a detailed picture of the promising aspects and the limitations of ESC rights adjudication before the two Committees. With regards to the CRPD Committee's framework for review of State party measures in the context of progressive realization of rights via its non-discrimination clause and the duty of reasonable accommodation, it will also be useful to reflect on the relationship between equality norms and the realization of ESC rights. Based on the research carried out in this thesis, it is aimed to devise a framework composed of strong aspects of both Committees' standards of review and to reflect on their potential for cross-fertilization.

In order to lay the foundations for this research as a whole, this thesis will begin by the analysis of the traditional objections to the justiciability of ESC rights and the doctrinal responses to provide the broader jurisprudential context of the justiciability paradigm through a legal methodology. I will select the most relevant legal sources in

order to analyse systematically legislative provisions, case law and academic sources in order to clarify the current state of the ESC rights adjudication and to facilitate the presentation of them in a categorized, coherent and structured manner to be able to show how the two Committees are part of these broader responses to the criticisms of justiciability.

I will then analyse the standards and doctrines of adjudication of ESC rights before these two UN Committees, CESCR and CRPD, comparatively since they are at the forefront of international adjudication of ESC rights. I will analyse them within a normative analytical framework, including the analysis of the text of the treaties, their *travaux préparatoires* (as it provides vital background information to the treaty provisions), and the views of the treaty bodies on individual communications to understand how they would shape the UN case law on ESC rights. This comparative methodology will help outline the commonalities and key differences between the two Committees' review standards for measures adopted by States in progressively realizing the ESC rights and the ways they form or advance the existing legal responses to the justiciability criticisms.

I will also provide a discussion on how the CRPD's reasonableness standard within the duty of reasonable accommodation and the CESCR Committee's reasonableness review can influence each other, given the textual and doctrinal differences, with a view towards harmonization of their principles for more developed ESC rights adjudication.

With respect to the individual communications before the CESCR Committee, I will examine all admissible decisions to date except for one case where there is no discussion regarding progressive realization of ESC rights.[13] With respect to the communications of the CRPD Committee, I will examine all admissible decisions except for the 7 cases, where there is no discussion regarding the duty of reasonable accommodation or ESC rights[14].

[13] As of 28 August 2019, five of the communications submitted to the CESCR Committee were declared admissible, and the case excluded from examination is *I.D.G v. Spain* (E/C.12/55/D/2/2014).
[14] As of 28 August 2019, 20 communications submitted to the CRPD Committee were declared admissible. And the 7 cases excluded from examination in this thesis are: *Bujdosó v. Hungary* (CRPD/C/10/D/4/2011), *Marlon James Noble v. Australia* (CRPD/C/16/D/7/2012), *Makarova v. Lithuania* (CRPD/C/18/D/30/2015), *X. v. United Republic of Tanzania* (CRPD/C/18/D/22/2014), *Y. v. United Republic of Tanzania* (CRPD/C/20/D/23/2014), *Iuliia Domina, Max Bendtsen v. Denmark* (CRPD/C/20/D/39/2017), and *Al Adam v. Saudi Arabia* (CRPD/C/20/D/38/2016).

Structure of the Thesis

Chapter 1 seeks to examine the philosophical objections against the justiciability of ESC rights, which were largely echoed during the negotiations for the OP-ICESCR. They related to the normative character of the rights and the role of the judiciary in adjudicating them. These objections will be discussed under three sections; nature of rights and positive-negative rights dichotomy; democratic legitimacy concerns and institutional capacity concerns.

In Chapter 2, I will provide a comparative analysis of doctrinal responses to the objections in Chapter 1 to see how they have been challenged over time in theory and in practice. I will use a comparative analysis of selected case law from domestic, regional and international jurisprudences to illustrate the progress of ESC rights adjudication and its persisting challenges, with a specific focus on the South African Constitutional Court's jurisprudence.

Chapter 3 will examine the standard of review and the doctrines of adjudication of ESC rights before the CESCR Committee. I will analyse the drafting history of the OP-ICESCR in detail as well as the views of the CESCR Committee to provide a detailed picture of its standard of review. This chapter will demonstrate that the CESCR Committee's reasonableness review has a specific focus on human dignity, similar to the South African Constitutional Court's reasonableness review developed in *Grootboom*[15] decision. It will also be demonstrated that the CESCR Committee has moved beyond the standard in *Grootboom* and provided substantive equality considerations via the concept of indirect discrimination while adjudicating ESC rights.

Chapter 4 will examine the standard of review and the doctrines of adjudication of ESC rights before the CRPD Committee, with a particular emphasis on the duty of reasonable accommodation. Firstly, the disability model and the understanding of equality in the CRPD will be explored. Then, the development of the reasonable accommodation duty in international human rights law and its inclusion in the CRPD will be examined through the *travaux préparatoires* of the CRPD to explore the implications of the convergence of ESC rights claims requiring resource allocations with the reasonable accommodation duty with an immediate effect. Lastly, the

[15] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7.

CRPD's general comment on equality and non-discrimination and the views on individual communications will be analysed. Based on this analysis, it will be demonstrated that the reasonableness review inherent in the CRPD's duty of reasonable accommodation locates its unique inclusive equality consideration at the centre of its assessment of state measures and provides an effective tool in addressing the socioeconomic disadvantages faced by persons with disabilities. However, it will be shown that it has limitations with respect to remedial justice due to its individualized nature.

Chapter 5 reviews the findings of the research and discusses the opportunities that exist in both treaty bodies' jurisprudences for cross-fertilization. It will be demonstrated that there are opportunities for cross-fertilization on both sides. Those opportunities will be discussed under separate headings, including equality considerations, effectiveness assessment, dignity considerations, participation of right holders, other considerations with respect to undue burden test, and lastly, remedies. Based on this comparative analysis, it will be shown that the case law of these Committees can be complementary to each other and there is much opportunity for further cross fertilization. It will be demonstrated that the inclusive equality focus inherent in the CRPD's standard of reasonableness as well as the effectiveness criterion and the participatory considerations can benefit the CESCR Committee's assessment of the realization of ESC rights. The dignity considerations of the CESCR Committee's jurisprudence can benefit the CRPD Committee for prioritizing the needs of the persons with disabilities in adjudicating ESC rights violations where the duty of reasonable accommodation is not applicable.

I. Objections to Adjudicating ESC Rights

Article 8 of the UDHR recognizes a right to a remedy for violations of all human rights. However, the creation of adjudication procedures for ESC rights at the national and international levels has, until recently, been relatively slow.[16] When the UN Commission on Human Rights started to draft legally binding conventions on human rights, based on the UDHR, the Commission was divided on the question of whether there should be one or two conventions.[17] Whilst the General Assembly underlined, in a resolution, that all categories of human rights are interdependent and called for a single convention, Western States managed to reverse this decision the following year.[18] Consequently, they created two separate covenants, which are considered to correspond to the two distinct categories of rights, which form the International Bill of Human Rights: ICCPR for civil and political rights; and ICESCR for economic, social and cultural rights.

The Optional Protocol to the ICCPR was simultaneously adopted with the ICCPR in 1966. This enabled victims of violations of the Covenant rights to submit individual communications to the Human Rights Committee (HRC). This contrasts with the OP-ICESCR, which was adopted 42 years later, in 2008. This delay is often attributed to the Cold War ideological divisions; however, the reasons behind this delay are more complicated.[19] According to Albuquerque and Langford, it was the result of diverging views over the role of international accountability, perceptions of the justiciability of ESC rights and institutional turf wars.[20]

During the initial negotiations of the OP-ICESCR within the UN Human Rights Council, States opposed to an optional protocol argued that ESC rights ought not to be considered justiciable, and hence should not be subject to a complaints procedure.[21]

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[16] Langford, *supra* note 6 at 3.
[17] Allan Rosas & Asbjørn Eide, *Economic, Social And Cultural Rights: A Universal Challenge*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK , 3 (Allan Rosas, Asbjørn Eide, & Catarina Krause eds., 2nd ed. 2001).
[18] *Id.* at 3.
[19] See for detailed information, MATTHEW C. R CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 9–20 (1995).
[20] Malcolm Langford & Catarina de Albuquerque, *The Origins of the Optional Protocol*, Vol. 6 *in* THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 17–35, 18 (Malcolm Langford et al. eds., 2016).
[21] Malcolm Langford et al., *Introduction*, Vol. 6 *in* THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 1–15, 4 (Malcolm Langford et al. eds., 2016).

The philosophical objections against the justiciability of ESC rights, which were largely echoed during the negotiations for the OP-ICESCR, related to their normative character and the role of the judiciary in adjudicating them. These objections, which I will discuss in the following sections, revolved around the idea that ESC rights are positive, requiring State action as opposed to CP rights that are negative, requiring State inaction. One major obstacle to developing an ESC rights jurisprudence was the belief that courts do not have democratic legitimacy or the institutional competence to adjudicate complaints related to social policy or budget priorities. CP rights are assumed to be precise and absolute, and thus justiciable. This contrasts with ESC rights, which are considered too vague and programmatic to be justiciable.

In the following sections I will discuss the traditional objections to the nature of the ESC rights and the judiciary, followed by a review of how they have been challenged over time in theory and in practice. I will use a comparative analysis of selected case law from domestic, regional and international jurisprudences to illustrate the progress of ESC rights adjudication and its persisting challenges.

A. Nature of Rights and the Positive-Negative Rights Dichotomy

The difference between the two sets of rights has always been based on the normative characteristic of rights and the perceived role of the State in the realization of rights.[22] CP rights are assumed to be negative rights that require State abstention, whereas ESC rights are regarded as positive rights that require State action in a wide range of socio-economic issues and budgetary policies. The positive v. negative rights dichotomy has influenced the character and content of the rights and the way in which they can be implemented. The assumption that the CP rights are fixed and absolute with a precise wording, creates an illusion that CP rights are immediately applicable. This contrasts with the belief that ESC rights are vague, relative and programmatic, as such ESC rights are conceptualized as only being realized progressively.

Vierdag and Bossuyt are the two scholars whose studies have been widely cited as representatives of the traditional objections to the justiciability of ESC rights. In his famous article on the legal nature of ESC rights, Vierdag answers the question of 'What is the legal nature of the rights granted by the ICESCR?' as follows:

[22] Rosas and Eide, *supra* note 17 at 5.

'except in circumstances of minimal or minor economic, social or cultural relevance, and subject to the distinctions made above, the rights granted by the International Covenant on Economic, Social and Cultural Rights are of such a nature as to be legally negligible.'[23]

He argued that ESC rights' implementation requires a prioritization of resources in different realms of life such as housing, education and health, thus he perceived the implementation of the ESC rights as political matters, rather than matters of law.[24]

Alternatively, without necessarily denying the legal character of ESC rights, Bossuyt argued that the difference between two sets of rights was too fundamental to ignore and that it was unrealistic to expect that ESC rights could be as justiciable as CP rights.[25] This was due to the requirement of States' financial resources for ESC rights to be implemented.[26] According to Bossuyt, while CP rights are considered cost-free, which could be equally ensured in countries with different levels of resources, the implementation of ESC rights must necessarily differ depending on the prosperity level of the country concerned as they are resource-sensitive rights.[27]

To explain the different nature between the sets of rights and the difficulty in enforcing ESC rights, Rubin suggested considering CP rights as restraints on governmental action and ESC rights as prescriptions for such action.[28] He stated that it is easier to tell governments that they must refrain from throwing persons into jail without a fair trial, rather than that they must guarantee a minimum standard of living.[29] He made this distinction because latter would inevitably require major societal readjustments, which would involve conflicts between different interest groups within societies, as well as among nations.[30]

The conceptualization of CP rights as cost-free and therefore more practicable and realizable, than ESC rights has been contested. Many authors have argued that we

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[23] Egbert W. Vierdag, *The legal nature of the rights granted by the international Covenant on Economic, Social and Cultural Rights*, 9 NETH. YEARB. INT. LAW 69–105, 105 (1978).
[24] *Id.* at 103.
[25] M. Bossuyt, *L 'interdiction de la discrimination dam le droit international des droits de I'homme 187-188* (Brussels, 1976) in Marc Bossuyt, *Categorical Rights and Vulnerable Groups: Moving away from the Universal Human Being*, 48 GEORGE WASH. INT. LAW REV. 27, 720.
[26] La distinction juridique entre les droits civils et politiques et les droits economics, sociaux et culturels", *Human Rights Journal,* Vol. VIII (1975) pp. 783-820, at 789-791 in Vierdag, *supra* note 23 at 82.
[27] La distinction juridique entre les droits civils et politiques et les droits economics, sociaux et culturels", *Human Rights Journal,* Vol. VIII (1975) pp. 783-820, at p. 789 et seq. in *Id.* at 82.
[28] Seymour J Rubin, *Economic and Social Human Rights and the New International Economic Order*, 1 31, 32–83 (1986).
[29] *Id.* at 82–83.
[30] *Id.* at 82–83.

perceive CP rights as cost-free because the societal establishment required to ensure some CP rights are already established in developed countries, not because of the inherent characteristics of CP rights.[31] If we consider the right to a fair trial, we have a tendency not to question the expenditure necessary for the realization of that right, such as the establishment and organization of courts. As domestic, regional and international judicial bodies have also recognised; CP rights also impose some positive obligations, which require expenditure of resources on states whereas ESC rights, which are conceptualised as imposing positive rights, also create some negative obligations.[32] Some of these distinctions have been unsustainable, with courts from different jurisdictions interpreting CP rights as requiring positive obligations and the allocation of resources. However we cannot dismiss all of these objections. Some of them are legitimate concerns and are valid for most of the ESC rights, in addition to some CP rights, that need to be addressed in order to have a better adjudication strategy. Rather than dividing rights as CP rights and ESC rights, it has been suggested to evaluate rights with their corresponding State obligations on a case-by-case analysis to analyse their suitability for adjudication, which I discuss in the second chapter of this thesis.

B. Democratic Legitimacy Concerns

As stated above, one of the major traditional objections to the justiciability of ESC rights relate to the assumption that the ESC rights do not include legal content, rather, they refer to policy matters as they necessitate prioritisation of resources for different realms of social life. Vierdag argued that the decisions about individuals' housing, employment and education need to be implemented by taking into account the limited availability of jobs, houses and schools, which requires a prioritisation of competing needs.[33] The formulation of ESC rights and CP rights in a positive v. negative rights dichotomy, in which the ESC rights are considered to entail a level of resource commitment, has led many authors to consider the adjudication of ESC rights by courts as democratically illegitimate. It has been argued that matters related to ESC rights come within the sphere of socio-economic policies of government and they are

[31] Aoife Nolan, Bruce Porter & Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, 10 (2007), http://ssrn.com/abstract=1434944.
[32] *Id.* at 10.
[33] Vierdag, *supra* note 23 at 103.

supposed to be dealt with by the elected representatives of the people, not the courts.[34] The proponents of the dichotomy of positive ESC rights vs. negative CP rights argue that the definition of ESC rights are vague and open to interpretation, therefore, the idea of the courts dealing with social and economic issues would be incompatible with the doctrine of separation of powers between the elected branches of the government and the judiciary.[35] This view has been adopted by some UK courts, particularly where the economic and social policy preferences may reasonably differ.[36] In the housing case of *Poplar Housing and Regeneration Community Association Ltd v Donoghue*, Lord Woolf stated: 'The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference.'[37] The basis for this view was that the courts have no legitimate means to make such decisions where opinions may reasonably differ; these decisions can only be made by those who are responsive to the range of affected interest groups and accountable for the consequences of their decisions.[38] Waldron justifies his similar view by referring to the right of the people to participate equally in social decisions and argues that it would be disrespectful to people in their democratic capacities if the courts engaged in socio-economic policymaking.[39]

As Nolan et al. points out, the idea that restraint on the economic policy decisions of the parliament by the judiciary is illegitimate is not new.[40] The reforms of the mid-Seventeenth century to limit the power of the English monarchy by giving taxation powers solely to the parliament were the historical origin of those concerns.[41] However, in modern societies, the legitimacy of the judiciary's review of the parliament's decisions for compliance with human rights, to enhance the democratic governance and accountability, originates from a different norm: the need to protect

[34] Nolan, Porter, and Langford, *supra* note 31 at 12.
[35] Koch, *supra* note 4 at 6.
[36] Sandra Fredman, *Justiciability and the Role of Courts*, *in* HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES , 95 (2008), http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199272761.001.0001/acprof-9780199272761 (last visited Jul 17, 2019).
[37] Donoghue v Poplar Housing & Regeneration Community Association Ltd & Anor [2001] EWCA Civ 595 (27 April 2001), , para 69, https://www.bailii.org/ew/cases/EWCA/Civ/2001/595.html (last visited Aug 31, 2019).
[38] Fredman, *supra* note 36 at 95.
[39] JEREMY WALDRON, LAW AND DISAGREEMENT 213 (1999).
[40] Nolan, Porter, and Langford, *supra* note 31 at 12.
[41] *Id.* at 12.

minorities against majoritarian decision-making.[42] Supporters of ESC rights adjudication indicate that ESC rights adjudication can actually complement parliamentary democracy by ensuring political space to those individuals and groups that are regularly and systematically excluded from politics due to the inherent weakness of majoritarianism when it comes to protecting the rights of individuals.[43]

We should also note that democracy is not identical to the rights of the majority. The concept of democracy has an inherent tension between the ideal of an elected and thus accountable government and the ideal of individuals automatically possessing inalienable rights, and sometimes it is more important for a democracy to limit the majority's actions in order to protect marginalized individuals.[44] From this point of view, the electoral unaccountability of the judiciary is not viewed as a restraint for judicial review, instead, judicial review functions as a protection mechanism against the majority rule since the judiciary is not accountable to the majority, but to the people.[45]

More problematic than the above-mentioned accountability objection is the concern widely referred as the *queue jumping* problem in ESC rights adjudication. The idea of adjudicating ESC rights claims has been criticized because litigation is an expensive method, only available to privileged people and inaccessible to most people.[46] Such an approach enables litigants to participate in the political process in an unrepresentative manner.[47] Although this criticism definitely has some validity, the ability of elites to manipulate and dominate is not exclusive to courtrooms and the jurisprudence has shown ways in which courts can actually make the voice of the most disadvantaged heard and could correct, rather than reinforce, inequalities and injustices by adjudicating positive rights.[48]

I will demonstrate how the evolution of ESC rights adjudication in different jurisdictions has responded to the claimed democratic illegitimacy of judiciaries in adjudicating ESC rights and dictating resource allocation decisions and the *queue jumping* problem with a comparative analysis in the second chapter.

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[42] *Id.* at 13.
[43] Malcolm Langford, *Closing the Gap-An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 27 NORD. TIDSSKR. MENNESKERETTIGHETER 1, 14 (2009).
[44] Koch, *supra* note 4 at 29.
[45] *Id.* at 29.
[46] Fredman, *supra* note 36 at 107.
[47] *Id.* at 107.
[48] *Id.* at 107.

C. Institutional Capacity Concerns

As the last major objection to the justiciability of ESC rights, I will discuss the argument that the courts are institutionally incompetent to adjudicate ESC rights claims. Objections based on institutional incompetence also originate from the view that ESC rights are said to be fundamentally different, requiring governmental action that can be resource-intensive, progressive and vague about the obligations they require from States. These decisions involve complex, polycentric, and diffuse interests about how scarce public resources are allocated.[49] While rights requiring states to restrain operate immediately, positive rights require continuing duties and ongoing monitoring.[50] In a judicial context, a 'polycentric' situation is described as one in which a judicial decision will have complex repercussions that will extend beyond the parties and the factual situation before the court.[51] It has been argued that the courts are not capable of making such polycentric decisions due to the 'triadic' nature of the judicial proceedings, including one judge and two adversarial parties.[52]

Opponents of ESC rights adjudication argued that the judiciary lacks the necessary information and expertise to deal with socio-economic issues that are wide-ranging and polycentric, therefore, the judiciary should abstain from ESC rights adjudication that involves the complex intersection of issues involving policy choices and political aspirations.[53] In his famous article, Fuller argued that the fundamental characteristic of the adjudication process, which is to convert anything submitted into a claim of right or an accusation of fault, works well with respect to disputes where one party claims to have been wronged by the other.[54] However, in the case of a dispute related to a polycentric issue that has an impact on more than two parties, who would not have a right to participate before the court, the adversarial structure of the adjudication works less well.[55]

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[49] Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 UNIV. PA. LAW REV. 1, 24 (1992).
[50] Fredman, *supra* note 36 at 92.
[51] Nolan, Porter, and Langford, *supra* note 31 at 18.
[52] *Id.* at 18.
[53] Scott and Macklem, *supra* note 49 at 24.
[54] Lon L Fuller, *THE FORMS AND LIMITS OF ADJUDICATION*, 92 HARV. LAW REV. 353–409 (1978); Kent Roach, *Polycentricity and queue jumping in public law remedies: A two-track response*, 66 UNIV. TOR. LAW J. 3–52, 9 (2016).
[55] Fuller, *supra* note 54; Roach, *supra* note 54 at 9.

Scott and Macklem also point out that there is an interconnectedness between two objections concerning the democratic illegitimacy and the institutional incompetence of courts.[56] The alleged lack of expertise reinforces the argument that it would be illegitimate for the courts to have an authoritative decision-making role on such open-ended issues because they are unelected and thus, unaccountable.[57]

On the other end of the spectrum, while accepting that ESC rights relate to goals, policies and programmes, Eide and Rosas believe in the vitality of including the concept of rights in such policies and programmes.[58] By taking ESC rights seriously a State implies a commitment to equality, protection of vulnerable groups and addressing questions of income distribution, which makes it fundamental to have legal entitlements, rather than to wish for merciful governments.[59] Furthermore, as the role of the modern nation-state seems to be on the decline with a wide range of powerful actors influencing policy making processes, such as international financial and development institutions and the private sector, the more difficult and complex it is to identify the main responsible actors for public policies.[60] This makes it all the more important to focus on rights, rather than policy goals.[61]

The responses in the literature to the objection of institutional incapacity have also included arguing that the adjudication processes' effect of drawing attention to personal circumstances that reveal failures and problems unknown or avoided by the law makers can in fact be beneficial in providing new information.[62] The adjudication of ESC rights can have a demonstrative effect of the implementation of societal ideals in the context of real lives.[63] Fredman states that in a polycentric situation, where taking action in one direction eliminates other policy choices, and necessitating distributive decisions, it becomes all the more important to reinforce the duty of explanation.[64] In such a situation, the court's role would not be to make the decision in the place of the decision-maker, but to require the decision-maker to give a

[56] Scott and Macklem, *supra* note 49 at 24–25.
[57] *Id.* at 25.
[58] Rosas and Eide, *supra* note 17 at 5–6.
[59] *Id.* at 5–6.
[60] *Id.* at 6.
[61] *Id.* at 6.
[62] Scott and Macklem, *supra* note 49 at 37.
[63] *Id.* at 37.
[64] Fredman, *supra* note 36 at 103.

reasoned explanation of why a duty has not been fulfilled or has been fulfilled in one way but not the other.[65]

It has also been posited that there is no reason to presume legislatures are better suited to deal with polycentric issues as there are also significant barriers on the elected branches' competency such as the division of governmental responsibilities into ministries, lack of overall accountability in budget setting processes and a tendency to respond to the most powerful lobbying.[66] Furthermore, allowing the courts to address polycentric issues does not necessarily mean that the power is accorded solely to the judiciary in having the final word in complex matters. As suggested by Liebenberg, there are judicial methods such as, remedial flexibility, to afford the legislature an opportunity to create a better solution to the subject matter of the litigation instead.[67]

[65] *Id.* at 103.
[66] Nolan, Porter, and Langford, *supra* note 31 at 19.
[67] Sandra Liebenberg, *Social and Economic Rights*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA , 41–11 (Matthew Chaskalson et al. ed., 1996); Nolan, Porter, and Langford, *supra* note 31 at 19.

II. Doctrinal Responses to Objections: A Comparative Review

Justiciability is defined as a 'contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability' by Scott and Macklem.[68] Increasing numbers of ESC rights adjudication at domestic, regional and international levels have demonstrated that there is a changing and evolving understanding of the nature of the justiciability of ESC rights. In this section, I will demonstrate the doctrinal responses to the objections I have covered in the first chapter and provide an analysis of a selection of landmark cases from domestic, regional and international jurisdictions. These cases cover a wide range of issues, including halting forced evictions, requiring the provision of medical treatments, and compelling the enrolment of poor children in schools. Through this analysis of the case law, I will explore the trends and the legal tools developed by the adjudicatory bodies to overcome the objections to ESC rights' justiciability, such as the democratic illegitimacy of courts dealing with policy issues or the courts' institutional incapacity to deal with such complex matters. Based on these cases, I will discuss both the achievements in ESC rights adjudication and also the remaining challenges for future advocacy.

