# A Re-examination of Economic, Social and Cultural Rights in a Political Society in the Light of the Principle of Human Dignity

Mosissa, Getahun Alemayehu

# A RE-EXAMINATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN A POLITICAL SOCIETY IN THE LIGHT OF THE PRINCIPLE OF HUMAN DIGNITY

School of Human Rights Research Series, Volume 91.

A commercial edition of this dissertation will be published by Intersentia under ISBN 978-1-78068-987-6

The titles published in this series are listed at the end of this volume.

# A Re-examination of Economic, Social and Cultural Rights in a Political Society in the Light of the Principle of Human Dignity

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on
Monday 4 May 2020 at 16.15 hours

by

**Getahun A. Mosissa**

born on 26 July 1982
in Nekemte, Ethiopia

**Supervisors:**
Prof. M.M.T.A. Brus
Prof. G.J. Vonk

**Assessment Committee**
Prof. B.C.A. Toebes
Prof. M. Ssenyonjo
Prof. P.C. Westerman

# ACKNOWLEDGMENTS

Finalising this thesis took more than originally expected. When I started this research in February 2010, my original intention was to critically explore issues surrounding the justiciability of ESC rights in the African Continent, in particular, if and whether courts could play a meaningful role in the effective realisation of ESC rights and thereby contribute to the fight against poverty and marginalisation affecting the bulk of population in the Continent. However, half-way between my research, I realised that, at the fundamental level, the problem of the realisation of ESC rights is not unique to the African Continent: it is the problem of every continent and legal system although the degree varies. This led me to substantially revise the research project and expand the scope of investigation. I was able to finish the major theoretical discussions and the review of the case law of the four international human rights systems (African, Inter-American, European and UN) in the remaining two years of my research period at the University of Groningen. Meanwhile, in May 2013, I had to return to my family and give company to my wife for the next six months awaiting the arrival of our third child, Shalom. Although I kept working on the research specially on the case law, I was not as effective as my time in Groningen for different reasons. When I returned to Groningen at the end of November 2013, I was only left with two months to finalise the entire research project but it was already obvious to me that more time was actually needed. Thus, having finished my research time at the University of Groningen, I returned to Jimma University Law School to resume my teaching position at the end of January 2014. But no sooner than my arrival at the Law School, I was given the task to coordinate and develop an LL.M curriculum for the specialisation in Human Rights and Criminal Law. I was also appointed as a deputy director of the School's Legal Aid Centre (LAC) which was responsible for providing free legal aid to the vulnerable members of the community such as the poor, children, women, persons with disabilities and the elderly (the position I held until September 2015). This meant that from March through July 2014 I was fully engaged in researching and developing the curriculum (together with few colleagues at the School) and in the works of the LAC. I had only spent a marginal time working on my dissertation during this time. Meanwhile, the LL.M specialisation program started accepting students since July 2014 for the summer programme and October 2014 for the regular programme. This also meant that I had to be responsible for the large share of teaching activities particularly for the human rights and international law components of the programme as there were

only very few of us who could lecture postgraduate courses in the School, the problem which to my knowledge remained a critical challenge even at the time I left the University in October 2019. Interestingly, by the time I left, the School had already graduated its fifth batch and has been struggling to cope with the growing number of students and high demand for the programme. My promotor, Professor dr. Marcel Brus, had the opportunity to give a class and public lecture during his summer visit to Ethiopia in 2015. Having realised the stagnation in my project, my dear and kind promotors, Professor dr. Marcel Brus and Professor dr. Gijs Vonk, helped me to retreat from the busy workload in Jimma to have time in Groningen as a visiting researcher. I had a valuable time from mid-February through mid-June 2015 to focus on my research project. It was during this time that I was able to write the draft outline and contents of the Part two of the study. From October 2015 through May 2018, I had to assume an additional academic responsibility at Jimma University as the coordinator of research and postgraduate studies of the College of Law and Governance. This was meant that for the next three years I barely had the time to work on the dissertation. This led me to resign from all of my academic responsibilities except class lectures. The first major revision of the entire thesis was accomplished between August and December 2018. The second and final revision was accomplished between April and December 2019. I am more than sure that had it not been for the encouragement of my promotors and the perseverance of my wife, Hirut Adnew, this project would not have come this far. I particularly promised my supervisors several broken deadlines but they were only humans with me. Especially during the last part of the revision, my first promotor Professor Marcel Brus bore the lion's share of the burden in reading through different versions of the thesis and providing feedbacks as well as in translating the thesis summary to *Samenvatting*. I owe both of my dearest supervisors the deepest of my gratitude, not just for their academic supervision but also for their kindness, patience and humanity during this difficult process of the journey. I am very grateful for all members of the scientific (assessment) committee, Professor B.C.A. Toebes, Professor M. Ssenyonjo and Professor P.C. Westerman for their role and comments on the manuscript. I am also grateful to the University of Groningen for giving me the position as a PhD Researcher through Ubbo Emmius Scholarship scheme from February 2010 through January 2014. My summer course at Upsala University (Sweden) on *Method and Methods in Legal Science* and at Abo Academy (Finland) on *Intensive Course on Justiciability of ESC Rights* (through a valuable financial support from the Finish Foreign Ministry) had significant contributions to my research project. My philosophy course on '*Global Justice*' at the University of Groningen helped me to appreciate the problem of ESC rights from a wider perspective. I had also a wonderful company from Marlies, Kirsten, Andre, Birgit, Antenor, Etienne, Esther, Wouter, Michiel, Mentko, Hans, Fitsum, Tadesse and many of the colleagues and friends at the University of Groningen during my

