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Introduction

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Human rights practice and scholarship have, at their best, the ability to make tangible differences in peoples' lives. By acting on and advocating for the principles behind codified human rights, and calling for the extension of existing bodies of law in ways that better protect and empower the marginalised or vulnerable, human rights lawyers and scholars work to ensure that human rights continue to provide a powerful, even radical, critique of the status quo in fact and in law.

Committed to this aim, the Queen Mary Human Rights Law Review is distinguished by having as its central goal the effective use of human rights in overcoming vulnerability and inequality, nationally and internationally. Hence the Review will focus on socio-economic rights, the rights of women and children and on other marginalised or disempowered groups. We seek out scholarship – and reflections on practice – that engage with these issues from a range of view points, including from beyond the discipline of law.

The journal's unique focus will also be reflected in special themed issues highlighting current human rights concerns in this ever-changing field. Authors have the freedom to explore cutting-edge human rights issues in depth by being able to write articles of up to 15,000 words in length.

The first edition showcases original scholarship produced by an international judge, international legal scholars, and Queen Mary's best students. Each article considers, though its own focus, the utility and power of human rights, their potential and limitations.

It is not a coincidence that the Queen Mary Human Rights Law Review is launched in both the 50th anniversary year of the founding of the Law Department and in the 800th anniversary of Magna Carta. Queen Mary has a long and proud tradition in human rights both nationally and internationally and our scholarship has contributed to importing human rights into leading cases, national legislation and treaty drafting. The Journal aims to contribute to and continue in this tradition, ensuring the continuing relevance of human rights, and furthering understanding of their importance and potential for those to whom they are denied.

As is fitting for a journal that seeks to foster equality, the QMHRR will be a freely available, open access publication, with an online presence hosted by the Queen Mary Department of Law. The first issue of the Review will also be printed on paper, and all future issues will carry an ISSN and will be fully citable internationally. We seek to enable debate among a global readership, recognising that the richest conversations draw on different and sometimes divergent traditions.

The Queen Mary Human Rights Review is just one of the exciting developments in the Queen Mary Human Right Collegium. The Collegium is a partnership between the British

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Institute of Human Rights and the Department of Law at Queen Mary, and provides a home for human rights events, scholarship, and activism at the Department of Law.[1]

The Review is grateful for all the generous support it has received from the Queen Mary Department of Law. In addition, the editors wish to acknowledge the help of the indispensable and hardworking assistant editors, and, of course, the authors.

[1] For more information on the Collegium membership and activities, please see: http://www.law.qmul.ac.uk/research/centres/humanrights/index.html

The Changing Face of the European Court of Human Rights: its Face in 2015?

Paul Mahoney*

1. Introduction

From its modest beginnings as an esoteric specialty of public international law known only to a few experts, the European Convention on Human Rights ('the Convention') has become a mainstream subject of national law throughout Europe. The European Court of Human Rights ('the Court' or 'the Strasbourg Court') itself, through its judgments in cases brought against States by individual citizens, has generated a voluminous corpus of case-law.

The aim of the present talk is to describe, necessarily in a very broad-brush manner, how what has changed over time since the elaboration of the Convention in 1949/1950 is not only the judicial interpretation of the substantive content of the loosely defined Convention rights in the face of a changed democratic society and new menaces, but also the institutional, procedural and other aspects of the machinery of enforcement set up under the Convention; and to look at the implications of that for all the various national societies of 800 million people making up the community of Contracting States.

Institutions, like the human beings composing them, are living organisms which evolve over time. Thriving institutions are ones that adapt in harmony with the environment in which they exist. The institutions set up under the Convention, principally embodied in the single Court since the reform of the Convention's enforcement machinery under Protocol no 11 in November 1998, are no exception to this rule. The face of the European Court of Human Rights in 2015 is not the face that the drafters of the Convention sculpted in 1949 and 1950, nor is it the face that the enforcement institutions wore in their formative years from the 1960s through to the 1990s. It may be that the face may well have to undergo further surgery, not merely cosmetic, if the Convention is to retain its effectiveness in the future in the rapidly changing Europe that awaits it.

2. The philosophical and historical origins of the Convention

The Convention was drafted in the immediate aftermath of the Second World War within the Council of Europe, an international organisation for intergovernmental co-operation originally set up in 1949 in Strasbourg (France) with ten, predominantly Western European member States, and now comprising 47 member States. The Council of Europe's principal objectives are stated to be furthering social progress, strengthening pluralist political democracy and the rule of law, safeguarding human rights and promoting European

* Judge sitting on the European Court of Human Rights in respect of the United Kingdom. Any views expressed are personal. The present article, first given as a the annual lecture of the Queen Mary Human Rights Collegium in spring 2015, is an updated version of a 2002 paper: Paul Mahoney, 'The Changing Face of the European Court of Human Rights', in *Trends in the International Law of Human Rights: Studies in Honour of Professor Antônio Augusto Cançado Trindade,* Renato Zerbini Ribeiro Leão et al (eds) (Porto Alegre, Sergio Antonio Fabris Editor, 2005) vol II at 251-263.

cultural identity.[1] Not surprisingly in view of this idealistic agenda, the European Convention on Human Rights was the very first treaty elaborated by this new European political institution. The Convention was opened for signature in Rome in 1950 and entered in operation in 1953 with the setting up of the European Commission of Human Rights, an independent, but not a judicial, body lacking a power of decision on the merits – the Court being set up later in 1959.

Originally the right of individual petition to the Commission and the jurisdiction of the Court to entertain cases were optional, not compulsory, for the Contracting States. The founding States undertook the enterprise of the Convention in 1949/1950 on the basis of a consensual, non-coercive theory of international law and wished to embody in the Convention a voluntary approach to international protection of human rights. The optional clauses in the Convention expressed the wish of many of the originator governments, including the United Kingdom, to accept a system of collective, essentially political guarantee of human rights, operated in the last resort by their peers, namely the other governments, through a final decision by the Committee of Ministers, but not adjudication by an international court sitting in public.

Pierre-Henri Teitgen, the French jurist and politician who, together with David Maxwell-Fyfe, later Lord Kilmuir, shares the credit for the early drafts of the Convention, described its objective as 'defining the seven, eight or ten fundamental freedoms that are essential for a democratic way of life'.[2] The Convention was conceived of as a collective means of external international control, outside the framework of the domestic legal system, in order, as one contemporary British witness put it, to 'preserve the rule of law and the principles of democracy and, should the danger arise, forestall any trend to dictatorship before it [was] too late'.[3] The impetus for the Convention and its enforcement machinery can thus be seen to be the post second-world-war desire to create in Europe an international bulwark against totalitarian regimes, whether left-wing or right-wing. The feared spectre was of anti-democratic political forces gaining power through parliamentary elections and then dismantling democracy through legally adopted legislation. The broader aim of the Contracting States, in agreeing to act together through the Convention machinery, was to set up an early warning system of any tendencies, including within national parliaments, of backsliding towards dictatorship and to prevent future conflict in Europe on the theory that democratic regimes respectful of human rights do not go to war with one another.

3. The early, formative years

Yet when we look at the functioning of the Convention enforcement machinery after it came into operation in 1953, we do not see a sombre panorama made up exclusively or even primarily of serious cases of incipient totalitarianism being nipped in the bud.[4] Some 20 years ago, in the third Doughty Street Lecture in London, bearing the title 'The Coming of Age of the European Convention on Human Rights', the then President of the Court, Rolv Ryssdal, formerly President of the Norwegian Supreme Court, made the point that

[1] Article 1 Council of Europe Statute 1949, ETS no 001.
[2] *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (The Hague, Martinus Nijhoff, 1975) vol I at 44.
[3] Quoted from A.H. Robertson, *Human Rights in Europe* (Manchester, Manchester University Press, 1963). Robertson was an official of the Council of Europe, ending his career as Director of Human Rights.
[4] See, in a similar vein, Luzius Wildhaber, ''Rethinking the European Court of Human Rights', in *The European Court of Human Rights Between Law and Politics,* Jonas Christoffersen and Mikael Rask Madsen (eds), (Oxford, Oxford University Press, 2013) 204-229, at 226: 'While there have been many important cases, only a few have been so exceptional as to influence, *per se*, the fate of European democracy.'

individuals in Europe had from the beginning been 'turn[ing] to the Strasbourg institutions to seek redress for their grievances in sometimes very ordinary situations, far removed from the concern to defeat totalitarian dictatorship and genocide that motivated the Convention system's founders'. He did not believe, however, that this was an unnatural development. 'On the contrary', he said, 'the logic of the right of individual petition required that the Convention system develop into one of quasi-constitutional protection. It was indeed foreseeable that the Convention made accessible to individuals would also be applied to relatively minor, sometimes highly technical issues.'[5]

As it has come to operate in practice, the Convention thus provides two layers of protection: firstly, against bad-faith abuse of governmental power and, secondly and more typically of the way the system actually works in practice, against excesses of majoritarian rule - that is national measures, including primary legislation, taken in good faith in the normal exercise of democratic discretion but which, although imposed in the general interest and for legitimate purposes, entail a disproportionate limitation on individual liberty. At this second layer the Convention can be seen, to paraphrase the words of Ed Bates in his book on the history of the Convention, as a Europe-wide Bill of Rights of the kind found in many national constitutions.[6] It is therefore perhaps a little surprising that some in the United Kingdom appear to have woken up only recently to the fact that the Strasbourg human rights system, firstly, represents an inroad into national sovereignty, including parliamentary sovereignty, and, secondly, is not concerned exclusively or even primarily with grave, flagrant violations of human rights of the type found in totalitarian or dictatorial regimes.

To begin with, the countries accepting the optional right of individual petition to the Commission and the jurisdiction of the Court were few. The awareness of the public and the legal professions was extremely limited. Applications were not numerous, to say the least. Of course, today in 2015, with 65-70,000 applications a year being registered, the cry of 'I'm taking my case to Strasbourg' is a familiar one. What should not be overlooked, though, is that this system did not simply take off in full flight in 1953, but needed some decades with cautious, slow progress forwards before it began functioning in a more sustained manner.

In sum, whereas in 1949/50 the drafters of the Convention conceived of it in general terms as a rampart against tyranny and dictatorship, an early warning system against the worst evils of governmental oppression and abuse, from the outset the vast majority of cases have in practice concerned the consequences of the normal exercise of democratic discretion at local level and the Convention institutions were seeking to dispense individual justice of the highest quality possible to each applicant.

4. The years of consolidation and growth, followed by reform

The landmark judgments fixing the basic contours of the substantive protection offered by the Convention rights – a topic left outside the framework of this talk – mostly date from the this creative period in the Court's history (from the mid-1970s through till the late 1990s).

So, more relevantly for the theme of the present paper, do the methods of interpretation of the Convention as we now know them. Building on jurisprudential foundations laid in the formative years, the Court developed a range of interpretative tools designed, among other things, for situating its decision-making power in relation to that of the national authorities.

[5] Rolv Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1996) 1 *European Human Rights Law Review* 18 at 22-23.

[6] Ed Bates, *The Evolution of the European Convention of Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, Oxford University Press, 2010).

These tools go to the impact of the Convention's enforcement machinery on the national societies of the Contracting States because the methods of interpretation adopted by the Court, and the constraints on what is legitimate interpretation, dictate how far the international control instituted by the Convention reaches into the domestic legal order and how strict the Court's scrutiny is of the measures taken by the national authorities in the exercise of their democratic discretion.[7] There is, for example, the interpretative principle - nowadays often criticised (and often misunderstood) by those who fear an over-interventionist and over-expansionist Strasbourg Court - which is known as 'evolutive interpretation', whereby the Convention is treated as a 'living instrument' to be interpreted in the light of present-day conditions, so as to seek out the current meaning of variable notions stated in the Convention.[8] Also noteworthy for the purposes of this paper is the doctrine of the margin of appreciation (first enunciated in 1976 in the *Little Red Schoolbook case,* again against the United Kingdom),[9] under which the national authorities are recognised as being invested in certain contexts with a degree of discretion as to how they regulate the exercise of the guaranteed rights and freedoms. By virtue of this doctrine, what is conferred on the Court is essentially a power of judicial review, not a power of re-hearing or of appeal or of re-decision on the merits.

In fields other than methods of interpretation proper, institutional consolidation and caseload growth, significant in themselves, were likewise accompanied by some quite significant developments altering the impact of the Convention in the Contracting States.

One important aspect of the general reach of the Convention that outgrew its original clothes was the Convention's application outside the confines of the national territory. The Convention in its first Article speaks of the Contracting States undertaking to secure enjoyment of the guaranteed human rights to all persons coming 'within their jurisdiction'. It is evident that for the drafters of the Convention in 1949-50 this undertaking, although not restricted to the citizens of the Contracting States, was essentially reserved to the national territory. The States could, for example, extend their Convention commitments to their overseas and colonial territories, but only if they chose to do so by means of an express declaration.[10] There was, if you like, thought to be a European territorial wall around the geographical area covered by the Convention's protection. Well, some rather serious breaches were made into that wall during this period.

Firstly, in the *Soering* case against the United Kingdom in 1989 – a case about the 'death-row phenomenon' in the United States of America – the Strasbourg Court established the principle of the extra-territorial responsibility of Contracting States under the Article which prohibits torture and inhuman and degrading treatment or punishment, in holding that expulsion or extradition by a Contracting State can engage the Convention responsibility of that State for proscribed ill-treatment which the expelled or extradited person may foreseeably suffer in the receiving country.[11]

Then in 1995 came the *Loizidou* case against Turkey, where the applicant was a Greek Cypriot who complained of being denied access to and enjoyment of her property in the northern part of Cyprus.[12] The Court ruled that even though the matters complained of were the result of events occurring in an area outside Turkey's national territory, they came 'within

[7] See Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57, at 58.
[8] See Paul Mahoney, 'The European Convention on Human Rights as a Living Instrument' (2005) *Bulletin des Droits de l'Homme,* Numéros 11/12.
[9] *Handyside v United Kingdom* (1976) 1 EHRR 737.
[10] See Article 56 of the Convention (territorial application).
[11] *Soering v United Kingdom* (1989) 11 EHRR 439.
[12] *Loizidou v Turkey (preliminary objections)* [GC] (1995) 20 EHRR 99.

the jurisdiction' of Turkey because of the effective control that Turkey exercised over that area. After *Soering* the door was opened to another kind of extra-territorial jurisdiction on the part of the Contracting States.

From the 1990s onward, a further element added to the equation was that the community of States to which the Convention system applies changed considerably in its make-up, with the expansion to include members of the former Soviet bloc, some with a relatively recent, incomplete and sometimes fragile democratic base.[13] The Court, like its parent organisation, the Council of Europe, had acquired a new mission as a facilitator of transition to full democracy. Until 1989 the Convention could be described as serving largely as an international control mechanism for fine-tuning sophisticated national democratic engines that were on the whole working well (the second layer of protection referred to above). The nature, and not only the volume, of the cases submitted underwent change.[14] Today this change can be confirmed in the current statistics which show a higher proportion than in previous epochs of violations found of the right-to-life-clause in the Convention (Article 2) (6% of the total in 2013) or of the clause prohibiting torture and inhuman or degrading treatment (Article 3) (almost 20% of the total).

As far as the older participating States were concerned, the environment within which the Court operates had also started to take on a new identity during this period of consolidation. The Convention and its accumulated case-law began to penetrate the fabric of domestic law and to be applied on a daily basis by national judges, whereas in earlier times the national legal systems did not on the whole take express account of the Convention standards. For the United Kingdom, the somewhat belated catalyst for this process was the entry into force of the Human Rights Act in 2000. With mechanisms like the Human Rights Act, the subsidiary character of the Convention is progressively reinforced by the national authorities themselves, not only the courts but also the legislature and the executive, thereby repatriating to the domestic legal system much of the human-rights review function hitherto performed in Strasbourg.

Another new factor emerging during the years of consolidation was that developments on the human rights front within the European Union were increasingly exercising an impact on the Convention system in Strasbourg. By this is meant the expanding membership of the European Union, combined with the 'constitutionalisation' within European Union law of safeguards for protecting human rights. This led to a dialogue or interaction between the two European Courts through the reasoning they used in their judgments, relying on and seeking inspiration from one another's case-law.

Consolidation and expansion came at a price, however. Inevitably, as the volume of judicial business increased and resources did not increase in parallel, corners began to be cut. Procedures for sifting out the huge mass of clearly inadmissible applications filed each year (some 90% of all cases decided) began to be simplified. From the late 1980s onwards, the Commission achieved some spectacular leaps in productivity in this way. But the

[13] For an early and perceptive assessment of the impact of the enlargement of the Council of Europe on the role of the Court, see Robert Harmsen, 'The European Convention on Human Rights after Enlargement' (2001) 5 *The International Journal of Human Rights* 18-43: 'The most direct change in the role of the Court prompted by enlargement is that the Court will, inevitably, be drawn into processes of democratic transition and consolidation. As cases come before the Court which stem from incomplete or unsuccessful processes of reform in the new member States, it will be called on, in effect, to act as an adjudicator of transition.'

[14] It is also interesting to note how, statistically, the new democracies from the former Soviet bloc began increasingly to enter into the Convention system. In 1999 the percentage of registered applications from the new democracies was 36%; by 2001 the figure had risen to 56%. The volume of applications from the original States did not diminish, however - it is merely that the rates of increase were not as high as those of the new States.

encasement of the system was splitting at the seams. There were too many applications for a part-time Commission to deal with; proceedings were lasting too long. And attitudes towards human rights protection had evolved since 1950. By the end of the 1980s, in practice all member States of the Council of Europe had ratified the Convention and all Contracting States accepted the optional clauses (the right of individual petition to the Commission and the jurisdiction of the Court). Ratification of the Convention and such acceptance were made conditions of entry to the Council of Europe for candidate countries from the former Soviet bloc following the fall of the Berlin Wall.

The first call to reshape the machinery of protection under the Convention to cope with caseload levels beyond those foreseen in 1949-1950 came in 1985 with a proposal by the Swiss Government to 'merge' the two former part-time enforcement bodies, the Commission and Court, into a single, permanent body. That initiative culminated in the setting up of the present single Court on the entry into force of Protocol no 11 to the Convention, 13 years later, in 1998.[15] In addition, Protocol no 11 judicialised the system, firstly by making the right of individual petition – to a judicial body – compulsory, on the same footing as the entitlement (very rarely exercised) of one Contracting State to bring an application against another; and, secondly, by removing the power that the Committee of Ministers had previously enjoyed of deciding cases on their merits.

The character of the system had evolved from voluntary towards binding, and from political towards judicial. Indeed one major reason for the Convention's effectiveness is now generally held to lie in the predominantly judicial character of the enforcement machinery that it has progressively come to acquire over the years.

5. The operating environment of the Court today and in the foreseeable future

At the beginning of our present century, after a few years of existence of the new single Court, it became evident that the aim defined by the drafters of Protocol no 11 was not being achieved: there was a continuing explosion in the caseload, with ever-growing delays in disposing of applications; despite constantly improving productivity, the total of pending cases was inexorably increasing, reaching a peak of almost 165,000 only a few years ago. Protocol no 14, which came into force in 2010, therefore introduced simplified, time-saving procedures for certain categories of less important cases – notably (a) enabling clearly inadmissible applications to be rejected summarily by a single judge on proposal of a non-judicial rapporteur (a senior lawyer in the Registry of the Court); and (b) enabling routine cases and repetitive cases covered by well established case-law to be dealt with by three-judge committees in a pared-down procedure.

Concurrently, the judicial review of national action that the Strasbourg Court is required to carry out has come to reflect the greater assumption by the national authorities of the concrete responsibility for implementing the Convention rights within their national legal order. As human rights culture percolates deeper and deeper into European societies and, in particular, into the legal protection afforded to citizens by the national courts in a given country, so, as a corollary, the scrutiny of the international Court in Strasbourg into the substantive outcome and merits of a case is likely to become less intense. In recent years, the Strasbourg Court has spelt out that the margin of appreciation now means that if the independent and impartial national courts have analysed in a comprehensive and convincing manner the contested legal measure on the basis of the relevant human rights standards, the Strasbourg Court will need strong reasons to substitute its own, different analysis for that of the national judges. Statements to this effect can be found in, for example, the case of *Von Hannover v Germany (no 2)* in which the applicant, Princess Caroline of Monaco, was

[15] Explanatory Report to Protocol no 11, at paras 10-18.

claiming that German law as applied by the German courts had not sufficiently protected her privacy from invasion by the media[16] and two British cases where the applicants were challenging the statutory ban on fox-hunting in the United Kingdom.[17]

This deference to the human rights assessments made by the national courts – in countries where the legal system is working properly and where the courts can be regarded as independent and impartial, it should be emphasised – is normal and not to be regarded as backtracking or as an abdication of its responsibility by the Strasbourg Court. Ever improving national implementation of the Convention rights in some – though not all – countries necessarily means less call for external control by the Strasbourg Court and, correspondingly, greater weight being attached by the Court to the subsidiary character of the international remedy.

On the other hand, if the Strasbourg spotlight is to be progressively dimmed as regards the substantive merits, it retains its glare in relation to the national decision-making machinery used for arriving at the contested outcome. Hence, for countries where the Convention and its case-law have been successfully integrated into national legal protection, the focus of the cases in Strasbourg is moving away not only from 'micro-management' of the merits of individual decisions[18] but also from detailed review of the underlying legislative, administrative or judicial policy towards review of the quality of the legal framework[19] and decision-making process[20] at national level. In other terms, for such countries where the legal system has become more Convention-friendly, the emphasis will tend to shift to review of democratic legality and due process, with the Strasbourg Court thereby adopting what Robert Spano, the current Icelandic judge on the Strasbourg Court, has described as a 'qualitative, democracy-enhancing approach'.[21]

The push towards greater subsidiarity through increasing cooperation between the Strasbourg Court and national courts in the legal protection of human rights is reflected in Protocol no 16 to the Convention, which was opened for signature last year as a follow-up to the Council of Europe's high-level conference at Brighton in April 2012 on the future of the Court and which foresees the Strasbourg Court being empowered to give advisory opinions at the request of superior national courts – in some ways comparable, but not 100%

[16] *Von Hannover v Germany (no 2)* [GC] (2012) 55 EHRR 388.

[17] *Friend v United Kingdom (App* no 16072/06) and *Countryside Alliance v United Kingdom* (App no. 27809/08), Admissibility, 24 November 2009 (ECtHR). See also *Roche v United Kingdom* [GC] (2006) 42 EHRR 30 at para 120; and *MGN Limited v United Kingdom*(App no 39401/04), Merits, 18 January 2011 (ECtHR) at paras 150 and 155.

[18] For a recent British example of this tendency, see *McDonald v United Kingdom* (App no 4241/12), Merits and Just Satisfaction, 20 May 2014 (ECtHR) at para 57, where the Court declined 'to substitute its own assessment of the merits of the contested measure' – refusal to provide a handicapped person with a certain kind of care – '(including, in particular, its own assessment of the factual details of proportionality)' because the Court was 'satisfied that the national courts [had] adequately balanced the applicant's personal interests against the more general interest of the competent public authority in carrying out its social responsibility of provision of care to the community at large'.

[19] For a recent British example of where the Court, in its review of Convention compliance, took into account the quality of the parliamentary process, see *Animal Defenders International v United Kingdom* [GC] (2013) 57 EHRR 21 at paras 108, 115-116.

[20] For a recent British example of review of the individual decision-making process, see *Paulet v United Kingdom* (App no 6219/08), Merits and Just Satisfaction, 13 May 2014 (ECtHR) especially at para 68, where the scope of review of legality carried out by the national courts was held to be too narrow to satisfy the requirement of seeking the fair balance inherent in the clause safeguarding the right of property (Article 1 of Protocol no 1 to the Convention).

[21] Robert Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?', to be published in the *Nordic Journal of Human Rights,* 2015. See also Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *Human Rights Law Review* 487-502.

comparable, to the well known system of preliminary rulings on European Union law that the national courts at all levels of jurisdiction may seek from the Court of Justice of the European Union in Luxembourg. In the long term, such a mechanism would plug the national courts into the Convention system and open up a direct channel of dialogue between the national courts and the Strasbourg Court. But in the short term, some commentators predict that it may well represent a further – unwelcome – heavy workload for the Strasbourg Court, on the top of its already existing backlog.

The implications of extending the territorial and geographical reach of the Convention have been enormous. As a result of the 1989 death-row extradition case, *Soering,* national extradition law and asylum law, and immigration law in general, have been brought within the protective sights of the Convention, and have themselves taken on a different, expanded character. The basic criterion – of 'exercise of control' – underlying the 1995 Northern Cyprus case, *Loizidou,* has been refined, leading, for example, to findings over the last few years by the new Court that the United Kingdom and, most recently, the Netherlands were responsible under the Convention for certain acts of their troops in Iraq, during the initial phase of international armed conflict as well as during the following period of occupation by coalition forces.[22] Some commentators go so far as to say that the 'jurisdictional' responsibility of the Contracting States under the Convention is no longer territorial, essentially restricted to Europe. Rather, the relationship between the State and the 'jurisdiction' it exercises under the Convention is to be assimilated to the relationship between a snail and its shell: wherever the snail goes, the shell goes too – so that, for example, on this analysis killings committed by drone strikes in foreign territory would be included within the Convention 'jurisdiction' of the Contracting States.[23] I of course cannot comment on such analytical speculation, but what is sure is that the Convention's territorial reach is now much greater than that ever imagined by the Convention's drafters.

Despite the growing convergence of Convention law and European Union law regarding fundamental rights, up till now the Strasbourg Court has had no jurisdiction to entertain applications brought against the European Union by individuals or companies aggrieved by some adverse decision taken by one of the European Union institutions, for the simple reason that the European Union, an international organisation, was not, and could not be, a Contracting Party to the Convention, the sole Contracting Parties being the States which are members of the Council of Europe.

The Lisbon Treaty, which came into force in 2009, represents one of the latest stages of the process whereby, over the years, the place occupied in the European Union legal order by human rights has evolved, with human rights being progressively integrated into the forefront of European Union law. One of the major innovatory changes introduced by the Treaty of Lisbon is that henceforth the European Union is not simply vested with the previously lacking legal capacity to accede to the Council of Europe's Convention, but is obliged to do so. The Lisbon Treaty also confers treaty status on the European Union's Charter of Fundamental Rights. The Luxembourg Court, within its admittedly more limited sphere of jurisdiction, has thereby been confirmed in its role as a supranational European human rights court.[24]

There is no need to be a soothsayer to see that participation of the European Union in the international system of human rights protection set up under the Convention is likely to have

[22] See, eg, *Al Skeini and Others v United Kingdom* [GC] (2011) 53 EHRR 18; *Hassan v United Kingdom* [GC] (App no 29750/09), Merits, 16 September 2014 (ECtHR); and *Jaloud v Netherlands* GC] (App no 47708/08), Merits and Just Satisfaction, 20 November 2014 (ECtHR).

[23] Mads Andenas and Eirik Bjorge, 'Human Rights and Acts by Troops Abroad: Rights and Jurisdictional Restrictions' (2012) 18 *European Public Law* 473 at 492.

[24] See Paul Mahoney, 'From Strasbourg to Luxembourg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon' (2011) 31 *Human Rights Law Journal* 73.

repercussions for the Strasbourg Court's workload and also for the relationship between the two European Courts. We are all aware of the fear in some quarters that accession will mean not only welcome unification of jurisprudence on human rights between the two European Courts, but also encroachment by the Strasbourg Court into the monopoly which has been conferred on the Luxembourg Court by the Treaties to interpret authoritatively European Union law. The recent opinion of the Luxembourg Court concerning the draft accession agreement that had been negotiated between the Council of Europe and the European Commission on behalf of the European Union[25] has thrown not just a few drops but whole buckets of cold water on the enthusiasm of committed accession-supporters. Whatever happens in the wake of this negative opinion, European Union accession to the Convention is not therefore to be expected for quite a few years yet. In any event, even when – or, perhaps even, if – accession does eventually go ahead, we would still have to wait for some while, for an accumulation of decided cases, in order to see how the shared European competence will be split between the two European Courts, meaning how deeply the Strasbourg Court will reach into the European Union legal order and into the Luxembourg Court's prerogatives under the European Union Treaties when carrying out its task of reviewing contested European Union legal acts for Convention compliance.

The consequences of the Court's judgment at the close of the judicial procedure are also no longer what they once used to be for the respondent States. The language of the relevant Convention provision dating from 1950 painted – and still paints – a picture of the primary responsibility for executing the judgment being conferred on the respondent State itself and the prerogative for controlling the execution resting exclusively with the Committee of Ministers.[26] The judgments of the former Court are replete with statements to the effect that the judgments are declaratory only (declaratory as to whether the facts found disclose a violation of the Convention) and that the Court has no power to make consequential orders (as to what should be done in execution of the judgment).[27] But the picture has changed somewhat following the arrival of the permanent single Court in 1998.

To start with, in 2004 the Court, in a couple of extreme cases, directed the immediate release of applicant prisoners being held in wholly arbitrary detention, offensive to the rule of law[28] - that is, in circumstances where there existed only one conceivable – and urgent – manner of executing the judgment so as to bring to an end the blatant denial of justice found by the Court. At about the same time, the Court began indicating in some judgments finding a violation of the right to a fair trial that the most appropriate manner of implementing the judgment would 'in principle' be to reopen the terminated – usually criminal – proceedings concerned.[29] Also in 2004, in a Grand Chamber case against Poland, confronted with the phenomenon of an influx of a large number of repetitive or clone applications all linked to the same systemic, structural deficiency in the domestic legal order (in the event, a malfunctioning legislative scheme for compensating expropriated property), the Court unveiled the pilot-judgment procedure - to a largely unsuspecting public, it must be said. This procedure entails freezing the follow-up applications and, in the pilot case, giving some

[25] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] OJ 2015 C65/2.

[26] Article 46(1) and (2) provides: '1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.'

[27] See, eg, *Le Compte, Van Leuven and De Meyere v Belgium (Article 50)* (1983) 5 EHRR 183, para 13; *Dudgeon v United Kingdom* (1983) 5 EHRR 573, para 15; *Zanghi v Italy* (App no 11491/85), Merits, 19 February 1991 (ECtHR), para 26; and *Castells v Spain* (1992) 14 EHRR 445, para 54.

[28] *Assanidze v Georgia* (2004) 39 EHRR 32, paras 202-203 and operative provision 14(a); *Ilasçu and Others v Moldova and Russia* (2005) 40 EHRR 46, para 490 and operative provision 22.

[29] See, eg, *Gençel v Turkey* (App no 53431/99), Merits and Just Satisfaction, 23 October 2003 (ECtHR), para 27; and *Somogyi v Italy* (2008) 46 EHRR 5, para 86; followed by the explanation given in *Öcalan v Turkey* [GC] (2005) 41 EHRR 45, paras 208-210.

guidance and, as in some more recent instances, even rather specific prescriptions as to the general measures to be taken at national level to remove the source of the generalised violation found.[30] The virus has quickly spread to all kinds of situations and rights. Thus, the taking of general measures has been recommended or directed, in greater or lesser detail, outside the framework of pilot judgments[31] and individual measures of release from custody have been ordered in circumstances not at all redolent of wholly arbitrary detention.[32] As Linos-Alexander Sicilianos, the Greek judge in the Court, has written, the practice, now illustrated by over 160 judgments, has evolved to the point where the Court can be taken to be exercising a complementary, though not unlimited, competence to recommend or even, exceptionally, to prescribe both individual and general remedial measures with a view to facilitating the future proper execution of the judgment.[33]

At more or less the same time as this jurisprudential emergence of the Court from its reticence to get involved in the execution process, the Convention itself was amended by the Contracting States: Protocol no 14, which entered into force in 2010, empowered the Committee of Ministers to refer a decided case back to the Court either for interpretation of a 'problematic' issue of execution in the judgment delivered or for so-called 'infringement proceedings' against a recalcitrant respondent State for failure to execute the judgment delivered.[34] To date, however, the Committee of Ministers has not had recourse to either of these two new powers.

The legislative, procedural and jurisprudential development we are witnessing on this front is a continuing one and there may be further staging posts along the road, further shifts of the responsibility for ensuring and controlling the proper execution of judgments towards the Court. It cannot be said, however, that the process of execution of judgments has been judicialised, with the Court now in the driving seat at the expense of the political actors.

The painful saga of the execution by the United Kingdom of the *Hirst* judgment of 2005 on prisoners' voting rights[35] spotlights one restraining brake on the full effectiveness of the Strasbourg Court's action. The Convention system is fully judicial up till delivery of the Court's judgment – that is clear, but thereafter, the execution seems to disappear into the political arena, with the only explicit role for the Court in the execution process being

[30] *Broniowski v Poland* [GC] (2005) 40 EHRR 21 (merits) and (2006) 43 EHRR 1 (just satisfaction). Subsequently, in 2011, a provision regulating the pilot judgment procedure was inserted in the Rules of Court (Rule 61). See Renata Degener and Paul Mahoney, 'The Prospects for a Test-Case Procedure in the European Court of Human Rights', in *Trente ans de droit européen des droits de l'homme: Etudes à la mémoire de Wolfgang Strasser,* Hanno Hartig (ed) (Brussels, Nemesis/Bruylant, 2007), at 173-207.

[31] Eg, in *McCaughey and Others v United Kingdom* (2014) 58 EHRR 13, paras 144-145 and operative provision 4(c)), one of a series of cases illustrative of excessive delays in conducting inquests, the United Kingdom Government were directed '[to] take, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by security forces in Northern Ireland where inquests are pending, that the procedural requirements of [the Convention's right-to-life safeguard] are complied with expeditiously'.

[32] Eg, in *Del Rio Prada v Spain* [GC] (2014) 58 EHRR 37, para 133 and operative provision 3, where the continued imprisonment, on the basis of the Spanish system of calculation of remission of sentences, of an ETA terrorist convicted of multiple murders was held to fall foul of the Convention's requirements, the Court ordered the applicant's release.

[33] Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46 ECHR' (2014) 32(3) *Netherlands Quarterly of Human Rights* 235-262.

[34] Article 46(3)-(5) of the Convention.

[35] *Hirst v United Kingdom (no 2)* [GC] (2006) 42 EHRR 41. See the pilot judgment in *Greens and MT v United Kingdom* (2011) 53 EHRR 21; and also *Firth and Others v United Kingdom* (App nos 47784/09 *et al*), Merits and Just Satisfaction, 12 August 2014 (ECtHR).

activated if the Committee of Ministers chooses under the new Protocol no 14 clauses to refer a decided case back to the Court.

Whether and how, with a view to countering the perceived weaknesses in the political process of execution, further initiatives should be taken by the Court is now on the table for discussion at the forthcoming intergovernmental conference in Brussels. The international system of enforcement of human rights as laid down in the Convention still does have limits. While the Court cannot be expected to fill all the gaps, judgment-execution is possibly one area where, in cooperation with the political actors – the Committee of Ministers and the Governments – some further development better exploiting the Court's contribution – its complementary competence, as Linos-Alexander Sicilianos put it – would be both feasible and profitable.

Finally, there is more disturbing storm-cloud on the horizon, a darker side to the future brought into stark relief by the recent events in Ukraine: the re-emergence of crises in Europe involving large-scale violations of human rights or breakdown of the democratic political order. The Greek Colonels' case provided an early, and happily isolated, example. Then came the Cyprus problem from 1974 onwards. This was followed in the 1990s by the 280 or so judgments in cases against Turkey finding serious violations (including killings, disappearances, ill-treatment, destruction of villages) which had taken place against the background of the armed conflict between the Turkish security forces and the PKK (the Workers' Party of Kurdistan), an illegal party. Subsequent to the establishment of the new single Court, we have had the Transdniestrian situation concerning Russia and Moldova; the NATO operation in former Yugoslavia and the war in Bosnia and Herzegovina; the flood of individual applications concerning Chechnya (more than 230 judgments delivered and 350 or so applications still pending – over 60% of these cases concerning enforced disappearances); the stand-off between Azerbaijan and Armenia over the disputed border territory of Nagorno-Karabakh; the events leading up to and including the war between Russia and Georgia; and now the events in Crimea and Eastern Ukraine in relation to which applications from both sides of the divide have already been lodged in Strasbourg.[36]

The judgment awarding financial compensation – of 90 million euros - in the case of *Cyprus v Turkey* concerning the 40-year old events of 1974 was delivered just a few months ago, 13 long years after the delivery of the principal judgment in this case.[37] As regards the Transdniestrian situation, the express direction given to the respondent Moldovan and Russian Governments in the operative provisions of the judgment to release applicant prisoners being arbitrarily held in detention by the breakaway regime in Transdniestria did not lead to any positive concrete result: the applicants remained mouldering in prison;[38] and thereafter the inflow of individual applications has continued.[39] After the first judgment delivered in July of last year, the inter-State proceedings between Georgia and Russia are rolling on at gentle speed and a large number of related individual applications are

[36] See the *Factsheet-Armed Conflicts* (September 2014) issued by the Registry of the Court, in which are summarised the many relevant decided and pending cases in these various connections.

[37] *Cyprus v Turkey* [GC] (2014) 59 EHRR 16. The principal judgment is reported in 35 EHRR 30. For a commentary on the recent judgment, the first to award just satisfaction in an inter-State case, see Isabella Risini, 'An Individual-Centred Decision Seen in the Historical and Institutional Context which Led to *Cyprus v. Turkey (IV)* / The Just-Satisfaction Judgment of the EurCourtHR' (2014) 34 *Human Rights Law Journal* 18-26.

[38] *Ilaşcu and Others,* above n 30; *Ivanţoc and Others v Moldova and Russia* (App no 23687/05), Merits and Just Satisfaction, 15 November 2011 (ECtHR).

[39] See *Catan and Others v Moldova and Russia* (2013)57 EHRR 4. A Grand Chamber judgment in the case of *Mozer v Moldova and Russia* (App no 11138/10), likewise concerning detention ordered by the courts in the unrecognised 'Moldovan Republic of Transdniestria', is expected soon.

pending.[40] Interim orders issued in the inter-State proceedings and indicating conservatory measures[41] were not exactly complied with. Notwithstanding this first largely fruitless exercise in granting interim measures in such a context of inter-State conflict, in March of this year a similar grant was made in the inter-State case brought by Ukraine against Russia. Both Contracting Parties concerned were called on to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting civilians' life and health at risk. Both States were asked to inform the Court as soon as possible of the measures taken to ensure that the Convention is fully complied with. Watching news reports on the television, one may wonder what impact this international judicial grant of interim measures is actually having on the conduct of military actions on the ground.

All in all, this aspect of the Court's operation – that is to say, in such extreme contexts of crisis or conflict – is not exactly a success story. One writer, the academic Robert Harmsen, has surmised that 'the boundaries of the system are being taken to – if not past – the breaking point of that which might be accomplished by a logic of judicial enforcement'.[42]

6. Conclusion

To the obvious remedy against outright governmental abuse and oppression (the Convention's first layer of protection, not so frequently invoked up till now) the day-to-day practice from 1953 onwards added the statistically more significant second layer of protection, namely the international 'constitutional' review of the ordinary exercise of democratic discretion at national level. By virtue of the right of individual petition under the Convention, there has been developed in Strasbourg an independent judicial mechanism allowing the 'ordinary' democratic health of each Contracting State to be regularly and randomly checked by individual applications which spotlight ills and weaknesses in the national legal order.

Into this subtle mechanism for the maintenance and promotion of human rights was integrated, after the fall of the Berlin Wall, a new mission for the Court, in helping to secure democratic stability in the former Soviet part of Europe. Parallel to this development, the progressive anchoring of the Convention in the domestic law of the participating States, especially the older Contracting States, meant that the subsidiary character of the Convention's machinery of enforcement could assume a greater dimension in relation to implementation of the Convention rights by the national authorities. This subsidiary character will hopefully be reinforced when Protocol no 16 and the Court's power to give advisory opinions at the request of superior national courts enter into force.

To this vision of what one might call a pan-European Bill of Rights offering constitutional justice for the Council of Europe community of more than 40 individual States in differing stages of democratic development will presumably, despite the negative opinion of the Luxembourg Court, eventually be grafted an independent, external human rights review of the supranational acts of the institutions of the European Union.

The introduction by the Court of the pilot-judgment procedure is generally judged to have been a success, even by the Contracting States despite the Court's thereby becoming

[40] *Georgia v Russia (I)* [GC] (App no 13255/07), Merits, 3 July 2014 (ECtHR). In *Georgia v Russia (II)* (App no 38263/08), the competent chamber, after having declared the application admissible, relinquished jurisdiction in favour of the Grand Chamber.
[41] Under Rule 39 of the Rules of Court.
[42] Robert Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-) Politics of Human Rights' in *Christoffersen and Rask Madsen,* above n 4, at 142.

indirectly involved at a preliminary stage in the execution of the judgment through its indication of general remedial measures susceptible of being taken by the respondent State. Nonetheless, repetitive or clone applications still represent half of the Court's docket – 35,000 of today's 70,000 pending applications. This and other perceived weaknesses in the political process of execution of judgments are prompting calls, not for judicial incursion into the post-judgment domain reserved by the Convention for the respondent Government and the Committee of Ministers of the Council of Europe,[43] but rather for improved forms of collaborative assistance on the part of the Court for the political and other actors concerned in the implementation of its judgments.

And last but evidently not least, there is the question: is the Strasbourg Court capable of dealing, constructively, preventively or contemporaneously, with large-scale events such as those occurring in Ukraine and with the systemic human rights problems they raise, affecting large swathes of the population? Or is it condemned to serving a largely historical, *ex post facto* role, one of assessing State conduct after the event? That is to say, we are talking about the effectiveness of the Strasbourg Court and of the remedy it is capable of offering in such contexts of conflict usually pitting, one against another, two of the Convention's Contracting States.

There thus now exist different pressures militating in favour of the Court's standing back from the flood of incoming individual applications, each one seeking individual justice and generally also financial compensation tailored to the particular case, in order to concentrate on the general interest in terms of human rights protection for democratic society as a whole in Europe. Some change of emphasis, back towards a broader monitoring (or 'constitutional') role for the enforcement machinery in the general interest of democratic society as contemplated by the drafters, can already be identified in the procedural amendments introduced in Protocol no 14, which came into force in 2010, notably the summary single-judge procedure for rejecting clearly inadmissible cases and the simplified three-judge committee procedure for routine cases. While, thanks to these new procedural tools, the 2011 peak of over 160,000 pending registered applications has been dramatically reduced to 70,000 today, case-overload is still with us, in that there are concealed in this reduced total of 70,000 applications significant backlogs of meritorious cases – not just repetitive cases or routine cases but, most worryingly for a Court that delivers on average 1,500 judgments a year, a backlog of no less than 7,300 high-priority cases, that is cases raising serious or urgent human rights issues. The Court is, of course, actively engaged in seeking corrective solutions within the existing treaty framework for removing the delays in dealing with this, the most important of the categories of cases before it.

Nonetheless, it would, the present writer believes, be blinkered to exclude as a matter of unbending principle that the face of the Strasbourg Court may have to undergo yet further change; that is to say, to exclude that what we have today – in terms of remedies, procedures, structures for decision-making and interactions between the Strasbourg Court and the legal orders in which the Convention rights are exercised – may not exactly be what we are liable to have in the future. Views vary of course as to what forms and degree of surgery the face should undergo - for example, how far is it permissible to regulate limitatively the right of individual petition in order to allow the Court to cope properly, and within a reasonable time, with the large volume of incoming applications; does the single-

[43] See *Bochan v Ukraine (no 2)* [GC] (App no. 22251/08), Merits and Just Satisfaction, 5 February 2015 (ECtHR), paras 33-34, citing *Egmez v Cyprus (no 2)* (App no 12214/07), Admissibility, 18 September 2012 (ECtHR), paras 48-56, at para 48, for recent confirmation that: 'Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment… For its part, the Court cannot assume any role in this dialogue…'

judge procedure mark the outer limit of the acceptable reduction in the intensity of judicial review accorded to clearly inadmissible cases; should there be even more streamlined procedures for processing routine cases, cases of repetitive violation and manifestly well-founded cases; should the Court seek to exercise more influence or control over the execution of its judgments by respondent States; should the procedure for inter-State cases be radically overhauled, given the deficiencies identified by commentators? More generally, as Luzius Wildhaber, a recent former President of the Court, formulated the choice, should the requisite renovation be achieved, as in the past 15 years or so, through successive touches of reactive, minimalist incrementalism – 'tinkering' and 'muddling through', in his words – or, rather, on the basis of a longer-term vision of the Court's mission, capable of providing what he calls 'a realistic Court at last'.[44] But this is not the place for those debates. What is certain is that the surrounding environment - national, supranational and international - is likely to continue changing and that, with it, must also change the face of the European Court of Human Rights if the Court is to retain its continuing effectiveness.

[44] *Wildhaber*, above n 4, especially at 223-229.

Identity and the Importance of the Name in Human Rights

Nicolas Gutierrez Douënel

Abstract

This article stands as a study on the relevance of the right to a name in international human rights law. It first tries to define the reasons for and consequences of namelessness, concluding that in reality these are rarely directly related to Article 24 of the ICCPR, which requires the naming and immediate registration of children at birth. It then goes on to argue that the name does have an importance in the field of human rights, especially in the context of discrimination concerning sex and race, and the right to the free development of one's personality. The difficulties in regulating the content of the name are also discussed, as well as the various approaches individual states have taken to try and solve the problem. The article concludes individual states should have as little a role to play in determining people's names as possible, as names are an important aspect of the personal freedom that human rights aim to protect.

Keywords

Right to a name – identity – birth registration – race – gender – citizenship – legal personality.

1. Introduction

A person's name has a particular importance with regard to his or her identity: indeed, when asked who you are, the first and obvious answer will be to give your name. A person's name is often, along with the physical appearance of that person**,** the first exterior sign of his or her identity, and it fulfils this role in two ways**.** Firstly it distinguishes the individual from the rest of society by providing the person with a unique name. Secondly, it also has the capacity to give a first impression of who that person is, normally providing an indication as to his or her sex and sometimes as to his or her origin. The name is therefore essential to one's identity, and to discuss the importance of the right to the former amounts in great part to considering the significance of the latter in human rights law.

The concept of identity is classically defined as 'the fact of being who or what a person or a thing is.'[1] We all need society in general (be it the individuals who surround us or the public officials) to be aware of, and recognise our individual and independent existence, as the opposite would deprive us of what Hannah Arendt calls the fundamental features of a truly human life, which consists of the objective relationship we have with other people that comes from being seen and heard by them and related to or separated from them.[2] While we may have private lives in which we do not interact with those around us, it is our public

[1] Oxford Dictionaries Online, at http://www.oxforddictionaries.com/definition/english/identity?q=identity, (last accessed 13 November 2013).

[2] Hannah Arendt, *The Human Condition* (Chicago, Chicago University Press, 1958) at 53-54.

lives that give meaning to our being. Having a public life means having a public identity, of which the name is an essential part.

If the concept of identity of the individual is so significant to the enjoyment of one's life, one would assume that it could be found and would be clearly defined in some international human rights agreements. However, this is surprisingly not the case. Geraldine Van Bueren has noted this 'curious omission' [3] which remains unresolved in international human rights law.

However, this does not mean the concept has been completely foreign to human rights law: a person's identity could simply mean his or her legal identity. In other words, the official recognition of existence is a means to enforce any rights which he or she may have by law. Most international documents on general human rights include in them the right to a name along with the right to registration at birth as well as the right to a nationality, proof that these three concepts are very closely interrelated.[4] In doing so, these texts indirectly assert the right to have a *legal identity*, which cannot exist without an official name. Worthy of mention is the fact that during the negotiations for the International Covenant on Civil and Political Rights the Belgian delegation proposed the right to a 'sensible name'.[5] This, however, was rejected, clearly establishing that the right as it is to be found in international human rights is nothing more than the right to *have* a name, and does not purport to regulate in any way the quality of the name.

Nevertheless, identity can also be construed differently, as the aggregate elements of what constitutes one's personality: his character, his sexuality but also his origins and his family which together constitute the *personal identity* of an individual.[6] This is equally important as people are not defined only by what distinguishes them from others, but also by what or who they are as an individual, independently of those around them.

According to these two possible conceptualisations of identity, the right to a name can be construed in two different ways which I will endeavour to examine: firstly as the right to *have* a name, which would form part of one's legal identity; and secondly as the right to have *your* name, as an element of one's personal identity.

2. Name and legal identity

A. Historical development of the right to a name

The right to have a name is of undoubted importance, demonstrated by the fact that it appears in most international human rights agreements.[7] Yet it does not appear anywhere in

[3] Geraldine Van Bueren, *International law on the Rights of the Child* 2nd edn (The Hague, Martinus Nijhoff, 1998) at 117.

[4] Article 24(2) of the International Covenant on Civil and Political Rights 1996 (999 UNTS 171) states that "Every child shall be registered immediately after birth and shall have a name", while Art7 (1) of the UN Convention on the Rights of the Child affirms that "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality (...)".

[5] Van Bueren, above n 3 p.118.

[6] On possible definitions of personal identity, see Jill Marshall *Personal Freedom through Human Rights? Autonomy, Identity and Integrity under the European Convention of Human Rights* (Martinus Nijhoff Publishers, 2009) at p. 89.

[7] In addition to the examples given at n 4, see Art 6 African Charter on the Rights and Welfare of the Child 1990 (OAU Doc. CAB/LEG/24.9/49); Art 18 American Convention on Human Rights 1969 (1144 UNTS 123).

the Universal Declaration of Human Rights,[8] or the European Convention on Human Rights[9]. These are, it may be argued, two of the most important documents on human rights written during the 20th century. The former was of great symbolic importance: drafted as a reaction to the atrocities committed prior to and during World War II, it was the first time governments from all around the globe agreed on the basic conditions for the respect of the human person, and established the basis for international human rights law as it exists today. The latter is the document which has directly given rise to the most extensive case-law on human rights in the world. Considering the significance of both texts, the absence of such a basic provision as the right to a name may be seen as rather odd. Equally, though, the minimal size of legal literature focusing on this right may put into question of the necessity and prominence of the right.

Some might argue that the right to a name is of little interest simply because we all already have a name, for the same reason which was at the basis of the creation of language: the capacity to distinguish people from others through simple words. Taken at the most basic level, they would be correct: I doubt the reader has met anyone with no name. However, it is very important to note at this point that the right to a name is a question of informal names, nicknames or other surnames which a person may be given by his friends and/or family. The international treaties protect the individual's right to have an *official* name, which forms part of his *legal identity*.

That the official name of a person is intricately linked to the legal identity of the individual is evidenced by the fact the right to a name in international human rights documents is almost invariably joined with the right to registration at birth and/or the right to a nationality.[10] The concept of a legal identity itself is actually a relatively modern idea and rose to prominence in two ways. It was only from the 16th century onwards that people in England were given official identities. That was due to the emergence of 'the modern state', a form of government 'whose ideology encompasses large scale plans for the improvement of the population's welfare'.[11] This new form of more centralised government needed two forms of 'legibility'. First, government needed the capacity to locate citizens uniquely and unambiguously. Second, it needed standardised information that would allow it to create aggregate statistics about property, income, health, demography, and productivity, amongst other things.[12] One of the main difficulties the state faced was that not only was there not a centralised or standardised census, but even where there was a registry most people would have one of eight or nine different names, making it hard to unambiguously identify individuals. The creation of patronyms was therefore an extremely useful tool in the creation of the modern state and a crucial victory in the struggle for visibility of the people.[13] The French Revolution and the French Declaration of the Rights of Men,[14] which was written subsequently, introduced the citizen as an individual with equal rights. This citizen therefore had to have a direct relationship with the state instead of going through social intermediaries such as clergy or nobles and had to be identified *individually* and not simply as a member of some community.[15]

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[8] 999 UNTS 302.

[9] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950 ETS 5.

[10] See above n 4.

[11] James C Scott et al 'The production of Legal Identities Proper to States: The Case of Permanent Family Surname' (2002) 44 *Comparative Studies in Society and History* 4 at 10.

[12] Ibid.

[13] Ibid at 6-7.

[14] 'Déclaration des Droits de l'Homme et du Citoyen de 1789', approved by the National Assembly of France, August 26, 1789.

[15] Scott et al, above n11 at 16.

As a result, by the 19th century forms of identification of the individual were well established in Western Europe, and the fixation of patronyms and its connection to registration was complete. This is why the right to *have* a name actually amounts to the right to be registered: if a name must be given at the time of registration, those who do not have an official name in the modern world are those who simply have not been registered at the time of their births.

B. Purposes of official naming

People who are not given a legal identity through registration and naming are often invisible. Their invisibility has two types of consequence, although they really seem to be two sides of the same coin. First, the registration and naming of the child serves the so called 'legal purpose' of providing and protecting the fundamental rights of the individual. Secondly, that every individual is given an official name through registration is essential in order to attend to the social needs of a particular region. It follows that non-registration of births leads to a situation where governments and other bodies which might contribute to the implementation of the required social policies simply do not have the sufficient information to take effective action. This is the 'statistical purpose'.[16]

Having an official identity gives the possibility to people of enforcing all sorts of rights. It gives them the capacity to sue (and to be sued, which can be equally important), but also gives them access to other benefits such as education, healthcare, and social security. People with no official name will not have the possibility to exercise any rights or enjoy any of these benefits. Indeed, the right to a legal identity amounts in a certain way to a right to have rights, and therefore provides the individual with a 'place in the world'.[17]

In that sense, Article 24 of the ICCPR only reiterates one of the basic principles of the rule of law: that the law applies to everyone. The people who most need this right to have their legal personality acknowledged are those who need the greatest amount of protection from abuses: children. Failure to officially name a child at the time of his birth, and therefore depriving him of any legal personality, makes him or her particularly vulnerable to all sorts of abuse, and consequently renders all the other rights in the Covenant almost irrelevant to them.[18]

One of the most important consequences of a child not having a formal identity is that it will very often mean an individual is deprived of his right to education. This is particularly important as it has very enduring effects on the opportunities that person might have when they come to reach adulthood.[19] Having an official name is generally an absolute requirement to enroll in any kind of educational institution. This rigid requirement has an obvious detrimental effect, and some countries such as India, Myanmar and Thailand have decided not to enforce it, or even to abolish it.[20] Unfortunately, these countries remain in the minority: in countries such as Cameroon, Lesotho and Yemen a child is not permitted to go to school without first providing a birth certificate.[21] Equally, access to healthcare will be a lot harder to obtain for a child who has no official name: access to hospitals and treatment in many countries is only provided to those who can first prove their citizenship.[22]

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[16] UNICEF *Birth Registration : Right from the Start* (Florence, Innocenti Research Centre, 2002) at 2.
[17] Allison Kesby *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford, Oxford University Press, 2012) at 13.
[18] UNICEF above n 16 at 4.
[19] Ibid.
[20] Ibid at 5.
[21] Ibid.
[22] Ibid.

Lack of a formal identity restricts a child's access to these fundamental rights, but it also makes them extremely vulnerable to exploitation and abuse, which thrive on non-registration.[23] A child (or even an adult) who has no official name is easy prey. That person is already invisible to society and their disappearance may well go unnoticed. Street children are the most extreme example of this: Their situation is often made particularly difficult to solve due to the fact they have no legal identity, so that their origins and whereabouts are almost impossible to trace.[24]

Children are also at risk of having their rights as children violated. Without an official name and identity, a child will be unable to prove their real age. That childhood and adulthood are two separate and different stages of life has been accepted by the international community: it was the underlying principle behind the Convention on the Rights of the Child, which delineates the particular rights of children as distinct from adults.[25] However, it is often disregarded by governments and individuals alike when it comes to implementing laws regulating the minimum age for the performance of some acts. The child labour problem in India is a well established and recognised issue which is greatly worsened by the fact that the real age of children is often hard to prove: the law establishes a minimum age of 14 for employment, but it is hardly ever implemented by factories and industries who hide behind the fact it cannot be proven that the children have not reached the minimum required age.[26] In almost all countries, the law sets a minimum age for marriage, but is often not enforced in parts of Africa and Southern Asia for the same reasons.[27]

Equally, when coming into conflict with the law, children normally have special rights due to their condition as minors. Again, these particular rights are often denied to them based on the fact they cannot prove they are underage. Article 40(3)(a) of the Convention on the Rights of the Child obliges States parties to set a Minimum Age of Criminal Responsibility, which is the 'minimum age below which children shall be presumed not to have the capacity to infringe penal law'.[28] Art 37 gives a right to the child in conflict with the law to be treated 'in a manner which takes into account the needs of persons of his or her age'. Unfortunately there are many examples where, although the required laws have been passed, they are not effective for the very same reason given in the previous examples: children who have not been given an official name and identity are incapable of proving their age, and in doubt the officials will treat them, incarcerate them and try them as though they were adults. To give one example, there have been several reports of children being locked up as adults in Guinea based on the fact that the officials believed the children had an adult physiology.[29] A similar problem arose with Australia's policy regarding asylum seekers.[30] Immigrants claiming to be minors had to undergo bone scans to test their age, and while the results were relied upon by the officials, the margin of error in such tests is actually very significant.[31]

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[23] Ibid.
[24] Ibid.
[25] UNICEF *Excluded and Invisible: The State of the World's Children* (New York, UNICEF, 2006) at 43.
[26] UNICEF above n 16 at 5.
[27] Ibid at 6.
[28] Don Cipriani *South Asia and the Minimum Age of Criminal Responsibility: Raising the Standard of Protection of Children's Rights* (Kathmandu, UNICEF, 2005) at 3.
[29] UNICEF above n 16 at 6.
[30] Mary Crock *Seeking Asylum Alone, A Study of Australian Law, Policy and Practice Regarding Unaccompanied Children* (Sydney, Themis Press, 2009).
[31] Ibid at 105.

Children are the most at risk amongst the people who are not given an official name, but the consequences often have long term effects on their lives: lack of education has long lasting negative results on the opportunities which one may have in later life.[32] Similarly, with respect to the right to access healthcare: a person with no legal identity will not suddenly gain access to hospital. The absence of a formal legal name and identity vexes not only the access to these 'social citizenship rights', but it also affects the enforcement 'civic citizenship rights' such as the right to vote and be elected to an official position.[33] The right to live in a well functioning democracy therefore also depends on everyone's existence being known to and acknowledged by the state: all elections require voters' lists, which are only possible through the official identification and the necessary naming of every individual in a certain country or society. Frauds and manipulation of electoral results is made much easier in some countries by the fact that these voters' lists are not representative of the actual population living in an area.[34] Fake names might be added to provide false ballots to a candidate and real people may well be taken off the list without this raising much attention due to the incomplete and unreliable nature of these lists. Entering the formal job market also proves very difficult to those without an official name.[35] The same can be said for the obtaining of a passport enabling the individual to travel legally, the opening of a bank account and pension fund, and the access to social security of any forms of credits. These examples illustrate the lasting negative impact of a lack of official identity for the individual.

In the breakdown of a civil society and political governability of a country resulting from a civil war, the problem of child soldiers often arises. It is today still a very serious issue, despite the prohibition of the recruitment of child soldiers in the Convention on the Rights of the Child (Article37), and has even been classified as a war crime in the Rome Statute of the International Criminal Court in its Article 8(2)(b)(xxvi). The minimum age for enrolment in any army or fighting unit has been set at 15 (18 for the state parties to the Optional Protocol to the CCR on the Involvement of Children in Armed Conflict which entered into effect in 2002). However the same difficulty which I have explained earlier arises here: without an official name and identity, there is no formal way of proving the age of a child, which opens many gates to those trying to enroll underage soldiers. For example, the Taliban in Afghanistan are known for enrolling any man who could grow a beard,[36] whereas the Nepali government would accept oral confirmation of an individual's age by that same individual.[37] The necessity that children be named and identified at birth cannot be stressed enough considering the gravity of such cases.

The second so called 'statistical purpose' of legal identity is very much the other side of the same coin. Having an adequate system of registration and naming of individuals gives to the state as well as to NGOs invaluable information which is an absolute precondition for effective measures or social policies in trying to improve the living standards in a country or region. In that sense as Scott argues, the creation of 'legible people' is really one of the preconditions of modern statecraft.[38] That is all the more relevant when considering the protection of rights of the weakest: how can a state fight child labour or human trafficking

[32] UNICEF above n 16 at 21.
[33] Mia Harbitz et al, *Democratic Governance, Citizenship and Legal Identity: Linking Theoretical Discussion and Operational Reality* (2009) Working paper for the Inter-American Development Bank. Available at http://www.iadb.org/intal/intalcdi/PE/2009/03791.pdf (last visited 15 November 2013) at 8.
[34] UNICEF above n 16 at 7.
[35] Ibid at 6.
[36] Saudamini Siegrist et al, *Birth Registration and Armed Conflict* (Florence, Innocenti Research Centre UNICEF, 2007) at 14.
[37] Ibid.
[38] James C Scott, *Seeing like a State* (Princeton, Princeton University Press, 1998) at 65.

and develop a right to education if it does not have reliable information as to how many people live in its territory?[39] How can it fight hunger if it does not know exactly how many people it is supposed to take care of? That many humanitarian actions or governmental social policies have failed in the past due to lack of information as regards the population is an established fact.[40] Furthermore, the regions of a country where the rate of people without an official name is the highest also tend to be the poorest regions which are the most in need for help from governments and NGOs[41]. The lack of information may consequently lead to ever more important disparities between the people of the same country.[42] That was indeed already one of the main concerns raised at the United Nations World Population Conference in Bucharest in 1974: amongst its findings, the report stresses the importance of 'vital statistic registers' in all countries, essential for the planning of investigations and the provision of a basis for the formulation, evaluation and application of population and development policies.[43] These ideas were confirmed in the following International Conference on Population in Mexico City of 1984.[44]

Countries in which the government is not able to conduct its activities normally or even at all, be it due to a civil war within the country or the happening of a natural disaster, pose particular difficulties as regards the right to a legal identity of the individual. While most of the effects discussed above are aggravated by a breakdown of the rule of law, issues of another nature may arise.