A. Tripartite obligations of States

The recognition by the state of the rights of every human being to an adequate standards of living[69] or the highest obtainable standard of mental and physical health[70], like many other ESC rights, requires a commitment by the state to take necessary steps to achieve the full realization of those rights. Therefore, 'there is no link between the facts and the legal consequences but merely a relation between an end and the means supposed to lead to that end.'[71] This 'means-and-end-approach' supports the concept of progressive realization of such rights and has led many to explain rights in a dichotomous way. As discussed in the first chapter, CP rights are viewed as negative rights that are immediately applicable whereas ESC rights are

[68] Scott and Macklem, *supra* note 49 at 17.
[69] See Article 11 of the ICESCR.
[70] See Article 12 of the ICESCR.
[71] Koch, *supra* note 4 at 4.

regarded as positive rights that depend on progressive realization and impose active obligations. Opponents of this dichotomy emphasize that all rights impose both positive and negative obligations on states and, 'attempting to draw a bright line between them leads judges to overlook one or other dimension'.[72]

It has been also argued that our present understanding of CP rights as fairly precise and limited rights is due to the fact that adjudicatory bodies, such as the European Court of Human Rights (ECtHR) and the HRC have gradually defined the legal content of the rights via individual petition procedures.[73] For example the expression 'family life' in Article 8 of the European Convention on Human Rights (ECHR) is an imprecise expression that has been clarified in practice.[74]

An affirmation of the fact that ESC rights impose not only positive obligations but also negative obligations was made by the CESCR Committee in its early General Comments. In its General Comment No. 4, it affirmed the negative obligations under the ICESCR with respect to forced evictions.[75] However, as rightly pointed out by Koch, this view of the CESCR Committee, stating that some CP rights also necessitated positive, costly obligations of states, does not necessarily imply that the judiciary is capable of dealing with another set of positive rights.[76] Such observations led scholars to abandon this dichotomy and instead, suggest tripartite obligations and evaluate the rights based on the obligations they impose on states. The tripartite typology of State duties was originally proposed by Shue as 'to avoid depriving, to protect from deprivation and to aid the deprived'.[77] Eide revised this typology of the human rights obligations as to respect, protect, fulfil[78], showing that compliance with human rights can require various measures from passive avoidance to active insurance of the satisfaction of individual needs.[79]

The tripartite typology of obligations were also introduced later in the CESCR Committee's General Comment No. 12 to articulate the nature of the state obligations:

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[72] Fredman, *supra* note 36 at 98.
[73] Koch, *supra* note 4 at 7.
[74] See https://hudoc.echr.coe.int/eng#{"kpthesaurus":["634"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]} for the case-law of the ECtHR regarding the positive obligations of States under Article 8.
[75] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant)*, para 18 (1991).
[76] Koch, *supra* note 4 at 8.
[77] Henry Shue, *The Interdependence of Duties*, *in* THE RIGHT TO FOOD , 83–84 (Philips Alston & Katarina Tomaševski eds., 1984).
[78] See Asbjørn Eide, *The Right to Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23.
[79] Koch, *supra* note 4 at 9.

> 'The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (*facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly.'[80]

This model of state obligations has been found to be useful as it stresses the unity between CP rights and ESC rights as it establishes that the various levels of obligations can be found in each separate right.[81] More importantly, it has been suggested that the tripartite obligations model can offer another advantage as to tailor the system of enforcement to the various types of obligations.[82] However, this model has also been criticized as being insufficient to describe the complexity of human rights obligations, which was evident in the fact that some scholars already offered another level of obligation, an obligation to promote.[83] That is why Shue describes typologies as 'ladders to be climbed and left behind, not monuments to be caressed or polished.'[84]

Although insufficient, to simplify presenting the discussions around the justiciability of ESC rights, scholars referred to this typology widely. However, it should not lead us to assume that the typology of obligations has managed to change the whole justiciability paradigm of human rights just because it replaced the CP v. ESC rights dichotomy with the tripartite typology. According to Koch, regardless of how much

[80] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food (art. 11)*, para 15 (1999).
[81] G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views*, *in* THE RIGHT TO FOOD , 107 (Philips Alston & Katarina Tomaševski eds., 1984).
[82] *Id.* at 108.
[83] Koch, *supra* note 4 at 10.
[84] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 160 (2nd ed. 1996).

we stress the indivisibility, interdependence and interrelation of human rights in a political context, there is a certain limit to this connectedness in a legal context.[85] She points out that 'while the progressive realization of economic, social and cultural rights must be considered a constant endeavour there is probably a limit as to the relevance of fulfilment steps in regard to civil and political rights.'[86] That is why the issue of justiciability is usually discussed in relation to ESC rights as the obligation to fulfil has the greatest relevance for them, not for CP rights.[87] This probably explains the fact that although there is very little in the wording of CP rights indicating that they require positive fulfilment measures, international adjudicatory bodies have demonstrated relatively more willingness to consider the existence of such measures with regards to CP rights under complaints procedures, which has resulted in the development of the *integrated approach,*[88] which will be further examined in the following section.

Another disadvantage of relying on the tripartite typology of obligations is that it appears to be only coherent where some pre-existing entitlements are naturalized and some claims are radicalized.[89] While an institutional structure and developed judicial system are required for the fulfilment of the right to fair trial, the corresponding state obligation for the right to fair trial is accepted as the duty to respect, since those conditions are perceived as already existing and therefore requiring only state restraint. On the other hand, the belief that the fact of homelessness or poverty imposes an obligation to provide housing or food, and is therefore subject only to progressive realization, obscures 'the possibility of any responsibility for the structures and processes that were themselves productive of those conditions.'[90] Therefore the typology seems to fall short in explaining whether a deprivation is to fall within the scope of the duty to respect or duty to fulfil depending on how broad one defines responsibility.[91] The tripartite typology, according to Craven, seems to encourage the tendency of seeing a deprivation within the scope of duty to fulfil,

[85] Koch, *supra* note 4 at 17.
[86] *Id.* at 17.
[87] Ida Elisabeth Koch, *Dichotomies, trichotomies or waves of duties?*, 5 HUM. RIGHTS LAW REV. 81–103, 95 (2005).
[88] Koch, *supra* note 4 at 17–18.
[89] Matthew Craven, *Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 27–42, 34 (John Squires, Malcolm Langford, & Bret Thiele eds., 2005).
[90] *Id.* at 34.
[91] *Id.* at 35.

unless the deprivation is linked to an act of public authority.[92] There is a danger in this as it divides individuals into those who are entitled to restitution and those who are entitled only to be *'*taken into consideration*'* in public policy-making.[93]

In the following section I will elaborate on the different approaches adopted by adjudicatory bodies in adjudicating ESC rights, starting with the above-mentioned *integrated approach*.

B. The Evolution of ESC Rights Jurisprudence

The antecedents of ESC rights adjudication were the decisions of judicial-like mechanisms, which addressed breaches of labour rights treaties, such as the ILO Conventions, and the early discrimination cases that referred to understandings of substantive equality.[94] For example, in *Brown v. Board of Education* case[95], the US Supreme Court struck down the separate schooling for African-Americans, known as 'separate but equal', by moving beyond the formalistic understanding of equality and stressing the fundamental value of education and the negative impacts of racial bias in the manner of its delivery[96]

After 1980s, ESC rights adjudication was dramatically expanded, particularly in the countries that experienced democratic revolutions at the time, whereas the division between CP and ESC rights was still quite visible in Western countries and at the European level.[97] The democratization wave in the aftermath of Cold War led many states, such as South Africa, to include ESC rights in their constitutions.[98]

Towards the end of 1980s, new platforms were created for ESC rights litigation at the regional and international level, starting with the American Court on Human Rights in 1987.[99] As there were many driving factors behind the rise of ESC rights adjudication, such as the effectiveness of human rights advocates, social movements and lawyers and the degree of the establishment of a litigation culture for human rights,

[92] *Id.* at 35.
[93] *Id.* at 35.
[94] Langford, *supra* note 6 at 5.
[95] Brown v. Board of Education, 347 U.S. 483 (1954), (1954), https://supreme.justia.com/cases/federal/us/347/483/ (last visited Aug 31, 2019).
[96] Langford, *supra* note 6 at 6.
[97] *Id.* at 7.
[98] *Id.* at 8.
[99] *Id.* at 8.

developing a universal theory from the jurisprudence is impossible.[100] However, it is important to explore the current trends to identify the common and divergent threads and the extent to which international and comparative law is influencing the developments from a positivist standpoint.[101] Taking into account this reality, I will focus on the landmark cases I find as most relevant to see the emerging trends and to better reflect on the achievements and failures in ESC rights adjudication. As discussed in the previous chapter, the idea of a judiciary dealing with complex and budgetary policies has been at the centre of the justiciability debate. I will now review leading cases from different jurisdictions to reflect on the adjudicatory bodies' interpretation of ESC rights-related obligations and their approaches to adjudicating resource-sensitive rights. In practice, in addition to the *integrated approach*, the responses developed by the adjudicatory bodies for ESC rights adjudication have included addressing them through the non-discrimination clauses, or following a 'minimum core approach' or 'taking adequate steps toward progressive realization' approach.[102]

1. Integrated Approach

This phenomenon, *integrated approach,* proposed by Scheinin, is about the international treaty bodies' protection of, or at least giving consideration to, ESC rights through their task to afford international protection to those rights explicitly covered by the treaties on traditional CP rights.[103]

In the famous *Airey v. Ireland*[104] case, ECtHR established that the ECHR rights, which are essentially CP rights, have implications of a social or economic nature and that the right to fair trial in civil lawsuits also incorporates the right to free legal aid for people with limited means. The ECtHR described what we refer as the *integrated approach* as follows; 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere

[100] *Id.* at 9–11.
[101] *Id.* at 12.
[102] *Id.* at 22.
[103] Martin Scheinin, *Economic and Social Rights as Legal Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK , 32 (Allan Rosas, Asbjørn Eide, & Catarina Krause eds., 2 ed. 2001).
[104] Airey v. Ireland, Application No. 6289/73, (1979).

from the field covered by the Convention.'[105]

The ECtHR has followed a similar logic it applied in *Airey* when deciding a case concerning an applicant suffering from metabolic myopathy. The ECtHR indicated that respect for privacy might necessitate the provision of housing to those with serious disabilities;

> 'Although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual.'[106]

However, the ECtHR further stated that for such an obligation to exist, there must be 'a direct and immediate link between the measures sought and the applicant's private life,'[107] indicating the willingness of the ECtHR to limit the potential positive obligations that can flow from such an understanding.[108] Therefore, one should be aware of the limitations of this avenue as the courts, such as the ECtHR, may be tempted to apply the doctrine of ' margin of appreciation' rather widely when the claim brought before it cannot be dealt without tackling the issues of resource allocation.[109]

Article 10 of the ICCPR, imposes an obligation to treat all persons deprived of their liberty 'with humanity and with respect for the inherent dignity of the human person.'[110] It has served as a vehicle for protecting ESC rights alongside Article 7 of the ICCPR[111] where the case involves very grave situations.[112] We observe this

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[105] *Id.* at para 26.
[106] Marzari v Italy, 28 EHRR CD 175, (1999).
[107] *Id.*
[108] Malcolm Langford, *Judging Resource Availability*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 89–108, 92 (John Squires, Malcolm Langford, & Bret Thiele eds., 2005).
[109] Martin Scheinin, *Justiciability and the Indivisibility of Human Rights*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 17–25, 24 (John Squires, Malcolm Langford, & Bret Thiele eds., 2005).
[110] Article 10(1) of the ICCPR: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'
[111] Article 7 ICCPR 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

mostly in prisoners' rights cases with respect to their entitlements to minimum standards of health care, nutrition etc. As Scheinin suggested, the reason for the development of these standards with respect to the rights of people who are deprived of their liberty lies in the fact that once the State interferes with a person's liberty, the State has a special responsibility to protect their life and well-being with positive measures.[113]

In *Mukong v. Cameroon*[114], adjudicated by HRC, the author had been detained in a cell at Police Headquarters, stripped of his clothes, and forced to sleep on a concrete floor. He was also detained at a camp where he allegedly was not allowed to talk to his lawyer, his wife or his friends. He was also allegedly subject to intimidation, beatings, mental torture, heat exposure and confinement in a cell for 24 hours. The author claimed violation of his right to be free from torture and cruel, inhumane or degrading treatment. The Government argued that 'the situation and comfort in the country's prisons must be linked to the state of economic and social development of the country'[115]. The HRC noted that

> 'certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include ... minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.'[116]

In another leading case related to the health rights of prisoners*, Lantsova v. Russian Federation*[117], the HRC found a violation of Article 6 of the ICCPR, the right to life, when a person died of pneumonia after one month in pre-trial detention under

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[112] Martin Scheinin, *Indirect Protection of Economic, Social and Cultural Rights in International Law*, *in* THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL AND NATIONAL PERSPECTIVES 72–88, 75 (Danwood Mzikenge Chirwa & Lilian Chenwi eds., 2016).
[113] *Id.* at 76.
[114] Mukong v. Cameroon, Communication No. 458/1991, CCPR/C/51/D/458/1991, UN Human Rights Committee, (1994).
[115] *Id.* at para 6.2.
[116] *Id.* at para 9.3.
[117] Lantsova v. Russian Federation, Communication No. 763/1997, CCPR/C/74/D/763/1997, UN Human Rights Committee, (2002).

deplorable conditions, and the state party had not taken appropriate measures to provide medical treatment to the individual.

In *Chiti v. Zambia*[118], apart from HRC's finding of a violation of Article 7 due to bad prison conditions and the denial of adequate medical treatment, there was also a separate finding related to the housing rights of the author's family; their illegal eviction and destruction of belongings that violated the right to privacy and the right to family.[119] With respect to remedies, the HRC noted that the State has an obligation to provide an effective and enforceable remedy since a violation has been established and requested the State to provide, within 180 days, information about the measures taken to give effect to its views.[120]

As those examples of prisoners' rights cases from the HRC's jurisprudence demonstrates, and as Albuquerque expressed, the pre-Optional Protocol to ICESCR era gave only fragmented protection to ESC rights with limited consideration about resource allocation matters, and the question of the supervision of the obligation to 'take steps' to progressively realize the ESC rights was left unanswered. [121]The remedial jurisprudence of the HRC also reflects the limitations of the 'indirect' protection of ESC rights through treaty bodies associated with CP rights adjudication.

Finally, it may be concluded that the *integrated approach* deals with ESC rights when they only appear as necessary fulfilment elements in CP rights. As such, the question of ESC rights adjudication in their own right, without being associated with CP rights, remains unanswered within this approach.

2. Equality and non-discrimination

Most human rights treaties, regardless of their inclusion of explicit ESC rights, include a non-discrimination clause. Some, but not all, treaties deal with non-discrimination as an accessory, rather than an independent, human right. For example the ECHR prohibits discrimination only on the enjoyment of those human rights that

[118] Chiti v. Zambia, Communication No. 1303/2004, CCPR/C/105/D/1303, UN Human Rights Committee, (2012).
[119] *Id.* at 12.8.
[120] *Id.* at 15.
[121] REPORT OF THE SECRETARY-GENERAL IN RESPONSE TO COMMISSION RESOLUTION 2003/18, ECONOMIC AND SOCIAL COUNCIL, E/CN.4/2004/WG.23/2, para 45 (2003).

are otherwise protected by the same Convention.[122] On the other hand, some other human rights treaties such as the ICCPR include a free-standing provision on non-discrimination,[123] making non-discrimination a human right on its own, irrespective of in what field the discrimination occurs. Despite this free-standing provision of ICCPR, there was no precedent in the HRC's jurisprudence showing that the ICCPR prohibited discrimination in the field of ESC rights until 1987, when it decided its first cases on gender-based discrimination in respect to unemployment benefit entitlements.[124] Through these and the following similar cases it was demonstrated that the human rights treaties could afford protection to some aspects of ESC rights through their non-discrimination provisions. For instance, *Gueye et al. v. France*[125], was adjudicated under the individual communications procedure of the HRC. The authors were 743 retired soldiers of the French army. They alleged that French legislation, which provided that the pensions of retired soldiers of Senegalese nationality, who served in the army prior to the independence of Senegal in 1960 and was less than that enjoyed by retired French soldiers, was discriminatory. The HRC held that the State discriminated against the authors, as the distinction in the legislation, which was not based on the service performed by the individual or his country of residence but directly on citizenship, was not based on reasonable and objective criteria.[126]

However, when the claim is about discrimination on the basis of a prohibited ground while accessing an existing government scheme, if there is no prohibition on retrogressive measures and recognition of positive dimensions of non-discrimination, states may equalise down by cancelling the already existing benefit for others.[127] Nonetheless, the equality understanding has been evolving beyond the formal non-discrimination principle towards more substantive equality understandings. The questions of whether equality rights or guarantees have substantive character and

[122] Article 14 of the ECHR: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
[123] Article 26 of the ICCPR: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[124] Scheinin, *supra* note 109 at 22. See *Zwaan – de Vries v the Netherlands* (Communication No. 182/1984), CCPR/C/29/D/182/1984; *Broeks v the Netherlands* (Communication No. 172/1984), CCPR/C/29/D/172/1984.
[125] Gueye et al. v. France, Communication No. 196/1985, CCPR/C/35/D/196/1985, UN Human Rights Committee, (1989).
[126] *Id.* at para 9.5.
[127] Langford, *supra* note 108 at 93.

whether they impose positive obligations to eliminate discrimination have been taken up by many adjudicatory bodies. There are quite a number of cases in which both negative and positive state obligations towards social rights have been addressed through the application of non-discrimination clauses in relation to the vulnerable groups.[128] In the famous Canadian Supreme Court case, *Eldridge v British Columbia*[129], the Supreme Court held that the right to equality places obligations on governments to allocate resources to ensure that disadvantaged groups have full advantage of public benefits. Accordingly for the people who are deaf, the State has the duty to reasonably accommodate their needs to the point of undue hardship.[130] The Court noted that the estimated cost of these interpretive services for the whole of British Columbia was approximately only 0.0025 percent of the provincial health care budget at the time[131]. Therefore the Court rejected the British Columbian provincial government's arguments that the denial of interpretive services to the deaf was justified due to the budgetary implications of such services.[132] The Court found that a declaration suspended for six months was the appropriate remedy in this case, as opposed to an injunctive relief, since 'there are myriad options available to the government that may rectify the unconstitutionality of the current system'.[133] What is remarkable about this case is that the Supreme Court of Canada provides for a basis for adjudicating ESC rights of vulnerable groups under the framework of equality rights, and it does that without 'usurping' the power of the legislative given its flexible remedial approach.

3. Minimum core approach

In their search for a basis for objective adjudication of ESC rights modelled in CP rights adjudication, courts have tended to employ the minimum core approach relying on identifying certain components of ESC rights that are immune from progressive realisation.[134] According to Craven, among many notions associated with the concept of minimum core, three in particular stand out: a core element in every right

[128] Scheinin, *supra* note 109 at 24.
[129] Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624, .
[130] *Id.* at para 94.
[131] *Id.* at para 87.
[132] *Id.* at para 87.
[133] *Id.* at para 96.
[134] Bruce Porter, *The Crisis of Economic, Social and Cultural Rights and Strategies for Addressing It*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 43–69, 48 (John Squires, Malcolm Langford, & Bret Thiele eds., 2005).

associated with survival which should be guaranteed to all in every circumstances, or only reasonable actions and omissions that can be expected from a state considering the available resources, or the r*aison d'être* of rights, without which the rights are incapable of limitation without violation.[135] The first notion is the only one 'adding something new rather than merely reorganising the existing terms of debate' according to Craven.[136] Based on this notion, the minimum core content of each right represents a quantitative or qualitative threshold of enjoyment, like in the case of a right to be free from hunger representing the minimum core content for the right to food.[137] However, the difficulty arises when even this basic minimum might be asking too much in certain contexts.[138] In its General Comment No. 3, the CESCR Committee responded to this problem as follows;

> 'the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party…In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[139]

The minimum core obligations doctrine therefore created (1) a *prima facie* violation, (2) an obligation to use every effort to use all available resources and (3) to prioritize the satisfaction of the need.[140] Therefore, what we should understand from the minimum core obligations is that the context in which the right needs to be realized is a determinant factor which includes the resource levels of the country. However, the State bears the burden of proving that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.[141]

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[135] Craven, *supra* note 89 at 39.
[136] *Id.* at 39.
[137] *Id.* at 39.
[138] *Id.* at 39.
[139] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment No. 3, The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* para 10 (1990).
[140] Malcolm Langford, *Substantive Obligations*, Vol. 6 *in* THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 203–251, 234 (Malcolm Langford et al. eds., 2016).
[141] UN Committee on Economic, Social and Cultural Rights, *supra* note 80 at para 17.

However, a shift in the understanding of the minimum core obligations occurred in the following General Comments of the CESCR. Although it was clear in the previous General Comments that the CESCR would accept the unavailability of resources as a defence, in the General Comment no. 14, after specifying what are the minimum core obligations, it further emphasised that 'a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations…which are non-derogable.[142] This change of understanding is rightly criticized by scholars as this would lead to an interpretation that states may be held accountable for denials of the rights that are beyond their control.[143] The Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, prepared by a group of experts, also provides for a similar understanding and states that the minimum core obligations apply irrespective of the availability of resources of the country concerned.[144] What is even more confusing is that the CESCR, in its General Comment no. 15, went on to state both the 'non-derogable' nature of the minimum core obligations that it stated with respect to the right to water, and the qualification from the General Comment no. 3 permitting the states to use resource unavailability as a defence.[145] Eventually in its 2007 Statement, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant'[146], CESCR seemed to re-establish its original position in General Comment no. 3, which does not refer to any non-derogability regarding the minimum core obligations. Among the minimum core obligations with respect to each of the ESC rights, the CESCR mentions the adoption and implementation of a national strategy and plan of action in its General Comments which seems to consolidate its understanding of the minimum core as a context/resource-dependent notion, which is open to the resource-unavailability defence.[147] Also, in its Concluding Observations, the CESCR applied the minimum core approach, requiring from some States a higher

[142] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment No. 14, The right to the highest attainable standard of health* para 47 (2000).
[143] Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT. LAW 462–515, 492–3 (2004).
[144] See Article 9 of the Maastricht Principles On Extraterritorial Obligations Of States In The Area Of Economic, Social And Cultural Rights. https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23
[145] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water* 40–41 (2002).
[146] REPORT OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHT TO ECOSOC (FOCUSING ON THE CONCEPT OF PROGRESSIVE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS), E/2007/82, (2014).
[147] See, e.g., UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 142 at para 43(f); UN Committee on Economic, Social and Cultural Rights, *supra* note 145 at para 37(f).

standard of realization depending on the context. In its Concluding Observations on Russian Federation[148], it required 'the raising of minimum pension levels' whereas for Canada, it recommended the establishment of social assistance at levels which ensure the realisation of an adequate standard of living for all.[149] Nevertheless, Langford noted that it is not clear whether the CESCR expressed such concerns on the basis of a failure to reach a minimum core or to progressively realize the rights.[150] Although, as mentioned above, the CESCR specified the nature of the essential minimum level for some rights in its General Comments, such as the provision of primary education for all, for the right to education or the provision of essential drugs defined under the WHO Action Programme on Essential Drugs, it generally refrained from quantifying it[151]. Instead, it tends to focus on a contextualized evaluation; whether the country has set a minimum, which the CESCR can evaluate its reasonableness and how it applies in a specific country.[152]

Based on this understanding of the CESCR Committee, the minimum core obligations seem only to shift the burden of proof.[153] Craven strongly criticizes this approach of the CESCR Committee, since making the minimum core obligations dependent on resource constraints may actually end up claiming that no violations of rights may be presumed in relation to non-core elements.[154]

This minimum core approach has also been criticized by Porter, as it may tend to deprive ESC rights jurisprudence of the benefits of a more modern conception of human rights, which is based on historically grounded values and subjective aspects of rights, such as the notion of human dignity.[155] For example, the Supreme Court of Canada seemed to affirm this critique and acknowledged the more modern view of human rights framework by recognizing both subjective and objective components of obligations, incorporating both the individual circumstances and the history of the

[148] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Concluding Observations, Russian Federation, E/C.12/1/Add.94* para 50 (2003).
[149] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *Concluding Observations, Canada, E/C.12/CAN/CO/5* para 53 (2006).
[150] Langford, *supra* note 140 at 235–6.
[151] Please see*, inter alia*, UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment No. 13, The right to education* para 57 (1999); UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 142 at para 43; UN Committee on Economic, Social and Cultural Rights, *supra* note 145 at para 37.
[152] Langford, *supra* note 140 at 236.
[153] Craven, *supra* note 89 at 40.
[154] *Id.* at 40.
[155] Porter, *supra* note 134 at 50.

constituency to which the rights claimant belongs.[156] Based on this framework, advocates in Canada have not found it helpful to determine what everyone is entitled to, in all contexts and at all times, in order to decide whether an individual circumstance constitutes a violation of a right.[157]

Langford suggests that, for the most useful insights into the adjudication of the minimum core obligations, we should also look at the origins of this minimum core obligations doctrine.[158] In Germany, the right to human dignity and the directive principle of the *Sozialstaat* (which may be translated as 'welfare state') led the Federal Constitutional Court of Germany to establish the doctrine of *existenz minimum* according to which the State must ensure 'every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life.'[159] In the *Hartz IV* decision, which is about the question of whether the amount of the consolidated benefit paid to adults and dependent children paid in a certain period was compatible with the right to a subsistence minimum, the Federal Court affirmed its doctrine that the guarantee of a subsistence minimum that is in line with human dignity cannot provide any quantifiable requirements.[160] Instead, it requires an examination of whether the legislature 'has covered and described the goal to ensure an existence that is in line with human dignity' and if it has selected a calculation procedure that is appropriate for an assessment of the subsistence minimum.[161] The legislature's method were found incompatible with the subsistence minimum due to, *inter alia,* the selecting of expenditure categories in a partially random manner for the benefit. With respect to remedies, the Federal Court ordered the State to 'implement a procedure to realistically ascertain the benefits needed in line with needs, which are required to ensure a subsistence minimum that is in line with human dignity' and also stressed that the unconstitutional provisions remain applicable until new provisions are adopted by the legislature.[162] It is important to highlight that the Federal Court managed to apply its *existenz minimum* doctrine in ESC rights adjudication in a way

[156]Law v. Canada (Minister of Employment and Immigration)1 SCR 497, , para 3, 59 (1999); Porter, *supra* note 134 at 50.
[157]Porter, *supra* note 134 at 51.
[158] Langford, *supra* note 140 at 236.
[159] BVerfG, Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09, (2010), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/02/ls20100209_1bvl000109en.html (last visited Sep 1, 2019); Langford, *supra* note 140 at 237.
[160] BVerfG, Judgment of the First Senate of 09 February 2010 - 1 BvL 1/09, *supra* note 159 at para 1, 142.
[161] *Id.* at para 143.
[162] *Id.* at para 212.

respecting the separation of powers as well as allowing space for the notion of human dignity incorporated into the adjudication process. Although the concerns of Craven and Porter with respect to minimum core obligations approach are legitimate, the Federal Court's application of doctrine of *existenz minimum* demonstrates that what matters most is not identifying quantifiable requirements for the minimum core, but rather, placing the concern for human dignity at the centre of the adjudication.