time in Groningen. The special cooperation and assistance of the people at the International Service Desk of the University is quite amazing. My special thanks also go to the staffs of the Groningen Graduate School of Law, in particular, Joop, Barbara, Marjolijn and Anita for their relentless assistance till the end of my research project. I would never forget the many times Marlies and I debated on the issues of human dignity, ESC rights and social justice, at times all the way from Amsterdam to Groningen. I continue to cherish the Groningen memory with Etienne Revebana and his family who remains to be a dear family. Matthias Olthar was and continues to be my dearest Dutch brother. I shared and enjoyed a lot of life's beauty and mystery with brother Matthias. I would like to say thank you to all of my companions at the University of Groningen. My dear wife Hirut Adnew and our three wonderful children, Daniel, Phares and Shalom, endured the pain of my absence and workload at the time they needed me most. They deserve the most of my gratitude.

# DEDICATION

This dissertation is dedicated to my dear wife, Hirut Adnew, and to Daniel, Phares and Shalom.

It is also dedicated to all members of humanity around the globe who continue to endure an unnecessary socioeconomic exclusion, discrimination, marginalisation and indignity in their everyday living.

# CONTENTS

# ACRONYMS

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| AfCoHPR | African Commission on Human and Peoples' Rights |
| ACRWC | African Charter on the Rights and Welfare of Child |
| Ad-Prot | Additional Protocol |
| AU | African Union |
| CEDAW | Committee on Elimination of All forms of Discrimination against Women |
| CEDAW | Convention on Elimination of All forms of Discrimination against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| Chapt(s) | Chapter(s) |
| CoE | Council of Europe |
| CRC | Committee on the Rights of Child |
| CRPD | Committee on the Rights of Persons with Disabilities |
| CRPWD | Convention on the Rights of Persons with Disabilities |
| ECSC | European Committee of Social Rights |
| ECtHR | European Court of Human Rights |
| ESC | Economic, Social and Cultural |
| EUCFR | European Union Charter of Fundamental Rights |
| FAO | Food and Agriculture Organisation |
| GA Res | General Assembly Resolution |
| G.C | General Comment |
| HRC | Human Rights Committee |
| HRCo | Human Rights Council |
| IACoHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court on Human Rights |
| IBR | International Bill of Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICPMW | International Convention on the Protection of the Rights of All Migrant Workers and Their Families |
| ILO | International Labour Organisation |
| n(nn) | Note(s) |
| NGO | Non-Governmental Organisations |

| | |
|---|---|
| No. (Nos.) | number(s) |
| OAS | Organization of American States |
| OAU | Organization of African Unity |
| OHCHR | Office of Hugh Commission on Human Rights |
| P(pp) | Page(s) |
| Para(s) | Paragraph(s) |
| SG | UN Secretary General |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNC | United Nations Charter |
| UN Doc. | UN Document |
| UNDP | United Nations Development Programme |
| WHO | World Health Organisation |