In situations resulting from internal conflicts or natural disasters, it is not uncommon for families to be split in the evacuation process. This can lead to children becoming unaccompanied minors, and it then becomes a priority to return them to their parents or caretakers.[45] But the numbers of displaced people can sometimes be so high that to find the families can amount to finding a needle in a haystack, and surnames are usually of great help in this enterprise.[46]

Finally, in the course of a civil war, people who had a legal name and identity have lost it through the destruction of the archives at the official registry, intentional or accidental.[47] Safe storage of these archives is absolutely essential to safeguard the rights of the individual for all the reasons stated above: the destruction by the Khmer Rouge of the official registers was a first step towards the genocide which took place later.[48] It stems from this that not only do the states have to make sure people are given an official name at birth, they must also take all precautionary steps necessary to ensure that the population does not run the risk of losing its official identity through the destruction of official lists.

C. The situation of official registration today

[39] Morris L Cohen et al, *Classification Plan for Laws Regulating the Vital Registration System* (Medford, Fletcher School of Law and Diplomacy, 1977).
[40] Frances Stewart, 'Basic Needs Strategies, Human Rights and the Right to Development' (1989) 11 *Human Right Quarterly* 347 at p.369.
[41] UNICEF, above n 16 at 6.
[42] UNICEF Regional Office for Latin America and the Caribbean *Derecho al Nombre y a la Nacionalidad: Propuesta de Trabajo para America Latina y el Caribe* (UNICEF, Bogotà, 2000).
[43] 'Report of the World Population Conference' 1974 (UN Publ.E/CONF.60/19), para 72.
[44] Mexico City Declaration on Population and Development, August 1984, available on http://www.apda.jp/en/pdf/declarations/1984_MexicoCity.pdf (last visited 13 November 2013) para 8.
[45] Siegrist, above n 36 at 13.
[46] Ibid.
[47] Ibid at 10.
[48] Ibid.

UNICEF has published some alarming reports on the issue of official registration around the globe. Even though Article 7 of the Convention on the Rights of the Child states that children "shall be registered *immediately* after birth", only half of all children under the age of five in the developing world have their births registered.[49] Sub-Saharan Africa and South Asia are where the situation is the most disquieting, with both regions attaining a birth registration rate of around only 40%:[50] the birth registration rate does not even reach 10 % in places such as Afghanistan, Chad, Ethiopia or Liberia.[51] This translates into a figure of 47 million children born every year who are not given an official identity.[52] Although there does not seem to be any major difference in rates of registration based on sex, geography seems to play an important role; urban areas having much better levels of registration than rural regions.[53]

The right to a name, nationality and registration is not exercised by children themselves, but by their parents on their behalf. One issue here is the fact that this right of the child is not seen as a fundamental right but as a simple formal technicality, both by states and parents. As a result it is often neglected in developing countries in the face of problems which are more tangible and considered more immediate or urgent.[54] This is the first barrier to registration and helps explains the lack of systematic registration in some parts of the world, but unfortunately it is one of many.

This lack of public will can translate into passive conduct by the officials who fail to grasp the importance of the right to an official identity which, in addition to the high cost of a national registration system, causes a lack of enforcement of existing legislation on the matter, as show the example of Papua New Guinea, a country made of over 600 islands inhabited by roughly four million people, which only has one registration office, in the capital.[55] It is therefore hardly surprising that not even twenty percent of new born children are given an official name.[56] It is also not surprising that, in light of this, parents do not enforce the right of their children if they are under the impression that the state itself is not doing its best to give them the opportunity to do so. Lack of investment in registration offices often means that the registrar officers are amongst the lowest and worst paid civil servants in the country.[57] Low pay can cause registration officers to be anything but committed to their work and can even give rise to corruption, as the case of Guatemala shows. Here, the trafficking of children is a real issue. Lawyers often buy children from the natural mother and register them as the child of someone else, often with the connivance of registration officers who receive payment in exchange.[58]

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[49] UNICEF, *Progress for Children: Achieving the MDGs with Equity* (New York, UNICEF, 2010) at 44.
[50] Ibid at 42.
[51] UNICEF, *State of the World's Children, Statistical table on birth registration* (2011), available at http://www.unicef.org/protection/57929_58022.html#Birth
[52] UNICEF above n 16 at 4.
[53] UNICEF above n 51.
[54] UNICEF above n 16 at 12.
[55] Ibid at 15.
[56] Ibid.
[57] Ibid at 13.
[58] UN Commission on Human Rights, *Report of the mission in Guatemala of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ofelia Calcetas-Santos*, 27 January 2000, E/CN.4/2000/73/Add.2 available at http://www.unhcr.org/refworld/country,,UNCHR,,GTM,,3ae6b0fe0,0.html (last visited 13 November 2013).

However, the most extreme example of disregard by the state for the right of the individual to a formal identity is the situation which arose in China as a consequence of the 'one child policy' which was a result of a fear of famine.[59] The methods which were used to control the birth ratio went from simple propaganda and educational work through the effective distribution of contraceptives to the refusal of water and electrical supply for violations, and fines were often handed out for non-compliance.[60] The consequence of this scheme was that many births went unregistered. As a result, up to six million births may have gone unregistered in China since the introduction of the policy.[61] Yet, this was largely ignored by the Chinese authorities, who considered the interests of Chinese society as a whole to be more important than the human rights of the individuals living within it.[62]

The obstacles above, which stem from a lack of political will amongst the high state officials, are those which affect the behaviour of the state itself as regards the issue of birth registration. But another sort of obstacle to this process also exists, and although it is not completely independent from those already discussed, they are very different in nature. These obstacles relate to the factors that help explain why parents themselves do not always take all the necessary steps to ensure their children have a name and a legal personality.

A survey of children's caretakers was conducted in 2005 by UNICEF to try and identify why many of them had failed to register the births of their children.[63] The single reason most commonly cited first in most countries was the fact registration simply costs too much.[64] Two types of cost are to be taken into account. Firstly, the direct cost of going through the administrative process of registration and, secondly, the opportunity cost of birth registration, depending on the ease of access to the registration office.[65]

Many countries still charge a fee for the registration of a new born child, be it directly or indirectly, though few countries charge an official fee for the actual registration itself, as a result of extensive campaigning by the United Nations, its specialised agencies, and humanitarian NGOs.[66] However, this does not mean that registration comes at no cost to parents: very often, while the act of registering and naming a child itself does not involve a fee, other technicalities directly linked to it can be very expensive. This is the case for example in Bolivia, where the process is free, but the issuing of a birth certificate still requires payment.[67] The same problem exists in Australia.[68] Similar hurdles exist in Peru, where parents must first pay for a medical certificate proving that the child was born alive.[69] Furthermore, penalties for late registration are counter-productive, as they serve are a

[59] Hongbin Li et al, 'Estimating the Effect of the One Child Policy on the Sex Ratio Imbalance in China: Identification Based on the Difference-in-Differences' (2011) 48 *Demography* 1535 at 1540.
[60] Carmel Shavel, 'China to CEDAW' (2001) 23 *Human Rights Quarterly* 119 at 135.
[61] UNICEF above n 16 at 14.
[62] Shavel above n 60 at 146.
[63] UNICEF, *The Rights Start to Life: a statistical analysis of birth registration* (New York, UNICEF, 2005).
[64] Ibid at 4.
[65] UNICEF above n 16 at 14.
[66] These include Plan-International, Cordaid, Child Rights Connect, and the World Health Organisation.
[67] Michael Foley et al, *Policy Implementation Gaps in Bolivian Birth Registration* (2007), written for Plan International, available at http://elliott.gwu.edu/assets/docs/acad/ids/capstone/bolivia07.pdf (last visited 13 November 2013).
[68] UNICEF above n 16 at 14.
[69] Communication from UNICEF Peru, 21st June 2001.

disincentive: parents who are at fault will be in no way convinced to register their child if they are aware they will have to pay a fine.

The act of going to the official registration office and taking all the necessary steps to register and name a child also has an opportunity cost for the parents. It is what the parents have to sacrifice in order to comply with the formalities. That cost is especially high where the state infrastructures are not sufficiently developed: parents have to travel to the registration office, which can in some countries take days. The case of Papua New Guinea, mentioned above,[70] is an example of this. With only one registration office in the whole country, it will take a considerable amount of time and effort for the parents to fulfil their obligation. The cost, be it economic or of another nature, is such that very often, parents will be unable to register their child or will decide it is not worth the trouble.

Finally and most importantly, the neglect of cultural and community differences is yet another factor that must be taken into account. From the 2005 UNICEF survey, it is clear that in many countries people do not know that they have to register and give an official name to their children, especially in Sub-Saharan Africa.[71] This lack of awareness as to the obligation to register and its benefits stems in great part from a lack of political will to make the requirement known and understood. Even when it is known, there are historical realities which influence the parents' behaviour: in Kenya, for example, many people are reluctant to register their child because they see the act of registration as a remnant of the colonial period, and not as something beneficial.[72] Cultural traditions also have to be considered, with regard to the naming of a child. In some communities in Madagascar, the naming of a child is a sacred practice and can potentially be subject to continual change, depending on the luck and fortunes of other people bearing the same name, so that official registration is not regarded as worthwhile.[73] Similarly, in other African countries such as Côte d'Ivoire, Ghana and Togo there is a belief that a child should be integrated into society gradually, so that the name is decided over quite a long period of time, and the legal period for registration might have elapsed by the time the community has reached its final decision.[74] As regards these situations, the governments of these states have a duty to educate and encourage the different parts of the populations as to the absolute necessity that a child be given an official name and identity as soon as possible. The consequences of a failure to do so can be disastrous. Similarly, states should consider changing naming laws in a way which can accommodate these cultural differences.

D. The call for the right to registration to be enshrined in international human rights law

As has been made clear, to have an official name is of paramount importance to any individual. As Geertz puts it, names are essential to turn 'anybodies' into 'somebodies',[75] and those who are not given a name at birth face extreme difficulties and dangers when it comes to claiming any sort of rights. The international community has realised this. It has managed to identify what the main challenges associated with providing people an official identity are, and has taken, and is still taking, some of the necessary actions to face them. However, the consequences of not having an official name have in reality quite little to do with the non-

[70] See text accompanying n 55.
[71] UNICEF above n 63 at 4.
[72] Eliwo Akoto, *Recording of Births in Sub-Saharan Africa : What Strategies can be Adopted to Improve Coverage?* (Florence, UNICEF Innocenti Research Centre, 2001).
[73] Unity Dow, 'Birth Registration: the "First" Right' *The Progress of Nations* (New York, UNICEF, 1998) at 6.
[74] Louis Lohlé-Tart et al, *Etat civil et recensements en Afrique francophone* (Centre français sur la population et le développement, 1999).
[75] Clifford Geertz, *The interpretation of culture* (New York, Basic Books, 1973) at 363.

compliance with the right to a name as it appears, for example in Article 24 ICCPR, and much more to do with the right to registration at birth. This is probably the most important reason the name is nowhere to be found in the European Convention on Human Rights or in the Universal Declaration of Human Rights: it is a social reality that every individual living in any sort of organised community *has* a name. Indeed, ethnographic research has failed to reveal a single community which does not use individual or collective names as a means for identification.[76] We simply need names to identify people, just like we need common words to identify objects. As a consequence, the fact that naming is central to registration in every country is in no way due to a legal obligation originating from some international agreement. It stems from a social reality, so that to include in a document on human rights the right to a name, which in reality entails no more than the right to *have* a name seems to be a tautology when there already is a right to registration, for registration automatically leads to naming of the child.

Nevertheless, names and naming practices can become an obstacle at the time of registration. The fact people are not allowed to register their children under names of a specific language in some countries poses the wider problem of state interference in naming practices. This is what the article examines next.

2. Name and Personal Identity

The right to a name, when given the simple meaning of the right to *have* a name, appears redundant: if the main justification for the establishment of fixed names is identification, why do we simply not use numbers? It is, after all, simpler; especially in countries with easy and affordable access to computer logistics. It is also less controversial and would not lead to the obstacle to registration which the rejection of naming practices by the state creates. Note that I uses the word 'appears' and not a categorical 'is'. That we all have a name due to cultural and historical reasons which have nothing to do with an international treaty is true. Nonetheless, stressing that people must be given a name as most international human right treaties do is not insignificant. The name is too important: it is a great part of what constitutes our identity and integrity as humans. Consider, for example, the un-naming and numbering of Jews when they entered Nazi concentration camps; this was akin to saying that the person was no longer human, and therefore not 'worthy of a name'.[77] Similarly, the de-naming of Kosovo Albanians during the Balkan war by the official state in the 1990s was an act of political annihilation.[78] Another example of this was the re-naming of slaves after they had been taken from their land.[79] These practices cannot be tolerated, and thus the issue and focus of the right to a name is not that we all get a name (that is used by our family and friends), but that we have a name by which the state can identify us, and which cannot be taken away from us.

The logical question which comes next then is this: what name can we be known by? That states refuse to register people under the name which their parents or they themselves have chosen raises the issue of whether we should be allowed to decide for ourselves what name we want, without interference by the state. In this second part, I will endeavour to address this question, by looking at what the name really entails, what it represents, whether the state is justified in setting restrictions on naming practices within its jurisdiction and, if it is, how far those restrictions should go.

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[76] Richard D Alford, *Naming and Identity: A cross cultural study of personal naming practices* (New Haven, HRAF Press, 1988).
[77] Primo Levi, *If this is a man* (New York, Orion Press, 1959) at 42.
[78] Gariele vom Bruck et al, *The Anthropology of Names and Naming* (Cambridge, Cambridge University Press, 2009) at 1.
[79] Ibid at 12.

To talk about the content of names in the context of human rights might seem odd, given that this is the area of law which deals with the most severe violations of the rights of individuals, such as summary executions, torture, or the unjustified depravation of liberty. However, as Gross notes, the issue of choice and change of name raises substantial concerns regarding the protection of gender equality, autonomy, choice of identity and minority rights.[80] The name, having a privileged relationship with the person who holds it and with his or her identity, can therefore also have a link with the rights which aim to protect the moral integrity of the individual.

A. What's in a name?...

... Juliet asks Romeo in one Shakespeare's best known plays.[81] This story of two people being kept apart because of nothing more than their different names - Monatague and Capulet - illustrates perfectly the importance of one's name as a symbol of who that person is, and where they belong. It is the prime example of names having the power both to unite as well as to divide us. However, what gives this symbolic power to something that is, on the face of it, nothing but a word seems to have puzzled many.

As Yom Tyrosh puts it, names are 'tricky entities' which are very ambivalent in their nature and their role.[82] On the one hand, a person's name is a very private thing: consider the fact most people are offended when someone forgets their name or gets it wrong. We take it personally because we feel this shows that the person attaches little importance to our persona. On the other hand, the name is also a very public element, as it is "the first point of interface, an anchor for identification" of the individual.[83] This point relates to the argument in Part I which concerns the importance of *having* a name; it is what permits a quick and easy identification of the individual. As Tyrosh also demonstrates, the significance of the name remains quite unclear.[84] It can be said that it is of 'trivial importance', in that it is nothing but a word, like any other. But it equally can be argued that it is of extreme significance: the name is part of what makes us human, it is what distinguishes us from (wild) animals. The importance given by modern society (or, at least, by Western modern societies) to the full realisation of the individual, which can be traced back to the French revolution and the Declaration of the Rights of the Man, has led to the necessity of having an instrument of personal identification.[85] This cult of the individual has led to a great extent to a conceptualisation of the name as 'quite literally personifying the individual by encapsulating the essence of that person for those who know them or know about them'.[86] At the same time, argues Finch, and as illustrated in Shakespeare's *Romeo and Juliet*, the construction of a name and its uses through a lifetime can also embody a sense of connectedness,[87] be it with one's family, ethnic group or religious community. The name works both as an individualising concept, and as a link between people.

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[80] Aeyal M. Gross, 'A Critical Study of European Human Rights Case Law on the Choice and Change of Names' (1996) 9 *Harvard Human Rights Journal* 269 at 269.
[81] Shakespeare's 'Romeo and Juliet'. Act 2, Scene 2.
[82] Yom Tirosh, 'A name of one's own : Gender and Legal Personhood in the European Court of Human Rights' (2010) 33 *Harvard Journal of Law and Gender* 247 at 254.
[83] Ibid.
[84] Ibid at 255.
[85] Jane Caplan et al, Documenting *Individual Identity: The Development of State Practices* (Princeton, Princenton University Press, 2001) at 6.
[86] Janet Finch, 'Naming Names: Kinship, Individuality and Personal Names' (2008) 43 *Sociology* 709 at 710.
[87] Ibid.

Finally, Gross phrases the complexity of the nature of names as a paradox: while my name is indeed considered 'mine', not only does everyone else use it more than I do, but it is other people that gave it to me, and I will need the approval of others to change it.[88] It is my name and yet I have little, if any, control over it. Laws in many countries regulate how we should be named and how we cannot be named, when we can change our names, when we cannot, and when we have to change our names. This seems very odd when considering that I call it 'my' name, thus conveying some sense of property over it. Smith justifies this property-like approach to the name by pointing out that the name is 'the most permanent of possessions, which remains when everything is lost; it is owned by those who possess nothing else',[89] but the lack of control that we may have over the name is a serious impediment to this classification of the name.

The complexity of the concept of the name is mirrored in the vast differences in naming practices around the world. For example, while in Scandinavia the surname historically had the meaning of 'son or daughter of', Spanish surnames have to be made of the surnames of both parents.[90] These two quite different ways of affirming the family ties between children and parents also contrast with cultures where there is no such desire, like in the classic Burmese culture where surnames do not exist at all.[91] This is a simple illustration of the difficulty that the law has had to face when trying to regulate the imposition of official names for the purposes of legibility: different cultures have different relationships with the name and in countries with a heterogeneous population constituted of different tribes or communities, it may seem hard to reconcile respect for the local traditions with the necessity of registration under a fixed name and surname. I will now turn to the situations in which this conflict may arise, and attempt to come to a conclusion as to whether these restrictions are justifiable.

B. The given name

In order to understand fully what the relation between different naming practices and the law should be, one must look at a potential function of the name: that of communicating information about the person.[92] The problem in the context of law is to determine how much names communicate about the people who hold them, and whether the law should have any say in the communicative potential of names. Heymann, in an interesting parallel study of personal names and trademark names used for commercial purposes, identifies three ways in which the name, just like any other word, identifies the person it refers to.[93] First, it *denotes*: it provides a simple means by which people can refer to that person.[94] This alone explains why the right to have *a* name is not enough: if every person in a community was called John Smith, then there would be little point in having a name. It would only serve to identify the people as members of that particular community but would fail to identify the person as a free standing individual. Secondly, it *connotes*: it communicates information about the person it refers to, be it directly or indirectly, like his or her sex or origin.[95] Finally, it *associates*: it communicates ties between the person and other people holding the same name, his or her family.[96] All three aspects are of great importance. They impact the choice parents make when deciding the name of their children, and can lead to people deciding to

[88] Gross above n 80 at 270.
[89] Elsdon Coles Smith, *The Story of our Names* (New York, Harper, 1950) at 61.
[90] Art 109 of the Spanish Civil Code and 55 of the Ley del Registro Civil 1957.
[91] David I Steinber, *Burma: The State of Myanmar* (Washington, D.C., Georgetown University Press, 2001) at xii.
[92] Laura A Heymann, 'Naming, Identity and Trademark Law' (2011) 86 *Indiana Law Journal* 381 at 384.
[93] Ibid at 394.
[94] Ibid.
[95] Ibid.
[96] Ibid at 397.

change their names, as they do not feel their names accurately represent who they are, or want to be.

Because the name has this primary function of communication, one must be wary of what exactly it communicates. Many countries have laws regulating the naming of new born children, which reflects the proposal by the Belgium government at the time of negotiation of the ICCPR of a right to a *reasonable* name. In Germany, for example, the name must not confuse as to the gender of the child and has to be approved by the office of vital statistics ("Standesmant").[97] This is to ensure that the child is not given a name which might be an inconvenience to him by leading to mockery which can have a traumatising effect on the child. This is similar to the situation in Iceland, where the name has to be approved by the Iceland Naming Committee which will decide whether the name is appropriate or not in the case the name is not on the Personal Names Register,[98] or in Sweden where all names which can potentially cause offence to people or inconvenience to the child cannot be approved.[99]

Even stricter rules apply in Denmark, which has a closed list of what can constitute an appropriate first name for the child. This list was published by the Ministry for Family and Consumer Affairs, and in order to register a child under any name which does not appear on the list, parents must obtain the approval of government officials.[100] Similar rules apply in Hungary, where lists of accepted male[101] and female[102] names have been published by the Hungarian government. Although Common Law countries such as the United Kingdom or the United States tend not to have laws regulating the naming of the child in such strict ways, this certainly does not mean there are no restrictions. They are simply looser and less clear: names such as 'Superman' have been accepted in the past.[103] While there are no set statutory limits, courts may interfere when they believe a name is inappropriate. For example, the Roman numeral 'III' was deemed to be inappropriate by the California Court of Appeal who held that a number could not constitute a name as it was 'inherently confusing'.[104] The situation in Japan and China is different, in large part due to the fact neither language uses an alphabet and instead is made of an enormous amount of different logograms. Japan has a closed list of thousands of logograms which can be used to create the name of the child determined by the Ministry of Justice,[105] and will reject any name which might be offensive or inappropriate, as was the name Akuma, which literally means 'devil'.[106] China, while not having a closed list, has the strict requirement that the name must be constituted exclusively of Chinese logograms which can be read by a computer.[107] This, while not constituting a closed list, established in effect a very firm barrier to the parent's

[97] Hydde Flippo *The German Way: Aspects of Behaviour, Attitudes and Customs in the German Speaking World* (Chicago, Passport Books, 1998) at 96-97.
[98] Art 5 and Art 22 of the Personal Names Act Nº45 of 17th May 1996.
[99] Personal Names Act 1982, Section 34.
[100] Danish Act on Names 2006 Art13-14.
[101] http://www.nytud.hu/oszt/nyelvmuvelo/utonevek/osszesffi.pdf, accessed November 13 2013.
[102] http://www.nytud.hu/oszt/nyelvmuvelo/utonevek/osszesnoi.pdf accessed November 13 2013.
[103] 'What can you name your child ?' *BBC News*, 10 August 2007, available on http://news.bbc.co.uk/1/hi/magazine/6939112.stm accessed November 2013.
[104] *In Re Ritchie* 159 Cal. App. 3rd. 1070, p.1072.
[105] Family Registration Law Art 50.2.
[106] Carlton FW Larson, 'Naming baby: the constitutional dimensions of parental naming rights' (2011) 80 *George Washington Law Review* 159 at 193.
[107] Sharon LaFraniere, 'Name not on our list? Change it, China says.' *New york Time*s, 20 April 2009, available at http://www.nytimes.com/2009/04/21/world/asia/21china.html accessed November 13 2013.

choice: many logograms are not entered into computerised systems, and cannot be, for the simple reason that it would be completely unpractical.[108]

Are these restrictions on first names justified? Are any restrictions on first names justified? There are two sides of this argument to consider: on the one hand, one can argue that any form of limitation by the state on a parent's decision is undesirable, as it is an invasion by the state into people's private lives by trampling on their right to freedom of expression. This has indeed been argued in American courts.[109] On the other hand, two main reasons of public interest may be brought forward for state interference. Firstly, given that a system of official identification through name has been put in place, it is logical that the state would try to make it as effective as possible. Indeed, that is the main reason for the system as it exists today in China or Japan. The second argument is that the state has a legitimate interest in preventing children being given names which might be detrimental to them. I will now turn to each of these arguments in turn.

The argument that interference by the state violates the right to freedom of expression of the parents which they exercise in naming their children, is wrong. Discussing the issue in the American context, Larson argues it would be an oppression to forbid the parents to name their child as they desire, infringing the First Amendment of the US Constitution.[110] Although freedom of expression is one of the most fundamental rights which people must possess in a democratic society, it is difficult to see how the naming of the child can be a suitable arena to exercise this right. It must be stressed that the right to a name is first and foremost a right which belongs to the child, and not to the parents. They do not have a right to name their child, but rather an obligation to do so; and while they should have great freedom in doing so for reasons which will become clear by the end of this work, it should kept in mind that the interest of the child is at stake here, not the freedom of the parents.

The arguments in favour of state intervention are slightly more complex. As Munday notes, it may very well be argued that there is a 'public sphere of legitimate concern'[111] but defining it is difficult. The first and obvious element of this 'public sphere of legitimate concern' relates to the discussion in Part I, in that a child should be registered in a way which permits easy registration and so that identification poses little difficulty. This means that the child should be given an official name which is not too hard to spell or pronounce, which permits others to identify his or her sex, and which should not be the same as one of his siblings to avoid confusion.

It is when one tries to argue that the state has a legitimate concern in ensuring that children are not given ridiculous names that things become more problematic. Some of the case law of the European Court of Human Rights (ECtHR) can help shed light on this difficult issue. The ECtHR is a particularly interesting case study for two main reasons. Firstly because, as its name suggests, the Court operates in the field of human rights, the universal characteristics of which allow for analysis that goes beyond jurisdiction-specific doctrines. Secondly, this is one of the only courts in the world (along with the European Court of Justice, but which only started deciding cases on the matter much later) which has had the opportunity to decide cases on the choice of names coming from different countries with different naming practices. In deciding those cases it has had to identify some specific and

[108] Ibid.
[109] Arnold J.'s dissenting opinion in the case of *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990).
[110] Larson, above n 106 at 181.
[111] Roderick Munday, 'The Girl They Named Manhattan: the Law of Forenames in France and England' (1985) 5 *Legal Studies* 331 at 339.

consistent principles which must apply to naming laws regardless of the legal system the people involved should be bound by.[112]

In the case of *Bughartz v Switzerland,*[113] it was made clear that despite the right to a name not being mentioned anywhere in the European Convention of Human Rights (ECHR), the court could decide cases on naming practices under Article 8(1) on the right to a private and family life. The Swiss government claimed that Article 8 did not apply to this case, thereby implying that the name was a public aspect of the person and therefore had nothing to do with one's private life. The majority of the Court, Judges Pettiti and Valticos dissenting on the question of applicability, stated that while the ECHR had no explicit provision on names, 'as a means of personal identification, a person's name none the less concerns his or her private life. The fact that society and the State have an interest in regulating the use of names does not exclude this'.[114] This was reiterated later by the Court in that same year in the case of *Stjerna v Finland.*[115] Therefore, it can be said that the interpretation of the implications of a name, and the rule put forward by the Court has been one of balance between the private and the public spheres of the name, recognising that both the individual and the State had an interest in the name that a person may hold.

However, the decision of the ECtHR in the case of *Lassauzet and Guillot v. France*[116] shows how difficult it can be to balance these two aspects. The facts of the case were quite simple. The parents wanted to name their daughter 'Fleur de Marie', after a heroine from a well known French novel. While both 'Fleur' and 'Marie' were on the list of acceptable names, and 'Fleur-Marie' would also have been registered, 'Fleur de Marie' was deemed by the French Court of Appeal as 'too whimsical and so eccentric" as to make the child a victim of potential abuses.[117] The Tribunal de Cassation upheld the decision.[118] Guillot and his wife then went to the ECtHR claiming this decision was a breach of Article 8(1) on the respect for a private and family life. The Court decided that while it 'understood that Mr and Mrs Guillot were upset by the refusal to register the forename they had chosen for their daughter' there was no breach of Article 8.[119] It accepted the argument put forward by the French government and the Commission that because the parents had the possibility of registering 'Fleur-Marie' as their daughter's forename, the government had not interfered with their right to choose.[120] This decision demonstrates the complexity of balancing the interest of the parents with the lawful interference of the State, if the Court agreed that the government can legitimately interfere to protect children from receiving a ridiculous name at birth, and that the name 'Fleur de Marie' was indeed whimsical, then how could it be satisfied with the name 'Fleur-Marie' which is practically the same and would put the child in a similar situation? Furthermore, does their argument that 'Fleur de Marie' can be used in the daughter's everyday life not defeat the whole purpose of the exercise which is to protect children from ridicule? Gross rightly argues that this decision is contradictory.[121] The dissenting opinion handed down by Judge MacDonald and Judge Meyer makes more sense. They firstly argued that the state's intervention 'certainly *was* an interference with the exercise by the applicants of their right to respect for their private and family life, which without doubt includes the right to choose a forename'.[122] Any restriction, no matter whether it is well

[112]Tirosh, above n 82 at 251.
[113] *Burghartz v. Switzerland* (1994) 18 EHRR 101.
[114]Ibid para 24.
[115] *Stjerna v. Finland* (1997) 24 EHRR para 37.
[116] *Guillot v. France*, app nº 22500/93.
[117] Ibid para 10.
[118] Ibid para 11.
[119] Ibid para 27.
[120] Ibid para 26.
[121] Gross, above n 80 at 278.
[122] *Guillot v France* (MacDonald and De Meyer dissenting).

founded is an interference with the freedom to choose.[123] However, they did not see how 'Fleur de Marie' could really harm the child, and therefore did not believe the state interference with Article 8(1) was justified.[124] This was the first case the Court heard on the choice of a child's forename. It raises some significant questions: it showed how difficult it is to determine what constitutes a name so ridiculous it becomes inappropriate for the child, and the Court avoided the question of who gets to decide whether a name is ridiculous.

Common law countries such as the United States and the United Kingdom have refused to interfere except in the most extreme of cases, believing that parents are in the best position to make that sort of decision, and will set limits when the name impedes an easy registration, such as when the name proposed is a single letter or a number. This very liberal approach to naming laws is based on two beliefs. Firstly, that the name the child is given at the time of his birth cannot be seriously prejudicial to his development. Secondly, that if the child is not happy with the name he has been given, he will be able to change it when he comes of age. It can be said that there is a strong belief in countries with such a system that the name has little, if any, impact on the development of the child. Yet, studies led by psychologists on the subject have tended to disprove this: indeed some have demonstrated that there exists a correlation between the name of the child and his or her capacity to develop normally and have even found that children with unusual first names are more likely to suffer from some psychological troubles. Ellis and Beechley have been able to find a 'significant tendency for boys with peculiar first names to be more severely emotionally disturbed than boys with normal names'.[125] Similarly, Tauber points out that the children's given names "unequivocally" influence the way teachers judge their students.[126] It can be said that while some studies try to minimise the importance of the given name in the development of the child,[127] the general consensus among psychologists is that names do 'play a role of some importance in our mental life, and may even influence our conduct in subtle ways which we often fail to recognise'.[128]

These studies established that unusual names have the potential to make life harder for children. But they fail to clarify one point: what constitutes a usual name? Researchers based their results on an empirical case-by-case approach, whereby a name was ranked as 'unusual' whenever the majority of the people participating in the study said it was unusual. They thus fail to identify the relevant elements which make a particular name unusual to the point that it is undesirable for the child to hold it. Many of these elements are subjective, and depend in great part on the cultural environment the child was born in. A name which would be deemed perfectly normal in one part of the world might seem completely 'whimsical' somewhere else.

The question of state interference in the naming of a child is therefore a very problematic one: while it is accepted that unusual names are undesirable, identifying what constitutes an unusual name on a national scale can sometimes be impossible in countries that are not culturally homogeneous. This is why Belgium's proposal of the right for a 'reasonable name' in the ICCPR, although having merits, was rejected. If the concept of unreasonableness

[123] Ibid.
[124] Ibid para (1).
[125] Albert Ellis et al, 'Emotional Disturbance in Children with Peculiar Given Names' (1984) 85 *The Journal of Genetic Psychology* 337 at 339.
[126] Robert T Tauber*, Self-fulfilling Prophecy : A Practical Guide to its Use in Education* (Westport, Greenwood Publishing Group, 1997) at 61.
[127] Richard L Zweigenhaft et al, 'The psychological impact of names' (1980) 110 *The Journal of Social Psychology* 203 at 207 ; Martin E Ford, 'Effects of Social Stimulus Value on Academic Achievements and Social Competence : A Reconsideration of Children's First Name Characteristics' (1984) 76(6) *Journal of Educational Psychology* 1149.
[128] John C Flugel, *The Psychology of Clothes* (London, Hogarth Press, 1930) at 208.

cannot be assessed at a national level, accepting the subjectivity of the concept might prove helpful. The reasonableness of a child's name should be assessed in the light of the parent's culture, and not on an objective basis. This is especially relevant when one understands that the very close link between names and ethnicity has often been, and still is, ignored by many nations.

C. Names, ethnicity and family

The name of one individual has a particularly close link with the origins of that person, both cultural and familial.

The link between one's ethnic background and one's name is quite obvious: most people's first names and surnames usually are a clear sign of the language they speak, thereby giving a clear clue as to their origins. This entails two things. Firstly, that names have historically had 'an important role in national or group identity formation';[129] and secondly that they are an equally important 'personal marker of individual identity'.[130] This brings us back to the name's capacity to bring together and to separate. People from the same ethnic group or the same country will tend to speak the same language, thereby unifying them. On the other hand cultural background is an important part of identity. Were I to immigrate to some country forcing me to change my name because of its foreign-sounding quality, I would feel that part of my identity had been taken from me.

There are three major purposes Scassa has identified for which nations have controlled the language of names: segregation, assimilation and 'nation building'.[131] All three are particularly violent in their rejection of cultural diversity. Segregation refers to the situation where a state obliges a particular group of people to change their names so that they are easily identifiable as being part of the particular group. The most extreme example of this was the order by the Nazi German government which required all Jews to have either Israel or Sarah as their first name.[132] This was but another step to heighten the stigma towards the Jewish people: giving the same name to each individual implies that each has no individuality. Assimilation is the reverse situation, where a state requires a particular group of people to change their names so that their different origins are effectively denied. Such policies were carried out by the Mussolini government in Italy in the northern German speaking regions during the 1920's. More recently in Bulgaria in the 1990's Turkish immigrants were forced to 'Bulgarise' their names.[133] The concept of 'nation building' is quite similar to the one of assimilation, with the difference that it is carried out when a nation is young, as was the case of the United States and Canada in the nineteenth and early twentieth centuries. At the time both states started to create lists of population, the problem of registration of native populations such as the Inuit in Canada and Native Americans in the United States was solved by forcing them to 'Americanise' their names.[134] These two countries, despite the fact that they have been defined in great part by their cultural diversity have had a tendency to include the language of names in a definition of what it is to be American or Canadian.[135]

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[129] Teresa Scassa 'National Identity, Ethnic Surnames and the State' (1996) 11 *Canadian Journal of Law and Society* 167 at 190.
[130] Ibid.
[131] Ibid at 170.
[132] Ibid at 174.
[133] Ibid at 175-177.
[134] Ibid at 180.
[135] Ibid at 190.

As Dunbar notes, there is a much greater interest in minority languages – and therefore, ethnical names – than there was in the past.[136] One of the main reasons is that the international community has come to the realisation that the language one person uses is a fundamental constitutive element of his or her personality,[137] so that taking this element from him or her is an extremely violent attack on his or her identity. This new debate arose after the fall of the Soviet Union and the independence of those countries whose cultures had been oppressed by the Russian sovereign, and led to a Framework Convention for the Protection of National Minorities made by the Council of Europe in 1995. Article 11 of the Convention provides that members of minority groups have the right to use their surnames and first names in the minority language, and that they have the right to official recognition of these forms of names.[138] The UN estimates that about 6,000 languages run the risk of disappearing by the end of this century,[139] and it is in great part due to the fact that people are simply not allowed to use them in any official context, including in the context of official naming. Europe is the only continent which provides special protection to minority languages internationally, and yet the problem also arises in all other continents in the world. As already mentioned, non-registration of indigenous children is often a result of laws which do not allow for registration under indigenous names.[140] These laws undermine cultural diversity, especially in nations which used to be colonies, where the borders were made by European powers with no regard for the real cultural distribution in a region. It is therefore of extreme importance that there should be an international effort directed towards the protection of minorities, starting with the authorisation of the registration of names which may appear unusual in the official languages of the country.

A name often communicates to some extent the origins of the person holding it, but it will always make clear the family ties of that person. Historically, European surnames were variable, depending on some characteristics of the individual such as his employment ('Smith'), which could change over time.[141] The imposition of fixed surnames changed this, so that surnames were a constant element of a person's official identity.[142] Through this change of customs, the surname became a family name, passed from parents to children, effectively becoming family property, especially in countries where it is extremely difficult to change one's name.[143] The ECtHR stressed this element in deciding that names were part of one's private life, and therefore were covered by Article 8 of the ECHR.[144] The link is most obvious in Scandinavian countries, where the surname literally means 'son of" or 'daughter of'. However, the link is not limited to family surnames. Studies have shown that up to 62 percent of all children were given a first name which referred to another family member,[145] and up to 84 percent of all families had at least one child with a kin-related name.[146] Respect

[136] Robert Dunbar 'Minority Language Rights in International Law' (2001) 50(1) *International and Comparative Law Quarterly* 90.
[137] Ibid at 93.
[138] Council of Europe, 'Framework Convention for the protection of national minorities and explanatory report' ETS N°157.
[139] Communication by the Office of the High Commissioner for Human Rights on the 12 March 2013, available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13124
[140] UNICEF 'Ensuring the Rights of Indigenous Children' (Florence, UNICEF Innocenti Research Centre 2004) at 9.
[141] Scott et al. n.11 at 10.
[142] Ibid.
[143] Roderick Munday. 'The French Law of Surnames: A Study in Rights of Property, Personality and Privacy' (1986) *Legal Studies* 79 at 94.
[144] *Burghartz*, above n 113.
[145] Alice S Rossi, 'Naming Children in Middle Class Families' (1965) 30 *American Sociology Review* 499 at 503.
[146] Ibid at 513.

to a family life, as most international human rights documents provide for, cannot be fully achieved if the state does not allow for the registration of the child under a name which seeks to reflect the family tie between the child and his or her parents.

The European Court of Justice in *Garcia Avello v. Belgium*[147] provides another illustration of the conflict between family and cultural ties and state's regulations. It is a Spanish naming custom that children receive the surnames of both parents. The claimant's children had dual Belgian/Spanish nationality, and while they were registered in Spain under the name 'Garcia Weber', the Belgian registry gave them the full name of their father, as per the law of the country. The Belgian government refused to alter the names, and argued in front of the ECJ that the immutability of names is 'a founding principle of social order, ... avoiding confusion as to identity or parentage of those concerned',[148] and the purpose of the law was to facilitate integration of those with double nationality.[149] The ECJ refused these arguments, stating that the immutability of names was a disproportionate measure,[150] unnecessary in the Community context where people with different nationalities often lived in same countries,[151] and decided there was a breach of Article 12 of the EC Treaty when people were not allowed to bear the same official name in different countries of the European Union.[152] This case serves as a prime example of the state using the 'legibility' argument to impose restrictions on naming decisions often quite unconvincingly. Is the identification of people by the state really made more difficult by people having a particular name which may link them to their families or culture? The argument was brought in the context of a petition to change names, and it is interesting to note that the very same argument has been brought by governments to justify the obligation imposed on some to change their name.[153] The law is not adapting to the changing nature of families: families are more and more culturally diverse, and there are factors such as the emergence of step-parents as the norm, yet the law in most countries takes an archaic approach to family names.[154]

D. A right to control your name?

The purpose of human rights to a great extent is that of ensuring full respect for the integrity of the person, be it physical or moral. This means that all the constituting elements of a person's identity must be respected. Indeed, it can be said that human rights depend greatly on the fact that we are autonomous, and have an identity and integrity as individuals.[155] This leads to two observations. Firstly, that people's identities must be respected, and if one believes the name is an important part of identity, then the state should not be able to oblige or force any individual to change their name. However, many states do force individuals to change their names. Policies regarding surnames following marriage have been a great indicator of the underlying sexism in society. Secondly, one must take into account the fact that each person changes in the course of his or her life, our personalities may change, and even the core elements which constitute who we are may be affected by our experiences. Therefore, the respect for one's private life includes a right to the free development of one's personality through personal autonomy.[156] As a result, though this is uncommon in western societies, it may be that the name a person holds no longer

[147] (C-148/02) *Garcia Avello v. Belgium.*
[148] Ibid para 40.
[149] Ibid.
[150] Ibid para 43.
[151] Ibid para 42.
[152] Ibid para 45
[153] As in *Turkey v Tekeli* (2006) 42 EHRR 53 para 44-48.
[154] Abigail B Bond, 'Reconstructing Families – changing children's surnames' (1998) 10 *Children and Family Law Quarterly* 17.
[155] Marshall, above n 6 at 6.
[156] Ibid at 3.

accurately represents the identity of that person, and that this person would wish to change it so that it corresponds to who he or she is. I will now turn to the problems that these two situations have created for the law, and how it has dealt with them.

The case of *Tekeli v Turkey*[157] serves as a perfect example of how naming laws can show the state's disregard for a person's integrity by forcing that person to abandon the name by which they are known. In 1995, Mrs. Ayten Ünal Tekeli filed a complaint against the Republic of Turkey to the European Commission of Human Rights, claiming the Turkish state failed to protect her rights under Article 8 and Article 14 of the ECHR. Mrs. Tekeli married in 1990, and under the Turkish Civil Code, was forced to change her surname on all official documents to her husband's. The Turkish Supreme Court had rejected her claim that she should be allowed to keep her name on the basis that 'The rule to which married women bear their husband's name derived from certain social realities... According to the thinking behind family law, the purpose of the rule is to protect women who are of a more delicate nature than men ... and preclude bicephalous authority within the family'.[158] In modern western society where women are supposedly no longer seen as inferior to men, this reasoning may seem outrageous. It should nevertheless be remembered that very similar beliefs were normal in these societies until recently. At the end of the nineteenth century, White wrote that 'properly speaking, a man is not married to a woman, or married with her; nor a man and a woman married to each other. The woman is married to the man. It is her name that is lost in his, not his in hers ... As long as a woman generally lives in her husband's house and bears his name; it is the woman who is married to the man'.[159] This clearly shows how name laws help in shaping substantive legal rights, such as freedom from discrimination based on gender.[160] The argument the Turkish government brought to the ECtHR was that such a naming policy was desirable as it in fact strengthened the situation of women in the family.[161] Turkey also pointed out the major difficulties that would arise should the law of registration be changed.[162] The ECtHR found that Turkish law was in breach of the Convention, not on the basis of Article 8, but on Article 14 on the right to freedom from discrimination. The fact Turkish law had been amended in 1997 so that women had the right to keep their maiden name along with their husband's name was not deemed satisfactory. Furthermore, the Court stated that the arguments provided by the Turkish government in support of the law were not satisfactory, failing to be 'objective and reasonable'.[163]

The argument that women should take the surname of their husbands for the purpose of legibility is unconvincing. The purpose would be achieved just as effectively if the husband changed his surname to that of his wife. In the case of *Burghartz v. Switzerland,*[164] a couple married in Germany and chose the wife's name as the family name, so that the husband had both his surname and his wife's. However, they were both registered in Switzerland under the husband's surname. In the ECtHR, the Swiss government argued that the law reflected a tradition whereby family unity was reflected in joint names, and the couple could not demonstrate such inconvenience which would justify a change.[165] The Court disagreed and found that the law was discriminatory towards women,[166] and agreed with the Commission that 'the right to develop and fulfil one's personality necessarily comprises the right to identity

[157] *Tekeli v Turkey* above n 133.
[158] Ibid para 16.
[159] Richard G White *Words and their Uses* (New York, Sheldon & Co, 1870) at 140.
[160] Tirosh, above n 52 at 249.
[161] n 133 para 46.
[162] Ibid para 44-48.
[163] Ibid para 66.
[164] Above n 113.
[165] Ibid para 26.
[166] Ibid para 28.

and therefore to a name'.[167] By this they meant that the right to decide what name to bear was inherently part of the right to be free to develop one's personality.

The *Burghartz* case was a ground breaking decision by the ECtHR. Indeed, several cases had been brought in front of the Commission previously, and been denied. In *Hangsmann-Hüsler v. Switzerland*[168] a woman who was running for parliamentary elections in her canton brought a claim to run under her own name, and not her husband's. She failed because the Commission was of the opinion that the restrictions under Swiss law were justified and pursued a legitimate aim of rendering people from the same family easily identifiable.[169] In *X v. Netherlands*[170] a woman argued that she should not be forced to change to her husband's surname on voting lists. Again, the Commission struck down the claim on the basis that the legibility argument made such obligations legitimate. In both cases, X and Hüsler were therefore known not as citizens in their own rights, but as 'the wife of'.[171] The position of the ECtHR has changed. Names are no longer seen as simple administrative tools, but as real elements of one's personality, meaning that discrimination based on sex in naming laws will no longer be allowed. Unfortunately, this positive evolution has not taken place in many parts of the world, where wives are still forced to change their surnames to their husband's upon marriage, thereby becoming little more than the 'wife of' of their husband, as opposed to a complete, autonomous individual. For example, in *Muller v. Namibia*[172] the husband of German origins applied to change his name to his wife's, but was unsuccessful.[173] The Constitutional Court of Namibia stated that he needed presidential approval to change his name, and the fact that wives did not face such a requirement was justified on the basis that people should not be allowed to change their names without control of the government.[174] Whether this argument is acceptable will be discussed below, but the difference in treatment between women and men in this area shows that men and women are not seen as equals; that a woman changing her name to the husband's name is perceived as normal, whereas the reverse is treated as an anomaly.

Many of the above arguments also apply to the right to change one's name. States which impose important restrictions usually do so arguing that names are simply an administrative tool which has little to do with one's personality. The main argument in favour of allowing people to change their names is that on the contrary names are a very important part of the integrity of an individual.

Probably the most extreme example of change of personality is change of gender. The amount of cases involving transsexuals that have been brought to the ECtHR is quite indicative of the difficulties they have had to face in order to have their new identity recognised by states. After having gone through the medical process of changing sex, these people usually want their new identity to be recognised by the state, and therefore apply for a change in their civil status which often involves a change of name. The case of *B v. France*[175] involved a male-to-female transsexual who applied to have her civil status changed, so that her name would be changed from Norbert Antoine to Lyne Antoinette. In French law, a 'legitimate interest" must be demonstrated to apply for a change of name, and the courts had refused her application. The ECtHR, however, found a breach of Article 8, as

[167] Ibid para 47.
[168] *Hangmann-Hüsler v. Switzerland* (App. nº 8042/77), admissibility, 15 December 1977.
[169] Ibid.
[170] *X. v. Netherlands* (App. nº 9250/81), admissibility, 3 May 1983.
[171] Tirosh, above n 52 at 267.
[172] *Muller v. Namibia* (2000) *Commonwealth Law Bulletin*, 26(2), 849.
[173] Ibid.
[174] Ibid at 850.
[175] *B v. France* 1992, 16 EHRR 1.

"the fair balance between the general interests and the interests of the individual'[176] led to the necessary conclusion that B should be allowed to have her name changed. The particular difficulties which exist in French law as regards change of name was an important factor in distinguishing this case from other cases such as *Rees v. UK*[177]which had very similar facts. In the United Kingdom the process for change of names is much more lenient as it can be changed by custom, and no legitimate interest must be demonstrated.[178]

The ECtHR has a quite sympathetic approach to the claim brought by transsexuals for change of name under the belief that there is indeed a real inconvenience in having a name which so obviously does not correspond to the physical appearance of the person. It has had a much less sympathetic approach to claims brought by people who wanted to change their names for other reasons. It has, for example, rejected claims based on the desire by individuals to manifest a closer link to their ancestors. *Boij v. Sweden*[179] involved the petition of a woman who desired to change her surname to the one her ancestors had. The Commission denied the petition and accepted the Swedish government's argument that she could not show serious inconvenience caused by her present name.[180] The Court took a similar approach in the case of *Stjerna v. Finland*[181]where a man felt it an injustice to bear half of the surname of his ancestors. He also claimed that his surname was difficult to pronounce and gave rise to a pejorative nickname.[182] The Court rejected his arguments and stated that 'whilst recognising that there may exist genuine reasons prompting an individual to wish to change his name, [it] accepts that legal restrictions on such possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking bearers of a given name to a family'.[183] The approach of the Court therefore seems to be that while it will protect the interests of transsexuals, who have a legitimate interest in changing their names, it will give a large margin of appreciation to the member states in deciding whether a person is allowed change his or her name.

3. Conclusion

The ICCPR and other international documents protect the right to have an official name. Not having an official name means one of two things: either the person was not registered at birth and was therefore not officially named, or that the state decided to take the name away from that person. The first of these scenarios is indeed very problematic, as it means the person remains without official identity and, as a result, without means to enforce his or her rights. However, namelessness is not solved in these cases thanks to a specific right to a name, but to a more general right to an official identity which encompasses the name, but also birth registration and the right to a nationality. The second scenario is a lot less common, but is of such violence that it may not be tolerated to any extent, so that it justifies in itself the existence of the right to have a name.

This right is necessary but it is not enough to cover the different functions of the name. The content of the name and its regulation do create problems, even when simply dealing with

[176] Ibid para 44.
[177] *Rees v. UK* 1986, 9 EHRR 203.
[178] The ECtHR later overturned its decision in *Rees* on the treatment of transsexuals in the United Kingdom, in the case of *Goodwin v. UK* (1996, 22 EHRR 123) but that case did not involve the question of change of name.
[179] *Boij v. Sweden* (App. 16878/90), Admissibility, 29 June 1992.
[180] Ibid.
[181] *Stejrna v. Finland*, 1994, 4 EHRR 195.
[182] Ibid para 10.
[183] Ibid para 39.

the right to have a name, if they can create disincentives for people to register children at birth by preventing them from doing so under the name they chose. The right to a name should impose a duty on the state to respect the symbolic aspect of the name. For example, the Chinese custom of calling orphans "Mei Ming" which literally means "No Name"[184] stigmatises these children by labelling them as people who do not belong anywhere.

State intervention should be kept to a minimum so as to respect the role of the name as a means of expressing family and cultural ties. When dealing with the name given at birth, states should accept that parents will normally know best, set a high threshold for the prohibition of a particular name, and take into account the cultural background of the family in assessing its reasonableness and harmfulness. Finally, the public interest argument supporting regulation of names relying on the concept of legibility of the people is no longer convincing in a society where most registration systems are computerised and many countries now provide their citizens with an identification number, be it formally (like in France)[185] or informally (like in the United States).[186] Such schemes should lead to the desirable situation in which parents would be allowed to freely choose their child's name, and individuals free to change theirs when the one they currently hold no longer fits them. Ultimately the name, being so closely linked to the identity of the individual, and considering that personal freedom is the heart of the human rights movement, should only be restricted when it has the capacity to harm the children bearing it or to offend others. Where no particular technical difficulty will be encountered in the registration of a particular name, any other restriction than these should be seen as an unjustified restriction on a person's freedom.

[184] Morrish, M. 'The Living Geography of China' (1997) 82 *Geography* 9.
[185] Décret n°55-1397 du 22 octobre 1955 instituant la carte nationale d'identité Art 1.3.
[186] Social Security Act 42 USC §405 (c) (2).

UNDRIP and Substantive Aspects of the "Right to Development" and the "Right to a Dignified Life" in the context of Indigenous Peoples: Hegemonic and Counter-Hegemonic Dimensions

Camilo Pérez-Bustillo*

Abstract

Key provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) exemplify both the limits of hegemonic approaches to international law and human rights, and the need to incorporate counter-hegemonic visions as to the rights of sectors which are the most marginalised within the contemporary international system. The challenges of navigating these countervailing forces are evident in case studies of the evolving approaches taken to such issues by the Inter-American Court of Human Rights and the World Bank, among others, and of the demands and alternative practices of indigenous movements in contexts such as Bolivia and Ecuador. These include an emphasis on the "refoundation" of existing states, and on the "decolonization" of constitutional frameworks, and ultimately of international human rights and international law, from below.

Keywords

Indigenous rights – right to development – right to a dignified life – hegemonic – counter-hegemonic – self-determination – autonomy – international poverty law – Inter-American Court of Human Rights – World Bank – UNDP.

1. Introduction

This paper explores representative examples of provisions in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which reflect the complex, evolving relationship between hegemonic and counter-hegemonic versions of contemporary human rights standards, and the demands of marginalized groups within the international system. My primary focus here is on the challenges and implications of Articles 20 (1), 21 and 24 of UNDRIP, within the context of the inter-relationship between these provisions, centred on the economic, social, and cultural (ESC) rights of indigenous peoples, and broader issues as to the evolving place of indigenous rights within the overall framework of international law and international human rights.

This includes issues related to the relationship between indigenous rights and recent advances as to the recognition of poverty as a violation of human rights, and a case study of how such issues have been approached in settings such as the Inter-American

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Court and the World Bank,[1] in the period leading up and subsequent to the Declaration´s adoption by the UN General Assembly in September 2007. Much of this turns on an intertwined approach to the "right to development" in the context of indigenous peoples, as an expression of their right to a "dignified life" within the framework of processes of self-determination and autonomy.

Contemporary trends in the international community as to the recognition of the rights of indigenous peoples highlight the extent to which the world system and hegemonic versions of international law and human rights discourses and practices are characterized by *inequalities of rights*. This is particularly so given the fact that the history of efforts to secure international recognition of the rights of indigenous peoples is deeply intertwined with the 16th century origins of international law and of what are now understood as "human rights." These arose within the context of theological, ethical, and juridical critiques of the injustices resulting from the Spanish Conquest of the Americas by scholars such as Bartolome de las Casas and others identified with the "Salamanca School."[2]

The demands of indigenous peoples' movements and their defenders today are often grounded in counter-hegemonic visions of human rights which echo these emancipatory origins. These include an insistence on the need to "decolonise" Western, Eurocentric versions of international law and human rights trapped in persistent conceptions of statehood characterized by their "coloniality," and to situate demands for the recognition of indigenous rights in relation to alternative paradigms such as "interculturality" and "international poverty law."[3]

This paper approaches the interpretation of the UN's Declaration on the Rights of Indigenous Peoples within the broader context of what Willem van Genugten and I have described elsewhere as the 'emerging international architecture of indigenous rights,'[4] with UNDRIP as a key expression of this evolving framework. From this perspective, global recognition of indigenous rights involves a multi-dimensional landscape which is 'both constituted by, and constitutive of, an interactive relationship between legal processes at the global, regional, and national levels'[5] including a wide range of potential actors within each of these dimensions: e.g the UN, ILO, World Bank, other specialized agencies (UNDP, etc.), international NGOs; the OAS, African Union, and EU, including regional human rights courts and commissions; and national states and courts, constitutions, and legislation.

Processes of recognition of indigenous rights in each of these dimensions vary in pace and depth, and their specific trajectory is often uneven and inconsistent. Sometimes advances at the international level help spur efforts towards recognition of rights at the national or regional levels, and sometimes the movement is in the opposite direction (from stronger recognition at national and/or regional level as a way of enriching and strengthening international standards). In other instances limits or weaknesses of standards and processes at the international level undermine efforts in regional and/or

[1] Camilo Pérez-Bustillo, 'Towards International Poverty Law? The World Bank, Human Rights, and Indigenous Peoples in Latin America' in *World Bank, IMF and Human Rights* Van Genugten, Hunt and Mathews (eds), *(*Nijmegen, Wolf Legal Publishers, 2003).

[2] Gustavo Gutiérrez, *Las Casas: The Poor of Jesus Christ* (Maryknoll, NY, Orbis Books, 1993)

[3] Catherine Walsh, *Interculturalidad crítica y (de) colonialidad: Ensayos desde Abya Yala* (Quito, Abya Yala/ICCI-ARY, 2009); Pérez-Bustillo (2003); Camilo Pérez-Bustillo and Karla Hernández-Mares, *Human Rights, Hegemony and Utopia in Latin America: Poverty, Forced Migration, and Resistance in Mexico and Colombia,* (Leiden, Brill, 2016).

[4] Willem van Genugten and Camilo Pérez-Bustillo 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional and National dimensions' (2004) 11 *International Journal of Minority and Group Rights* 379-409.

[5] Ibid, p. 380.

national spaces (such as the relationship between UN and OAS processes, and between OAS processes and national trends within the Inter-American System). In this way indigenous rights standards in each of these three dimensions (international, regional, national) can serve as either "ceilings" or "floors" in their interaction with each other and with the evolving demands of international indigenous rights movements, depending on varying historical and institutional contexts.

2. Introduction to UNDRIP Articles 20, 21, 22, 24, 44, related provisions, and their inter-relationship

Article 20 of UNDRIP begins by articulating indigenous peoples´ rights 'to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.' This Article also frames issues related to economic, social and cultural rights within an underlying framework of indigenous rights to self-determination and autonomy, as expressed in Arts. 3 and 4 of the Declaration (and further reflected in other key articles with a related emphasis such as Arts. 18, 31, 32, 34, and corollary concerns as to processes of development in Arts. 39 and 41), as the context from which everything else flows, and within which Article 20´s approach to ESC rights is embedded. This is underlined for example by Article 20´s emphasis on a right to be 'secure in the enjoyment of *their own* means of subsistence and development (emphasis added).' UNDRIP´s approach thus grounds the "right to development" in the context of the exercise of indigenous peoples´ rights to self-determination and autonomy.

Article 20´s emphasis on issues related to the "subsistence" of indigenous peoples should be interpreted in light of related conceptualizations of indigenous rights which have been developed elsewhere within the contemporary international system such as the Inter-American Court of Human Rights. The Inter-American Court has approached such issues in the indigenous rights context from the perspective of a "right to life"[6] (as an expression of the "right to a dignified life") in its case law both in contexts involving massacres and forced disappearances, and with reference to especially vulnerable groups such as women, street children, indigenous peoples, victims of forced displacement, and migrants, in a logic of protection convergent with that which is suggested by the emphasis on special measures for specific groups in Articles 21 and 22. The references then in Articles 21 and 43 to concepts such as "subsistence" and "survival" must also be read in relationship to each other and against the background of related developments in scholarship, case law, and authoritative interpretations as to ESC issues and issues of poverty and human rights by the UN Committee on Economic, Social and Cultural Rights.

One of the most recent and detailed decisions of the Inter-American Court of Human Rights regarding indigenous rights issues was handed down in a case involving the Sarayaku Kichwa indigenous people of Ecuador´s Amazonian region, who alleged violations of their rights to free, prior, and informed consultation regarding oil exploration in their traditional territories, and challenged its devastating effects, including its impact on their "right to life." The *Sarayaku* case is especially interesting for purposes of this article because it is the most extensive indigenous rights decision rendered by the Court subsequent to the adoption of UNDRIP and the first to address the implications of specific provisions of the Declaration in detail, thus illustrating in

[6] This right is also recognized in Article 20, African (Banjul) Charter on Peoples' and Human Rights, 1986, 21 ILM 58; see also *Case of the Kichwa Indigenous People of Sarayuku v. Ecuador*, Merits and Reparations, 27 June 2002, IACtHR Series C no 245, p. 66.

practice the complex inter-relationship between global and regional norms and mechanisms alluded to above.

The *Sarayaku* case also arises in a unique historical context of transition between differing paradigms of indigenous rights within the framework of the Ecuadorian state, since it was first brought in December 2003 during the period prior to Ecuador´s new constitution, which came into effect in 2008, and reflects a shift from a state openly hostile to indigenous rights claims to one which at least rhetorically accepts the need for fuller recognition of such rights. At the same time the case reflects the limits in this adjustment to the Ecuadorian state´s approach to such issues, even under its new constitutional dispensation which is widely recognized internationally for its innovative character, since the current regime headed by President Rafael Correa rejects the possibility of an indigenous 'veto' of oil exploration and other development mega-projects, and in general has had a very conflictive relationship with indigenous organizations on a range of issues where it is argued that Correa is undermining the intent of the 2008 constitutional reforms.[7]

The *Sarayaku* decision refers to UNDRIP as relevant authority on 14 different occasions to shape its approach to the case, while highlighting the "widely accepted" character of the Declaration as evidenced by the 143 votes cast in its favor at the General Assembly and the fact that Ecuador itself cast one of them.[8] The Court specifically refers to Article 20 of UNDRIP in this context, as part of its broader summary of the overall thrust of the Declaration, which it defined in terms of including the rights of indigenous peoples 'to freely determine their political situation, to freely pursue their economic, social and cultural development, to participate in the adoption of decisions that affect them, and to participate fully, if they so wish, in the political, economic, social and cultural life of the State.'[9] Article 20 is thus cited with emphasis on its contribution to a broader concept: the right of indigenous peoples to 'freely pursue their economic, social and cultural development.'[10] My argument here is that it is this principle which should be understood as the guiding thread connecting Articles 20, 21, 24, and 44 for purposes of this article, together with the "right to life."