4. Taking steps toward progressive realisation: South African model of reasonableness review

Throughout the previous parts in this thesis, I have noted that most of the concerns about the justiciability of ESC rights escalate when it comes to adjudicating fulfilment measures, in other words, to the third level in tripartite obligations. Paradoxically, there is an emerging and significant case law on the obligation to fulfil as expressed in many instruments as the duty to take steps to progressively realize the rights within maximum available resources.[163]

Among the most cited and significant cases illustrating this approach, the three leading judgments of the South African Constitutional Courts stand out. What makes these cases even more worth analysing is the South African Constitutional Court's express jurisdiction to adjudicate ESC rights, its sensitivity to the democratic issues and the pioneering manner in which it has developed its jurisprudence.[164]

The South African Constitution[165] expressly recognizes that all rights give rise to a range of duties. Section 7 of the Constitution provides that: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'. These duties are not subject to the limitations of progressive realization or available resources. There are also some other ESC rights specified in the Constitution that are not expressly subject to resource constraints:

- The rights of children to family, parental or appropriate alternative care, and to basic nutrition, shelter, basic health care services and social service,[166]
- The right to emergency medical treatment[167],

[163] Langford, *supra* note 108 at 103.
[164] Fredman, *supra* note 36 at 113.
[165] THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, (1996), http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.
[166] *Id.* at Section 28(1).

- The right to basic education,[168]
- The rights of detained persons to adequate accommodation, nutrition, reading material and medical treatment[169]

For the purposes of this thesis, I will also mention the ESC rights that give rise to qualified duties in the Constitution in sections 26 and 27:

Section 26(1) 'Everyone has the right to have access to adequate housing.'

Section 27(1) 'Everyone has the right to have access to—

(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

In respect of these rights, a second paragraph follows stating, 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'[170]

As indicated by Fredman, the South African Constitutional Court's political positioning in the new democratic state to create a break from the abuses of the past has impacted its self-perception, in addition to its explicit mandate to adjudicate on these duties by the Constitution.[171] However, this does not necessarily make the Constitutional Court usurp power from the elected government, instead, the Court has viewed the government, rather than itself, as the primary agent for realizing the transformation into a democratic state by utilizing the concept of 'reasonableness' emanating from the state obligations specified in above-mentioned sections 26 and 27.[172]

In *Soobramoney v Ministry of Health*[173]*,* the applicant suffered from chronic renal failure, among other diseases and was in dire need of renal dialysis that would have prolonged his life. When the applicant ran out of personal funds with which to pay private providers, he sought service in a state-funded hospital. He was refused treatment because his general physical condition did not qualify him for treatment

[167] *Id.* at Section 27(3).
[168] *Id.* at Section 29(1)(a).
[169] *Id.* at 35(2)(e).
[170] *Id.* at 26(2), 27(2).
[171] Fredman, *supra* note 36 at 114.
[172] *Id.* at 114.
[173] Thiagraj Soobramoney v. Minister Of Health (Kwazulu-Natal), CCT 32/97, (1997).

under the criteria or guidelines used by the hospital to determine eligibility for such treatments. Because of limited resources the hospital had adopted a policy of admitting only those who could be cured within a short period and those with chronic renal failure who are eligible for a kidney transplant.

Although the case was litigated on the basis of the right to life and the right to emergency health care, both of which would give rise to an immediate duty on the state, the Court preferred to examine the case under the right to access to health instead, triggering the reasonableness criterion in section 27(2).[174] As it considered the case under the general provisions on the right to health, not under the emergency medical treatment, the obligations imposed on the state regarding access to health care were dependent upon the resources available. The Court noted that if all persons who suffer from chronic renal failure were to be provided with dialysis treatment and if this principle were to be applied to all patients claiming access to expensive medical treatment, 'the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet.'[175] It declared that it could not interfere with decisions taken in good faith by political organs and medical authorities as to how to allocate budgets and decide on priorities[176] and concluded that:

> 'The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with the treatment. But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security.'[177]

Mr. Soobramoney's appeal was therefore dismissed. This judgment focused on obtaining an explanation for the refusal of treatment rather than its own evaluation of those reasons' validity. The Court held that the rationing decision had been made on clear and transparent criteria, which were consistently applied and reflected the need

[174] Fredman, *supra* note 36 at 114.
[175] THIAGRAJ SOOBRAMONEY V. MINISTER OF HEALTH (KWAZULU-NATAL), CCT 32/97, *supra* note 173 at para 28.
[176] *Id.* at para 29.
[177] *Id.* at para 31.

to find a balance between the conflicting shortage of machines and high levels of demand.[178]

Madala, in a concurring opinion, however, speculated that a solution 'might be to embark upon a massive education campaign to inform the citizens generally about the causes of renal failure, hypertension and diabetes and the diet which persons afflicted by renal failure could resort to in order to prolong their life expectancy.'[179] While this opinion seems like as a step towards recognition of the state's duty to progressively realize the right to health, this case has overlooked the progressive realization of the right to health.[180] The Soobramoney judgment has therefore been criticized as requiring so little beyond transparency and not giving enough weight to human rights and their corresponding duties.[181]

The *South Africa v Grootboom and Others*[182] case concerned a community of squatters, including children, who had to leave their informal settlement called, Wallacedene, due to lamentable conditions and occupied a privately owned land as many had been on a waiting list for as long as seven years for low-cost housing. After they had been forcibly evicted in a premature and inhumane way, reminiscent of apartheid-style evictions,[183] they went and sheltered on the Wallacedene sports field. They lacked basic infrastructure such as basic sanitation and electricity.

The applicants based their claim partly on section 26, which is one of the rights imposing qualified obligations upon the state to take reasonable measures to ensure the progressive realization of this right within its available resources. The second basis for their claim was the children's right to shelter in section 28(1)(c) which is not subject to resource constraints. The court examined the case based on section 26, which gave rise to qualified duties.

In the beginning of its judgment, the Court refused to use the 'minimum core' approach suggested by *amicus curiae*, as it considered the task of determining a minimum core obligation for the progressive realization of access to adequate housing as a complex one, requiring the identification of the needs and opportunities based on

[178] Fredman, *supra* note 36 at 116.
[179] THIAGRAJ SOOBRAMONEY V. MINISTER OF HEALTH (KWAZULU-NATAL), CCT 32/97, *supra* note 173 at para 49.
[180] Langford, *supra* note 108 at 105.
[181] Fredman, *supra* note 36 at 116.
[182] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7.
[183] *Id.* at para 10.; *Id.* at 6. where Yacoob J, while delivering this judgment, locates the country's acute housing shortage in the historical context of the apartheid era.

the economic and social circumstances of the country; such as income, unemployment, availability of land and poverty.[184]

The Court stated that in any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question is whether the legislative and other measures taken by the state are reasonable.[185] While assessing the reasonableness of the measures, including the housing programme that aimed at achieving the progressive realization of the right of access to adequate housing, the Court stated that the measures must be capable of facilitating the realisation of the right.[186] However, it acted cautiously about the principle of separation of powers, by stressing the considerable margin left to the state within the concept of reasonableness:

> 'The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive…A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent…It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligation'[187]

While applying the reasonableness test, the Court also stressed that mere statistical success is not enough, and that measures failing to give due attention to those 'whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril' may not pass the reasonableness test.[188]

However, as the housing programmes did not deal directly with crisis situations in the housing field, the question was whether a housing programme that fails to account for the immediate improvement of the circumstances of those in crisis could meet the reasonableness test.[189] The Court noted that it might have been acceptable if the nationwide programme would result in affordable houses for most people within a

[184] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7 at para 32.
[185] *Id.* at para 41.
[186] *Id.* at para 41.
[187] *Id.* at para 42.
[188] *Id.* at para 44.
[189] *Id.* at 62–3.

reasonably short time.[190] However, as this was not the case and the programme gave priority to the development of permanent housing, the Court found that the housing programme fell short of obligations imposed upon the national government to the extent that it failed to recognise that the state must provide for relief for those in desperate need.[191] The Court made a declaratory order requiring the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution, including the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.[192]

Finally, the Court rejected the claims under section 28 imposing obligations irrespective of resource availability since it considered that the constitutional scheme for progressive realisation of ESC rights would make little sense 'if it could be trumped in every case by the rights of children to get shelter from the state on demand'.[193] The Court interpreted the provisions in section 28 as imposing obligations primarily on the parents or family and only alternatively on the state, not creating any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.[194] However, according to the Court, this should not be understood as that the state incurs no obligation in relation to children who are being cared for by their parents or families, and the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection provided by section 28.[195]

According to Langford and Thiele, the well-reasoned *Grootboom* judgment of the South African Constitutional Court 'has perhaps contributed the most to a growing international awareness of the means by which the ESC rights can be rendered justiciable.'[196] This ruling modifies the rationality review adopted in the Soobramoney case, in which the Court focused only on obtaining a rationing decision, and applies the reasonableness review within which it also seeks the due account given to the human dignity principle and the most disadvantaged in the society. It places the adjudication of ESC rights within a familiar framework to courts in all

[190] *Id.* at para 65.
[191] *Id.* at para 66.
[192] *Id.* at para 96.
[193] *Id.* at para 71.
[194] *Id.* at para 76-7.
[195] *Id.* at para 78.
[196] Malcolm Langford & Bret Thiele, *Introduction: The Road to a Remedy*, *in* THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1–13, 3 (John Squires, Malcolm Langford, & Bret Thiele eds., 2005).

jurisdictions[197], therefore advocates of ESC rights are now engaged with more routine questions of the precise parameters of justiciability, new strategies to have more suitable remedies and better implementation and similar challenges we face in CP rights litigation.[198]

However, it should also be noted that equality concerns were not raised explicitly as an argument in either the *Soobramoney* case or the *Grootboom* case. Both cases focused on the content of the positive obligation on the State to fulfil the rights in question.[199]

In *Minister of Health v Treatment Action Campaign (TAC)*[200] case, both the *Soobramoney* and *Grootboom* cases were addressed in an interesting way.[201] The *TAC* case concerned the denial of access to a medication, anti-retroviral drug Nevirapine, which substantially reduces the risk of mother-to-child transmission (MTCT) of HIV. The applicants contended that the measures adopted by government to provide access to health care services to HIV- positive pregnant women were deficient in two material respects: the prohibition of the administration of Nevirapine at public hospitals and clinics outside the research and training sites and the failure to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV.[202] In reply to these, the government stated *inter alia* that the Nevirapine would not be efficient if it did not come within a full package, including breastmilk substitutes, advice and counseling to mothers and due to resource constraints providing this comprehensive package outside the research and training sites was not reasonably possible.[203]

The Court noted that the issue in this case was concerned with transmission at or before birth, in which Nevirapine would remain to some extent efficacious in combating mother-to-child transmission even if the medication came without the full package.[204] According to the Court, the fact that the training sites are of vital importance in providing crucial data on which a comprehensive programme for

[197] https://www.escr-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc
[198] Langford and Thiele, *supra* note 196 at 3.
[199] BRODERICK, *supra* note 9 at 199.
[200] Minister of Health and Others v Treatment Action Campaign & Others (10) BCLR 1033 (CC), (2002).
[201] Langford, *supra* note 108 at 105.
[202] MINISTER OF HEALTH AND OTHERS V TREATMENT ACTION CAMPAIGN & OTHERS (10) BCLR 1033 (CC), *supra* note 200 at para 44.
[203] *Id.* at para 51.
[204] *Id.* at para 58.

mother-to-child transmission can be developed and, if financially feasible, implemented, should not mean that Nevirapine must be withheld, in the meantime, from poor mothers and children who do not have access to the research and training sites.[205] Relying on the *Grootboom* judgment, the Court stated that the primary obligation to provide basic health care services rests on those parents who can afford to pay for such services, however, this does not mean that the state incurs no obligation in relation to children who are being cared for by their parents or families.[206]

Considering 'children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means,'[207] the Court concluded that it was not reasonable to restrict the use of Nevirapine to the research and training sites:

> 'Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government in so far as it confines the use of nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution.'[208]

The Court also held that there was *Grootboom*-style obligation to extend the Nevirapine program throughout the entire country:'[209]

'The government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of Nevirapine for the purpose of

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[205] *Id.* at para 68.
[206] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7 at para 78; MINISTER OF HEALTH AND OTHERS V TREATMENT ACTION CAMPAIGN & OTHERS (10) BCLR 1033 (CC), *supra* note 200 at para 77.
[207] MINISTER OF HEALTH AND OTHERS V TREATMENT ACTION CAMPAIGN & OTHERS (10) BCLR 1033 (CC), *supra* note 200 at para 79.
[208] *Id.* at para 80.
[209] Langford, *supra* note 108 at 105.

reducing the risk of mother-to-child transmission of HIV.'[210]

Although *TAC* provided the first occasion on which an equality argument was raised as a subsidiary claim, it was overlooked by the Constitutional Court for the most part.[211]

[210] MINISTER OF HEALTH AND OTHERS V TREATMENT ACTION CAMPAIGN & OTHERS (10) BCLR 1033 (CC), *supra* note 200 at para 95.
[211] BRODERICK, *supra* note 9 at 199.

III. Adjudicating ESC Rights before the CESCR Committee

The sister treaties comprising together the International Bill of Rights, the ICCPR and the ICESCR, were both adopted on the same day in 1966, but an optional protocol enabling an individual complaint mechanism was only added to the former 42 years later. On 10 December 2008, the UN General Assembly adopted the OP-ICESCR that allows individuals or a group of individuals to make complaints to the CESCR Committee. It came into force on 5 May 2013 and there are currently 24 States Parties to the OP-ICESCR.[212] This delay is often explained by the Cold War ideological divisions and justified on the basis of different characteristics of ESC rights and their so-called inappropriateness for judicial review since ESC rights involve not only immediate obligations but also obligations that can be progressively realized.[213] However, in recent decades, as demonstrated by examples from different jurisdictions in the previous chapter, it has been more broadly accepted that the differentiation of the two categories of rights as CP and ESC rights radically undermined the holistic conception of human rights set out in the UDHR.[214]

On the one hand, more substantive understandings of CP rights, including non-discrimination, have included the programmatic obligations traditionally associated with ESC rights as being fundamental to CP rights, on the other hand, in many jurisdictions, justiciable ESC rights have been inserted into constitutions.[215] A similar trend also occurred at the regional level, with the introduction of the collective complaint procedure under the European Social Charter in 1995 and the inclusion of ESC rights in the African Commission on Human and Peoples' Rights and Inter-American Court on Human Rights.

Following the significant development of ESC rights jurisprudence at domestic and regional levels, demands for an Optional Protocol to ICESCR were expressly articulated at an international right to food conference.[216] The first formal discussion of an optional protocol was initiated by the CESCR in 1990.[217] CESCR presented its

[212] This is the number of states that had ratified the OP-ICESCR as at 23 July 2019.
[213] Langford et al., *supra* note 21 at 2.
[214] *Id.* at 2.
[215] Jurisdictions provided justiciable ESC rights include, *inter alia*, Argentina, Colombia, Finland, India, South Africa and Switzerland.
[216] Proceedings of the international conference "The Right to Food, from Soft to Hard Law", held 6-9 June 1984 at the conference centre "Woudschoten". For more details see THE RIGHT TO FOOD, (Philips Alston & Katarina Tomaševski eds., 1984).
[217] UN Doc. E/C.12/1991/Wp.2

report with a draft protocol to the former UN Commission on Human Rights in 1996.[218]After appointing an Independent Expert on the question of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Commission on Human Rights eventually established an open-ended working group to study options regarding the elaboration of an optional protocol to the ICESCR. During the initial negotiations of the OP-ICESCR in the Open-ended Working Group sessions, there were significant numbers of objections to a complaint mechanism, despite the emerging trends at domestic and regional levels for ESC rights adjudication. States opposed to the Optional Protocol argued, *inter alia,* that the provisions of the ICESCR 'were insufficiently clear to lend themselves to a complaints procedure or to be justiciable'[219] and 'a complaints procedure might unduly interfere in the democratic process and national policy-making with regard to political, economic and budgetary priorities'[220]. The arguments largely reflected the wider historical debate on the justiciability of ESC rights, which I covered in the first chapter.

After a consensus was achieved for drafting a complaints procedure, some of the opposing states advocated for an incorporation of a reference to a margin of discretion in relation to a particular category of ESC rights claims with the hope that it would lead the CESCR Committee to compromise on the right to effective remedies in situations where the state's resource allocation or policy choices are at issue.[221] Other states proposed to limit the communications procedure to the fulfilment of minimum standards[222] or to give states the option of selecting which rights would be subject to the complaint procedure[223]. In the end, the OP-ICESCR was drafted in a way affirming its purpose of providing access to justice for victims of violations of any and all ESC rights.[224] Navanethem Pillay, the UN High Commissioner for Human Rights, thus welcomed the Optional Protocol to ICESCR by saying that it "is of

[218] UN Doc. E/C.12/1996/CRP.2/Add.1.
[219] REPORT OF THE OPEN-ENDED WORKING GROUP TO CONSIDER OPTIONS REGARDING THE ELABORATION OF AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON ITS FIRST SESSION (E/CN.4/2004/44), para 20 (2004), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/120/29/PDF/G0412029.pdf?OpenElement (last visited Sep 1, 2019).
[220] *Id.* at para 22.
[221] Bruce Porter, *The Reasonableness Of Article 8 (4)–Adjudicating Claims From The Margins*, Vol 27 NORD. TIDSSKR. MENNESKERETTIGHETER 39–53, 50 (2009).
[222] REPORT OF THE OPEN-ENDED WORKING GROUP TO CONSIDER OPTIONS REGARDING THE ELABORATION OF AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON ITS THIRD SESSION, E/CN.4/2006/47, para 93 (2006), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/120/29/PDF/G0412029.pdf?OpenElement (last visited Sep 1, 2019).
[223] *Id.* at para 27.
[224] Langford et al., *supra* note 21 at 4.

singular importance ... closing a historic gap in human rights protection under the international system."[225]

During the negotiations for the drafting of the OP-ICESCR, one of the most contentious issues, if not the most, was the standard of review that would be applied in the complaints mechanism under the OP-ICESCR. Following intensive debates and discussions, negotiators agreed to include a 'reasonableness' standard of review to assess whether States are in compliance with their obligations to take steps to progressively realize ESC rights. In the next part, my key focus will be the reasonableness standard of review while reviewing the drafting history of the OP-ICESCR.

A. Travaux Préparatoires of the OP-ICESCR and Its Standard of Review

The most important rule of the OP-ICESCR is its standard of review contained in Article 8(4), the CESCR Committee is required to abide by this standard when examining individual complaints. It provides direction as to how the CESCR Committee should adjudicate claims about alleged failures of States to adopt reasonable measures to realise ICESCR rights, and addresses the critical relationship between individual communications and broader issues of socio-economic policy.[226]

Since the prevalent paradigm prior to the OP-ICESCR was more concerned with reviewing state action and deciding whether particular actions are contrary to the rules, it made adjudicative bodies reluctant to engage with violation claims linked to the failure of States to legislate or act in order to ensure the realization of rights or to advance the transformative goals of ESC rights.[227] From this perspective, the adoption of the reasonableness standard of review in the OP-ICESCR's Article 8(4) meant 'directly confronting a prevailing bias in favour of negative rights-oriented

[225] Statement by the High Commissioner for Human Rights, Ms. Navanethem Pillay, *Official Records,* 65th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 3pm.
[226] Bruce Porter, *Reasonableness and Article 8(4)*, Vol. 6 *in* THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 173–202, 173 (Malcolm Langford et al. eds., 2016).
[227] Bruce Porter, *Inclusive Interpretations: Social and Economic Rights and the Canadian Charter*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (Helena Alviar García, Karl Klare, & Lucy Williams eds., 2014), https://ssrn.com/abstract=2502466 (last visited Sep 1, 2019); Porter, *supra* note 226 at 175.

adjudication and challenging those who wished to restrict the scope of the OP-ICESCR to the more traditional types of claims.'[228]

Therefore, correcting this prevailing rights paradigm in order to engage with violations resulting from state failures to take appropriate measures, while at the same time maintaining a clear distinction between the adjudicative role of human rights bodies and the role of States to enact policy and implement programmes was the challenge the drafters of the OP-ICESCR needed to overcome.[229]

In its first meeting of the Working Group, the discussion on the issue of justiciability provided clear evidence that there was significant opposition to a complaint procedure[230] However, in the beginning of the second session, Louise Arbour, the UN High Commissioner for Human Rights, managed to bring some conciliation over these concerns, drawing on her own experience as a judge, including as a justice of the Supreme Court of Canada. She introduced the concept of reasonableness as a potential resolution to the deadlock on the issue of justiciability of positive measures, using familiar concepts from civil and political rights adjudication[231]:

> 'From my own experience of working with courts and tribunals, I know how delicate the issue of separation of powers can be and how important it is to acknowledge the connections between legal and political processes without blurring the lines that must separate them. However, reviewing claims related to social, economic and cultural rights is not fundamentally different from the functions involved in the review of petitions concerning other rights. As for normal judicial review functions, the key is often in examining the 'reasonableness' of measures adopted by each State - given its specific resources and circumstances - by reference to objective criteria that are developed in accordance with standard judicial experience and with the accumulation of jurisprudence. A petition system at the international level can help provide guidance for the reasonable interpretation of universal norms in the provision of remedies at the domestic level. In many cases, it can also serve to establish if there is already the effective or appropriate

[228] Porter, *supra* note 226 at 175–6.
[229] *Id.* at 176.
[230] Porter, *supra* note 221 at 44.
[231] Porter, *supra* note 226 at 178.

> implementation of existing laws and policies, rather than to determine the reasonableness of such laws and policies.'[232]

The High Commissioner referred to the concept of reasonableness in subsequent addresses to the Open Ended Working Group and explained that the issues related to budgetary allocation are not beyond the competence of adjudicative bodies to review:

> 'The concept of "reasonableness" of State action is a well-known legal concept and long used in adjudication of civil and political rights. The growing body of jurisprudence at the national and regional levels illustrates that it can be similarly employed to assess the extent to which States respect their obligations in the area of economic, social and cultural rights. Such rights might not be fully achievable for all on an immediate basis, yet they remain rights. The obligations of States in this domain can be fully enforced while taking into account their resource constraints - and judges have an important role to play in this regard. I should also point out that many aspects of economic, social and cultural rights can be respected at little or no additional expense through simple regulatory changes or through the provision of a remedy to an aggrieved individual.'[233]

Subsequent discussions at the Open-Ended Working Group focused more attention on the reasonableness approach proposed by the High Commissioner, and began to generate more support for the drafting of a complaints procedure.[234] In its resolution 1/3, the newly-established Human Rights Council extended the mandate of the Working Group to elaborate an optional protocol to the ICESCR and requested the Chairperson to prepare "a first draft optional protocol ... to be used as a basis for the forthcoming negotiations"[235]

In light of the discussions in the forth session, a revised draft Optional Protocol was prepared but the discussions on some of the key issues continued, such as the question

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[232] Address by Ms. Louise Arbour, High Commissioner for Human Rights, to the second session of the Open-Ended Working Group (2005), , https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7657&LangID=E (last visited Sep 1, 2019).

[233] Address by Ms. Louise Arbour, High Commissioner for Human Rights, to the third session of the Open-Ended Working Group (2006), , https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6011&LangID=E (last visited Sep 1, 2019).