# CHAPTER 1
# GENERAL INTRODUCTION

## 1.1. HUMAN RIGHTS BEYOND DIVIDE

As seen over the last several decades, the discourse on the nature and implications of ESC rights has been fraught with intense philosophical, political-ideological and cultural and practical controversies.[1] In fact, a close look at academic literature reveals that such important notions as fundamental, basic, inherent, constitutional and negative rights are often employed with the intention to diminish the normative essence and significance of ESC rights as human rights.[2] Although there are major progresses especially with respect to defending the

---

1 See for instance, Stephen P Marks, 'The Past and Future of the Separation of Human Rights into Categories' (2009) 24 Maryland Journal of International Law 209; JK Patnaik, 'Human, Rights: The Concept and Perspectives: A Third World View' (2004) 65 The Indian Journal of Political Science 499; Rhoda E Howard and Jack Donnelly, 'Human Dignity, Human Rights, and Political Regimes' (1986) 80 The American Political Science Review 801; Grace Y Kao, *Grounding Human Rights in a Pluralist World* (Georgetown University Press 2011); Ari Kohen, *In Defense of Human Rights: A Non-Religious Grounding in a Pluralistic World* (Routledge 2007); Eric A Posner, 'Human Welfare, Not Human Rights' (2008); David Ingram, 'Between Political Liberalism and Postnational Cosmopolitanism : Toward an Alternative Theory of Human Rights' (2003) 31 Political Theory 359; Gerald C MacCallum, Jr., 'Negative and Positive Freedom' (1967) 76 The Philosophical Review 312; Robert Alexy, 'Discourse Theory and Human Rights' (1996) 9 Ratio Juris 209; Robert Alexy, 'Discourse Theory and Fundamental Rights' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (SAGE Publications, Inc 2006).

2 See generally, J Narain, 'Human and Fundamental Rights: What Are They About?' (1993) XV The Liverpool Law Review; Alexy, 'Discourse Theory and Fundamental Rights' (n 1); EW Vierdag, 'Some Remarks about Special Features of Human Rights Treaties' (1994) 25 Netherlands Yearbook of International Law 119; Posner (n 1); James Griffin, 'Welfare Rights' (2000) 4 The Journal of Ethics 27; Charles R Beitz, *The Idea of Human Rights* (Cambridge University Press 2009); EW Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69; Ashutosh Bhagwat, *The Myth of Rights: The Purposes and Limits of Constitutional Rights* (Oxford University Press); David Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (Cato Institute 1998); Maurice Cranstson, *What Are Human Rights?* (The Bodley Head Ltd 1973). But see Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996); Massimo La Torre, 'Nine Critiques to Alexy's Theory of Fundamental Rights' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006); Paul Brest, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship' (1981) 90 The Yale Law Journal 1063; C Michael Macmillan, 'Social versus Political Rights' (1986) 19 Canadian Journal of Political Science 283.

significance of ESC rights using comparative arguments from civil and political rights[3], the controversy surrounding the normative foundation and practical significance of ESC rights for a given political society has not yet settled. In all this, the central point of contention revolves around two fundamental normative questions: first, whether or not ESC rights could be justified on the same normative (moral) argument and principle as civil and political rights and, second, the normative significance or implications of ESC rights in practice.[4]

In relation to the first question, generally, different authors suggest the principle of autonomy or human dignity as a foundation (justification) of civil

[3] There are now numerous publications defending the justiciability of ESC rights. The following are just few examples: Shue (n 2); Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156; Nsongurua J Udombana, 'Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39 Cornell International Law Journal 181; Asbjorn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd Revise, Martinus Nijhoff Publishers 2001); Amartya Sen, *Development as Freedom* (paperback, Oxford University Press 2001); John Squires, Malcolm Langford and Bret Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press 2005); Malcolm Langford and Aoife Nolan (eds), *Litigating Economic, Social and Cultural Rights (Legal Practioners Dossier)* (Centre on Housing Rights and Evictions (COHRE) 2006); Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008); Alan Gewirth, *The Community of Rights* (The University of Chicago Press 1996); Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010); Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002); Fons Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006); Mónica Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights : Beyond Traditional Paradigms and Notions' (2007) 29 Human Rights Quarterly 431; Obiajulu Nnamuchi, 'Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria' (2008) 52 Journal of African Law 1; Christian Courtis, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (2008); Eibe Riedel, 'Economic, Social and Cultural Rights' in Catarina Krause and Martin Scheinin (ed), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2009); Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights' (2003) 72 Nordic Journal of InternationalLaw 3; Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 The American Journal of International Law 462; Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009); Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010); Mashood Baderin and Robert Mccorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007).