The Inter-American Court´s approach in the *Sarayaku* case, perhaps the leading case in international indigenous rights jurisprudence in the period since the UNDRIP was adopted, converges with the emphasis I have suggested above, which seeks to situate Articles 20, 21, and 24 within the broader framework of the relationship between poverty and underlying issues of autonomy. This relationship is central to Amartya Sen´s understanding of poverty, ultimately, as a deprivation of freedom which is manifested in a lack of control over the circumstances in which one lives.[11] From this perspective, Articles 21 and 22 should be understood in terms of how the violations of economic and social rights that are inherent in conditions of poverty also constitute violations of collective and individual rights to self-determination and autonomy. This in turn lays a juridical basis for approaching poverty itself as a violation of rights to personal and community autonomy. This dovetails in turn with arguments that not only does poverty necessarily imply a violation of human rights, but even more concretely

[7] Robin Llewellyn, 'Facing the New Conquistador: Indigenous Rights and Repression in Rafael Correas's Ecuador' in Centre for World Indigenous Studies (January 25 2014). Available at https://intercontinentalcry.org/facing-new-conquistador-indigenous-rights-repression-rafael-correas-ecuador-21831/

[8] Kichwa, above note 6 at p.62.

[9] Ibid.

[10] Ibid.

[11] Amartya Sen, *Development as Freedom* (New York, Anchor Books, 1998).

that the essence of poverty is in fact the violation of human rights,[12] reflected in a "poverty of rights" at its very core, and that human rights violations are thus not "merely" the consequence of poverty, but also one of its causes.

The UN Committee on Economic, Social, and Cultural Rights (UNCESCR) has been developing a similar approach to such issues since its Statement on Poverty issued in May 2001,[13] which set in motion the drafting of the UN´s Guiding Principles on Extreme Poverty and Human Rights, which were recently adopted by the UN Human Rights Council and incorporated by explicit reference in a General Assembly Resolution adopted in December 2012.[14] Together the 2001 Statement and the Principles adopted in 2012 constitute in effect the foundational documents of what I have described elsewhere as the emerging paradigm of "international poverty law";[15] UNDRIP adds several key elements to this overall framework, including the necessary centrality of indigenous rights issues to any meaningful effort to combat global poverty and inequality.

It is within this context that Article 20´s reference to "development" is worth highlighting. The concept of "development" is a recurrent reference in the UNDRIP's Preamble and several articles (including the first reference to the concept in the Preamble, where it is significantly framed in terms of the "right to development"), but is also of course a hotly contested notion central to the "paradigm wars" waged by indigenous rights movements, scholars, and defenders of indigenous rights against neo-liberal policies and mega-projects which are often associated with institutions such as the World Bank and their local allies.[16] Ongoing, often divisive and polarising debates as to the meaning and implications of "development" during the process which led to the Declaration´s adoption explain in part why this concept is in fact never defined explicitly in the text, which means that we have to draw on this continuing debate in order to interpret these provisions.

I also explore this further below as reflected in the evolving indigenous peoples´ policies of the World Bank, UNDP, EU, and regional banks, relevant case law of regional courts such as the Inter-American Human Rights Court, and developments at the national level in Latin America as to constitutional recognition and the jurisprudence of national courts, which illustrate the uneven, evolving impact of the Declaration. This includes the emergence of alternative conceptions of development grounded in indigenous cosmologies, languages, practices and demands. All of this provides an important backdrop in turn for understanding what might have been intended by Article 20 (2) with

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[12] Willem van Genungten and Camilo Pérez-Bustillo, *The Poverty of Rights: Human Rights and the Eradication of Poverty* (London, Zed Books, 2011); Camilo Pérez-Bustillo, 'Human Rights from Below: Indigenous Peoples, Poverty, and Human Rights' (May 2008) Newsletter of the Comparative Research Programme on Poverty.

[13] See Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, 4 May 2001, E/C.12/2001/10.

[14] GA Res 67/164, 20 December 2012, A/RES/67/164.

[15] Camilo Pérez-Bustillo, 'Towards International Poverty Law? The World Bank, Human Rights, and Indigenous Peoples in Latin America' in *World Bank, IMF and Human Rights* Van Genugten, Hunt and Mathews (eds)*, (*Nijmegen, Wolf Legal Publishers, 2003); Camilo Pérez-Bustillo, 'Human Rights from Below: Indigenous Peoples, Poverty, and Human Rights' Comparative Research Programme on Poverty (CROP) Newsletter, May 2008, http://www.crop.org/viewfile.aspx?id=158; Camilo Pérez-Bustillo, 'New Developments in International Poverty Law: The UN Guiding Principles on Extreme Poverty and Human Rights,' http://www.crop.org/viewfile.aspx?id=516.

[16] Jerry Mander and Victoria Tauli-Corpuz (eds) *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (International Forum on Globalization, 2006).

its emphasis on a right to 'just and fair redress' when indigenous peoples are 'deprived of *their* means of subsistence and development' set forth in Art. 20 (1).[17]

Art. 21 (1) situates Article 20´s emphasis on economic, social and cultural issues specified in Article 21, in terms of a right to the "*improvement*" [18] of conditions and rights related to 'education, employment, vocational training and retraining, housing, sanitation, health and social security,' within the overall framework of the right of indigenous peoples to non-discrimination (echoing Article 2´s emphasis on this entitlement, which is also referenced explicitly in articles 8, 9 and 13-17 and 24). Article 21 (2) focuses on state duties (as to what they "*shall*" do in the economic, social and cultural context), in terms of "*effective* measures"[19] 'and, where appropriate, *special measures* to ensure *continued improvement*,'[20] and also stresses that states should undertake such measures with '(p)articular attention…to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities'; issues as to women and overall as to gender equality are specifically meanwhile the emphasis of Article 44.

Rights involving each of the groups specified in these articles of the UNDRIP must in turn be interpreted in a manner consistent with other international normative frameworks such as the ICESCR (as to economic, social and cultural rights), CEDAW (as to women and gender), CRC (as to children), CERD (as to the inter-relationship between racial discrimination and violations of indigenous rights) and CRPD (as to the rights of the disabled). Similarly, Article 24´s focus on indigenous rights related to health must be harmonised with specific approaches to the right to health and the 'highest attainable standards' which it imposes, which have been interpreted and developed by CESCR, among other relevant sources. This must include due reference to important recent advances in the litigation of health rights in national, regional and international contexts.[21]

Article 24´s approach to issues involving indigenous peoples and health rights reflects a similar relationship between that focus and evolving conceptions of cultural rights, as does the embedding in Article 20 of issues regarding economic and social rights in deeper notions as to self-determination and autonomy. Just as Article 20 insists on a relationship between violations of economic and social rights related to 'subsistence and development' and violations of rights to autonomy, Article 24 (1) begins with an overall statement as to indigenous peoples´ rights to traditional medicines and health practices 'including the conservation of their vital medicinal plants, animals and minerals,' and then affirms their rights of access 'without any discrimination, to all social and health services.' Article 24 (2) then situates their right to health within the overall context framed by Article 24 (1), with its two interrelated components- the right to traditional practices and the right to all social and health services and non-discrimination. This construction strongly suggests that the UNDRIP´s approach to health rights, as to economic and social rights more generally, is to assume that the best way to guarantee them is within indigenous systems of self-governance and autonomy, as a guiding thread that is woven throughout the Declaration.

Issues of gender equality pose a difficult challenge in many indigenous communities, often because of the disproportionate impact on women and girls of colonial legacies and neo-colonial, neo-liberal policies, and the ways in which such legacies and effects

[17] Emphasis added.
[18] Emphasis added.
[19] Emphasis added.
[20] Emphasis added.
[21] Alicia Ely Yamin and Siri Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (eds) (Cambridge, Harvard University Press, 2011).

often become intertwined with conceptions of "tradition."[22] It is precisely however in contexts such as Bolivia and Mexico´s indigenous Zapatista movement where important advances in the construction of alternative public policies at the national and local levels which deepen the recognition of indigenous rights have at the same time produced the most notable successes in addressing the rights of indigenous women, and in generating their participation and leadership in such processes.[23]

The references in UNDRIP articles 21 (2), 22 and 44 to the particularised vulnerabilities of specific groups and need for preferential measures along the lines of affirmative or positive action or positive discrimination, as they are labelled in varying contexts where anti-discrimination policies against minorities and/or indigenous peoples are in place, ranging from India, the U.S, Canada and the European Union to South Africa, Australia, New Zealand, Brazil, are key.[24] From this perspective, the issue of "special measures" and their appropriate character includes the emphasis in Art. 22 on the "rights and special needs" of the same sectors specified in 21 (2), and underlines the importance of focusing on the same especially vulnerable groups highlighted in 21 (2). Article 22 (2) in turn stresses the need for the "full protection" of such groups against all forms of violence and discrimination, including upon the basis of gender as emphasized by Article 44.

The UN´s Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has suggested the following framework to assess the appropriateness and effectiveness of "special measures," within the context of the rights of Aboriginal and Torres Strait Islanders indigenous peoples in Australia. [25] These were at issue in the case of *Maloney vs. The Queen* decided by Australia´s High Court in June 2013,[26] which ultimately upheld restrictions on the nature and quantity of liquor possessed in public areas on Palm Island in Queensland as valid "special measures" with a legitimate anti-discriminatory purpose. As Anaya notes, pursuant to Article 1 (4) of the CERD, '(s)pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection … shall not be

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[22] Ellen-Rose Kambel, *Forest Peoples Program, A Guide to Indigenous Women's Rights Under the International Convention on the Elimination of all Forms of Discrimination Against Women* (Moreton-in-Marsh, Forest Peoples Programme, 2004). Available at: http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/cedawguidejan04eng.pdf; Chandra K. Roy, *Indigenous Women: A Gender Perspective* (Resource Centre for the Rights of Indigenous People, 2004). Available at: http://www.galdu.org/govat/doc/galdu_cala_5_indigenous_women_croy.pdf; International Work Group for Indigenous Affairs, Position Paper and Strategy: Gender and Indigenous Women (1999). Available at: http://www.iwgia.org/images/stories/sections/about-iwgia/documents/strategy-papers/Genderstrategy.pdf.

[23] Stéphanie Rousseau, 'Indigenous and Feminist Movements at the Constituent Assembly in Bolivia: Locating the Representation of Indigenous Women' (2011) 46 *Latin American Research Review* 2; R. Aída Hernández Castillo, 'Zapatismo and the Emergence of Indigenous Feminism' (2002) 15 Report on Race and Identity 6.

[24] See generally Colm O´Cinneide 'Positive Action' (2012) http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2012_Cinneide_EN.pdf.

[25] Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 4 March 2010, A/HRC/15/ (regarding the issue of "special measures" and standards to determine their appropriateness). See Human Rights Law Centre, *High Court to hear landmark case on race discrimination and "special measures"* (11 December 2012), http://www.hrlc.org.au/high-court-to-hear-landdmark-case-on-race-discrimination-and-special-measures-2 (accessed November 16 2014) (regarding the *Maloney* case specifically). See also *Joan Monica Maloney v The Queen* [2013] HCA 28 (19 June 2013)

[26] See *Maloney v The Queen* HCA 28

deemed racial discrimination.'[27] Similarly the UN Committee on the Elimination of Racial Discrimination has advised that '(s)pecial measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary ... States should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.'[28] These are the standards that should in turn guide interpretation of the "special measures" contemplated by UNDRIP.

A. Overall Context for the Enjoyment of Indigenous Economic and Social Rights: "Survival, Dignity, Well-Being"

What is then the broader context within which we should approach Articles 20, 21, 24 and 44 of UNDRIP? Article 43 of the Declaration explicitly affirms that the rights recognized in UNDRIP reflect '*minimum* standards'[29] related to the 'survival, dignity and well-being' of the indigenous peoples of the world. This conceptualization of the Declaration as establishing a set of minimums, which is crucial, is discussed further below, but the decision to include words such as 'survival, dignity and well-being' has additional importance. In effect Article 43 defines these as three overall imperatives of the Declaration, which should shape the landscape within which its more specific requirements must be understood.

The choice of the concept of "survival" as the first one listed suggests that the economic, social and cultural rights addressed by Articles 21 and 22 must be understood as providing the material basis necessary to ensure the "survival" of indigenous peoples. This in turn acquires additional meaning when it is understood that indigenous peoples are confronted with at least three different kinds of threats to the survival which the Declaration is intended to ensure: physical survival in the face of material conditions of deprivation and discrimination, cultural survival as groups with distinct territories, cosmologies, traditions, identities and institutions, and as to their sustainability as peoples. As a combination of the two dimensions described above, such threats include circumstances where environmental devastation (for example due to megaprojects) and climate change undermine and ultimately erode or eliminate the ability of indigenous peoples to maintain and reproduce their identity in their traditional territories. The Declaration´s reliance on the concept of "survival" in Article 43 thus converges with, and its interpretation ought to be informed by, the Inter-American Court´s conceptualization of the "right to life" in the context of indigenous rights in the *Sarayaku* case.

The plaintiffs in the *Sarayaku* case argued that:

> the State had incurred responsibility by placing the members of the Sarayaku People at serious risk as a result of the oil company's "unconsulted" incursion into their territory. *They also argued that the State had not taken the necessary and sufficient measures to ensure decent living conditions for all the members of the Sarayaku People*, 'affecting their different way of life, their individual and collective life project and their development model,' which constituted a violation of Article 4 (1) of the Convention. They further argued that the State had not taken any steps to fulfill its obligation to protect the community, taking into account the special situation of vulnerability of the indigenous people due to the

[27] Anaya, above note 25.
[28] CERD General Recommendation No.32: The Meaning and Scope of Special Measures in the International Covenant on the Elimination of Racial Discrimination (2009) CERD/C/2007/1 para 16.
[29] Emphasis added.

> incursion by the oil company. *They argued that, during the period of food shortages and state of emergency, there were case of illnesses that mainly affected children and the elderly, a situation described as 'fatal to the health of Sarayaku members who were prevented from having access to health care centers,' which affected their right to life.*[30]

Their argument relied in part on the Inter-American Court´s approach in the *Yakye Axa* case from Paraguay, where the Court declared:

> [T]hat the State was responsible for the violation of the right to life, considering that, having failed to ensure the right to communal property, the State had deprived the Community of the possibility of having access to their traditional means of subsistence, as well as the use and enjoyment of the natural resources necessary to obtain clean water and for the practice of traditional medicine for the prevention and treatment of diseases, *and for failing to adopt the affirmative measures required to ensure decent living conditions*.[31]

The *Sarayaku* court further elaborated on this approach, and explicitly incorporated the implications of UNDRIP into its overall reasoning, including the following test for determining whether the "right to life" had been violated in a specific case:

> For this positive obligation to arise, it must be determined that, at the time the events occurred, the authorities knew or should have known about the existence of a situation that posed an immediate and certain risk to the life of an individual or of a group of individuals, and that they did not take the necessary measures available to them that could be reasonably expected to prevent or avoid such risk,[32] and determined that the Sarayaku community had suffered equitable, 'non-pecuniary damages' that must be compensated, which were attributable to the effects on their 'health and safety' due to the unconsented oil exploration in their traditional territories which had been encouraged, facilitated, and subsidized by the State.[33]

These effects included several dimensions which are related to issues highlighted in Articles 20, 21, 22 and 24 of UNDRIP:

> (a) as a result of food shortages during and after the "state of emergency" to defend the territory of Sarayaku, "its members suffered various illnesses such as malnutrition, fever, diarrhea, vomiting, headaches, an increase in gastritis and anemia, hepatitis B and other illnesses"; (b) the conflict seriously disrupted the security, tranquility and way of life of members of the People, who feel that [at any time] anything can happen to them and [that] all the threats could be real"; (c) the children have lived in fear of the militarization of the territory and for the fate of their parents and, as a result of the suspension of classes, did not return to their studies; (d) the effects of the threats, harassment and physical abuse to

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[30] *Sarayaku*, above n 6 at 67 (emphasis added) (note specific reference to the effects on indigenous elderly persons, as contemplated by UNDRIP Articles 21 (2) and 22)).

[31] *Case of the Yakye Axa Indigenous Community v. Paraguay,* Merits, Reparations and Costs, 17 June 2005, IACtHR Series C 15 (2005), para. 158(d)-(e). See also *Case of the "Children's Rehabilitation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs, 2 September 2004, IACtHR Series C 112 (2004) para. 176; *Case of the La Rochela Massacre v. Colombia*. Merits, Reparations and Costs, 11 May 2007, IACtHR Series C 163 (2007), paras. 124, 125, 127 and 128; *Case of Gelman v. Uruguay,* Merits and Reparations, 24 February 2011, IACtHR Series C 221 (2011) para. 130 (emphasis added).

[32] *Sarayaku*, above n 6 at 67.

[33] Ibid.

> which they were subjected still continue to this day as "Sarayaku members continue to fear for the future of their territory"; (e) "as a result of the State's actions, the Sarayaku People have been stigmatized as a 'guerrilla' people and as 'a real state within a State,' with ties to subversive activities, which has affected their relations with much of Ecuadorian society."[34]

Article 43´s foundational emphasis on "survival," as reflected more specifically in the economic, social and cultural issues underlined in Articles 21 and 22, must also evoke the longstanding history of genocidal violence against indigenous peoples associated with colonialism and neo-colonialism throughout the last 500 years (in contexts such as Latin America, Africa, the U.S and Australia),[35] including recent cases on a mass scale such as Guatemala, Peru and Colombia,[36] and others on a continuous basis involving the indigenous peoples of the Amazonian region[37] and South Pacific.[38] Together then, Articles 43, 21 and 22 must be also assessed at the level of their implementation in terms of their efficacy as measures for the prevention of "genocide" as understood in the 1948 Genocide Convention and its progeny, within the framework of international criminal and humanitarian law, as well as that of international human rights norms.

All three of these concepts - "survival, dignity, well-being" - also reflect recurrent themes among social movements, advocates and scholars who specialise in issues related to poverty, and regarding the relationship between poverty, inequality, and human rights in general, including matters related to the justiciability and enforceability of ESC rights, and to broader issues as to the right to development and the pursuit of "global justice," development ethics, etc.[39] The reference to "survival" provides further grounding for interpretation of the implications of the economic, social and cultural rights and conditions highlighted in Articles 21 and 22, and for the additional emphasis in these articles on the particularized needs of specific groups within this context. Scholars such as Thomas Pogge, for example, have insisted on the imperative from an ethical perspective to accord due importance to the human toll represented by the number of preventable deaths (due to hunger and illness for example) attributable to poverty and inequality, as the result of structural injustices in the global international order.[40]

B. Additional conceptual issues in the interpretation of the UNDRIP

The Declaration symbolises the potential emergence of a historic new pact between indigenous peoples and the international system which reflects important hopes and aspirations, but it also confronts multiple barriers to its effective implementation which are inherent in the origins, characteristics, structures and contradictions of that system itself. This goes to the heart of the complex chemistry

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[34] Ibid.

[35] See for eg Ronald Wright *Stolen Continents: 500 Years of Conquest and Resistance in the Americas* (Boston, Mariner Books, 1992); Ana Vrdoljak 'Reparations for Cultural Loss' in Federico Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford, Oxford University Press, 2008) at 203 – 206.

[36] See generally M. Esparza, H.R Huttenbach and D. Feirstein (eds.) *State Violence and Genocide in Latin America: The Cold War Years* (London, Routledge Books, 2010).

[37] See generally 'Brazilian Indians,' Survival International, http://www.survivalinternational.org/tribes/brazilian.

[38] See regarding Australia and New Zealand: Jon Reyner and Navin Kumar Smith, 'Cultural Genocide in Australia, Canada, New Zealand and the United States - The Destruction and Transformation of Indigenous Cultures,' (2010) 21(4) Indigenous Policy Journal 1.

[39] See generally Willem van Genugten and Camilo Pérez-Bustillo, *The Poverty of Rights: Human Rights and the Eradication of Poverty* (London, Zed Books, 2011); Margot E Salmon, ***Global Responsibility for Human Rights: World Poverty and the Development of International Law*** (Oxford, Oxford University Press, 2007).

[40] See Thomas W. Pogge, *World Poverty and Human Rights* (London, Polity Press, 2008).

between the Declaration and other international norms and structures within which it is necessarily embedded. On the one hand the Declaration must be understood and interpreted within the context, and against the backdrop, of the overall contemporary international system, but on the other hand, several of its provisions conflict with, or fit at best uneasily, with longstanding assumptions and practices which are characteristic of that system. Multiple complexities arise here which must be navigated.

One solution to these dilemmas has been suggested by a series of key cases decided by the Inter-American Court of Human Rights,[41] which together constitute the most advanced interpretation of indigenous rights issues in the world, including reiterated references to the importance of UNDRIP. The Inter-American Court´s jurisprudence as to these issues has for example been specifically incorporated by reference into the indigenous peoples´ policies of the Inter-American Development Bank (IADB).[42] From the Inter-American courts´ perspective, despite its regional mandate and structure, its reasoning as to indigenous rights issues which arise in Latin America (the single region of the world where indigenous peoples are most concentrated), must necessarily take broader international standards, such as UNDRIP and ILO Convention 169, in this context, or international humanitarian law, and others, into account. This is because the Court understands itself to be a component of a broader international system within which its decisions must be contextualized and harmonized, and also because the Inter-American system has not yet succeeded in adopting an indigenous rights declaration[43] or convention of its own, as it has done on other key issues such as torture, forced disappearances and violence against women. Not surprisingly it is precisely two of the four states which voted against the adoption of UNDRIP by the General Assembly, the U.S and Canada, and one of the relative handful which abstained, Colombia, which have played key roles in preventing the adoption thus far of an Inter-American version of the UN Declaration.

Given the *regional* normative vacuum in the Inter-American System as to indigenous rights, which have been recognized widely in many Latin American states through national legislation, sweeping constitutional reforms and the rich jurisprudence of several national courts, UNDRIP and ILO Convention 169 acquire additional importance, as authoritative statements of the current status of indigenous rights under international law, from the Court´s perspective. In this specific context of the relationship between UNDRIP and the Inter-American System, as mediated by the Court, UNDRIP serves as a basis to strengthen the regional approach, through jurisprudence, upon the basis of notions derived from both international conventional and customary law, which would otherwise have to turn primarily to national sources of law as their operative bases. The Inter-American System is thus in sum a generally favourable landscape for a more expansive interpretation of indigenous rights than other such settings within the overall international system or other regions where the institutional will, capacity, normative and political contexts are much less favourable.

Issues of indigenous rights are closely related to broader issues as to hegemonic and potentially counter-hegemonic dimensions of international law and human rights, because of the historically constructed, epistemological, structural and conceptual

[41] See generally Thomas M. Antkowiak 'Rights, Resources and Rhetoric: Indigenous peoples and the Inter-American Court of Human Rights' (2013) 35 University of Pennsylvania Journal of International Law 1 and S. James Anaya *International Human Rights and Indigenous Peoples* (New York, Aspen Publishers, 2009).

[42] Ibid.

[43] See Permanent Council of the Organization of American States, Committee on Judicial and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous People, Documents Page, 2014. [2014]. Available at: http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp#2013 (accessed April 4 2014).

marginalisation of indigenous rights claims, and the purported limits on their legitimacy within established frameworks. These include, first, the Westphalian legacy which underlies the traditional doctrinal emphasis within international law on nation states as its most privileged subjects. Second, the secondary status of economic, social and cultural rights in comparison to civil and political rights in terms of hierarchy, justiciability and enforceability. And third, the marginalisation of collective (or group) rights in deference to the classical liberal and neoliberal emphasis on individual rights. These three factors together reflect the combined effects of what Richard Falk has referred to as "state" and "market" logic. [44]

This in practice is reflected in the tendency in classical liberal and neoliberal thinking to closely associate or even equate civil and political rights, and thus "liberty," with rights related to the protection of individual interests in property, and to accord a lesser status to claims, such as those of indigenous peoples, to the protection of interests in collective or communal forms of property, which predate both capitalist market relations and the formation of the national states which configure the hegemonic international system. Such approaches conflict for example with Article 2 of the UNDRIP which affirms that indigenous peoples and individuals 'are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights…'

3. Indigenous peoples, poverty, and the poverty of rights

My approach to these issues here is that these key characteristics of hegemonic approaches to international law produce a "poverty of rights" which is one of the causes - as well as consequences - of widespread material impoverishment and dispossession among the world´s indigenous peoples, and of an "inequality of rights" between indigenous peoples as subjects of rights and other rights-bearers (for example states) within the international system.

The World Bank (the Bank) has extensively documented[45] "high poverty rates" and entrenched patterns of inequality among indigenous peoples throughout the world, 'and little to no improvement in poverty rates over time.'[46] These findings, further summarized below, clearly heighten the importance of the provisions in Articles 20, 21 and 24 of UNDRIP regarding the economic, social and cultural rights of indigenous peoples in the context of persistent conditions of poverty and inequality.

The Bank´s overall conclusion from these studies[47] is that: 'Indigenous Peoples worldwide continue to be among the poorest of the poor and continue to suffer from

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[44] See generally Richard A. Falk *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York, Routledge, 2000).

[45] See generally The World Bank, Indigenous Peoples, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html; see also The World Bank, Social Development: Indigenous Peoples, *Indigenous Peoples Still Among Poorest in World, but Progress Reported in Some Countries* (2010), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,contentMDK:22556986~pagePK:148956~piPK:149081~theSitePK:407802,00.html (accessed April 5 2014).

[46] Ibid.

[47] Recently updated in a book published in 2011; an earlier version of these same conclusions was presented at the 9th annual session of the UN´s Permanent Forum on Indigenous Issues in June 2010, see generally http://documents.worldbank.org/curated/en/2011/10/15198880/still-among-poorest-poor (accessed February 12 2015).

higher poverty, lower education, and a greater incidence of disease and discrimination than other groups,'[48] and its researchers conclude:

> [o]ur estimates confirm that worldwide, indigenous peoples are over-represented among the poor - up to 10 percent of the worlds' poor, even though they account for only 4 percent of the world's total population. … (W)hat we know from these studies is reason for grave concern. Without exception, they show that indigenous peoples are severely disadvantaged, based on a range of socioeconomic indicators. In 1994, the first regional analysis of indigenous peoples in Latin America found systematic evidence of poverty rates far worse than those of the population on average…In 2004 a major World Bank follow-up study found that while programs have been launched to improve access to health care and education, indigenous peoples still consistently account for the highest and "stickiest" poverty rates in the region (Hall and Patrinos 2006)… The findings confirm the dire state of indigenous peoples globally - still among the poorest of the poor.[49]

These studies and conclusions interestingly do not take into account more recent indicators from Bolivia and Ecuador since 2009,[50] which report significant overall declines from longstanding, ingrained poverty rates as the result of "special measures" specifically focused on indigenous peoples, implemented in these countries as the result of sweeping constitutional and legislative reforms. This may be because these states like others such as Venezuela, Argentina and Brazil have pursued pro-poor policies and approaches to issues involving indigenous peoples that in many respects conflict with the World Bank´s continuing insistence on what is essentially a recycled version of the long discredited Washington Consensus, sweetened by elaborate rhetoric as to "good governance," "participation" and even "human rights."[51] In effect the Bank has carefully documented the continued holocaust of persistent global, regional and national patterns of entrenched poverty and equality among indigenous peoples, at the same time as its policies continue to contribute significantly to the dimensions and persistence of such conditions.[52]

The Bank´s role in promoting and subsidising policies that have contributed significantly to such consequences in turn raises the question of its own responsibility to comply with UNDRIP (and broader provisions of international human rights law),[53] and to be held fully accountable for violations of UNDRIP attributable to its actions and omissions.[54] Such obligations and duties of redress are heightened in the context of the

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[48] Ibid, 2011.
[49] Ibid.
[50] See generally Mark Weisbrot, Center for Economic and Policy Research, *CEPR Reports and Policy Papers*, http://www.cepr.net/index.php/clips/mark-weisbrots-publications/ (Accessed April 5 2012).
[51] See Alfred Aaad Filho, 'Toward a Pro-Poor Development Strategy for Middle-Income Countries: A Comment on Bresser-Pereira and Nakano' (2004) 24(1) Brazilian Journal of Political Economy 130.
[52] Letter from Secretariat of the UN Permanent Forum on Indigenous Issues to World Bank President Jim Yong Kim (February 6, 2015), http://www.un.org/esa/socdev/unpfii/documents/News/2015/PFII-letter-to%20the-WB-6-Feb-2015.pdf.
[53] See generally Human Rights Watch, *World Bank: Ducking Human Rights Issues* (22 July2013), http://www.hrw.org/news/2013/07/22/world-bank-ducking-human-rights-issues; for a summary of the Bank's current approach to human rights issues, see World Bank, *Human Rights*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20749693~pagePK:98400~piPK:98424~theSitePK:95474,00.html (accessed April 5 2012)
[54] See generally Van Genugten, et. al, above n 1.

emphasis in Articles 20, 21 and 24 on social and economic rights, given the Bank´s ostensible mission of preventing, reducing and even ultimately eliminating poverty. Such an assessment as to the Bank's compliance with its responsibilities under international human rights law must include a determination as to whether the Bank´s own policies constitute appropriate, "effective measures" to address the economic and social rights of indigenous peoples on a global scale, as well as in specific regional and national settings where its institutional role has a significant impact.

My emphasis here is on exploring implications of the extent to which the World Bank has recognised the rights of indigenous peoples, and the relationship between its still incomplete recognition of these rights and continuing limitations on the overall incorporation of international human rights norms into its policies and practices. The evolution over the last thirty years in international recognition of the rights of indigenous peoples since the establishment of the UN´s Working Group on Indigenous Populations in 1982, in spaces ranging from the UN and the World Bank to regional organisations such as the Organization of American States (OAS), and in Latin American constitutions such as those of Nicaragua (1987), Colombia (1991), Venezuela (1999), Ecuador (2008) and Bolivia (2009), is a key case study of how counter-hegemonic dimensions of human rights (e.g indigenous rights) can attain a certain formal status within hegemonic spaces such as the UN General Assembly, and yet still be resisted and only selectively complied with at the core of the world-system in hegemonic settings such as the World Bank.

A. Historical origins of indigenous rights

Indigenous rights issues are an especially apt case study given that it is the struggle for their recognition during the 16th century in the wake of the Spanish Conquest of the Americas which lies at the origins of international law and human rights in the activism and scholarship of Bartolomé de las Casas and the Salamanca School (as key forerunners of Grotius and eventually of Kant). Tendencies and limitations characterising the recognition of indigenous rights by the World Bank are similarly symptomatic of broader issues as to the nature of the contemporary world system, given the centrality of the Bank to the most powerful dimensions of this system, and the continued marginality of indigenous peoples as among its most excluded sectors.

My approach to these issues draws upon several interrelated dimensions which include the specific provisions of Articles 20, 21 and 24 of UNDRIP and related aspects which I have highlighted above, and the following three foci: first, a comparison between the characteristics of the Bank´s current Indigenous Peoples Policy (Operational Policy -OP- 4.10 and Bank Procedure - BP- 4.10, hereinafter OP/BP 4.10),[55] and key contemporary sources of indigenous rights standards such as UNDRIP, ILO Convention 169, the jurisprudence of the Inter-American Court of Human Rights and constitutional courts in countries such as Colombia and Australia, national constitutional frameworks and laws (from the Americas to the Philippines), the findings and recommendations of specialised mechanisms within the UN, and the policies of other multilateral organizations, among other potential sources. Second, contributions grounded in the demands and concerns of indigenous rights movements and

[55] Adopted by the Bank´s Board of Executive Directors in May 2005 and in effect since July of that year, as successor to Operational Directive -OD- 4.20, which was the applicable policy for indigenous peoples between 1991 and 2005; OD 4.20 in turn was preceded by Operational Manual Statement – OMS- 2.34 and related policies, first developed in 1981. See generally Shelton H. Davis, The World Bank, *The World Bank and Indigenous People* (1993), http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/11/14/000012009_20031114144132/Rendered/PDF/272050WB0and0Indigenous0Peoples01public1.pdf (accessed April 5 2014).

defenders, and academic experts, for example. Third, an analysis of the historical context within which indigenous rights issues have emerged.

B. The World Bank as case study

The Bank´s approach to international standards as to indigenous rights is selective. As its own Learning Review issued in August 2011 regarding the implementation of its Indigenous Peoples Policy since July 2005 indicates, the Bank´s current approach 'strengthens requirements' in three policy contexts, projects related to extractive industries, 'physical relocation' of indigenous peoples due to project impact, and 'commercial development of Indigenous Peoples['] cultural resources and knowledge". [56] However, at least four key dimensions of its new approach 'did not fully meet the expectations of some external stakeholders.'[57] These areas are: self-identification as the principal criterion for determining indigenous status, and regarding requirements as to free prior informed consent in the face of projects which affect them, the full recognition of customary land rights and the prohibition of physical relocation).[58] An initial concern here is the opaque quality of the language employed by the Bank in such contexts: for example, where it refers to 'physical relocation,' indigenous rights defenders critical of the Bank's approach to such issues would insist instead on the normative concept of "forced displacement." The transition from the latter to the former eliminates both the agency of those whose rights are violated and that of the perpetrators arguably responsible (the Bank and its borrowers).

My approach here includes an insistence upon a critical understanding of legal definitions of rights in positive law in any specific historical period as minimums, not maximums ("floors" and not "ceilings"), and thus as points of departure, not destinations in themselves. From this perspective, the Bank´s policies with respect to the rights of indigenous peoples would take an alternative approach shaped in compliance with the highest standards reflected in applicable law and related contexts such as in e.g. UNDRIP; ILO Convention 169; international, regional and national jurisprudence and laws; policies of other multilateral organizations, as relevant "minimums." This would also be more consistent with the argument that the Bank has an equitable duty, analogous to those imposed in a fiduciary context, to go beyond such "minimums" (towards higher standards of compliance), given the inequality in power between the Bank and indigenous peoples, and generally between it and member states primarily responsible in the first instance for compliance with international, regional and national standards. This "higher duty" reflects Luigi Ferrajoli´s argument that the imperative to protect human rights most strictly applies as a "law of the weakest" wherever the correlation of power reflected in, or which underlies, a relationship between social actors is unequal.[59]

The Bank´s selective approach to compliance with international standards as to indigenous rights issues should thus be approached from a broader perspective that highlights the Bank´s equally inconsistent approach to the implications of a fully incorporated human rights perspective. In both contexts, as to indigenous rights and as to human rights overall, the Bank combines a generalised and discursive embrace of human rights discourse with actual policies and practices that upon detailed examination fall short of what full good faith compliance would demand. These gaps in

[56] See generally The World Bank, OPCS Working Paper, *Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006-2008)* (August 2011), http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf (accessed April 5 2014).
[57] Ibid, p.2.
[58] Ibid.
[59] Luigi Ferrajoli *Derechos y garantías: La ley del más débil* (Barcelona, Editorial Trotta, 1999).

turn reflect a deeper conflict in contemporary international law and human rights between hegemonic and counter-hegemonic approaches to such issues.

The hegemonic or counter-hegemonic character of such approaches has reference both to their respective locations in the configuration of the domains of overall discourses of international law and human rights. For example, as to which discourses have greater institutional weight and diffusion within the prevailing global order, and the spaces where the discourses are produced and reproduced, such as in think tanks, NGOs, research institutes, universities, publishers, journals, funders). Further, hegemonic and counter-hegemonic dimensions can be seen in the extent to which such discourses are in practice aligned with, or challenge, the premises and effects of existent forms, structures and processes of domination, exploitation and discrimination. This includes implicit and explicit tensions between these two contending paradigms given the emphases accorded by hegemonic approaches to the following actors: first, nation-states as the most privileged subjects of rights, rather than peoples, communities or persons. Second, to individual rights related to the defense of interests related to private property and the market, rather than collective rights. Third, to their civil and political rather than their economic, social, cultural and environmental dimensions. Fourth, to the formalist, positivist, and proceduralist dimension of rights rather than to their substantive compliance, in actual practice, in terms of their indivisibility, inter-dependence and integrality. Finally, in epistemological terms, to Eurocentrist and Occidentalist configurations of rights, law and justice and of their history and theory, rather than to their authentic, inter-cultural, 'trans-modern'[60] universality and plurality in the context of the 'epistemologies of the South.'[61]

This differentiation between hegemonic and counter-hegemonic configurations of international law and human rights helps explain how it is possible for the World Bank to simultaneously affirm its adherence to such discourses and to fall short in practice from full compliance with multiple concrete human rights standards such as those reflected in Articles 20, 21, 24 and 44 of UNDRIP. Such inconsistencies may well undermine the Bank´s institutional legitimacy in the medium and long-term, but serve its short-range interests by reducing the high potential budgetary and political costs which taking human rights seriously as part of its day to day operations might imply. Its current approach is also functional since it in effect transfers the costs of compliance to its state members, which are more likely to be directly vulnerable to the pressures of human rights litigation, advocacy and activism to which the Bank is largely immune. The Bank´s gradual opening over the last decade to human rights discourse within its own institutional framework, initially as an outgrowth of its emphasis in the 1990s on issues of democratic governance and "rule of law," must also be understood as part of a broader and more complex process of convergence between hegemonic paradigms of development and those related to human rights as reflected in the UN´s Millennium Summit and Millennium Development Goals, and in contexts such as the evolution of the UNDP´s Human Development Index and paradigm.

Debates in the international community as to the rights of indigenous peoples highlight the extent to which the world system and hegemonic versions of international law and human rights discourses and practices are characterized by *inequalities of rights*. This is particularly so given the fact that the history of efforts to secure international recognition of the rights of indigenous peoples is completely intertwined with the origins

[60] Enrique Dussel, *Ethics of Liberation in the Age of Globalization and Exclusion*, (Durham, Duke University Press, 2013).
[61] Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Boulder, Paradigm Publishers, 2014).

of international law, and what is now understood as 'human rights.'[62] The adoption in 2007 of the UNDRIP is in this sense simply the latest stage in a continuing and still incomplete process of recognition of such rights, which in fact have an existence prior to that of the so-called "international community" itself, and prior to that of its constituent states.

C. Illustrative policies in other contexts

A key additional objective of this paper is to assess the World Bank´s policies and practices regarding indigenous rights issues with the UNDRIP´s interpretation of the "right to development" in the indigenous context, and with alternative paradigms grounded in indigenous traditions and the demands and accomplishments of social movements which have promoted the redefinition and recognition of their rights. The emphasis here is on cases which illustrate the complex, interactive relationship between rights recognized in the UNDRIP and related legal and policy developments, which together constitute the relevant landscape for assessing its potential implications and impact. Key examples include the policies and practices of other multilateral organizations besides the World Bank (including to varying extents the United Nations Development Program (UNDP), European Union (EU), Inter-American Court on Human Rights (IACHR), Organization of American States (OAS) and Inter-American Development Bank (IADB). Policies and practices of states are also relevant, including new constitutional norms, implementing legislation, and jurisprudence in or regarding countries such as Nicaragua, Paraguay, Surinam, Colombia, Venezuela, Ecuador and Bolivia; and notable regressive trends in cases such as Mexico, Peru and Chile. These norms are beginning to transform what is understood by "development" - and thus "development law" - and have significant implications for the conceptualisation of human rights, from a non-Western, non-Eurocentric perspective in the context of indigenous peoples, particularly in Latin America.

State law and practice here includes the emphasis in constitutions recently adopted in Bolivia, in effect as of January 2009 and Ecuador in 2008, on alternative indigenous concepts of development such as "*sumak kawsay*" (in the variant of the prehispanic language of Quechua spoken in Ecuador), and "*suma qamaña*" (in the variant of the prehispanic language of Aymara spoken in Bolivia), which have been translated into Spanish as "*vivir bien*" and into English as "living well" or "collective well-being." These concepts are deployed as bases for the "refoundation" of these states and for the intended accompanying "decolonization" of their constitutions and legal systems as a whole.[63] They have been drawn from indigenous movements in these countries as part of their recovery of basic principles embedded in the civilizations prevailing in the Andean region prior to Hispanic colonial conquest in the 16th century, and provide the overall normative framework for the approach taken in these constitutions to issues of state legitimacy, social policy and social development, and human rights, as well as to indigenous rights in particular.[64] The indigenous social movements of Bolivia and Ecuador are among those which are most influential in Latin America as a whole, and

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[62] See generally Martti Koskenniemi, 'Colonization of the Indies - The Origin of International Law?' (Talk at the University of Zaragoza, December 2009), http://www.helsinki.fi/eci/Publications/Koskenniemi/Zaragoza-10final.pdf

[63] See generally Edgardo Lander 'The discourse of civil society and current decolonisation struggles in South America'(2010) http://www.tni.org/sites/www.tni.org/files/download/the_discourse_of_civil_society_and_current_decolonization_struggles_in_latin_america.pdf and César Augusto Baldi, 'New Latin American Constitutionalism: Challenging Eurocentrism and Decolonizing History' (6 February 2012), http://criticallegalthinking.com/2012/02/06/new-latin-american-constitutionalism-challenging-eurocentrism-decolonizing-history/

[64] Ibid.

thus the impact of their success in obtaining constitutional recognition of their normative approach to indigenous policy issues are also likely to have widespread impact beyond these two countries, as evidenced below in their incorporation into UNDP´s processes of consultation and policy development and in the discourse of organisations such as the influential Society for International Development (SID). Such approaches are also notable in regional and local efforts to revitalise and strengthen autonomous indigenous community structures of governance and justice, and as to the provision of alternative systems of education and health care in contexts such as Mexico's Zapatistas and the Nasa people of Colombia.[65]

In the Bolivian context, the most far-reaching thus far, this involves a commitment in the Constitution´s Preamble to building a new kind of state based upon 'respect and equality for all' and principles such as 'sovereignty, dignity, complementarity, solidarity, harmony and equity in the distribution of social wealth.' Both constitutions, along with those of Venezuela and Colombia, are also notable for the extent to which they explicitly incorporate detailed aspects of international human rights law, including indigenous rights, and provide for their justiciability in national courts, unlike states such as Mexico. In most cases these references reflect the highest levels of protection or recognition existent in relevant international or regional instruments. However, in some disturbing cases they fall short of these; for example providing only for rights of prior consultation but not of "free prior informed consent" for indigenous peoples as to legislative or administrative decisions that might affect them, as required by Art. 19 of the UNDRIP, and in others go further beyond the limits of current international minimums. With respect to this example then the relative weakness of the Bolivian and Ecuadorian constitutional provisions as to rights of consultation must be strengthened by adding and applying the right to prior consent recognized in Art. 19 of the UNDRIP, as part of these states´ obligations to harmonize their approach with that of the strongest levels of protection applicable pursuant to international customary law.

On the other hand, in Ecuador for example the new constitution includes the recognition (Art. 71 of the Constitution) of the justiciable rights of the planet itself as a living organism ("*Pacha Mama*," similar to the concept of "Gaia" prevalent among the proponents of "deep ecology") with legal standing as a subject of rights, and although this is not explicitly echoed in the Bolivian Constitution, the Bolivian state organised an unprecedented international summit held in April 2010, focused on promoting the recognition for all peoples throughout the world of the Ecuadorian approach as a response to the failures of the Copenhagen summit (COP 15) in December 2009, and as a way to promote a more unified stance among countries of the Global South, leading up to COP 16 in Mexico in December 2010 and Rio plus 20 in June 2012.

The 'People´s Agreement' or Declaration[66] adopted by the Cochabamba People´s Summit included specific calls supporting the creation of two new independent tribunals: one focused on issues of Climate Justice and Environmental Justice, which is intended to provide a forum for the states of the peoples of the Global South to judge the conduct of the states of the Global North (similar in certain respects to the Latin American Water Tribunal), and another which is the first International Tribunal of Conscience focused on issues involving the rights and dignity of migrants, refugees and the displaced.[67] Both of these tribunals are likely forums for challenging the continuing limitations of the World Bank´s approach to indigenous rights issues, in addition to the

[65] P**é**rez-Bustillo and Hern**á**ndez Mares (2016, forthcoming)

[66] See World People's Conference on Climate Change and the Rights of Mother Earth, *People's Agreement of Cochabamba* (22 April 2010), http://pwccc.wordpress.com/2010/04/24/peoples-agreement/

[67] See The Comparative Research Programme on Poverty, *The International Tribunal of Conscience* (2010), http://www.crop.org/storypg.aspx?id=346.

longstanding Permanent People´s Tribunal founded in 1979 as the principal successor to the Russell Tribunal of the 1960s. [68] The combined effect of the Ecuadorian constitutional provisions and of Bolivian state policy is thus to highlight the direct connection between the overall approach to indigenous rights and human rights in these contexts and issues of environmental policy and climate change from the perspective of alternative development paradigms, in a way which builds upon but also further strengthens the level of recognition of such issues in the UNDRIP.

The insistence in the recently adopted constitutional frameworks in Bolivia and Ecuador on the need for alternative development paradigms rooted directly in indigenous traditions and the ethics and practices of contemporary indigenous social movements is convergent with the emphasis in UNDRIP (e.g. Art. 23) on the right of indigenous peoples to determine and define their own priorities and strategies for development, and the importance accorded in the European Council´s Resolution of 30 November 1998[69] to respect for the concept of "self-development" by indigenous peoples, which the Resolution defines as the 'shaping of their own social, economic, and cultural development and their own cultural identities,'[70] and which includes respect for their 'right to choose their own development paths,' the 'right to object to projects, in particular in their own traditional areas,' and to compensation 'where projects negatively affect' their livelihoods.[71] The European Commission´s May 1998 Working Document regarding 'support for indigenous peoples in the development cooperation of the Community and the Member States,'[72] which helped lay the basis for the November 1998 Resolution, specifically refers to the Draft version of UNDRIP as one of the bases for its approach.[73]

The IADB´s policy for indigenous peoples, meanwhile, specifically emphasises the need to 'promote the institutionalization of the information, timely diffusion, consultation, good faith negotiation and participation mechanisms and processes' necessary to fulfill 'commitments made both nationally and internationally regarding consultation with and participation of indigenous peoples in the issues, activities and decisions that affect them.'[74] It also provides that such 'mechanisms and processes must take into account the general principle of the free prior and informed consent of indigenous peoples as a way to exercise their rights' and to 'decide their own priorities for the process of development...and to exercise control, to the extent possible, over their own economic, social, and cultural development[75],' in language anticipating the essence of Arts. 19, 20, 21 and 24 of UNDRIP.
Similarly, the IADB´s 2006 Strategy for Indigenous Development adopts the paradigm of 'development with identity,' which it defines in terms of principles such as 'equity, interconnectedness, reciprocity, and solidarity,' and with reference to a 'vision of sufficient well-being,' which are present in either or both of the approaches developed in terms of the alternative Andean indigenous paradigms of "living well" or "collective well-being" in the Bolivian and Ecuadorian constitutions, and which at minimum are convergent with such approaches.[76]

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[68] See Lelio and Lisli Basso Foundation, '*Tribunale Permanente del Popoli: Introduction,*' http://www.internazionaleleliobasso.it/?page_id=207&lang=en

[69] European Council Resolution, Indigenous peoples within the framework of the development cooperation of the Community and the Member States, 30 November 1998.

[70] Ibid. at para 2.

[71] Ibid. at para 5.

[72] European Commission, Working Document of May 1998, On support for indigenous peoples in the development co-operation of the Community and the Member States.

[73] Ibid.

[74] Inter-American Development Bank, *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development* (2006).

[75] Ibid.

[76] Ibid.

Meanwhile the UNDP explicitly recognizes the right to "free prior informed consent" by indigenous peoples in the context of development processes and ties it directly to the UNDP´s understanding of their "right to development"[77] and rights to self-determination and autonomy, while carefully anchoring its overall approach within the framework of overall trends as to the recognition of indigenous rights within the UN system. The UNDP convened its own consultation in January 2010 with indigenous policy experts, including several designated by the UN´s Permanent Forum on Indigenous Issues (PFII), which it attributes in part to the 'fresh impetus' for 'UNDP engagement with indigenous peoples' resulting from the adoption of UNDRIP.[78] This consultation was also motivated by the 20th anniversary of UNDP and its Human Development Reports and by UNDP´s leadership in the overall Millennium Development Goals (MDG) process. Here too it would be important for the UNDP to specifically highlight and reference UNDRIP standards within its current policy frameworks and in its ongoing global, regional and national reports, in addition to the mention made of the need for a monitoring tool to track the impact of the UNDRIP in the focus group discussion report cited above. The report specifically notes the emergence and broader relevance of alternative paradigms such as those summarised above in the context of Bolivia and Ecuador:

> 'Indigenous peoples from different parts of the world have been promoting a different concept of development that is multi-dimensional, holistic, cyclical, regenerative, and sustainable. A good example is the indigenous concept of "Bien Vivir" ("Live Well") in Latin America, which should be noted in the HDR through a text box in the report. This is something that is being used more and more by governments (e.g., the Governments of Bolivia and Nicaragua), and may significantly contribute to the concept of human development for all, not only indigenous peoples.'[79]

UNDP also notes repeatedly the relevance of indigenous peoples´ issues in the context of its work in The Philippines, in addition to its efforts in the Latin American context.[80]

UNDP was also instrumental in the process leading to the drafting of the UN Development Group´s (UNDG) Guidelines on Indigenous Peoples´ Issues,[81] issued in February 2008, which are directed at shaping the approach of UN country teams throughout the world, and which emphasise the centrality of UNDRIP, and underline the importance of implementation of Articles 41 and 42 by UN system staff.[82] Box 2 of the Guidelines text describes the desired characteristics of "free prior informed consent" (FPIC).[83]

The UNDG Guidelines emphasise the connection between indigenous peoples´ right to development, rights to FPIC and rights to self-determination and autonomy, and suggest the following framework for interpreting and implementing the right to development in the context of indigenous peoples:

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[77] United Nations Development Programme, *UNDP and Indigenous Peoples: A Policy of Engagement* (01 June 2001).
[78] See United Nations Development Programme, *UNDP and Indigenous Peoples*, http://cq-publish.dev.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_human_rights/empowering_indigenous_peoples.html (accessed April 5 2014).
[79] Ibid, p.2.
[80] Ibid.
[81] United Nations Development Group, Policy and Guidance, *UNDG Guidelines on Indigenous Peoples* (1 February 2008)
[82] Ibid, p.7.
[83] Ibid, p.30.

> Indigenous peoples and the right to development: Indigenous peoples have the right to define and decide on their own development priorities. This means they have the right to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development that may affect them. This principle is re-affirmed as one of the objectives of the Second International Decade on the World's Indigenous People. The principle requires that UN programmes and projects also take measures to involve indigenous peoples in all stages of the development process. Indigenous peoples' lands have been disproportionately affected by development activities because they often contain valuable natural resources including timber, minerals, biodiversity resources, water and oil among others. . . Land and resource issues are often at the heart of the tensions between indigenous communities and States and are often the source of human rights violations . . . Some of the issues that confront many indigenous communities worldwide are ownership rights, the right to adequate housing … and protection from forced evictions. . . natural resource management questions, management and use of protected areas and/or nature reserves, benefit-sharing, protection from environmental impacts and guarantees for sacred or cultural sites. These issues may be resolved through dialogue and negotiation where national laws are in line with the individual and collective human rights of indigenous peoples.
>
> The development goals of indigenous peoples are closely linked to their ability to exercise decision-making in their communities (including the participation of women in this decision-making), maintain rights over their lands and resources, protect the rights of groups within indigenous communities, such as women and children and live according to their cultures and traditions. Cooperation between the United Nations and indigenous peoples in development requires respect for these socio-cultural and economic factors. The seventh Conference of the Parties of the Convention on Biological Diversity, adopted the Akwé: Kon guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities…It is expected that the impact assessment (embodied in the guidelines) will help prevent the potential adverse impacts of proposed developments on the livelihoods of indigenous and local communities concerned.[84]

With these examples in mind, I now return to the World Bank, to assess the implications of its current policies as to indigenous peoples.

C. Implications of Current World Bank Policies as to Indigenous Peoples

The impact of the World Bank´s activities on indigenous peoples has historically been a key component of overall concerns as to the social and environmental consequences of its policies and practices. According to Fox and Brown´s overview, 23 of the 36 NGO campaigns protesting Bank projects which they consider to have had a significant impact on Bank policies involved issues of indigenous rights. [85] More recently the Bank´s study 'Implementation of the World Bank´s Indigenous Peoples Policy, a Learning Review,'[86] assessing projects implemented in the fiscal years 2006, 2007 and

[84] Ibid, p.15-16.
[85] L. David Brown and Jonathan Fox (eds), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, MIT Press, 1998)
[86] The World Bank, OPCS Working Paper, *Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006-2008)* (August 2011)

2008 (the first three years that the revised Indigenous Peoples Policy was in effect) and released in August 2011, found that between July 2005 and July 2008, approximately 12 percent (a total number of 132) of all projects approved by the Bank during this period triggered an application of OP 4.10, with 41% (55 of 132) of these in Latin American and Caribbean region; in general 19% of the 510 projects triggering application of WB´s indigenous peoples policies between fiscal year 1993 and fiscal year 2008 were based in this region.[87] This makes the Latin American experiences referred above all the more relevant to a full assessment of the context within which the Bank´s Indigenous Peoples Policy is applied.

The shift from OD 4.20 to OP/BP 4.10 in July 2005[88] has meanwhile expanded the potential range of application of the Bank´s Indigenous Peoples Policy from situations characterized by "potential adverse impacts" on indigenous peoples to contexts which more broadly include their "presence," though it is not clear how this wider reference is quantified, or involve an area (it is unclear if this means territory, land or resources) to which they have a "collective attachment." At the same time the concept of "informed participation" included in OD 4.20 has been replaced in OP/BP 4.10 by that of 'informed consultation,' which is arguably a more precise formulation, in theory. In practice however, the ground potentially gained by narrowing "participation" down to its constituent dimension of "consultation" has been lost by failing to give it the concrete anchoring of "consent," as required by Article 19 of UNDRIP, and as affirmed in the UNDP context cited in the preceding section. Meanwhile no concrete reference is made anywhere in the text of OP/BP 4.10 to any specific text or norm of international human rights law regarding the rights of indigenous peoples. The initial failure to refer to UNDRIP could be explained by the fact that the new policy was adopted in 2005 prior to the Declaration´s own adoption in 2007, but reference to ILO Convention 169 (which has been in force since 1991) is also absent, so there must be another rationale at play here. This exemplifies the Bank´s continuing overall refusal to fully and explicitly embrace international human rights norms as the basis for prescriptive restrictions on its own policies and practices,[89] as discussed above.

4. Conclusion

Articles 20, 21 and 24 of UNDRIP reflect the potential and limits of hegemonic approaches to the recognition of the rights of indigenous peoples in the contemporary international system, and the need to draw upon counter-hegemonic visions grounded in the demands of indigenous movements throughout the world. The Inter-American Court of Human Rights, World Bank and other key sites for the definition of development policy, such as the United Nations Development Program, Inter-American Development Bank and the European Union, provide relevant case studies that illustrate the complex challenges of navigating such countervailing forces. Key examples of alternative visions and practices include the Inter-American Court's recognition of a "right to a dignified life" as the centre of gravity for the assessment of

[87] Ibid.

[88] See generally The World Bank, *Indigenous Peoples* (July 2005), http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (accessed April 5 2014)

[89] See generally Pérez-Bustillo (2003); see also Human Rights Watch, *World Bank Group: Proposed Policy a Setback for Rights* (10 October 2014), http://www.hrw.org/news/2014/10/10/world-bank-group-proposed-policy-setback-rights, *World Bank: Ducking Human Rights Issues* (22 July 2013) http://www.hrw.org/news/2013/07/22/world-bank-ducking-human-rights-issues, *Abuse-Free Development* (22 July 2013) http://www.hrw.org/reports/2013/07/22/abuse-free-development.

indigenous claims. They also include ongoing efforts to bring about the "refoundation" and "decolonisation" of the constitutional law and structure of existing states in Latin America such as Bolivia and Ecuador, which emphasise indigenous peoples' rights to self-determination and autonomy, as part of a broader vision grounded in the need to reconstruct hegemonic versions of human rights from below.

Realising Children's Rights in the United Kingdom: Using International Law to give Children a Platform to Justice

Amina Hussain*

Abstract

This paper explores how international law can be used as a platform to ensure justice for children. This can only be achieved by full incorporation of the United Nations Convention on the Rights of the Child (UNCRC) into UK law and encouraging the courts to embrace a rights culture in relation to children. It is also argued that extending the role of the UK's Children's Commissioners to effectively hear individual cases could help safeguard and protect the rights of the child in the immediate future while incorporation remains the long-term goal. It will be argued that the UK needs to ratify the new Optional Protocol to the UNCRC on a Communications Procedure, which offers a child-specific petitioning mechanism for children to voice complaints. Finally, it will highlight the fact that the majority of children's rights are not included in current domestic provision, and conclude that incorporating the UNCRC will allow children to be seen as rights holders, and is the next natural step the UK can take to realise children's rights.

Keywords

Children's rights – United Nations Convention on the Rights of the Child – Children's Commissioners – European Convention on Human Rights – Incorporating Children's Rights.

1. Introduction

The United Kingdom (UK) has chosen not to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into domestic law. It has been suggested that this failure renders the Convention largely unenforceable in the UK and that it is thus of persuasive influence only.[1] As a result, areas of the Convention are often poorly implemented within the UK,[2] particularly children's socio-economic rights guarantees which are uniquely protected in the UNCRC.

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[1] Jane Fortin, *Children's Rights and the Developing Law* (3rd ed) (New York, Cambridge University Press, 2009) 48.

[2] Osian Rees, 'Dealing with individual cases: an essential role for national human rights institutions for children?' (2010) 18(3) *International Journal of Children's Rights* 430.

The UNCRC has been in force for over twenty years, yet the Committee's reports to the UK still indicate areas of concern where the UK is failing to meet the CRC's standards.[3] In each of the Committee's concluding observations, they have called for the UK to incorporate the UNCRC in order to focus its attention on realising each of the rights it contains rather than just some of them.[4] King has suggested that this picking and choosing has allowed the government to amend policies which suit it, rather than policies which suit children.[5] The government seems reluctant to embrace children as rights-holders, and wavers in its commitment to children's rights. Given the economic climate of the UK and growing levels of poverty that are likely to increase given current austerity measures,[6] it has become more important to reignite the debate on how to better realise children's rights.

This paper seeks to explore how international law, namely the UNCRC, can be used as a platform to ensure justice for children by recognising their need for specific rights, and specific judicial processes. To this end, the paper will consider the role the European Convention of Human Rights (ECHR) has played in protecting children's rights and conclude that whilst there have been some successes, the UNCRC can offer better protection to children given its extensive range of rights, in comparison to the limited offerings of the ECHR. The paper then provides three recommendations as to how the United Kingdom could better realise the rights protected in the UNCRC.

First, it will call for full incorporation of the UNCRC into UK law and make comparisons with other countries that have done so. It will assess the power that incorporation can have on the courts in embracing a rights culture in relation to children. It will argue that doing so will demonstrate the government's commitment to taking its international obligations seriously and provide the necessary safeguards to better realise children's rights. Secondly, whilst recognising that incorporation should be the long-term goal for the UK, extending the role of the Children's Commissioners in the UK to effectively hear individual cases is needed to safeguard and protect the rights of the child in the immediate future. In response to the ratification of the UNCRC, each of the four devolved nations established Children's Commissioners.[7] There are currently inconsistencies in the mandates of the Children's Commissioners, leaving some children better protected than others. While the Commissioners in Northern Ireland and Wales have the remit to hear individual cases brought by children, the Commissioners in Scotland and England do not. This paper will consider these differences and argue that the ability to make individual

[3] See Committee on the Rights of the Child Concluding Observations regarding United Kingdom 15 February 1995 CRC/C/15/Add.34 (I); Committee on the Rights of the Child Concluding Observations regarding United Kingdom 9 October 2002 CRC/C/15/Add.188 (II); Committee on the Rights of the Child Concluding Observations regarding United Kingdom 20 October 2008 CRC/C/GBR/CO/4 (III/IV). Repeated areas of concern include: insufficient allocation of resources to children's socio-economic rights and eradicating poverty (I: para 9; II: para 34; III/IV: para 18); failute to prohibit corporal punishment in the family (I: para 15; II para 36; III/IV: para 41); failure to respect the views of the child (I: para 14, II: para 29, III/IV: para 32).

[4] Ibid. (1: para 8; II: para 8-9; III/IV: para 11).

[5] M King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United
Nations Convention' (1994) Family Law Report on Illegitimacy, Law Com No 118 at 397.

[6] For a discussion of this, see Office of the Children's Commissioner, *A Child Rights Impact Assessment of Budget Decisions: including the 2013 Budget, and the cumulative impact of tax-benefit reforms and reductions in spending on public services 2010 – 2015,* June 2013.