[234] Porter, *supra* note 226 at 179.

[235] HUMAN RIGHTS COUNCIL RESOLUTION 1/3 ON OPEN-ENDED WORKING GROUP ON AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, , http://ap.ohchr.org/documents/E/HRC/resolutions/A-HRC-RES-1-3.doc (last visited Sep 1, 2019).

of adopting a comprehensive approach to the Optional Protocol or an 'à la carte' approach. Some states argued that the term 'reasonableness' should be replaced by 'unreasonableness' and a reference to 'the broad margin of appreciation of the State party to determine the optimum use of its resources' should be added.[236]

In response to States' interests in obtaining further clarification regarding the question of how the CESCR would apply the obligation under article 2, paragraph 1, "to take steps ... to the maximum of its available resources" to achieve progressively the full realization of the rights recognized in the ICESCR, the CESCR adopted a statement 'to clarify how it might consider States Parties' obligations under Article 2(1)[237] in the context of an individual communications procedure'.[238] The CESCR explicitly stated that it would review whether the measures taken are adequate or reasonable, taking into account, *inter alia*, the following:

> (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
> (b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
> (c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;
> (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
> (e) The time frame in which the steps were taken;
> (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non- discriminatory, and whether they prioritized grave situations or situations of risk.[239]

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[236] REPORT OF THE OPEN-ENDED WORKING GROUP ON AN OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON ITS FOURTH SESSION (A/HRC/6/8), 95 (2007), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/138/89/PDF/G0713889.pdf?OpenElement (last visited Sep 1, 2019).
[237] Article 2(1) of the ICESCR: Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[238] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AN EVALUATION OF THE OBLIGATION TO TAKE STEPS TO THE "MAXIMUM OF AVAILABLE RESOURCES" UNDER AN OPTIONAL PROTOCOL TO THE COVENANT (E/C.12/2007/1), para 2 (2007), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/441/63/PDF/G0744163.pdf?OpenElement (last visited Sep 1, 2019).
[239] *Id.* at para 8.

The CESCR also stated that while assessing the reasonableness of the measures taken, it would place great importance on transparent and participative decision-making processes at the national level and it would respect the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances.[240]

A consensus began to emerge within the Working Group in favour of the inclusion of a reference to reasonableness along the lines proposed by the High Commissioner.[241] Its inclusion was seen by some states as an assurance that the Committee would not exceed its competence by interfering with policy choices and resource allocation decisions, whereas other states accepted it as an affirmation that the Committee would engage with issues of compliance with Article 2(1) ensuring 'access to justice for victims of violations linked to the failure by States to adopt positive measures and effective strategies.'[242]

However, the above-mentioned 'margin of appreciation' reference in the CESCR's statement was of concern to some states as such a reference is strongly associated in many jurisdictions with the notion of a 'reduced standard of scrutiny' which would result in an excessive deference to State. [243] On the other hand, some states considered such a reference as to only mean that the CESCR Committee should recognise that where there are a number of options available to the State to achieve compliance, it is up to the State to make the choice of means and it is not the CESCR Committee's role to decide what is the best policy.[244] At that point, a reference was made to the South African Constitutional Court's decision on the *Grootboom* case and the reasonableness review the South African Court used[245]: 'The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness.'[246]

A similar wording was inserted into the revised text, affirming that in considering the reasonableness of the steps taken, the CESCR Committee may adopt a range of possible policy measures and that there could be different policies which can be

[240] *Id.* at para 11.
[241] Porter, *supra* note 226 at 184.
[242] *Id.* at 184.
[243] *Id.* at 185.
[244] *Id.* at 186.
[245] *Id.* at 186.
[246] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7 at para 41.

compliant with ICESCR obligations. The text was subsequently adopted without any changes to Article 8(4), and, thus, the reference to margin of appreciation was not included in the final version:

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.[247]

The agreement on the reasonableness standard of review implied a consensus that a procedure designed to remedy violations of ESC rights must place squarely within its scope the violations which emanate from States' failures to adopt positive measures to realize rights, including, where appropriate, legislative measures and budgetary allocations.[248] The importance of the acceptance of the fact that the State party can adopt from a range of possible policies what it consider as the most appropriate and the CESCR Committee would only examine the reasonableness of the steps taken is that it creates a balanced approach to the legitimacy of each body. The CESCR Committee cannot act as a policy maker in place of the State, but such deference to the State authority does not mean deference to what the State considers as reasonable in relation to compliance with rights under ICESCR.[249]

According to Porter, it is of critical importance to consider the foundational principles affirmed in *Grootboom*, as the South African Constitutional Court's reasoning in the *Grootboom* decision heavily influenced the way in which the Working Group worded the final version of Article 8(4) and the specified reasonableness review.[250] The South African Court affirmed in *Grootboom* the human dignity as the foundation of reasonableness review:

> 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not

[247] Article 8(4) of OP-ICESCR.
[248] https://www.escr-net.org/timeline-campaign-op-icescr
[249] Porter, *supra* note 226 at 187.
[250] *Id.* at 191.

be ignored by the measures aimed at achieving realisation of the right.'[251]

The reasonableness review in Article 8(4), developed on the standard of review in the *Grootboom* decision stressing the dignity interests of the rights claimants and enhancing the democratic accountability this way, evaluates not just the State's justification of its policies based on resource restraints but also whether 'the steps taken by the State would allow the realisation of the rights at stake in the particular socio-economic and historical context in a manner that provides full participatory rights and recognises the dignity and rights of those whose claims are at issue.'[252] In the following section, I will examine the jurisprudence of the CESCR Committee under its communications procedure established with the OP-ICESCR to better understand the application of the reasonableness review in practice and observe how the CESCR Committee has interpreted it.

B. The Views of the CESCR Committee

The interpretation and application of the reasonableness standard in Article 8(4) in the jurisprudence of the CESCR Committee moves from applying a vague minimum core approach and allowing a relatively wide margin of discretion to States, to a more assertive stand and less deferential approach requiring higher reasonableness standards for State measures, considering the dignity of human beings. The evolution of the review standard in the jurisprudence will be demonstrated in this section, as I will discuss the cases grouped under separate headings referring to each approach.

1. Minimum Core Approach

In *López Rodríguez v. Spain*[253], the issue was the reduction in the author's non-contributory disability benefit due to taking into account the cost of his upkeep in prison after his incarceration. The author argued, *inter alia*, that this reduction in his disability allowance violated his right to social security.

[251] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7 at para 44.
[252] Porter, *supra* note 226 at 194.
[253] López Rodríguez v. Spain, Committee on Economic, Social and Cultural Rights, Communication No. 001/2013 (E/C.12/57/D/1/2013), (2016), https://juris.ohchr.org/Search/Details/2095 (last visited Sep 1, 2019).

The CESCR Committee in this case recalled that states have an obligation to ensure the satisfaction of the minimum essential levels of the right to social security and that when individuals are unable to realize that right themselves, the States are obliged to provide the right to social security.[254] In light of this principle, the CESCR Committee considered that 'a non-contributory benefit cannot, in principle, be withdrawn, reduced or suspended as a consequence of the deprivation of liberty of the beneficiary, unless the measure is provided for by law, is reasonable and proportionate, and guarantees at least a minimum level of benefits'.[255]

In determining whether the measure, the reduction in the non-contributory disability allowance, is in compliance with the criteria above, the CESCR Committee considered the fact that in case of non-contributory benefits which draw exclusively on public funds, States 'have a certain amount of discretion to make the most appropriate use of tax revenue with a view to guaranteeing the full realization of the rights…and ensuring, among other things, that the social security system provides a minimum essential level of benefits to all individuals and families'.[256] Accordingly the CESCR Committee found it reasonable, for the purposes of a more effective resource allocation, to consider reducing a non-contributory benefit if there is a change in the needs of the beneficiary.[257]

The CESCR Committee found that there is no evidence of any serious negative effect as the author did not provide any evidence that 'would indicate that the measure in question was disproportionate in that it impaired the satisfaction of his own or his family's basic needs that the non-contributory benefit was intended to cover'.[258] Therefore it concluded that the reduction in the non-contributory benefit did not constitute a violation of the right to social security.

In this decision, although there is explicit reference to the minimum core obligations of the State, the CESCR Committee has not used this occasion to elaborate more on its minimum core obligations approach. It did not consider that the reduction in the non-contributory benefit of the author concerned the minimum core of the right to social security, therefore shifted the burden of proof. What is striking is the CESCR Committee's employment of a reasonableness review in a way to require the author,

[254] *Id.* at paras 10.3, 10.4.
[255] *Id.* at para 11.3.
[256] *Id.* at para 13.3.
[257] *Id.* at para 13.3.
[258] *Id.* at para 13.4.

instead of the State, to bear the burden of proving that the measure in question was disproportionate and impaired his or his family's basic needs, taken into account the vulnerability of the author who is a person with disabilities and the lack of any dignity consideration in the CESCR Committee's reasoning.

2. Reasonableness and Human Dignity

In the case of *Ben Djazia et al v. Spain*[259], the main question the CESCR Committee was asked to consider was whether the eviction of low-income tenants in private rental accommodation in Madrid and the failure to grant alternative accommodation amounted to a violation of their right to adequate housing.

Mr Djazia and Ms Bellili and their two children had lived in a rented room in Madrid and had paid their rent on time until Mr Djazia's monthly unemployment benefit was stopped. The tenancy expired and the lessor did not extend the tenancy agreement. Djazia and Bellili refused to leave as they had no income or alternative accommodation. The lessor brought a civil proceeding for the eviction of the authors at the Madrid Court of First Instance. The Court ordered the authors' eviction and instructed the related government agencies to adopt the measures within their competence to protect the authors against situations of distress and exclusion. The authors and their children were evicted and taken into a temporary State emergency shelter. After they were instructed to leave, they spent 4 days in their family car, before being accommodated by a friend. Although Mr Djazia had made 13 applications for housing support over a decade, he was denied each time and no support was given to the family by the State, except for the emergency accommodation.

The authors argued before the CESCR Committee that the State had violated their right to adequate housing under Article 11(1), since they were evicted despite not having alternative accommodation and without consideration of the impact of the eviction order on their children.

The CESCR Committee first stated that the forced evictions are *prima facie* incompatible with the requirements of the ICESCR and they can be justified only in

[259] Ben Djazia et al v. Spain, Committee on Economic, Social and Cultural Rights, Communication No. 005/2015 (E/C.12/61/D/5/2015), (2017), https://juris.ohchr.org/Search/Details/2407 (last visited Sep 1, 2019).

the most exceptional circumstances, and that the protection against forced eviction also applies to persons living in rental accommodation as the scope of the ICESCR also extends to relations between individuals.[260] It highlighted positive obligations of the state to protect the right to housing even where the eviction is justified -where provided by law and carried out as a last resort-, such as genuine prior consultation with the persons concerned, an assurance that no other rights will be violated as a result of the eviction, special protection to vulnerable groups -including women, children, older persons, persons with disabilities- and reasonable measures to provide alternative housing.[261]

With respect to providing alternative housing, the CESCR Committee noted that 'any measure adopted must be deliberate, specific and as straightforward as possible to fulfil this right as swiftly and efficiently as possible.'[262] It further stated that policies on alternative housing should be commensurate with the need of those concerned and the urgency of the situation and should respect the dignity of the person.[263]

The CESCR Committee considered the arguments of the State as insufficient to demonstrate that it had made all possible effort, using all available resources, to realize the right to housing of persons who, like the authors, were in a situation of dire need.[264] The CESCR Committee gave an example of an argument which could have been considered sufficient in that regard; denying the authors social housing was necessary because it was putting its resources towards a general policy or an emergency plan to be implemented by the authorities with a view to progressively realizing the right to housing, especially for persons in a particularly vulnerable situation.[265] It appears that this reasoning of the CESCR Committee was quite influenced by the reasoning of the South African Court in the *Grootboom* case where it focused on human dignity and evaluated the nationwide housing program as failing to address the needs of those in desperate situations.[266] Also, the CESCR Committee noted that the State could not convincingly explain why it was necessary to adopt a retrogressive measure, namely the selling part of the public housing stock to

[260] *Id.* at paras 13.3, 14.2.
[261] *Id.* at para 15.1, 15.2.
[262] *Id.* at para 15.3.
[263] *Id.* at para 15.3.
[264] *Id.* at para 17.5.
[265] *Id.* at para 17.5.
[266] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7 at paras 65-66.

investment companies, despite the fact that the number of public housing units available annually in Madrid was significantly fewer than the demand.[267]

Due to a lack of sufficient explanation as to why it denied alternative accommodation to the authors, and any convincing reason as to why it was necessary to adopt a retrogressive measure, the CESCR Committee found that State failed to provide reasonable arguments to demonstrate that, 'despite having taken all necessary measures, to the maximum of available resources, it was impossible to provide the authors with alternative housing.'[268]

This decision is important as it illuminated the promises of the reasonableness review of the CESCR Committee under Article 8(4) of the OP-ICESCR. It affirms the centrality of dignity considerations in reviewing state measures and that there is a higher threshold for states to justify the reasonableness of their measures when the question is about the protection of particularly vulnerable groups. It is important to note that in this decision, the CESCR Committee has not made any significant reference to margin of discretion of the State, which would lead to a rather deferential review. Lastly, the CESCR Committee's finding in this case that the selling off of public housing at a point that it was sorely needed is a retrogressive measure that the State could not adequately justify may be 'indicative of a new, more muscular approach' by the CESCR Committee, requiring higher standards for justifications by States.[269]

3. Equality Considerations

In the case of *Trujillo Calero v. Ecuador*[270], the main issue was an unpaid domestic worker's deprivation of a special pension due to termination of her voluntary affiliation after she had failed to make contributions for a certain period of time.

The author made 29 years' worth of retirement contributions to the Ecuadorian Social Security Institute (ESSI). Of the 305 contributions she made, approximately half were

[267] BEN DJAZIA ET AL V. SPAIN, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 005/2015 (E/C.12/61/D/5/2015), *supra* note 259 at para 17.6.
[268] *Id.* at para 17.8.
[269] Ben Warwick, *Djazia and Bellili v Spain: Eviction and Homelessness under the OP-ICESCR* (2018), http://ohrh.law.ox.ac.uk/djazia-and-bellili-v-spain-eviction-and-homelessness-under-the-op-icescr/ (last visited Sep 1, 2019).
[270] Trujillo Calero v. Ecuador, Committee on Economic, Social and Cultural Rights, Communication No. 010/2015 (E/C.12/63/D/10/2015), (2018), https://juris.ohchr.org/Search/Details/2409 (last visited Sep 1, 2019).

voluntary contributions, made between 1981 and 1995, when she was an unpaid domestic worker, caring for her home and children, without having an employment relationship with an employer. During the time she was an unpaid domestic worker, she could not make any contributions for a period of 8 months starting in 1989, though she retroactively paid them in 1990. In 2001, when she had a paid job, she consulted ESSI officials on a number of occasions about whether she was able to retire under the special reduced retirement scheme and, on each occasion, the officials informed her it was possible but she should resign from her job in order to be able to retire. The author resigned from her job and applied to the ESSI for special retirement. However, her request was rejected on the basis that she did not meet the eligibility requirements as her voluntary affiliation had terminated in 1989, when she had failed to pay her contributions for more than 6 consecutive months and the voluntary contributions she had made after this termination became invalid. Ms. Trujillo was only made aware in 2007 of these administrative decisions and she appealed one of those rulings before the IESS to no avail. Ms. Trujillo then sought relief sequentially from the District Court, the National Court of Justice and the Constitutional Court. She was denied at each step.

Before the CESCR Committee, the author claimed that Ecuador had violated her right to social security as the ESSI failed to notify her timely that the voluntary contributions she had made were invalid and thus she became deprived of a special pension. She also argued that the State discriminated her on the ground of her gender as the social security regime had serious restrictions for unpaid female domestic workers in practice because it was intended for professionals. She also pointed out that the State has no non-contributory pension scheme in place for persons unable to contribute to social security, thus leaving older persons completely unprotected.

ESCR-Net submitted a third party intervention to the CESCR and highlighted the obligation of States to ensure that their social security systems benefit all without discrimination, including women who perform unpaid care work, to take positive steps to ensure social security coverage for persons who have no access to or are unable to benefit from existing social security systems, in particular older women, and to ensure that such systems facilitate access to information and due process, including the right to an effective remedy.

The CESCR firstly noted that in adopting a criteria for eligibility for social security regimes the states have a margin of discretion, which is limited by the requirement that the criteria has to be reasonable, proportionate and transparent.[271] As the ESSI not only failed to inform the author in an appropriate and timely fashion of the invalidity of her voluntary contributions, it also disregarded the legitimate expectation it created in the author's mind that she met the requirements by continuing to receive the payments, the CESCR Committee found the penalty unreasonable.[272] Even if it is assumed that the aim of the penalty was to protect the resources of the social security system, which is a valid and legitimate objective, the State party has not shown that it was the only way to achieve this purpose.[273] Thus, the CESCR considered the penalty disproportionate for the author, who was an unpaid domestic worker at the time and therefore found a violation of the right to social security.

The CESCR Committee recalled the prohibition of discrimination, whether in law or in fact, including indirect discrimination that refers to 'laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.'[274] The CESCR Committee stated that since there is a legal provision, formulated in a neutral manner, which might in fact affect a clearly higher percentage of women than men; the burden of proving that such a situation does not constitute indirect discrimination on grounds of gender lies with the State.[275] Due to the lack of sufficient explanation from the State, the CESCR Committee found that the conditions of voluntary affiliation imposed on the author, as an unpaid female domestic worker constituted discriminatory treatment.[276]

This decision is of critical importance as for the first time a UN treaty body has ruled on the link between unpaid care work and gendered access to social security.[277] It shows us the strategic importance of the link between ESC rights adjudication and substantive equality, and how the interplay between those two could give us

[271] *Id.* at 12.1.
[272] *Id.* at para 16.3.
[273] *Id.* at para 17.1.
[274] *Id.* at para 13.2.
[275] *Id.* at para 19.4.
[276] *Id.* at 19.5.
[277] https://www.escr-net.org/caselaw/2018/marcia-cecilia-trujillo-calero-v-ecuador-cescr-communication-102015-un-doc

significant results for the realization of the vulnerable individuals' historically overlooked and marginalized rights.

In another case, *S.C. and G.P. v. Italy*[278], where the issue was the transfer of an embryo into a woman without her valid consent, it was affirmed, once again, that States are obligated to deliver substantive equality by removing not only direct but also indirect discrimination[279].

In this case, the authors, S.C. and G.P., were a couple that went to a private clinic, which specialized in assisted reproductive technology to seek assistance to conceive a baby. They undertook two in vitro fertilization cycles but S.C. declined to have the embryo transferred into her uterus as it was graded as average quality with a low chance of implantation. The clinic informed her that she could not waive her consent to transfer the embryo into her uterus according to Italian law, thus she was forced to allow the transfer. She subsequently suffered a miscarriage.

The authors argued before the CESCR Committee that the transfer of an embryo into S.C.'s uterus without her consent was a violation of her right to health and the uncertainty created by the law regarding whether consent to the transfer of embryos can be withdrawn after fertilization prevented them from trying to conceive again and thus, constituted a violation of the authors' rights to the highest attainable standard of health and to the protection of their family.

The CESCR Committee, by referring to its General Comment no. 22, noted that 'violations of the obligation to respect occur when the State, through laws, policies or actions, undermines the right to sexual and reproductive health. Such violations include State interference with an individual's freedom to control his or her own body and ability to make free, informed and responsible decisions in this regard... Laws and policies that prescribe involuntary, coercive or forced medical interventions, including forced sterilization or mandatory HIV/AIDS, virginity or pregnancy testing, also violate the obligation to respect.'[280] Accordingly, the CESCR Committee concluded that forcing a woman to have an embryo transferred into her uterus, which constituted a forced medical intervention, violated S.C.'s right to health.

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[278] S.C. and G.P. v. Italy, Committee on Economic, Social and Cultural Rights, Communication No. 022/2017, (E/C.12/65/D/22/2017), (2019), https://juris.ohchr.org/Search/Details/2522.
[279] *Id.* at para 8.2.
[280] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General comment No. 22, The right to sexual and reproductive health* paras 56,57 (2016); S.C. AND G.P. V. ITALY, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 022/2017, (E/C.12/65/D/22/2017), *supra* note 278 at para 8.1.

It further noted that the States have the duty to remove not only direct but also indirect discrimination. As the restriction on the right to withdraw consent for the embryo transfer places an extremely high burden on women, the CESCR Committee concluded that the transfer of the embryo into S.C.'s uterus without her valid consent constituted a violation of her right to the highest attainable standard of health and her right to gender equality in her enjoyment of her right to health.[281]

With regard to the uncertainty created by the law regarding whether consent to the transfer of embryos can be withdrawn after fertilization, the CESCR Committee first noted that the domestic law created a restriction on the authors' right to health, as it prevents their access to a health treatment that is otherwise available in the State party.[282] It considered that this prohibition, or at least, the ambiguity concerning the existence of such prohibition on withdrawing one's consent touched upon the very substance of the right to health, therefore not compatible with the nature of the right.[283] The CESCR Committee found a violation of right to health accordingly.

4. Review of the CESCR Jurisprudence

Although not all the CESCR Committee views mentioned above contain substantial discussions with respect to positive state measures and the consideration of the reasonableness of the limitations related to available resources, there is now enough precedent to believe that individual communication procedure under the OP-ICESCR is definitely promising for furthering the ESC rights adjudication internationally and is open to development with respect to the interpretation and application of the reasonableness review under Article 8(4) of the OP-ICESCR. As Porter points out, 'the concept of reasonableness is a double edged sword' and it can be used to justify a virtually unlimited margin of discretion to states' socio-economic policies, or alternatively, it can be used to rise to the challenge presented by genuine ESC rights claims that go to the systemic causes of poverty and exclusion[284]. The interpretation and application of the reasonableness standard in Article 8(4) in the above-mentioned jurisprudence of the CESCR Committee moves from applying a vague minimum core

[281] S.C. AND G.P. V. ITALY, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 022/2017, (E/C.12/65/D/22/2017), *supra* note 278 at para 10.3.
[282] *Id.* at para 11.1.
[283] *Id.* at para 11.2.
[284] Porter, *supra* note 221 at 40.

approach and allowing a relatively wide margin of discretion to States, as in the case of *Lopez Rodriguez*, to a more assertive stand and less deferential approach requiring higher reasonableness standards for State measures, considering the dignity of human beings, as in the case of *Djazia et al*.

It is also worth noting that two of the cases, *Trujillo Calero v. Ecuador S.C.* and *G.P. v. Italy*, where the CESCR Committee found indirect discrimination, show us the vital link between substantive equality considerations and the realization of ESC rights. Based on the jurisprudence analyzed in this chapter, it is clear that the CESCR's reasonableness review framework which has been influenced by the South African model of reasonableness in *Grootboom*, gives due account to human dignity. However, what is also notable here is that the CESCR Committee has moved beyond the standard in *Grootboom* and provided substantive equality considerations via indirect discrimination concept while adjudicating ESC rights.

Another 'significant and potentially transformative' issue about the reasonableness standard of review in CESCR Committee's jurisprudence, which emerged 'from a convergence of CP rights with ESC rights jurisprudence', is that it affirms the rights claims related to positive measures under the ICESCR are to be adjudicated rather than being dismissed, and the solution to a violation may not be a singular remedy, but it may entail a range of possible options as the corresponding state obligations are subject to the limitations of available resources and progressive realization over time.[285]

5. Remedies

Remedies associated with ESC rights adjudication may require complex policy changes requiring reallocation of resources. As suggested by Çalı, the procedural framework that is most likely to advance the effective ESC rights implementation would therefore be the one that strikes the right balance between the level of specificity required in articulating the remedies and the space left to domestic authorities to manoeuvre in the implementation process.[286]

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[285] *Id.* at 43.
[286] Başak Çalı, *Enforcement*, Vol. 6 *in* THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 359–380, 361 (Malcolm Langford et al. eds., 2016).