[4] Alexy, 'Discourse Theory and Human Rights' (n 1); Robert Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (paperback, Oxford University Press 2010); Augestin J Menendez and Erik O Eriksen (eds), *Constitutional Rights through Discourse: On Robert Alexy's Legal Theory – European and Theoretical Perspectives, ARENA Report No.9/2004* (ARENA 2004); Gewirth, *The Community of Rights* (n 3); Shue (n 2).

and political rights.[5] It is generally accepted that those falling within the category of civil and political rights are considered as rights essentially connected with and hence flowing from the nature of human beings. This is to say that civil and political rights are inherent in or intrinsically associated with the moral fact of being human and hence are regarded as inherent (inalienable, real, fundamental or basic) human rights. But many seriously doubt if this is equally true with respect to ESC rights. Some authors categorically reject the idea that ESC rights are inherent human rights.[6] It is obvious that to say ESC rights are not inherent human rights means they lack the essential character of being real and universal human rights. Thus, for some, ESC rights should best be described as welfare rights or programs for their existence and realisation are essentially the function of (or contingent up on) the nature of the political culture, availability of material resources and the existence of specific government policies to that effect.[7] This also means that ESC rights are not moral (human) rights which can be justified on the basis of the kind of moral arguments and principles suggested in connection with civil and political rights. If so, then, they cannot be regarded as urgent and compelling human rights as such.[8] Although some support the idea that ESC rights equally flow from human dignity, they fail to show the necessary connection between human dignity and ESC rights, that is, in what sense ESC

---

5 For more on this, see Chapters three and four below. See generally, Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press); Alexy, 'Discourse Theory and Human Rights' (n 1); Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4); Gewirth, *The Community of Rights* (n 3); Michael Meyer, 'The Simple Dignity of Sentient Life : Speciesism and Human Dignity' (2001) 32 Journal of Social Philosophy 115; George Kateb, *Human Dignity* (The Belknap Press of Harvard University Press Cambridge, 2011); Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848; Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (2013); Jeremy Waldron, 'Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley' (2009) 09–50.

6 See Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (n 2); Vierdag, 'Some Remarks about Special Features of Human Rights Treaties' (n 2); Aryeh Neier, *The International Human Rights Movement: A History* (Princeton University Press 2012); Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (Public Affairs 2003); Posner (n 1); Griffin (n 2); James Griffin, *On Human Rights* (Oxford University Press 2008); Cranstson (n 2); Kelley (n 2).

7 This is true of welfare benefits and programs of the welfarist states; the classical example during our time (of government orientation) is the health and social security benefits under Obama Administration (and Democrats-controlled Congress) and the subsequent threat to amend or totally undue those benefits under the Trump Administration (and Republican-controlled Congress); further example is the withdrawal of several unemployment benefits following the 2008 economic recession and the resultant austerity measures adopted by, in particular, many Eurozone countries such as Greece, Italy, Spain, Portugal and Ireland.

8 See particularly, Louis Henkin, 'Rights: Here and There' (1981) 81 Columbia Law Review 1582; Shue (n 2) 13ff (discussing the nature of moral rights). Hence, in essence, human (moral) rights cannot be seen as contingent (situation-dependent) but rather compelling or coercive trumping all types of considerations or requiring weighty justifications to the contrary. See particularly Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Academic 1997) chapt 7.

rights are inherent rights and how the normative idea of human dignity gives rise to their justification.[9]

The second problem concerns the practical implications or significance of ESC rights. Even though this problem remains to be the most critical stumbling block of the entire human rights system[10], it is particularly so in relation to the realisation of ESC rights.[11] In particular, the controversy over the practical implications of ESC rights is well-captured in the so-called justiciability debate over the past decades.[12] Many proponents of ESC rights sincerely hoped that

---

9 Many authors on ESC rights often make reference to their importance for the protection of human dignity and argue this in connection with the merits of civil and political rights. This is however quite different from a foundational argument. It is one thing to say that ESC rights are important. It is quite a different thing to say that human dignity is the ultimate normative foundation of ESC rights. Often these two are conflated in literature dealing with ESC rights effectively leaving the foundational argument merely at the rhetorical level.