[7] Wales: Children's Commissioner for Wales Act 2001 (c.18); Northern Ireland: The Commissioner for Children and Young People (Northern Ireland) Order 2003 (No. 439, N.I. 11); Scotland: Commissioner for Children and Young People (Scotland) Act 2003 (asp 17); England: Children Act 2004, part 1 (c.31).

complaints has helped achieve better protection for some children, but also recognise some reluctance on the part of the courts in accepting cases brought by the Children's Commissioners. Thirdly, it will call for the UK to ratify the new Optional Protocol on a Communications Procedure to offer children a child-specific petitioning mechanism to voice their complaints. By doing this, children's rights can be "significantly strengthened"[8] since the protocol will not only give children an international platform to raise their concerns, but place them on an equal international level with adults.

2. Shortcomings of the Human Rights Act and the European Convention on Human Rights in the Protection of Child Rights

The Human Rights Act1998 (HRA)[9] has been crucial in securing the realisation of many human rights,[10] but this paper highlights the fact that children need access to child-specific procedures, which can be used to adjudicate all of the rights protected in the UNCRC. Further, with recent discussions in the UK about repealing the HRA and withdrawing from the European Convention on Human Rights (ECHR) by a Conservative government at the next general election,[11] it is important to consider how children's rights could be better protected using the UNCRC if it was protected in domestic law. This section will consider both domestic jurisprudence and Strasbourg jurisprudence to assess the value the HRA and ECHR have had in relation to children's rights.

Most notably, unlike the UNCRC, the HRA does not contain social, economic and cultural rights nor does it explicitly refer to children[12]. Instead, the HRA's focus is upon the so-called "traditional rights,"[13] those which are civil and political in nature. Further, Fortin has suggested that civil and political rights are "usually relatively unimportant to children brought up in the protected environment of their own homes"[14] which calls for the need to better protect the rights of vulnerable children. Van Bueren has commented that the HRA is "strangely silent"[15] in relation to socio-economic rights and highlights how these rights can empower children to have access to suitably nutritious food and water, adequate housing and access to healthcare.[16]

Despite this, the UK courts have been faced with cases which concern the rights of children. However, as will be highlighted, the approaches taken by UK courts have been far from consistent, particularly in the interpretation of international treaty obligations.

A. Children's rights cases from Strasbourg

[8] Fortin, above n 1 at 52; Rees, above n 2 at 430.
[9] Human Rights Act 1998 (c.42).
[10] For an overview see Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2011) 69 *Modern Law Review* 299.
[11] Conservative Home, Theresa May, *We Will Win by Being the Party for All*, March 9th 2013 http://conservativehome.blogs.com/thetorydiary/2013/03/full-text-of-theresa-mays-speech-we-will-win-by-being-the-party-for-all.html (accessed 8 February 2015).
[12] With the exceptions of Article 5.1(d) which allows the detention of minors as a way of "educational supervision" and Article 2 of the First Protocol which states that no person should be denied the right to an education.
[13] Civil and political rights are thought to date back to the Magna Carta 1215. For a discussion of why socio-economic rights are equally as traditional see Geraldine Van Bueren, 'Socio-Economic Rights and a Bill of Rights – An Overlooked British Tradition' (2013) *Public Law.*
[14] Fortin, above n 1 at para 61.
[15] Geraldine Van Bueren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' (2002) *Public Law*, 456 at 456.
[16] Ibid.

The limited number of cases brought by children to the European Commission and Court in Strasbourg have been interpreted "cautiously."[17] This caution is best illustrated in the infamous decision of *Nielsen v Denmark*.[18]

The applicant, a twelve-year-old boy, had been running away from his mother's home to live with his father, which his mother considered to be a symptom of psychiatric illness.[19] As his parents were unmarried, under Danish law the mother had "sole parental rights over the child."[20] The father appealed against the decision of the mother to place their son in a care home but his appeal was subsequently rejected since the court found it not to be in the "interests of the child."[21]

A medical investigation took place and concluded that the applicant was "trapped in a neurotic state requiring treatment"[22] and he was placed in a psychiatric ward. The applicant claimed that this deprived him of his liberty and was contrary to Article 5 of the ECHR.[23] The Commission agreed that this amounted to a breach of his Convention right, but this was not a view adopted by the European Court of Human Rights (ECtHR). The ECtHR stated that when assessing deprivation of liberty cases they must have "regard to the applicant's actual situation…taking into account such factors as the type, duration, effects and manner of implementation of the measures in question" suggesting the case would be interpreted on a subjective basis.[24]

The ECtHR agreed with the government that the "applicant was in need of medical treatment for his nervous system…this treatment did not involve medication, but consisted of regular talks and environmental therapy,"[25] leading to the conclusion that the hospitalisation amounted to a deprivation of liberty, but was a reasonable action by a mother exercising her parental rights and therefore justifiable under Article 5(2) ECHR.[26] In discussing the length of time the child was detained, it was concluded that whilst it "may appear to be a rather long time for a boy of 12 years of age…it did not exceed the average period of therapy."[27] In terms of the child's views of his hospitalisation, the court concluded that "he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child."[28] Despite the case being brought by the child himself, the decision was still brought from a parental rights perspective rather than a child's.

The strong dissent stated that the "boy was not mentally ill"[29] and that placing him in a psychiatric hospital "against his will…and the length and nature of the committal"[30] amounted to an unjustified deprivation of his liberty. According to Fortin, this case demonstrates that the "Convention is ill equipped to help courts find an appropriate

[17] Fortin, above n 1 at 54.
[18] *Nielsen v Denmark* (1989) 11 EHRR 175.
[19] Ibid. at para 13.
[20] Ibid. at para 10.
[21] Ibid. at para 14.
[22] Ibid. at para 31.
[23] Ibid. at para 55.
[24] Ibid. at para 67.
[25] Ibid. at para 70.
[26] Ibid. at para 72.
[27] Ibid. at para 70.
[28] Ibid. at para 72.
[29] Ibid. Joint Dissenting Opinion Of Judges Thór Vilhjálmsson, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo And Valticos at page 24.
[30] Ibid.

balance between parents' powers and children's rights"[31] particularly since the court failed to recognise the subjective nature of the case that it had promised to consider.[32]
The decision points to the need for a child-focussed approach that could have been achieved through application of the UNCRC. Five and a half months is an excruciatingly long detention period for a child who simply wanted to live with his father. Had Strasbourg taken account of the UNCRC, it is likely that Articles 9, 12 and 37 of the ECHR would have been engaged; these articles ensure children shall not be arbitrarily separated from their parents,[33] allow children to express their views where they are capable of doing so,[34] and prohibit children from being deprived of their liberty arbitrarily.[35] If the UNCRC had been applied, the applicant would have been able to demonstrate that he had a right not to be arbitrarily separated from his parents and that his views were accorded due regard in matters that affected him.

Further examples of the Strasbourg court failing to recognise children as right holders through the ECHR are demonstrated in *Valsamis v Greece*.[36] In this case, the applicants, who were Jehovah's Witnesses, complained of the one-day suspension their twelve-year-old daughter received from school for refusing to take part in a military parade to commemorate National Day.[37] It is important to note that the child expressed that her religious beliefs that prevented her from taking part to the headmaster, but exemption was denied.[38] The applicants claimed that this violated their rights protected in Article 9,[39] with which both the Commission and the Court disagreed.[40] However, in reaching these conclusions, both the Commission and the Court considered only the parents' right to religious freedom as opposed to separately considering a potential violation of the child's right[41] as recognised by Article 14 of the UNCRC which protects children's right to "freedom of thought conscience and religion."[42] Whilst the manifestation of this right is subject to the same caveats[43] as Article 9 ECHR, it is disappointing that the Court did not recognise the impact on the child who had expressed her religious beliefs to her headmaster. This decision provides further ammunition for the premise that the ECHR is unqualified to effectively deal with the rights of the child.

Another example of the court's failure to consider children's rights can also be seen in the *Costello-Roberts* decision[44] which further demonstrates the need for child-sensitive decision making. This was a case where a seven-year-old boy, who had recently started boarding school, was beaten with a slipper by his headmaster for accumulating five de-merit marks for trivial actions (such as talking in the corridor). The punishment was

[31] Fortin, above n 1 at 55.
[32] Nielsen, above at para 67.
[33] Article 9, United Nations Convention on the Rights of the Child 1989.
[34] Article 12, United Nations Convention on the Rights of the Child 1989.
[35] Article 37, United Nations Convention on the Rights of the Child 1989.
[36] *Valsamis v Greece* (1997) 24 EHRR 294.
[37] Ibid. at para 9.
[38] Ibid. at para 10.
[39] Article 9, European Convention on Human Rights: '…the right to freedom of thought, conscience and religion' subject 'only to such limitations as are prescribed by law…necessary for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'
[40] Valsamis, above n 36 at para 18 and 34-38.
[41] Ibid. at para 37.
[42] Article 14, United Nations Convention on the Rights of the Chid 1989
[43] Article 14(3): " Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."
[44] *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112.

administered eight days after the final incident.[45] He wrote a letter to his parents asking them to collect him, explaining his punishment.[46] Legal proceedings were initiated, and the boy claimed breaches of three Convention rights. Firstly, Article 3, which protects an individual from "torture or…inhuman or degrading treatment or punishment."[47] Secondly, Article 8 which states that "everyone has the right to respect for his private and family life"[48] and thirdly, Article 13 which states that "everyone whose rights…are violated shall have an effective remedy before a national authority."[49]

The case focused on whether or not the physical punishment exceeded a certain standard of severity, as per the test laid down in the *Tyrer*[50] case which stated that the punishment needed to go beyond the usual scope of humiliation as is expected, and that this was to be assessed subjectively.[51]

The Commission recognised that given the applicant's age and the fact he was away from home for the first time he was likely to be "seriously intimidated"[52] by the height and force of the headmaster.[53] Further, they accepted that the punishment was mild in comparison to the birching of Anthony Tyrer but "its negative psychological effects were serious and long lasting, given the applicant's age and the surrounding factual context."[54]

Although the Commission accepted that the treatment was "probably pedagogically undesirable given his age" it could "not be said to have reached the level of severe ill-treatment proscribed by Article 3 of the Convention."[55] However, the joint dissent of Mrs Thune and Mr Geus is important, drawing on the assessment that the decision was dependent upon "all of the circumstances of the cases" and therefore "the level of severity should thus be decided on the basis of an assessment of the situation as a whole as it appeared to the pupil concerned".[56] Further dissent was added by Mr Loucaides, who stated that "any school corporal punishment amounts to a breach of Article 3 bearing in mind present day values regarding human dignity and human personality."[57]

These dissents are in line with the position of the UNCRC that obliges states to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence."[58] Further, the UN Committee on the Rights of the Child has been firm in its expectation for states to implement measures to "prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children."[59]

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[45] Ibid. at para 9.
[46] Ibid.
[47] Article 3, European Convention on Human Rights
[48] Article 8, European Convention on Human Rights
[49] Article 13, European Convention on Human Rights
[50] *Tyrer v United Kingdom* (1979-80) 2 EHRR 1. The applicant (aged 15) was sentenced to three strokes of the birch by a juvenile court in the Isle of Man on conviction of assault occasioning actual bodily harm which was found to violate Article 3 ECHR.
[51] Costello-Robert, above n 44 at para 30.
[52] Ibid. at para 39.
[53] Ibid.
[54] Ibid.
[55] Ibid. at para 42.
[56] Costello-Robert, above n 44 at para 129.
[57] Ibid. at para 130.
[58] Article 19, United Nations Convention on the Rights of the Child.
[59] Committee on the Rights of the Child, General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia) 21 August 2006 CRC/GC/2005/6 at para 2.

Despite the dissents from the Commission, the Court's decided that the punishment did not reach the required level of severity: "While the Court has certain misgivings about the automatic nature of the punishment and the three-day wait before its imposition, it considers that minimum level of severity not to have been attained in this case."[60]
It may therefore be concluded that the decision of Costello-Roberts is contradictory, since it accepts the need for subjective assessment but still uses a "severity test" that seems to ignore the factual context. Whilst corporal punishment has since been banned in schools,[61] as the case below will indicate, *Costello-Roberts* demonstrates the need for incorporation of children's rights provisions, especially to address corporal punishment within the family, which remains a contentious issue.[62]

B. Children's rights cases under the Human Rights Act

Similar to the Strasbourg jurisprudence, the position under the Human Rights Act is inconsistent in terms of recognising children's rights. A clear example of this appears in the case of *Williamson*[63] which demonstrates the domestic courts' failure to include children in the decision-making process, a failure which would be overcome by incorporation of the UNCRC, ensuring children's rights were at the forefront of the case. In *Williamson*, the parents and teachers of a group of children were claiming that the prohibition of corporal punishment in schools under Section 548 Education Act 1996 amounted to a breach of their religious freedom under Article 9 of the ECHR.[64] They believed that physical discipline helped form a "godly character" and the prohibition interfered with their religious freedom. Lord Bingham held that there had been an interference with the claimant's rights under Article 9(1) and rejected the Secretary of State's view that stated there was no interference since the parents could attend the school and administer the corporal punishment themselves.[65] Lord Bingham found these alternatives inadequate since it would require a parent to "make himself available on call to attend school to administer corporal punishment should his child be guilty of indiscipline deserving of such punishment. [This] strikes me as unrealistic for many parents."[66]

Quite remarkably, when discussing whether or not the religious belief satisfied the Article 9(1) criteria, Lord Bingham overlooked the rights of the child. He did not consider the impact linking corporal punishment and manifestation of religious beliefs together could have on the future wellbeing of the child.[67] Although it is to be welcomed that this interference was justified under Article 9(2) in protecting the welfare of children, Lord Bingham largely overlooked the rights of the child.

Baroness Hale did address this issue, reminding the other Lordships: "this is, and has always been, a case about children, their rights and the rights of their parents and

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[60] Costello-Robert, above n 44 at para 32.
[61] The Education (No 2) Act 1986 banned corporal punishment in schools in England and Wales that received public funding. This was extended to all schools by s.548 of the Education Act 1996 (as extended by s.131 of the School Standards and Framework 1998)
For example, see Sir Roger Singleton, 'Physical Punishment: improving consistency and protection' (2010) http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/DCSF-00282-2010.pdf (accessed on 18 March 2014)
[63] *R v (Williamson and Others) v Secretary of State for Education and Employment* [2005] UKHL 15.
[64] Article 9(1), European Convention of Human Rights.
[65] Williamson, above n 63 at para 40.
[66] Ibid. at para 41.
[67] Buxton LJ at the Court of Appeal who thought their beliefs were not sufficiently coherent at para 35.

teachers…the battle has been fought on ground selected by the adults."[68] Yet Baroness Hale thought the real question, was "whether any limits set by the state can be justified under article 9(2),"[69] agreeing with Lord Bingham that Section 548 did amount to a justified interference of the parents' religious freedom.[70] Langlaude is critical of Baroness Hale and believes that "re-characterising [the case] as involving children's rights" makes the issue more complex.[71] This opinion demonstrates the need for children to be better represented in cases that affect them, so it need not be a matter of re-characterising but one that is accepted as the norm. Freeman suggests that had there been litigators representing children's rights, or even a non-governmental organisation, the case 'would have looked very different, even though, of course, the conclusion would have been the same."[72] This is an interesting suggestion, and one which would be welcomed, since it would place the rights of the child at the forefront of the decision-making.

Despite this, reference was made to the UNCRC by Baroness Hale who, in agreement with Articles 3, 19 and 37 held that "if a child has a right to be brought up without institutional violence, as he does, that right should be respected whether or not his parents and teachers believe otherwise."[73]

It was on this basis that Baroness Hale found that the interference to the parent's religious freedom was justified. Baroness Hale also considered the reports published by the Committee of the UNCRC, and particularly the second review which recommended that the United Kingdom "with urgency adopt a legislation…to remove the „reasonable chastisement" defence and prohibit all corporal punishment in the family."[74] Baroness Hale found it unnecessary to rely on this recommendation, finding that the matter of family corporal punishment was a more complex issue that was not relevant here. What is of relevance is, as Freeman notes, "children were the objects of concern, not the subjects in their own rights."[75] Further, Freeman argues that the "state did not argue that corporal punishment necessarily involved an infringement of any rights of the children."[76] If children's rights were incorporated into UK legislation, then this would avoid any future opportunities to ignore children as right holders as was done by the state and the majority of the judiciary in this case.

More recently there have been improvements to the protection of children as right holders, best demonstrated through the UK Supreme Court case of *ZH v Tanzania.*[77] This significant case concerned a woman who entered the UK as a national of Tanzania and claimed asylum, unsuccessfully, on three occasions.[78] Within two years of living in the UK she formed a relationship with a British citizen with whom she had two children, with each

[68] Williamson, above n 63 at para 71.
[69] Ibid.
[70] Ibid.
[71] Sylvie Langlaude, 'Flogging Children with religion: a comment on the House of Lords' decision in Williamson' (2005) 38(8) *Ecclesiastical Law Journal* 344.
[72] Michael Freeman, (ed), *Children's Rights: Progress and Perspectives: Essays from the International Journal of Children's Rights"* (Leiden, Martinus Nijhoff Publishers, 2011) at 7.
[73] Ibid. at 86.
[74] Committee on the Rights of the Child Concluding Observations regarding United Kingdom 9 October 2002 CRC/C/15/Add.188 at para 34.
[75] Michael Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 *The International Journal of Children's Rights* 5 at 6.
[76] Ibid.
[77] *ZH v Tanzania* [2011] UKSC 4.
[78] Ibid. at para 5.

child born in the UK.[79] Some years later the relationship deteriorated, but the father maintained a sustained relationship with both children.[80]

The mother was granted a fresh asylum claim in 2007, but this was rejected by the Secretary of State in 2008.[81] The case eventually reached the Supreme Court, where the mother argued that "insufficient weight is given to the welfare of all children affected by decisions to remove their parents and in particular to the welfare of children who are British citizens."[82] The issue of the case therefore focused on the "weight to be given to the best interests of children"[83] where their parent(s) are to be deported from the UK. As such, consideration was placed on how to interpret Article 8 ECHR which protects an individual's right for his private and family life, in accordance with previous decisions as well as the UNCRC.

Baroness Hale, in delivering her judgment, initially highlighted the need for Article 8 to be balanced for each family member individually,[84] which was of particular importance when children were involved. Although she recognised that the starting point is that Article 8 is not an absolute right,[85] her decision-making revolved around the welfare of the children in the case. She referred to the Strasbourg decision of *Rodrigues da Silva, Hoogkamer v Netherlands*[86] which referred to the previous legal test as:

> …[W]hether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious….where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.[87]

Although this test seems to be particularly strict, the Supreme Court in this instance were able to depart from it and find a violation of Article 8 by relying on the "best interests" of the child.[88] Baroness Hale welcomed this decision, since it was a relatively recent case within which "the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making."[89]

Baroness Hale centred her decision on the UNCRC, in which she comfortably grappled with the interpretation of the relevant provisions.[90] Baroness Hale stressed the importance of citizenship, and that these children were "British children"[91] by descent of a British

[79] Ibid. at para 2.
[80] Ibid. at para 3: Also of note is that the father was diagnosed with HIV (human immunodeficiency virus) and his source of income came from disability benefits, but these points were concluded by the Supreme Court not to be significant in determining whether or not the children could live with the father.
[81] ZH, above n 77 at para 6.
[82] Ibid. at para 12.
[83] Ibid. at para 1.
[84] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39.
[85] ZH, above n 77 at para 17.
[86] *Rodrigues da Silva, Hoogkamer v Netherlands* (2007) 44 EHRR 729.
[87] Ibid at para 39 referring to *Mitchell & Ors v UK* (Application Numbers: 34356/06 and 40528/06) on 24 February 2010.
[88] *Rodrigues da Silva*, above n 91 at para 44.
[89] ZH, above n 77 at para 20.
[90] These included Article 3, 9 and 12 of the European Convention of Human Rights.
[91] ZH, above n 77 at para 31.

parent, giving them an "unqualified right of abode"[92] which should not be ignored.[93] Although nationality was not to be a "trump card,"[94] it was a right included in the UNCRC,[95] which meant it was of particular importance within the assessment. She dismissed the claim that given the children's age they would be able to "readily adapt"[96] to life in another country, since as citizens of Britain they were entitled to grow up in their own country. This treatment of children as holders of a distinct right of nationality, separate from their parents' rights of nationality, is a significant development in recognising children as rights holders. [97]

Baroness Hale then moved on to consider Article 3 of the UNCRC, which states that the best interests of the child is the primary consideration. In doing so, she appropriately considered competing interpretations, and relied on the General Comment 12 of the Committee on the Rights of the Child.[98] Her approach recognised that in order to determine the child's best interests, it was important to consider the child's own views, stating that "…the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents" this should not be taken for granted in every case."[99]

Although Baroness Hale's reasoning is encouraging, children need to be aware of their ability to express their wishes, which is something Baroness Hale should have considered when delivering her judgment. Still, Baroness Hale recognised children as rights-holders and effectively balanced their rights against the interests of others, an approach seldom adopted by the English courts. This can be viewed as a significant development in providing children with appropriate platforms to justice. Although critics[100] may assume this to be a case-specific decision, the approach taken by Baroness Hale in expanding the "best interests principle" through the UNCRC and beyond domestic legislation can "open the way for the child's best interests to be recognised…in a diverse range of domestic situations."[101]

Another victory for the realisation of the rights in the UNCRC in a domestic context is the case of *R(C) v The Secretary of State for Justice.*[102] The case sought to challenge amended rules prepared by the Secretary of State, which extended the circumstances whereby physical punishment could be used in Secure Training Centres (STCs).[103] A child, "C", and the Commissioner for Children sought judicial review against these rules arguing that they breached Articles 3 and 8 of the ECHR. The amended rules were particularly controversial because they had resulted in the death of two young boys, one who committed suicide after being subject to physical restraint and another who died

[92] Ibid.
[93] Ibid. at para 20.
[94] Ibid. at para 30.
[95] Article 7 and 8 of the United Nations Convention on the Rights of the Child.
[96] ZH, above n 77 at para 31.
[97] Geraldine Van Bueren, 'Acknowledging Children as International Citizens: A child-sensitive communication mechanism for the Convention on the Rights of the Child' in *The Human Rights of Children* Invernizzi and Williams (eds) (Farnham, Ashgate, 2011).
[98] Committee on the Rights of the Child, General Comment No 12: The right of the child to be heard, 20 July 2009, CRC/C/GC/12.
[99] ZH, above n 77 at para 34.
[100] See Jane Fortin, 'Are children's best interests really best?'(2011) 74(6) *Modern Law Review* 947.
[101] Alistair MacDonald, 'The best interests principle breaks out' (2011) *Family Law* 851 at 854.
[102] *R(C) v The Secretary of State for Justice* [2008] EWCA Civ 882.
[103] Ibid. at para 2: STCs accommodate children who have either been sentenced to custody or are remanded in custody, aging from 12-17.

during the restraint.[104] Evidence was presented to the Court of Appeal from The Prison Service Training Manual on Physical Control in Care which noted the potential dangers of the punishments including the inability to breathe, feeling sick or vomiting and developing swelling to the face, amongst others.[105]

In considering whether or not the Rules violated Article 3 of the ECHR, Buxton LJ referred to Baroness Hale's judgment in *R(R) v Durham Constabulary*[106] where she stated that interpretation of Article 3 of the ECHR ought to be conducted in light of the UNCRC.[107] In this case, Baroness Hale reminded the court that Article 37 of the UNCRC was of relevance, as it `provides that "every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."[108]

As such, Buxton LJ had "no hesitation in saying that any system that involves physical intervention against another's will and carries the threat of the sort of outcome identified…is in any normal understanding of language degrading and an infringement of human dignity.[109] However, this did not establish a blanket rule on the use of physical restraint. Rather, in this case the Secretary of State had failed to establish why physical restraint was to be used as a discipline technique. Since physical restraint was not necessary in these circumstances, the court also found the Rules to violate Article 8 of the ECHR.[110]

The Children's Legal Centre hailed this case as a "landmark judgment"[111] since it not only impacted on the violence children had been experiencing in fact, but was a "clear statement that the UN Convention…should be considered very carefully by the Government and, indeed, by the UK courts."[112] While the most obvious conclusion to draw from the more recent cases is that the UK courts are becoming better equipped in using the UNCRC in their decision-making, dispelling any argument for future incorporation. However, this simplistic analysis is not the most accurate. Recognition ought to be given to the development of the jurisprudence from *Costello Roberts* and *Williamson* to *ZH v Tanzania*, it has been neither consistent nor sufficiently expansive.

Interestingly, Baroness Hale has argued that there is a value in making the UNCRC part of a potential UK Bill of Rights, despite her success in using the UNCRC in her judgments.[113] Speaking extra-judicially, Baroness Hale was critical of the ECHR's protection of children since it "was not drafted with children in mind."[114] She further explained that "the European Convention is mainly concerned with freedom from state interference...there is very little in it about providing for the needs of anyone, let alone children. But children often need a great deal of state interference if they are to survive, let

[104] The inquest found that the restraint being used was unsafe and was not used as a matter of last resort.
[105] R(C), above n 102 at para 63.
[106] *R(R)v Durham Constabulary* [2005] 1 WLR 1184.
[107] Ibid. at para 26.
[108] Article 37(3), United Nations Convention on the Rights of the Child.
[109] R(C), above n 102 at para 64.
[110] Ibid. at para 80-81.
[111] Children's Legal Centre, 'Prison Rules: Judgement strengthens children's rights' (2008) 249 *childRIGHT* 14, 17.
[112] Ibid.
[113] Joint Committee on Human Rights, 'A Bill of Rights for the UK?' (2007-08: Volume 2) Q 202.
[114] Brenda Hale, 'Understanding Children's Rights: Theory and Practice' (2006) 3 *Family Court Review* 350, 351.

alone thrive."[115] This is important, since it recognises the vast amount of support children need in order to develop. Baroness Hale is recognising the active role of the UNCRC in placing children at the heart of decision-making processes. This confirms the assertion that the ECHR, including in its incorporation into the UK through the HRA, only protects children up to a certain point, necessitating the need for formal incorporation of the UNCRC, thus providing children with broader rights.

3. Time to Incorporate the UNCRC

In light of the judicial approaches considered above, the need for incorporation of the UNCRC continues, as incorporation would allow for greater consistency and accountability in cases addressing the rights of the child. The ECHR, whether considered at Strasbourg or by the UK Courts under the HRA has, on occasion, protected children's rights but it has often left many children unprotected. It is simply the nature of the ECHR that it fails to include the vast rights protected for in the UNCRC. Incorporation of the UNCRC would allow for a child-specific language, which would "make visible [child's rights] what has for too long been suppressed. It can lead to different and new stories being heard in public."[116] In addition, incorporation would demonstrate the government's commitment to taking its international obligations more seriously and, as will be argued, will provide the protection necessary to realise children's rights.

Since it ratified the UNCRC, the United Kingdom has reported to the UN Committee on the Rights of the Child on three occasions,[117] with its fifth report due in 2014. The Committee have been particularly critical of the UK's failure to comply with the UNCRC. The UK's initial report, submitted in 1994, focussed heavily on the introduction of the Children Act 1989[118] which the UK claimed to "clearly reflect the principles of the Convention."[119] The Committee welcomed the adoption of the Children Act but showed concern that the "best interests principle"[120] was not being sufficiently reflected in health, education and social security legislation.[121] Another point of criticism was the fact that there were no adequate measures to ensure the implementation of the UNCRC, particularly economic, social and cultural rights,[122] despite increasing numbers of children living in conditions of poverty.[123] This illustrates that the Committee does not see the ECHR and HRA as sufficient.

These criticisms were identified in the second, third and fourth concluding observations.[124] The UNCRC Committee argued that ratification would "help to ensure that the needs and interests of children are given a high profile across government."[125] Despite this optimism,

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[115] Ibid.
[116] Freeman, above n 76 at 6.
[117] Committee on the Rights of the Child Concluding Observations regarding United Kingdom 15 February 1995 CRC/C/15/Add.34; Committee on the Rights of the Child Concluding Observations regarding United Kingdom 9 October 2002 CRC/C/15/Add.188; Committee on the Rights of the Child Concluding Observations regarding United Kingdom 20 October 2008 CRC/C/GBR/CO/4.
[118] Children Act 1989.
[119] Committee on the Rights of the Child, Initial Reports of State parties due in 1994: United Kingdom of Great Britain and Northern Ireland, 28 March 1994, CRC/C/11/Add.1.
[120] Children Act 1989, s.1.
[121] Committee on the Rights of the Child, Concluding Observations regarding United Kingdom of Great Britain and Northern Ireland, 15 February 1995, CRC/C/15/Add.34 at para 11.
[122] Ibid. at para 9.
[123] Committee on the Rights of the Child Concluding Observations regarding United Kingdom, 15 February 1995 CRC/C/15/Add.34.
[124] Committee on the Rights of the Child, above n 117: II at para 8 & 45; III/IV at para 18 & 19.
[125] Committee on the Rights of the Child, above n 119 at para 15.

ratification has not been sufficient; awareness of children's rights in the UK is particularly low,[126] and the Children Act 1989 is by no means comprehensive enough to capture the spirit of the Convention.

A study conducted by Matemba provides evidence on the impact of incorporating international human rights legislation in the national legal order in Africa.[127] Matemba's findings indicated that "incorporation of human rights principles and obligations enshrined in international and regional human rights instruments into domestic law is the most effective way of ensuring that the instruments have a significant impact in a national legal order,"[128] leading her to the conclusion that "ratification of human rights instruments in itself is largely a formal and in some cases an empty gesture."[129] This is the position of the UK, in that "non-transformed,"[130] (in other words, unincorporated) treaties do not in themselves grant individuals a cause of action, which is of particular concern given the lack of petitioning mechanism provided internationally under the UNCRC.[131]

Despite these failings, the UK government has yet to express any intention of incorporating the UNCRC.[132] Former Children's Minister Tim Loughton stated that the Coalition Government had "no plans to incorporate the Convention into domestic legislation"[133] and the current Children's Minister Edward Timpson has not suggested otherwise. Although Baroness Walmsley drafted a Children's Rights Bill[134] which sought to incorporate the majority of the UNCRC into domestic legislation, the Bill did not reach a second reading before the current Government was formed. Since then, no discussions to reignite the Bill have taken place. Additionally, research undertaken by Children's Rights Alliance England (CRAE) indicated that in 31% of the areas of concern from the previous Committee report, the situation was worsening.[135] Without incorporation, the situation is unlikely to improve. The UK would not be alone in incorporating the UNCRC and the UK should allay its concerns over incorporation by examining the other nations that have incorporated the UNCRC. Argentina, Belgium, Norway and Spain are among the countries that have already incorporated the UNCRC into their national legal systems.[136] This paper now turns to examine these lessons from abroad using the examples of Spain and Norway.

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[126] See UK Children's Commissioners' Report to the UN Committee on the Rights of the Child (June 2008) at para 13-16. http://www.childcom.org.uk/uploads/publications/61.pdf (accessed on 25 November 2013).

[127] Reyneck Matemba, 'Incorporation of international and regional human rights instruments: comparative analyses of methods of incorporation and the impact that human rights instruments have in a national legal order' (2011) 37(3) *Commonwealth Law Bulletin* 435.

[128] Ibid. at 444.

[129] Ibid. at 436.

[130] See Bharat Malkani, 'Human Rights treaties in the English legal system' (2011) *Public Law* 554.

[131] To be discussed later.

[132] Until the recent discussions of a British Bill of Rights, when the inclusion of children's rights was raised. raised.

[133] House of Commons Written Answers 9 September 2011, Column 907W.

[134] House of Lords, Children's Rights Bill: http://www.publications.parliament.uk/pa/ld200910/ldbills/008/10008.iii.html (accessed 25 November 2013).

[135] Children's Rights Alliance for England, 'State of Children's Rights in England' (2013) http://www.crae.org.uk/news-and-events/news/government-failing-in-its-responsibilities-and-promises-to-children.html (accessed 25 November 2013).

[136] UNICEF Innocenti Research Centre (2008), 'Law Reform and the Implementation of the Convention on the Rights of the Child' (2008) at 5.

4. Study of Spain and Norway's protection systems and Lessons for the UK

Spain is of particular interest, as a case study in the protection of children's rights since its 1978 Constitution states that "children shall enjoy the protection provided for in the international agreements safeguarding their rights"[137] meaning that the UNCRC was automatically incorporated after Spain's ratification in 1990. This was complemented by the Organic Law on the Legal Protection of Children and Young People in 1996, which was thought to strengthen the position of children as right holders.[138] Although this is largely true, the focus of the Organic Law is predominantly on civil rights meaning children's socio-economic rights are largely omitted.[139] Spain's most recent report to the Committee demonstrated an increase in expenditure on all areas of children's rights showing it to be a primary concern of the government.[140] Despite difficulties in accessing translated versions of judicial decisions in Spain, its report to the Committee also included examples of decisions that embraced international children's rights.[141]

A Supreme Court decision expressly mentioned the UNCRC, in arguing that contact rights are secondary to the best interests of the child.[142] Although the UK protects the best interests of children through its welfare principle under Section1 of the Children Act 1989, there is a common law presumption of contact that has the potential to undermine this, thus illustrating that the approach in Spain provides better protection for Children.[143] Further, in matters of juvenile justice, the Spanish courts interpreted Article 40(2)(b)(iii) of the UNCRC to be a fundamental norm to ensure children accused of criminal offences have access to a procedure "without delay [led by] a competent, independent and impartial authority or judicial body in a fair hearing according to law."[144] On the other hand, the state of juvenile justice in the UK has faced severe criticism by the Committee on the Rights of the Child, including issues such as the low age of criminal responsibility and lack of child centred procedures.[145]

The United Kingdom is fully capable of incorporating the UNCRC, in the same way that it did with the Human Rights Act 1998, and this is illustrated by the fact that Norway, a country thought to lead the way in children's rights, had accomplished the same. In 2003, Norway integrated the Convention through an amendment to their Human Rights Act of 1999.[146] As a result, further domestic legislation was amended to comply with the

[137] The Spanish Constitution, December 1978, Article 39(4).
[138] UNICEF, 'The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries' (2012) at 64-65.
[139] For example, rights include: the right to freedom of thought, conscience and religion (Article 4), the right to information (Article 5), the right to freedom of assembly (Article 7), the right to freedom of expression (Article 8), the right to be heard within the family and in administrative and judicial proceedings (Article 9). Also see UNICEF, above n 138 at 64-65.
[140] Committee on the Rights of the Child, Third and Fourth State Report of Spain (20 November 2009) at para 257.
[141] Ibid. at para 204, 214, 216 and 275-6.
[142] Supreme Court, Sentence 670/2004 of 12 July.
[143] Also, criticisms of the presumption of contact have been because of domestic violent concerns as oppose to the undermining of children's rights.
[144] In Sentence 601/2004 of 25 June.
[145] Committee on the Rights of the Child Concluding Observations regarding United Kingdom 15 February 1995 CRC/C/15/Add.34.
[146] Human Rights Act, Norway, s.3.

Convention.[147] A strong example of this compliance is demonstrated by raising the age of criminal responsibility to fifteen.[148] Further, the Norwegian Children Act has reduced the age where children possess the right to express their opinions to the age of seven.[149]

UNICEF undertook a research report which considered the implementation of the UNCRC across several countries. The report's findings in Norway indicated that incorporation has led to greater awareness of the Convention by both the media and children, with 56% of children having knowledge of the UNCRC. In addition, 84% of children felt they were involved in the decision-making process within the home and 71% felt included in decision-making within their schools,[150] which contrasts starkly with the results in the UK, where statistics indicate that whilst 44% of Scottish children knew of the UNCRC[151], just 13% of English children[152] and only 8% of Welsh children had heard of the Convention.[153]

The developments in Norway are useful in illustrating the potential scope for the UK to better protect children's rights. This is particularly so in relation to Norway's decision to reduce the age children could express their opinion in family disputes. The Norwegian system also supports Freeman's criticism of the UK's approach to realising children's rights. He argues that the UK "underestimates the capacities and maturity of many children"[154] but simultaneously "ignores the fact we are prepared to impose responsibility on children, including criminal responsibility, often long before we are disposed to confer rights on them."[155] The UK has come under extensive criticism by the Committee on several occasions regarding the age of ten years being too low for the imposition of criminal responsibility.[156] As seen in Norway, incorporating the UNCRC has given rise to significant legislative changes that are not currently afforded parliamentary time in the UK.

Not only do the positions from abroad demonstrate that incorporation is within the UK's capabilities, it is also important to recognise the varying degrees of UNCRC implementation within the United Kingdom's devolved nations. The lack of consistency here, along with the lack of consistency in judicial decision-making, strengthens the position that the UK should strongly consider incorporation. The most obvious example of this inconsistency can be seen by the different mandates of the Children's Commissioners as will be discussed below.

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[147] For examples see the Kindergarten Act 2005 which enshrines children's rights to express their views in accordance with their age and maturity; Children's Act 2005 which ensures children are not subjected to violence (s.30) and ensures children's opinions are listened to in relation to matters affecting them (s.31); Immigration Act 2008 which considers the best interests of the child (s.38).

[148] General Civil Penal Code of 22 May 1902 No. 10, s.46 (in initial State Party report, para 79).

[149] S.31, Act No. 7 of 8 April 1981 relating to Children and Parents (The Children Act): 'When the child reaches the age of 7, it shall be allowed to voice its view before any decisions are made about the child's personal situation.

[150] UNICEF Innocenti Research Centre, 'Law Reform and the Implementation of the Convention on the Rights of the Child' (2008) at 62.

[151] UK Children's Commissioners, above n 126 at 9.

[152] Ibid.

[153] Ibid.

[154] M Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 *The International*
Journal of Children's Rights 5, 10.

[155] Ibid.

[156] Committee on the Rights of the Child Concluding Observations regarding United Kingdom 20 October 2008 CRC/C/GBR/CO/4 at para 77.

However, despite this, one identical commitment across the devolved parts of the UK is the call for the UK government to incorporate the UNCRC.[157] A joint report on behalf of all four Children's Commissioners emphasising the need for incorporation is significant, and shows the potential and capability of the Children's Commissioners in ensuring the monitoring and implementation of potential national laws. The report recognised the limited reference to "rights" in governmental proposals and legislation and also highlighted areas of law which are in breach of the UNCRC.[158] This is significant, as it demonstrates the combined commitment of the Children's Commissioners for national laws to reflect the UNCRC more appropriately. For example, a Home Office guide to anti-social behaviour orders (ASBOs) stated that it would release the name, photograph and address of those who have "ASBOs" attached to them. The legality of this guide was challenged, and it was for the High Court to decide whether or not there was a presumption in favour of refusal of anonymity in line with s.39 of the Children and Young Persons Act.[159]

T was an eleven-year-old boy with an ASBO attached for harassing members of his community.[160] An appeal was dismissed, and counsel for the child asked for an order under s.39 of the Children and Young Persons Act which would conceal his identity.[161] The reasons advanced were his young age and the potential detriment "naming and shaming" him could have on attempted rehabilitation.[162] The order was dismissed, and T appealed through judicial review, claiming that the court had failed to attach importance to his age and had not recognised improvement in his behaviour since the ASBO was attached.[163] Although the decision quashed the earlier ruling and ordered the case for reconsideration, Elias J did not quash the refusal of anonymity order. In his judgment he asserted "where an anti-social behaviour order has been imposed, that is a factor which reinforces, and in some cases may strongly reinforce, the general public interest in the public disorder of court proceedings."[164] Elias J gave two reasons for this view. Firstly, disclosure of identity would make an order "efficacious", as it would allow the local community to be aware of the specific individual, potentially increasing the enforcement of the order.[165] Secondly, a public interest argument was advanced that the purpose of ASBOs was to "protect the public from individuals who have committed conduct or behaviour which is wholly unacceptable and of an anti-social nature."[166] On this point, he refused to accept this was merely "naming and shaming", but that it had protective purposes.[167] In doing so he rejected Lord Bingham's assertion in an earlier case that "it would be wholly wrong for any court to dispense with a juvenile's prima facie right to anonymity as an additional punishment. It is also very difficult to see any place for naming and shaming.[168]

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[157] UK Children's Commissioners, above n 126 at 9-10.

[158] Ibid. at 9. Cited: For example, the 'naming and shaming' of children subject to anti-social behaviour orders.

[159] *R. (on the application of T) v St Albans Crown Court and Chief Constable of Surrey v JHG and DHG* [2002] EWHC 1129 (Admin).

[160] Ibid. at para 27: The judgment stated this included unpleasant abuse, which included putting excrement in a baby's face.

[161] Ibid. at para 26.

[162] Ibid. at para 29.

[163] Ibid. at para 30.

[164] Ibid. at para 22. The judgment stated this included unpleasant abuse, which included putting excrement in a baby's face.

[165] Ibid.

[166] Ibid. at para 27.

[167] *R. (on the application of T) v St Albans Crown Court and Chief Constable of Surrey* at para 22.

[168] *McKerry v Teesdale and Wear Valley* Justices [2000] WL 546 at para 44.

Niamh Jource has cited evidence indicating that by "labelling a child as an offender, the stigma attached to it often means the child will live up to the label he has been given."[169] It is of note that Lord Bingham in *McKerry* reached his decision as a result of referencing the UNCRC and the Beijing Rules[170] whereas Elias J did not. Not only does the decision in *R v St Albans* breach the child's right to privacy, but it is arguable that sending the decisions for re- examination breaches the child's right to a decision without delay.[171]

It is a combination of these breaches, the ad hoc approach to recognising children's international rights, and the inconsistencies within the devolved nations, that led the four Children's Commissioners to conclude that incorporation of the UNCRC needed to be the next step of the UK government in realising children's rights.[172] Incorporation of the UNCRC would ensure that each of the nations is upholding the same level of standards.

5. Conclusions on the UK's Need to Incorporate the UNCRC

However, it is important to discuss successes in order to demonstrate to the government that its commitment to children lends itself to future incorporation. As a result, there are some indications of the UK's attempt to take children's rights seriously. The Childcare Act 2006 imposes a duty on the local authority to "reduce inequalities between young children in their area"[173] and "improve [their] well-being"[174] which includes "protection from harm and neglect,"[175] providing "education, training and recreation"[176] and their "social and economic well- being."[177] Although this is a significant legal development, it is not without its weaknesses. Linsev and McAuliffe have highlighted that the Act "primarily focuses on young people from birth to five years old"[178] and sits within the realms of parental rights rather than children's rights.[179] It has been suggested that the aim of the Act is to cater for better and more flexible childcare, which will then help reduce child poverty.[180] Despites these criticisms however, the Childcare Act demonstrates a positive step of the government in recognising children's socio-economic rights which can be better developed through a further step of incorporation. In addition, the Child Poverty Act[181] was introduced in 2010, which imposes a duty on the State to eradicate child poverty by 2020 to almost zero.[182] It sets out four child-poverty targets that the Secretary of State must meet by 2020, along with duties to publish a strategy every three years and

[169] Niamh Jource, 'An Analysis of the Extent of the Juvenile Offender's Right to Privacy: Is the Child's Right to Privacy Circumvented by Public Interest?" (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 113.

[170] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules) 1985 A/RES/40/33.

[171] In accordance with Article 37(d) of the United Nations Convention on the Rights of the Child.

[172] UK Children's Commissioners, above n 126 at 9-10.

[173] Childcare Act 2006 (c.21), s.1(b).

[174] Childcare Act 2006, s.1(a).

[175] Childcare Act 2006, s.2(b).

[176] Childcare Act 2006, s.2(b)(c).

[177] Childcare Act 2006, s.2(e).

[178] Alison Linsev and Ann-Marie McAuliffe, 'Children at the Centre? The Childcare Act 2006' (2006) 40 *Children & Society* 404, at 405.

[179] Ibid. at 404.

[180] Ibid. at 406.

[181] The Child Poverty Act 2010 (c.9).

[182] For a discussion on why complete eradication was considered not possible see: Impact Assessment for the Child Poverty Bill, December 2009, para 1.15.

annual progress reports.[183] Although a recent report suggests that these targets are unlikely to be met,[184] this fact should not undermine the attempts to tackle child poverty and the Act is an important step in the government recognising socio-economic rights.

Incorporating the UNCRC should be the next natural step for the UK, since the courts have become more familiar with the provisions and more proficient in applying them, albeit in a limited manner. Further, despite the inconsistencies across the devolved nations, each Children's Commissioner has called for incorporation. Incorporation would allow the courts greater flexibility in ensuring their decisions are UNCRC compliant. Harmonising some of the inconsistencies between the roles of the Children's Commissioners could also be significant in helping to better realise children's rights, most particularly the potential role to consider individual complaints.

6. Protecting Child Rights in the UK through Extending and Harmonising the Roles of the Children's Commissioners

The National Human Rights Institutions (NHRI) have played a unique role in protecting and monitoring human rights, and the introduction of Children's Commissioners in the United Kingdom have demonstrated their utility in specifically protecting and monitoring children's rights. However, as will be argued, their potential for realising children's rights has not yet been fully attained, and the scope for expansion and harmonisation across the children's commissioners is necessary in order for them to operate as effective NHRIs.

In 1991, as NHRIs became more popular, a workshop took place to establish principles and rules that NHRIs were to follow. These rules became more commonly known as the Paris Principles,[185] which have been described as the normative standards for NHRIs and they have "marked the beginning of serious international co-operation and standardisation."[186] Although these non-binding principles offer proposed responsibilities, such as submitting recommendations or proposals, promoting harmonisation of national laws, and encouraging ratification of international law, inconsistencies remain. The inconsistencies are most apparent in the role of child-specific institutions, namely Children's Commissioners and Ombudspersons, and when discussing whether or not they have (or should have) the function to hear individual child complaints.

The Paris Principles do not state that a NHRI *should* have the power to deal with individual complaints, rather that they *may* be authorised to hear such complaints.[187] This view has been criticised by Carver who has stated that the "essential characteristic"[188] of an NHRI is to hear individual petitions. Similarly, the Committee on the Rights of the Child has advocated that the institutions "must have the power to consider individual complaints and petitions."[189] This shows that there are variations in whether or not an individual

[183] The Child Poverty Act 2010 (c.9), s. 2(1).
[184] CRAE, above n 135 at 11.
[185] Principles Relating to the Status of National Institutions, 'The Paris Principles.' Adopted by General Assembly Resolution 48/134 of 20 December 1993.
[186] International Council on Human Rights Policy, 'Assessing the Effectiveness of National Human Rights Institutions' (2005) at 6: http://www.ichrp.org/files/reports/18/125_report.pdf (accessed 25 November 2013).
[187] Paris Principles, above n 185 at 3.
[188] Richard Carver, 'Performance & Legitimacy: National human rights institutions' (2004, 2nd ed) *International Council on Human Rights Policy* at 2.
[189] See Committee on the rights of the Child, General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15 November 2002, CRC/GC/2002/2.

complaints function is considered necessary. However, there is consistency in that the institutions are thought to be a "valuable mechanism for promoting children's rights and as tools for implementing the United Nations Convention on the Rights of the Child."[190] The position in the UK is varied, with some of the Children's Commissioners having the competence to hear individual complaints while others do not as will be discussed below. Assessment of the effectiveness of the different Children's Commissioners will allow a conclusion to be drawn on whether extending the remit of the Commissioners so they can all hear individual complaints would be helpful in realising children's rights in the UK.

Wales was the first country to introduce a Children's Commissioner under the Commissioner for Wales Act 2001. It was proposed that the duty to was to "ensure children's rights are respected through monitoring and oversight of the operation of complaints and whistle blowing procedures and the arrangements for children's advocacy."[191] The 2001 Act sets out the principal aim of the commissioner as to "safeguard and promote the rights and welfare of children."[192] The powers of the Welsh Commissioner are the widest in the UK, since the powers extend to the Commissioner providing advice and receiving and dealing with individual complaints and investigations.[193]

Statistics show that in the years 2012-13, the Welsh Commissioner received 535 individual cases.[194] Given the sensitive nature of the complaints, it is difficult to source information on the successes and outcomes of any complaints submitted. However, Rees has provided an example of a twelve-year-old boy who soiled himself in school because his teacher would not let him use the bathroom during lesson time. The parents contacted the Commissioner's office who then contacted the school, raising the child's rights under both Article 37 to be free from cruel or degrading treatment and Article 24, the right to the highest attainable standard of health. As a result, the school drafted a new policy, which children were involved in, subsequently improving their participation rights.[195] Whilst this is a simple example, it effectively demonstrates the significance the Commissioner can have in improving the day-to-day experiences of children in scenarios that may not be deemed important enough to reach the courts.

Many have been critical of the Commissioner's role, suggesting that it is a waste of resources[196] particularly as many of the submitted cases were diverted to other bodies that were able to deal with the complaints.[197] However, Rees has cogently argued that had it not been for the Commissioner, the children would not have been aware of the services that were more appropriate to deal with their complaints, and it signals the need for children to have access to a child-specific petitioning device.[198]

Northern Ireland was second to establish a Children's Commissioner in the United Kingdom under the Commissioner for Children and Young People (Northern Ireland)

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[190] Rees, above n 2 at 417.
[191] Report of the Tribunal of Inquiry into the abuse of children in case in the former county council areas of Gwynedd and Clwydd since 1974, HC 201 (TSO, 2000) at para 56.05.
[192] Commissioner for Wales Act 2001 (c.18), s.2.
[193] Ibid. at s.3-4.
[194] Children's Commissioner for Wales, Annual Report and Accounts for 2012/213, at 25: http://www.childcomwales.org.uk/uploads/publications/400.pdf (accessed 25th November 2013)
[195] Rees, above n 2 at 425.
[196] P Newell & M Rosenbaum, *Taking Children Seriously: A Proposal for a Children's Rights Commissioner* (London, Calouste Gulbenkian Foundation, 1991) at 25.
[197] Rees, above n 2 at 425.
[198] Ibid.

Order 2003.[199] The role of the commissioner is to "safeguard and promote the rights and best interests of children and young persons."[200] The duties are similar to the Welsh Commissioner in that the Commissioner monitors the rights of children and also has investigatory duties.[201] However, the role does differ slightly in that Article 11 and 12 of the 2003 Order set out conditions that must be met before the Irish Commissioner can fulfil his or her duties:

> (3) The Commissioner shall not provide any assistance to a child or young person under paragraph (1) unless it appears to the Commissioner that there is no other person or body likely to provide such assistance.
>
> (4) The Commissioner shall not take any action on behalf of a child or young person under paragraph (2) unless it appears to the Commissioner that there is no other person or body likely to take such action.[202]

This means that the Commissioner can only exercise his or her role to review and investigate when all other routes are exhausted.

Whilst the mandate still provides children with a platform to raise their concerns, it is not a child-centred approach. This can be contrasted with the position in Wales that uses the Welsh Commissioner as the first point of call, with complaints then transferred to the relevant bodies. Haydon was appointed to review the Irish legislation, and in turn was also critical of the Welsh procedure, stating that "children and young people will not necessarily be aware [of] which institutions they should contact", and suggests that "if their rights are being breached, immediate action is required by adults to protect them and safeguard their rights."[203]

The Order further adds that the Commissioner can only conduct an investigation if he or she is satisfied that the "complaint does not fall within an existing statutory complaints system."[204] Haydon believes this to be too stringent a rule, since in almost all instances a complainant has access to a remedy through judicial review, which she suggests is not an appropriate mechanism since it will cause several cases to reach the courts that may be more "appropriately resolved"[205] by the Commissioner.

The potential for an appropriate remedy is unlikely to be achieved through judicial review. This can be highlighted by a judicial review application undertaken by the Commissioner in 2004 against the Minister of State for Criminal Justice over draft anti-social behaviour

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[199] Commissioner for Children and Young People (Northern Ireland) Order 2003 (SI 2003/439) (N.I 11).

[200] Ibid. at s.6.

[201] Commissioner for Children and Young People (Northern Ireland) Order 2003 (SI 2003/439) (N.I 11), Article 11 and 12.

[202] Commissioner for Children and Young People (Northern Ireland) Order 2003 (SI 2003/439) (N.I 11) S.11.

[203] Deena Haydon, 'Independent Review of the Legislation of the Northern Ireland Commissioner for Children and Young People', Putting Children First Alliance (October 2006) at 16.

[204] Ibid.

[205] Ibid.

legislation.[206] The Commissioner's arguments were two-fold: firstly, children had not been consulted during the drafting and had not participated in the policy-making, and secondly, that the legislation ignored the rights of the children not to have an anti-social behaviour order attached to them.

Girvan J refused the application, stating that the Commissioner "faces the legal problem created by the need to establish victimhood within the Act and Convention."[207] Under the Northern Ireland Act 1998, judicial review actions can only be brought by a victim and "the fact that [the Commissioner] is empowered to bring proceedings under the 2003 Act does not itself confer upon her a power to bring proceedings to challenge legislation or draft legislation."[208] This seemingly weakens the investigative role of the Commissioner and the ability to initiate proceedings on behalf of the children he or she represents.

The problem with this case is that it remains unclear as to whether a potential child complainant would need to have an anti-social behaviour order attached to them before they could satisfy the victim test. If this is the case then it would undermine the purpose of challenging draft legislation, and ignore the child's right to participation as required under the UNCRC.[209]

However, despite these restrictions, between 2007 and 2008 the Commissioner dealt with over seven hundred cases.[210] In 2007, the Commissioner sought to challenge the legality of the decisions to introduce a law that provided a defence of reasonable chastisement of a child to an assault charge.[211] The Commissioner further sought a declaration of incompatibility with the ECHR in that such legislation breached Articles 3, 8 and 14. The first issue for the court was again whether or not the Commissioner could satisfy the "victim test". The Commissioner argued that it "inconceivable that the Parliamentary draftsman intended that the Commissioner…should not be entitled to enforce the Convention rights of children in a judicial review."[212] Further, the Commissioner argued that it would be "almost unseemly"[213] to be required to wait until a child came forward alleging a violation of their rights.

The initial reaction of Gillen J was to "invoke the canon of statutory construction that an Act of Parliament should be read so as to promote, not so as to defeat or impair, the central purpose aim…of that legislation."[214] Although the court highlighted an example from the ECtHR which broadened the "victim test"[215] Gillen J concluded that the applicant did not satisfy the victim test, finding that with no evidence of a specific case of a child victim, the test could not be met.[216] Gillen J asserted that this need not "dilute"[217] the role of the Commissioner, since the Commissioner was still able to provide assistance to individual

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[206] *The Northern Ireland Commissioner For Children And Young People Of The Decisions Announced By The Minister Of State For Criminal Justice, John Spellar On 10 May 2004* [2004] NIQB 40.
[207] Ibid. at para 14.
[208] Ibid.
[209] Article 12, United Nations Convention on the Rights of the Child.
[210] Rees, above n 2 at 425.
[211] *In the matter of an application for judicial review by the Northern Ireland Commissioner for Children and Young people of decisions made by Peter Hain the Secretary of State and David Hanson the Minister of State* [2007] NIQB 115.
[212] Ibid. at para 11.
[213] Ibid.
[214] Ibid.
[215] *Rushbridger and Toyn v Attorney General* (2003) UKHL 38 at para 21; *Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 EHHR 244 at 258.
[216] Peter Hain, above n 211 at para 18.
[217] Ibid.

child victims as well as seek judicial review outside of the Convention.[218] However, it is hard to accept this reasoning, since it is the duty of the commissioner to protect the rights of the children as set out by the UNCRC. If the courts are taking this restrictive view of the legally binding HRA, it raises concerns for any potential of the rights in the UNCRC to be protected in the courts.

Despite this, Gillen J proceeded as if the victim status had been met in order to fully assess the case. Gillen J found that Article 8 was engaged but the proposed legislation was a proportionate response in balancing the rights of the child against the rights of the parent to bring up their child.[219] In relation to Article 3, the Commissioner argued that reasonable chastisement was "so vague, imprecise and lacking in protection for children"[220] that it constituted a breach of Article 3 which needed to be interpreted in a child-centred way. Gillen J accepted that "children do represent a vulnerable class of individuals and so in my opinion should be accorded particular protection,"[221] but that the punishment would still need to reach a comparative minimum level of severity. It was further held that there was "nothing imprecise or vague about the use of the standard of reasonableness" which is in stark contrast to the opinion of the Committee on the Rights of the Child who have persistently commented on its "imprecise nature."[222] Further, the Commissioner raised international arguments regarding compliance with the UNCRC to ban corporal punishment of children but this too was rejected. Gillen J thought the Commissioner was mixing "obligation with aspiration,"[223] suggesting the UNCRC was the latter, showing a disappointing image of the UNCRC's rights within the courtroom.

Despite this, success can be seen outside of the courtroom. The Northern Ireland Children's Commissioner website highlights several case studies of recent work with which the office has been involved. For example a mother of a young diabetic child who needed insulin injected during school hours found there were no trained members of staff who could do this.[224] The lack of insulin during the day was affecting the child's concentration levels, and meant he could not take part in physical education lessons. The Commissioner advised the mother on the rights of the child and her legal options as well as discussing the matter with diabetic nurses in the area.[225] Legal proceedings did not need to be initiated, since the school agreed to train staff members in how to administer the medication.[226]

The function to undertake individual complaints in Northern Ireland is well utilised, demonstrated by the number of cases heard and their case study examples discussed above. However, similarly to Wales, the example of Northern Ireland shows that the Commissioner is able to operate well outside of the courtroom, but the position of the courts is largely unwelcoming towards the UNCRC, which is a finding consistent with the majority of cases earlier discussed.[227]

The approach in Scotland and England is unlike those taken in Wales and Northern Ireland due to the fact that the function of the Children's Commissioners does not extend

[218] Ibid.
[219] Ibid. at para 47.
[220] Ibid. at para 55.
[221] Ibid. at para 59.
[222] Committee on the Rights of the Child Concluding Observations regarding United Kingdom 15 February 1995 CRC/C/15/Add.34 at para 16.
[223] Peter Hain, above n 211 at para 64.
[224] Northern Ireland Commissioner for Children and Young People: 'in Schools' http://www.niccy.org/LegalandCasework/CaseStudies (accessed 25 November 2013).
[225] Ibid.
[226] Ibid.
[227] See above from pages 4-16.

to hearing individual cases. In 2002, Scotland issued a report that proposed the creation of a Children's Commissioner to promote children's rights in the context of the UNCRC. This led to the Commissioner for Young People (Scotland) Act 2003,[228] which sets out the general role of the Commissioner as to "promote and safeguard the rights of children and young people."[229] The Commissioner has no power to initiate investigations in relation to individual children. It was thought that there were already appropriate means for investigation into securing children's rights.[230] However, Rees has reported a discussion with Kathleen Marshall, the Commissioner in the years 2004-2009 where Marshall stated that "if a young person contacted us about something… an issue, we wouldn't hesitate to help take it forward… to get somebody to help them take it forward so we wouldn't turn a young person away."[231]

This ad hoc approach raises concerns of accountability and consistency. It is therefore not surprising and welcoming that the Children and Young People (Scotland) Bill which was passed in February 2014 and has extended the role of the commissioner to undertake investigations on behalf of children.[232]

The Children's Commissioner for England was established under the Children Act 2004 and the Commissioner's general function is in "promoting awareness of the views and interests of children in England."[233] The key difference here compared with the other Commissioners is the omission of the word "rights" in the English context, with the focus on children's interests instead. Williams suggests that the reason for this is "...so that the UNCRC is a point of reference, an aid to interpretation, rather than an over-arching set of principles"[234] which is in keeping with the approach taken by the government, and largely by the courts.

However, the Department for Education has published draft clauses to replace those set in the 2004 Act after the Dunford Review.[235] The Department intends to embrace a "rights culture" and promote and protect the rights of children in England in line with the UNCRC, and retain the powers to initiate enquiries and assess child rights in relation to policy proposals. The Dunford Review concluded that the current remit of the Children's Commissioner was too limited and that "England need[ed] a Commissioner with adequate powers in order to meet its obligations under [the UNCRC].[236] Dunford initiated an online questionnaire to assess the awareness of the Children's Commissioner. Disappointingly, out of 707 children, only 156 had heard of the Children's Commissioner (22%).[237] The

[228] Commissioner for Children and Young People (Scotland)Act 2003.
[229] Commissioner for Children and Young People (Scotland)Act 2003, s.4(1).
[230] Report on the Proposed Commissioner of Children and Young People Bill, SP, Paper 617, Session (2002) For example: S.16 Children (Scotland Act) 1995 allows children over to 12 to express their views in any court hearing.
[231] Rees, above n 2 at 429.
[232] Children and Young People (Scotland) Bill (February 2014) at part 2: http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27bs4-aspassed.pdf (accessed 24th March 2014).
[233] Children Act 2004, s.2(1).
[234] Jane Williams, 'Effective Government Structures for Children? The UK's Four Children's Commissioners' (2005) 17 *Child and Family Law Quarterly* 37 at 48.
[235] John Dunford, 'Review of the Office of the Children's Commissioner (England)' (2010) https://www.education.gov.uk/publications/eOrderingDownload/Cm-7981.pdf The Dunford Review was an independent review of the office, role and functions of the Children's Commissioner for England. It particularly considered the remit of the Commissioner and John Dunford included 46 recommendations based on the evidence he found.
[236] Ibid. at 6.
[237] Ibid. at 15-16.