In the above-mentioned *Ben Djazia et al v. Spain* case, with respect to remedies, the CESCR Committee stated that the State has an obligation to grant the authors public housing or any other measure enabling them to enjoy adequate accommodation, following an assessment of their current situation and genuine consultation with them.[287] As general recommendations to the State, the CESCR Committee noted that the State has an obligation to take necessary measures to ensure, *inter alia,* that the defendants are able to object or lodge appeals in eviction proceedings and evictions are carried out only after genuine consultation with the persons, and evicted persons have alternative housing, especially in cases involving vulnerable people.[288] The CESCR also added that the State should develop and implement a comprehensive plan to guarantee the right to adequate housing for low-income persons, which should contain necessary resources, indicators, time frames and evaluation criteria.[289]

The approach in the remedies section of this case, which is not too specific in recommending States what action to take, thus not triggering 'usurpation of power' criticisms has also been followed in *Trujillo Calero v. Ecuador.*

In *Trujillo Calero,* while stating that the State has an obligation to provide the author with the benefits, taking into account the contributions she made to ESSI, the Committee also noted that, in the alternative, the State could provide the author other equivalent social security benefit enabling her to have an adequate and dignified standard of living.[290]

Similarly, with respect to remedies in *S.C. and G.P. v. Italy,* the CESCR Committee stated that the State has an obligation to enable the authors' right to access in vitro fertilization treatments with trust that their right to withdraw their consent to medical treatments will be respected.[291] As general recommendations, the CESCR Committee noted that the State has obligation to take necessary measures to guarantee, *inter alia*, the right of all women to take free decisions regarding medical interventions affecting

[287] BEN DJAZIA ET AL V. SPAIN, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 005/2015 (E/C.12/61/D/5/2015), *supra* note 259 at para 20.
[288] *Id.* at para 21.
[289] *Id.* at para 21.
[290] TRUJILLO CALERO V. ECUADOR, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 010/2015 (E/C.12/63/D/10/2015), *supra* note 270 at para 22.
[291] S.C. AND G.P. V. ITALY, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 022/2017, (E/C.12/65/D/22/2017), *supra* note 278 at para 13.

their bodies, access to all reproductive treatments, and the right to withdraw their consent to the transfer of embryos for procreation.[292]

As the current jurisprudence of the CESCR Committee shows us, the CESCR Committee has managed to strike a balance between being flexible in its remedial jurisprudence and assisting the State in implementing its position by giving a list of remedies, which are not too specific. In a country where a non-contributory pension scheme does not exist which has negative impacts on older persons who were unable to contribute to a scheme, the CESCR Committee was clear enough in its recommendations to require the State to formulate a comprehensive non-contributory pension scheme within a reasonable time. On the other hand, it has been cautious in choosing its language to avoid 'imposing' a solution on the State. This cautiousness is also noteworthy for a practical reason. Since a remedial section with too detailed requirements demanding compliance from the State would lead to concerns about 'watering down' of the decisions in the implementation phase, it is preferable to establish a partnership with the State rather than to dictate certain solutions.[293] The approach adopted by the CESCR Committee in its decisions has allowed for more optimism for post-decision implementation with realistic outcomes.

Following the analysis of the general trends in ESC rights adjudication in the second chapter, I have tried to draw a detailed picture of the standard of review the CESCR Committee has applied so far, through a reading of its drafting history and jurisprudence to demonstrate its current development level. In the next chapter, I will provide an examination of the Convention on the Rights of Persons with Disabilities (CRPD), particularly its reasonable accommodation duty, and the corresponding jurisprudence to be able to compare its capacity to consolidate ESC rights adjudication, by setting an example of doing a balancing exercise while examining the reasonableness of the positive state measures requiring resource allocation, to the CESCR Committee's jurisprudence.

[292] *Id.* at para 14.
[293] Çalı, *supra* note 286 at 367.

IV. Adjudicating ESC Rights before the CRPD Committee

The CRPD is the most recently adopted treaty among the core UN human rights treaties that contains progressive provisions, especially with respect to equality and non-discrimination. It incorporates a model of equality, that is described as 'inclusive equality by the CRPD Committee, which embraces a substantive equality understanding that extends and elaborates on the content of equality in a fair redistributive dimension to address socioeconomic disadvantages.[294] It seeks to target the structural inequalities faced by persons with disabilities, particularly via the duty of reasonable accommodation. This duty is defined as, 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms,' in Article 2 of the CRPD. The reasonable accommodation duty is incorporated into the CRPD's non-discrimination clause in Article 5(3) as follows; 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.

The duty of reasonable accommodation requires immediate realization[295] and spans all human rights in the CRPD. This includes CP and ESC rights. As such, it blurs the dividing lines between CP and ESC rights.[296] Consequently, its inclusion within the non-discrimination norm was controversial during the negotiation sessions of the CRPD. Strong objections were raised by the delegates, especially the EU Presidency, that the non-discrimination norm with the inclusion of the reasonable accommodation duty, could become, 'a Trojan horse for the enforceability of more and more slices of social and economic rights.'[297]

As the CRPD's equality model is different to previous paradigms of equality, it is useful to examine the adjudication of ESC rights within the existing ESC rights paradigm and compare it to decisions made under CESCR.

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[294] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 11.
[295] *Id.* at para 23.
[296] Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?*, Vol. 100 *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES. 81–109, 104 (Oddnỳ Mjöll Arnardóttir & Gerard Quinn eds., 2009), http://public.eblib.com/choice/publicfullrecord.aspx?p=467759 (last visited Jan 23, 2018).
[297] Quinn, *supra* note 10 at 100.

I will begin this chapter with an explanation of the CRPD's understanding of disability and its equality model and compare it to previous understandings in international human rights law. This provides essential context to a thorough analysis of the CRPD's equality paradigm, including the reasonable accommodation duty. This will be followed by an analysis of the scope and elements of the reasonable accommodation duty based on the *travaux préparatoires* of the CRPD and the CRPD Committee's general comment on equality and non-discrimination. At the end of this chapter I will explore the Views of the CRPD Committee on the communications submitted to it through the communications procedure under the OP-CRPD to better assess its interpretation of the duty to reasonably accommodate and what it offers to advance the ESC rights adjudication paradigm in comparison to the CESCR.

A. The Disability Model in the CRPD

Based on a variety of sources, the UN discloses that twenty per cent of the world's poorest people have some kind of disability; they tend to be regarded in their own communities as the most disadvantaged; they are more likely to be victims of violence or rape; and ninety per cent of children with disabilities in developing countries do not attend school.[298]

Even though the figures have been clearly worrisome from a human rights perspective, it was only in 2006 with the CRPD that the issue of disability has attracted enough attention to be recognized as a human rights issue by a legally binding international instrument. For this reason, Quinn[299] described the CRPD as, 'the single most exciting development to take place in the disability field for many decades'.[300]

For a long time, the challenges that persons with disabilities have faced were assumed to be the natural and unavoidable consequence of their physical, mental, intellectual or sensory impairment.[301] When disability was perceived in this way, society's responses were restricted to only one of two paths: individuals can be 'fixed' through

[298] https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html
[299] G. Quinn is a leading authority on international and comparative disability law and led the delegation of Rehabilitation International during the negotiations of the CRPD in New York.
[300] Quinn, *supra* note 10 at 90.
[301] MONITORING THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES GUIDANCE FOR HUMAN RIGHTS MONITORS, PROFESSIONAL TRAINING SERIES NO. 17, 5, https://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf.

medicine or rehabilitation; or they can be cared for, through charity or welfare programmes.[302]

What makes the CRPD unique is the fact that its focus is no longer on the so-called deficiencies of the person. Instead, it focuses on the environment constructed without considering the situation of persons with disabilities. As Ambassador MacKay, Chairman of the Ad Hoc Committee that developed the CRPD text, characterized the CRPD as embodying a 'paradigm shift' away from a social welfare response to disability to a rights-based approach.[303]

The point of departure for developing the CRPD was primarily based on the ideal of achieving substantive equality for persons with disabilities. This could be achieved by providing reasonable accommodation for their specific individual needs and eliminating social barriers to their full inclusion into society. The formal guarantees of equal treatment without the provision of special support and access mechanisms for persons with disabilities are not sufficient to achieve genuine equality of opportunity.[304] Therefore, the role of the concept of reasonable accommodation duty is incredibly important to analyse to what extent the CRPD will enable the persons with disabilities the equal enjoyment of opportunities and full inclusion in all aspects of life.

In the next section, I will explain the change in the understandings of equality in international human rights law to explain the 'paradigm shift' and the implications of the incorporation of reasonable accommodation into the non-discrimination clause of the CRPD.

B. The 'Paradigm Shift' from Formal Equality to Substantive Equality

This section will provide an analysis of the various theoretical models of equality[305] and provide reflections on how each model relates to certain UN human rights

[302] *Id.* at 8.
[303] UN Enable, Video Archive of the Opening for Signature Ceremony available at: http://www.un.org/disabilities/default.asp?id=160
[304] NICHOLAS BAMFORTH, COLM O'CINNEIDE & MALEIHA MALIK, DISCRIMINATION LAW: THEORY AND CONTEXT 1072 (2008).
[305] I followed the classification of Arnardóttir that is made chronologically in: Oddnỳ Mjöll Arnardóttir, *A future of multidimensional disadvantage equality?*, Vol. 100 *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH

treaties. This will help situate where the CRPD's non-discrimination clause fits within those distinct approaches to equality.

1. Formal equality Model

The *formal equality* model, focuses exclusively on equal treatment in the application and implementation of laws and rights. It requires that individuals are treated in the same manner, if they are similarly situated. This model was based on the Aristotelian understanding of equality, namely, treating alike those things that are alike, whereas treating unalike things that are unalike in proportion to their unlikeness.[306] As this model focuses on equal treatment and does not consider the possible unequal results that the equal treatment may deliver; the individual merits and faults are the basis for consideration, rather than the structural disadvantages that some groups suffered from.[307]

The problem with this formal equality model, as explained by Arnardóttir, is the fact that a person has to be the same as the standard representing the 'normalcy' in the society before she/he could ever make a claim to non-discrimination.[308] In other words, while setting the social norm, this model ignores human difference and the societal barriers that inhibit the enjoyment of rights and full participation in society.[309] The neutrality that comes with the formal equality model is particularly problematic in the disability context as it does not take into account the varied and multifaceted differences people with disabilities have.[310]

The formal equality model dominated the international human rights law in the period before the mid-1970s.[311] The non-discrimination clauses of both ICCPR and ICESCR, corresponding to this era are both 'open-ended' provisions whose, 'emphasis is on prohibiting distinctions on the grounds of personal characteristics rather than on

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DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES. 41–66 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009), http://public.eblib.com/choice/publicfullrecord.aspx?p=467759 (last visited Jan 23, 2018).

[306] ARISTOTLE, ETHICA NICOMACHEA (2012). Book V, III, 113a-113b.

[307] Arnardóttir, *supra* note 305 at 48.

[308] *Id.* at 48–49.

[309] Janet E. Lord & Rebecca Brown, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities*, *in* CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 273–308, 275 (Marcia H. Rioux, Lee Ann Basser, & Melinda Jones eds., 2011), http://www.socialrightsontario.ca/wp-content/uploads/2011/08/article_RebeccaBrown_Reasonableness-for-Convention-for-persons-with-disabilities.pdf.

[310] BRODERICK, *supra* note 9 at 32.

[311] Arnardóttir, *supra* note 305 at 47.

removing obstacles in society to allow for the full participation of persons with certain characteristics.'[312]

2. Substantive Difference Model

This approach corresponds to the era starting with the Convention on the Elimination of Racial Discrimination (CERD) and Convention on the Elimination of Discrimination against Women (CEDAW). Contrary to the understanding of formal equality that excludes the differences, this approach recognizes that some differences, generally defined by biological indicators, should be accommodated to facilitate inclusion and enable the persons having such differences to in fact enjoy equality.[313] Therefore, this approach reflects the development of international human rights law from negative obligations to its combination with some positive obligations for states in ensuring human rights.[314] In the CERD and the CEDAW, there is an express definition of discrimination that referred to the purpose or effect of discriminatory measures implying the need for positive state obligations to prevent cases like indirect discrimination[315] or to accommodate differences.[316] However, this substantive difference approach only targets specific differences. As such, it leaves the question of which differences should be accommodated unanswered.[317] During this era, the focus was generally on "immutable differences" such as, race and gender that have the potential to be affected by adverse stereotypes. The inherent weakness of this article is the fact that this approach also focuses on a 'normal' standard within a, 'framework designed to protect the self-sufficient autonomous individual'.[318] Therefore, persons with disabilities were still perceived as incomparable to the standard in the society

[312] M. VENTEGODT LIISBERG, DISABILITY AND EMPLOYMENT: A CONTEMPORARY DISABILITY HUMAN RIGHTS APPROACH APPLIED TO DANISH, SWEDISH AND EU LAW AND POLICY 26 (2011), https://cris.maastrichtuniversity.nl/portal/en/publications/disability-and-employment-a-contemporary-disability-human-rights-approach-applied-to-danish-swedish-and-eu-law-and-policy(ee6594ea-b225-433c-909f-6cea3b4d231e)/export.html (last visited Sep 1, 2019).
[313] Arnardóttir, *supra* note 305 at 50.
[314] *Id.* at 50.
[315] Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on some people *(CESCR Committee, General Comment No. 20, para 10)*
[316] *See Article 1(4) and 2(2) of the CERD and Article 4 of the CEDAW.*
[317] Arnardóttir, *supra* note 305 at 50.
[318] Colm O'Cinneide, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities*, Vol. 100 *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES. 163–198, 171 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009), http://public.eblib.com/choice/publicfullrecord.aspx?p=467759 (last visited Jan 23, 2018).

and disability remained mostly unnoticed as an equality issue.[319]

3. Substantive Disadvantage Model

The previous models focus on comparative concepts of sameness with the 'normal' and differences from the 'normal.' The substantive disadvantage model's emphasis is on the alteration of the social norm to better reflect human diversity.[320] It also seeks to address the systemic patterns of power, dominance and disadvantage that exist in society[321]. The main characteristic of this era, which was in the mid-1990s until the present, is its basis on theories of social construction.[322] It posits that the existence of a disability is not determined by the impairments of persons, or it is not an inevitable result of the impairment, rather, it is socially constructed, or in other words, brought into existence by social forces.[323] According to this understanding, disability is recognized as the result of the interaction of the individual with an environment that does not accommodate the differences of the individual. Unlike the previous models which did not see the issue of disability as an equality issue unless the persons with disabilities were cured and assimilated to the social norm; this model strongly reinforces that the issue of disability has something to do with the social, legal, economic, political and environmental conditions that act as barriers to the full exercise of rights by persons with disabilities.[324] For instance, based on this model (generally regarded as the 'social model of disability'[325]), marginalization and exclusion of persons with disabilities from education are not the result of their inability to learn, but of insufficient teacher training or inaccessible classrooms.[326]

This equality model's impact on international human rights law is an increased focus on the positive obligations of states.[327] In other words, the progress of the understanding of equality from the formal model to the substantive model involves an evolution in states' actions so that persons with disabilities are no longer considered

[319] Arnardóttir, *supra* note 305 at 54.
[320] R. Kayess & P. French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RIGHTS LAW REV. 1–34, 8 (2008).
[321] Arnardóttir, *supra* note 305 at 55.
[322] *Id.* at 55.
[323] Adapted from the theory of Ian Hacking, which can be found at *Id.* at 50.
[324] MONITORING THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES GUIDANCE FOR HUMAN RIGHTS MONITORS, PROFESSIONAL TRAINING SERIES NO. 17, *supra* note 301 at 8–9.
[325] *Id.* at 8.
[326] *Id.* at 8.
[327] Arnardóttir, *supra* note 305 at 55.

only as objects of social welfare schemes, rather, in the very heart of the equality framework, as holders of rights. From this point of view, protecting and promoting the rights of persons with disabilities does not mean only providing disability-related services, but also accommodating their specific needs, so that they could enjoy equal opportunities.

The concept of reasonable accommodation in the CRPD comes into play at this level, requiring an analysis of the individuals' situation on a case-by-case basis to achieve equality. By requiring reasonable accommodation of the individual needs of the persons with disabilities, it is suggested that the CRPD aims to bridge the unsustainable gap between the CP rights and the ESC rights,[328] as stated at the beginning of this chapter. Notwithstanding the correlation of formal equality model in international human rights law, which is an emphasis on negative state obligations; the CRPD's reasonable accommodation duty promises a shift towards accepting that respect for core CP rights may require states' positive actions,[329] including identifying social barriers to the enjoyment of human rights of persons with disabilities and taking appropriate steps to remove them.[330] Contrary to the previous equality models accepting non-discrimination as an accessory right; under the substantive equality model, the CRPD, accepts denial of reasonable accommodation *per se* as discrimination on the basis of disability. As the reasonable accommodation duty under the non-discrimination obligation, which is not subject to progressive realization[331], requires states to take positive action, sometimes by allocating additional financial resources, it results with a blurred distinction between traditionally negative and positive rights that have corresponded to CP rights, and ESC rights, respectively.[332]

In order to examine the implications of the convergence of ESC rights claims requiring positive measures and resource allocation with the reasonable accommodation duty with an immediate effect, I will now explore the development of the concept of reasonable accommodation in the international human rights law followed by an examination of the scope of the reasonable accommodation duty based

[328] Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. LAW REV. CALIF. LAW REV. 75–121 (2007); O'Cinneide, *supra* note 318 at 166.
[329] O'Cinneide, *supra* note 318 at 170.
[330] Lawson, *supra* note 296 at 103.
[331] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 12.
[332] Lawson, *supra* note 296 at 104.

on the *travaux préparatoires* of the CRPD.

C. The Development of Reasonable Accommodation Duty in Human Rights Law and the *Travaux Préparatoires* of the CRPD

The CRPD is the first UN human rights treaty that includes the duty of reasonable accommodation, which brings a substantive equality perspective to the issue of rights for people with disabilities. This did not happen immediately. The concept of reasonable accommodation was in use in various international and regional documents prior to the adoption of the CRPD. The concept is rooted in US law (1960s) and Canadian law (1980s) and was first implemented, in both countries, with respect to religious belief.[333] The concept was later applied to disability discrimination and the US Rehabilitation Act was the first domestic disability legislation that incorporated the duty of reasonable accommodation.[334] It eventually became one of the central pillars of the Americans with Disabilities Act in 1990, a highly influential piece of US legislation on persons with disabilities.[335] While the concept of reasonable accommodation was being developed in the US and other inspired countries around the world, it also started to appear at the international level. In 1982, as the major outcome of the International Year of Disabled Persons, the General Assembly adopted the World Programme of Action Concerning Disabled Persons. In this document, although the concept of reasonable accommodation was not explicitly mentioned, the importance of taking the needs of every individual into account is stated as the following;

'The principle of equal rights for the disabled and non-disabled implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.'

The concept of reasonable accommodation was made explicit for the first time in General Comment No.5 on persons with disabilities by the CESCR Committee.

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[333] EMMANUELLE BRIBOSIA & ISABELLE RORIVE, *Reasonable Accomodation Beyond Disability in Europe?* 12 (2013), http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/13/reasonable_accommodation_beyond_disability_in_europe_en.pdf (last visited Sep 2, 2019).
[334] Frédéric Mégret & Dianah Msipa, *Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality*, 30 SOUTH AFR. J. HUM. RIGHTS 252–274, 3 (2014).
[335] *Id.* at 3.

According to the CESCR Committee, 'the requirement contained in Article 2(2) of the ICESCR that the rights "enunciated ... will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability', although the ICESCR does not explicitly refer 'disability' as a discrimination ground.[336]

The CESCR Committee defined disability-based discrimination in its General Comment as 'including any distinction, exclusion, restriction or preference, or *denial of reasonable accommodation* based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights'.[337] Also, the duty of reasonable accommodation was applied implicitly in several cases before international courts and treaty bodies, such as the one involving a prisoner with disabilities before the HRC. In the case before the HRC, *Hamilton v. Jamaica*[338], the author of the communication was a prisoner who was paralyzed in both legs and unable to move from his cell unless he was carried by other inmates. He was also unable to remove his slop bucket from the cell himself and he had to pay other inmates to remove it. Due to those conditions, the HRC held that the state's failure to detain a prisoner with paralyzed legs in a place that was adapted to meet his needs constituted a violation of his right to be treated with humanity and with respect for the inherent dignity of the human.

However, the cases in which a duty to reasonably accommodate was implicitly applied, such as *Hamilton v. Jamaica* case before the HRC, are limited, both in requiring a violation of an underlying substantive right, as well as limiting the discussion of the violations to those relating to the rights to life, dignity, and humane treatment.[339] In those cases, denial of the right to be reasonably accommodated in itself was not seen as a part of the non-discrimination obligation.

From 1994 to 2004, seventeen disability-related individual complaints were made to UN human rights treaty bodies, of which thirteen were declared inadmissible.[340] According to O'Cinneide, the case-law of the UN treaty bodies has provided little benefits for persons with disabilities, with the exception of the odd decision, *Hamilton*

[336] UN Committee on Economic, Social and Cultural Rights, *General comment No. 5, Persons with disabilities*, para 5 (1994).
[337] *Id.* at para 5.
[338] Zephiniah Hamilton v. Jamaica, Communication No. 616/1995, CCPR/C/66/D/616/1995, UN Human Rights Committee, (1999).
[339] Lord and Brown, *supra* note 309 at 284.
[340] See Stein, Stein, *supra* note 328 at 75–122.

v. Jamaica[341], which is also limited in certain aspects as stated above.

Since the reasonable accommodation of the individual needs of persons with disabilities was largely left to soft law documents, and most of the treaties make no mention for disability as a suspect discrimination ground[342] it became apparent that those efforts proved ineffective. Thus, 'there was a vacuum…to be filled in the context of disability.'[343]

The ineffectiveness of the non-discrimination framework in the context of disabilities were also mentioned in the 2002 Study for the Office of the United Nations High Commissioner for Human Rights[344] with reference to the fact that the relevant jurisprudence of the treaty bodies on disability were sparse and only one General Comment had been adopted on the issue by the treaty bodies.[345]

In the aforementioned 2002 Study, several practical recommendations were made to improve the visibility of disability. It also provides some arguments regarding the advantages of drafting a new thematic convention on the rights of persons with disabilities. Eventually, in 2001, Mexico succeeded in getting the General Assembly to create an Ad Hoc Committee to consider proposals for a new thematic convention on disability.[346] Initially, there was no mention of 'reasonable accommodation' in the working paper submitted by Mexico to the Ad Hoc Committee at its first session. During the following sessions of the Ad Hoc Committee, however, in which all genuinely interested civil society groups could be present and speak[347], the inclusion of the reasonable accommodation duty into the Convention became one of the most contentious issues.[348] Before the second session, some regional expert groups recommended to incorporate the lack of reasonable accommodation as a form of discrimination into the Convention.[349] For example, the Meeting of Bangkok suggested that the definition of discrimination in the Convention should 'include a failure to accord reasonable accommodation as discrimination (as does the CESCR

[341] O'Cinneide, *supra* note 318 at 174.
[342] Article 2 of the Convention on the Rights of the Child includes an explicit mention of disability as a discrimination ground.
[343] Arnardóttir, *supra* note 305 at 45.
[344] GERARD QUINN, THERESIA DEGENER & ANNA BRUCE, HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY (2002).
[345] Quinn, *supra* note 10 at 96.
[346] *Id.* at 96.
[347] *Id.* at 98.
[348] See the background conference document on reasonable accommodation at 7th session at: http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm
[349] See the compilation of proposals for the Convention at: http://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp13.htm

Committee in its General comment 5), and should include a definition of reasonable accommodation'[350]. In the second session, the Ad Hoc Committee decided to establish a Working Group with the aim of preparing and presenting a draft text, which would be the basis for negotiation by Member States and Observers. In advance of the meetings of the Working Group; States, observers, regional meetings, relevant United Nations bodies, entities, and agencies, regional commissions, intergovernmental organizations and non-governmental organizations submitted contributions to be taken into account while preparing the draft. Around fifty percent of these contributions suggested that the reasonable accommodation duty should be incorporated into the Convention[351]. The Chair of the Ad Hoc Committee also presented a draft text to the Working Group, which also included, 'a failure to make a reasonable accommodation' in the scope of the definition of discrimination.[352] Taking into account all contributions, the Working Group narrowed down the options, prepared a draft text, thus, provided a basis for negotiations at the Ad Hoc Committee. The issues, which the delegations wanted to further discuss in the Ad Hoc Committee, were made clear in the draft text with footnotes. Draft Article 7/4 regarding reasonable accommodation read as the following;[353]

'In order to secure the right to equality for persons with disabilities, States Parties undertake to take all appropriate steps, including by legislation, to provide reasonable accommodation,[27] defined as necessary and appropriate modification and adjustments to guarantee to persons with disabilities the enjoyment or exercise on an equal footing of all human rights and fundamental freedoms, unless such measures would impose a disproportionate burden.'

In the footnote 27 of this draft Article, it is stated that while the Working Group considered that there was a need for a concept such as reasonable accommodation in the Convention in order to secure compliance with the principle of non-discrimination, the Ad Hoc Committee might wish to consider the following points[354];

[350] See the proposals of the Meeting of Bangkok at http://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp13.htm.
[351] See http://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp13.htm for the scope and definition proposals.
[352] See the draft text of the Chair presented to the Ad Hoc Committee at: http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm
[353] http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm
[354] See draft article 7 of the Working group text and its footnote 27 at: http://www.un.org/esa/socdev/enable/rights/ahcwgreporta7.htm

- The concept should be kept both general and flexible so that it would reflect the various legal traditions, and could be adapted to different contexts such as education and employment.
- The process of determining what amounted to a reasonable accommodation should be both individualized (in the sense that it should consciously address the individual's specific need for accommodation) and interactive as between the individual and the relevant entity concerned.
- An entity should not be allowed to force an individual to accept any particular reasonable accommodation. However in a range of accommodations is available (each of which was, by definition, reasonable), an individual does not have the right to choose the one that he or she preferred.
- The availability of state funding should limit the use of 'disproportionate burden' as a reason by employers and service providers not to provide reasonable accommodation.
- Some members of the Working Group supported the proposition that a failure to reasonably accommodate should in itself constitute discrimination, some of those members highlighted General Comment 5 of the CESCR Committee as supporting this view.
- Other members of the Working Group considered that the CRPD should not dictate the manner by which the concept of reasonable accommodation should be achieved or framed under relevant domestic legislation. Specifically, according to them, it was inappropriate for an international legal instrument designed primarily to engage State responsibility to frame a failure to reasonably accommodate on the part of private entities as a violation of the non-discrimination principle.