10 See generally Wade M Cole, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981–2007' (2014) 117 American Journal of Sociology 1131; Edwin Egede, 'Bringing Human Rights Home : An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51 Journal of African Law 249; Ryan Goodman and Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 European Journal of International Law; Courtney Hillebrecht, 'Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals' (2009) 1 Journal of Human Rights Practice 362; Daniel W. Hill Jr., 'Estimating the Effects of Human Rights Treaties on State Behavior' (2010) 72 The Journal of Politics 1161; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 The Yale Law Journal 1935; Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 Journal of Conflict Resolution 925.

11 Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources "to Realizing Economic, Social, and Cultural Rights' (1994) 16 Human Rights Quarterly 693; Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by Human Rights Organization' (2004) 26 Human Rights Quarterly 63; K (Katarina) Tomasevski, 'Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson' (2005) 27 Human Rights Quarterly 709; Sital Kalantry, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators : A Focus on the Right to Education in the ICESCR' (2010) 32 Human Rights Quarterly 253; Mary Robinson, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 Human Rights Quarterly 866; 'Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical Paper by the Chairperson-Rapporteur, Catarina de Albuquerque (UN Doc. E/CN.4/2006/WG.23/2)'; Amrei Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557; Riedel, Giacca and Golay (n 3); Alston and Quinn (n 3).

12 James L Cavallaro and Emily J Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas' (2004) 56 Hastings Law Journal 217; Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press 2008); Tara J Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas' (2006) 39 N.Y.U. Journal of International Law and Politics 1; James L. Cavallaro & Emily Schaffer, 'Rejoinder: Justice before Justiciability: Inter-American Litigation and Social Change' (2006) 39 N.Y.U. Journal of International Law and Politics 345; Tara J Melish, 'Counter-Rejoinder: Justice Vs. Justiciability?: Normative Neutrality and Technical Precision,

articulation of some generic human rights obligations (both for civil and political rights and ESC rights) in terms of, for instance, the obligation to respect, protect, promote, fulfil, etc. would significantly take away the ambiguity (elasticity or impossibility) charge often voiced against the normative contents of ESC rights and the corresponding State obligations and that this articulation would, in turn, help in ensuring greater (or increasing) accountability of the States for the realisation of these rights.[13]

---

the Role of the Lawyer in Supranational Social Rights Litigation' (2006) 39 N.Y.U. Journal of International Law and Politics 385; Shadrack BO Gutto, 'Beyond Justiciability: Challenges of Implementing/ Enforcing Socio-Economic Rights in South Africa' (1998) 4 Buffalo Human Rights Law Review 79; Tinta (n 3); Koch (n 3); Dennis and Stewart (n 3); Squires, Langford and Thiele (n 3); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008); David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 401; Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004); Abdullahi An-Na'im, 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004); Lord Lester and Colm O'Cinneide, 'The Effective Protection of Socio-Economic Rights' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004); S Muralidhar, 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate'' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004); Langford (n 3).

13 This, in turn, is born out of the long debate as to the human rights nature of ESC rights. Thus, the need for the articulation of concrete obligations ensuing from ESC rights is seen as viable strategy to defend their status as human rights. This project is first championed by Henry Shue followed by other scholars as Asbjorn Eide and Matthew Craven and this was later fully embraced by human rights tribunals as the UN CESCR and the AfCoHPR. See Shue (n 2) arguing that the effective realisation of all human rights entails the obligation to avoid deprivation, to protect against deprivation and to aid the deprived. This formed the theoretical basis for the current obligation to respect, protect, fulfil, etc. now widely used in international human rights law. See also A Chapman and S Russel (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002); Courtis (n 3); Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003); Luisa Cabal, Mónica Roa and Lilian Sepúlveda-oliva, 'What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?' (2003) 7 Health and Human Rights 50; Kitty Arambulo, *Strengthening the Supervision of the International Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Intersentia 1999); Victor Dankwa, Cees Flinterman and Scott Leckie, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 705; Coomans (n 3); Jackbeth K Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6 International Journal of Human Rights 29; Eide, Krause and Rosas (n 3); Dennis and Stewart (n 3); Riedel (n 3); Riedel, Giacca and Golay (n 3); Baderin and Mccorquodale (n 3); Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System : A Manual on Presenting Claims* (2002); Alston and Quinn (n 3); Shue (n 2); Langford (n 3). For the normative developments of ESC rights adjudication by national courts, see generally Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (n 3); S Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 Law, Democracy