Dunford Review concluded that there was a low public profile of the Commissioner[238] and confusion as to its remit,[239] and that the Commissioner currently lacks a duty to promote the rights of children.[240] This suggests that a lack of duty to promote children's rights, a poor awareness and the incapability to hear individual cases places the English Commissioner at a severe disadvantage to its UK counterparts.
Dunford considered the approach of the other UK Commissioners and the roles of Ombudspersons in places such as Ireland and Norway, but concluded that this was not an appropriate role. The report stated that "the Commissioner should not become a *de facto* court of appeal when all other routes have been exhausted or have the power to adjudicate…The Commissioner should signpost children to complaints mechanisms and advocacy services."[241] Unfortunately, this leaves children in England at a disadvantage compared to elsewhere in the UK, and ignores the results of the other Commissioners in securing the protection of individual children's rights which has resulted in policy change that will impact upon many.[242]

As has been highlighted above, there is no consensus to whether or not NHRIs should be able to hear individual complaints, which can be illustrated not only in the differing mandates of the four UK Children's Commissioners but also in academic and political scholarship. For example, in 2004, then Secretary of State Margaret Hodge thought to extend the role of the English Commissioner would "lose the broader focus that I want this powerful champion for children to have, which is the interests of children."[243] However, this proposition is arguably ill founded, as since then the Dunford Review has highlighted the shortcomings in only concentrating on the "interests" of children. The correct approach may be that of Williams who has stated that "a Commissioner with power to deal with individual cases [is] more of an effective champion on the issues that the children themselves feel the need to raise individually."[244] These successes are highlighted by the Welsh and Northern Irish Commissioners and their impact in realising children's rights.

Comparing the approach across the UK indicates that whilst the role of hearing individual complaints is crucial in providing remedies for children, there is reluctance by the judiciary to use the UNCRC effectively. As such, whilst there are significant benefits in the Commissioners undertaking individual complaints, the long-term goal must still be to incorporate the UNCRC to ensure adequate protection for children where violations reach the courts. Incorporating the UNCRC will standardise and improve services for all children.

7. The need to introduce a Communications Procedure for Children

Although the UNCRC is largely accepted as a comprehensive piece of international legislation, it has not been without criticism. Noticeably, the UNCRC was drafted without a communications procedure for children to bring individual complaints petitions before the UNCRC Committee. Since the decisions of the UK relying on the ECHR has "not led to a blossoming of decisions taking full account of children's rights"[245] the need for an international complaints mechanism is crucial in realising children's rights.

[238] Ibid. at 55.
[239] Ibid. at 41.
[240] Ibid. at 22-23.
[241] Ibid. at para 32.
[242] See above from page 31.
[243] Hansard, HC Committee B, Col 17 (12 October 2004, first sitting).
[244] Williams, above n 251 at 50.
[245] E Kay, M Tisdall, John M Davis & Michael Gallagher, 'Reflecting upon children and young people's participation in the UK' (2008) 16(3) *International Journal of Children's Rights* 343, 346.

Although the need for a petitioning device was raised during the drafting of the UNCRC, the proposal was rejected since at this time the justiciability of socio-economic rights was a contentious issue.[246] However, as stated by Van Bueren, this line of reasoning would have been justifiable in the 1980s, but in the 21st century where there is an abundance of jurisprudence recognising the justiciability of socio-economic rights,[247] it is an argument that would be unlikely to succeed.

In 2008 a Working Group was set up to "explore the possibility" of creating a complaints mechanism for children.[248] In February 2012, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC) was opened for signature.[249] Ratifying the OPIC would reinforce the UK"s obligation to provide appropriate domestic remedies, which has not been achieved through the HRA's incorporation of the rights in the ECHR, and therefore would be another important tool to call for incorporation of the UNCRC. It would also emphasise the significance of harmonising the ambits of the Children's Commissioners across the United Kingdom.

The UNCRC was the only international treaty to lack access to a complaints procedure. Although the ICESCR complaints procedure only recently entered into force,[250] it was drafted in 2008, indicating that the UNCRC communications procedure is long overdue. Therefore, several reasons can be advocated for the UK to ratify the OPIC.[251] Firstly, for reasons of equality and harmonisation with the other international treaties which have access to a communications procedure. Secondly, the right to an effective remedy is part of international customary law.[252] Thirdly, children need to be recognised as citizens,[253] and Van Bueren has argued that a complaints mechanism could also "focus attention" on children as citizens of the world. She has argued that there is a lack of opportunities for "children to engage in political systems and processes in their own nation states."[254] Finally, and most importantly, children need access to a child-specific mechanism which is sensitive and understanding to their needs as children. The committee needs to be made up of child rights experts, which refutes any arguments suggesting that children can instead rely on the other international communication mechanisms.

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[246] Van Bueren, above n 97 at 120.

[247] Most prominently discussed in South Africa. For example see *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] (1) SA 46 (CC); For a general discussion see: Murray Wesson, 'Equality and social rights: an exploration in light of the South African Constitution' (2007) *Public Law* 748.

[248] See Sarah Spronk, 'Realising Children's Right to Health: Additional Value of the Optional Protocol on a Communications Procedure' (August 2012).

[249] At the time of writing, there are 45 signatories to the Protocol and 10 ratifications: http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11-d&chapter=4&lang=en (accessed 24 March 2014).

[250] The Optional Protocol to the ICESCR entered into force on 5th May 2013 after opening for ratification on the 10th December 2008: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3-a&chapter=4&lang=en (accessed 25 November 2013).

[251] Jaap E Doek, 'The CRC: Dynamics and Directions of Monitoring its implementation' in *The Human Rights of Children: From Visions to Implementation*, Invernizzi and Williams (eds) (Farnham, Ashgate, 2011) at 113.

[252] Ibid at 112; Article 8, Universal Declaration of Human Rights.

[253] Van Bueren, above n 97 at 120.

[254] Ibid.

The ambit of the protocol is guided by the best interests of the child[255] whilst allowing for the evolving capacity of the child,[256] and recognising the need for child specific procedures,[257] which largely mirrors the language used in the UNCRC which should now be familiar to nation states, including the UK.[258] Amongst the admissibility criteria,[259] some concerns can be drawn out. For the communication to be admissible, it must be made in writing. It is arguable that this is not wholly child-sensitive. Prior to the drafting, Van Bueren made reference to the Inter American Commission on Human Rights which receives online petition forms.[260] In times where children are able to independently use computers and the Internet, this could have been discussed as a more accessible way of reaching out to children. She also suggested extending this to receiving audio or audio-visual complaints.[261] Further, the International Criminal Court has also accepted drawings as evidence for the crimes in Darfur[262] , which is something the OPIC could consider. This would also reinforce the commitment to the child's "freedom of expression."[263]

The African Charter on the Rights of the Child provides a petitioning device through the African Committee, whereby children (and NGOs on their behalf) are able to bring complaints.[264] Since coming into force, the Committee has received two complaints, one of which has been finalised, the *Institute for Human Rights and Development in Africa v The Government of Kenya*.[265] This was a claim brought on behalf of children of Nubian descent living in Kenya. The Nubas were conscripted to the colonial British army in the 1900s, and upon dismissal, their request to return to the Nuba Mountains (now known as central Sudan) was refused and they were forced to remain in Kenya. As a result of Kenyan independence, the complainants contend that the citizenship of Nubians was ignored. Since they have not descended from Kenya, they are not entitled to Kenyan citizenship, but nor did the colonial Government grant them British citizenship. As a result, it was difficult for parents' to register their children's birth as they lacked identification. It was alleged that this violated Article 6 of the African Children's Charter,[266] since children were effectively rendered stateless.

In terms of admissibility, the form of the complaint was accepted. Whether or not local remedies had been exhausted raised a more difficult question. An exception to this rule is if the State lacks awareness of the violation. However, the Committee did not believe that Kenya was unaware of the situation in relation to stateless Nubians but accepted admissibility since the route to domestic remedies would be "unduly prolonged."[267] The

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[255] Article 2, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC).
[256] Article 2, OPIC.
[257] Article 3, OPIC.
[258] Particularly the 'best interests' principle which a version of is seen domestically through the Children Act 1989 and through the Human Rights Act 1998.
[259] See Article 7, OPIC.
[260] See 'Waging Peace': http://www.wagingpeace.info/index.php/sudan/the-drawings/8-sudan/147-the- drawings (accessed 25 November 2013).
[261] Van Bueren, above n 97 at 129.
[262] BBC News, 'Child Drawings of Darfur' (4th March 2009): http://news.bbc.co.uk/1/hi/7923247.stm (accessed 25 November 2013).
[263] Article 12, Convention on the Rights of the Child; Van Bueren, above n 97 at 129.
[264] ACERWC, 'Communications': http://acerwc.org/communications (accessed 25 November 2013).
[265] *The Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya* (2009) No 002/Com/002/2009.
[266] The right to have a birth registration, and to acquire a nationality at birth.
[267] Children of Nuba Mountains, above n 265 at 31.

children had already been waiting six years for a decision from the High Court in Nairobi. The committee concluded that "a year in the life of a child is almost six percent of his or her childhood"[268] and this had to be given significant weight.

The Committee emphasised that birth registration was the "first official acknowledgement of a child's existence and a child who is not registered at birth is in danger of being shut out of society."[269] They were also of the position that there is a "strong and direct link" between birth registration and nationality, referencing the African Children's Charter[270] as well as the UNCRC[271] which led them to conclude that there had been a violation of Article 6 of the African Children's Charter.

This decision is significant, since the African Charter on the Rights of the Child was adopted shortly after the UNCRC, with many of the rights and language used overlapping.[272] Further, the mandate and admissibility criterion of the African Committee mostly mirrors that of the UNCRC Communications procedure.[273] It can therefore be used to assess the potential of the UNCRC Communications procedure. The decision of the African Committee is encouraging, since the Committee acknowledged the sense of time in relation to children. This approach was alluded to in the Costello-Roberts case[274] but the judgment did not follow suit.[275] The more lenient approach taken to 'exhausting domestic remedies' is to be welcomed, since it acknowledges children's needs for effective child-sensitive mechanisms which take account of their need for timely decisions. The Committee was also able to comment that the "violation complained of has persisted unchecked for more than half a century."[276] This suggests that the communications procedure is able to bring important, and often overlooked, matters to the attention of a State, since it is unlikely that it would volunteer such violations through the reporting mechanisms. The African Committee also took a holistic approach to the violation, discussing the possibility of violations of the right to education,[277] health[278] and discrimination.[279] This approach has not been taken by the UK courts when faced with alleged violations, since the courts have been restricted by the civil and political rights protected through the HRA.

Giving children in the UK access to an international communications procedure is long overdue, and not only will it give them access to a child-sensitive petitioning device, it will mark an encouraging step in the realisation that children's rights are as important as adults'. As it stands nationally, the majority of children's rights are not included in current domestic provisions, and allowing children to complain about potential violations has the potential to better shape the lives they live. In January 2014, OPIC received its tenth ratification from Costa Rica and in accordance with Article 19(1) OPIC it entered into force on the 14th April 2014.[280] The position in Africa demonstrates the strength a tool like this

[268] Ibid. at para 33.
[269] Ibid. at para 38.
[270] The African Charter on the Rights and Welfare of the Child (ACRWC) 1990.
[271] Children of Nuba Mountains, above n 282 at para 42.
[272] See Eva Brems, *Human Rights: Universality and Diversity* (The Hague, Kluwer Law International, 2001) at 137-147.
[273] Ibid.
[274] *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112.
[275] See above from page 7.
[276] Children of Nuba Mountains, above n 265 at para 68.
[277] Ibid. at paras 63-58.
[278] Ibid. at paras 59-62.
[279] Ibid. at paras 55-57.
[280] As of 22 March 2014: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en

can have. OPIC will help create an international conversation of children's rights and avoid future criticisms of the UNCRC as being an aspiration on paper rather than granting rights in practice.

8. Conclusion

The current complaints procedures for children in the UK are inadequate, especially when compared to other jurisdictions. They are not designed for children and nor do they consistently consider children's rights. The HRA has not been sufficient, since the rights incorporated into UK law under the ECHR do not protect the wide range of rights included in the UNCRC. An international petitioning device for children could remedy this and prove to be a useful tool not only in realising children's rights but lobbying the government to take children's rights more seriously.

In 1990, shortly after the UNCRC was adopted, Balton asserted that it was "high time to focus on improving the international machinery for the enforcement of human rights"[281] in order to realise children's rights. If it was high time then, it is most certainly high time now, over twenty years later. From the earlier case law discussed,[282] and the positive impact the African Charter has had, it is clear that a lack of communications procedure has allowed national courts in Europe to interpret children's rights in a limited way. Van Bueren has stated that a communications procedure would be a "catalyst for change…"[283] for the realisation of children's rights, since the Committee would not only practice child-sensitive procedures, but force national courts to do the same. The current scope of the Committee to only allow for periodic reporting every four years is not sufficient to enforce children's rights. There is "no real teeth in these provisions"[284] and failure to incorporate the UNCRC into national legislation means children do not have access to an appeal or complaints procedure[285] that would give rise to adequate remedies.[286] Ratifying the OPIC will provide children with the child-sensitive mechanism they are entitled to and lead the way for future incorporation of the UNCRC.

Harmonising the roles of the Children's Commissioners in the UK to undertake individual complaints will have a positive impact on children's rights. It will give children a point of call they can contact to investigate potential violations. This coupled with the roles of the Commissioners to safeguard the rights of children could result in the Commissioner having a significant impact in giving children a platform to justice. Children should not be placed at a disadvantage depending on where they live in the UK, and this premise also applies globally.

However, these two proposals can only achieve so much, and must be short-term solutions, with incorporating the UNCRC remaining the overall goal for the UK. The current failings raised in the UNCRC Committee's reports indicate that without

[281] D A Balton, 'The Convention on the Rights of the Child: Prospects for International Enforcement' (1990) 12(1) *Human Rights Quarterly* 120, 129.
[282] See above from page 4.
[283] Geraldine Van Bueren, 'Multigenerational citizenship: the importance of Recognising Children as National and International Citizens' in *The Child as Citizen* Felton and Earls (eds) (Thousand Oaks, Sage Publications, 2011) at 45.
[284] Michael Freeman, 'The Future of Children's Rights' (2000) 14 *Children & Society Volume* 277, 290.
[285] Committee on the Rights of the Child, General Comment No 12: The right of the child to be heard, 20 July 2009, CRC/C/GC/12 at para 42.
[286] Ibid.

incorporation, the UK government will continue to pick and choose which rights to protect. Incorporating the UNCRC has not only become widespread across the globe, but is providing success in realising children's rights, proving the assertion that "law is an important symbol of legitimacy. It's an accomplished fact, which is difficult to resist".[287] Not only do statistics indicate children's greater awareness of the UNCRC, but the law is responding to potential violations.

Although the courts are showing a degree of ease and familiarity with the UNCRC, which is something to celebrate, this is still not consistent and can only go so far to protect children's rights. Whilst judges like Baroness Hale are using creative interpretations of the UNCRC within their judgments, without having all of the rights in the UNCRC incorporated, the potential for violations is wide open. Incorporating the UNCRC will allow children to be seen as rights holders, and is the next natural step the UK can take to realise children's rights. Michael Freeman has stated that "a child deprived of the sort of rights accorded by the United Nations Convention will grow up very differently from one to whom such rights are granted."[288]

It is time to equally protect all children, and incorporating international law provides a significant way of achieving this, recognising that each and every child deserves the protection of the UNCRC.

[287] Michael Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15 *The International Journal of Children's Rights* 5, 17.
[288] Ibid. at 10.

The UK and the International Covenant on Economic, Social and Cultural Rights: Time for Change?

Jeremy Baily*

Abstract

This paper will argue that there is a need for the incorporation of the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and that this is best achieved through a method of progressive realisation. The specific rights that will be considered are the right to education, the right to housing and the right to healthcare. Furthermore, the European Convention on Human Rights (ECHR) and outcome duties will be considered as to their protection of socio-economic rights currently, and as how their methods could help protection of the rights in the ICESCR in the future.

Keywords

Socio-economic rights – Incorporation – ICESCR – Progressive Realisation – Bill of Rights – ECHR.

1. Introduction

Not a lot is made of the category of economic, social and cultural rights in the United Kingdom, they are very rarely publicised and are often subservient in the press to civil and political rights. The UK is party to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as 'ICESCR' or 'the Covenant') and ratified the convention in 1976.

However, the UK operates a predominately dualist system of international law, and the ICESCR has not been incorporated into national law via statute, meaning that although the principles of the Covenant are largely respected separately in statutes, its provisions cannot be relied on in national courts. The UK Government has reiterated this principle of international law in its latest report to the Committee on Economic, Social and Cultural Rights (CESCR) commenting that 'international instruments ratified by the UK are not directly enforceable by domestic courts unless they have been specifically incorporated into domestic law by an Act of Parliament.'[1]

The CESCR have said in General Comment Number 9 that 'legally binding international human rights standards should operate directly and immediately within domestic legal systems, enabling individuals to seek enforcement of their rights before national courts and tribunals.'[2] The British government refuted the need for incorporation of the Covenant in its fifth periodic report to the CESCR because 'through appropriate legislation and

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[1] Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant, United Kingdom of Great Britain and Northern Ireland, 31 January 2008, E/C.12/GBR/5, at [50].

[2] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, at [4].

administrative measures … the Government is complying with the Covenant by progressively realising, without discrimination, the rights contained in articles 1 to 15 of the Covenant.'[3]

It can be argued that the UK government is incorrect in its assertion that it does not need to incorporate the rights of the ICESCR. To assess whether this argument holds weight, we must bear in mind the principle of indivisibility, that all human rights are equal in strength and importance, and for this reason, I do not intend address all of the UK's social, economic and cultural legislation, and instead will focus on the areas that are most likely to be in breach of the Covenant. Comparisons with other states' methods of incorporation will be prevalent, because the best way of assessing potential advantages and pitfalls with incorporation methods is by seeing if they have been effective in the states that use them.

This paper begins with a discussion of the enjoyment of social and economic rights in the UK. In section 2 there will be a discussion on outcome duties, because these duties are similar to the incorporation method of progressive realisation in the ICESCR, in that they do not give immediate rights but a duty to work towards an end goal. In 2.A the right to education is dealt with, as the raising of tuition fees is a recent contemporary issue which may well be a clear breach of the UK's obligations under ICESCR. In section 2.B the right to housing is discussed, largely because the CESCR feel that the UK is in breach of its rights in this area, due to a lack of an enforceable right to housing in UK legislation. In section 2.C the right to health is considered in line with the ICESCR non-discrimination provisions due to the discrepancy in UK law between provision of healthcare to citizens of the UK and those who are here illegally.

In section 3 it will be shown how although the ECHR does offer some incidental protection of socio-economic rights, this is nowhere near the level of rights that would be provided if the ICESCR were to be incorporated into UK law. Finally, having shown how the UK is in breach of its international obligations under ICESCR, discussion will move to how this could be remedied with reference to outcome duties and the Joint Committee on Human Rights suggestions for methods of incorporation, and it will be argued that progressive realisation is the way forward.

There will be reference throughout to the Committee on Economic, Social and Cultural Rights (CESCR), which is the body that monitors implementation of the ICESCR. These references will often be to general comments, which are general statements about how the CESCR believe a right should be incorporated, or reports on the UK's implementation of the rights in general. The general comments are important because they often highlight the best way of implementing a right, and the reports on the UK equally so because they highlight areas where implementation of the ICESCR is viewed as weak by the Committee.

2. Economic and Social Rights in the UK

A. The right to education

The UK has a sophisticated education system that meets most of the provisions under article 13 of the ICESCR. This may well mean that the minimum core that is outlined in General Comment Number 3, and furthered in relation to education in General Comment number 13,[4] is satisfied. The minimum core concept is described as an 'obligation to ensure

[3] UK Report, above n1, at para 72.
[4] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Article 13 of the Covenant), 12 August 1999, E/C.12/1999/10, at para 57.

the satisfaction of, at the very least, minimum essential levels of each of the rights.'[5] Furthermore, without this obligation, the CESCR claims that the Covenant would be devoid of its 'raison d'etre.'[6]

The CESCR continues with the minimum core obligation analysis specifically in relation to education, describing it as 'the most basic forms of education'[7], which are set out plainly in article 13 of the ICESCR. The most contentious area of this article with relation to UK domestic policy is the recent increase in tuition fees for higher education. This is because the ICESCR provides in Article 13(2)(c) that 'higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.' Van Bueren points out that 'the UK is therefore legally obliged to make universities progressively free.'[8]

The Browne Report[9] is an interesting document, which has a heavy focus on social mobility and trying to help the economically disadvantaged into university, despite the rise in tuition fees, which is to be commended in the light of the ICESCR article 13(2)(c). 'The HE [Higher Education] Council will target funding to improve access and completion rates for students from disadvantaged backgrounds.'[10] It is clear from this statement that there will not only be help to improve accessibility of disadvantaged students into university, but also to help them complete their degrees. However, whilst this is to be applauded, it is clear that the minimum core cannot be satisfied until there is progression towards free higher education, and the two regulations[11] that resulted in the increase in tuition fees are directly contradictory to this aim.

Whilst on the face of it, the Browne Report shows a steady increase in the participation of the less privileged attending universities, Hall believes that these statistics are not a true reflection of the situation. He uses the graduate premium as a test, meaning those with parents who fall within socio-economic groups 1-3 (largely graduate jobs). He then uses this to demonstrate that 'young adults from families already enjoying the "graduate premium" are twice as likely to go to university as their contemporaries from working-class families.'[12] This shows that there could potentially be an inequality issue within the UK higher education system. This is emphasised by Willetts' view that the more privileged the education, the more likely people are to reach the cognitive level required by university study; 'bright children from a disadvantaged background have their cognitive skills steadily destroyed during their years at school whilst more affluent children start off with a lower cognitive skill set and this increases slowly the more privileged an education they receive.'[13]

Connelly believes that there could be a challenge to segregation in the UK educational system using the ECHR, saying that the legitimate aim of 'the parents' liberty to educate their children independently' would not stand up to 'the considerable inequality' generated

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[5] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)', 14 December 1990, E/1991/23, at para 10.
[6] ibid.
[7] ibid.
[8] Geraldine Van Bueren, *Rights and Proper Debate (2012)*, http://www.timeshighereducation.co.uk/story.asp?storycode=421458, (accessed 17 February 2013).
[9] John Browne, 'An Independent Review of Higher Education Funding and Student Finance', Department for Business Innovation and Skills (Ref: 10/1208), 12th October 2010.
[10] ibid p 48.
[11] Higher Education (Basic Amount) Regulations 2010 (SI 2010/3021) and the Higher Education (Higher Amount) Regulations 2010 (SI 2010/3020).
[12] Martin Hall, 'The end of the British Public University?' (2011), *International Journal of Law in the Built Environment*, vol. 3(1), g 6.
[13] David Willetts, *The pinch: How the baby boomers took their children's futures – and why they should give it back* (Atlantic Books, 2010) p 200.

when you consider how few people can afford their children to be educated privately.[14] Whilst a legal challenge under article 2 of ECHR could be viable, if the ICESCR were to be incorporated into UK law, article 13(2)(c), 'higher education shall be made equally accessible to all, on the basis of capacity', may well render the state/private school distinction as failing to give all students equal access to higher education, not because of capacity at the time of applying but because of failure to nurture that capacity earlier.

There has been a legal challenge against the legality of the increase in tuition fees,[15] under article 6 of the ECHR, which provides for access to education, when read with article 14 on the prevention of discrimination. Whilst the defendants accepted the principle that one could be discriminated against on the basis of being from a 'lower socio-economic group',[16] they disputed the argument that the Government's policy actually amounted to discrimination at all. Elias LJ did go on to consider article 13 of the ICESCR, but said that he did not think that 'it materially advanc[ed] the Claimant's case.'[17] The reasoning he gave was that whilst the Covenant could be used to help to interpret the ECHR, UK courts could not give effect 'to rights in the international instrument itself.'[18] Furthermore, Elias LJ highlighted that there could be two states charging the same for education but only one would be acting unlawfully if it previously had free education, doubting 'whether this is a legitimate approach to the interpretation of the Convention.'[19] This discussion is all very well when framed as the ECHR using the Covenant to interpret its provisions, but when the Covenant stands alone, it is clear that raising tuition fees is a breach of the ICESCR.[20]

When discussing resource allocation in the above case, Elias LJ was very reluctant to become involved in issues which he thought should be left for Parliament. He did accept that there would be a narrower scope for the margin of appreciation in secondary education cases because of their crucial importance in the development of a child, but said that in higher education a wide margin of appreciation was fully justified because of the legitimate objective of a sustainable higher education system.[21]

Porter argues convincingly that retrogressive measures do not automatically mean that there has been a violation of the Covenant, merely that the state must be held to a 'higher test in terms of justifying any deliberately backward-moving measures'.[22] This is the approach taken in General Comment Number 3, which states that deliberately retrogressive measures 'would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[23] One cannot help but agree with Elias LJ that a

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[14] Michael Connolly (2013), 'Social mobility, education and the European Convention on Human Rights', *European Human Rights Law Review*, issue 2, p 163.
[15] *R (on the application of Hurley and another) v Secretary of State for Business, Innovation and Skills*, [2012] EWHC 201 (Admin).
[16] ibid at para 29.
[17] ibid at para 43.
[18] ibid.
[19] ibid at para 45.
[20] General Comment 13, above n4, at para 9 i.e. retrogressive measures.
[21] Hurley, above n17, at para 64.
[22] Bruce Porter, *The domestic implementation of the ICESCR: The right to effective remedies, the role of courts and the place of the claimants of ESC rights,* remarks for the workshop for judges and lawyers in North East Asia on the justiciability of economic, social and cultural rights hosted by the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists (Ulaan Bataar, Mongolia, January 26-28, 2004), http://www.srap.ca/publications/porter_the_domestic_implementation_of_the_icescr.pdf, accessed on 12 January 2013).
[23] General Comment 13, above n4, at para 9.

sustainable future for UK higher education is a justifiable aim, especially when the availability of loans mitigates any discriminatory effect under article 2(2) of the Covenant.

Other countries have followed the UK's lead in defying their obligations under the ICESCR and raising tuition fees for students. Germany is one of these, with the judiciary going against the will of the federal government in allowing the introduction of tuition fees by federal states.[24] Achelpöhler et al believe that the judgment by the German Constitutional Court was flawed in its reasoning, saying that 'the court did not consider whether a prohibition on tuition fees was substantively constitutional, nor did it answer the question as to whether the legal provisions should have been approved.'[25] Instead, the court focused on the competence of the federal government to enact laws which prohibited the introduction of tuition fees.[26]

When looking at the effect of the introduction of tuition fees on widening participation, it is noted that in Germany for the first three intakes after the introduction of tuition fees the intake fell year by year, 'reversing the previous trend.'[27] However, it is important to note that while the UK is not the only offender in this area, in terms of international human rights obligations reciprocity can never be a defence to a breach of human rights obligations.[28] Glocker seems to miss the point with her analysis of the German tuition fee ruling. Glocker claims that 'as long as there is no evidence that equal access to higher education is prohibited, the Federal Constitutional Court has no reason to change the ruling on student fees.'[29] What this comment fails to take into account are the three points: first, the substantive human rights issues that I have discussed with regard to both the UK and Germany, that progressive introduction of free higher education should be aimed for; second, how regressive measures can only be accepted with a real and true need to; and finally, the fact that even though article 13(2)(c) of the ICESCR is regularly flouted, doing so does not make it any more legally acceptable.

B. The Right to Housing

Article 11.1 of the ICESCR provides that there should be an adequate standard of living for the rights holder, including housing, and a continuous improvement in the standard. CESCR have stated that the right to adequate housing should be seen holistically: 'the right to housing should not be interpreted in a narrow or restrictive sense … rather it should be seen as the right to live somewhere in security, peace and dignity.'[30]

CESCR, in response to the latest UK report to them, have said that they are concerned about the 'chronic shortage of housing', and encouraged the state 'to intensify its efforts to ensure that everyone has access to housing.'[31] It is worth considering the Homelessness etc. (Scotland) Act 2003 because CESCR recommended this as the 'best practice, especially its provision relating to the right to housing as an enforceable right.'[32] Although the

[24] Wilhelm Achelpöhler et al, 'The introduction of tuition fees in Germany and the International Covenant on Economic, Social and Cultural Rights (UN ICESCR)' (2007), *Gewerkschaft Erziehung and Wissenschaft(GEW) and freier zusammenschluss von studentInnenschaften (fzs)*, p 20.
[25] ibid.
[26] BVerfGE 112, 226 – Tuition fees, (2005).
[27] ibid p 30.
[28] Article 30, Universal Declaration of Human Rights 1948.
[29] Daniela Glocker, 'Equality considerations of higher education financing schemes*'* (2009) *DIW Berlin,* p 4.
[30] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23.
[31] UN Committee on Economic, Social and Cultural Rights (CESCR), Report on the forty-second and forty-third sessions, 4-22 May 2009, 2-20 November 2009, E/2010/22, E/C.12/2009/3, at para 256.
[32] CESCR, above n 31, at para 256.

Report does not specify which part of the Act it is referring to, it is most likely sections 2 and 3, which modify sections 31 and 32 of the Housing (Scotland) Act 1967. Section 2 abolishes the priority need test contained in both section 31 and 32,[33] meaning that those who are not intentionally homeless,[34] and those who are not intentionally threatened with homelessness,[35] are to be provided with accommodation[36] (or see that it is reasonably ensured that they do not become homeless).[37] Scottish legislation creates concrete rights for the homeless; there is no longer the caveat of priority need.

The UK legislation is similar to the Scottish, but the priority need test is still in force. It gives priority to children aged 17 and 18[38] and those under the age of 21 who have 'institutional backgrounds.'[39] In cases where the applicant is not categorised as priority need, there is merely a discretion placed on the local authority to offer assistance. In cases of non-priority homelessness, they 'may secure that accommodation is available for occupation by the applicant'[40] and in cases of threatened homelessness 'the authority may take reasonable steps to secure that accommodation does not cease to be available for the applicant's occupation.'[41]

The ICESCR does not speak of voluntary homelessness or of a spectrum of need, it is indiscriminate in its housing provisions and therefore by prioritising some people's needs over others it is contravening this principle. However, there could well be justification for this contravention in the fact that land is a sparse and finite resource, and so here more than in other areas, the UK government could rely on the limitation of 'maximum of available resources' in ICESCR Article 2(1), as long as the prioritisation is reasonable. Furthermore, if ICESCR were to be incorporated and progressive realisation were used, then the rights could be granted to citizens gradually as more social housing became available, and it would be justifiable to start with those in most need.

South Africa has incorporated socio-economic rights into its constitution. These rights contain 'close textual similarities'[42] to those of the ICESCR. It is important to assess the main judgments under the South African Constitution as many of them concern housing rights and whether the constitutional rights provisions result in substantive rights for individuals. The first thing to note is that the Constitutional Court of South Africa have made it clear that socio-economic rights are, at least to some extent, justiciable. They have said of the budgetary allocation precluding justiciability argument that 'many of the civil and political rights … will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.'[43] Budgetary implications are something that UK judges have always been reluctant to judge upon, but if the ICESCR were to be incorporated in the UK then it is something that they would have to do in order for its effectiveness and legality to be maintained.

[33] Homelessness etc. (Scotland) Act 2003, s2(1)(a) and s2(1)(b).
[34] Housing (Scotland) Act 1967, s31(2).
[35] ibid s32(2).
[36] ibid s31(2).
[37] ibid s32(2).
[38] The Homelessness (Priority Need for Accommodation) (England) Order 2002, s3(1).
[39] Ibid s4 and s5.
[40] Housing Act 1996, s192(2), as amended by Homelessness Act 2002, s5(1).
[41] ibid s195(9), as amended by Homelessness Act 2002 s5(2).
[42] Marius Pierterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience' (2004), *Human Rights Quarterly*, vol. 26(4), p 883.
[43] Certification of the Constitution of the Republic of South Africa, [1996] CCT 23/96, at [78].

Grootboom[44] is a landmark case when it comes to socio-economic and housing rights. Van Bueren has even gone so far as to say that it 'hammered the final nail into the coffin of non-justiciability.'[45] This argument can be backed up with serious credentials by examining the case. The close symmetry between the South African Constitution and the Covenant is made clear, particularly when looking at progressive realisation, where the court gave effect to the proposition exactly as it appeared in General Comment number 9.[46] This is a clear example of how the judiciary can use the Covenant to help interpret domestic legislation.

In *Grootboom*, whilst the Court did not enforce the right to adequate housing under s26(1) of the Constitution substantially for the claimants, they did find that the South African government were under a duty to do what was reasonable to provide a housing strategy that catered for not only medium and long-term goals, but also one that provides 'relief for those in desperate need.'[47] Yacoob J also strayed into the territory of budgetary allocation, no doubt buoyed by the principles laid down in the Certification of the Constitution case, saying that 'recognition of the obligation to meet immediate needs' requires national government to 'plan, budget and monitor the fulfilment of the immediate needs and the management of the crises.'[48] It can be argued that a similar approach could help the UK's homelessness epidemic, by requiring a clear programme that progressively improved the situation, without a need for an enforceable substantive right.

Despite the positive approach that the South African Constitutional Court have taken toward the realisation of socio-economic rights, Sandra Liebenberg believes that 'the Court's reluctance to recognise direct individual positive rights discourages social rights claiming.'[49] There is evidence to suggest this could be true, even looking at *Grootboom* where there was no order as to the substantive rights of the appellant. However, this is much more evident in the case of *Soobramoney*[50] (although not a right to housing case, it builds on the principles discussed above), where Liebenberg's point is emphasised perfectly by Sachs J's statement that 'important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious.'[51] This judgment shows that whilst the *Grootboom* case has ensured that socio-economic rights in the constitution are justiciable, it has not gone that step further by giving effect to the rights in a substantive way which helps the individual.

The South African example shows how a bill of rights contained within a constitution can give the illusion of enforceable socio-economic rights, and could certainly with a more positive judicial attitude bring about a change in attitudes towards socio-economic rights. The problem so far, as Mbazira points out, is that 'the Constitutional Court has been caught between the need to translate the paper rights into tangible rights' and 'the need to maintain the separation of powers by deferring to the legislative and executive branches of government.'[52] If the same approach were taken in the UK, then the situation may be the same as in the South Africa. However, the progressive realisation model would at least give some onus to improving the amount of social housing available, rather than standing still and

[44] *The Government of the Republic of South Africa v Irene Grootboom and Others*, [2000] Case CCT 11/00.
[45] Geraldine Van Bueren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' (2002), *Public Law*, p 461.
[46] *Grootboom*, above n 44 at para 45.
[47] Ibid. at para 66.
[48] Ibid. 68.
[49] Sandra Liebenberg, 'Needs, rights and transformations: Adjudicating social rights' (2005), *Centre for Human Rights and Global Justice Working Paper, Economic and Social Rights Series*, No 8, p 26.
[50] *Thiagraj Soobramoney v Minister of Health (Kwazulu-Natal)*, [1997] Case CCT 32/97.
[51] ibid at para 58.
[52] Christopher Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*, (Pretoria, Pretoria University Law Press, 2009) p 55.

relying on the priority need test which will never grant housing rights to all with limited social housing available.

It is not only in South Africa where housing rights have been incorporated into national legislation as supposedly enforceable substantive rights, but in Europe as well. France is the continental leader in this area, with the droit au lodgement opposable (DALO) legislation[53], which literally translates to enforceable right to housing. According to Loison, the legislation owes much to the work of Augustin Legrand and the voluntary organisation Enfants de Don Quichotte, due to the intense media pressure they exerted, and the organising of campaigns done by them. These campaigns included encouraging members of the public to go and live in tents for a week in order to live the life of a homeless person.[54] This is the type of activism that could encourage the implementation of socio-economic rights in the UK, but currently they are not publicised nearly enough to put the amount of pressure on Parliament which is needed.

Loison draws comparisons between Scottish and French legislation. Both offer an enforceable right to housing, she notes, but in Scotland the legislation was enacted through political will and in France media pressure. The result is a broader set of homelessness policies in Scotland, whilst in France there is just DALO offering enforceable rights.[55]

Whilst the French legislation is commendable, it is arguable that it was rushed and does not cure the roots of homelessness in the country. These problems are compounded by the fact that each commune in the state possesses its own set of regulations governing social housing, meaning that 'French housing law is complex' and that it is hard to make generalisations about the law.[56] However, it cannot be denied that DALO has been successful to some extent because, as Tars, Luma and Paul point out, about 50% of all French tenants receive some sort of individual rent subsidy, although this cannot entirely be attributed to the effects of DALO.[57] If the UK were to follow France's lead, however, it is unlikely that it would be so successful. The priority need test currently in place fails because of a lack of social housing, and without wider policies to introduce more social housing, the French system of an enforceable right would be unlikely to improve matters.

An alternative system to those in France and Scotland, which it could be argued has been more successful, is that of the Netherlands, where the Law on Housing Benefit[58] provides for financial assistance[59] and the Dutch Civil Code allows individuals to challenge unreasonable rents in a quasi-judicial tribunal[60]. The Rent Tribunal is empowered to evaluate the size and quality of the property, giving it housing points and then using these to set the rent at a particular level, with the Minister of Public Housing setting the maximum rent for each point value[61]. This has been described as 'one of the most impressive housing policies in Europe' and has set the Netherlands apart as a 'leader in providing the right to housing.'[62] This

[53] Establishing the enforceable right to housing and various measures for social cohesion, Law No. 2007-290, 2007.
[54] Marie Loison, 'The implementation of an enforceable right to housing in France' (2007)*, European Journal of Homelessness*, vol. 1, p 188.
[55] ibid p 193.
[56] Eric Tars, Julia Lum, E. Kieran Paul, 'The Champagne of Housing Rights : France's Enforceable Right to Housing and Lessons for U.S. Advocates' (2012), *Northeastern University Law Journal*, vol. 4(2), p 436.
[57] Ibid p 438.
[58] Law on Housing Benefit 1997 (The Netherlands).
[59] ibid article 5.
[60] Dutch Civil Code, Book 7, Article 7:248.
[61] Ibid Article 7:248.
[62] Kyra Olds, 'The role of courts in making the right to housing a reality throughout Europe: Lessons from France and the Netherlands' (2010), *Wisconsin International Law Journal*, vol. 28(1), p 183.

praise for the Netherland's housing policy could be justified, as the social aspects of the Netherland's housing policy are indeed novel and forward thinking. Over 30% of all housing in the country is social housing, and it is not stigmatised in the same way that it is in the UK, with the even the middle-class occupying some of this housing.[63]

Whilst the Dutch system is respectable and provides everybody with a chance of applying for social assistance, it does not give the concrete rights to housing that the Scottish and French legislation does. Moreover, it is the lower economic classes that need to be concentrated on in the UK. *Grootboom* emphasises that the whole population needs to be considered in housing policies under the ICESCR, and it would be unreasonable to fail to provide for the worst off. It seems unrealistic to have to consider the whole population in the UK in the consideration of housing rights, as most are not having their rights violated; it would be more appropriate to concentrate solely on those in most need of housing support. If there were a ruling following incorporation of ICESCR, the court would most likely consider it only unreasonable to fail to provide social housing for those who are having their rights breached, in line with *Grootboom* more than the Netherland's impressive all-encompassing social housing policy.

As it stands the priority need test could be the best option in securing a minimum level of housing for all, especially if it were combined with a duty of progressive realisation, which as the South African jurisprudence shows, has resulted in plans being put in place in the short and long term to combat homelessness. Obviously an enforceable right to housing would be the most effective right in isolation, but when put in the UK context it will fall down exactly where the priority need currently does, there is not enough social housing in the UK to fulfil the demand of those who are having their housing rights breached. A duty of progressive realisation would ensure that the social housing situation was continually improved; whilst priority need would ensure those in need most were helped first.

C. The Right to Health

The British National Health Service (NHS) has long been admired as one of the best in the world. It provides free health care for all British citizens, without discrimination with regards to how much that person may contribute towards the running of it through taxation, and the underlying premise of a right to healthcare under the NHS is hardly ever criticised. However there are areas, particularly the treatment of asylum seekers, which may well fall foul of the over-arching principle of non-discrimination in the ICESCR's Article 2(2).

It is important to realise that 'the right to health care is a fundamental human right and as such is bestowed on irregular migrants. Thus the question of health care for irregular migrants has an inherent human rights dimension.'[64] It is also a right which is recognised by the ICESCR in article 12(1) as 'the enjoyment of the highest attainable standard of physical and mental health.' This article combined with the principle of non-discrimination clearly gives all those living in the UK, whether legally or otherwise, a right to healthcare.

The legislation with regard to provision of healthcare in the UK is governed largely by the NHS Acts, and has evolved to become harsher on those who do not live in the UK. This is quite understandable, although no more excusable, as the public mood towards asylum seekers has equally turned sour.[65] The first evidence of this change in priority from

[63] ibid p184.
[64] Sylvie de Lomba, 'Irregular migrants and the right to health care: a case study of health care provision for irregular migrants in France and the UK' (2011), *International Journal of Law in Context*, special issue 3, p 357.
[65] Alexandria J. Innes, 'When the threatened become the threat: the construction of asylum seekers in British media narratives' (2010)*, International Relations*, vol. 24(4), p 456-477.

Parliament came with the NHS Act 1977, which made provision to charge 'non-residents'[66], however no implementing provisions were forthcoming to bring section 121 into effect. Regulations eventually followed in 1989 to charge 'overseas visitors'[67] for secondary health care (described as hospital treatment). This condition was tightened by changing of the wording from 'overseas visitors' to 'not ordinarily resident in the United Kingdom.'[68] This has been described as a 'subtle linguistic adjustment', [69] but it can be argued it is more than that, as it could potentially exclude not only those who seek asylum here and foreign visitors, but UK citizens who live and work abroad.

One of the more contentious points that arise out of asylum seekers' access to health care is when they are refused asylum but cannot return to their home country. This is obviously an issue if they are suffering from serious illnesses because their human right to health care is being breached whether they are 'ordinarily resident' in the country or not. The case of *YA*[70] gave considerable guidance as to the accessibility to the NHS of failed asylum seekers. *YA* was a failed asylum seeker who could not return to Palestine due to an absence of travel documents and a refusal by the Israeli government to facilitate his return to Palestine.[71] Two main issues are discussed in the case. First, whether *YA* was ordinarily resident; second whether he was lawfully resident. Ward LJ decided that *YA* was neither. Ward LJ's reasoning on the first point can be seen as harsh, but fair, that residence 'by grace and favour is not ordinary', that 'the purpose of the National Health Act is to provide a service for the people of England' and that 'failed asylum seekers ought not to be here.'[72]

The second legal point is more contentious, and arguably decided wrongly. Ward LJ does not give the words their ordinary meaning, and therefore comes to an outcome he finds favourable.[73] According to Ward LJ, lawful in this context 'means more than merely not unlawful but should be understood to connote the requirement of a positive legal underpinning. Being here by grace and favour does not create that necessary foundation.'[74] Accordingly, we are left with a situation where asylum seekers awaiting deportation must rely on the discretion of NHS doctors, who must make a judgement about how long the failed asylum seeker is likely to stay in the UK; a decision which they are in no way qualified to make.

The Department of Health have given reasons as to why failed asylum seekers are not given free entitlement to health care. [75] The underlying theme is that of health tourism, and anxiety that 'automatic entitlement to full, free secondary care, including both urgent and non-urgent treatment, would not be consistent with the denial of leave to remain and may act both as a deterrent to leaving the UK on a voluntary basis and an incentive to others to travel here illegally.'[76] In the same document, the Department of Health purports to provide evidence for health tourism, but in doing so highlights their lack of hard evidence to support its existence, saying that 'the NHS does not collect detailed data on the overseas visitors it treats or charges so the precise scale of health tourism is difficult to quantify. However, NHS frontline staff regularly report examples of people who have apparently travelled to the UK to seek

[66] NHS Act 1977, s121.
[67] NHS (Charges to Overseas Visitors) Regulations 1989, SI 1989/306.
[68] NHS (Charges to Overseas Visitors) Regulations 2004, SI 2004/614.
[69] Dallal Stevens, 'Asylum seekers and the right to access health care' (2010), *Northern Ireland Law Quarterly*, vol. 61(4), p 365.
[70] *R (on application of YA) v Secretary of State for Health*, [2009] EWCA Civ 225.
[71] ibid at para 4.
[72] ibid at para 61.
[73] Ibid.
[74] ibid at para 65.
[75] Department of Health, 'Review of access to the NHS by foreign nationals; Consultation on Proposals', February 2010.
[76] ibid p 11.

treatment, sometimes even arriving with their medical notes to show to clinicians.'[77] This seems highly incredulous, and it seems likely that if health tourism was an obvious and expensive issue then there would be statistical evidence that proved as much.

Commendable measures that are mentioned in the consultation document are those which are preventative, such as proposals that those with significant NHS debt would be refused entry to the country.[78] This would solve a lot of the problems with breach of the ICESCR as long as the refusal of entry was legitimate. Another possible solution would be that of information sharing, but there is clearly the issue of data protection, which the Department of Health acknowledge would have to be their number one priority.[79]

There is evidence to suggest that the views of the government could well be totally unfounded. Although the article is very broad, Bollini's analysis applies to the UK system when he states that 'asylum seekers […] are often submitted to a medical examination upon arrival.'[80] This examination is provided for by section 36 of the Immigration Rules[81] which makes clear that any person who intends to remain in the UK for more than 6 months must be submitted to a medical examination. The rules go on to say that 'where the Medical Inspector advises that a person seeking entry is suffering from a specified disease or condition which may interfere with his ability to support himself or his dependants, the Immigration Officer should take account of this, in conjunction with other factors, in deciding whether to admit that person.'[82] Therefore the issue of health tourism must be limited, if pre-existing illnesses can be taken into account when choosing whether individuals are granted leave to remain.

It must of course be noted that freedom of movement within the EU can cause problems in this area, because it can be hard to submit EU citizens to medical examination when they are freely allowed into the UK without being questioned on their intention to stay.

3. The ECHR and Socio-Economic Rights

Many have argued that some socio-economic rights are protected under the ECHR, which is primarily concerned with civil and political rights. What is clear, and what Baderin and McCorquodale argue, is that 'what the Convention sometimes protects are economic and social aspects of explicit Convention rights.'[83] What this means is that whilst the socio-economic rights are not protected explicitly, they are consequentially, in order to ensure the full protection of civil and political rights.

For example, the right to a home, a socio-economic right, could be protected by provision of shelter in order to not infringe on the article 8 ECHR right to family and private life. It is important to examine the issue of ECHR protection of socio-economic rights because the ECHR is incorporated into the UK constitution via the Human Rights Act (HRA),[84] and so if socio-economic rights were protected fully under it, there would be no need for the incorporation of the ICESCR. It seems inappropriate to discuss the European Social Charter,

[77] ibid p 17.
[78] ibid p 19-20.
[79] ibid p 20-21.
[80] Paola Bollini, 'Asylum Seekers in Europe: Entitlements, Health Status, and Human Rights Issues' (1997), *European Journal of Health Law*, vol. 4(3), p 258.
[81] Section 36, UK Immigration Rules 1994 HC 395 (last amended March 2013 HC 1039).
[82] ibid s 37.
[83] Mashood Baderin and Robert McCorquodale, *Economic, Social and Cultural Rights in Action* (Oxford, Oxford University Press, 2007) p 241.
[84] Section 1(2), Human Rights Act 1998.

because although the UK has signed and ratified it, it has not been incorporated into UK law and so only enjoys similar standing to the ICESCR itself.

Airey v Ireland[85] was the case which set the ECHR's approach to economic, social and cultural rights. What the Airey case emphasises is that there can be no clear distinction between social and economic rights and civil and political rights, and it emphasises 'the real and practical way'[86] in which the protection of civil and political rights can also have an effect in improving socio-economic rights. The underlying principles of human rights doctrine are that all human rights are indivisible. They are all equal and interdependent: they rely on each other to function fully.[87] Craig Scott captures the essence of these principles very well, arguing that there should a rejection of what he calls 'textual technicality' and instead a wider view should be taken: 'by breaking out of overly rigid categories, human rights analysis can better focus on the underlying interests that rights should serve to protect … and the kinds of harms, practices, and systems that have historically generated the need for a discourse on human rights.'[88]

As we will see, despite the protection that the ECHR does occasionally offer to socio-economic rights, it is not enough to achieve these aims.

Rory O'Connell, whilst focusing on the right to work, offers three conclusions to his discussion which apply to the protection of socio-economic rights in general. First, the ECHR offers 'only indirect or collateral protection' to socio-economic rights, 'another right is always in play'. Second, they help to 'confirm the interdependence of civil and political rights with social and economic rights.' Third, 'these cases demonstrate how a doctrine of proportionality can be applied to decisions' which interfere with socio-economic rights.[89] These conclusions highlight the problem relying on the ECHR brings: if there is no ECHR right which is being protected then the socio-economic violation will not be offered the protection which it deserves.

The European Court of Human Rights in *Campagnano v Italy* used a particularly inventive method of reasoning in using Article 8 of the ECHR to hold that Italian bankruptcy law which placed the applicants on a register for five years after bankruptcy, precluding them from being able to get a job in certain professional roles, violated Article 8, which 'encompassed the right to form and develop relationships, including those of a professional character.'[90] This wide interpretation of what comprises private life enabled the court to protect the appellant's economic right to work. However, the fact that these wide interpretations have to be used show that the ECHR does not naturally protect socio-economic rights, as O'Connell argued above.

Pillay maintains that 'fundamental human rights' have had a much bigger role to play than prior to the HRA and that the level of scrutiny is 'much more clearly articulated in cases in which the Human Rights Act 1998 is relied upon.'[91] The case Pillay focuses on is *R v*

[85] *Airey v Ireland*, Application No. 6289/73, [1979] ECHR 3.
[86] ibid at para 26.
[87] United Nations Human Rights, Office of the High Commissioner for Human Rights, *What are human rights?*, http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx, (accessed 24th October 2013).
[88] Craig Scott, 'Reaching beyond (without abandoning) the category of "economic, social and cultural rights' (1999), *Human Rights Quarterly*, vol. 21(3), p 637.
[89] Rory O'Connell, 'The right to work in the ECHR' (2012), *European Human Rights Law Review*, issue 2, p 184.
[90] *Campagnano v Italy*, Application no. 77955/01, (2009) 48 E.H.R.R. 43, at para 53.
[91] Anashri Pillay, 'Courts, variable standards of review and resource allocation: developing a model for the enforcement of social and economic rights' (2007), *European Human Rights Law Review*, issue 6, p 629.

Secretary of State for the Home Department ex parte Razgar, an immigration case where the claimant argued that removal would have an adverse effect on their mental health.[92] For our purposes, although this case involved a potential breach of human rights, meaning that the level of scrutiny was high, it seems more appropriate to concentrate on the limitations within the judgment. Several comments by Lord Bingham show that it may not be as easy in reality as it is in principle to use Article 8 to protect socio-economic interests. Lord Bingham, albeit in obiter, said that 'reliance may in principle be placed on Article 8 to resist an expulsion decision, even where the main emphasis is […] on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough Article 8 may in principle be invoked.' We can conclude, taking the judgment as a whole, that whilst ECHR cases will be given a higher level of scrutiny, it is not necessarily true that socio-economic rights such as the right to health, as was the ancillary right in this case, will always be protected. The higher level of scrutiny just ensures that the decisions of the decision-makers are correct given the law and that the correct considerations are taken.

It may be presumed by the outside world that Article 3 would have quite a high threshold, particularly due to the use of the words torture and degrading treatment. However, the Strasbourg decision of *Price* ruled that the threshold for what can be held as degrading or inhuman treatment can differ from person to person.[93] The case involved a disabled woman who was sentenced to a week in prison and detained for a night in an ordinary prison cell, which was not adapted to her specific needs. It was held that this contravened Article 3, with Judge Greve giving the most reasoned opinion. He made it clear that he believed, quite rightly so, that 'it is obvious that restraining any non-disabled person to the applicant's level of ability to move and assist herself, for even a limited period of time, would amount to inhuman and degrading treatment – possibly torture.'[94] He took this further, and set out the Price principle seen above that 'she has to be treated differently from other people because her situation is significantly different.'[95] From this judgment we can see that socio-economic rights can be protected if the person is particularly vulnerable and the treatment is bad enough given the circumstance to be inhuman and degrading, however, this is the lowered threshold, and in general the threshold will be much higher.

Having demonstrated that in some cases the threshold for a successful appeal under Article 3 is not unachievably high, there needs to be some realism added to my argument and that comes in the form of the House of Lords decision of *N v Secretary of State* for the Home Department.[96] The case is significant and builds on the debate I discussed above as to asylum seekers and healthcare. Lord Nicholls was cautious about ruling that the HIV positive claimant could stay in the United Kingdom, despite the fact that if she were to be deported her treatment would come at a 'considerable cost'.[97] He reasoned that 'it would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country.'[98] This draws up the argument of health tourism mentioned above, and shows how wary the judiciary are of making a judgment that could potentially conflict with the interests of Parliament, even when there is legislation such as the HRA which actively allows them to do so. The decision in *N* may have been different if the ICESCR was incorporated and there were two pieces of domestic legislation acting, the HRA

[92] *Regina v Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27
[93] *Price v The United Kingdom*, Application no. 33394/96.
[94] ibid, per separate opinion of Judge Greve.
[95] Ibid.
[96] *N v Secretary of State for the Home Department* [2005] UKHL 31.
[97] ibid at para 51.
[98] ibid at para 53.

as it is and one incorporating the ICESCR, so that article 12 of the ICESCR was also effective.

Apart from socio-economic rights being protected inadvertently through administrative law and the HRA, welfare legislation can be interpreted in order to be compliant with the ECHR, therefore giving better protection to welfare rights. The most likely avenue of protection is article 3 ECHR, if the welfare legislation advocates treatment which contradicts it or fails to provide treatment which is required in by it. However, Palmer contends that 'a review of leading section 3 cases demonstrates that by comparison with other legislative areas, there has been little use of section 3 to read welfare legislation compatibly with convention rights.'[99]

In the case of *R (Adam, Limbuela and Tesema) v Home Secretary*[100], the House of Lords decided again to extend the rights of asylum seekers, this time finding that legislation which required asylum seekers to submit claims for social support 'as soon as reasonably practicable' was incompatible with article 3 of the ECHR.[101] This is obviously significant because if the legislation were to have been upheld, then asylum seeker's access to socio-economic rights would be even more restricted. An important part of the judgment is the manner in which the court dealt with the contentious issue of positive and negative violations of convention rights. It was submitted that 'Article 3 is aimed primarily at state-sponsored violence. The further one moves away from that core concept the more it must be construed flexibly. The article does not set out to regulate the provision of economic and social rights.'[102] However, after considering the Strasbourg precedent on the issue, and particularly the non-derogable nature of article 3, they decided 'Article 3 may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. … It may also require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article.'[103] Chakrabarti calls this decision 'ironically perhaps, the boldest judicial championing of asylum seekers' rights to date', justifying her irony by demonstrating that due process claims against detention by asylum seekers under the ECHR have largely been rejected.[104]

It is clear, even from the few cases that I have analysed, that whilst the ECHR can protect socio-economic rights, this is not its primary function. The case must be successful on the civil and political point which it is brought under, and little concern is given by the judiciary to subsidiary socio-economic points in the judgment, unless the legislation goes so far as to breach article 3. Therefore we cannot rely on the ECHR to protect the interests that the ICESCR would do much more effectively if it were to be incorporated into the UK legislation.

4. Time for Change: Models of Incorporation

Having assessed areas in which social and economic rights are lacking in the UK, it is now appropriate to discuss possible ways of remedying these inconsistencies with the ICESCR. First, I will focus on outcome duties and how these could be built into socio-economic legislation to ensure that the outcome which was aimed for (full compliance with

[99] Elizabeth Palmer, 'Courts, resources and the HRA: reading section 17 of the Children Act 1989 compatibly with Article 8 ECHR' (2001), *European Human Rights Law Review*, issue 3, pg 317.
[100] *R (Adam, Limbuela and Tesema) v Home Secretary* [2006] 1 A.C. 396.
[101] Section 95, Immigration and Asylum Act 1999.
[102] Limbuela, above n 100 at para 397.
[103] Ibid at para 46.
[104] Shami Chakrabarti, 'Rights and rhetoric: The politics of asylum and human rights culture in the United Kingdom' (2005), *Journal of Law and Society*, vol. 32(1), p 145-146.

the right) is reached, and that the plan to reach it is accessible to the courts for judicial review. Finally, I will go on to discuss the three models of incorporation suggested by The Joint Committee on Human Rights (JCHR) in its report, each with its merits and pitfalls. These models are: fully justiciable and legally enforceable rights, directive principles of state policy and progressive realisation.[105] This section assesses each in turn and suggests which would be the best method to close the discrepancies between UK law and the ICESCR. Some will suit the UK legislative and judicial branches of government more than others. The method which offers the strongest arguments whilst still being practicable, and has the strongest history of effective use in other jurisdictions is that which is used in the ICESCR itself; progressive realisation. However, it is important to note that outcome duties could be used within a method of progressive realisation to ensure that there is a real enforceable duty to work towards the end goal.

A. Outcome duties

Reid sets out six different types of duty that are commonly placed on ministers, but suggests that the ones that are included in the Child Poverty Act (CPA)[106] and the Climate Change (Scotland) Act[107] are a different type of duty, because they require a target to be met.[108] Focus must be given to the CPA, due to the provisions in the ICESCR giving special protection to children, particularly under article 10(2) which provides that 'special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.'

There are no qualifications under the CPA as to resources, which makes it different from the ICESCR in that under Article 2(1) of the Covenant it is provided there is provision that the realisation only need be 'to the maximum of its [the state's] available resources.' This means that it is an absolute duty to reach the targets that are set out, which relate to relative low income,[109] combined low income and material deprivation,[110] absolute low income[111] and persistent poverty.[112] Ellie Palmer even goes as far to say that, in theory, there could be a cause of action should there be 'sufficient persuasive evidence' to suggest that the actions of the Secretary of State had meant that the targets could not be met.[113] A textual interpretation of the statute would certainly suggest that the duties which lie within are absolute, and if they are then they could be spread across ESC legislation in order to ensure that they are justiciable and possibly even relinquish the need for incorporating ICECR into domestic legislation.

In a very recent judicial review case, the CPA was judged upon in a procedural manner, and this showed that that the judiciary are taking the duties within it very seriously.[114] The case involved section 10(1) of the CPA, which provides that the secretary of state must ask for advice from the commission (referring to section 8(1) requiring a Child Poverty Commission to be set up) before formulating a UK strategy with the aim of meeting the targets within the

[105] Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-2008, July 2008.
[106] Child Poverty Act 2010.
[107] Climate Change (Scotland) Act 2009.
[108] Colin Reid, 'A new sort of duty? The significance of "outcome" duties in the Climate Change and Child Poverty Acts' (2012), *Public Law*, pg 750-751.
[109] Section 3, Child Poverty Act 2010.
[110] Ibid, section 4.
[111] Ibid, section 5.
[112] Ibid, section 6.
[113] Ellie Palmer, 'The Child Poverty Act 2010: Holding government to account for promises in a recessionary climate' (2010), *European Human Rights Law Review*, issue 3, p 314.
[114] *The Queen on application of Child Poverty Action Group v Secretary of State for Work and Pensions and Secretary of State for Education*, [2012] EWHC 2579 (Admin).

statute. Mr Justice Singh discussed parliamentary intention at some length before deciding that Parliament never intended a decision to be made without the opinion of the commission, which was to be filled with relevant experts.[115] The defendant argument that Parliament could not have intended to vitiate the vires of the secretary of state to produce the strategy was rejected[116] because the setting up and consulting of the commission was seen as a condition precedent of the compiling of the report.

It is clear from the above case that the duties within the Act will be given a great deal of scrutiny under judicial review. However, this is in relation to procedural duties within the statute, and there is a great deal of case law to suggest that these can be enforced.[117] Whether this will be extended to include the outcome duties which are set in rigid language, which Reid emphasises, are 'precise' and without specific wording to limit them,[118] remains to be seen. However, there is clearly no degree of 'elasticity'[119] such as was available in the Education Act 1944, for example, which was phrased in a wide manner and led the court to hold that there was not an absolute duty.[120] If the courts take a strict interpretation of outcome duties they could be instrumental in reducing child poverty, and could be extended (although this would require Parliament to fully accept that socio-economic rights are justiciable) to other ESC rights.

King is sceptical about the potential enforceability of outcome duties, saying that 'target duties are statutory duties phrased in very broad and general terms, and are held by courts to be normally unenforceable by individuals.'[121] His argument centres on the case of ex parte Ali, drawing the conclusion that all duties of this type are unenforceable.[122] Whilst precedent would agree with this conclusion, it is worth noting that the duties in the CPA are much tighter and it is more likely that they could be enforced by the judiciary.

Sandra Fredman is an advocate of using the outcome duty as it is expressed in the Child Poverty Act, and the reasons she puts forward assess the advantages of this type of legislation in a clear and persuasive way. Fredman addresses the lack of an individual substantive enforceable right, something which is evident in the South African litigation, and asserts that 'the remedy need not entail providing individualised benefit … this is because positive duties are not necessarily correlative to a right to a bundle of goods, but rather a right to action.'[123] We can analogise this with the ICESCR because the duty to progressively realise rights within available resources does not necessarily enable everybody to an immediate right. Instead the outcome duty gives a time-scale for the duty to be met, allowing the person to challenge in judicial review the strategy that purports to reach that target.