  Unlike the members supporting the proposition that a failure to provide reasonable accommodation should in itself constitute discrimination, some members, like the EU, argued for the separation of the concept of reasonable accommodation from the concept of discrimination because otherwise, they believed, it could become a Trojan horse for the enforceability of more and more slices of ESC rights.[355] Due to the expenditure often associated with reasonable accommodation, its positioning within

[355] Quinn, *supra* note 10 at 100.

the sphere of CP rights became controversial during negotiations.[356]

During the fourth session, as mentioned above, Article 7(4) was discussed and some amendments were made on it. [357] The EU emphasized that the reasonable accommodation concept was a highly individualized concept, therefore, suggested to include the qualification 'where needed' and this suggestion was accepted by the vast majority of the members. Also, some argued that since it would be private enterprises that would be obligated, not the states, the states' role should be expressed as, 'to ensure that reasonable accommodation is provided,' instead of, 'to provide reasonable accommodation'. One of the most discussed issues regarding the reasonable accommodation was the added qualification to the definition of the reasonable accommodation at the end of the paragraph. Some members, such as the Philippines, shared their concerns regarding the placement of 'disproportionate burden'. They argued that it could be brought further up into the sentence following 'modifications and adjustments' and the word 'unless' that connotes conditionality could be replaced with a phrase like 'without imposing'. Moreover, some members like Costa Rica argued that while 'necessary' and 'appropriate' applied to persons with disabilities, the notion 'reasonableness' already existed to meet the concerns of States as a balancing tool. From Costa Rica's point of view, the additional qualification at the end, 'unless such measures would impose a disproportionate burden' was, therefore, redundant. However, this argument did not attract enough supporters. Ultimately, the Coordinator proposed the following reformulation as the best compromise that could be reached (the Footnote 27 remained the same, though);

'Reasonable accommodation to be defined as necessary and appropriate modifications and adjustments, not imposing a disproportionate burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment and exercise on a basis of equality with others, of all human rights and fundamental freedoms.'

In the seventh session, reasonable accommodation was again on the top of the agenda. UN High Commissioner for Human Rights at the time, Louise Arbour, made a statement during that session, including her views about the concept of reasonable accommodation. She stated that while the concept was a well-known legal concept in the field of CP rights, the growing body of jurisprudence at national and regional

[356] Lawson, *supra* note 296 at 104.
[357] See the daily summary of discussions related to draft Article 7 at: http://www.un.org/esa/socdev/enable/rights/ahc4sumart07.htm

levels illustrated that it could be similarly employed to assess the extent to which states respect their duties in the field of ESC rights, as it is often attitudes, rather than resource constraints, that create the strongest barriers to the enjoyment of CP rights and of ESC rights by persons with disabilities.[358] This statement reaffirmed that the reasonable accommodation duty is not limited with the field of CP rights, but it also applies in the field of ESC rights.

The International Disability Caucus (IDC)[359] in the seventh session made it clear that the reasonable accommodation duty was different from general accessibility. IDC stated upon the Chair's request that there was a distinction between reasonable accommodation and general accessibility; reasonable accommodation refers to individual cases, such as for an employee or a student requiring an accommodation for a specific purpose (which should be immediately achievable), whereas making the entire environment immediately accessible would indeed be impossible.[360]

In the seventh session, a background conference document[361] regarding reasonable accommodation was also prepared. This document provides a description of how national legislations incorporate the concept of reasonable accommodation to persons with disabilities. After summarizing the legislative formulations of the concept in different countries, the document makes the following concluding points as regards the national legislations' understanding of reasonable accommodation[362];

- The scope of reasonable accommodation does not usually extend to all areas of social, political, civil and economic life covered by the discrimination prohibition. It is often statutorily limited to the employment and housing contexts and/or the provision of public goods and services.
- As for the concept of disproportionate burden, all formulations tend to rest on two common parameters: (1) an insistence on 'reasonableness in the circumstances'; and (2) an underlying proportionality test that balances the rights of, and burdens and benefits to, all persons affected by the proposed accommodation.
- All examples of national legislation, together with their accompanying interpretations, place the burden of proof with respect to 'unjustifiable hardship' (or its terminological

[358] See the statement of Louise Arbour at: http://www.un.org/esa/socdev/enable/rights/ahc7stathchr.htm
[359] IDC is a group actively involved in the preparation of CRPD, composed of 59 NGOs from all over the world.
[360] http://www.un.org/esa/socdev/enable/rights/ahc7sum16jan.htm
[361] See the background conference document at: http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm
[362] See the background conference document at: http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm

equivalent) on the claimed provider of reasonable accommodation, such as the employer.

While it is the claimant's (person with disabilities who seeks accommodation) burden to prove that the sought accommodation is reasonable, it is the claimed provider's burden to prove that 'unjustifiable hardship' would arise if the accommodation was provided. Therefore, 'reasonableness' and 'unjustifiable burden', while largely identical in scope, are often interpreted in national legislation as a means of differentiating a plaintiff's case from the defendant's legitimate defence.

At the end, the Ad Hoc Committee eventually adopted the CRPD on 13 December 2006, which accepts the denial of reasonable accommodation as a form of discrimination and defines reasonable accommodation as the following;

'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'[363]

The CRPD, under Article 5 on equality and non-discrimination, requires States Parties to, 'take all appropriate steps to ensure that reasonable accommodation is provided.' While this article has a general application across the CRPD, there are also provisions on substantive rights, including ESC rights, in which a specific reference to reasonable accommodation is also made; liberty and security of the person (Article 14(2)), education (Article 24), employment (Article 27), and access to justice (Article 12).

The Optional Protocol to the CRPD, which entered into force on the same day with the CRPD, 3 May 2008, established the CRPD Committee, which monitors implementation of the CRPD by the States Parties.

In the next section, to elucidate the scope of the reasonable accommodation duty, I will seek to provide the CRPD Committee's clarification of the reasonable accommodation duty based on its general comment on equality and non-discrimination, dated 28 April 2018. The last section of this chapter will comprise an analysis of the CRPD Committee's Views, with a specific focus on its interpretation of the reasonable accommodation duty to see its potential with respect to ESC rights

[363] See Article 2 of the CRPD.

adjudication in comparison to the CESCR.

D. CRPD Committee's General Comment No. 6 on Equality and Non-Discrimination

As it was quite clear from the drafting history of the CRPD, some aspects of the reasonable accommodation duty had proved difficult to understand, which required further clarification from the CRPD Committee. In its General Comment No. 6, the CRPD Committee provided such clarifications on certain aspects of the reasonable accommodation duty.

First of all, it should be noted that the CRPD Committee has defined the CRPD's equality model as '*inclusive equality*'. After having explained the formal equality and the substantive equality models, it went on to say that the CRPD developed a new model of equality that embraces a substantive equality understanding that extends and elaborates on the content of equality in:

> '(a) a fair redistributive dimension to address socioeconomic disadvantages;
> (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
> (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
> (d) an accommodating dimension to make space for difference as a matter of human dignity.'[364]

It is of critical importance, for the purposes of this thesis, to note that the CRPD Committee clearly stressed in the above-mentioned paragraph that the CRPD developed a 'new model of equality', which contains 'a fair redistributive dimension to address socioeconomic disadvantages'. This should be seen as reaffirming the merge of immediately applicable non-discrimination duty with the ESC rights that are normally subject to progressive realization.

[364] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 11.

The CRPD Committee also noted that the reasonable accommodation duty is different to accessibility duties. It stated that, as an *ex nunc* duty, reasonable accommodation must be provided immediately (which may be limited by disproportionality) from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights.[365] However, accessibility must be implemented gradually but unconditionally.[366] Therefore, accessibility and reasonable accommodation duties complement each other as the gradual realization of accessibility may take time, and reasonable accommodation duty can provide access to an individual in the meantime as an immediate duty.[367]

The CRPD Committee also noted that the reasonable accommodation duty is not limited to situations where a person with disability has actually asked for such an accommodation; it should also apply in situations where a potential duty bearer should have realized that the person in question had a disability that might require accommodations to address barriers to exercising rights.[368]

Contrary to the assertions during the drafting history that the word, 'reasonable,' acts as a qualifier, such as to modify or weaken the provision of accommodation, the CRPD Committee clarified that the term 'reasonable' is not an exception clause or a means by which the costs of accommodation or the availability of resources can be assessed. Instead, it is a reference to its relevance, appropriateness and effectiveness for the person with a disability.[369]

'Disproportionate' or 'undue' burdens are the qualifier terms according to the CRPD Committee, which should be considered synonyms insofar as they refer to the idea that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party.[370]

In paragraph 26 of its General Comment No. 6 the CRPD Committee indicated key elements for guidance on the implementation of the reasonable accommodation duty that are of critical importance for the purposes of this thesis[371]:

[365] *Id.* at paras 24 and 41.
[366] *Id.* at para 41.
[367] *Id.* at para 42.
[368] *Id.* at para 24.
[369] *Id.* at para 25.
[370] *Id.* at para 25.
[371] *Id.* at para 26.

- Identifying and removing barriers that have an impact on the enjoyment of the rights, in dialogue with the person with a disability concerned,
- Assessing whether an accommodation is feasible (legally or in practice) — an accommodation that is legally or materially impossible is unfeasible,
- Assessing whether the accommodation is relevant (i.e., necessary and appropriate) or effective in ensuring the realization of the right in question,
- Assessing whether the modification imposes a disproportionate or undue burden on the duty bearer; which requires an assessment of the proportionality between the means employed and its aim,
- Ensuring that the reasonable accommodation is suitable to achieve the essential objective of the promotion of equality based on consultations with the relevant body and the person concerned. Potential factors to be considered include financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution, third-party benefits, negative impacts on other persons and reasonable health and safety requirements. Regarding the State party as a whole and the private sector entities, overall assets rather than just the resources of a unit or department within an organizational structure must be considered,
- Ensuring that the persons with a disability more broadly do not bear the costs;
- Ensuring that the burden of proof rests with the duty bearer who claims that his or her burden would be disproportionate or undue.

Finally the CRPD Committee noted that the length of the relationship between the individual requesting the accommodation and the duty bearer is another factor to consider in evaluating the justification of the denial of the reasonable accommodation.[372]

In this section, I have provided the scope of the reasonable accommodation duty based on the General Comment No. 6 of the CRPD Committee to understand how the merging of immediately applicable non-discrimination duty with the ESC rights that are normally subject to progressive realization could work. In the following section, I will provide the CRPD Committee's Views to further analyse how it interprets the

[372] *Id.* at para 27.

concept of reasonable accommodation and compare it to the CESCR Committee's standard of review.

E. The Views of the CRPD Committee

In comparison to the CESCR's reasonableness review standard, which was heavily affected by the South African Court's reasoning in the *Grootboom* decision, what the CRPD Committee provides in its General Comment No.6 as guidance for the implementation of the reasonable accommodation duty, is a more detailed standard. It comprises a set of factors that needs to be taken into account when balancing the needs and interests of the person with disabilities on the one hand, and the accommodation duty-bearer on the other. The purpose of this balancing act inherent in the reasonable accommodation duty is to achieve inclusive equality of persons with disabilities, whereas under the reasonableness review of the CESCR, the CESCR Committee assesses whether the measures taken are reasonable for the purpose of achieving progressively the fulfilment of ESC rights. Notwithstanding this difference in their purposes; since the reasonable accommodation duty spans all substantive rights, including ESC rights, its guidance on the implementation of the reasonable accommodation is quite important for ESC rights adjudication at the UN level.

I will now look at the Views of the CRPD Committee to further analyse how the CRPD Committee implements the reasonable accommodation duty and carries out its balancing task when deciding whether the requested reasonable accommodation imposes a disproportionate burden on the State party. I will also touch upon cases where there is no reasonable accommodation request, but claims related to similar concepts such as accessibility and special measures to provide the broader picture of ESC rights adjudication under the CRPD Committee's individual communications mechanism in a comparative manner.

1. Views on Reasonable Accommodation Duty

In the case of *H.M. v. Sweden*[373], the issue was a local municipality's refusal to grant a building permission for the construction of a hydrotherapy pool for the

[373] H.M. V. SWEDEN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 3/2011, (CRPD/C/7/D/3/2011), (2012), HTTPS://JURIS.OHCHR.ORG/SEARCH/DETAILS/1984 (LAST VISITED SEP 1, 2019).

rehabilitation of a person with a physical disability on grounds of incompatibility of the subject matter extension with the city development plan.

To have this pool constructed, the author applied for planning permission for an extension, which would to a large extent be on a land where building is not permitted (although it is her privately owned piece of land). However, her application for the planning permit was refused by the local authority that asserted that construction could not be permitted on the land in question as the author's request is not a minor departure from the plan where, according to the Planning and Building Act, only minor departures from the plan are allowed.[374]

The author complained to the CRPD Committee for the refusal of her application for planning permit, as she considered that the health, interest and well-being of a person with disability came above the public interest protected by the city development plan She accepted that her request could not be considered 'minor' but contended she should have been permitted to build.

In the CRPD Committee's view, since the only effective mean to meet her health needs was her access to a hydrotherapy pool at home, the appropriate adjustment for the person with disability required a departure from the development plan.[375] Therefore, even though it was not a minor departure, the Committee concluded that the departure from the plan would not impose a disproportionate or undue burden on the State party.[376]

The CRPD Committee found that the State failed to provide reasonable accommodation and fulfil its obligations concerning non-discrimination, living independently and being included in the community, health and rehabilitation.

Based on the interpretation of the CRPD Committee on its views on *H.M. v. Sweden*, the balancing act inherent in the reasonable accommodation duty requires (1) an examination of reasonableness in circumstances, including its effectiveness (in this case, the Committee noted that the planning permit was the only effective mean to the applicant's realization of rights), and (2) a proportionality test that balances the rights of, and burdens to, all persons affected by the subject matter accommodation (in this case, the Committee decided that the rights of the applicant prevailed over the public

[374] *Id.* at para 4.5.
[375] *Id.* at para 8.5.
[376] *Id.* at para 8.5.

interest of maintaining the development plan).

The case of *X v. Argentina*[377] illustrates a classic example of reasonable accommodation for persons with disabilities in a prison setting.

The author of this communication, while under detention in prison, was assigned to a first-floor cell and was unable to access the recreation yard, depriving him of access to fresh air and natural light. Also, the accommodations made by the prison authorities were allegedly insufficient. For instance, because of the size of the bathroom, his access to shower and toilet with wheelchairs was limited. Since the partially adapted plastic chair in the bathroom did not meet basic safety standards, he was dependent on others or a nurse.[378] Due to the lack of a special mattress, he allegedly developed bedsores on a number of occasions.[379]

The complainant, who was a prisoner with disabilities argued that, *inter alia,* his right to be reasonably accommodated in the prison under Article 14(2)[380] of the CRPD was violated as the authorities failed to take his disability into consideration and to make the reasonable accommodations required for his needs.[381]

The CRPD Committee, after having acknowledged the accommodations made by the State party, noted that the State party had not, 'irrefutably demonstrated that the accommodations made in the prison complex are sufficient to ensure the author's independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service.'[382] Since the State party had not asserted that there were any obstacles that would prevent it from taking the necessary measures to facilitate the author's mobility nor denied the author's allegations that architectural barriers to accessibility persist, the CRPD Committee concluded that the author's rights under, *inter alia,* Article 14(2), right to be reasonably accommodated when deprived of liberty, was violated.[383]

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[377] X. v. Argentina, Committee on the Rights of Persons with Disabilities, Communication No. 008/2012 (CRPD/C/11/D/8/2012), (2014), https://juris.ohchr.org/Search/Details/1989 (last visited Sep 1, 2019).
[378] *Id.* at para 8.4.
[379] *Id.* at para 8.4.
[380] Article 14(2) of the CRPD: States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.
[381] X. v. Argentina, Committee on the Rights of Persons with Disabilities, Communication No. 008/2012 (CRPD/C/11/D/8/2012), *supra* note 377 at para 3.3.
[382] *Id.* at para 8.5.
[383] *Id.* at para 8.5.

The significance of this case is the CRPD Committee's confirmation of the fact that the burden of proving that the provided accommodations are sufficient or that the requested accommodations would impose undue burden is on States Parties once the claimant alleges a denial of reasonable accommodation.

In the case of *Marie-Louise Jüngelin v. Sweden*[384], the author was a woman with visual impairment who claimed she was subjected to discrimination on the basis of her disability because the public agency employer, Social Insurance Agency, failed to provide her reasonable accommodation in a recruitment procedure, and the domestic court gave insufficient consideration to alternatives that would allow her to do the tasks assigned to the post.

The author applied to the Social Insurance Agency to work as an investigator. After the interview, she was informed that since the Agency's internal computer system could not be adapted for her, she had not been considered for the post although she had the required competence and experience. Following several applications to relevant bodies, the domestic court concluded that the adaptation measures which the Agency would have had to adopt were not reasonable.[385]

Eventually, the author applied to the CRPD Committee and argued that the Agency did not adequately assess the possibility of taking adjustment measures and the Court's decision that found the possible adjustments not reasonable and proportionate was discriminatory. Also, she stated that the Court did not consider the benefits of the adjustment for any future employee with visual impairment.[386]

Although the CRPD Committee, by referring to the State Party's margin of appreciation when assessing the reasonableness and proportionality of accommodation measures, upheld that the domestic court thoroughly and objectively assessed the alternatives and concluded that the author's rights under Article 5 and 27 had not been violated, five CRPD Committee members issued a joint dissenting opinion (with another member concurred with this dissenting opinion). In their opinion they referred implicitly to the concept of the effectiveness of accommodation measures in the realisation of disability rights.[387] The dissenting Committee members

[384] Marie-Louise Jüngelin v. Sweden, Committee on the Rights of Persons with Disabilities, Communication No. 005/2011 (CRPD/C/12/D/5/2011), (2014), https://juris.ohchr.org/Search/Details/2006 (last visited Sep 1, 2019).
[385] *Id.* at para 2.8.
[386] *Id.* at para 3.3.
[387] BRODERICK, *supra* note 9 at 161.

stated that 'the reasonableness and proportionality of the measures of accommodation proposed must be assessed in the view of the context in which they are requested.[388] Since in this case, the accommodation was requested in a professional context, the test of reasonableness and proportionality has to ensure, *inter alia, that* (1) the measures of accommodation were requested to promote the employment of a person with disability who has the professional capacity and experience to perform the tasks; and (2) the public entity to which the candidate applied can reasonably be expected to adopt and implement accommodation measures.[389]

According to the dissenting opinion, the benefits of the adjustments for the future employees must also be taken into account while assessing the reasonableness and proportionality.[390] Also, the profile of the employer should have been considered more carefully, as the Social Insurance Agency was one of the State Party's main public institutions. Finally, they criticized the fact that the wage subsidies and assistance benefits, which the candidate and potential employer could have accessed should the candidate have been selected, had not been considered.[391] Thus, they considered that the domestic court's assessments of the requested accommodations resulted with a denial of reasonable accommodation, resulting in a de facto discrimination, and violations of Article 5 and 27.[392]

Although this view of the CRPD Committee was very insufficient in its reasoning, the dissenting opinion provides valuable insight into the criteria that should be used when assessing the reasonableness and proportionality of the requested accommodation. The effectiveness of the accommodation, taken into account the context that the reasonable accommodation is required (such as the professional context of this case), the profile and available resources of the duty-bearer, and the benefits of the accommodation for third parties in the future should be among the criteria when assessing the implementation of the reasonable accommodation duty.

In another case, *Michael Lockrey v. Australia*[393], the author was a person who was deaf and required real-time steno-captioning of formal communications in order to

[388] MARIE-LOUISE JÜNGELIN V. SWEDEN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 005/2011 (CRPD/C/12/D/5/2011), *supra* note 384 at Appendix para 4.
[389] *Id.* at Appendix para 4.
[390] *Id.* at Appendix para 5.
[391] *Id.* at Appendix para 5.
[392] *Id.* at Appendix para 6.
[393] Michael Lockrey v. Australia, Committee on the Rights of Persons with Disabilities, Communication No. 013/2013 (CRPD/C/15/D/13/2013), (2016), https://juris.ohchr.org/Search/Details/2143 (last visited Sep 1, 2019).

communicate with others. The Sheriff of New South Wales summoned the author to serve as a juror three times. Each time the author wrote to the Office of the Sheriff to request that steno-captioning of proceedings be provided to participate in the jury selection process and jury duty. His requests were rejected and he was advised to submit a medical certificate certifying that he was deaf or otherwise he would face a fine for failing to attend jury service. The author did not submit a medical certificate, as he did not consider himself incapable of performing jury duty. The Sheriff's office based the refusal to provide steno-captioning on the Jury Act 1977, considering that the introduction of a non-jury person in the deliberations room would be incompatible with the confidentiality of jury deliberations.

The author, before the CRPD Committee, argued, *inter alia*, that the refusal to permit steno-captioning constituted a violation of*, inter alia,* his right to non-discrimination under Articles 5 and 12.

Recalling the definition of 'reasonable accommodation' from Article 2 of the CRPD, the CRPD Committee stated that the state enjoys a certain margin of appreciation, as it did in the case of *Marie-Louise Jüngelin v. Sweden*. However, it went on to say that when assessing the reasonableness and proportionality of accommodation measures, it must ensure that 'such an assessment is made in a thorough and objective manner, covering all the pertinent elements, before reaching a conclusion that the respective support and adaptation measures would constitute a disproportionate or undue burden.'[394]

The CRPD Committee observed that the adjustments provided by the State party for people with hearing impairments would not enable the author to participate in a jury on an equal basis with others.[395] It noted that the State did not provide any data or analysis to demonstrate that the use of stenographers would constitute a disproportionate or undue burden, nor any argument justifying that no adjustment, such as a special oath before a court, could be made to enable the person assisting with steno-captioning to perform his or her functions without affecting the confidentiality of the jury deliberations.[396] Therefore, the CRPD Committee concluded that the State party had not taken the necessary steps to ensure reasonable accommodation for the author and concluded that the refusal to provide steno-

[394] *Id.* at para 8.4.
[395] *Id.* at para 8.5.
[396] *Id.* at para 8.5.

captioning, without thoroughly assessing whether that would constitute a disproportionate or undue burden, amounted to disability based discrimination. It therefore found violations of, *inter alia*, Article 5 (1) and (3) of the CRPD.

The CRPD Committee reemphasized the 'effectiveness' of reasonable accommodations in allowing participation of the disabled person in the activity concerned here.[397] It considered that the adjustments provided by the State for people with hearing impairments did not enable the author to participate in a jury on an equal basis with others. As such, it failed the effectiveness criteria. Another important clarification that the CRPD Committee provided was that once a State considers an accommodation as an undue burden, it has to provide data or analysis to justify its position.

In a similar case, *Gemma Beasley v. Australia*[398]*,* the author was deaf who required Australian Sign Language (Auslan) interpreting of formal communications in order to communicate with others. The Sheriff of New South Wales summoned her to serve as a juror before the Supreme Court of New South Wales. After the author had contacted the Sheriff's office and explained that she was deaf and would require an Auslan interpreter to participate in the jury selection process and jury duty, the Sheriff's officer advised that such support could not be provided,

Before the CRPD Committee, the author complained that the refusal to permit Auslan interpretation constitutes a violation of, *inter alia*, her right to access to the support she needed to exercise her legal capacity to perform jury duty pursuant to Article 12 (3) of the CRPD and her right to non-discrimination under Articles 5 and 12.

In this case, which is quite similar to the *Lockrey* case, the CRPD Committee emphasized the 'effectiveness' of the reasonable accommodation again, by stating that the adjustments provided by the State party for people with hearing impairments would not enable the author to participate in a jury on an equal basis with others.[399] It also noted that the State did not provide any data or analysis to demonstrate that the use of Auslan interpreters would constitute a disproportionate or undue burden.[400]

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[397] ANDREA BRODERICK, *Working Report on Reasonable Accommodation under the CRPD: The Georgian Context* 38 (2017), http://ewmi-prolog.org/images/files/5816RepotonReasonableAcommodationinGeorgiaENG.pdf (last visited Sep 2, 2019).
[398] Gemma Beasley v. Australia, Committee on the Rights of Persons with Disabilities, Communication No. 011/2013 (CRPD/C/15/D/11/2013), (2016), https://juris.ohchr.org/Search/Details/2142 (last visited Sep 1, 2019).
[399] *Id.* at para 8.5.
[400] *Id.* at para 8.5.

It also stated the State did not provide any argument justifying that no adjustment, such as a special oath before a court, could be made to enable the Auslan interpreter to perform his/her functions without affecting the confidentiality of the deliberations of the jury.[401] Finding that the State party had not taken the necessary steps to ensure reasonable accommodation for the author and concluding that the refusal to provide Auslan interpretation, without thoroughly assessing whether it would constitute a disproportionate or undue burden, amounted to disability-based discrimination; it found violations of, *inter alia*, Article 5 (1) and (3) of the CRPD.