However, the empirical reality of ESC rights seen over the last several decades is rather depressing.[14] Although some progresses have been made in terms of the legal and judicial recognition of ESC rights, the proportion of individuals and groups of individuals suffering from such social evils as chronic poverty, hunger, homelessness, social exclusion, marginalisation, discrimination, displacement, unemployment as well as from lack of access to health care, education, social security and safe and potable water are steadily increasing at an alarming rate.[15] In this regard, the empirical evidence is abound. Just to state few of them, over a decade ago, the WHO African Regional Report documented facts about the state of maternal health care in Africa. It stated that 'Millions of women, new-borns and children in Africa are dying from preventable causes every year. Millions more suffer ill-health or disability related to pregnancy and child birth. African women risk deaths to give life and their offspring have the smallest survival chances in the world.'[16] Unfortunately, there is little evidence that this hard fact has changed over the last decade. To the contrary, it can be said that the Ebola crisis which continues to claim tens of thousands of lives since its outbreak in 2015, the mass exodus of migration (mostly originating from Africa) crossing to Europe or being stranded in Libyan detention facilities or sinking into the Mediterranean

& Development 159; Anashri Pillay, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014) 63 International and Comparative Law Quarterly 385; Muralidhar (n 12); Coomans (n 3); Courtis (n 3); Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008); Langford (n 3). For principles developed through softlaws, see also The Limburg Principle on the Implementation of the International Covenant on Economic Social and Cultural Rights (1986); The Maastricht Guidelines on Violations of Economic Social and Cultural Rights (1997). And for CESCR's intervention in this debate, see particularly its General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), adopted in Fifth Session (1990). See also CESCR General Comment No. 9: The Domestic Application of the Covenant, adopted in its Nineteenth Session (1998); CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12), adopted in its Twenty-second Session (2000).

14 See particularly Landau (n 12) (discussing the practice of ESC rights litigation); but see Mark Tushnet, 'A Response to David Landau' (*Opinio Juris*) <opiniojuris.org/2012/01/23/hilj_tushnet-responds-to-landau/> accessed 13 September 2017 (reacting to Landau's criticism); See also Varun Gauri and Daniel M Brinks, 'Introduction' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008); Jonathan Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008).

15 See GA Mosissa, 'Ensuring the Realization of the Right to Health through the African Union (AU) System: A Review of Its Normative, Policy and Institutional Frameworks' in B Toebes and others (eds), *The Right to Health: A Multi-Country Study of Law, Policy and Practice* (TMC Asser Press 2014) 45–47 (where I have tried to summarise some relevant empirical facts drawn from reports of global and regional institutions like WHO, UNDP and FAO).

16 See The Health of the People: the African Regional Health Report (WHO 2006) 17; See also The World Health Report 2008: Primary Health Care, Now More Than Ever (WHO 2008).

Sea, the HIV/AIDS infections constantly increasing at an alarming rate coupled with unacceptably high level of unemployment rate once again confirmed the still fragile nature of the Africa's Continent and its socioeconomic and political systems. It is also evident that, of FAO's staggering yearly report concerning millions of individuals going to bed hungry every day, the Global South, Africa in particular, takes the lion's share.

In fact, the embodiment or personification of the state of abject poverty specially striking the African Continent and beyond was best expressed by the situation of the young Tunisian university graduate setting himself on fire, out of desperation due to lack of socio-economic opportunity and remedy resulting from systemic (structural) failure in his country. That the case was not an isolated incident was immediately attested by the waves of protest that have since been shaking the near-total Arab world – the so-called *Arab Spring*. And, despite the presence of even deeper levels of poverty in most African countries, protests of similar kinds were initially forcefully suppressed by the respective governments. Nevertheless, popular demands for changes towards democratic rule and social justice were later able to overpower the suppressive attempts as recently seen in countries like Ethiopia, Zimbabwe and Sudan. The same was also true in several Latin American countries including in Argentina, Chile, Brazil and Venezuela where people were constantly protesting against the widening socioeconomic inequalities and lack of social justice in their respective countries. Furthermore, the so-called occupy movements in major Western cities like New York, Amsterdam, Paris and London following the 2008 economic crisis and the subsequent large financial bailout of big companies were also expressions of similar socioeconomic problems disproportionately affecting those parts of the populations who became unemployed and poor as the result of the crisis.