Where Fredman also believes the outcome duties in the CPA are particularly beneficial in socio-economic rights enforcement is in the clear separation of powers and the accountability of government to both Parliament and the judiciary. 'Accountability is primarily to Parliament in the form of progress towards meeting the targets. … The court has no role in setting targets or designing strategies, but requires the government to be accountable for the chosen strategy, and capable of demonstrating in a convincing manner that the strategy

[115] Ibid at para 45.
[116] Ibid at para 34.
[117] See for example *R. (on the application of Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin).
[118] Ried, above n108, p 755.
[119] Woolf LJ in *R v Inner London Education Authority, ex parte Ali*, quoted in Reid, p 755.
[120] *R v Inner London Education Authority Ex p. Ali* (1990) Admin. L.R. 822.
[121] Jeff King, 'The justiciability of resource allocation' (2007), *The Modern Law Review*, vol. 70(2), p 214.
[122] ibid p 214.
[123] Sandra Fredman (2010), *'New Horizons: incorporating socio-economic rights in a British Bill of Rights'*, Public Law, p 308.

will achieve the predetermined goals.'[124] This counters the belief that the judiciary are adjudicating on matters which they have no institutional competency, because they are instead deciding whether the strategy works and whether it has been put in place following the right channels and consulting the right bodies. Essentially the courts are performing administrative review, which they are capable of doing. The Child Poverty Action Group case is a good example of this. When provisions are phrased like, with an immediate duty to take action and a delayed duty to meet a target, it gives an immediate procedural duty and a delayed substantive duty. Therefore the courts are judging areas that they are competent in, and without the resource allocation qualification there is no automatic justification for failure, just review under normal administrative review functions.

It is clear that this type of duty legislation could be used within a progressive realisation model to ensure that procedures were put in place, even if long-term, to ensure that the rights were progressively realised and substantive rights were eventually reached, perhaps within a set time frame.

B. Fully justiciable and legally enforceable rights

The CESCR would urge the government to directly incorporate the ICESCR as in their view the government's international obligations under the Covenant require it, as discussed above.[125] The JCHR shun this model without giving it the respect that it demands, being the only model which can guarantee substantive rights for the people of the UK:

> We agree with the Government that including fully justiciable and legally enforceable economic and social rights in any Bill of Rights carries too great a risk that the courts will interfere with legislatives judgments about priority setting ... we recognise that the democratic branches (Government and Parliament) must retain the responsibility for economic and social policy, in which the courts lack expertise and have limited institutional competence or authority.[126]

Van Bueren talks of a constitutional culture within the UK which the HRA has become a part of, but which economic and social rights remain far from. She argues that a social and economic human rights act would contribute to this constitutional culture's development.[127] This is also something that the Equality and Human Rights Commission recommends in its submission regarding the ICESCR. It notes that the UK needs to 'develop a human rights based approach to the application of the rights under the Convention to ensure that the rights are taken into consideration in the development of relevant legislation and policy.'[128] Without this change in constitutional culture, and in the status of legislation enshrining them, social and economic rights can never have the same importance as civil and political rights have under the HRA.

Fox-Decent does not consider socio-economic rights in any great detail in his article on human rights and the rule of law,[129] but what he does say can be seen as advocating fully incorporated rights. Whilst he acknowledges the difficult resource allocation issues, he goes on to state that 'if economic rights really are human rights that reflect the demands of human dignity, then some commitment to them follows from a commitment to the rule of law. A

[124] Ibid. p 319
[125] General Comment 9, above n 2, at para 4
[126] JCHR, above n 105, 47.
[127] Van Bueren, above n 45, p 462.
[128] Equality and Human Rights Commission, Submission on the United Kingdom's fifth periodic report under the International Covenant on Economic Social and Cultural Rights, August 2009, pg 10.
[129] Evan Fox-Decent, 'Is the rule of law really indifferent to human rights?' (2008), *Law and Philosophy*, vol. 27(6).

dignity-based argument for economic rights that does not reduce the rule of law to merely the rule of good law could proceed along the following lines: economic rights do not guarantee anything more than the minimal preconditions necessary for the reasonable enjoyment of civil and political rights.'[130] What is interesting about this is that he does not consider whether socio-economic rights should be incorporated, merely whether they are human rights in the first place. The tone of the article clearly shows that he believes all human rights should be respected fully, albeit if only by a minimum core method, and that their resource allocation dimension does not put socio-economic rights at odds with the rule of law.

The credible argument against the involvement of the judiciary in enforcing socio-economic rights in the UK is the one of institutional capacity, rather than non-justiciability. We have already seen through the example of the South African system how, given the right constitutional platform, judges can enforce socio-economic rights. A process of building 'individual and institutional capacity'[131] could well be implemented where the judiciary and socio-economic rights are concerned, as suggested by Barmes in a different context.[132] It is also relevant to point out the frequently mooted argument that the judiciary were not well versed in deciding on civil and political rights before the HRA also holds strong,[133] and with education and experience, the judiciary would soon be up to the levels that would be required of them.

There are those that believe that courts should not defer to Parliament, and some argue that that 'statutes must be interpreted, as a far as possible, consistently with the constitutional rights embodied in the general law; administrative decisions must be shown to be justified by the needs of the public interest, wherever they involve the curtailment of established rights.'[134] This is very much a parliamentary sovereignty argument, that in order for the court's to be able to adjudicate on areas which are rightly for the executive to decide upon (as they involve resource allocation), Parliament must grant them that power through constitutionally significant legislation.

However, there are those who would argue that the courts do not possess 'the power to dictate to the government how resources should be allocated in order to enforce socio-economic rights.'[135] Jheelan justifies this position with examples of how the judiciary have bowed to the power of the government in the cases of *Soobramoney* and the Indian case of *Olga Tellis*. He notes 'that the courts recognise the limits to which they can go.'[136] Again, it is clear that courts do not possess this type of power automatically; rather with an altered constitutional framework they could be given this power. The reluctance Jheelan relies on did not come in the face of fully incorporated rights, but in the context of progressive realisation (South Africa) and directive principles of state policy (India). If absolute rights were to be fully incorporated into UK law, then there is no reason why the judiciary could not rule upon them, using proportionality review to balance them against other constitutional principles such as parliamentary sovereignty.

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[130] ibid p 580.
[131] Lizzie Barmes, 'Equality law and experimentation: The positive action challenge' (2009), *Cambridge Law Journal*, vol. 68(3), p 651.
[132] Ibid.
[133] A.W. Bradley, 'Relations between Executive, Judiciary and Parliament: an evolving saga?' (2008), *Public Law*, p 475-476.
[134] T.R.S. Allan, 'Human rights and judicial review: A critique of "due deference"' (2006), *Cambridge Law Journal*, vol. 63(3), p 682.
[135] Navish Jheelan, 'The enforceability of socio-economic rights' (2007), *European Human Rights Law Review*, issue 2, p 153.
[136] Ibid.

A good discussion of the issues of judicial intervention on socio-economic rights can be found in Abramovich's article.[137] Whilst the article is not based upon the UK constitutional system, his strong view does apply to the UK 'that judicial intervention in these fields should be, in the interest of preserving its legitimacy, firmly based on a legal standard', by which he refers to a standard of review akin to proportionality or reasonableness.[138] If either proportionality or reasonableness review were to be implemented then the judiciary could rule on whether the deprivation of these rights to a claimant was justified as being reasonable given the economic resources of the country or proportionate when balanced against other demands on these resources.

However, direct enforcement may not be the right way to go about incorporation of socio-economic rights given that it would result in a lot of litigation, and a huge burden on the courts to be consistent throughout. This is why a duty of progressive realisation may be the answer, because that way there is no duty to provide the rights in the first place, merely a duty to progress. This will be dealt with in more depth in the model three analysis below.

Abramovich recommends a remedy that could be useful to the UK, and it is one which the UK judiciary is definitely practised in. In this arrangement, the judiciary 'is limited to declaring that the omission of the state is illegal, without proposing remedial steps.'[139] This is equivalent to a declaration of incompatibility under the HRA, and if there were to be an instrument which directly incorporated the ICESCR into UK law, it is one which could be implemented. However, as Neenan points out, a declaration of incompatibility 'has no real practical effect for the litigant', and ironically to get a ruling that will be beneficial to, he/she will have to try to convince the court that the legislation they have been wronged by is compatible with the convention, and get a favourable interpretation of both (this would of course only be relevant if the method of incorporation used was similar to the HRA).[140] It seems paradoxical to suggest that in trying to protect socio-economic rights, which are largely positive obligations, there should be no benefit to the individual. However, as was seen in the progressive realisation cases above such as *Grootboom*, there was also no immediate relief to the individual. Indeed, the ICESCR itself offers no immediate substantive rights for the individual.

C. Directive Principles of State Policy

This model of incorporating socio-economic rights would focus not on having them enforced in courts, but in a Constitutional provision which would put a (non-enforceable, or at least non-justiciable) obligation on the state to further the social rights of its subjects. This technique is used in both the Indian and Irish Constitutions.[141] The JCHR put forward a damning view of this particular model of incorporation, 'this model avoids the pitfalls of the first model because it keeps the courts out altogether. In our view, however, it risks the constitutional commitments being meaningless in practice.'[142] The JCHR are justified in saying this, because there are not any strong arguments for using directive principles within developed constitutions.

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[137] Victor Abramovich, 'Courses of action in economic, social and cultural rights: Instruments and allies', *SUR International Journal on Human Rights*, issue 2, http://www.surjournal.org/eng/conteudos/artigos2/ing/artigo_abramovich.htm, (accessed 7 April 2013).
[138] ibid.
[139] ibid.
[140] Caroline Neenan (2000), 'Is a declaration of incompatibility an effective remedy?', *Judicial Review*, vol. 5(4), p 249.
[141] Article 45, Constitution of Ireland 1937; and Article 37, Constitution of India 1949.
[142] JCHR, above n105, p 48.

There needs to be a role for the courts in the enforcement of socio-economic rights, because without this they could be totally devoid of meaning. Van Bueren furthers her argument for a constitutional culture shift, by emphasising the need for 'constitutional conversation.'[143] Furthermore, she states that 'judges ought to be deferential to a democratic parliament. But deference does not only imply submission … deference also means respect. … A constitutional conversation creates such respect without breaching the separation of powers. The judicial voice should not be marginalised by out-dated concepts of the separation of powers.'[144] Whilst separation of powers is an important concept, it is by no means the driving one behind the UK constitution. It is well established that the Parliament is sovereign, and that it can only be restrained by itself in the way of constitutional change, much like the HRA. Whether a directive principle approach would achieve this constitutional culture shift, with more of a focus on separation of powers and empowering the judiciary, is seriously debateable. To achieve this, socio-economic provisions would have to be placed in a constitutionally significant document such as a Bill of Rights, or a codified constitution.

Considering the close proximity and cultural similarities, it is important to assess the effectiveness of the directive principles of The Constitution of Ireland, and to see how a similar constitutional arrangement could work in the UK. The Constitution of Ireland outlines 'Directive Principles of Social Policy', which are intended to guide the Irish Parliament and not be judged upon by the Irish judiciary.[145] The judgment in the *O'Reilly* case is an important one, and severely limits the scope and effectiveness of directive principles. It is in this case that we see how the directive principle method can fall foul of the competing interests of the judiciary and Parliament, and even the argument of non-justiciability that has plagued socio-economic rights for years. The case involved a traveller family who lived in serious poverty and claimed a basic standard of living. Costello J said that for the court to intervene it 'would have to make an assessment of the validity of the many competing claims on those resources'.[146] He went on to say that it was not the court's place to adjudicate on 'the fairness or otherwise of the manner in which other organs of the State had administered public resources.'[147] Ultimately, the court's rejection of the justiciability of the socio-economic rights comes down to the perceived lack of institutional competency of the judiciary. Costello J concluded that he could not construe the Constitution as conferring the power to fulfil the role of adjudicating on resource allocation.[148]

Hogan argues that if this method is to work, then 'further extensive powers will thereby be transferred to an already powerful judiciary', this is 'unless the rights in question are to be purely paper rights.'[149] This sums up the problem with the method, and one which the JCHR identified in what is quoted above. Whilst it does not run the risk of the judiciary making decisions that they are not qualified to make, it also does not give them a basis to strike down legislation beyond those already afforded to it by administrative law. Wiles accepts that in poorer countries, this may well be a plausible solution because the depth of poverty means 'even minimum core standards are hard for the state to achieve', and it has to be accepted that 'cases such as *Olga Tellis* will inevitably constitute somewhat symbolic gestures in India, as they cannot effect the depth of social and economic change necessary to ameliorate the poverty besetting much of the country.'[150] Wiles condemns the use of directive principles in developed countries, however, believing that they would confuse

[143] Van Bueren, above n 45, p 462.
[144] Ibid. p 464.
[145] Constitution of Ireland, above n 141, Article 45.
[146] *O'Reilly v Limerick Corporation* [1989] IRLM 181; in Gerard Hogan, 'Directive Principles, socio-economic rights, and the Constitution' (2001), *The Irish Jurist*, vol. 36, p 182.
[147] Ibid.
[148] Ibid.
[149] ibid p 197.
[150] Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006), *American University International Law Review*, vol. 22(1), p 60.

constitutional principles and 'put fundamental notions of legal certainty and the separation of powers in jeopardy' and 'thereby determinable by the whim of the judiciary currently in place, which may pick and choose which policies they attack.'[151] The constitutional principles of the UK are so settled that it seems unlikely that there would be such an unsettling effect, and an argument based upon the fact they would not be used seems more viable. Just because the judiciary could, in theory, albeit on limited constitutional ground, strike down parliamentary legislation due to it being incompatible with the ICESCR (or a UK Bill of Rights if that is what the directive was written into), it does not mean that they would chose to do so. Directive principles of state policy give the main prerogative to the Parliament, and the judiciary would probably only be willing to step in when these are glaringly broken, to an extent where the ECHR would in all probability cover such an obvious breach of socio-economic rights as discussed above.

D. A duty of progressive realisation of economic and social rights by reasonable legislative and other measures, within available resources

This is the model the JCHR prefers, although they describe it in a manner that mixes the previous two methods of incorporation and uses the progressive realisation tag to add a very real obligation to the process which the judiciary can rule upon.[152] This is also the obligation that exists in the South African jurisdiction, discussed above, and in the ICESCR itself. There is therefore evidence for its effectiveness.

The progressive realisation model, as described in the Covenant's Article 2(1), imposes an obligation upon the state to 'take steps [...] 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.' This is the duty upon the state. According to the JCHR, the duty on the judiciary is described 'the possibility of a degree of judicial involvement in extreme cases (e.g. of unjustifiable omission of provision for a particular vulnerable group).'[153] Where the JCHR have failed to understand the obligation is in the lack of explicit attention to the minimum core doctrine, instead implicitly including it in the description of their model.

In the South African Constitution, the majority of the socio-economic rights set out in the Bill of Rights are framed so as to be achieved through reasonable measures, both legislative and others.[154] This can be seen to be a precursor to the inevitable, that the South African Constitutional Court would assess the legislation using a reasonableness review standard. In the case of *Grootboom*, both the reasonableness approach and the overall model of progressive realisation were created. As to the concept of reasonableness, Yacoob J held that the availability of resources and the concept of reasonable measures cannot be taken distinctly, but that 'both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.'[155] He went on to apply a minimum core obligation concept to his reasoning, saying that 'a programme that excludes a significant segment of society cannot be said to be reasonable.'[156] This shows that South African reasonableness when it comes to socio-economic rights is multi-faceted and combines reasonableness, available resources and a minimum core obligation, with no breach occurring if government action is reasonable once these factors have been taken into account. The South African progressive realisation model is one which definitely overcomes the problems of directive

[151] ibid p 59.
[152] JCHR above n 105, p 49.
[153] Ibid 49.
[154] Mbazira, above n 52, Chapter 2: Bill of Rights, e.g. s26(2).
[155] Grootboom, above n 44, at para 46.
[156] Ibid at para 43.

state policies, because there are real obligations involved. Yacoob J, also in the *Grootboom* case, set out that although obligations do not have to be met immediately 'the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal.'[157] Obviously the substance and significance of the steps will depend on resources, but Yacoob J makes it clear that some steps must be taken, which is encouraging and could well help the UK to meet its obligations under the ICESCR, particularly because overall they are not a long way away from meeting them.

The South African approach has not been praised by all and those who believe it has not gone far enough almost all come to the same conclusion: the problem is that no immediate relief is provided to the plaintiff. Grant believes that 'it is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.'[158] This concern is one which could plague the UK if they do choose to incorporate socio-economic rights, as reasonableness in administrative law is not used as merits review. The lack of an immediately enforceable right to the plaintiff certainly takes the shine off the South African experience and is a lesson which the UK government will have to consider if they ever become serious about implementing socio-economic rights by way of domestic law.

Whilst the UK judiciary is well versed in using proportionality in a human rights sense due to the ECHR, their use of reasonableness review in administrative law must also be noted. There is a risk that if reasonableness review were to be implemented then there would be little change as the standard Wednesbury review would be used, which advocates that for a decision of a public authority to be unreasonable it must be 'so unreasonable that no reasonable authority could ever have come to it.'[159] However, it is more likely that given the advancements in Administrative Law and the development of anxious scrutiny review, especially in human rights cases, that this would be used instead. This would ensure that all administrative decisions that would potentially contradict the progressive realisation model are given an intensive review, and would ensure that more focus is given to the allocation of resources. The case of *R v Secretary of State for Defence Ex p Smith* is a particularly significant judgment in the development of anxious scrutiny review, with this submission from Mr. David Pannick QC being endorsed by Bingham M.R. that 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.'[160] The significance this may offer to a court judging upon a breach of socio-economic rights is obvious, because a strong justification would have to be offered for the decision to be held a rational one, and it would be less likely that a broad allocation of resources justification would be accepted. It would also help to ensure that retrogressive measures would be harder to justify, because if the resources were available in the first place then a strong justification would need to be forthcoming to convince the court that the switching of these would be reasonable.

In decisions under the HRA proportionality review is used, however, it does not necessarily follow that decisions under the ICESCR's socio-economic rights would be the same, as proportionality has only really grown in UK law since the HRA, and is a borrowed concept

[157] Ibid at para 45.
[158] Evadne Grant, 'Enforcing social and economic rights: The right to adequate housing in South Africa' (2007), *African Journal of International and Comparative Law*, vol. 15(1), p 25.
[159] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, per Lord Greene M.R., p 230.
[160] *R v Secretary of State for Defence Ex parte Smith* [1996] Q.B. 517, per Sir Thomas Bingham M.R., p 554.

from the European Court of Human Rights. It is certainly fit for its civil and political purpose, and may work in socio-economic enforcement, but the key problem would be that resource allocation involves many competing interests, rather than the classic deprivation of liberty against a matter of public interest, such as public security. It would be nigh on impossible for the judiciary to pick out all the competing interests and say definitively whether or not the issue in question is more or less important than one or more of them, and if so, which one it is significantly more important than.

John Laws, admittedly writing before the incorporation of the ECHR, believes that proportionality review has the characteristics to help the Court in deciding when a decision-making authority has ordered its priorities wrong, such as in the *Tandy* case discussed below. Laws describes proportionality review as such; 'the very essence of discretionary decision-making consists, surely, in the attribution of relative importance to the factors in the case. And here is my point: this is precisely what proportionality is about ... if we are to entertain a form of review in which fundamental rights are to enjoy the court's distinct protection, the very exercise consists in an insistence that the decision-maker is not free to order his priorities as he chooses.'[161] Laws puts it very succinctly, that proportionality could be used where it is possible that the decision-maker has placed considerations such as budgetary restrictions above the fundamental rights of the individual, where the proper order of considerations when reviewed proportionally would place the fundamental rights above them.

The *Tandy* case shows that the UK judiciary are not totally inept at considering Parliament's allocation of resources. In the case the House of Lords considered whether 'available resources' was a legal consideration in the reduction of educational support from five hours home tuition to three for a minor with a disability, despite the Education Act 1983 not being phrased in any way to suggest that resources should be a valid consideration.[162] They held that it was not,[163] and despite the case being one of administrative law nature and not of human rights discourse, it is still significant that they felt they could give a ruling that condemned a public authority for the way in which it spent the money given to it by Parliament.

Clearly, the progressive realisation method offers the most promise and the best fit with the UK constitution. However, there is still the problem of the method of review the judiciary would be capable of using. As discussed above, the preferred review option would be either proportionality or anxious scrutiny review. Goodwin believes that the fundamental rights distinction is an important one, and that the judiciary's constitutional role ensures that 'proportionality must only be used where Parliament has dictated.'[164] He also outlines that in administrative decisions which infringe fundamental rights, 'there is a strong normative reason for imposing a stricter standard of review.'[165] In conclusion, Goodwin makes a case 'for extending a higher and more searching standard of review (viz. proportionality) to decisions infringing all fundamental rights, not merely those protected by the HRA or European Union law.'[166] Here lies the problem, for proportionality review to be used in socio-economic rights, the method must be endorsed by the Parliament in a similar way to the HRA, making it constitutionally fundamental and therefore classifying the rights within as fundamental rights. However, anxious scrutiny was used for rights which were deemed fundamental before the HRA, so any kind of legislation which gave the rights within the

[161] John Laws, 'Is the High Court the guardian of fundamental constitutional rights?' (1993), *Public Law*, p 73-74.
[162] *R v East Sussex County Council ex parte Tandy* [1998] 2 W.L.R. 884.
[163] Ibid, 746-747 (per Lord Browne-Wilkinson).
[164] James Goodwin, 'The last defence of *Wednesbury'* (2012), *Public Law*, p 465.
[165] ibid pg 461.
[166] ibid pg 465.

ICESCR Parliamentary endorsement, such as a Bill of Rights, would potentially lead to the rights within being given anxious scrutiny review. However, it could well be argued that due to the UK's international obligations under the ICESCR, whether or not incorporated, socio-economic rights should be given anxious scrutiny review anyway.

In the context of housing rights, Kenna believes that the over-reliance on the reasonableness test (which would include anxious scrutiny reasonableness) 'reduces the effectiveness of housing rights and the universal minimum core obligation.'[167] Kenna makes a very good point here: the reasonableness test is probably the wrong one in relation to housing rights, a proportionality test being more appropriate in order to weigh up the competing interests of the applicant and the scarcity of available resources. This type of proportionality test would be in line with the ICESCR, because it would ensure that housing rights are fulfilled to the maximum of available resources. However, a proportionality and finite resource argument would not prevail if a breach of the minimum core obligation case was brought, so there would still be a need for a programme to be put in place to fulfil everybody's need for a home. This argument for proportionality also fits well with the right to healthcare, and would allow the courts to balance the needs of the individual and the health tourism concerns of the government.

5. Conclusion

The areas of socio-economic law which I have discussed are complex minefields of legislation. They give little hope to the everyday individual who believes they may have had their rights infringed, especially asylum seekers who may not even speak English. Even if they could understand the legislation, what my analysis demonstrates is that largely they could not rely on it to enforce their socio-economic rights.

The right to housing is the glaringly obvious area of UK law, which does not meet up to the standards of the ICESCR, with no enforceable right to housing and a clear problem with homelessness; this alone could be used to argue for the incorporation of the Covenant. There needs to be some kind of enforceable right to housing, or at least a better social welfare system such as the one used in the Netherlands to ensure that those who need the support get it, and to avoid the stigmatisation which is associated with homelessness in the UK at this moment in time. There is some evidence in the progression in the right to housing, with the House of Lords *R v Southwark* judgment ensuring that homeless persons aged 16 or 17 who required accommodation were to be provided with it under section 20 of the Children Act 1989.[168] A lack of a progressively free higher education system has also come to prominence in recent years, and the legal challenge against it demonstrates the futility of trying to rely on the ICESCR's provisions to protect substantive rights. This is one area where a sufficient justification may be forthcoming however, as the aim of a sustainable higher education system for all is better than the possibility of a slash in university places if the previous regime had continued. The right to health is an area where the non-discrimination provision of the ICESCR is especially tested, and one where the vulnerable are not treated in a way that is consistent with the ICESCR's values. Whilst the ECHR and its incorporation into UK law was a huge constitutional step, and one which has to be applauded in pushing the boundaries of UK public and constitutional law, it is not enough to protect socio-economic rights on its own, we can no longer rely on it to protect rights which it is not designed to protect.

[167] Padraig Kenna, 'Can housing rights be applied to modern housing systems?' (2010), *International Journal of Law in the Built Environment*, vol. 2(2), p 110.
[168] *Regina (G) v Southwark London Borough Council* [2009] UKHL 26.

An interesting area of UK law that could be particularly useful in the protection of socio-economic rights, especially if the Government were to go down the Bill of Rights route, is outcome duties. An outcome duty placed in a constitutionally significant bill of rights document would carry the weight which it deserves, and give the judiciary real authority to denounce the government or public authorities were they not on target, or did not achieve, their goal.

The comparisons with other states is something which is particularly useful when assessing the pitfalls of socio-economic protection in the UK, and it is clear that South Africa has been one of the most revolutionary states in this area. Their model of progressive realisation could be replicated in the UK, either through a Bill of Rights or the incorporation of the ICESCR directly into UK law. It matters not which one of these methods of transposition is chosen by Parliament, as long as the method of progressive realisation is used and all the rights incorporated into UK law match those of the ICESCR. The South African experience shows that there can be a model which incorporates all the ICESCR's approaches to give a wide-ranging rights system which does not guarantee immediate substantive rights, but does leave a duty on the government to ensure that progression is made, whilst still ensuring that there is at least some minimum level of protection of rights.

The irrationality area of UK law is somewhat confused, and there has not been the need to discuss it in great depth here. What has been noted is that socio-economic rights need to reach the heights of fundamental rights for them to be given anxious scrutiny review. A UK Bill of Rights would achieve this, and incorporating the ICESCR would lead to the potential for the use of proportionality review.

It seems unlikely that the government will allow the incorporation of the ICESCR, and with it the higher standard of review, due to their insistence that it does not need to happen. The best we can hope for is a Bill of Rights and a favourable judicial interpretation that allows them to subject socio-economic rights to anxious scrutiny review. The idea that the judiciary of this country are not up to the challenge is somewhat short sighted given the HRA and recent developments in UK public law, and after all, if the much less developed South Africa can do it, then it is certain that the UK can as well.

The protection of the right to health under the ECHR: Is imposing positive obligations the correct way to go?

Mag. Molly Kos, LL.M

Abstract

Although the ECHR was not foreseen to include Socio-Economic Rights, the European Court of Human Rights (ECtHR) has developed case law through which, in fact, it is protecting Socio-Economic Rights by interpretation of the rights as entailing positive obligations. The enforcement of the right to health through the ECtHR provides for a widespread examination of case law concerning the right to life, the prohibition of torture, the right to respect for private and family life, the right to freedom of thought, belief and religion, the right to freedom of expression and the prohibition of discrimination. This essay illustrates that although throughout the years the ECtHR has increasingly interpreted the enshrined Civil and Political Rights more broadly in accordance with the present day conditions in Europe's societies and laws, in the ECtHR's case law one will not find a system for imposing positive obligations, as the Court remains particularly reluctant to explicitly acknowledge their existence. Here, it is argued that although the ECtHR has not yet provided for systematization on positive obligations, it is enforcing the right to health through the latter concept and should continue to do so. It constitutes a major step for achieving the aim of overall human rights protection in Europe.

Keywords

Human Rights – Socio-Economic Rights – Right to Health – ECHR – positive obligations – ECtHR – ESCR.

1. Introduction

The right to health is not explicitly protected in most European constitutions or in one of the world's most influential human rights treaties, the European Convention on Human Rights (ECHR).[1] Despite this lack of the right to health in written law the standard of health care in Europe is steadily improving, however some issues, such as inequality in access to health care vary from state to state.[2] Therefore examining the right to health within this European context and in particular within the ECHR system provides for an in depth examination of the enhancement of human rights interpretation and thus the enhancement of human rights protection. The concept of positive obligations used by the European Court of Human Rights (ECtHR) helps to stretch the Convention Rights to the next level: the enforcement of the right to health through a convention on Civil and Political Rights.

[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.
[2] European Commission, *The EU explained: Public health*, at p. 4 http://europa.eu/pol/pdf/flipbook/en/public_health_en.pdf (accessed 23 March 2014).

This essay argues that the integrated approach[3] of protecting Economic, Social and Cultural Rights through treaties on Civil and Political Rights is one of the main ways Socio-economic Rights can step out of the shadow of Civil and Political Rights. It is described as 'the possibility of the treaty bodies in question to protect or at least take into account social and economic rights through their task to afford international protection to those rights explicitly covered by the treaties in question.'[4] This approach encourages the justiciability of Socio-Economic Rights through complaint procedures developed for Civil and Political Rights treaties.

This essay first outlines the human rights protection scheme in the Council of Europe (COE), showing the different approaches designed for the two categories of rights, socio-economic rights under the European Social Charter (ESC)[5] and civil and political rights under the ECHR. The focus of this article however lies on the ECHR, as the main field of examination is the enforcement of the right to health through Civil and Political Rights by imposing positive obligations.[6]

In the following section the right to health in its various shapes is discussed. The development of the right to health in an international perspective shows the tensions arising on questions of definition and scope. The General Comment No. 14[7] of the Committee of the International Covenant on Economic Social and Cultural Rights (ICESCR)[8] gives guidance and demonstrates the overlap of the right to health with other Socio-economic Rights as well as Civil and Political Rights, further examples will be drawn from the American Convention on Human Rights (ACHR)[9] and domestic jurisdictions. A comparative law analyses helps to show the varieties in approaching the right to health on an international as well as on a domestic level

In the following Part the focus lies on the approach of the ECtHR towards the right to health. A main part of the ECtHR's case law within this realm concerns prisoner rights, however this article does not examine this issue.[10] Instead, it will focus on cases dealing with the right to life, the prohibition of torture, inhuman and degrading treatment outside prisons, the right to family and private life, the right to freedom of thought, belief and religion, the right to freedom of expression and finally focus on the prohibition of discrimination in connection to these rights.

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[3] Asbjørn Eide, Catarina Krause, Allan Rosas, *Economic Social and Cultural Rights,* (Dordrecht M. Nijhoff, 2001) at 32.

[4] Martin Scheinin, 'Economic and Social Rights as Legal Rights', in above n 2, at 44.

[5] Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

[6] This article does not cover the European Social Charter as this treaty only covers Socio-Economic Rights.

[7] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

[8] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368(1967).

[9] Organization of American States (OAS), *American Convention on Human Rights*, San José, 22 November 1969.

[10] The right to health for prisoners triggers specific questions which have already been elaborated on extensively ie: H.R. Abbing, 'Prisoners Right to healthcare - a European Perspective' (2013), 20 (1) *European Journal of Health Law*, 5-19; Pauline M. Prior, 'Mentally disordered offenders and the European Court of Human Rights' (2007), 30 *International Journal of Law and Psychiatry*, 546-557; Rick Lines, 'The right to health of prisoners in international human rights law' (2008), 4 (1), *International Journal of Prisoner Health*, 3-53; Piet Hein van Kempen, 'Positive obligations to ensure the human rights of prisoners', in *Prison Policy and Prisoner's Rights. The Protection of Prisoner's Fundamental Rights in International and Domestic Law*, Peter J.P. Tak & Manon Jendly (eds) (Nijmegen Wolf Legal Publishers, 2008).

The final part looks at the positive obligations used to implement Socio-economic Rights, considering how imposing positive obligations can bring to life the right to health within the ECHR. The particular interest of this article is going to be the lack of full acknowledgement of positive obligations in the ECtHR's case law. The relationship between the powers of the ECtHR given by the COE member states and the member states willingness to accept the obligations imposed on them by the Court will be at issue. Linked to this the lack of systematisation in the Court's case law on positive obligations it is examined, to determine whether this might endanger the predictability of the outcome of the cases and might lead to member states opposing the Court's decisions.

2. The Scheme of Socio-Economic Rights Protection in Europe

With the adoption of the ECHR in 1950 one of the milestones in European cooperation on the protection of human rights and the maintenance of peace was achieved. However it was only in 1961 when the ESC was adopted, that a full system of human rights protection was established. This triggers the question of why the ECtHR is considering socio-economic Rights, although the Convention only entails protection for the socio-economic right to education.[11]

Under the Convention, States as well as individuals are eligible to lodge a complaint with the Court against any COE member state due to an alleged violation by the member state.[12] The ESC however, is built upon a state reporting system and has introduced a system of collective complaints.[13] In Article 1 of the Additional Protocol the types of organisations able to make a complaint are set out. These include international and national unions and international NGO's. Under Article 2 of the Additional Protocol national NGO's are eligible to make a complaint, however this provision allows states to declare whether they will accept complaints from national NGO's. After having met the admissibility requirements[14] and the complaint is signed by a person authorised to represent that complainant organisation,[15] the ECSR proceeds to examine the merits.[16] Due to the fact that the ESC provides a collective complaints system, there is no victim requirement, no requirement to exhaust domestic remedies and no time limit for bringing the complaint.[17] The decision of the European Committee of Social Rights (ECSR) is transmitted to the Committee of Ministers, which is expected to adopt a resolution on the complaint.[18] However it is argued that 'the Committee of Ministers has shown reluctance in ensuring the

[11] Article 2 Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, N 009, 20 March 1952.
[12] Article 34 and Article 36 ECHR.
[13] Council of Europe, *Additional Protocol of 1995 providing for a system of collective complaints*, 9 November 1995, CETS No. 158; until now 98 complaints have been lodged http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.pdf. (accessed on April 11 2013).
[14] Ibid. at Article 4.
[15] Governmental Committee of the European Social Charter and the European Code of Social Security, Rules of Procedure, GC (2012)03, 27 March 2012, at Rule 23.
[16] Council of Europe, above note 13 at Article 7.
[17] Holly Cullen, 'The collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009), 9 (1) *Human Rights Law Review* 61, at 64.
[18] Council of Europe, above note 13 at Article 9.

implementation of findings of the European Social Committee'[19] and this raises concerns over 'politicisation of a process that ought to be an independent and quasi-judicial one.'[20]

The two systems demonstrate the historical and in practice still existent division of Socio-economic Rights and Civil and Political Rights. The former were and sometimes still are considered to be non-justiciable, due to the fact that they are allegedly framed too broadly and in imprecise language.[21] Socio-economic rights have often been regarded as being inherently social and political decisions within the power of the executive and thus it has been argued that a judicial organ would not have the legitimacy to deal with them without infringing the concept of separation of powers.[22] These arguments are best countered by the analysis of Sandra Fredman who disagrees with these assumptions and argues that 'if positive duties, which are often related to Socio-Economic Rights, are in fact indeterminable, politicians too will have difficulty in settling on standards.'[23]

Furthermore, national courts are now beginning to consider socio-economic rights. Examples can be found in cases before the Indian Supreme Court[24] where the Directive Principles of State Policy (DPSP)[25] are used to interpret Civil and Political Rights, or in Columbia where the Constitutional Court held in several cases that Socio-economic Rights are justiciable when connected with a fundamental right enshrined in the constitution, and that in relation to the right to health a failure to provide access to health services amounts to a violation of the right to life.[26]

As demonstrated, the approach to Socio-economic Rights through the ECHR is not without controversy but it has the advantage of filling a gap of protection. From the indivisibility of human rights it follows that 'every right – regardless of whether it is classified as a civil, political, economic, social or cultural right – requires both abstention and positive action by the state, and there is hardly any right that does not require resources to be implemented and protected.'[27] Accordingly, this essay posits that there is no reason why the ECtHR should not proceed in approaching Socio-Economic Rights, especially when there is a demand in having an independent judicial body without any political interference operating under an individual complaint system to adjudicate on these violations.

3. The Right to Health in International Law

[19] Robin Churchill & Urfan Kahliq, 'The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with Economic and Social Rights?' (2004), 15 (3) *European Journal of International Law* 417, at 448.
[20] Ibid. at 449.
[21] Ibid.
[22] Virginia Mantouvalou 'The Case for Social Rights' in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights,* (Oxford, Hard Publishing, 2010), at 19.
[23] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, New York Oxford University Press, 2008) at 71.
[24] *Parmanand Katara v Union of India* (1989) 4 SCC 286 (India Supreme Court).
[25] In Part IV of the Indian Constitution last amended 2011: Articles 36 to 51, Article 38 (emphasis added). See further in part 3 of this article.
[26] Case T- 484/1992, 11 August 1992; Case T – 328/1993, 12 August 1993 (Columbia Constitutional Court).
[27] Christian Courtis, 'Standards to make ESC Rights justiciable: A summary exploration' (2009), 2 (9) *Erasmus Law Review*, 379, at 381.

Historically the right to health has existed for centuries. Although unenforceable, it provided the public with health care for free.[28] Only after the Second World War was the right to health defined at an international level in the World Health Organizations' Constitution Preamble: 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[29] In 1948 the right to health became part of the UN framework, introduced in Article 25 of the Universal Declaration of Human Rights[30] and later was included in Article 12 (1) ICESCR which obliges states to *'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*'

The term '*highest attainable standard of health*' is one of many used: the African Charter on Human and Peoples' Rights refers to the '*best attainable state of physical and mental health*[31]' and the ESC entails an obligation for the member states to place measures that ensure the '*effective exercise of the right to protection of health.*'[32]

When examining these various broad definitions it follows that the right to health must be examined from the individuals' perspective.[33] One must rely on the geographic, cultural and socio-economic factors of the individual claiming the right. For this reason it is necessary to distinguish between a core right and the preconditions underlying the enjoyment of the right in every individual circumstance. The General Comment No. 14 introduced a minimum core, not without controversy,[34] below which no state is allowed to go.

The interdependence, indivisibility and interrelatedness of human rights[35] are shown by the underlying preconditions necessary to enjoy the right to health.[36] Without clean and safe drinking water, lack of sanitation or without having the proper nutrition, especially when it concerns the most vulnerable groups, such as children, women and elderly people, the right to health cannot be realised.[37] These underlying preconditions themselves can *inter alia* be subsumed under the right to water as well as the right to food. Furthermore the right to education and with it the right to be adequately informed and educated on matters of food and water as well as health should be seen as another important underlying precondition for realising the right to health.

[28] Paul Pfeiffer, *Das Allgemeine Krankenhaus in Wien von 1784,* (Berlin LIT, 2012): The general hospital in Vienna opened for the public in 1748.
[29] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p 100), entered into force on 7 April 1948.
[30] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (UDHR).
[31] Article 16 African Union, *African (Banjul) Charter on Human and Peoples' Rights*, adopted June 27, 1981; OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[32] Article 11 ESC.
[33] GC 14, above note 7 at para 9.
[34] *Minister of Health v Treatment Action Campaign (TAC*) [CCT 8/02] (South Africa) at para 34: "...the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them."
[35] Vienna Declaration and Programme of Action (A/CONF.157/23), adopted by the World Conference on Human Rights, held in Vienna, 14–25 June 1993.
[36] See also the close relationship established in Article 25 of the UDHR.
[37] GC 14, above note 7 at para 40.

Access to health information can be seen as one of the main underlying preconditions necessary for the realization of the right to health.[38] Within the concept of accessibility the right to have access to health information is included.[39] Its importance was emphasised by the IACHR stating that 'the right to have access to health information ensures that every individual is able to make free and informed decisions with regard to intimate aspects of his/her life.'[40] The power of having information as well as being educated on health issues, relates to numerous other rights such as freedom of expression, right to family life, right to personal integrity and non-discrimination.[41] Without having the necessary information no one is able to have full enjoyment of rights, as one is not able to make informed decisions from the wide range of possibilities before them.[42]

In addition, the right to health also serves as a requirement for enjoying other rights. Without being in a good physical and mental health state, an individual cannot pursue the enjoyment of other rights such as the right to work or education.[43] It is one of the main preconditions for avoiding slipping into poverty.[44] The argument of Yamin that 'the General Comment No. 14 tries to clarify the normative content of the right to health and erode arguments that the right to health cannot be a fundamental, and enforceable, principle in law and policy making in this realm',[45] has to be emphasised. General Comment No. 14 provides guiding principles on how to achieve the full enjoyment of the right to health. Such principles include availability of health services, financial, geographical and cultural accessibility, quality of health services and equality to have access.[46] Availability requires a state to take measures to make available 'functioning public health and health care facilities, goods and services, as well as programs.'[47] Health services have to provide for a certain standard of health care equally, notwithstanding certain cultural practices that have to be acceptable and do not run counter to the health of the individual.[48]

When looking at the issue of minimum core requirements, arguments can be made for and against a universal or country-based system. Although the latter would probably mean very intense and costly monitoring of every single state more regularly to raise the minimum core, it appears to be the only possibility to comply with Article 2 ICESCR which orders states to take steps to the maximum of their available resources to achieve progressively the full realisation of the rights recognized, even when financial resources are tight. The only immediate obligation of states is to provide the minimum core and to guarantee the non-discrimination in enjoyment of the right.[49] Thus imagining a universal minimum core could run counter the progressive realisation of the right to health. In particular, financially weaker states could refrain from even trying to rise up to such a universal minimum core standard. A high threshold would have to be put in place to assure that those states with

[38] Ibid. at para 11.
[39] Ibid. at para 12b.
[40] IACHR, 'Access to Information on Reproductive Health from a Human Rights Perspective', OEA/Ser.L/V/II. Doc 61, 22 November 2011, at 5.
[41] GC 14, above note 7 at para 3.
[42] Ibid. at para 11.
[43] Ibid. at para 3.
[44] Stephen P Marks, 'Poverty' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds.) *International Human Rights Law*, (Oxford, Oxford University Press, 2010) at 620.
[45] Alicia Ely Yamin, 'Not just a tragedy: Access to medications as a right under international Law' (2003) 21 *Boston University International Law Journal*, 325, at 330.
[46] GC 14, above note 7 at para 12.
[47] Ibid. at para 12a.
[48] Ibid. at para 12d and 12c.
[49] Article 2(2) ICESCR.

functioning health care systems and thus those which have a high standard of health care, do not enact retrogressive laws or implement measures that do not progressively improve the right to health.

The well-known tripartite typology for state obligations is "to respect, to protect and to fulfil"[50] is also used for the right to health. 'To respect' implies that states must 'refrain from denying or limiting equal access' for all.[51] Within the obligation 'to protect' states have an obligation to prevent non-state-actors to infringe the right to health, for example ensuring that privatisation of health services will not infringe the accessibility of health services or that traditional practices are not forced on the individual, among other actions or omissions. It also raises the issue of human rights obligations of transnational corporations. Environmental hazards emerging out of acts of companies which lead to the decline of the state of health of people, as well as the obligations of pharmaceutical corporations on the accessibility and availability of medicine can be approached through this obligation.[52] Lastly, 'to fulfil' includes 'the obligations to facilitate, provide and promote'.[53] States are required 'to give sufficient recognition to the right to health in national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health.'[54]

A. Comparative regional and domestic case law from jurisdictions outside europe enforcing the right to health

At the regional level under the ACHR the right to life is often interpreted broadly in order to protect the right to health. This approach is evident in a recent decision by the Inter-American Commission that deals with the refusal of El Salvador to purchase 'triple therapy' and other medications which prevent death and improve quality of life for people living with HIV.[55] As the Commission is not eligible to decide on individual petitions claiming Article 10 of the Additional Protocol of El Salvador, the issue was once again considered under Article 4.[56] It was emphasised that the right to life is more than merely not dying but requires the enjoyment of a certain quality of life and well-being. Thus, not providing this medication was violating Article 4 and furthermore supported the discrimination and stigmatization of HIV-infection.

One of the most influential cases on the right to life is *Ximenes-Lopes v. Brazil.*[57] The case concerns the degrading and inhuman treatment of a person with mental illness in a private psychiatric clinic operating in the public health system, and the subsequent death of this person, due lack of adequate health care conditions in this hospital . It was held that 'due to the essential nature to the right to life, no restrictive approach thereto is to be admitted.'[58] The IACtHR emphasised the importance of positive obligations to prevent violations and thus the necessity of establishing a legal framework that allows deterring any threat to the right of life.[59]

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[50] GC 14, above note 7 at para 33.
[51] Ibid. at para 34.
[52] Ibid. at para 35.
[53] Ibid. at para 33.
[54] Ibid. at para 36.
[55] *Jorge Odir Miranda Cortez et al. v. Salvador,* IACHR Report No. 27/09 (2009).
[56] Right to life; only the right to education and trade unions under the Protocol of San Salvador can give rise to legal petitions.
[57] *Ximenes-Lopes v Brazil*, IACtHR, Merits, 4 July 2006 Series C no 149 (2006).
[58] Ibid. at para 124.
[59] See further a case on the failure of authorities of an effective investigation of the death of a girl in a private hospital *Albán-Cornejo et al v Ecuador*, IACtHR, Merits, 22 November 2007 Series C no 171 (2007).

In the case of *Yakye Axa Indigenous Community v. Paraguay*[60] the IACtHR dealt with the right to own and possess territory and the failure of the state in leaving the indigenous community in a vulnerable situation in terms of food, medical and public health care; a failure through which Paraguay constantly threatened their survival. Although this case concerned the right to own and possess territory the IACtHR referred back to its case law under the right to life and stated that 'the right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one. When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist.'[61] This case is a perfect example of the interdependence and interrelatedness of rights in the health sphere and the importance of ensuring its underlying preconditions.

Furthermore, a currently pending petition at the IACtHR, *Community of La Oroya v Peru,*[62] deals with claims of environmental contamination caused by a complex that resulted *inter alia* in the violation of the right to health. The application argues that Peru failed to comply with its positive obligations under environmental and health regulations. The complex belongs to a US company which raises one of the core problems of the state's positive obligations for third parties infringing the right to health. As Spieler argues 'if this case comes to the IACtHR and is decided in favour of the petitioners it would be the first ruling on the violation of human rights of a non-indigenous community caused by the contamination of the environment.'[63] A more detailed insight in to the relationship between environmental hazards and the right to health is provided in Part 3, when examining the ECtHR approach.

Due to the fact that the IACtHR and the ECtHR are the only regional human rights courts it is necessary to also look at the domestic level and thus filter out those domestic courts that show the most progressive stance towards the right to health. As Birgit Toebes argues 'states are the entities best suited for creating basic conditions under which the health of the individual is protected and possibly even enhanced.'[64] By building up on this argument this author argues that states are the entities engaged by international human rights law and therefore have to respect, protect and fulfil their obligations within this realm even if there is a private health care system. In case of privatisation of the health sector they still have to ensure the right to health by exercising due diligence and control. This applies to the ECHR scheme as the ECtHR has held that when a state relies on private organizations to execute essential public functions it still carries the responsibility for a breach of the Convention Rights by the former.[65] The Special Rapporteur on the Right to Health Paul Hunt appointed by the UN Human Rights Council found that the right to health was enshrined in over sixty national constitutions by 2003.[66] A subsequent survey in 2004 counted 67.5% of constitutions had provisions regarding health or health care.[67] Recent examples of

[60] *Yakye Axa Indigenous Community v Paraguay*, IACtHR, Merits, 17 June 2005 Series C no 125 (2005).
[61] *Street Children Case (Morales v Guatemala),* IACtHR, Merits, 19 November 1999, IACtHR Series C no 63 (1999), at para 139.
[62] *Community of La Oroya v Peru* Admissibility Decision IACHR Report No. 76/09.
[63] Paula Spieler, 'The La Oroya Case: The Relationship between Environmental Degradation and Human Rights Violations', (2010-2011) 1, *Human Rights Brief* at 19.
[64] Birgit Toebes, 'The Right to Health', supra note 3, at 169.
[65] *Van de Mussele v Belgium* (App no 8919/80) Merits, 23 November 1983 (ECtHR), at para 29.
[66] Report of the Special Rapporteur Paul Hunt, 'The Right of Everyone to the Highest Attainable Standard of Physical and Mental Health', submitted in accordance with Commission Resolution 2002/31, U.N. ESCOR, 59th Sess., Agenda Item 23, 20, U.N. Doc. E/CN.4/2003/58.
[67] Eleanor Kinney and Brian Clark, 'Provisions for Health and Health Care in the Constitutions of the Countries of the World' (2004) 37 *Cornell International Law Journal*, 285 at 291; See *inter alia* a right

cases on the right to health at a national level can be found *inter alia* in Kenya[68] and in South Africa.[69]

In a Kenyan case an intersex person who was raised as a male was exposed to strip searches by guards while in prison.[70] He was restricted from obtaining a birth certificate and thus was not able to obtain an identification card which would have enabled him to get a job, health care, right to adequate housing or to vote.[71] At the time of the decision of this case the new Constitution of Kenya was not yet operative, thus the court only found a violation of his rights in the case of the strip searches, but did not find discrimination because of his intersex status.[72] The newly enacted Kenyan constitution entails a provision on equality and prohibition of discrimination which would have allowed[73] the court to find a violation of the right to health due to the discrimination on the grounds of the health status of the applicant.

In the Argentinian case of *Mariela Viceconte v Ministry of Health and Social Welfare,*[74] it was claimed that the state had to ensure the manufacturing of a vaccine against Argentine haemorrhagic fever. The Court of Appeal ruled the positive obligation of the state to manufacture the vaccine for those who lack access and set a legally binding deadline for the obligation to be met. Byrne notes that: 'This case had an immense political impact, as five years later Argentina had developed a social plan to deliver basic medicines.'[75] It shows that progressive decisions by courts on imposing positive obligations within the realm of the right to health can have an important impact on the right to health. Particularly vulnerable groups were rejected access to the most basic health services. The court did, by not refraining to decide on a cost intense and thus highly political issue, provide for access to health services to those who needed it the most, but would have probably not been able to access this vaccine in the near future.

In regards to the prohibition of discrimination the Canadian case of *Eldrigde v British Columbia*[76] stands out. The applicants, born deaf, complained about lack of sign interpreters in the health sector as this impaired their ability to communicate with health care personnel and thus increased the risk of misdiagnosis and ineffective treatment.[77] The Court found that 'hospitals providing medically necessary services carry out a specific governmental objective. [78] 'The failure to provide sign language interpreters - is intimately connected to providing medical services as instituted by the legislation.'[79]

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to free medical services and a right to health Constitution of Guyana 1980 Article 25 or a right to a healthy environment and the right to enjoy the highest possible standard of mental and physical health Constitution of Hungary 2011 Article 70/D.

[68] *R.M. v Attorney General & 4 others* (2010) eKLR (Kenya); Kenyan Constitution 2010 Article 43(1)(a) Right to health.

[69] Inter alia *Soobramoney v Minister of Health* (1997) CCT 32/97 (Republic of South Africa); Constitution of the Republic of South Africa 1996 Article 27(1)(a).

[70] *R.M v Attorney General & 4 others* at para 10.

[71] Ibid. at paras 30-32.

[72] Ibid. at para 136.

[73] Kenyan Constitution Article 27, in particular Article 27(5) on the discrimination on the grounds of a health status.

[74] No 31.777/96 (1998) (Argentina Federal Administrative Court of Appeals of Argentina, Fourth Chamber).

[75] Byrne at 528.

[76] 3 SCR 624 (1997) (Court of Appeal British Columbia, Canada).

[77] Ibid. at p 2.

[78] Ibid. at p 6.

[79] Ibid.

However Indian courts can be considered to be one of the most progressive domestic courts when it comes to Socio-economic Rights protection. India has chosen to take the path of introducing DPSP which entail Socio-economic Rights that should guide the decisions of the state and that have to be applied in the judicial process. After years of non-recognition, the Indian Supreme Court held that 'harmony has to exist between the fundamental rights and the DP, due to being a basic feature of the Indian constitution.'[80] The Indian constitution does not entail a right to health but courts still hand down progressive decisions when interpreting the right to life. 'This in fact resulted in accusations of judicial activism, but was justified by the Supreme Court as being necessary to make up for the lack of a strong executive and legislature.'[81]

The case of *Pt. Parmanand Katara v Union of India*[82] concerned an injured person being denied medical treatment by doctors in several hospitals. The Supreme Court held that there is an obligation for those in charge of the health of the community to preserve life and this obligation is absolute and total.[83] Similar issues were raised in a case where a person was denied medical treatment in several hospitals after in the end being treated in a private hospital.[84] It was held that due to India providing a welfare system on the regional as well as state level, therefore the state does have the obligation to give every person in need the necessary medical care.[85] The Indian Supreme Court also dealt with the question of banning a number of hazardous drugs in the case of *Vincent Panikurlangara v Union of India*[86] and found that the state has an obligation to ensure that medicines are available at reasonable prices, so as to be within the common man's reach.[87] These set of cases demonstrate that the Indian Supreme Court does not hold back with enforcing the right to health through the application of a traditional Civil and Political Right.

4. The ECtHR approach to the right to health

The ECHR is a regional human rights treaty with a range of varying conceptions on the right to health throughout the member states. Thus an autonomous approach and interpretation can lead to controversies, especially within the realm of reproductive health care as there are vast cultural differences throughout the 47 member states. Also important to consider are the different systems of health care, ranging from free health care in the UK for everyone to the concept of obligatory insurance based health-care in a number of other COE member states.[88] Additionally the quality of health care diverges and the concept of equal access gives rise to issues on private health care systems as well as discrimination. However, in general the argument that 'the minimum core in

[80] C. Raj Kumar & K. Chockalingam, *Human Rights, Justice, & Constitutional Empowerment*, (New Delhi, Oxford Oxford University Press, 2007) at 33; *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 (India).
[81] Jennifer Sellin, 'Justiciability of the Right to Health – Access to Medicines, The South African and Indian Experience' (2009) 2 (4) Erasmus Law Review 445, at 463.
[82] supra note 24.
[83] Ibid. at 998.
[84] *Paschim banga Khet Samity v State of West Bengal*, 6 May 1996, 1996 SCC (4) 37 (India Supreme Court).
[85] Ibid. at para 9.
[86] 1987 AIR 990 (India Supreme Court).
[87] Ibid. at 479-480.
[88] Christian Hans Fendt, *Gesundheitssysteme der Europäischen Union: Österreich und das Vereinigte Königreich im Vergleich*, (Wien Universität Wien Fakultät Wirtschaftswissenschaften, 2010).

Europe has generally already been realised through the welfare state'[89] has strong support.

The issue of minimum core and the concept of progressive realisation came to the ECtHR's attention and was solved by using the well-developed concepts of 'margin of appreciation'[90] and proportionality. When analysing the common European standard the financial landscape of the COE member states has to be emphasised as there is great diversity in economies and state structures. Thus, while maintaining a uniform human rights standard throughout the COE would be highly ideal, it may not be feasible for some of the member states due to financial and structural restraints. The best way to remedy this problem is through adjusting the positive obligation to the particular circumstances in a certain state and thus using the concept of margin of appreciation. Also to avoid a decline of progressive realisation Fredman argues that 'attempts of the Member States for retrogressive measures should trigger a heightened level of justification.'[91]

Regarding the concept of positive obligations, the rights enshrined in the ECHR used to be perceived as negative obligations for the state, but it was soon recognized that 'it does not make a difference for the applicant whether the violation of his or her rights was caused by an act of the state or by any other cause.'[92] Thus the ECtHR does not distinguish between the tripartite of state obligations, but only uses positive and negative obligations. The former designate the protective duty of the state to guarantee the realisation of human rights. The latter require the state to refrain from infringing those rights. However it can be agreed that 'this division does not depend on the action or omission of an authority, but whether the human right can be realised with or without the state's assistance.'[93]

The ECtHR does not protect Socio-economic Rights in an overwhelming manner. This can be seen in practice by its rejection of numerous cases at admissibility level.[94] However emphasis has to be given to the fact that Socio-economic Rights are included in the ECHR,[95] the interrelated and indivisible nature of human rights shows the inevitable link with Civil and Political Rights, which the Court has recognised in its case law. The first time the Court dealt with the relationship between the two sets of rights was a case concerning a woman seeking free legal assistance for judicial separation proceedings against her husband in Ireland.[96] Emphasising the indivisibility of human rights the Court held that '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 from the field

[89] Sandra Fredman, 'New Horizons: Incorporating Socio-economic Rights in a British Bill of Rights', (2010), *Public Law Oxford Legal Studies Research Paper* No. 56/2010, 297, at 308.
[90] *Handyside v UK* (App no 5493/72) 7 December 1976 (ECtHR), at paras 48-49.
[91] Fredman 'New Horizons' above n 89 at 12.
[92] Cordula Dröge, 'Summary Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention', in Bogdandy and others (eds.) *Beiträge zum ausländischen Recht und Völkerrecht Volume 159*, (Köln Springer, 2003), at 384.
[93] Ibid. at 380.
[94] *Pançenko v Latvia* (App no 40772/98) Dec., 28 October 1999 (ECtHR): 'The Convention does not guarantee, as such, socio economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.'
[95] Eva Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights', in *Exploring Social Rights: between theory and practice,* Daphne Barak-Erez and Aeyal Gross (eds) (Oxford Hart, 2007) at 138.
[96] *Airey v Ireland* (App no 6289/73) Merits, 9 October 1979 (ECtHR).

covered by the Convention.'[97] As will be seen next when examining the cases, the Court has applied this rule in varying degrees.

A. The Right to Life

The right to life is used throughout regional human rights courts as well as domestic courts to enforce the right to health. Jurisdictions in South America, India and the ACHR[98] interpret the right to life and in particular its scope in various ways. This extensive use has not arrived at the ECtHR yet as it takes a cautious approach towards Article 2 of the Convention and the right to health.

Article 2 entails a negative obligation for state parties not to infringe the right to life of every individual under their jurisdiction by law.[99] Furthermore the deprivation of life is only regarded as lawful as long as it is absolutely necessary and occurs under one of the aims set out.[100] The common test of proportionality in the Convention is 'necessary in a democratic society'[101], but as was set out in *McCann and others v UK*[102] 'the test of 'absolute necessity', indicates that a stricter and more compelling test must be employed from that normally applicable.'[103] Already through the wording of Article 2 (2) ECHR 'absolutely necessary', it is evident that this stricter standard of necessity has to be applied in all cases of the right to life. In the same case the Court held that Article 2 also imposes a positive obligation on the Member states to investigate when a death occurred in breach of this Article.[104]

The Court's cautious approach towards the right to life is evident in the admissibility decision of *Nitecki v Poland*[105] where the Court had to decide on the refusal to refund the full price of a life-saving drug by the state. The Court held that an issue may arise under Article 2 'where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.'[106] But it concluded that the applicant had the same care available as all patients and as 70% of the drug was refunded, paying the remaining 30% by himself did not violate his right to life.[107] In a recent case concerning free medical treatment for a terminal disease patient, *Panaitescu v Romania,*[108] the Court held that the order by the Romanian court for authorities to provide the applicant with the prescribed medication and reimburse him any costs was not enforced and thus violated his right to life.[109] However, the delayed and partial enforcement of the judgment led to the deterioration of the applicant's health and culminated in his death.[110] Furthermore the Court held that 'as it is not open to state authorities to cite lack of funds or resources as an excuse for not honouring a judgment debt, the same principle applies *a fortiori* when there is need to secure the practical and effective protection of the right protected by

[97] Ibid. at para 26.
[98] American Convention above note 9: Article 10 Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights art 19.6, 17 November 1988, O.A.S.T.S No. 69 (entered into force 16 November 1999) (Protocol of San Salvador).
[99] Article 2(1) ECHR.
[100] Article 2(2) ECHR.
[101] Article 8-11 ECHR.
[102] (App no 18984/91) Merits, 27 September 1995 (ECtHR).
[103] Ibid. at para 149.
[104] Ibid. at para 161.
[105] (App no 65653/01) Merits, 21 March 2002 (ECtHR).
[106] *Cyprus v Turkey* (App no 25781/94) Merits, 10 May 2001 (ECtHR) at para 219.
[107] *Nitecki* under the subheading "the law" at para 1.
[108] (App no 30909/06) Merits, 10 April 2012 (ECtHR).
[109] Ibid. at para 31.
[110] Ibid. at para 31-34.

Article 2.'[111] Indian case law and the Argentinian case of *Mariela Viceconte v Ministry of Health and Social Welfare*, as examined above, take up a progressive and far reaching approach on access to free medication. However transferring this approach to the ECHR system is rather problematic. Due to different systems of health care and differing degrees of development of the welfare state as well as varying financial resources and different levels of constitutional acknowledgement of the right to health. Although the ECHR sets binding obligations, regardless of factors in the member states the right to health is not included in the ECHR and thus the states willingness in complying with their positive obligations that in fact result in the protection of the right to health can sometimes be rather small. However some of these issues could be circumvented by allowing a wide margin of appreciation but the lack of financial resources would still govern the concerns of those states lacking the very same. The case of *Panaitescu* and the Courts' negative stance on a state arguing a lack of resources has to be seen as a step forward. On the other hand the Court has already dealt with the issue of free medication in *Nitecki* and emphasised the non-discrimination of the applicant due to having had the same care available as everyone else and thereby only went so far as to ensure the equal access to health care within a state.