In another case, *J.H. v. Australia*[402], where the facts were identical to *Gemma Beasley*, the CRPD Committee reaffirmed the above-mentioned criteria with respect to the effectiveness of the reasonable accommodation and the State obligation to provide data or analysis to prove that the requested accommodation would impose an undue burden.

The case of *Fiona Given v. Australia*[403] concerns a person who had cerebral palsy and, as a result, had limited muscle control and dexterity and no speech. She used an electric wheelchair for mobility and an electronic synthetic speech-generating device for communication.

In the federal elections, she wanted to vote by secret ballot on an equal basis with other electors. To be able to do this, the author required access to an electronic voting system, but under the Electoral Act, this option was available only to persons with visual impairments. In the absence of an electronic voting facility, she opted to exercise her right as a person with physical disabilities to request the assistance of the polling booth's presiding officer in marking the ballot papers according to her instructions, folding them and depositing them in the ballot box. However, the presiding officer refused the author's request for assistance and directed the author to obtain assistance from her attendant.

Before the CRPD Committee, the author argued that the State party had violated her rights to participation in political and public life under Article 29, read alone and in conjunction with articles 4, 5 and 9 of the CRPD.

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[401] *Id.* at para 8.5.
[402] J.H. v. Australia, Committee on the Rights of Persons with Disabilities, Communication No. 035/2016 (CRPD/C/20/35/2016), (2018), https://juris.ohchr.org/Search/Details/2512 (last visited Sep 1, 2019).
[403] Fiona Given v. Australia, Committee on the Rights of Persons with Disabilities, Communication No. 019/2014 (CRPD/C/19/D/19/2014), (2018), https://juris.ohchr.org/Search/Details/2393 (last visited Sep 1, 2019).

The CRPD Committee firstly restated the principles with respect to the accessibility duty. It found that the failure to provide the author with access to an electronic voting platform already available in the State party, without providing her with an alternative that would have enabled her to cast her vote secretly[404], resulted in a denial of her rights to participation in political and public life, under article 29 (a) (i) and (ii), read alone and in conjunction with articles 5 (2), 4 (1) (a), (b), (d), (e) and (g) and 9 (1) and (2) (g) of the CRPD.

Notwithstanding the CRPD Committee's reference to accessibility duty, the substance of the decision appears to relate to the duty of reasonable accommodation. The CRPD Committee stated that none of the options available to the author in the federal election could have enabled her to exercise her right to vote in the way she wanted, namely without having to reveal her political choice to the person accompanying her.[405] It further noted that the State party had not provided 'any information that could justify the claim that the use of such an electronic voting option would have constituted a disproportionate burden, so as to prevent its use in the 2013 federal election for the author and for all persons requiring such accommodation'.[406] The referral to the 'disproportionate burden' is not compatible with the accessibility duty as it is unconditional.

In the most recent decision of the CRPD Committee, *V.F.C. v. Spain*[407], the case concerned a policeman who had a traffic accident that left him with a permanent motor disability. The Ministry of Labour and Immigration declared that his status was one of 'permanent disability for the performance of his occupation'. Due to this finding, he was required to take mandatory retirement and was expelled from the local police force.

Based on the rules of the Autonomous Community of Catalonia, the author requested to be assigned to a 'modified duty'. Barcelona City Council denied the author's application on the basis of the modified-duty regulations of the Barcelona municipal police (ordinance) whereby persons who have taken mandatory retirement as a result of 'permanent total disability' are not allowed to undertake a modified-duty assignment. The author's subsequent appeals were unsuccessful.

[404] *Id.* at paras 8.4 and 8.7.
[405] *Id.* at para 8.7.
[406] *Id.* at para 8.9.
[407] V.F.C. v. Spain, Committee on the Rights of Persons with Disabilities, Communication No. 034/2015 (CRPD/C/21/D/34/2015), (2019), https://juris.ohchr.org/Search/Details/2515 (last visited Sep 1, 2019).

The author complained before the CRPD Committee that the State discriminated against him by forcing him to retire and refusing to assign him to modified duty on the grounds of his 'permanent total disability' which was a status not determined on the basis of a medical examination. He also claimed that the State had failed to promote the employment of persons with disabilities in the public sector and to promote their integration.

In addition to emphasising the importance of the obligation on duty-bearers to create a dialogue with the individuals with disabilities in the process of finding solutions to better realize their rights; the Committee also noted that while assessing the relevance, suitability and effectiveness of reasonable accommodation, factors such as financial costs, available resources, size of the accommodating party, the effect of the modification on the institution and the overall assets, rather than just the resources of a unit within an organizational structure must be taken into account.[408]

The CRPD Committee also considered that, since creating a dialogue for the purpose of evaluating the author's capacities within the police force was completely ruled out by depriving him from his status as a public servant upon his mandatory retirement, he had no opportunity to request 'reasonable accommodation that would have enabled him to perform modified duties.'[409] Thus, the CRPD Committee noted that the State had failed to show that other types of duties that the author might have been able to perform were not available within the police force.[410]

The CRPD Committee emphasized that in determining which reasonable accommodation measures to adopt, the State must ensure that the effective adjustments are identified to enable the employee to carry out his or her key duties.[411] If such effective measures, which do not impose an undue burden, cannot be identified; the assignment of the employee to a modified duty should be considered as the last resort measure.[412]

As under the modified-duty regulations of the Barcelona municipal police it was not possible for any person whose status was determined as 'permanent total disability' to be assigned to modified duty and such determination did not include an analysis of

[408] *Id.* at para 8.6.
[409] *Id.* at para 8.6.
[410] *Id.* at para 8.6.
[411] *Id.* at para 8.7.
[412] *Id.* at para 8.7.

the author's potential, the Committee found that these rules under which the author was prevented from undertaking a modified-duty assignment or entering into a dialogue aimed at enabling him to carry out alternative tasks of police work contravened the rights enshrined in articles 5 and 27 of the CRPD.[413]

It is quite evident from this last decision that the CRPD Committee's understanding of the concept of the reasonable accommodation duty is much clearer now. It has developed a better framework for analysing whether the State parties fulfil their reasonable accommodation duties. However, the CRPD Committee's statement in this case with respect to the assessment of the relevance, suitability and effectiveness of reasonable accommodation seems contradict its previous statements. In its General Comment No. 6, the CRPD Committee stated that 'reasonableness' should not act as a distinct qualifier to the duty, rather, it is a reference to its relevance, appropriateness and effectiveness for the person with a disability.[414] However, in this case the CRPD Committee mentioned factors like the financial cost and available resources as criteria to assess the relevance, suitability and effectiveness, in other words the 'reasonableness' of the accommodation. I do not regard this as a change in the CRPD Committee's approach, rather, it seems to me as a conceptual confusion which does not lend itself to a substantive change in the CRPD Committee's application of the reasonable accommodation duty. Therefore we should read the factors -such as financial costs, available resources, size of the accommodating party, the effect of the modification on the institution and the overall assets- as important criteria that must be taken into account under the proportionality test, when assessing whether the accommodation imposes an undue or disproportionate burden.

Finally, the CRPD Committee's focus on the importance of creating a dialogue with the persons with disabilities while finding the effective accommodation is also worth noting as it demonstrates the importance of a participatory process during the process of accommodating the needs of persons with disabilities.

2. Views on Accessibility

[413] *Id.* at para 8.10.
[414] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 25.

The case of *Nyusti and Takács v. Hungary*[415] concerned inaccessible ATMs of OTP Bank, which lacked Braille fonts, audible instructions and voice assistance. The applicants were persons with visual impairments and had separate contracts for private account services with OTP. They argued that even though they had to pay the same level of fees as other clients, they were denied access on an equal basis with others to the use of their banking services and transactions.

The authors' initial complaint to OTP had focused on the lack of reasonable accommodation, i.e. failure by the bank to provide for individual measures by retrofitting some of its ATMs in the proximity of the authors' homes in order to adjust the banking services to the authors' needs.[416] However, the authors' civil actions before the domestic courts and their communication before the CRPD Committee raised a broader claim, i.e. the lack of accessibility for persons with visual impairments to the entire network of ATMs operated by the bank. Ultimately, the Committee decided to examine the totality of the authors' claims under the CRPD provision on accessibility, Article 9, not under Article 5 on equality and non-discrimination that refers to reasonable accommodation.[417]

Having taken note of the State party's measures referring to the gradual achievability of the accessibility of ATMs, the CRPD Committee considered that none of those measures had ensured the accessibility to the banking card services provided by OTP ATMs for the authors and persons in a similar situation, in violation of Article 9.

Although the CRPD Committee found a violation of Article 9 on accessibility and did not examine the communication under Article 5, this communication's significance, for the purposes of this thesis, is the fact that the CRPD Committee revealed an important aspect of the reasonable accommodation duty, which gave rise to many discussions during the preparation of the CRPD. By distinguishing between general accessibility and reasonable accommodation, the Committee made clear that the duty to reasonably accommodate is an individualized concept in the sense that it should address the individual's specific need for accommodation in her or his circumstances.

[415] Nyusti and Takács v. Hungary, Committee on the Rights of Persons with Disabilities, Communication No. 001/2010 (CRPD/C/9/D/1/2010), (2013), https://juris.ohchr.org/Search/Details/1986 (last visited Sep 1, 2019).
[416] *Id.* at para 9.2.
[417] *Id.* at para 9.2.

In a similar case, *F. v. Austria*[418], a person with a visual impairment, who used public transportation for his daily activities, particularly tram line 3 of the city of Linz, which was managed by Linz Linien GmbH argued that the lack of the audio system at the tram stops prevented him from accessing the information that was only visually available, amounting to discrimination as it deprived him of using the public transportation on an equal basis with others, in violation of Articles 5 and 9 of the CRPD.

The CRPD Committee noted that none of the new stops was equipped with the digital audio system, although the system was known to the service providers and it could have been installed at limited cost during the initial construction of the extension to Line 3.[419] It would have enabled immediate access to real-time information to persons with visual impairments on an equal basis with others while the existing alternatives, namely, different applications accessible through the Internet and by mobile telephone and the line message system, do not.[420] Therefore, the non-installation of the audio system when extending the tram network, 'resulted into a denial of the access to information and communication technologies and to facilities and services open to the public on an equal basis with others, and therefore amounts to a violation of Articles 5 (2); and 9 (1) and (2) (f) and (h) of the CRPD'.[421]

This decision lacks a proportionality or reasonableness analysis because the requested measure was about an installation of an audio system from the beginning of the construction of a railway. As such, it invoked the accessibility duty in the Article 9 of the CRPD. This case again demonstrates the difference between the duty of reasonable accommodation and general accessibility as the CRPD Committee, by referring to its General Comment No. 2, recalled that accessibility is an *ex ante* duty, therefore, the states have the duty to provide accessibility before receiving an individual request.[422] It also noted that the obligation to implement accessibility is unconditional, meaning the entity is obliged to provide accessibility cannot excuse its

[418] F. v. Austria, Committee on the Rights of Persons with Disabilities, Communication No. 021/2014 (CRPD/C/14/D/21/2014), (2015), https://juris.ohchr.org/Search/Details/2087 (last visited Sep 1, 2019).
[419] *Id.* at para 8.7.
[420] *Id.* at para 8.7.
[421] *Id.* at para 8.7.
[422] *Id.* at para 8.4.

omission by referring to the burden of providing access for persons with disabilities.[423]

The case of *Bacher v. Austria*[424] concerns a person,, who was on the autism spectrum and occasionally needed a wheelchair. The house in which he lived was only accessible by a footpath, which would become particularly dangerous for Mr. Bacher and the persons who would help him when it rained, snowed or hailed. As he grew, his parent became unable to carry him and decided to build a roof over the path to protect it from bad weather. Planning permission was granted by the local authority for such a roof, with the agreement of the immediate neighbors within 15 metres of the place of the construction.

Later, another neighbor, Mr. R sued Mr. Bacher's parents before the District Court, claiming that the roof had reduced the width of the path, and its height violated his right of way. Upon the District Court's order, the roof was removed. Mr. Bacher's family appealed the decision to no avail.

Before the CRPD Committee, the author, Mr. Bacher's sister, claimed, *inter alia*, that Mr. Bacher's right to be treated with respect and dignity and to participation and inclusion had been systematically ignored and his right to accessibility had been violated by the courts through their decisions that prevented his family from taking the measures necessary to protect the path and enable its safe use.

The CRPD Committee noted that the domestic courts did not make a thorough analysis of the special needs of Mr. Bacher and the authorities instead considered that the subject matter of the judicial proceedings had nothing to do with the rights of persons with disabilities and focused on the resolution of the property rights issue at stake.[425] By ignoring the multidimensional consequences of the decisions adopted by State party's authorities on the accessibility rights of Mr. Bacher, the CRPD Committee considered that the State party had violated Article 9, read alone and in conjunction with Article 3 of the CRPD.

Like *F. v. Austria* case, this case also lacks a reasonableness or proportionality analysis as the measures concerned should have been taken under the accessibility

[423] *Id.* at 8.4.
[424] Bacher v. Austria, Committee on the Rights of Persons with Disabilities, Communication No. 026/2014 (CRPD/C/19/D/26/2014), (2018), https://juris.ohchr.org/Search/Details/2394 (last visited Sep 1, 2019).
[425] *Id.* at para 9.9.

duty of the State which is unconditional, and not subject to an undue burden defence.

3. Views on Specific Measures

In *Liliane Gröninger et al. v. Germany*[426], the author submitted the communication on behalf of her son, her husband and herself. Her son was a person with a disability. She alleged that the provisions of the social legislation, which related to granting an integration subsidy were discriminatory because they were applicable only to persons with disabilities whose full working capacity might be restored within 36 months and they created no rights for the person with disabilities. Furthermore, only employers had the right to claim the subsidy and the way in which the employment agencies used discretion was in implementing those provisions by led to further discrimination.

The CRPD Committee noted that the scheme in practice required employers to go through an additional application process, the duration and the outcome of which were not certain, and that the person with disabilities had no possibility to take part in the process.[427] It described this policy as corresponding to the 'medical model of disability', because it tended to consider disability 'as something that is transitional and that, in consequence, can be "surpassed or cured" with time'[428]. Therefore it found this policy inconsistent with the general principles in Article 3.

The CRPD recalled Article 3 which, 'establishes that in its legislation, policies and practice the State party should be guided by respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; non-discrimination; full and effective participation and inclusion in society; and equality of opportunity'.[429] Accordingly, the CRPD Committee considered that the existing model for the provision of integration subsidies had not effectively promoted the employment of persons with disabilities, particularly because of the apparent difficulties faced by potential employers when trying to gain access to the subsidy.[430] It concluded that the administrative complexities which put the person with disability into a disadvantageous position, resulting with indirect discrimination,

[426] Liliane Gröninger et al. v. Germany, Committee on the Rights of Persons with Disabilities, Communication No. 002/2010 (CRPD/C/D/2/2010), (2014), https://juris.ohchr.org/Search/Details/2005 (last visited Sep 1, 2019).
[427] *Id.* at para 6.2.
[428] *Id.* at para 6.2.
[429] *Id.* at para 6.2.
[430] *Id.* at para 6.2.

had violated his rights under, *inter alia*, Article 27, paragraph 1 (h), read together with Article 3 (a), (b), (c) and (e), Article 4, paragraph 1 (a) and Article 5, paragraph 1.

This case has not been dealt under the reasonable accommodation duty. However, it is important to note that the CRPD Committee made its assessment based on the general principles of the CRPD, such as the inherent dignity and individual autonomy of persons, full and effective participation and equality of opportunity. Importantly, the CRPD Committee factored in the apparent difficulties faced by potential employers in acquiring the subsidy while making an assessment of the effectiveness of the integration subsidy measure.

In the case of *A.F. v. Italy*[431], the author was a person who had Gaucher's disease since childhood and a permanent 50 per cent physical impairment, registered at the unemployment office. According to the Law No. 68/1999 of Italy, public employers with a workforce of more than fifty employees had to ensure that at least 7 percent of their workforce was people who were registered as disabled. Moreover, public employers were encouraged to reserve up to half of the positions to be filled through competitive exams for registered persons with disabilities.

Among other competitive examinations, the author sat an exam at the University of Modena and Reggio Emilia for a scientific technician position and ranked third. However, as only one position was to be filled, A.F. was not recruited. After his application to the Administrative Court was rejected, he appealed the decision to the Council of State which observed that the 50 per cent reserve quota for persons with disabilities did not apply to all public competitive examinations. Instead, it aimed to reach a general quota of persons with disabilities working in public entities. The Council of State also stated that the University had not failed to respect the 50 per cent reserve quota since 50 per cent of one post equalled zero.

The author argued before the CRPD Committee that his rights under Article 27 of the CRPD had been breached, as the examination did not comply with the 50 per cent quota to be reserved for persons with disabilities. He also pointed out that the widespread practice of opening competitive examinations for a single position enabled public employers to avoid the 50 per cent quota prescribed by law. He also

[431] A.F. v. Italy, Committee on the Rights of Persons with Disabilities, Communication No. 009/2012 (CRPD/C/13/D/9/2012), (2015), https://juris.ohchr.org/Search/Details/2008 (last visited Sep 1, 2019).

observed that most public competitive examinations that are open to persons with disabilities are for administrative rather than technical positions.

The CRPD Committee, in its relatively brief view, highlighted the State obligations under Article 27 and found that, 'the author did not provide any element which would enable the Committee to conclude that the provisions of the national legislation and its application amounted to a violation of his individual rights under the Convention'.[432] It considered that the Council of State had 'thoroughly and objectively' assessed all elements of the case and there was no evidence that this decision was 'manifestly arbitrary or amounted to a denial of justice', therefore it found no violation of Article 27 CRPD.[433]

The CRPD and Article 27 require States to take general measures to stimulate the employment of persons with disabilities, including employing people with disabilities in the public sector and promoting their employment opportunities and career advancement in the labour market. However, in this case, the CRPD Committee did not discuss the relationship of between these general group-based measures, some of which might involve positive action, with the CRPD provisions that provide for individual rights, including the prohibition of discrimination.[434] While initially this case may not seem likely to reveal the problems regarding the structural discrimination faced by persons with disabilities, the authors' argument that most of the competitive examinations were only for administrative, rather than technical positions, for persons with disabilities warranted greater examination. Unfortunately, the CRPD Committee failed to address the structural discrimination aspect of the issue, although the author's arguments 'provided enough entry points for the CRPD Committee to discuss such matters'.[435]

As rightly suggested by Waddington, while the author may have never been the best candidate in any exam, and therefore have legitimately been excluded from the recruitment, the overall conditions of the education and work preparation persons with disabilities receive in the country might have been of a lesser quality than that

[432] *Id.* at para 8.5.
[433] *Id.* at para 8.5.
[434] Lisa Waddington, *Positive Action Measures and the UN Convention on the Rights of Persons with Disabilities*, INT. LABOR RIGHTS CASE LAW BRILLNIJHOFF (2016), https://cris.maastrichtuniversity.nl/ws/files/5265994/CRPD_Comm_AF_v_Italy_final_SSRN.docx.
[435] *Id.*

available to persons without disabilities, resulting in a continual disadvantage when compared to non-disabled candidates.[436]

This case demonstrates the limitations of the duty of reasonable accommodation for ESC rights adjudication where the case concerns failures of adopting general measures. Although the duty of reasonable accommodation, which is restated in Article 27 of the CRPD with respect to the right to work and employment, confers individual rights, 'it is doubtful that individuals can base claims on the (Article 27) obligations that relate to disability policy or positive action more generally'[437], where a *prima facie* failure to reasonably accommodate can not be established.

4. Remedies

The remedies concerning cases, where the CRPD Committee found a violation of the duty of reasonable accommodation, were specific and directed at the individual requested the accommodation. For instance, in *H.M. v. Sweden,* the CRPD Committee recommended the State party to reconsider her application for a building permit for a hydrotherapy pool.[438] Similarly, in *Lockrey* and *Gemma Beasley* cases, the CRPD Committee noted that the State parties were under an obligation to enable the applicants' participation in jury duty, providing them with reasonable accommodation in the form of steno-captioning or Auslan interpretation in a manner that respects the confidentiality of proceedings, at all stages of jury selection and court proceedings.[439]

In *Fiona Given* case, the CRPD Committee again recommended the State to ensure that the author has access to voting procedures and facilities that would enable her to vote by secret ballot without having to reveal her voting intention.[440] Similarly in *V.F.C. v. Spain,* the CRPD Committee recommended the State party take measures to 'ensure that the author is given the opportunity to undergo an assessment of fitness for alternative duties for the purpose of evaluating his potential to undertake modified

[436] *Id.*
[437] *Id.*
[438] H.M. V. SWEDEN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 3/2011, (CRPD/C/7/D/3/2011), *supra* note 373 at para 9.
[439] MICHAEL LOCKREY V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 013/2013 (CRPD/C/15/D/13/2013), *supra* note 393 at para 9; GEMMA BEASLEY V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 011/2013 (CRPD/C/15/D/11/2013), *supra* note 398 at para 9.
[440] FIONA GIVEN V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 019/2014 (CRPD/C/19/D/19/2014), *supra* note 403 at para 9.

duties or other complementary activities, including any reasonable accommodation that may be required.[441]

In all these cases where the CRPD Committee found a violation of the duty of reasonable accommodation, the CRPD Committee provided a road map in the remedies sections of its Views for the State Parties as to how to take measures to correct the wrongdoings.

However, in cases related to obligations other than the duty of reasonable accommodation, such as accessibility, the remedies sections are more of a generalized and vague nature, only recommending States to remedy the lack of accessibility in general.[442]

In *Gröninger et al. v. Germany,* a case concerning special measures, the CRPD Committee similarly noted that the State party was under 'an obligation to remedy its failure to fulfil its obligations...including by reassessing his case and applying all measures available under domestic legislation in order to effectively promote employment opportunities.'[443]

The cases examined by the CRPD Committee so far demonstrate us that when it comes to remedying a violation of reasonable accommodation duty, it provides a detailed remedies section explaining what is required from the state as its primary focus is the right holder individual. However, in cases where there are violations of other obligations, such as accessibility, the CRPD Committee does provide more general recommendations, albeit rather in vague terms.

In the following chapter, I will provide a review of the criteria the CRPD Committee has provided to date when assessing state measures, particularly under the duty of reasonable accommodation. I will then compare it to the criteria used in the CESCR Committee's reasonableness standard of review to better reflect on the differences as well as opportunities for cross-fertilization between the two UN treaty bodies, including a comparison between their remedial aspects.

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[441] V.F.C. v. Spain, Committee on the Rights of Persons with Disabilities, Communication No. 034/2015 (CRPD/C/21/D/34/2015), *supra* note 407 at para 9.

[442] Nyusti and Takács v. Hungary, Committee on the Rights of Persons with Disabilities, Communication No. 001/2010 (CRPD/C/9/D/1/2010), *supra* note 415 at para 10; F. v. Austria, Committee on the Rights of Persons with Disabilities, Communication No. 021/2014 (CRPD/C/14/D/21/2014), *supra* note 418 at para 9; Bacher v. Austria, Committee on the Rights of Persons with Disabilities, Communication No. 026/2014 (CRPD/C/19/D/26/2014), *supra* note 424 at para 10.

[443] Liliane Gröninger et al. v. Germany, Committee on the Rights of Persons with Disabilities, Communication No. 002/2010 (CRPD/C/D/2/2010), *supra* note 426 at para 7.

V. Opportunities for Cross-Fertilisation between the Jurisprudences of the CRPD and the CESCR Committees

The reasonable accommodation duty, and the obligation of progressive realization of ESC rights have different objectives. The reasonableness standard of the CESCR Committee concerns the implementation of ESC rights in general and the duty to provide reasonable accommodation in the CRPD relates to the prohibition of discrimination against persons with disabilities. Notwithstanding this difference, both obligations reflect the needs and interests of persons with disabilities on the one hand and the needs and interests of duty-bearers on the other, including resource limitations and other non-financial considerations.[444]

Throughout the previous chapters, I have examined the criteria the CRPD Committee has provided with respect to the assessment of states' compliance with the principles enshrined in the CRPD, particularly with the duty of reasonable accommodation. I will now examine those criteria under separate headings, followed by 'Remedies' section, to provide a better comparison to the CESCR Committee's reasonableness standard of review to demonstrate their differences and their potential to develop a better ESC rights adjudication mechanism with opportunities for cross-fertilization between each other.