These facts are not mere facts or fact-fictions. They are facts about the day-to-day lived experiences of real human lives. As such they have compelling moral and legal implications. Above all, they directly point to the relevance or irrelevance of normative guarantees enshrined in mushrooms of international (global, regional and sub-regional) human rights instruments, the human rights to economic, social and cultural rights, and the corresponding legal obligations of the States in realising these rights.

Indeed, it is worth recognising that the practical implications of ESC rights are, generally speaking, directly connected to the resource capacity of the States. It needs no evidence that, today, a sizable part of the world population lives in poor and fragile economies. For instance, many African and Asian countries host a large proportion of population stricken by extreme poverty and disease, in addition to the broken infrastructure and the rule of law affecting these continents. The governments of these regions in their part often complain in one way or another that they are unfairly expected to live up to higher standards of legal obligations which is incompatible with the level of socioeconomic developments in their

respective countries. However, the problem of resource scarcity and its direct impact on the realisation of ESC rights is not only the problem of developing and least developing nations. For instance, following the 2008 economic crisis, several Eurozone countries have been forced to adopt severe austerity measures which in practical terms meant the withdrawal of socioeconomic support programs benefiting the most vulnerable parts of their society; this was justified on the ground that such programs are not affordable for countries worst hit by the economic recession. This, in turn, seems to confirm the old argument that ESC rights are essentially contingent and programmatic and hence the reason for providing them as state's directive policy principles as enshrined in most modern constitutions. In other words, it gives the impression that they are not inherent and hence automatically enforceable human rights but rather contingent welfare programs which a given government may at its own discretion choose to provide to certain individuals but depending particularly on the financial affordability and sustainability of such programs.[17] This also seems to be the main reason why,

[17] Among several publications on this point, See generally Daniel Edmiston, 'Welfare, Austerity and Social Citizenship in the UK' (2017) 16 Social Policy and Society 261; Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); Aldo Caliari, 'Human Rights Law: How Has It Been Relevant to Austerity and Debt Crises?' (2016) 110 American Society of International Law Proceedings 129; Isabel Ortiz and others, 'The Decade of Adjustment: A Review of Austerity Trends 2010–2020 in 187 Countries' (2008); Daniel Edmiston, Ruth Patrick and Kayleigh Garthwaite, 'Austerity, Welfare and Social Citizenship' (2017) 16 Social Policy and Society 253; Elizabeth Dowler and Hannah Lambie-Mumford, 'Introduction: Hunger, Food and Social Policy in Austerity' (2015) 14 Social Policy and Society 411; Mary Dowell-Jones, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (2015) 15 Human Rights Law Review 193; Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 669; James Crotty, 'The Great Austerity War: What Caused the US Deficit Crisis and Who Should Pay to Fix It?' (2012) 36 Cambridge Journal of Economics 79; Joe Wills and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights' (2016) 23 Indiana Journal of Global Legal Studies 629; David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine: A Rejoinder to Xenophon Contiades and Alkmene Fotiadou' (2014) 12 International Journal of Constitutional Law (I.CON) 747; David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 International Journal of Constitutional Law (I.CON) 710; Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1 Journal of Human Rights Practice 277; Khalid Koser, 'The Impact of the Global Financial Crisis on International Migration' (2010) 11 The Whitehead Journal of Diplomacy and International Relations; Lillian M Langford, 'The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity' (2013) 26 Harvard Human Rights Journal 217; Riedel, Giacca and Golay (n 3); Mary Dowell-Jones, 'The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014); Sally-Anne Way, Nicholas Lusiani and Ignacio Saiz, 'Economic and Social Rights in the "Great Recession": Towards a Human Rights-Centred Economic Policy in Times of Crisis' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014); Sandra Ratjen and Manav Satija, 'Realizing Economic, Social, and Cultural

in spite of the wealth of academic literature urging the judicial institutions to give equal consideration to ESC rights issues, the breadth and depth of jurisprudence from across jurisdictions lack some level of comprehension and penetration especially given the number of years that has been passed since the International Bill of Rights providing for ESC rights came into effect and the intensity of the pressing social issues at hand in the world today. Even in countries where courts have been willing to entertain ESC rights claims, the effectiveness of the current structure of ESC rights litigation has been seriously doubted particularly with respect to redressing the root causes of socioeconomic injustices within a given system.[18] This all leads us to pause and ask if there is any point in recognising ESC rights as human rights in international law. This is the major question behind this study as clearly stated below.