Turning to cases of medical negligence in *Calvelli and Ciglio v Italy*[112] the Court did not find a violation of Article 2, due to the fact that the applicants had waived their right to further pursue proceedings against the doctors responsible through their settlement with the health authorities in the civil proceedings.[113] However the Court held that the principles of not intentionally taking lives and especially taking appropriate steps to safeguard lives under the state's jurisdiction also apply to the public-health sphere. The positive obligations under Article 2 therefore require states to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives.[114] These include an effective judicial system to hold those accountable for death through negligence.[115]

India's jurisprudence on expanding the right to life to approach the right to health is a pioneering approach, particular in cases of emergency health care. However cases on emergency treatment have not come before the ECtHR. This may result from the fact that the standard of health-care throughout the member states is very high. As the Indian cases relate to individuals coming from poor backgrounds and facing extensive discrimination, the courts' progressive and immediate approach to protect their lives seems better fitted for this particular situation. In the COE member states discrimination does not necessarily relate to emergency treatment where there is a risk of life, but as will be seen below, often occurs in cases on access to a specific health treatment or the manner in which it is provided. Hence although welcoming the broad concept of the right to life used by the Indian courts, it might be hard to convert it into a regional system with differing degrees of health care and cultural and moral diversities.

The right to life has the status of *ius cogens*[116] and has been expanded throughout the years to approach the right to health. The ECtHR uses it in cases of medical negligence and lack of effective investigation, but never went as far as the Indian courts in recognising a broader more comprehensive concept of the right to life. However in the case of *Guerra and Others v Italy*[117], approached under Article 8, Judge Jambreck in his

[111] Ibid. at para 35.
[112] (App no 32967/96) Merits, 17 January 2002 (ECtHR).
[113] See *Powell v UK* (App no 45305/99) Dec., 4 May 2000 (ECtHR).
[114] *Calvelli and Ciglio* at paras 48-49.
[115] Ibid. at para 53.
[116] Yamin, above note 45 at 330; *Street Children Case* above note 61at para 139.
[117] (App no 116/1996/735/932) Merits, 10 February 1998 (ECtHR).

concurring opinion took a more progressive stance than the ECtHR generally does when arguing that protection of health and physical integrity is closely associated with the right to life. Thus the idea of stretching the right to life to protect the right to health more fiercely can be found within the Court, but it has not until now fully arrived within the Courts' case law. It will be seen for how long the Court will hold up this conservative approach towards the right to life and will proactively recognise a right to health within the right to life.

B. Prohibition of Torture, Inhuman and Degrading Treatment

Next, emphasis is placed on Article 3 and the prohibition of torture, inhuman and degrading treatment. There is a clear distinction between torture and inhuman and degrading treatment derived from the case law of the Court,[118] relating to the intensity of the act. 'To determine the severity or intensity of the suffering, factors such as duration, the physical and mental effects it has on the person, sex, age and state of health of the victim and the manner and method of its execution have to be taken into account.'[119] Furthermore the '*Drittwirkung effect*' of Article 3 has to be stressed, under which member states are under an obligation to prevent that individuals under their jurisdiction are subjected to torture or inhuman and degrading treatment by other individuals and not just by state agents.[120] It is one of the crucial positive obligations imposed on the member states next to the obligation to investigate on allegations of a violation of Article 3.

Probably one of the best-known cases in relation to the right to health before the Court is *D. v UK*.[121] The case of an HIV infected person on the edge of being extradited to the Caribbean has been the only case where the Court has held that the loss of medical treatment in the UK would shorten the life expectancy and thus the person should not be extradited.[122] Since then all subsequent applications on stopping extraditions on health grounds were rendered inadmissible by the Court.[123] It is the Court's established case law that 'advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably'[124] yet Article 3 should only be used in very exceptional cases. The Court considers it of great importance that 'Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.'[125]

A probable reason for this harsh jurisprudence on the issue of allowing the state of health as a ground not to be expelled is the already existing backlog of cases, thus opening up the jurisprudence for Article 3 and more generously restricting expulsions would put the Court in an even tenser situation with regard to its workload. Although acknowledging this, a softening of the approach and lowering the threshold for what is considered as a very exceptional case would nevertheless be welcomed.

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[118] *Dikme v Turkey* (App no 20869/92) Merits, 11 July 2000 (ECtHR), at para 93.
[119] Aisling Reidy, *A guide to the implementation of Article 3 of the European Convention on Human Rights*, Human Rights Handbooks No. 6, (Strasbourg COE, 2002) at 12.
[120] Ibid. at 37.
[121] (App No 30240/96) Merits, 2 May 1997 (ECtHR).
[122] Ibid. at para 53.
[123] See inter alia *N. v UK* (App no 26565/05) Merits, 27 May 2008 (ECtHR).
[124] Ibid. at para 44.
[125] Ibid.

In regards to reproductive rights, in the case of *R.R v Poland*[126], the applicant asked for an abortion due to suspected malformation of the foetus, but was not able to obtain further tests due to the refusal of doctors and hospitals. Subsequently it was too late to terminate the pregnancy legally. The Court held that she was entitled as a matter of domestic law to avail herself of several diagnostic services but the doctors did not give her the proper and timely attention she needed.[127] Thus the state of vulnerability and the failure of the doctors reached the threshold of Article 3.

Staying within the right to health of women and their reproductive integrity, the Court found a violation of Article 3 in the case of *V.C. v Slovakia.*[128] The applicant, a woman of Roma origin, was sterilised during the delivery of her second child. The Court held that it appeared that she had not been fully informed about her health status, the procedure and alternatives and furthermore to request her consent while being in labour and shortly before going into surgery did not permit her to take a decision of her own free will.[129] 'The sterilisation grossly interfered with her physical integrity as she was thereby being deprived of her reproductive capability'[130] without any medical indication and lack of her informed consent. Forced sterilisation violates the core right of reproductive self-determination, performing it on one of the most vulnerable communities living in Europe runs against any of the aforementioned principles on the right to health. Thus the Court had a duty to condemn Slovakia for allowing those horrible practices to happen and not responding to them. Unfortunately it has been observed that such acts have not stopped and that disabled women are also frequently targeted.[131]

C. The Right to Family and Private Life

Enshrined in Article 8, the right to respect for private and family life is a qualified right, and therefore the state has to prove that the interference happened pursuant to a legitimate aim and was necessary in a democratic society which is determined by a proportionality test. In cases concerning the right to health emphasis is put on the notion of 'private life' as it protects the physical and moral integrity of a person.[132]

In a case concerning forced sexual intercourse of a minor, the Court held that 'private life is a concept which covers the physical and moral integrity of a person, including his or her sexual life.'[133] Pursuant to this the concept, 'private life' includes every compulsory medical treatment imposed on an individual.[134] Also protected under Article 8 is the right to respect for home and correspondence. The right to respect for home covers all living places and gives rise to cases concerning the protection from environmental nuisance.[135] Under the notion of 'respect' the Court has awarded the member states a wide margin of appreciation. Within the realm of qualified rights the duty of positive actions of the member states towards individuals under their jurisdiction means that a fair balance

[126] (App no 27617/04), Merits, 26 May 2011 (ECtHR).
[127] Ibid. at para 157-159.
[128] (App no 18968/07), Merits, 8 November 2011 (ECtHR).
[129] Ibid. at para 112.
[130] Ibid. at para 116.
[131] Christina Zampas & Adriana Lamacková 'Ethical and Legal issues in Reproductive Health, Forced and coerced sterilization of women in Europe' (2011) 114 *International Journal of Gynaecology and Obstetrics*, 163, at 165.
[132] Ursula Kilkelly, *The right to respect private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights*, Human Rights Handbooks No.1 (Strasbourg, COE, 2001) at 14.
[133] *X and Y v the Netherlands* (App no 8978/80), Merits, 26 March 1985 (ECtHR), at para 22.
[134] Kilkelly, above note 132 at 15.
[135] Ibid. at 19.

between the general interest of the community and the interest of the individual has to be struck.[136]

(i) Reproductive Rights

The case of *Tysiąc v Poland*[137] concerns the denial of legal abortion. After the applicants' delivery of her child, her health deteriorated badly and at the time of the proceedings she was facing a risk of going blind. The Court held that 'legislation regulating the interruption of pregnancy touches upon the sphere of private life since whenever a woman is pregnant her private life becomes closely connected with the developing foetus,'[138] furthermore 'private life includes a person's physical and psychological integrity that goes hand in hand with a positive obligation to secure the effective respect for it.'[139] 'Thus this situation shows the need for balancing not only between privacy and public interest but also the assessment of the positive obligations of the State to secure the physical integrity of mothers-to-be.'[140] The Court has given the member states a wide margin of appreciation when dealing with termination of pregnancy, however it should be borne in mind that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'[141] Thus the Court held that 'once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.'[142] Furthermore the criminalization of illegal abortion in Poland and the lack of clear legal provisions have a chilling effect on the legal right to obtain a therapeutic abortion. Further on the Court held that 'the time factor for abortion is of critical importance and thus procedures in place should ensure that such decisions are timely so as to limit or prevent damage to a women's health which might be occasioned by a late abortion.'[143]

This case stands out as a paradigm for the approach towards the right to health by the ECtHR, it emphasises the importance of practical and effective exercise of a right provided for under Polish law and furthermore it addresses the issue of negative impacts through lack of clear legislation and criminalizing illegal abortion. By emphasising effectiveness the Court urges the authorities to fulfil their positive obligation. However due to the unclear judgement it is open for criticism, such as arguing the evolution of 'a Right to Abortion – not openly but through the backdoor.'[144] Cornides argues that the ECtHR actually promotes a right to abortion and does not leave this precarious issue to the margin of appreciation of the member states. However this argument can be countered 'through reading the judgment the way it was meant, it goes no further than stating that there must be a real opportunity to access a therapeutic abortion under a law that already provides for that procedure in order to demonstrate conformity with Article 8.'[145]

[136] Ibid. at 21.
[137] (App no 5410/03), Merits, 20 March 2007 (ECtHR).
[138] *Brüggemann and Scheuten v Germany*, no. 6959/75, 19 May 1976, Decision, at para 100.
[139] Inter alia *Glass v the United Kingdom* (App no 61827/00), Merits 9 March 2004 (ECtHR), at paras 74-83.
[140] *Tysiąc* at para 107.
[141] *Airey* at para 24.
[142] *Tysiąc* at para 116.
[143] Ibid. at para 118.
[144] Jackob Cornides, 'Human Rights Pitted Against Man' (2008) 12 (1) *International Journal on Human Rights*, 107, at 126.
[145] Nicolette Priaulx, 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of *Tysiąc v Poland*' (2008) 15 *European Journal of Health Law*, 361, at 373.

Soon after, the Court handed down the judgement in *A, B and C v Ireland*.[146] In this case, three women, who had obtained an abortion in the UK, complained of a violation of Article 8 due to the restrictions on lawful abortion in Ireland for health and/or well-being reasons. Regarding the first two applicants the Court found that although there is a consensus of a substantial majority of States in the COE that have less strict rules on abortion, it does not narrow the width of Ireland's margin of appreciation, due to the fact that the consensus was specifically achieved on the availability of abortion.[147] Thus by focusing on the right of the unborn, the Court was able to adhere to the wide margin of appreciation.

With this decision the Court unfortunately supports the existing hypocrisy in Ireland, that notwithstanding the importance of morals women are still obtaining abortion, just not on Irish soil. Therefore it is argued that this arrangement should not have been so keenly approved by the Court, when recognizing the European consensus on prioritising the rights of the pregnant woman over those of the foetus.[148] In the case of the third applicant, where there was a risk of life for the mother, the Court found a violation of Article 8, due to the fact that the medical consultation or going through a litigation process could not be considered as effective when determining whether an abortion may be lawfully performed in Ireland on the ground of a risk to life.[149] The Court held that 'the lack of procedures to establish the lawfulness of an abortion leads to legal uncertainty which leads to a gap between the legal right and the practical implementation.'[150] In balancing the right of the mother against the right of the foetus, in cases of risk of life of the mother a strong international consensus, also from the case law of the IACtHR[151] and the CEDAW[152] on imposing positive obligations on the state to prevent the death of the mother, exists.

Although emphasis on the right to life is welcomed, the ECtHR did not consider the aspects of the third applicant in *A, B and C* under the much more powerful provision of Article 2, but stayed within Article 8, highlighting the non-effectiveness of the measures put in place by Ireland to comply with their obligations under Article 8. The Court should have considered the right to life of the mother, but was cautious to infringe on the margin of appreciation.

Another case concerning the pregnant woman's health relates to the right to deliver a child in a certain manner. In *Ternovszky v Hungary*[153] the applicant wanted to give birth at home. The protection of Article 8 incorporates the right to both become and to not become a parent[154] and thus a right of choosing the circumstances of becoming a parent and the circumstances of giving birth form part of one's private life. Although the applicant was not prevented from giving birth at home, the legislation for health professionals dissuading them from providing assistance constituted an interference with the right to respect for private life of the prospective mothers.[155] Health professionals when encouraging home birth seemed to overstep their license and

[146] (App no 25579/05), Merits, 16 December 2010 (ECtHR).
[147] Ibid. at paras 235-237.
[148] Elisabeth Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 11 (3), Human Rights Law Review, 556, at 563.
[149] *A, B and C* at para 263.
[150] *Tysiąc* at para 123; *R.R.* at para 213.
[151] *Xákmok Kásek Indigenous Community v Paraguay*, IACtHR Merits, 24 August 2010, IACtHR Series C no 214 (2010).
[152] *Da Silva Pimentel v Brazil*, CEDAW Case no 17/2008, Merits (25 July 2011).
[153] (App no 67545/09), Merits 14 December 2010 (ECtHR).
[154] *Evans v UK* (App no 6339/05), Merits 10 April 2007 (ECtHR) at para 71.
[155] *Ternovsky* at para 22.

might have faced administrative sanctions.[156] Thus the Court held that the limitation of choices for prospective mothers, due to legal uncertainty and the subsequent immediate danger for health professionals, is incompatible with the necessary foreseeability and hence the lawfulness requirement under Article 8.[157] Its decision in the case of child delivery at home 'has urged the Hungarian government to enact legislation to allow home birth with the presence of a qualified obstetrician or midwife at the birth, except for cases when the baby's life is threatened.'[158]

The ECtHR also dealt with reproductive health procedures when deciding on the case of eight Slovakian women and their forced sterilization after delivering their children.[159] The conduct of the authorities was the same as in *V.C*.[160], namely the sterilisation of a woman of Roma origin after the delivery of her child. But in this case after their lawyers had been denied access to medical records, the applicants started civil proceedings to access the records. The issue at stake was the effectiveness of the manner in which the information was provided. The applicants were only allowed to make handwritten excerpts of the records.[161] No compelling reasons for refusing the photocopying of the files were given by the authorities,[162] thus the Court had to conclude that Slovakia had failed to comply with its positive obligation to provide an effective access to information.[163]

Within this realm of having access to information the case of *A.S. v Hungary*[164] at the Committee of the Convention to Eliminate all forms of Discrimination against Women (CEDAW)[165] is of particular interest when examining the approach of the ECtHR to the right to health. The Committee of the CEDAW held the government of Hungary accountable for failing to provide necessary information to a woman to enable her to give informed consent to a reproductive health-related procedure.[166] It was the first case decided by an international human rights body that held a government accountable for failing to provide necessary information to a woman to enable her to give informed consent to a reproductive health procedure.[167] This case shows that the ECtHR comes to the same conclusion by expanding the right to respect for private life as the Committee of the CEDAW, although the CEDAW does entail specific rights on how to improve a woman's health.

The cases on abortion and child delivery show the importance of a regulatory framework of adjudicatory and enforcement machinery protecting individual's rights, as the right to health seems to be neglected through ineffectiveness. The concept of practicability of a right runs like a common thread through the case law of the Court approaching the right to health.

(ii) Environmental Rights

[156] Ibid. at para 17.
[157] Ibid. at para 26.
[158] M. Eggermont, 'The Choice of Child Delivery Is a European Human Right', (2012) 19 *European Journal of Health Law*, 257, at 259.
[159] *K.H. and Others v Slovakia*, (App no 32881/04), Merits, 28 April 2009 (ECtHR).
[160] supra note 130.
[161] *K.H. and Others* at para 52.
[162] Ibid. at para 53.
[163] Ibid. at para 49.
[164] *A.S. v Hungary* CEDAW Case no 4/2004.
[165] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/38.
[166] Article 10 (h), Article 12, Article 16(1)(e) CEDAW.
[167] Zampas & Lamacková, above note 131 at 165.

Within the case law on the right to private life, cases of environmental hazards often have an adverse impact on the right to health. Therefore it is argued that the protection of human rights and the protection of the environment both originate from obtaining the highest quality of life for everyone.[168] Furthermore, due to the positive obligations imposed on states the higher standards of environmental quality can be secured and pollution affecting health and private life controlled.[169] Boyle argues that 'through holding governments directly accountable for their failure to regulate and control environmental nuisance, including those caused by corporations and for facilitating access to justice and enforcing environmental laws and judicial decisions'[170], the right to health can be enforced.

Additionally, the GC 14 covers supply of safe and potable water and basic sanitation and the prevention and reduction of exposure to harmful substances including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health.[171] When linked together, Socio-economic Rights promote a right to a decent environment; therefore one should not hold back in using human rights law and courts to enforce a healthy environment.

Within the case law on environmental hazards as an infringement on the right to health, a positive development is evident. Throughout the years the Court has held states accountable for not complying with their positive obligations within this realm. However in the early case of *Powell and Rayner v UK*[172] and nuisance resulting from Heathrow airport, the Court could not yet decide whether to follow the positive duty to take reasonable and appropriate measures to secure the applicants' rights or to take the path of 'interference by a public authority.' It emphasised the fact that in both instances a fair balance has to be struck and did not find that the authorities violated neither a possible positive obligations imposed on them nor was there an interference by public authorities that was not justified in accordance with Article 8 (2).[173] The Court argued it was not in the position to assess the level of nuisance or assess the best social and technical policy and was not willing to impose a positive obligation on how to the authorities should handle this issue, allowing the member states a wide margin of appreciation in the sphere of social policy.

One of the first more progressive cases was *Lopez Ostra v Spain*.[174] The applicant had been living next to a plant, which polluted the environment and immediately caused health problems and nuisance. The Court found that Spain did not strike a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of her right under Article 8.[175]

The subsequent and similar case of *Guerra and Others,*[176] where the applicants had to wait for essential information that would had enabled them to assess the risks they and their families might run if they had continued living in their homes until the plant was shut down, violated the right to have access to health information. In the recent case of *Fadeyeva v Russia*[177] the Court went a little further in determining that the

[168] Spieler, above note 63 at 20.
[169] Alan Boyle, 'Human Rights and the environment: where next?' [2012] *European Journal of International Law*, at 613.
[170] Ibid. at 613-614.
[171] GC 14, above note 7 at para 12 (2) b.
[172] (App no 9310/81), Merits, 21 February 1990 (ECtHR).
[173] Ibid. at para 41.
[174] (App no 16798/90), Merits, 9 December 1994 (ECtHR).
[175] Ibid. at para 58.
[176] supra note at 119.
[177] (App no 55723/00), Merits, 9 June 2005 (ECtHR).

state had not offered the applicant any help to move from the dangerous area affected by industrial emissions from a steel plant and had not applied effective measures to reduce the industrial pollution to acceptable levels.[178]

Roche v UK[179] concerns the applicants' time in the army where he was invited to take part in research on chemical weapons. Pursuant to the deterioration of his health the applicant requested his army records, but was denied disclosure.[180] The Court referred to its earlier case law in *McGinley and Egan v UK,*[181] a case concerning servicemen who had participated in armed forces atmospheric tests of nuclear weapons, and held that 'the issue of access to information, which could either have allayed the applicant's fears or enabled him to assess the danger to which he had been exposed, was sufficiently closely linked to his private life.'[182] Emphasising the states positive obligation by focusing on the competing interest of the individual and the general interest of the community the Court found a violation.[183]

It has yet to be seen how in two cases against Norway which concern the risks the applicants were exposed to when taking on diving jobs in the North Sea[184] currently pending before the ECtHR how the Court will proceed with this issue.

The importance of having access to information on health cannot be emphasised enough. These cases are a significant example of the Courts engagement in approaching the right to health and in particular the right to have access to information and show the importance of positive obligations imposed on member states. Special emphasis has to be given to the development in expanding the concept of positive obligations to factories polluting the environment and thus the giving hope for future cases in the context of the right to health and environmental hazards.

The cases on environmental hazards highlight the importance of having access to health information and show the Court's willingness to enhance its practice in using Article 8 to approach the right to health.

(iii) Transgender Rights

The last development of the right to health that will be examined is in relation to transgender persons. In the case of *Rees v UK,*[185] regarding the failure of the State to provide measures to legally constitute the change of sex, the Court, though emphasizing the difficulties affecting transgender persons, was cautious to impose positive obligations on the state and relied on the wide margin of appreciation.[186] Soon after, in *Christine Goodwin v UK*[187], the lack of legal recognition of the change of sex and the subsequent difficulties in relation to social security and employment were in question. This time the Court departed from its earlier case law due to the changing conditions in the member states, and interpreted the rights 'in the light of present-day conditions.'[188] Based on the continuing trend in favour of social

[178] Ibid. at para 133.
[179] (App no 32555/96), Merits, 19 October 2005 (ECtHR).
[180] Ibid. at para 19.
[181] (App no 10/1997/794/995-996), Merits, 9 June 1998 (ECtHR).
[182] Ibid. at para 97.
[183] *Roche* at para 167.
[184] *Vilnes v Norway* no. 52806/09, *Muledal and Others v Norway*, no. 22703/10.
[185] (App no 9532/81), Merits, 17 October 1986 (ECtHR).
[186] Ibid. at para 47.
[187] (App no 28597/95), Merits, 11 July 2002 (ECtHR).
[188] Ibid. at para 75.

acceptance and the new legal recognition of transsexuals after surgery,[189] and since there were no significant factors of public interest to weigh against the interest of the transsexual,[190] the UK had failed to comply with its positive obligation.[191]

In *Van Kück v Germany*[192] the issue was the criteria on reimbursement of medical treatment used by the courts for the applicant's claim for reimbursement of the cost of gender re-assignment. During the proceedings the domestic courts placed a burden on the applicant to prove the medical necessity of the treatment.[193] Considering this the ECtHR held that 'using this burden especially in one of the most intimate areas of private life appears disproportionate.'[194]

Although there has been development in protecting the rights of transgender persons, it can be argued that the Court did not go far enough. When looking at the problems of marriage or adoption for transgender persons, the heterosexual conceptualization of marriage and family is still strongly evident. The outcome of the case law on transgender and intersex persons is that although some recognition of their health status has been given 'the main focus still lies on the biological sex concept instead of allowing a transition toward a social/cultural sex.'[195] When looking at the present-day conditions and recognizing the immense progress made in reproductive medicine, the Court should not shy away from encouraging the protection of transgender and intersex persons on grounds of lack of a common European standard.

D. Freedom of thought, conscience and religion

Under Article 9 the Convention protects the right to freedom of thought, conscience and religion. Campbell argues that 'within health care a state may come into several roles to interfere with Article 9, from being a provider of a public health care system, a medical employer, regulator of health care professionals and so on.'[196] Thus difficult issues arise for states in relation to health care and conscience, but the Court has made clear in *R.R v Poland* that the rights under Article 9 of health professionals should not prevent patients from access to services to which they are legally entitled.[197]

Most domestic legal systems entail a right for every adult, not lacking in mental capacity, to decide on the medical treatment performed on him/her. The right to decide also falls under Article 8 and an individual's personal and physical integrity and the right to self-determination[198], even in cases where a decision to reject the treatment might lead to the death of this person. Thus adult decision making based on his/her belief, protected under Article 9 is in accordance with the right to health. Article 8 also enshrines the right to respect for family life and includes a right on the upbringing of children and subsequently their medical treatment. 'Therefore where decisions on the medical treatment of children are based on belief of their parents,

[189] Ibid. at para 85.
[190] Ibid. at para 91.
[191] Ibid. at para 93.
[192] (App no 35968/97), Merits, 12 June 2003 (ECtHR).
[193] Ibid. at para 42.
[194] Ibid. at para 82.
[195] Maya Sabatello, 'Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework', (2011) 33 (1) *Human Rights Quaterly*, 43, at 62.
[196] Mark Campbell, 'Conscientious objection, health care and Article 9 of the European Convention on Human Rights', (2011) 4 *Medical Law International*, 284, at 293.
[197] *R.R* at para 206.
[198] *Pretty v the United Kingdom* (App no 2346/02), Merits, 29 April 2002 (ECtHR), at para 83.

their authority has to be limited, especially when there is a risk of life. The well-being of the child has to have priority.'[199] Furthermore, as stated above, under Article 2 the state has a positive obligation to protect life under its jurisdiction, letting a child die would run counter to this provision.

One very recent but highly criticised decision was given by the Regional Court of Colone in a case of a circumcision of a young boy out of religious belief.[200] In the criminal proceedings against the doctor who had performed the circumcision, the court found a violation of the physical integrity of the child.[201] It held that the well-being of the child has to be given primacy against the right of the parents to raise their child as they wish.[202] The violation of the physical integrity of the child without his consent cannot be overridden by the parents' right to practice their religion, especially when there is no particular burden on the parents to wait until their child is able to decide for him or herself.[203]

This decision is highly debatable, as it arguably does not strike the necessary balance with the right to freedom of religion. The burden put on the parents to wait has to be considered as an infringement of Article 9, especially when considering a possible cultural pressure stemming from their religious community. Furthermore if one follows this judgement it would lead to an overall adverse effect, due to male circumcision as a religious practice being inherent in several religions around the world the practice would not stop, but would be exercised hidden by laymen in unsafe environments and thus would infringe the right to have access to the highest attainable standard of health. The same holds true for the practice of Female Genital Mutilation, as it can be argued that by performing the circumcisions in a safe environment with high standards of health care helps to prevent greater dangers, as for example otherwise the circumcisions could be performed by traditional practitioners.[204]

The ECtHR was confronted with Article 9 and the right to health when it dealt with the dissolution and banning of Jehovah's Witnesses in Russia.[205] It is general knowledge that Jehovah's Witnesses refuse any blood transfusions, including in emergency situations.[206] Thus the state's interest in protecting the lives and health of its citizens conflicts with the right to practice the Jehovah Witness religion. Free will is of utmost importance when deciding on medical treatment, but not always sufficiently clear in relation to religion. The ECtHR examined his dilemma by referring to the case of *Re T* in the UK,[207] in which Lord Staughton states that 'for a consent or refusal to be less than a true consent or refusal there must be such a degree of external influence as to persuade the patient to depart from her own wishes, to an extent the law regards it as undue.'[208] The ECtHR found that the members of Jehovah's Witnesses have decided to refuse blood transfusions while not being in any emergency situation but simply

[199] Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Human Rights Handbooks, (Strasbourg COE, 2012) at 73.
[200] LG Köln 151 Ns 169/11, 7 May 2012 (Cologne Regional Court, Germany)
[201] Ibid. at para 15.
[202] Ibid.
[203] Ibid.
[204] World Health Organization, Global Strategy to stop health-care providers from performing female genital mutilation, WHO/RHR/10.9, 2010.
[205] *Jehovah's Witnesses of Moscow and Others v Russia* (App no 302/02), Merits, 10 June 2010 (ECtHR).
[206] Ibid. at para 133.
[207] Re T (Adult Refusal of Treatment) [1992] 4 All ER 649.
[208] Ibid. Lord Staughton at para 5.

have prepared for such events and have decided free from any constraints.[209] Therefore although preserving the life or health of a patient is of legitimate interest, it cannot override the patient's stronger interest in directing the course of his/her own life.[210]

This decision again shows that consent to medical treatment is the cornerstone of the right to health. As long as this consent can be considered to have been given in full mental capacity it will always override the interest of providing someone with a certain treatment.

E. The right to freedom of expression

Article 10, the right to freedom of expression, forms the last of the self-standing provisions that approach the right to health. It entails freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The latter aspect includes the right to gather and seek information mostly for the media,[211] but the Court has also read into it, a right of the public to be adequately informed.[212]

One very influential case, *Open Door and Dublin Well Woman v Ireland,*[213] concerned two non-profit organisations that were engaged in counselling pregnant women. Both companies were subjected to injunction proceedings with the intention to restrain them from providing information on abortion facilities outside the jurisdiction of Ireland.[214] The Court found that as the Irish constitution provides for a high threshold of protection to the unborn, the Irish courts have interpreted their role as the guarantors of constitutional rights. Thus the possibility that legal action might be taken against the applicants must have been foreseeable for the applicants, therefore the requirement of being 'prescribed by law'[215] was met. Focusing on the proportionality test the Court argued that as the freedom of expression is also applicable to 'information' or 'ideas' that offend, shock or disturb the state or any sector of the population[216] and as the information was not made available to the public at large and was already available elsewhere, the injunction appeared to be ineffective to protect morals.[217] Furthermore the Court looked at the dangers for women that risk their health when obtaining an abortion at a later stage of their pregnancy due to lack of counselling and stated that 'this injunction may have had adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information.'[218]

With this powerful example of a decision approaching the right to health the Court not only ensured the health of thousands of pregnant women in Ireland but also summed up one of the most important factors in Socio-economic Rights; members of vulnerable groups, as in this case, poor and/or uneducated pregnant women, are in need of the most careful protection.

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[209] *Jehovah's Witnesses of Moscow and Others* at para 139.
[210] Ibid. at para 136.
[211] Monica Macovei, *The Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, (Strasbourg COE Handbook No. 2, 2nd 2004), at 10-11.
[212] *The Sunday Times v UK*, 30 Eur.Ct. H.R. (ser. A) 1979, at para 66.
[213] (App no 14234/88; 14235/88), Merits, 29 October 1992 (ECtHR).
[214] Ibid. at para 9.
[215] Ibid. at para 60.
[216] *Handyside* at para 49.
[217] *Open Door and Dublin Well Women* at para 75-76.
[218] Ibid. at para 77.

Another example of Article 10 and the right to health is the case of *Frankowicz v Poland.*[219] The Court recognised that all patients had the right to consult another doctor for a second opinion on the treatment they had received.[220] Thus it dealt with the freedom of expression of a doctor in relation to his colleagues and considered that an absolute prohibition of any criticism was likely to discourage doctors from providing their patients with an objective opinion.[221] Although once again the Court did not construe a right to receive information into Article 10, but highlighted the issue of being adequately informed by protecting the doctor's freedom of expression and thereby approaching the right to health of the patients. Through this case as well as through cases under Article 2 and the issue of effective investigations on medical negligence the Court indirectly approaches the progressive improvement of the highest possible standard of health care within the medical profession.

F. The prohibition of discrimination

The last right examined is the right not to be discriminated against under Article 14, which can only be invoked in connection with an alleged violation of another right. The Court does not require an actual violation of the substantive provision, the requirement is satisfied as long as the discrimination falls 'within the ambit' of the substantive right. The list of grounds of discrimination entailed in Article 14 is non-exhaustive, which is important as it does not expressly list a health status or any medical condition among the protected grounds of discrimination. However the Court has held that physical disability and various health impairments fall within its scope.[222] It has managed to include the right to health as a factor outside the person's control, [223] meaning that a person's health condition is in general not a situation a person chooses to be in.

It is established case law that 'discrimination means treating differently, without an objective and reasonable justification, persons in analogous or relevantly similar situations.'[224]

In the recent case of *Kiyutin v Russia*[225] the Court was confronted with the situation of an Uzbekistan national who applied for a residence permit in Russia. He was required to undergo a medical examination during which he tested positive for HIV, a reason under Russian law to deny the issue of a residence permit.[226] It has already been established by the Court and recognized by international human rights law,[227] that discrimination on grounds of health fall within the scope of Article 14. Thus the Court held that as the majority consensus in the member states as well as in international human rights law is contrary to the Russian legislation, the justification of the protection of the public health was not satisfied. They held that 'the mere presence of a HIV-positive individual in a country is not itself a threat to public health.'[228] Furthermore, due to the fact that non-Russian nationals have no entitlement to free medical assistance, except emergency treatment, economic considerations for

[219] (App no 53025/99), Merits, 16 December 2008 (ECtHR).
[220] Ibid. at para 49.
[221] Ibid. at para 51.
[222] *Glor v Switzerland* (App no 13444/04), Merits, 30 April 2009 (ECtHR), at para 53
[223] Ibid. at paras 53-56.
[224] Inter alia *D.H and Others v Czech Republic* (App no 57325/00), Merits, 13 November 2007 (ECtHR) at para 175.
[225] (App no 2700/10), Merits, 10 March 2011 (ECtHR).
[226] Ibid. at para 9.
[227] UN Commission on Human Rights Res. No 1995/44, UN Convention on the Rights of Persons with Disabilities, PACE Recommendation 1116 (1989).
[228] *Kiyutin* at para 68.

justifying the differential treatment were not convincing.[229] The Court put emphasis on the problem of creating a false sense of security by encouraging the local population to consider HIV/AIDS as a 'foreign problem.'[230] This practice of associating public health threats with foreigners entails tremendous consequences. It might help to prevent a flu epidemic spreading in a country but cannot be considered as a measure to protect the public health, as it denies the need for a functioning health education and an effective health-care system. Illnesses do not stem from foreigners but are inherent in human nature.

Cases on forced sterilization of women of Roma origin can be viewed as discrimination on grounds of ethnic origin. This discrimination results in the refusal of health care to a whole vulnerable group. In *V.C.* the complainant claimed a violation of Article 8 in conjunction with Article 14, but the Court held that although the material before it indicated such discrimination, it was not sufficient to demonstrate a violation of Article 14.[231] Nevertheless in her dissenting opinion Judge Mijovic argued that the 'special attention' for Roma women in Slovakia, such as being placed in separate rooms with their own toilets, showed the negative policy towards the Roma population.[232] She found that 'the applicant had been 'marked out' and observed as a patient who had to be sterilised just because of her origin.'[233] Considering this dissent one might say that if the Court has to consider future cases on forced sterilization of Roma women, it might find a violation of Article 14 and thus help to approach the right to health in one of the most vulnerable communities in Europe. Möschel argues that the test for establishing discrimination 'should be one of 'different treatment' that Roma are subjected to, as it would open the way to recognising the Roma as a specifically vulnerable group in need of specific protection.[234] Furthermore emphasis has to be given to the argument that if the Court takes a more pro-active stance, it would force the member states to implement training and awareness programmes that specifically address anti-racism for police, hospital and judicial personnel or mechanisms to detect judicial bias, to show that there was no racial discrimination in the particular member state.[235]

Yamin argues that 'discrimination is both a cause and an effect of many life-threatening diseases'[236], as well as lack of acceptable, available and accessible health care. One can distinguish two sets of discrimination through case law. On the one hand in the cases of *Eldrige* and *V.C.* people are discriminated against due to their disability, race, ethnicity, gender, sexual orientation and poverty. On the other hand as seen in *Kiyutin* 'once people have certain diseases, they are subject to tremendous stigma and discrimination'[237], which can also lead to total denial of medication or health care. Most importantly it has to be noted that no matter under which circumstances, the human right to health acknowledges that being human is the only requirement to demand the necessary and effective treatment.

5. Imposing Positive Obligations

[229] Ibid. at para 70.
[230] Ibid. at para 71.
[231] *V.C.* at para 177.
[232] Ibid. Dissenting Opinion Judge Mijovic at p 43.
[233] Ibid. at p 44.
[234] Matthias Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?, (2012) 12 (3) *Human Rights Law Review*, 479, at 503.
[235] Ibid. at 504.
[236] Yamin, above note 45 at 346.
[237] Ibid. at 347.

After this extensive examination of case law on the right to health, it can be seen that the main mechanism used to approach the right to health under the ECHR is imposing positive obligations. In this regard the tripartite of state duties entailed in ICESCR as outlined in Part IV provides for the backbone of this examination.

A. The obligation to protect

In examining the positive obligations used by the Court the framework proposed by Fredman is useful. Fredman distinguishes four principles under the obligation to protect: "the duty to protect, the duty to restrain from infringing another person's rights, the principle of institutional balance and the issue of competing resources."[238] This concept can be relocated in the ECtHR jurisprudence, starting from the *Plattform 'Ärzte für das Leben' v Austria*[239] decision, to *Osman v UK* and throughout the cases which are discussed in Part IV.

The "duty to protect" entails taking preventive measures to protect an individual from a third person and can be derived from the obligation 'to secure the rights of everyone within their jurisdiction.'[240] In the case of the right to health examples for the duty to protect can be derived from *inter alia* cases on environmental hazards caused by private persons that trigger deterioration the state of health of a person under the jurisdiction of a member state. The "duty of restraint" means respecting the rights of the person infringing the rights of someone else and those not interfering with the former's rights unjustifiably. For example within the concept of freedom of expression there is a right for everyone to counter argue against a particular opinion.

For the "institutional balance" the ECtHR uses the margin of appreciation and thus gives room for state authorities to operate within the autonomy given to them from the legislator. Often expanding positive obligations means narrowing down the margin of appreciation. However it has been observed that 'the ECtHR relies on a general interpretative obligation to respect domestic cultural traditions and values when determining the meaning and scope of the ECHR rights, which is considered to be a principle of general application in international law.'[241]

As to the "issue of competing resources" the ECtHR has held that 'it should be handled by the states through operational choices which must be made in terms of priorities and resources.'[242] Thus the ECtHR fully applied the concept proposed by Fredman.

For the obligation to protect and the determination of reasonableness and appropriateness, different degrees for Article 2 and 3 as absolute rights and the qualified rights under Article 8-11 are used.[243] However in any case decisions have to be proportionate, as Fredman also states 'in Socio-economic rights cases the standard applied should indeed be a proportionality test, as the state would be required to demonstrate that the steps it is taking are the most appropriate means of achieving the right.'[244]

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[238] Fredman *Human Rights Transformed*, above note 23 at 75.
[239] *Plattform 'Ärzte für das Leben' v Austria,* (App no 10126/82), Merits, 21 June 1988 (ECtHR).
[240] Article 1 ECHR.
[241] See D. Harris, M. O'Boyle and C. Warbrick, Law of the European Convention on Human Rights, (Oxford, OUP 2009) at 18-21, cited in Ellie Palmer, 'Protecting Socio-economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', (2009) 2 (4) *Erasmus Law Review*, 397, at 405.
[242] *Osman v UK* (App no 23452/94), Merits, 28 October 1998 (ECtHR), at para 116.
[243] See above Part 4.
[244] Fredman 'New Horizons' above note 89 at 317.

The obligation to protect can furthermore be divided into both horizontal and vertical dimensions. The horizontal dimension[245] determines the human rights protection between private persons while the vertical dimension explains the relationship between private persons and the state. In both scenarios the state has to protect the individual from interference, first from another private person and at second from the state itself. The latter obligation is wider as it also includes the obligation to realise the effective enjoyment of human rights. In the field of Socio-economic Rights the Court has used the concept of effectiveness extensively.[246]

The protection of individuals from private persons violating their human rights has increased during the last decades. Referring back to the cases of environmental hazards caused by factories and thus often the involvement of transnational corporations, as in *Community of La Oroya v Peru*[247], courts use positive obligations to fill the gap of human rights protection. This author argues, that through this approach the Court holds states responsible for not preventing the violation of rights through third persons and thereby take into consideration the extent of due diligence and control exercised by the state. However the ECtHR only uses the proportionality test and balances the competing rights and the public interest in the private sphere, 'but has not been prepared to hold that Convention rights may have a direct horizontal application.'[248]

B. The obligation to fulfil

For Fredman the duty to fulfil entails questions on how and when it should be fulfilled. However it has to be emphasised that being incapable of fulfilling obligations immediately as well as relying on the shortage of resources and on difficult balancing between other competing factors cannot be used to downgrade a certain right.[249] Fredman once again proposes four parameters: First *effectiveness*, in the Courts language this equals the appropriateness of the measure to reach the legitimate aim, although the Court sometimes also refers to the effectiveness of a certain domestic law or measure that has been ordered by a state as for example on the question of investigation of a death through medical negligence or to the effective access to legal abortion. Secondly she refers to *participation* of those affected by the measures, by *inter alia* having access to information on the right to health and thereafter being actively enabled to participate. The third parameter is *accountability*, meaning the authorities' opportunity to explain and justify their decision. And the final one is *equality*, which has been already emphasised by the GC 14, namely that equal enjoyment of the right to health sometimes means deferring the disadvantaged when allocating resources.[250]

One has to refer to the GC 14 in determining the *effectiveness* of the availability, accessibility and its underlying preconditions. The affected persons need to be able *to participate* in the decision-making. Thereby the cases of *Guerra and others* and *Lopez Ostra* should be kept in mind, as complainants were denied the necessary information and thus were not able to participate in accordance with the states

[245] Dröge above note 92 at 381.
[246] see *inter alia Tysiac*.
[247] *Guerra*, above note 63.
[248] Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect', (2009) 9 (2) *Human Rights Law Review*, 225, at 244.
[249] Fredman *Human Rights Transformed* above note 23 at 77.
[250] GC 14, above note 7 at para 19.

obligations. *Accountability* is once more achieved by the state justifying an infringement within the states resources to comply with its obligation. Whenever a state has to make a decision that infringes on an individuals' right to health it has to justify that within the state resources it has tried everything to comply with the obligation to provide the highest attainable standard of health for this person. Finally *equality* of access and availability to health care, in its various forms, builds the last cornerstone and is used in cases such as *Open Door and Dublin Well* or *Kiyutin*, where the Court emphasised the importance of especially protecting the vulnerable groups. However it did not apply this concept in the cases of discrimination of Roma women.

C. The scope of positive obligations within the ECtHR's case law

While the Court sought to define the scope of the positive obligations for the state in *Osman v UK*[251], there is as yet no systematisation or categorization concerning when the Court is going to use the positive obligations and if so, how far they might be stretched. [252] This lack of continuity and sometimes perhaps lack of foreseeability is particular evident in Article 3 cases on expulsion. Only in the case of *D. v UK* the Court found a violation of Article 3 and thus protected a person's right to health by prohibiting the expulsion. The high standard set in this case has until yet never triggered another violation of Article 3 in relation to the right to health and expulsion. Thus the argument can be made that in fact the Court does not progressively continue protecting the right to health in these cases, but continues giving judgements with a too high threshold. Furthermore hesitation by the Court is evident in stretching in particular the right to life as far as other regional and domestic courts. The case *Nitecki v Poland* is a great example of this as the Court did not promote a right to health more actively but only looked at the situation of the individual without considering the allocation of health related costs in general. Sometimes the Court's practice and the lack of systematization in imposing positive obligations on member states cause unpredictability and inconsistency. Subsequently this can lead to low acceptance by the member states when being confronted with these positive obligations as well as to confusion by national courts and lawyers. Therefore the Court should aim to provide some structure to enhance predictable and foreseeable outcomes, especially as those are the cornerstones of the rule of law.

The dynamic and 'present-day interpretation' of human rights is one of the reasons justifying the evolution and expansion of human rights in general. The best example of this is the case law of the ECtHR on transgender rights;[253] throughout two decades the Court has evolved in its jurisprudence and thereby expanded the positive obligations. However this does not mean that 'present-day interpretation' always results in an expansion of positive obligations, as present-day conditions can also trigger a step backwards. This can be seen in the cases on expulsion since *D. v UK,*[254] a number of cases, at least from this author's point of view, have deserved to get the same attention from the Court in indirectly promoting the right to health. Therefore the argument that the Court has created a too high threshold so that only the exception to the exceptions can reach it gets strong support from the obligation of progressive realisation of the right to health. The right to health is protected in varying degrees in the member states, from no protection at all to full enforceability,[255] thus

[251] (App no 23452/94), Merits, 28 October 1998 (ECtHR).
[252] *Plattform 'Ärzte für das Leben'* at para 31.
[253] See above in Part IV. C. *inter alia Rees v UK, Christine Goodwin v UK, Van Kück v Germany.*
[254] Above note 123.
[255] European Parliament Working Papers, Fundamental Social Rights in Europe, Social Affairs Series, SOCI 104 EN, November 1999.

when scrutinizing the common European standard and using comparative interpretation the Court would not find any reason to approach such a right. However this author argues that it should look at the concept of the welfare state. There may only be a few actual enforceable rights in relation to health in the member states, but there is an accepted common minimum social standard, such as insurance for health, free basic education or a guarantee for an existential minimum. This reality should lead the Court to approach the right to health more extensively.

The issue on how far the Court should go is also one of distinguishing the horizontal and vertical dimension of the right to health. 'It is settled jurisprudence of the Court that no one can ask for criminal proceedings against third parties'[256], thus the margin of appreciation and proportionality have to guide the way on how far the state has to go. However 'in the specific sphere of medical negligence the obligation may, for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in criminal courts.'[257] The Court furthermore held that 'prompt examination of such cases is in any event important for safety of all users of all health services.'[258] These two dimensions can help guide the Court in stretching positive obligations for the member states. In particular the horizontal dimension gives room to broaden the spectrum of positive obligations for a state, as a state is then not only responsible for itself but also for those violations of the right to health of individuals by third persons.

Due to the lack of systematisation on when to impose positive obligations it is difficult to predict how the ECtHR will proceed. In any event one case stands out in imposing positive obligations on a Member State in relation to the right to health. In *L v Lithuania*[259] the Court found 'a limited legislative gap in gender-reassignment surgery, which leaves the applicant in a situation of distressing uncertainty *vis-a-vis* his private life and the recognition of his true identity.'[260] Thus it ordered the enactment of subsidiary legislation within three months, however if this would prove to be not possible the applicant should have the surgery performed abroad and financed, at least in part, by Lithuania.[261] It has been observed that this constitutes a new practice in the jurisprudence of the Court[262] and is not welcomed by all judges.[263]

6. Conclusion

The ECHR is an outstanding achievement of the European states in protecting human rights and has become a pan-European instrument. It is argued that 'today's human rights understanding has evolved from a solely liberal thinking to a social thinking and thus from negative obligations to multidimensional ones.'[264] Thus it is now common

[256] Khanlar Hajiyev, 'The evolution of positive obligations under the European Convention on Human Rights – by the European Court of Human Rights', in Spielmann and others (eds.), *The European Convention on Human Rights, a living instrument: Essays in honour of Christos L. Rozakis,* (Bruxelles Bruylant, 2011) at 212.
[257] Ibid.; *Silih v Slovenia* (App no 71463/03), Merits, 9 April 2009 (ECtHR), at para 194.
[258] Ibid. at para 196.
[259] (App no 27527/03), Merits, 11 September 2007 (ECtHR).
[260] Ibid. at para 59.
[261] Ibid. at para 58 and 74.
[262] Toma Birmontiené, 'The Development of Health Law as a Way to Change Traditional Attitudes in National Legal Systems. The Influence of International Human Rights Law: What is Left for the National Legislator?' (2010) 17 *European Journal of Health Law*, 23, at 33.
[263] Partly Dissenting opinion by Judge Fura-Sandström: 'the Court risks acting ultra vires, as the Convention clearly sets out a division of competences.'
[264] Dröge above note 92 at 383.

ground to guarantee the enjoyment of human rights through having legislation effectively enforceable and not only existent in theory, as well as protecting human rights from violations of private persons and the state. This notion is one broadly expressed throughout the case law approaching the right to health under the ECHR.

As the right to health deals with such sensitive moral and ethical issues, enhanced through the fast growing medical and scientific development, the argument of leaving the member states with a wide margin of appreciation has to be emphasised, even more when considering that the constitutional control mechanism has to apply to the Convention. As well the notion of a common European standard has contributed to the improvement of health care in states lacking the high standard performed by some of the other member states. Thus the Court should when examining the right to health first of all take into account the well-functioning welfare systems in Europe and thus find common grounds for the right to health already implemented in most of the member states. In this regard the concept of 'present day interpretation' which in other words is referred to in the Court's case law as the ECHR being a living instrument that must be interpreted according to the present-day conditions,[265] gives further input for the progressive development of the Court's case law and the acknowledgment of the right to health approached through the welfare system. Hence it can be argued that the Court actually does not overstretch the Convention rights, but by ensuring equal and effective access to health care for the individual takes into account the reality of health care in Europe.

In the future, the Court should take a more expansive integrated approach to give the right to health full recognition as foreseen in international human rights law and live up to the indivisibility and interdependence of rights. Though examining some of the dissenting opinions in relation to the right to life or the right not to be discriminated, it seems that such development has already been taking place, which does give hope for the future. Although the Court's jurisprudence lacks the progressiveness of the South American or Indian courts, it is nevertheless willing, in a cautious manner, to further impose positive obligations on the states and thus enforce the right to health.

Article 1 of the Convention sets out the task for the member states as well as for the Court, 'to secure' the Convention rights. This entails a notion of positive action otherwise the drafters could have chosen the language of 'to respect.' Hence it can be seen as the basis for the Court's power to impose positive obligation being inherent in the Convention system. However it remains to be seen when the Court will be prepared to fully recognise positive obligations and thus provide a structure in theory and system on how it will use them. In any case it has to be kept in mind that even if the Court is willing to impose legislation or specific measures as seen in the case of *L.*, it will be of little consequence unless there is full and timely cooperation with the member states.

[265] *inter alia Soering v UK* (App. no 14038/88) Merits, 7 July 1989, at para 102.

Another Dimension of the Right to Education: is "Equally Accessible Higher Education" a Dream?

Sezen Kama[★]

Abstract

As a human right, education is one of the subsidiary elements for a society helping to fight against discrimination and exclusion. This is because it is necessary to understand the real meaning of it promulgated under international and regional instruments for creating a homogeneous society. However, even if the necessity of primary and secondary education has been generally understood by many governments, the importance of higher education and the necessity of equal accessibility have been still seen as a dream for all layers of society. Discrimination based on sex, disability and economic status is a particular threat for equally accessible higher education in this monetarist world. On the other hand, there is an urgent need to provide progressive realisation with higher education due to this importance for the society and for the justiciability of economic, social and cultural rights ('ESCR') and the principle of equality. Nevertheless, the main question in this paper is how equally accessible higher education is far from being just a dream in different parts of the world.

Keywords:

Right to education – Higher Education – ESCR – Justiciability of Economic, Social and Cultural Rights – Discrimination – Fees – Equality.

1. Introduction

In today's monetarist world, discrimination on several bases has occurred and obviously most of the time people from vulnerable backgrounds have been affected by it. On the other hand, these vulnerable groups have a chance to change their destiny, and realise their dignity. They can thus build their countries' future with the notion of education. As Nelson Mandela said: 'Education is the most powerful weapon which you can use to change the world.[1] However, if we want to do it, education must be at least non-discriminative and equally accessible for everyone.

Education with these basic principles has been assessed as a human right which is inherent to all human beings without discrimination, interdependent, interrelated and indivisible.[2] This human right includes three main levels of education which are primary, secondary and

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[1] Nelson Mandela, 'Lighting your way to a better future' speech at launch of Mindset Network, 16 July 2003, http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS909, Accessed 22 November 2013.

[2] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjørn Eide et al. (eds) *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, 2001) at 12.

higher (tertiary) education.[3] These three types have particularly been regulated in many international and regional human rights instruments[4] all of which have different legal obligations. Primary education is the most protected part of the right to education as a foundation.[5] However secondary education and higher education, due to their complementarity, do not enjoy the same level of protection. More specifically with regard to higher education general, it must be equally accessible to everyone on the basis of capacity. Also, this main aim is making it progressively free at the end. In addition, higher education enrolment rates have been dramatically increasing nowadays. In 1950, the world total enrolment rate was just 6.5 million; however, after 1997, it has reached almost 90 million.[6] It may be said that almost 50 years ago, access to higher education was a privilege in most parts of the world. On the contrary, it is not possible to claim the same argument since the framework of human rights protection has enlarged. Nevertheless, nowadays even primary education as a foundation of the right to education has faced many challenges owing to its socio-economic character. Higher education has many more problematic areas in terms of equality. These problems are not only related to its accessibility, but the general concept of the right to education and its practice as well.

Taking these general explanations into account in this paper, equally accessible higher education is explained through the right to education as one of fundamental human rights from the general to the specific. While doing this, first of all in Section 2, the general context of the right to education is set forth and the issue of privatisation and capitalism and its role in the cost of education is discussed. Then Section 3 reviews international and regional provisions of this right, and specifically Section 3 (a) gives detailed explanations on the basis of higher education in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention against Discrimination in Education (CADE) which clearly spell out the legal standards of relevance. Also in Section 4, justiciability of this right and the current changing system of justiciability of economic, social and cultural rights are assessed. Last, Section 5 analyses several cases from various jurisdictions to reach a conclusion about equal accessibility of higher education in conjunction with Section 4. For this universal result, initially two The Organisation for Economic Co-operation and Development (OECD countries, the UK and Turkey, have been selected in terms of economical aspect of higher education. In addition various related examples about gender and racial discrimination, minorities, disabled students and economic accessibility in education will be examined, particularly from the US, Kenya, Botswana, South Africa, Russia, Canada, France, for the general framework of equally accessible higher education as one of the dimensions of the right to education to understand its possibility in today's world.

2. General Context of the Right to Education

Education is one of the main principles for the development of the human personality, and it helps people to realise their role and existence in the world. As the New York Court of Appeals held in *Campaign for Fiscal Equity Inc., et al. v. State of New York, et al.*, 'education

[3] Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: including a systemic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (Martinus Nijhoff Publishers, 2006) at 47.

[4] See e.g. Universal Declaration of Human Rights, International Covenant on Economic Social and Cultural Rights, Convention on the Rights of the Child, Convention on the Elimination of all forms of Discrimination against Women, International Convention on the Elimination of all forms of Racial Discrimination, UNESCO Convention against Discrimination in Education.

[5] Kate Halvorsen, 'Notes on the Realization of the Human Right to Education' (1990) 12(3) *Human Rights Quarterly* 341 at 350.

[6] UNESCO, *The Right to Education - Towards Education for All throughout Life World Education Report* (UNESCO Publishing, 2000) at 67.

… prepares [students] to function productively as civic participants.'[7] This understanding helps it to be examined under the idea of human rights in connection with equality of opportunity in many different constitutions. For instance, in Article 42 of the Constitution of the Republic of Turkey, the right to education is promulgated under the chapter of 'Fundamental Rights and Duties'.[8] Also, the Nigerian and Tanzanian Constitutions emphasise 'equal and adequate opportunities' in education, while the Constitutions of Brazil, Uganda, Liberia, Ivory Coast and Algeria state 'equal access to educational opportunities to receive highest level education'.[9] In addition to these domestic provisions, it has been called a human right protected at the international level since the Universal Declaration of Human Rights (UDHR)[10], and then by some of the UN documents, such as the ICESCR of 1966[11], the Convention on the Rights of the Child (CRC) of 1989[12], or by UNESCO's provisions, such as the CADE in 1960, or by the Council of Europe such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in 1952. Education, with its significant role, is not just only one of the fundamental human rights; it also helps to realise and fulfil other human rights. In *Mohini Jain. v. State of Karnataka*[13], the Supreme Court of India held that the right to education is directly related to the right to life, because the real meaning of human dignity and life is mainly understood with the right to education; and thus they are interconnected.[14] This case is therefore one of the important decisions to show how inclusive the right to education is. Also, it includes not only public and formal education; private and non-formal education is also examined under this right.[15]

Nevertheless, a concept is that education is a basic human right may be assessed as desirable in today's world owing to many reasons. In accordance with the above mentioned reasons, the failure to protect the right to education is a violation of international law and it is in scope of the responsibility of the state under international and regional legal instruments. However, education has started to be perceived as a human need or privilege, not as a human right nowadays, since the idea is that education is a subject of commerce and competition, particularly due to the idea of privatization and capitalism.[16] Because of the idea that education is a privilege some people who are unable to pay fees will be excluded from being educated or to get a low qualified education. Moreover, this discriminative approach is not just because of economic weakness. It has also many other dismissive implications, specifically for other vulnerable groups like women, disabled people, migrants. It is thus completely outside the concept of human rights. From the economic perspective, when education is accepted as one of fundamental human rights, it should be free or at least

[7] *Campaign for Fiscal Equity Inc., et al. v. State of New York, et al.*, 2003 NY Int 84 (New York State Court of Appeals); Michael A. Rebell, 'The Right to Comprehensive Educational Opportunity' (2012) 47 *Harvard Civil Rights and Civil Liberties Law Review* 47 at 68.

[8] The Constitution of the Republic of Turkey, http://global.tbmm.gov.tr/docs/constitution_en.pdf, (accessed 21 March 2013).

[9] Kishore Singh, 'UNESCO's Convention against Discrimination in Education (1960): Key Pillar of the Education for All' (2008) 4 *International Journal for Education Law and Policy* 70 at 81. For further details see Article 208 V. of the Brazilian Constitution, Article 14.1 of the Constitution of Philippines, Article 18 of the Federal Republic of Nigeria, Article 11 of the Constitution of the United Republic of Tanzania, Article 6 of the Constitution of Liberia, Article 18 of the Constitution of Uganda, Article 7 of the Constitution of Ivory Coast and Article 53 of the Constitution of Algeria.

[10] Article 26, GA Res 217A(III), 10 December 1948, A/810 at 71 , http://www.un.org/en/documents/udhr/ (accessed 15 February 2013).

[11] Article 13, International Covenant on Economic and Social and Cultural Rights 1966 993 UNTS 3.

[12] Article 28, Convention on the Rights of the Child 1989, 1577 UNTS 3.

[13] *Miss Mohini Jain v. State of Karnataka and Ors* 1992 SCR(3) 658, 30 July 1992; R. Singh, 'Right to Education- A Review of Mohini Jain' (1993) 5 *Student Advocate* 79.

[14] *Miss Mohini Jain* (ibid) at 661.

[15] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The right to education (art. 13), 8 December 1999, E/C.12/1999/10.

[16] The International Consultative Forum on Education for All, *Education a Right or a Privilege?* (UNESCO Publishing, 1999) at 2.

affordable for everyone. Furthermore, education has to cover all people without any discriminative basis. Nonetheless, even if states accept that education is a human right, including all afore mentioned principles, generally they fail to realise it progressively to improve it in the concept of human rights.

Education as a human right is assessed under the Economic Social and Cultural Rights (ESCR) framework; it therefore includes positive duties. However, it has negative obligations at the same time, like the other main human rights category, which is Civil and Political Rights (CPR).This is because, problems related to the right to education are getting more complicated, and therefore due to its artificial character causing a deficiency under the idea of interdependent human rights strongly criticised by some scholars. They suggest that when this right is analysed, both of these sides have to be taken into account and conclude that the right to education is non-derogable.[17] It may be said that fulfilling negative obligations is easier than the positive obligations from states' points of view, and more specifically the right to education leaves many policies to fulfil its obligations to states due to its positive obligations. More clearly, the right to education needs policies to be implemented for states to fulfil positive obligations.

In addition, within the context of this paper and especially in terms of equally accessible higher education, it is a controversial problem as to how governments satisfy the need of education "equally" to all on the basis of a student's capacity, since economic wealth of the country and equality have been main issues in today's global, capitalist and most of the time discriminative world. In another aspect, at the same time education has been assessed as a proper investment and solution for the future of the government to escape these inequalities.[18]

First of all this right is always evaluated with the essential principles of availability, accessibility, acceptability and adaptability in the light of the UN Economic and Social Council General Comment No:13. Generally, availability means educational institutions and programmes in the country must be available in terms of quantity.[19] For instance, the number of buildings, libraries, sanitation, water, information technologies should be enough number for both sexes. Secondly, acceptability includes the idea that the system and policy of education have to be relevant, culturally proper, with contemporary and qualified curricula and teaching methods have to cover these principles.[20] Thirdly, adaptability covers the flexibility of education, because it has to be easily adapted any time for the needs of different societies, cultures and students.[21] Finally, accessibility, which is the main principle for the aim of this paper, mainly indicates educational programmes and institutions have to be accessible for everyone without any discriminative basis.[22]

To fulfil this complex and significant right, it is necessary to understand its basic principles protected under many international and regional documents. It is noteworthy to realise that even if there are many legal impetuses to protect this right, there is still a problematic area in human rights doctrine in terms of equality, economy and justiciability, particularly in the view of governments' applications. The following sections thus try to explain the main legal provisions about the right to education regionally and internationally, how they cover this right generally and how they reach equally accessible education, specifically higher

[17] Geraldine Van Bueren, 'Education: Whose Right is it Anyway?' in Liz Heffernan (eds) *Human Rights: A European Perspective* (The Round Hall Press, 1994) at 341.
[18] General Comment 13, above n 15.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.

education; and whether justiciability is possible or not in different countries' examples about higher education.