A. Equality Considerations

It is obvious that the basis of the duty of reasonable accommodation is the concern about equality for persons with disabilities. As the CRPD Committee stated, while assessing the implementation of the duty of reasonable accommodation, it must be ensured that the reasonable accommodation is suitable to achieve the essential objective of the promotion of equality and the elimination of discrimination against persons with disabilities.[445] Therefore, in order to determine the reasonableness of measures adopted under the duty of reasonable accommodation, the object and

[444] Andrea Broderick, *Harmonisation and Cross-Fertilisation of Socio-Economic Rights in the Human Rights Treaty Bodies: Disability and the Reasonableness Review Case Study*, 5 LAWS 38, 2 (2016).
[445] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 26.

purpose of the duty itself, promotion of equality and elimination of discrimination, should be considered.[446]

It should also be recalled that, apart from the general duty of reasonable accommodation duty in Article 5, many CRPD rights also fall under the traditional category of ESC rights that contain specific reasonable accommodation requirements, which brings an immediacy into the realization of those rights, though limited with the individualized context of the accommodation. This convergence of the equality principle with the ESC rights, in itself, may provide an important key to advancing ESC rights adjudication.[447] This aspect of the reasonable accommodation is also in line with the CRPD Committee's definition of 'inclusive equality model' that embraces a fair redistributive dimension to address socioeconomic disadvantages.[448]

In all cases in which the CRPD Committee found a violation of the duty of reasonable accommodation, the equal enjoyment of the right in question was paramount. In examining the equal enjoyment of the right, the CRPD Committee did not focus on comparative concepts of sameness or differences from the 'normal'. It did not require a comparison between the persons with disabilities and 'others' but simply focused on the effective enjoyment of rights by persons with disabilities in a way they wanted, within the limits of undue burden test. Unlike the cases where the CESCR Committee found indirect discrimination, *Trujillo Calero v. Ecuador S.C.* and *G.P. v. Italy,* the CRPD Committee cases concerning the duty of reasonable accommodation has sought to address the socioeconomic disadvantages faced by persons with disabilities without referring to a 'normal' way of the enjoyment of the right in question.

As Bribosia and Rorive stated, indirect discrimination generally 'enables a determination of whether a provision, criterion or practice has a discriminatory character. Should this be the case, such a provision, criterion or practice must be abandoned and replaced by a new, non-discriminatory, generally applicable measure.'[449] This was indeed the case, e.g., in *Trujillo Calero v. Ecuador*, where the CESCR Committee recommended the State 'to take relevant special legislative and/or administrative measures to ensure that in practice men and women enjoy the right to social security, including access to a retirement pension, on a basis of equality,

[446] BRODERICK, *supra* note 9 at 162.
[447] *Id.* at 221.
[448] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 11.
[449] BRIBOSIA AND RORIVE, *supra* note 333 at 38.

including measures to eliminate the factors that prevent women engaged in unpaid domestic work from contributing to social security schemes'.[450]

However, what we have observed in the CRPD Committee's jurisprudence on the duty of reasonable accommodation is that the CRPD Committee has required the adoption of concrete positive measures to remove the disadvantage experienced by the person with disabilities.

Therefore, I believe the inclusive equality enshrined in the duty of reasonable accommodation in the CRPD can help strengthen the protection of ESC rights of the vulnerable people under the CESCR Committee's procedure.

B. Effectiveness of the Measures

There is a balancing act inherent in the CRPD's duty of reasonable accommodation, which comprises of two constituent parts.[451] The first part, concerning the interests of the persons with disabilities, imposes a positive obligation to provide a reasonable accommodation, which is reasonable, in other words, necessary and appropriate.

The CRPD Committee stated that the term 'reasonable' in the definition is not an exception clause or a means by which the costs of accommodation or the availability of resources can be assessed. Instead, it is a reference to its relevance, appropriateness and effectiveness for the person with a disability.[452]

The CRPD Committee, starting with its very early jurisprudence on reasonable accommodation, has elaborated on the effectiveness element. In H.M. v. Sweden, the CRPD Committee based its reasoning on the fact that the only effective way to meet the author's health needs was her access to a hydrotherapy pool at home.[453]

Although the *Gröninger* case does not involve the duty of reasonable accommodation, the CRPD Committee made a similar assessment and concluded that the provision of integration subsidies had not effectively promoted the employment of persons with disabilities due to the apparent difficulties faced by potential employers in acquiring

[450] TRUJILLO CALERO V. ECUADOR, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 010/2015 (E/C.12/63/D/10/2015), *supra* note 270 at para 23.
[451] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 25.
[452] *Id.* at para 25.
[453] H.M. V. SWEDEN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 3/2011, (CRPD/C/7/D/3/2011), *supra* note 373 at para 8.5.

the subsidy that acted as a deterrent for the employability of persons with disabilities.[454]

In the dissenting opinion of the *Jüngelin v. Sweden* case, the effectiveness element was referred to implicitly[455]; 'the reasonableness and proportionality of the measures of accommodation proposed must be assessed in the view of the context in which they are requested.'[456] The dissenting members considered the measures ineffective, as they should have promoted the employment of a person with disability who had the professional capacity and experience to perform the tasks.[457]

In *Lockrey, Gemma Beasley and J.H.* cases, the CRPD Committee also referred to the effectiveness of the accommodation and considered that the adjustments provided by the State for people with hearing impairments did not enable the authors to participate in a jury on an equal basis with others, which resulted in a failure at the effectiveness criteria.[458] In *Fiona Given v. Australia*, the CRPD Committee again made an effectiveness assessment with respect to options available to the author in the federal election and concluded that none of them could have enabled her to exercise her right to vote in the way she wanted, namely without having to reveal her political choice to the person accompanying her.[459]

Lastly, it should be noted from the CRPD Committee's decision in *V.F.C. v. Spain* that for an accommodation measure to be effective, it must enable the employee to carry out his or her key duties in deciding which reasonable accommodation measures to adopt.[460]

As the case analysis above demonstrates, there is a quite well-established effectiveness criteria in the CRPD Committee's jurisprudence. Based on that, for an accommodation measure to be effective, it should enable the right holder to enjoy his or her right in question fully, on an equal basis with others (e.g. without having to

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[454] LILIANE GRÖNINGER ET AL. V. GERMANY, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 002/2010 (CRPD/C/D/2/2010), *supra* note 426 at para 6.2.
[455] BRODERICK, *supra* note 9 at 161.
[456] MARIE-LOUISE JÜNGELIN V. SWEDEN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 005/2011 (CRPD/C/12/D/5/2011), *supra* note 384 at para 4.
[457] *Id.* at Appendix para 4.
[458] MICHAEL LOCKREY V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 013/2013 (CRPD/C/15/D/13/2013), *supra* note 393 at para 8.5; GEMMA BEASLEY V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 011/2013 (CRPD/C/15/D/11/2013), *supra* note 398 at para 8.5.
[459] FIONA GIVEN V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 019/2014 (CRPD/C/19/D/19/2014), *supra* note 403 at para 8.7.
[460] V.F.C. V. SPAIN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 034/2015 (CRPD/C/21/D/34/2015), *supra* note 407 at para 8.7.

reveal political choice to others while voting or without having to work in a way inconsistent with the profession).

On the other hand, it should be recalled that the CESCR Committee in its authoritative statement outlining criteria pertinent to whether measures taken by States to fulfil ESC rights are 'adequate' or 'reasonable', asserted that a relevant consideration is whether the State adopted the option that least restricts ICESCR rights, in circumstances where several options are available.[461] The CESCR Committee confirmed this understanding of the term 'appropriate measures' as meaning measures resulting in the effective implementation of rights in its General Comment No. 9.[462]

However, beside these statements, there is not much clarification in the jurisprudence of the CESCR Committee with respect to the effectiveness criteria. Therefore the CRPD Committee's elaboration can help improve the reasonableness standard of review under the CESCR with respect to the 'effectiveness' component.

C. Dignity Considerations

The CRPD Committee stated the following, among others, as comprising the content of inclusive equality;

> -a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society, and
> -an accommodating dimension to make space for difference as a matter of human dignity.[463]

The CRPD Committee also stated that 'reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account.'[464]

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[461] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AN EVALUATION OF THE OBLIGATION TO TAKE STEPS TO THE "MAXIMUM OF AVAILABLE RESOURCES" UNDER AN OPTIONAL PROTOCOL TO THE COVENANT (E/C.12/2007/1), *supra* note 238 at para 8d.
[462] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9, The domestic application of the Covenant*, para 2 (1998).
[463] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 11.
[464] UN Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Accessibility*, CRPD/C/GC/2, para 26 (2014).

We see the implementation of these dignity considerations in every CRPD case either directly or indirectly. In Gröninger et al. v. Germany, for example, the CRPD Committee made its assessment based on the general principles of the CRPD, - including inherent dignity and individual autonomy of persons, full and effective participation and equality of opportunity- in a way resembled to the assessment under the duty of reasonable accommodation.[465]

In *Fiona Given,* the CRPD Committee's assessment of the denial of access to an electronic voting platform as an accommodation measure for a person with disabilities also took into account the way the author wanted to enjoy her right to vote, as a priority, putting the human dignity and equal opportunity concerns at the centre of its assessment.[466]

The requirement of reasonable accommodation under the CRPD communication procedure has focused on the equal worth of all human beings and their entitlement to enjoy their rights on an equal basis with others.

On the other hand, the CESCR Committee has acknowledged, in its General Comment 5, that all services for persons with disabilities 'should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity'[467]

In *Ben Djazia et al v. Spain* case, the CESCR Committee has taken into account the vulnerability of the persons and affirmed that there is a higher threshold for states to justify the reasonableness of their measures when the question is about the protection of particularly vulnerable groups. It further stated that when an eviction is justified, the relevant authorities must ensure that it is carried out in accordance with legislation that is compatible with the ICESCR, including the principle of human dignity contained in the preamble, in accordance with the general principles of reasonableness and proportionality.[468]

In considering the justifications of the State regarding the lack of access to alternative housing, the CESCR Committee noted that the arguments of the State were

[465] LILIANE GRÖNINGER ET AL. V. GERMANY, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 002/2010 (CRPD/C/D/2/2010), *supra* note 426 at para 6.2.
[466] FIONA GIVEN V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 019/2014 (CRPD/C/19/D/19/2014), *supra* note 403 at para 8.7.
[467] UN Committee on Economic, Social and Cultural Rights, *supra* note 336 at para 34.
[468] BEN DJAZIA ET AL V. SPAIN, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, COMMUNICATION NO. 005/2015 (E/C.12/61/D/5/2015), *supra* note 259 at para 13.4.

insufficient to demonstrate that it had made all possible effort, using all available resources, to realize the right to housing of persons who, like the authors, were in a situation of dire need.[469] Therefore, in *Ben Djazia et al v. Spain,* the CESCR Committee, quite similarly to the South African Court's reasoning in *Grootboom* decision, focused on the 'urgency of needs' of vulnerable people within its dignity considerations.[470]

This 'urgency of the needs' aspect of the human dignity considerations that exist in the CESCR Committee jurisprudence should also be reflected in the jurisprudence of the CRPD Committee, and the needs of persons with disabilities who 'are in most dire circumstances must be catered for first and foremost'.[471]

Therefore, although both Committees refer to the human dignity principle, the 'urgency of the needs aspect' in the CESCR Committee's jurisprudence can be useful for CRPD Committee in assessing the state measures when the duty of reasonable accommodation is not applicable, as in the case of *A.F. v. Italy.*

As discussed above, the *A.F. v. Italy* case 'provided enough entry points for the CRPD Committee' to discuss the wider socioeconomic problems and disadvantages faced by persons with disabilities in their access to employment.[472] However, as there was not a *prima facie* failure of the duty of reasonable accommodation, the failures of obligations relating to general disability policy measures could not be addressed.

The human dignity considerations of the CESCR Committee may be useful for the CRPD Committee in prioritizing the needs of the persons with disabilities in adjudicating ESC rights violations where the duty of reasonable accommodation is not applicable.

D. Participation of Right Holders

The CRPD Committee, in its General Comment No. 6 indicated 'identifying and removing barriers to the enjoyment of the rights, in dialogue with the person with a disability concerned' as a key element for guidance on the implementation of the

[469] *Id.* at para 17.5.
[470] Broderick originally noted that the 'the urgency of needs' consideration was confirmed in the Grootboom decision. See BRODERICK, *supra* note 9 at 225.
[471] *Id.* at 227.
[472] Waddington, *supra* note 434.

reasonable accommodation duty.[473] It further noted the importance of consultations with the relevant body and the person concerned in finding the suitable accommodation.[474]

In *Gröninger* case, while assessing the process of integration subsidy application, the CRPD Committee factored in the lack of the involvement of the person with disabilities in the process.[475] Also, in *V.F.C. v. Spain*, the CRPD Committee once again reminded the importance of the obligation on duty-bearers to create a dialogue with the individuals with disabilities in the process of finding solutions to better realize their rights.[476]

In order to achieve full and effective participation in society, the CESCR Committee has also emphasized the importance of cooperation. It noted that 'the specific measures necessary to realise the rights of persons with disabilities must be developed in cooperation with representatives of persons with disabilities.'[477] The CESCR also stated that while assessing the reasonableness of the measures taken, it would place great importance on transparent and participative decision-making processes at the national level.[478]

These are positive signals that the participatory considerations are on the agenda of both treaty bodies. Yet, the model of reasonableness review adopted by the South African Court, which heavily affected the standard of review under Article 8(4) of the OP-ICESCR, has been criticised for 'failing to give adequate weight to the perspective and voice of rights claimants and their communities in the application of human rights norms to particular contexts and in the implementation of appropriate remedies.'[479] It is too early to raise the same concerns with respect to the CESCR Committee, given the number of its communications. However, the centrality of the persons with disabilities in the reasonable accommodation cases, as being the party who requested the accommodation, and the CRPD Committee's focus on the

[473] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at para 26.
[474] *Id.* at para 26.
[475] LILIANE GRÖNINGER ET AL. V. GERMANY, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 002/2010 (CRPD/C/D/2/2010), *supra* note 426 at para 6.2.
[476] V.F.C. V. SPAIN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 034/2015 (CRPD/C/21/D/34/2015), *supra* note 407 at paras 8.6 and 8.7.
[477] UN Committee on Economic, Social and Cultural Rights, *supra* note 336 at para 14.
[478] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AN EVALUATION OF THE OBLIGATION TO TAKE STEPS TO THE "MAXIMUM OF AVAILABLE RESOURCES" UNDER AN OPTIONAL PROTOCOL TO THE COVENANT (E/C.12/2007/1), *supra* note 238 at para 11.
[479] Porter, *supra* note 221 at 52.

participatory considerations can potentially be an example for the CESCR Committee to incorporate the voices of the vulnerable people in adjudicating ESC rights.

E. Other Considerations: Undue Burden Test

With respect to the second constituent part of the duty of reasonable accommodation, that sets the limit of the duty to provide reasonable accommodation, the CRPD Committee states, in its General Comment No. 6, that potential factors to be considered, when assessing whether the measure taken under the duty of reasonable accommodation impose an undue or disproportionate burden, include: financial costs, resources available (including public subsidies), the size of the duty bearer, the effect of the modification on the institution, third-party benefits, negative impacts on other persons and reasonable health and safety requirements and the length of the relationship between the individual requesting the accommodation and the duty-bearer.[480] In *V.F.C. v. Spain*, the CRPD Committee restated some of those factors.[481]

Some of those factors have been discussed in the jurisprudence of the CRPD Committee. In the dissenting opinion of the *Jungelin v. Sweden,* it was considered that the profile of the employer (Social Insurance Agency, one of the main public institutions of the State) should have been considered more carefully when assessing whether the measure would impose an undue burden on the accommodation party. They also considered the wage subsidies as relevant factors in the consideration of the undue burden.[482]

Additionally, again in the dissenting opinion of the *Jüngelin*, it was considered that the benefits of the adjustments for the future employees must also be taken into account.[483]

Goldschmidt confirmed this fact by stating that many of the provisions of the CRPD, including reasonable accommodation duty, should not be 'regarded as costs only; they may lead to profit as well.'[484]

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[480] UN Committee on the Rights of Persons with Disabilities, *supra* note 8 at paras 25 and 27.
[481] V.F.C. V. SPAIN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 034/2015 (CRPD/C/21/D/34/2015), *supra* note 407 at para 8.6.
[482] MARIE-LOUISE JÜNGELIN V. SWEDEN, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 005/2011 (CRPD/C/12/D/5/2011), *supra* note 384 at Appendix para 5.
[483] *Id.* at Appendix para 5.

Those issues may seem only relevant in the sphere of the duty of reasonable accommodation, which contains an individualized reasonableness assessment that principally balance the interests of the individual with the duty-bearer, whereas under the reasonableness review of the CESCR, there is already a wide range of benefits and costs that needs to be balanced. However, some of those factors can still illuminate the ESC rights adjudication under the CESCR. In *Lockrey* and *Beasley* cases, the CRPD Committee noted that the State did not provide any data or analysis to demonstrate that the use of stenographers would constitute a disproportionate burden nor any argument justifying that no adjustment, such as a special oath before a court, could be made to enable the person assisting with steno-captioning to perform his or her functions without affecting the confidentiality of the jury deliberations.[485]

By pointing the possibility of costless measures in compliance with the CRPD's principles, these decisions show us a vital fact: if all options are given due consideration genuinely, while keeping equality, dignity and participatory considerations as priority, the realization of the rights may sometimes not even involve significant costs, when the profile and size of the duty bearer is considered. This should also apply to ESC rights adjudication of the CESCR Committee since some of the disadvantages and inequalities faced by vulnerable groups may have minor or zero impact on resource allocations of the State if there is a genuine willingness and effort for rights to be realized.

F. Remedies

With respects to remedies, within the jurisprudence of the CRPD, provided in the previous chapter, there is one difference that stimulates attention, between the cases that are dealt with under the duty of reasonable accommodation and the cases that are not.

In all cases, where the CRPD Committee found a violation of reasonable accommodation, the remedy concerning the author is providing the specific

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[484] J. Goldschmidt, *Shifting the Burden of Proof: How the CRPD is Transforming our Understanding of Discrimination, Intersectionality and Priorities*, *in* DISABILITY AND UNIVERSAL HUMAN RIGHTS: LEGAL, ETHICAL, AND CONCEPTUAL IMPLICATIONS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES , 52 (Joel Anderson & Joseph Pieter Mathijs Philips eds., 2012).

[485] MICHAEL LOCKREY V. AUSTRALIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 013/2013 (CRPD/C/15/D/13/2013), *supra* note 393 at para 8.5.

accommodation measure in question to the individual concerned, leaving no lacunae as to 'how to' take appropriate measures. However, where there was not a violation of reasonable accommodation, *Gröninger et al. v. Germany, F. Austria and Bacher v. Austria*, the remedies were expressed in a vague manner.

In *Gröninger et al. v. Germany*, the CRPD Committee recommended the State 'to remedy its failure to fulfil its obligations.[486] In *F. Austria,* it recommended 'to remedy the lack of accessibility to the information visually available for all lines of the tram network.[487] In *Bacher v. Austria,* it recommended 'to facilitate a solution to the conflict related to the use of the path…taking into account the special needs of Mr. Bacher as a person with disabilities and the criteria established in the present Views.'[488]

At first glance the remedies for the failure of the duty to reasonably accommodate looks more appealing from a practical point of view. Although, they may present a more successful enforcement record, since their application is limited and individualized, they may leave critical ESC rights violations unremedied.

A.F. v. Italy, where the CRPD Committee found no violation, illustrates the limitations of the reasonable accommodation duty with respect to ESC rights adjudication. If the circumstances do not allow establishing a *prima facie* failure to reasonably accommodate, there is a risk that the alleged violations of ESC rights with respect to wider policy measures and positive action might be left unaddressed.[489]

Therefore, the duty of reasonable accommodation that spans all ESC rights in the CRPD has the potential to provide an example for the CESCR Committee with the way it balances the needs and interests of the right holder and the duty bearer, especially with its focus on the equality considerations, effectiveness and participatory considerations. However, it does not provide much when it comes to remedying broader violations of socio-economic policy measures, as its primary focus is the right holder individual.

[486] LILIANE GRÖNINGER ET AL. V. GERMANY, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 002/2010 (CRPD/C/D/2/2010), *supra* note 426 at para 7.
[487] F. V. AUSTRIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 021/2014 (CRPD/C/14/D/21/2014), *supra* note 418 at para 9.
[488] BACHER V. AUSTRIA, COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, COMMUNICATION NO. 026/2014 (CRPD/C/19/D/26/2014), *supra* note 424 at para 10.
[489] Waddington, *supra* note 434.

Conclusion

This thesis has provided a comparative analysis of the standards of review and the doctrines of adjudication with respect to ESC rights between the two UN treaty bodies, CESCR Committee and CRPD Committee.

It has first analysed the traditional objections to the justiciability of ESC rights, which are related to the normative character of the rights and the role of the judiciary in adjudicating them. These objections have been discussed under three sections; nature of rights and positive-negative rights dichotomy; democratic legitimacy concerns and institutional capacity concerns.

A comparative analysis of doctrinal responses to those objections has also been provided to see how they have been challenged over time in theory and in practice. I have used a comparative analysis of selected case law from domestic, regional and international jurisprudences to illustrate the progress of ESC rights adjudication and its persisting challenges, with a specific focus on the South African Constitutional Court's jurisprudence.

The development of the ESC rights adjudication at domestic and regional levels has been followed by exciting developments within the UN human rights protection mechanisms. Around the same time the adoption of the OP-ICESCR, the CRPD and its Optional Protocol entered into force. The immediately realisable duty of reasonable accommodation within the CRPD's non-discrimination clause that spans all CRPD rights -including the ESC rights- has injected an element of immediacy into the realization of those rights.[490] Since a new avenue for ESC rights adjudication has been created by the OP-ICESCR and the CRPD has incorporated its very own standard of 'reasonableness' via the duty of reasonable accommodation in assessing the realization of rights, it was a worthy enterprise to examine and compare the standards of review and the doctrines of adjudication of ESC rights before the CESCR Committee and the CRPD Committee.

[490] BRODERICK, *supra* note 9 at 221.

I have first analysed the drafting history of the OP-ICESCR in detail as well as the views of the CESCR Committee to provide a detailed picture of its standard of review. I have demonstrated that the CESCR Committee's reasonableness review has a specific focus on human dignity, similar to the South African Constitutional Court's reasonableness review developed in *Grootboom*[491] decision. I have also demonstrated that the CESCR Committee has moved beyond the standard in *Grootboom* and provided substantive equality considerations via the concept of indirect discrimination while adjudicating ESC rights.

Then the standard of review and the doctrines of adjudication of ESC rights before the CRPD Committee, with a particular emphasis on the duty of reasonable accommodation have been examined. The disability model and the understanding of equality in the CRPD has been explored. The development of the reasonable accommodation duty in international human rights law and its inclusion in the CRPD has been examined through the *travaux préparatoires* of the CRPD to explore the implications of the convergence of ESC rights claims requiring resource allocations with the reasonable accommodation duty with an immediate effect. And the CRPD's general comment on equality and non-discrimination and the views on individual communications have been analysed. Based on this analysis, I have demonstrated that the reasonableness review inherent in the CRPD's duty of reasonable accommodation locates its unique inclusive equality consideration at the centre of its assessment of state measures and provides an effective tool in addressing the socioeconomic disadvantages faced by persons with disabilities. However, it has limitations with respect to remedial justice due to its individualized nature.

Finally, the findings of the research and a discussion of the opportunities that exist in both treaty bodies' jurisprudences for cross-fertilization have been provided. It has been demonstrated that there are opportunities for cross-fertilization on both sides. Those opportunities have been discussed under separate headings, including equality considerations, effectiveness assessment, dignity considerations, participation of right holders, other considerations with respect to undue burden test, and lastly, remedies. It has been demonstrated that the inclusive equality focus inherent in the CRPD's standard of reasonableness as well as the effectiveness criterion and the participatory considerations can benefit the CESCR Committee's assessment of the realization of

[491] GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V GROOTBOOM AND OTHERS, *supra* note 7.

ESC rights. The dignity considerations of the CESCR Committee's jurisprudence can benefit the CRPD Committee for prioritizing the needs of the persons with disabilities in adjudicating ESC rights violations where the duty of reasonable accommodation is not applicable.

Considering the broader context of the development of the ESC rights adjudication provided at the beginning of this thesis, starting with the traditional objections against the justiciability of ESC rights and as well as the doctrinal responses, one must be realistic about the types of measures that States can take in the implementation of ESC rights. Striking the right balance between remedying the violations resulting from state failures to progressively realize ESC rights, while at the same time maintaining a clear distance between the adjudicative role of human rights bodies and the role of States in resource allocations and policy making has been the major question in ESC rights adjudication. It is fair to say that responses at the UN level to that question have been promising despite the relatively recent establishment of the two communication procedures and should attract more attention and further research in the future. Having been influenced by the *Grootboom* decision, the CESCR Committee's focus on the human dignity in its reasonableness review is remarkable. What is more important is that the CESCR Committee takes it from there and moves beyond the dignity considerations, with including the equality considerations in its adjudication. Its remedial approach is also noteworthy, which aims to strike a balance between being flexible and assisting the State in implementing the ESC rights.

The CRPD, on the other hand, demonstrated the paramount importance of the interconnectedness of the substantive equality with the implementation of ESC rights. While being highly individualized in nature and limited in its remedial aspects, the reasonableness review inherent in its reasonable accommodation duty, with a consideration of the object and purpose of the CRPD will be essential to any assessment of rights adjudication. Both UN treaty bodies have their strengths and they can help create a more developed ESC rights adjudication at the UN level, provided that they work together towards harmonization of their principles.

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