3. The Protection of the Right to Education in International and Regional Instruments

The right to education is protected not only in the European, African and American contexts, but also by many special agencies, such as the UN and UNESCO. In addition, access to education is assessed as one of the main elements of the right to education in almost all covenants. In this section, many of them are examined generally; however it begins with ICESCR and the CADE by UNESCO since they may be seen as the backbones of the right to education and equally accessible higher education in the international arena. In particular ICESCR is becoming the most overarching provision thanks to the ratification of the Optional Protocol of the ICESCR (OP ICESCR) in 2013.[23]

A. International level protection: general framework, the ICESCR and the Convention against Discrimination in Education

The first international legal instrument about the right to education is the UDHR. Article 26 of the UDHR says; "Everyone has the right to education." Also, for higher education, it indicates that "higher education shall be equally accessible to all on the basis of merit." This article must be assessed with Article 22 of the UDHR because it mentions ESCR that everyone has been "entitled to realisation through national effort and international cooperation and in accordance with the organization and resources of each state". States must take necessary steps for the right to education as one of these ESCR, and use their resources to fulfil it through international cooperation. It is hence obvious that ESCR need considerable resources, and there are some arguments against ESCR that, especially for non-developed and developing countries which do not have enough resources, it is hard to fulfil this obligation. The term of "in accordance with the resources of each state" has to be thus interpreted carefully, and generally means that states have a duty to extent their resources as possible as available, and their realisation must be progressive.[24]

In addition, Article 2 of the UDHR states that everybody is entitled to all human rights without any kind of distinction, such as race, sex, colour, language, and religion, political or other opinion. The right to education is thus implemented equally. States have to adjust negative obligations, and adopt positive measures to provide this right for everyone.

Also, ICCPR includes a provision about the right to education; however, it protects only the right for parents to ensure their children's moral and religious education in article 18(4).

On the other hand, there are many international provisions about different dimensions of the right to education, such as The Declaration on the Elimination of All Forms of Racial Discrimination of 1963, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Declaration on the Elimination of All Forms against Women of 1967 and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 providing the right to education with a protection on the basis of gender, religion and race, or the Convention Relating to the Status of Refugees of 1951, the International Convention on the Protection of the Rights of All Migrant Workers

[23] OP ICESCR Status: There are 45 signatories and 11 parties as of 15 December 2013, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3-a&chapter=4&lang=en (accessed 15 December 2013); Geneva Academy of International Humanitarian Law and Human Rights, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Geneva Academy Publishing, 2013) at 3.

[24] K. D. Beiter above n 3 at 91- 93.

and Members of their Families of 1990, the Declaration on the Rights of Disabled Person of 1975.

Apart from the above indicated international documents about the right to education, the ICESCR, which is a legally binding international agreement, composes the right to education in more detail with Articles 13 and 14. Particularly Article 13 is the most comprehensive provision about the right to education because all state parties agree on the right to education for everyone. This is because when this right is provided to all indiscriminately; this will help to create a free and integrated society.[25] For higher education, Article 13(2)(c) of the ICESCR says that '[it] shall be made equally accessible to all on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.' The process of all levels of education should thus be free at the end based on the fiscal capacity of the state.

In that provision for equally accessible higher education, one notion comes into prominence, which is accessibility.[26] This accessibility means that educational institutions have to be available for everybody in three different bases, which are non-discrimination, physical accessibility and economical accessibility.[27] It may be supported that the notion of accessibility is the main point about the relationship between equality (non-discrimination) and the right to education because the principle of equality has been involved with the idea that all men are equal, and they ought to be treated equally. If this principle is to become real in practice, it means that there is non-discriminative education. For primary education, it is stated that it should be compulsory and free for all. It so means that primary education has to be compulsory accessible. Particularly without fees, it is the most accessible level of the education system. Nevertheless, Article 13(2)(b) includes that secondary education; 'shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education…'. It hence means that there is a need to reach available, accessible and finally gradually free secondary education not for everyone, but in general. However, the threshold is more complicated for higher education. Article 13(2)(c) says: '[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education…'; it should be therefore understood that higher education should be implemented equally only for those who continue or demand to continue studying at higher education level. In addition, the capacity criterion is chosen as an objective assessment method to decide who will continue this level in accordance with their future potential. In the UDHR, as mentioned before, 'higher education shall be equally accessible to all on the basis of merit' which is related to students' past academic achievements. It can be hence concluded that the relevance on students' past academic achievements this is a positive step in terms of accessibility for those who have low grades at previous school terms.[28] More clearly, Article 13(2)(c) ICESCR focuses on the future potential and capacity of students who would like to continue higher education, unlike the UDHR and this gives an equal chance for candidates to access higher education. As indicated for secondary education, higher education is a process requiring incremental realisation through free education. The progressive realisation is the key point of the right to education as an ESCR. In Article 2 of the ICESCR, each state party has a duty '…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 realisation of the rights… by all appropriate means…' It thus gives a responsibility to every contracting party who has to make cooperation in economical areas to the maximum available resources

[25] Ibid at 94.
[26] General Comment 13, above n 15.
[27] Ibid.
[28] Tristan McCowan , 'Is There A Universal Right To Higher Education?' (2012) 60(2) *British Journal of Educational Studies* 111 at 114.

with the idea of progressive realisation, which is directly related to the main aim of this paper.

This is because, when the whole system of the right to education is examined, Article 13 of the ICESCR may be seen as the most prominent formulation internationally, particularly after the ratification of OP ICESCR. Nonetheless, it shall be interpreted with Article 2 including general state obligations. Furthermore, the Committee on Economic, Social and Cultural Rights (CESCR) has embodied General Comment No: 11 and 13[29] on the right to education to provide contracting states with deep information about every single sub-principle of the right.

In terms of official acceptance of this right, the ICESCR has been ratified by 151 out of 194 states,[30] the CRC by 192 out of 194 states,[31] and the CADE by 100 states.[32] Even if universality of the right to education has been accepted as in official scale, it has not been largely implemented in practice because the right to education, like every ESCR, requires the usage of maximum available resources for states' obligations towards progressively realising the right to education in accordance with the Article 13 of the ICESCR. Moreover, especially in terms of higher education, this progressive realisation is really significant to provide equally accessible to all on a basis of capacity. This side of the right is directly related to the principle of non-discrimination and accessibility; it is so necessary to analyse equal accessibility of higher education with some specific examples from some countries and implications about progressive realisation.

Another international leading and standard-setting regulation about this issue by UNESCO is the Convention against Discrimination in Education in 1960, which has a provision for 'full and equal opportunities in education for all' in the preamble of its constitution. This convention prohibits any kind of discrimination in Article 3 based on race, colour, sex, religion, political or other opinion, national or social origin, economic condition or birth. Particularly within the context of this paper, it is noteworthy that economic condition is also included in the prohibition on discrimination. Moreover, in accordance with the UN CESCR General Comment No: 13, when the ICESCR is interpreted in the light of the CADE, unequal spending policies causing different qualities of education for persons living different geographies can result in discrimination. Contracting states hence have to provide appropriate measures to prevent *de facto* discrimination since the CADE requires states to both reduce violations and regularise positive measures. In Article 4 of the CADE, contracting parties are obliged 'to make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity.' For higher education, once again accessibility is the most stressed notion to secure non-discrimination, physical and economical accessibility. With this characteristic, equally "accessible" higher education for those who want to attend this level of education, and have necessary qualifications, comes into prominence not only in the ICESCR, but in the CADE as well. As emphasised above, both accessibility and availability mean that educational institutions and programmes should be available and quality for everybody. In connection with this, it is the first legally binding provision, and Article 4 says; 'to ensure that the standards of education

[29] General Comment 13 above n 15.

[30] Status of the ICESCR available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no =IV-3&chapt er=4&lang=en, (accessed 24 January 2013).

[31] Status of the CRC available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no= IV-11&chapte r= 4&lang=en (accessed 25 January 2013).

[32] Status of the CADE available at: http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_ TOPIC&URL_S ECTION=201.html#RESERVES (accessed 25 January 2013).

are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of education provided are also equivalent.' It is obvious that the same level quality for institutions at higher education is directly related to the principle of equality and indirect accessibility. This issue is raised in Turkey that there are two types of universities which are public and private universities. However, it is doubtful that their quality is equal not only between private and public universities, but also between universities which have been settled in main cities and the other small cities. Does this inequality cause a violation of the CADE? In this country, there is a general university entrance exam assessing the capacity of students. Apart from that the quality of education depends on the "individual capacity" in Article 4 of the CADE, and the "capacity" in Article 13(2)(c) of the ICESCR. It is therefore deduced that the general university entrance exam provides a legal base for equality in accordance with the human rights framework of the country under Article 4 of the CADE and Article 13(2)(c) of the ICESCR.

As known, three obligations are required for states to cover human rights, which are to respect, protect and fulfil.[33] Particularly in terms of the CADE, states have to take necessary steps for cooperation and to regulate necessary legal provisions in their national law. Apart from this, even if it is not a legally binding provision, Dakar Framework for Action in the World Education Forum 2000, which has a strong moral force, declared again that education which is a human right, and it should be accessible to all.[34] However, at the time of the Eighth Consultation of Member States for the implementation of the Convention against Discrimination in Education from 2006 to 2011, it was seen that although there are some improvements to realise equally accessible "higher" education, member states had faced many challenges, specifically in terms of economical inequalities.[35]

B. Regional level of protection

Education as a right provides all people with an adequate standard of living because of its character as an ESCR. Furthermore, as known it is directly related to the understanding of other human rights as well.[36] This is because the right to education has found general acceptance in many communities which have different economic, social, and cultural backgrounds. Its importance has been accepted in Western, African and Middle Eastern societies by emphasising its value and significance for exercising other rights.[37] It is thus protected not just at the international level; it is also covered regionally at the European, American and African levels.

To begin with, under the framework of the Council of Europe, the ECHR includes only CPR, not ESCR. However, Article 2 Protocol No: 1 of the ECHR covers the right to education, including both generations on the human rights framework. In this provision, this right is promulgated in a negative way: 'No person shall be denied the right to education', in order to emphasise its universality and non-discriminatory characteristics. Even if it does not mention any specific phase of education, the previous European Commission of Human Rights held

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[33] Ida Elizabeth Koch, *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) at 20.

[34] UNESCO, *Dakar Framework for Action in the World Education Forum 2000* http://unesdoc.unesco.org/images/0012/001211/121147e.pdf (accessed 15 December 2013).

[35] UNESCO, *Implementation of the Convention and Recommendation against Discrimination in Education- Results of the Eighth Consultation of Member States (2011-2013)* 11- 13- 18, http://unesdoc.unesco.org/images/0022/002221/222100E.pdf, (accessed 15 December 2013).

[36] F. Coomans and J. Jansen, 'Recht op kosteloos onderwijs: De les- en cursusgeldwet en het recht op onderwijs' (The Right to Free Education: The class and course fees act and the right to education, K. D. Beiter), (1991) 16(3) *Nederlands Juristen Comite voor de Mensenrechten-Bulletin* 187 in K. D. Beiter, above n 3 at 32.

[37] K. D. Beiter, above n 3 at 33-34.

that the right to education 'includes entry to … primary, secondary and higher education' in the merits of *Belgian Linguistic Case.*[38] In *Tarantino and Others v. Italy,*[39] the ECtHR particularly decided that access to higher education is 'an inherent part' of Article 2 Protocol No:1; but it may be limited by contracting states which have a certain margin of appreciation.

The second European instrument is the European Social Charter, which does not have a specific provision named the right to education. It includes the right to vocational training covering access 'to higher technical and university education based solely on individual aptitude'.[40] However, it does not say anything about equally accessible higher education, general secondary education and the compulsory character of primary education.

When the other regional legal instruments are examined, there are many provisions about the right to education. First of all, under the concept of American regional protection, the Charter of the Organization of American States (COAS) was regularised in the 9th International Conference of American States in 1948, and it protects the right to education in articles 34, 49, and 50. Article 49, as the most comprehensive one, indicates that states must show the greatest effort to provide the right to education effectively, and 'higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.'[41] Therefore, everybody is the subject of this education by saying 'all', even if there is necessary to meet regulatory and academic standards. In this regulation, it mentions an obligation to meet regulatory and academic standards unlike Article 26 of the UDHR covering accessibility 'on the basis of merit'. Also, another legal provision about the right to education based on equality is article 12 of the American Declaration of the Rights and Duties of Man 1948, and it indicates free education at least at primary level. The supervisory body of this declaration is the Inter-American Commission on Human Rights. The third legal instrument of the American Human Rights framework is the American Convention on Human Rights (ACHR). This convention protects CPR, like the ECHR. Nevertheless, the Additional Protocol to the American Convention on Human Rights (AP ACHR) (Protocol of San Salvador) was adopted in 1988, and Article 13 embodied the right to education. In point of higher education, it says; 'higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education.' It is clearly seen that this provision is most similar to Article 13 of the ICESCR which is explained in detail, and the ultimate aim is again to reach free higher education equally and incrementally to all. Furthermore, this Protocol reinforces the protection of the right to education by promulgating individual application via Article 19(6). However, the language of Article 13(3)(c) is not as obligatory as Article 13 of the ICESCR because while the ICESCR includes the word of 'shall', the AP ACHR uses 'should'.[42] This Additional Protocol is supervised by submitting reports to the Inter-American Council for Integral Development to assess how the state takes measures to provide these protocol rights in accordance with Article 19(2) of the AP ACHR, and a copy of these reports is sent to the Inter-American Commission on Human Rights. Thus with the Protocol of San Salvador, the right to education is not only a right monitored by states' reports, but also an exigible right under which individuals can make a claim.

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[38] *Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium"*
v Belgium (1968) 1 EHRR 252 at para 1.
[39] *Tarantino and Others v. Italy* (2013) 57 EHRR 26.
[40] The European Social Charter (Revised), http://conventions.coe.int/Treaty/en/Treaties/Html /163.htm (accessed 16 March 2013).
[41] The Charter of the Organization of American States, http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm (accessed 1 February 2013).
[42] K. D. Beiter, above n 3 at 209.

Another regional protection mechanism on the right to education is provided in Africa. The African Charter on Human and Peoples' Rights (ACHPR) has the right to education in its Article 17, and it says; 'every individual shall have the right to education.' It is seen that there is not any specific provision in terms of higher education and so the protection of the right to education in Africa is not as comprehensive as European and American levels. Also, other legal provisions for the right to education are limited on the base of various specific groups such as for women, as in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and for children, as in the African Charter on the Rights and Welfare of the Child.

After these international and regional provisions on the right to education, it is noteworthy to examine the general perspective of justiciability and then implications and cases from different countries around the world in scope of equally accessible higher education. These explanations show whether accessibility in education and specifically equally accessible higher education are dreams or whether it is possible to conclude that these ultimate aims are not far away from reality.

4. Justiciability of Economic, Social and Cultural Rights and the Right to Education

The main differences between CPR and ESCR are their judicial enforceability and protection mechanisms. However, when these differences are examined, it should not be forgotten that all human rights are interdependent and indivisible. This idea is the fundamental principle of the UN human rights project since the UDHR.[43] People can only enjoy one generation of rights when the other is realised.[44] Moreover, for the concept of these two generations of rights, the most important common ground is that the conventions' obligations for both types of rights have to be treated equally via the same emphasis. Paragraph 3 of the Limburg Principles on the Implementation of the ICESCR indicates that; '…equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.'[45] The protection of all human rights thus contains three essential obligations on states which are to respect, protect and fulfil.[46] From this point of view, it can be understood that both classes of human rights are meaningful when they are implemented together, and their generations' names, which are first, second and third generations, are not related to hierarchy.[47] It may be only said that in terms of obligations of states, first and third obligations replace each other in the context of ESCR as the obligation to fulfil is a positive obligation, and costs money. In addition, this obligation particularly comes out even in the situation of privatisation of education[48] and implementation of school fees.

In point of the main aim of this paper, Article 13(2)(c) states; 'Higher education shall be made equally accessible to all on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education'. It is thus easy to say that when the government introduces or increase fees dramatically for higher education, this is a violation of the ICESCR as the government does not fulfil its obligation on progressively free

[43] Kitty Arambulo, 'Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects' (1999) School of Human Rights Research Series Vol: 3, Intersentia, at 110; Magdelena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) at 120.
[44] K. D. Beiter, above n 3 at 65.
[45] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, http://www.unhcr.org/refworld/docid/48abd5790.html (accessed 29 January 2013).
[46] I. E. Koch, (n 33) at 20.; K. D. Beiter, above n 3 at 47-48.
[47] H. Victor Conde, *A Handbook of International Human Rights Terminology* (University of Nebraska Press, 2004) at 236.
[48] K. Singh, above n 9 at 74.

higher education. Even if the sub-paragraph of Article 13(2) says 'on the basis of capacity', it is frankly seen that this process should be through the progressive introduction of free education with regard to the scope of this paper. Hence if there is non-free higher education, it has to become progressively cheaper, and then finally has to be free.

This positive obligation side of ESCR causes a problematic area in point of justiciability. The justiciability of ESCR has been formed in General Comment No:3[49] and the Limburg Principles.[50] Paragraph 8 of Limburg Principles says; 'Although the full realisation of the rights recognised in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.' Also in paragraph 5 of General Comment No:3, it is indicated that:

> Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. ... [Some examples of ESCR] would seem to be capable of immediate application by judicial and other organs in many national legal systems.

This includes examples in connection with the topic of this paper, such as article 13(2)(a) compulsory and free primary education. These above mentioned documents have hence included the idea of justiciability of ESCR for some rights, yet it is necessary to realise progressively to adjudicate to some extent for others, like the progressive introduction of free higher education.

Generally, there are three main interrelated arguments against the justiciability of ESCR. First of all, 'the expense argument' mentions that ESCR cost money, and any decision related to a policy involves how money will be spent, such as free or non-free education, free or non-free healthcare policies and so on. The second one is the indeterminacy argument indicating ESCR are vague and not well-defined. This is because, it is claimed that judges would necessarily act arbitrarily and so domestic jurisdictions would exceed their powers under the doctrine of separation of powers.[51] Lastly, the argument of positiveness as explained above is that ESCR require a positive action rather than a negative action inactive position.[52] Nonetheless, especially for the first argument, it can be claimed that courts can just examine the government's action in terms of the realisation of ESCR, and rationality of their actions. They do not decide how to spend money unlike the executive branch.

Even if there is an above indicated opposition against the idea of justiciability of ESCR, 2013 was the milestone for this uncertainty in the human rights framework. As it is known, the Optional Protocol of ICESCR (OP-ICESCR) was adopted in 2008 by the UN General Assembly. Finally, it was been ratified by 10 states[53], and it entered into force on 5 May 2013.[54] This entrance is a starting point for the changing protection system of ESCR since it will allow probable victims to bring a complaint about ESCR under the jurisdiction of the state

[49] CESCR, General Comment No 3, 14 December 1990, E/1991/23.
[50] Limburg Principles, above n 45.
[51] Olivier De Schutter, *Economic, Social and Cultural Rights as Human Rights: An Introduction* (The Interdisciplinary Research Cell in Human Rights-CRIDHO Working Papers, 2013) at 9.
[52] Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights*, 464 at 465.
[53] These states are Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain and Uruguay. 'Pillay welcomes major breakthrough enabling individual complaints on economic, social and cultural rights' (United Nations Human Rights Office of the High Commissioner for Human Rights, 6 February 2013) http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12968&LangID=E (accessed 15 March 2013).
[54] Ibid.

parties.[55] It is frankly seen that this improvement will finally provide ESCR with equal basis as CPR. In terms of the right to education, after this improvement, the Committee will start to examine complaints from individuals or groups of individuals who claim a violation of their right to education protected under Article 13 of the ICESCR, and thus jurisprudence and precedents shaping the framework of this right will develop '…and outline adequate remedies for victims'.[56] However, before these concrete precedents in near future, it is necessary to understand whether there is a possibility to conclude that equally accessible higher education is protected via different jurisdictions.

5. Applications and Implementations: Equal Accessibility in Higher Education and Progressive Introduction of Free Higher Education

After all these general and specific explanations, for the notion of higher education, the main question should be whether equally accessible higher education is a right or privilege under the concept of human rights. Many countries around the world have underpinned this question. Particularly even if enrolment rates on higher education have been increasing, access level has been still low.[57]

As generally explained before, accessibility, which is one of the main characteristics of the right to education, has capital importance in terms of higher education. It provides an equal educational basis for everyone without discrimination; institutions and programmes have to be accessible to all. Taking this understanding into account, it is frankly seen that equally accessible higher education is a right under international and regional covenants; but it does not mean that this situation prevents it to be a dream in practice. To decide whether equally accessible higher education is a reality, three separate forms of accessibility which are non-discrimination, physical accessibility and economic accessibility should be examined with many positive and negative applications and implementations from all around the world.

A. Non-Discriminatory Access

It is clearly seen from the aforementioned discussion that non-discriminatory access means education must be accessible to all people without discrimination on the basis of age, colour, sex, religion, national origin, disability or any other grounds in the scope of Article 13 of the ICESCR.[58] This principle is also utterly important for higher education under the same article because higher education must be equally accessible to all meaning that students shall not be discriminated against due to any prohibited reasons. One of the oldest cases about the right to a non-discriminatory education issue is *Murray v. Pearson.*[59] In that case, University of Maryland School of Law rejected a black student. The Maryland Court of Appeals held that a university had to admit him to the university because of the principle of equality. This case is one of the backbone decisions in U.S. law in terms of equally accessible higher education. Another case from the U.S. showing racial concerns in education, which were raised in a different way, was *Grutter v. Bollinger.*[60] In this case, the University of Michigan Law School used affirmative action on its admission policy, and denied the applicant's admission because it used the notion of race as predominant criteria

[55] Articles 1-2 OP ICESCR.
[56] Ibid.
[57] T. McCowan, above n 28 at 111.
[58] General Comment 13, above n 15.
[59] *Murray v. Pearson* 169 Md. 478, 182 A. 590 (1936) (Maryland Court of Appeals); United States Courts, *History of Brown v Board of Education*,http://www.uscourts.gov/EducationalResources/ConstitutionResources/LegalLandmarks/HistoryOfBrownVBoardOfEducation.aspx (accessed 19 February 2013).
[60] *Grutter v. Bollinger* 539 US 306 (2003) (US Supreme Court).

to give a greater chance for certain minority groups and create a diverse atmosphere. The Court in that time thus held that this policy may help underrepresented minority groups; yet other qualifications have to be taken into account for all applicants.[61] It may be concluded that affirmative action is significant to accessing higher education as a legal impetus to provide a threshold for equality. Another important case about university admission criteria and affirmative action is *Motala and Another v. University of Natal.*[62] The Constitutional Court of South Africa decided that affirmative action in higher education helped students who were from disadvantaged backgrounds by prioritising their accessibility to the university. It is understood from these cases that equal access to higher education may be provided to vulnerable students by affirmative action, and so discrimination can be prevented.

The notion of discrimination is one of the main prohibitions in human rights doctrine. Moreover, the right to education in principle should be applied fully and immediately without any discriminative basis. It is interpreted with the CADE, and Protocol 1 Article 2 of the ECHR. This Protocol states that nobody shall be deprived the right to education;[63] it must be thus assessed that higher education has to be equally accessible under the principle of non-discrimination. This principle is generally contravened on the basis of gender issues, minorities, and disabled students who come from vulnerable backgrounds.

As a beginning, in terms of gender discrimination in higher education, cases about Muslim women and the headscarf issue most of the time show a negative side of the problem. The first example is from Turkey since notions of discrimination and right to education in equally accessible higher education were examined in detailed via the case of *Leyla Sahin v. Turkey.*[64] Before 2010, there was a general ban on headscarves at higher education institutions in Turkey, generally by universities' circulars.[65] Therefore, if a woman student wore a headscarf, she could not attend lectures, exams and so on. Leyla Sahin, a female student at Istanbul University Faculty of Medicine, brought a case against Turkey concerning the prohibition of attendance to exams and lectures by claiming violations of Articles 8, 9, 10, 14 and Article 2 of Protocol No: 1. The European Court of Human Right (ECtHR) held on 10 November 2005 that there was no violation in terms of these rights. In the decision of the Grand Chamber, it indicated that the right to education was not an absolute right; it may be hence limited by a certain margin of appreciation.[66] In addition, according to the Court, this restriction was foreseeable, pursued the legitimate aims of the rights of others, and

[61] Ibid at 305.
[62] *Motala and Another v University of Natal* (1995) (3) BCLR 374 (D) (The Constitutional Court of South Africa).
[63] Protocol to the Convention for the Protection of Human Rights and Fundemental Freedoms 1950 http://www.echr.coe.int /NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf (accessed 20 February 2013).
[64] *Leyla Sahin v. Turkey* (2007) 44 EHRR 5.
[65] For instance in this case, on 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular by promulgating; "By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students. However, students who insist on attending tutorials and entering lecture theatres although their names and numbers are not on the lists must be advised of the position and, should they refuse to leave, their names and numbers must be taken and they must be informed that they are not entitled to attend lectures. If they refuse to leave the lecture theatre, the teacher shall record the incident in a report explaining why it was not possible to give the lecture and shall bring the incident to the attention of the university authorities as a matter of urgency so that disciplinary measures can be taken." *Leyla Sahin v. Turkey* (ibid) para 16.
[66] *Leyla Sahin v. Turkey*, above n 64 at para 154.

maintaining public order due to its disciplinary character.[67] However, this case is one of the most criticised one in the history of ECtHR.[68] Apart from the whole decision, there was an obvious discriminative policy in higher education in terms of the freedom of religion and the principle of equality. It is obvious that this issue is directly related with the principle of equally accessible higher education. This prohibition prevents women with headscarves from attending universities to study at undergraduate and postgraduate level. As mentioned before, non-discrimination is an overriding right, which is taken into account with both CPR and ESCR. Also, it is not subject to progressive realisation. This right should be realised immediately and fully.[69] If it takes time to fulfil this obligation, it means that the principle of equal accessibility to higher education is violated. The headscarf case of Turkey was therefore a clear violation of this idea of equally accessible higher education. Notwithstanding this ban has been gradually abolished by universities' own circulars or their practice after the Regulation by the Council of Higher Education to Istanbul University on 23 July 2010[70] and as it is seen an important step to equally accessible higher education in Turkey without any gender based discrimination.

Secondly, the same issue has been raised in Kenya. Even if the case is not directly related to higher education, there are many implications for equal accessibility. In *Republic v Head Teacher, Kenya High School & another Ex-Parte SMY,*[71] the High Court at Nairobi held that the ban on wearing Hijab at high school is not a violation of the right to the manifestation of religion and a constitutional right. In the case, the Permanent Secretary of the Ministry of Education wrote a letter addressed to all Heads of the schools because, between 18 May and 26 May 2009, many persons and organisations made claims about the refusal by some schools to allow students to wear religious dress, especially hijab for Muslim students.[72] Then, the applicant was prevented from wearing a hijab by her school administration, and so she brought a case before the High Court. She claimed that this was a clear breach of her right to manifestation of her religion.[73] Notwithstanding, as mentioned above, the Court refused this claim since only the Minister of Education has the power to send obligatory letters in response to complaints under the Education Act.[74] Therefore, there was no legitimate expectation for the applicant.[75] In addition, the Court decided that '[t]here is no evidence that the Muslim girls were ever treated differently on account of their religion or religious beliefs… it is my finding that no evidence has been tendered to show that the applicant has at any time been subjected to any form of discrimination by the respondents

[67] Ibid at para 158.
[68] The dissenting opinion of Judge Tulkensconstitutes the basis of the criticism in terms of the right to education: "it can reasonably be argued that the applicant's exclusion from lectures and examinations and, consequently, from the university itself, rendered her right to education ineffective and, therefore, impaired the very essence of that right." *Leyla Sahin v. Turkey* (n 64) The Dissenting Opinion of Judge Tulkens at para 17.
[69] Katarina Tomasevski, 'Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable' (2001) Right to Education Primers No: 3, The Swedish International Development Cooperation Agency, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, at 27.
[70]David Keane, 'The End of the Headscarf Ban in Turkish Universities?', (Human Rights in Ireland, 26 October 2010) http://humanrights.ie/civil-liberties/the-end-of-the-headscarf-ban-in-turkish-universities/ (accessed 15 March 2013); Jonathan Head, 'Quiet end to Turkey's college headscarf ban' *BBC News*, 31 December 2010 http://www.bbc.co.uk/news/world-europe-11880622 (accessed 21 February 2013).
[71] *Republic v Head Teacher, Kenya High School Ex-parte SMY (a minor suing through her mother and next friend A B)* (2012) The High Court of Kenya at Nairobi, Miscellaneous Civil Application No.318 of 2010.
[72] Ibid at 2.
[73] Ibid at 5.
[74] Ibid at 7.
[75] Ibid at 8.

on any of the grounds envisaged under Art. 27.'[76] Moreover, according to the Court, wearing hijab may cause discrimination of the other students wearing their prescribed school uniform.[77] However, it is obviously observed in the changing precedents of the ECtHR that the ban on wearing headscarf, hijab or any other religious symbol is discrimination itself.[78] From the perspective of the High Court at Nairobi, school uniforms represent the concept of equality unlike wearing hijab. It may be thus claimed that in terms of university education, there is no school uniform procedure, and so when taking the Court's view into account, wearing a headscarf may not cause discrimination between women university students.

The other important issue about gender discrimination is pregnancy at higher education. For this side of the accessibility of higher education, in the case from Botswana, *Student Representative Council of Molepolole College of Education v. Attorney General of Botswana,*[79] there were regulations which provided that if a college student got pregnant, she would have to disclose her pregnancy and leave the college for at least one year.[80] The Student Representative Council challenged this regulation claiming that it was 'unfair, unreasonable' and a breach of the Constitution of Botswana.[81] Then, the Botswana Court of Appeal held that this was a punishment specifically for unmarried female students and their babies, and therefore, it is an obvious discrimination against women under the idea of the right to education.[82] It is therefore a positive step to reach equal access to higher education for pregnant students.

Even if non-discrimination is not subject to progressive realisation and should be realised immediately and fully,[83] for some low-budget countries it is a process to reach a non-discriminatory level at higher education. For instance, in South Africa, even if its Constitution is 'the world's leading example of a transformative' one due to the apartheid regime,[84] it is not an easy process for vulnerable people, such as black people, women and poor persons, to reach equality in all parts of social life. Even so, the South African National Plan in Education White Paper 3 aims that higher education institutions will establish 'equity targets' and 'develop strategies to ensure equity'.[85]

Another form of discrimination on education can be due to a language barrier for minorities in a country. Many studies show that people can learn more efficiently in their mother tongue.[86] If this is not provided for minorities and migrants, it may cause exclusion.[87] Thus, if

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[76] Ibid at 10.
[77] Ibid at 10.
[78] *Eweida and Others v. the United Kingdom* (2013) 57 EHRR 8.
[79] *Student Representative Council of Molepolole College of Education v. Attorney General of Botswana (for and on behalf of the Principal of Molepolole College of Education and Parmanent Secretary of Ministry of Education)* 1995 BLR 178 (Botswana Court of Appeal) in E.K. Quansah, 'Is the Right to Get Pregnant A Fundamental Human Right in Botswana?', [1995] 39(1) *Journal of African Law* 97.
[80] *Student Representative Council of Molepolole College of Education v. Attorney General of Botswana* (ibid) at 1.
[81] Ibid at 2.
[82] Ibid at 9.
[83] K. Tomasevski, above n 69 at 27.
[84] Cass R. Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2001) Public Law Working Paper No. 12; University of Chicago Law & Economics, Olin Working Paper No. 124, at 4.
[85] Department of Basic Education, *Education White Paper 3: A Programme for the Transformation of Higher Education*, 15 August 1997, Official Gazette, at 7 http://www.unisa.ac.za/contents/projects/docs/white%20paper%203.pdf (accessed 16 March 2013); Kader Asmal, *The Media Launch of the National Plan for Higher Education* (Speech given as Minister of Education, 5 March 2001) http://www.info.gov.za/speeches/2001/0103061145a1001.htm (accessed 15 March 2013).
[86] 'The Mother-Tongue Dilemma', UNESCO's Education Today Newsletter, http://www.unesco.org/education/education_today/ed_today6.pdf (accessed 23 February 2013).

a student would like to study in his/her mother-tongue, s/he should not be deprived of it, particularly during primary education. Furthermore, it was suggested that states should take positive measures for minorities to be able to learn their mother tongue, and it is especially crucial for pre-school and primary level.[88] This mother-tongue dilemma has been raised in Turkey almost from the beginning of the foundation of the Republic. Article 42 (9) of the current Constitution of the Republic of Turkey stipulates that '[n]o language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education. Foreign languages to be taught in institutions of education and the rules to be followed by schools conducting education in a foreign language shall be determined by law. The provisions of international treaties are reserved.'[89] Nevertheless, in September 2013 the Government announced a "Democracy Package" which includes some reforms on a much-debated ban on wearing headscarves in public offices, permits education in mother tongues in private schools and commences a debate on the country's much-criticised electoral system and so on.[90] In terms of education in mother tongues, the provision will be added to the Law on Foreign Language Education and Teaching numbered 2923 and will allow opening private schools in other mother tongues. Even if this situation has been harshly criticised by opposition parties,[91] some proponents of education in mother-tongue think that it is a starting point to public school education in mother tongue.[92]Moreover, there are some other steps about the mother tongue issue in Turkish higher education that may be assessed as an improvement with regards to democracy. In 2011, Turkey's first Kurdish language undergraduate programme was opened at Mardin Artuklu University[93] and Mus Alparslan University in south eastern province.[94] Then, in Ankara which is the capital city of Turkey, Bilkent University has started 'Introduction to Kurdish' lessons in February 2013.[95]

Furthermore, equal accessibility of higher education must be understood for disabled students as well in the CESCR General Comment No:5 explaining the importance of the non-discrimination principle for persons with disabilities.[96] Primary, secondary and tertiary education should be equal for people with disabilities, and states must take measures to fulfil this responsibility. For example, in the UK, The Special Educational Needs and Disability Act

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[87] UNGA, 'Report of the Special Rapporteur on the Right to Education, Kishore Singh – The Promotion of Equality of Opportunity in Education' (18 April 2011) A/HRC/17/29, at 16.
[88] Ibid.
[89] Article 42 (9) of Constitution of the Republic of Turkey, http://global.tbmm.gov.tr/docs/constitution_en.pdf (accessed 21 January 2013).
[90] 'Democracy package expected to energize Turkey-EU relations' *Today's Zaman*, 6 October 2013 http://www.todayszaman.com/newsDetail_getNewsById.action;jsessionid=47A84F92FCD952107BD8528540CBD225?newsId=328101 (accessed 15 December 2013); Hüseyin Hayatsever, 'Government takes steps on headscarf, Kurds, electoral system' *Hurriyet Daily News*, 30 September 2013 http://www.hurriyetdailynews.com/government-takes-steps-on-headscarf-kurds-electoral-system.aspx?PageID=238&NID=55393&NewsCatID=338 (accessed 15 December 2013).
[91] 'The Opposition is Reactive on the Democracy Package' *BBC*, 15 February 2013 (Sezen Kama, tr.) http://www.bbc.co.uk/turkce/haberler/2013/10/131001_turkiye_muhalefet_demokratiklesme.shtml (accessed 13 February 2013).
[92] B. S. Gur, 'Democratic Education Package' *SETA*, 17 February 2013 (Sezen Kama tr.) http://setav.org/tr/demokratik-egitim-paketi/yorum/12082 (accessed 16 February 2013).
[93] Doğan News Agency, 'First undergrad Kurdish department opens in SE', *Hurriyet Daily News*, 24 September 2011 http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=first-undergrad-kurdish-department-opens-in-se-2011-09-23 (accessed 23 January 2013).
[94] 'Kurdish can be taught in Turkey's schools, Erdogan says', *BBC*, 12 June 2012, http://www.bbc.com/news/world-europe-18410596 (accessed 29 January 2013); Yigal Schleifer, 'Turkey: Despite Challenges, First University-level Kurdish Course Opens' *The Turko File, 17 October 2011* http://www.eurasianet.org/node/64327 (accessed 15 February 2013).
[95]'A Kurdish Lesson at Bilkent' *NTVMSNBC*, 11 February 2013 (Sezen Kama tr.) http://www.ntvmsnbc.com/id/25420853/ (accessed 10 February 2013).
[96] CESCR, General Comment No: 5 Persons with Disabilities, 9 December 1994, E/1995/22.

2001[97] Chapter 2 prohibits discrimination against disabled students in their access to higher education. All persons who have a disability should benefit from universities and higher education colleges. Besides in the USA, the Rehabilitation Act 1973[98] Section 504 includes a rule that no person can be excluded from higher education. On the other hand in Turkey, there is not any specific provision for a prohibition of discrimination against disabled students in higher education; there is just a general prohibition of discrimination promulgated under the provision of equality before the law in the Constitution of the Republic of Turkey and the Criminal Code Article 121. Moreover in South Africa, even if a high percentage of higher education institutions offer support services for disabled students, these institutions and their members are not legally obliged to provide these support services with disabled students.[99] It is hence seen that with regard to discrimination based on disability, there is increasing urgency to promulgate preventative measures like positive implementations.

Apart from these, it is noteworthy that prohibition on discrimination should be extended to all people who are nationals or non-nationals living in the state's territory without looking at their legal status. This is especially important for undocumented migrants. In Europe, the numbers of migrants are increasing,[100], and many European countries have made strict measures of socio-economic services and foreign recruitment.[101]

In these migration cases, the universal character of the right to education comes into prominence since in accordance with the First Protocol to the European Convention on Human Rights contains three further fundamental rights, '[n]o one shall be denied the right to education.' For example, in *Timishev v. Russia,*[102] the ECtHR held that the refusal of admission to the school 'which they [the applicant's children] had attended for the previous two years', by reason of the applicant's forced migrant status, was a violation of the right to education under the OP 1 Article 2 and the prohibition on discrimination under Article 14 of the ECHR. For higher education therefore this equality principle may be extended.

Non-discrimination is also directly related to other sub-principles under the accessibility of education. Particularly it has commonly been raised that if spending policies of education cause a different quality in different locations, it affects not only economical accessibility, but physical accessibility as well. Besides, if school fees are applied unequally to students who are citizens of different countries, this causes another discriminative application on a fiscal basis. In the UK, publicly funded higher education institutions charge two levels of fee based on nationality: the "home" fee, which is lower, and the "overseas" fee, which is higher under the Higher Education Act 2004.[103] Even this classification is discriminative in itself. This principle is hence the most comprehensive one to be realised for the accessibility of education.

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[97] The Special Educational Needs and Disability Act 2001 http://www.legislation.gov.uk /ukpga/2001/10/contents (accessed 18 February 2013).

[98] The U.S. Rehabilitation Act 1973 http://www.dol.gov/oasam/regs/statutes/sec504.htm (accessed 17 March 2013).

[99] K. Rajohane Matshedisho, 'Access to Higher Education for Disabled Students in South Africa: A Contradictory Conjuncture of Benevolence, Rights, and the Social Model of Disability' (2007) 22(7) *Disability & Society* 685 at 697.

[100] House of Lords European Union Select Committee, 'Migration Patterns and Trends in Europe' in *The EU's Global Approach to Migration and Mobility* (11 December 2012) http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/91/9105.htm (accessed 19 March 2013).

[101] OECD, 'Recent Developments in International Migration Movements and Policies' in *International Migration Outlook 2013* (OECD Publishing, 2013) at 17.

[102] *Timishev v. Russia* (2007) 44 EHRR 37 at para 59.

[103] Higher Education Act 2004 http://www.legislation.gov.uk/ukpga/2004/8/contents)(accessed 25 February 2013).

With regards to the United States, in *Pyler v. Doe*[104] the US Supreme Court held that the Fourteenth Amendment including the provision 'no State shall … deny to any person within its jurisdiction the equal protection of the laws'[105] should be interpreted as meaning that any citizen or stranger on the state's territory has equal protection. Even if this case is related to an undocumented school-age child, this basic rule can be extended to higher education. Normally, they are not precluded from undertaking higher education in the US, but they have to pay the same state tuition as non-resident students.[106] A different aspect of this issue was raised in 1978 with *Elkins v. Moreno.*[107] In this case, the University of Maryland denied an in-state university fee from a student whose parents had G4 visa status (a non-immigrant visa granted to officers or employees of international treaty organizations and members of their immediate families).[108] The Court indicated that it was necessary to meet the domicile intent requirement for in-state tuition. However the question is whether G-4 aliens can become domiciliaries of Maryland and this is purely a matter of state law according to the Court.[109]

Moreover, this international principle is covered by Article 2 (2) of the ICESCR, and it has an immediate effect. State parties therefore must guarantee this right without any discriminative basis, even if there are limited available resources. However, in practise there are not just positive implementations, but negatives as well.

B. *Physical Accessibility*

This side of education means that it has to be within a convenient geographical location and a safe area like a neighbourhood school or it must be provided via modern technology, such as distance learning programmes.[110]

Physical accessibility comes into prominence particularly for disabled students. In higher education, disabled students have faced problems all over the world. With reference to the NGOs Joint Report of Turkey to the UN Committee on ESCR,[111] a lack of accessibility is a general and widespread problem in Turkey. Schools and universities in Turkey are generally built based on projects which do not satisfy universal accessibility standards.[112] It is therefore observed that disabled students are not able to access properly and equally not only higher education, but also the other levels of education in Turkey.

Notwithstanding there are some positive steps for disabled students' accessibility to higher education. One of these positive steps has risen in Canada, which is a leading country in terms of the rights of disabled students. In 2012 the Supreme Court of Canada held in *Moore v. British Colombia*[113] that school administrations cannot show budget constraints or any other reasons as an excuse not to provide students with special physical needs or equipment to be educated. This decision shows that responsible administration, the District and the Province, 'failed to provide [student] with sufficient support to enable him (the

[104] *Pyler v. Doe*, 457 U.S. 202 (1982) (US Supreme Court).
[105] Ibid at II.
[106] Jennifer L. Maki, 'The Three R's: Reading, 'Righting, and Rewarding Illegal Immigrants: How Higher Education Has Acquiesced in the Illegal Presence of Undocumented Aliens in the United States' (2005) 13(4) *William & Mary Bill of Rights Journal* 1341 at 1344.
[107] *Elkins v. Moreno*, 435 U.S. 647 (1978) (US Supreme Court).
[108] Ibid.
[109] Ibid.
[110] General Comment 13, above n 15 at para 6(b).
[111] *NGOs' Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights* (25- 28 May 2010) http://www2.ohchr.org/english/bodies/cescr/docs/ngos/NGOsJointSubmission_TurkeyWG44.pdf (accessed 16 March 2013).
[112] Ibid.
[113] *Moore v. British Colombia* (2012) Supreme Court of Canada 61.

disabled applicant) to access public education.'[114] Even if this case is not directly related to higher education, it is obvious that this precedent helps to understand that students from all education levels who have learning disabilities need extra physical equipment and have to access education.

C. Economic Accessibility

Before the UDHR, in the Constitution of the Union of the Soviet Socialist Republics of 1936, the right to education was recognised with all improved principals. It says; 'citizens of the U.S.S.R. have the right to education. This right is ensured by universal, compulsory elementary education; by education, including higher education, being free of charge…',[115] since in the socialist approach, the right to education is one of the most prominent human rights required positive actions by states and societies.[116] However, in today's capitalist world, family income of students is one of the main criteria for the university application and acceptance process due to the fees with respect to the OECD 2012 Report.[117] Therefore, to provide equally accessible higher education with students from all economic level is getting not only harder, but also vital.

Economic accessibility means that education must be affordable to all. It hence covers primary, secondary and higher education in different ways. To begin with primary education must be "free to all"; however secondary and higher education shall be realised progressively introduce free education.[118]

The real meaning of economic accessibility to all must be understood with 'progressive introduction to free education'.[119] It emphasises an economical process which is getting progressively free. States have to take proper and concrete steps to fulfil this obligation. It means that states have a continuing obligation to go further towards the full realisation of the right to education.[120] Besides, it emphasises that this realisation cannot be in a short period of time; nevertheless this does not mean that the process will be retrogressive depriving the actual meaning of the right; it must be progressive.[121] If a state deliberately takes retrogressive measures, it has the burden of proof to convince that they were decided upon after many considerations, and the state used its maximum available resources to fulfil these obligations.[122] At the end of the process, secondary and higher education will be free, and when states try to put this ultimate aim into practice, all necessary measures should not be retrogressive. The main issue about higher education is therefore tuition fees and whether they have a progressive character or not.

This contradiction comes into prominence in the UK. Tuition fees of higher education in this country, which had been up to £1200, came into practice for the first time with the Teaching and Education Act 1998.[123] After this critical change, the Higher Education Act 2004

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[114] Ibid.
[115] The Constitution of the Union of Soviet Socialist Republics of 1936 http://www.departments.bucknell.edu/russian/const/36cons04.html#chap10 (accessed 21 March 2013).
[116] Manfred Nowak, 'The Right to Education – Its Meaning, Significance and Limitations' (1991) 9(4) *Netherlands Quarterly of Human Rights* 418.
[117] OECD, *Education at a Glance 2012: Highlights* (2012) http://www.oecd.org/edu/highlights.pdf (accessed 11 March 2013).
[118] Article 13 ICESCR.
[119] General Comment 13 above n 15 at para 6(b).
[120] Ibid at paras 14 and 20.
[121] Ibid at paras 14 and 45.
[122] CESCR, General Comment No 3: The nature of States Parties' obligations (art 2, para 1), 14 December 1990, E/1991/23.
[123] The Teaching and Education Act 1998, Chapter 26 http://www.legislation.gov.uk/ukpga/1998/30/contents (accessed 12 March 2013).

introduced variable tuition fees which must be maximum £3000.[124] Then, the Higher Education Regulations 2010 set tuition fees at the higher amount of £9000 via an approval of the Office for Fair Access (OFFA), and from September 2012 these rates have started to be implemented.[125] This short process shows that higher education fees have dramatically increased in the UK until now, and with reference to the 2012 OECD Education at a Glance Report, the UK has the third highest tuition fees between the OECD countries.[126] It is a clear retrogressive process with regard to the fees. Therefore, the UK does not fulfil its international obligations on the right to education owing to these retrogressive steps. However, it is necessary to examine the country's economic level and grants and loans opportunities to decide whether this policy causes an obstacle specifically for low-income students in the UK.

In 1992-1993, 1998-1999 and 2004- 2005 academic years, there were no tuition fees for people who had a parental income less than £10 000; but in 2006- 2007, they had to pay £3000 per annum.[127] On the other hand, in point of maintenance grant eligibility, for people having the same parental income the amount of grant was £2989 per year in 1992-1993 academic year.[128] Then it was decreased substantially to £949 in 1998-1999. In 2004-2005, it was £1040, and it was raised to £2700 in 2006-2007.[129] It is important to note that 2006-2007 academic year is crucial for these analyses. Before this period, there were different level maintenance grants. However, there was a sudden increase in tuition fees to £3000 in 2006-2007 even for people from the low-income level. It is distinguishable to realise that, compared to when there was no tuition fee and there were different level grants, after 2006-2007 the level of grants have not showed the same level rise as the accelerated tuition fees. Particularly even though the 2012 changes on tuition fees in higher education have caused a sharp increase, there has been smaller improvement for grants. Besides, even if grants and loans are really significant part for students' participation on higher education, the level of tuition fees has more deep effect. The correlation between tuition fees and higher education clearly shows via the research of Dearden, Fitzsimons and Wyness that '£1,000 increase in fees results in a 3.9 percentage point decrease in first-year-university participation, whilst a £1,000 increase in grants leads to a 2.6 percentage point increase in participation.'[130]

On the other hand, one positive step about tuition fees with the 2012 changes is instead of up-front tuition fees, they can be deferred until after graduation with loans that students can pay when their income reaches the threshold of £21000 (previously it was £15000).[131] However, this may create another problem physiologically that is a fear of debt; as Education Secretary of Scotland Fiona Hyslop said, 'We believe that debt, and the fear of debt, can be a real deterrent and can actually prevent some young people going to university.'[132] In addition, some organizations like the National Union of Students claim that students have faced direct financial pressure, and many students have to work part-time especially to pay their living costs since loans are not enough for students living far away from their family

[124] The Higher Education Act 2004 (The Original Version) http://www.legislation.gov.uk/uksi/2004/2781/introduction/made (accessed 11 March 2013).
[125] The Higher Education (Higher Amount) (England) Regulations 2010 http://www.legislation.gov.uk/uksi/ 2010/3020/contents/made (accessed 15 March 2013).
[126] Above n 118.
[127] Lorraine Dearden, Emla Fitzsimons and Gill Wyness, 'The Impact of Tuition Fees and Support on University Participation in the UK' (2011) Centre for the Economics of Education, http://cee.lse.ac.uk/ceedps/ceedp 126.pdf (accessed 27 February 2013).
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid. For further details about the Student Loan's Repayment Policy see https://www.gov.uk/student-finance/repayments (accessed 25 March 2013).
[132] Scottish Government, *Graduate endowment scrapped* (28 February 2008) http://www.scotland.gov.uk/News/Releases/2008/ 02/28172530 (accessed 15 January 2013).

homes.[133] Also, with reference to the 2012 OECD Education at a Glance Report, the UK has the highest expenditure rate for tertiary education per student, and it has risen since 2000 dramatically[134] and this may be a supportive argument in terms of the tuition fees. However, even if the UK spends more for its higher education, the higher fees have still affected students from low-income families. Therefore, it is claimed that the progressive realisation should be measured through the government reducing fees per student. Overall expenditure on tertiary education is one of the subsidiary measures to decide whether there is a progressive realisation in higher education.

This current situation finally has caused to be brought a case before the High Court of Justice Queen's Bench Division Administrative Court on 17 February 2012. In *The Queen on the Application of Hurley and Moore v Secretary of State for Business Innovation and Skills,*[135] there were two students who wished to go to a university. These students sought judicial review against the decision by the Higher Education (Basic Amount) Regulations 2010 and the Higher Education (Higher Amount) Regulations 2010, to allow universities to increase their fees up to £9000 per year.[136] The applicants claim that to increase fees is a violation of the right to education covered internationally by Article 2 of Protocol 1, by Article 14 of the ECHR and also the prohibition of discrimination and it will cause a chilling effect specifically for students from disadvantaged social backgrounds.[137] In addition, it is a breach of the public sector equality duties included by the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 according to the claimants.[138] Besides, the counsel for the claimants tried to strengthen their claims thanks to the basis of the ICESCR Article 13(2)(c). As explained before, this provision is the most specific one in terms of equally accessible higher education, and the ECtHR held that when there is an interpretation of provisions, firstly the most specialised international instruments should be examined.[139] Therefore, according to the claimants, The High Court had to take it into account due to the UK's ratification of ICESCR.[140] Within this context, the High Court accepted that equally accessible higher education needs implications without any discriminative basis including person from low-level economic status. However, it held that the student loans prevent or reduce this negative situation in the UK. Even if, as Ms Mountfield QC indicated, that 'to impose an unjustified restriction on the right of access to higher education so as to constitute a breach of the Protocol'[141], the High Court decided that to increase the higher education fees was proportionate, non-discriminative and had a legitimate objective in the example of the UK, and it was not a breach of the ECHR.[142] Notwithstanding, this is not a retrogressive decision as it may be said that these two students win the case partially not in terms of international instruments, but because of national public sector equality duties. This is because the High Court held that the government had failed to fulfil its duties under the domestic anti-discrimination law. In the UK, public authorities have to promote 'equality of opportunity for certain groups'.[143]

It may be criticised that if the government does not satisfy the obligations of domestic anti-discrimination law, how the same situation would not cause a violation internationally as well.

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[133] 'Q&A: Student Fees' *BBC News*, 9 July 2009 http://news.bbc.co.uk/1/hi/education/3013272.stm (accessed 20 January 2013).
[134] Above n 118.
[135] *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills [2012] EWHC 201*.
[136] Ibid.
[137] Ibid at para 4(1).
[138] Ibid at para 4.
[139] *Opuz v. Turkey* (2010) 50 EHRR 28.
[140] *R* (*Hurley and Moore)*, above n 136 at 37.
[141] Ibid at para 33.
[142] Ibid at para 101.
[143] Ibid.

Also economically, the UN Development Programme the Human Development Report 2013 revealed that '[t]he United Kingdom, unfortunately, has an exceptionally high degree of inequality.'[144] The Office for National Statistics analysis shows that some regions in the UK are 10 times poorer that London.[145] With this information, it is thus clearly seen that increased university fees may cause an extra obstacle for the idea of equally accessible higher education for poor areas. Moreover, even if the availability of loans eases the chilling effect of the high amount of fees on poor students,[146] 'a £1,000 increase results in a 3.9 percentage … decrease in first-year-university participation, a £1,000 increase in grants leads to a 2.6 percentage … increase in participation.'[147] Furthermore, the fear of debt would cause discouragement to many students and would have an impact on the poorer sections of the community disproportionally.[148]

Another current incident about discrimination based on economic accessibility in the UK is brought against Oxford University since a claimant who did not show a financial guarantee was barred from access to postgraduate education.[149] In that case, Oxford University St. Hugh College made its selection based on wealth that applicant has to show an evident covering more than £20,000 per annum including living expenses. This postgraduate student therefore sued the College due to the fact that '[a]ccess can't be limited to those who can afford to socialise and dine in college, or live in a room of a particular size and cost.'[150] At the first hearing of the case before the Manchester County Court in 15 February 2013, the Director of Graduate Admissions apologised and the case has been settled with the applicant being offered a place on the MSc in Economic and Social History.[151] Furthermore, Oxford University has decided to review their postgraduate admission criteria.[152] Before this current incident, some leaders at universities announced 'their concerns about the socially divisive impact of rising tuition fees' in January.[153] It is claimed that this situation is an obvious discrimination against poor students, and this 'selecting students by wealth' policy may reduce to access higher education equally. Besides, this policy may be assessed as a breach of the right to education (Article 2 of Protocol 1 by Article 14 of the ECHR and Article 13 of ICESCR) and public sector equality duties like the *Hurley and Moore v Secretary of State for Business Innovation and Skills* case.[154]

On the other hand, there are many positive examples about economic accessibility in higher education. In Turkey, there are two types of universities which are public and private (non-profit foundation) universities.[155] To be accepted to all undergraduate programs in Turkey, a student must provide a valid high school diploma and a sufficient score on the Student

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[144] United Nations Development Programme, *The 2013 Human Development Report – The Rise of the South: Human Progress in a Diverse World* (UNDP Publishing, 2013).
[145] Bethan West, 'Regional Gross Value Added' (2010) 4(6) *Economic and Labour Market Review* 35 at 35- 36.
[146] *R (Hurley and Moore)*, above n 136 at para 33.
[147] L. Dearden, E. Fitzsimons and G. Wyness, above n 128.
[148] *R (Hurley and Moore)*, above n 136 at para 33.
[149] Daniel Boffey, 'Oxford college sued over using 'selection by wealth' for admissions' *The Guardian*, 19 January 2013 http://www.guardian.co.uk/education/2013/jan/19/oxford-university-st-hughs-sued-student-fees (accessed 23 March 2013).
[150] Damien Shannon, 'Why I am suing Oxford for 'selecting students by wealth'' *The Guardian*, 21 January 2013 http://www.guardian.co.uk/commentisfree/2013/jan/21/suing-oxford-university-students-wealth (accessed 23 March 2013).
[151] Daniel Boffey, 'Oxford University settles 'selection by wealth' case' *The Guardian*, 23 March 2013 http://www.guardian.co.uk/education/2013/mar/23/oxford-university-settles-selection-wealth-case (accessed 25 March 2013).
[152] Ibid.
[153] Ibid.
[154] *R (Hurley and Moore)*, above n 136.
[155] 'The Higher Education System in Turkey' (Council of Higher Education, 2010) at 10-13.

Selection and Placement Examinations. Some programmes require extra special abilities like art, music, sports, etc. If s/he has a good score, then s/he can go to the high-ranked university which may be public or private.[156] On 29 August 2012, the Cabinet Decree[157] came into force, and thanks to this Decree, higher education (not only undergraduate but postgraduate also) has been completely free in a day-time and distance education, except an evening education. Students were only making a contribution depending on the programme but the maximum is almost 300 pounds per year.[158] However, private universities are not free.

Furthermore, another positive example is from France. In this country, when students would like to go to a university, they have to pass the Baccalaureate exam to be entitled to a free place at a university.[159] Universities are almost free in France. It has one of the lowest tuition fee levels in accordance with the OECD 2012 Education at a Glance Report.[160] Students in France just have to get an exam at the end of the first year at a university, and pass this exam.[161]

Both Turkey and France provide all students planning to go to a university unlike their economic level, with the equally accessible higher education on a fiscal basis in scope of Article 13 (2) (c)of the ICESCR because they just have general entrance exams, and these exams are for assessing students' capacity which shows students' future potential. Particularly Turkey's change on higher education fees by the Cabinet Decree in August 2012 shows the real implication of 'progressively free higher education'. However, when the world-scale is taken into account, unfortunately many of the late developing countries have started to change their student fee systems. The U.S. has the first and Korea the second highest university fees in accordance with the OECD 2012 Report.[162] Moreover, this retrogressive process has been expanded by many countries from Chile, Indonesia to China, Mexico and Poland.[163]

6. Conclusion

Principle of equality is an integral part of the world for social justice. This equal world is built by well-educated people, and thus everything starts with education. From primary to higher education, all levels have vital effect to realise the importance of all human rights and human dignity. This is because education is accepted one of the fundamental human rights.

As a human right, it is clear that there is a framework including its principles not only internationally, but also regionally and domestically. At the international level, the idea of the right to education comes from the UDHR. In addition, there are many other international instruments about this right. However, two of them are the most comprehensive provisions which are Article 13 of the ICESCR and the CADE. The protection mechanism of the right to education and within this context equally accessible higher education will be more effective

[156] Ibid at 11-12.
[157] The Cabinet Decree numbered 2012/3584, The Official Gazette (Sezen Kama tr, 29.08.2012) http://www.resmigazete.gov.tr/eskiler/2012/08/20120829-1.htm (accessed 23 March 2013).
[158] Ibid.
[159] Ministry of Higher Education and Research, *The French System of Higher Education*, http://www.enseignementsup-recherche.gouv.fr/pid25125/le-systeme-francais-d-enseignement-superieur.html (accessed 10 March 2013).
[160] Above n 118.
[161] *The French System of Higher Education*, above n 160; Campus France, *Universites and higher education and research clusters*, http://www.campusfrance.org/en/page/universities-and-higher-education-and-research-clusters (accessed 10 March 2013).
[162] OECD, above n 161.
[163] Ibid.

as an exigible right with individual complaint thanks to the OP ICESCR. Moreover in point of regional protection, before the ECtHR, people can make a claim about this right just under the First Protocol to the ECHR. Secondly, the COAS, the American Declaration of the Rights and Duties of Man and the ACHR are seen as protection mechanisms for these rights in America, and it is possible to make a claim via individual application. On the other hand in Africa, the ACHPR and some specific provisions provide this right with a very limited protection.

Mainly this right must be available, accessible, acceptable and adaptable. It can claim that for equality, accessibility has a substantial role. Besides, this accessible education must be based on equality as well. Both of them are hence *sine qua non* principles for each other. Within this context, even if primary education has to be compulsory and secondary education has to be generally accessible; specifically higher education has to be equally accessible.

This equal accessibility covers three other dimensions which are non-discriminatory, physical and economic access. When these three sub-headings are examined with different applications and implementations, it is generally realised that equally accessible higher education is not a dream. For non-discriminatory accessibility, specifically cases from the U.S. show that even the affirmative action should be assessed as one of the criteria under the university admission process to reach a real equal access to higher education. This non-discrimination principle is also related to women's situations in higher education. It is clear that removing a ban on headscarf and accepting pregnant students in higher education are other positive reflections of this right. Furthermore, in point of migrants and minorities in higher education, an opening of undergraduate programs in minorities' languages and accepting undocumented migrants as having an equal protection of the laws affects equal accessibility in a positive way. Nevertheless, especially in Europe, nowadays the number of migrants has been increasing; therefore many countries have started to restrict their immigration policies. Their effects on higher education will be hence seen in the near future.

The second sub-principle of accessibility covers physical accessibility. It is seen from the cases that this is important principally for disabled students in higher education. As it is understood that this aspect of accessibility has many deficiencies in primary, secondary and particularly in higher education in some countries; however it is also significant to note via the Canadian case that there are some receptive steps as well.

Except from these implications on non-discrimination and physical accessibility, the economic aspect of accessibility has been the most controversial area nowadays. As indicated above, most of the international and regional provisions about the right to education include a duty for progressively free higher education since the real and exact equal accessibility to this level of education can be provided with free education. Nonetheless, specifically the situation in the UK shows that states generally have a tendency to use their economic concerns to deprive their obligations about free higher education. As it is seen, progressive realisation and high amount of expenditure rates in tertiary education have been used as an excuse for the university fees by states. In other aspect, it is deduced from the free higher education systems in Turkey and France that economic problems cannot be the only reasons to make a regressive realisation. It is hence noteworthy that deprivation of higher education most of the time may be based on arbitrary criteria, such as economic status, to interfere with the right to equally accessible higher education. However, due to the fact that many countries have started to review their higher education policies on tuition fees, the idea of progressively free higher education is unfortunately a dream from these countries' perspective.

Taking all explanation into account, the right to education as one of the basic human rights should be provided to all people with the concept of equality. In higher education, this

equality directly comes from the notion of accessibility. After the assessment of cases from different geographical areas of the world, even if sometimes it is hard to find higher education cases, it is obvious that there are some deficiencies about the dimension of equal accessibility in higher education, and states may use progressive realisation reversely. In other respects, there are some receptive applications and implementations as well. Particularly with the current process of the OP of the ICESCR and its individual complaint procedure, the UN protection framework and domestic jurisdictions about this right will be empowered. In this way, equally accessible higher education might be a reality without any omission. It is just an urgent need to realise it.

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