## 1.2. RESEARCH QUESTIONS

In the light of the foregoing background contexts and problems, this dissertation seeks to raise and examine the following central research question. *What normative justification can be provided for economic, social and cultural human rights (ESC rights) guaranteed under international law and how can or should this justification impact the State obligations emerging from these rights*? This central research question can, however, *be broken-down into the following specific sub-questions:*

- *Whether and in what manner human dignity provides a viable normative justification for economic, social and cultural human rights guaranteed in international law?*
- *What concrete legal obligations of the State party flow from these rights and how are these obligations reflected in the jurisprudence of international human rights monitoring bodies from across jurisdictions?*

In the process of answering these questions, the study also seeks to provide answers to the question concerning the kind of legal obligations the State party

---

Rights for All' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014). See particularly CESCR General Comment No. 3: the Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), adopted in Fifth Session (1990) (stating that the State's obligation to realise ESC rights for vulnerable persons is a matter of priority during dire economic crisis).

18 Landau's interesting article on the reality of social rights litigation is one of the eye-opening publication showing the limited impact of ESC rights litigation for the poor. Landau (n 12). Gauri and Brinks' edited volume on Courting Social Justice is also significant in this regard in which they, in substance, doubted the effectiveness of formal litigation for the protection of fundamental ESC rights of vulnerable persons often disadvantaged by structural injustices. See Gauri and Brinks (n 14); Gauri and Brinks (n 13). See also Berger (n 14).

bears towards vulnerable persons in the context of ESC rights. These questions indeed signify complex theoretical and legal debates surrounding the normative status and implications of ESC rights as human rights. They are questions born out of the current limitations and lack of substantive progress in both the academic debate and the enforcement of ESC rights in practice. Unless these questions are addressed in a principled and coherent manner, the academic discourse on the idea of ESC rights as human rights would not have any meaningful practical-legal effect. This is so because the substantive significance of ESC rights as human rights essentially depends on the justifications for compelling State obligations particularly towards those persons who are deprived of essential material conditions of life required to live a dignified human life in a political society. To this end, the study seeks to provide a detailed theoretical and jurisprudential argument and evidence concerning the nature and implications of ESC rights.

## 1.3. OBJECTIVES OF THE RESEARCH

The main objectives of this research are re-examining and providing a fresh perspective on the normative justification, and effective implementation of ESC rights in practice; that is, clarifying how we should understand the normative foundation and nature of these rights, and the concrete legal implications ensuing therefrom both generally and in the specific context of vulnerable persons. This dissertation is accordingly aimed at re-examining in detail the nature, justification and scope of State party's legal obligations flowing from ESC rights guaranteed in international law. In order to achieve these objectives, the study takes the following important steps in the respective order. The first is examining the different conceptions of human rights and their implications on ESC rights as human rights. The second is taking a brief excursion into the existing major human rights theories. The third step is analysing in detail if and in what sense the principle of human dignity can and should be considered as the normative foundation of ESC rights. The final step is analysing the concrete legal obligations flowing from these rights.

Addressing the theoretical and legal questions raised above requires us to primarily re-conceptualise and re-constitute the very idea and justification of human rights. This is especially based on the understanding that many of the disagreements concerning human rights are essentially rooted in the unnecessary abstraction or over-idealisation of both the concept and foundation of human rights.[19] As such, this study seeks to argue for a more robust and practical

[19] A recent critical challenge against philosophical abstraction of human rights comes from Benjamin Gregg who proposed to reject the universal metaphysical (and theological) conception of human rights and instead offered to justify human rights as socially constructed cultural (local) phenomena. See Benjamin Gregg, *Human Rights as Social Construction*

conception and theory of human rights consistent with their basic functions and *raison d'être* in a political society.[20] The systematic discussion of the existing concept and conceptions of human rights and the underlying theories of human rights is therefore needed in order to show their limitations or gaps in helping us to fully capture the nature and function of human rights in a political society and, therewith, the need to come up with an alternative viable conception and theory of human rights that explains in a coherent and holistic manner what human rights are and what they are for. To this end, the researcher relies more on practical arguments than abstract philosophical analysis of the notion of human rights and human dignity.[21] Although abstract metaphysical arguments about human rights and their justification are interesting intellectual exercises, this research seeks to emphasise the primacy (primary importance) of the practical and social essence (both in terms of their origin and justification) of the idea and implications of human rights, for which abstract metaphysical arguments may not always be readily available.[22] Accordingly, it aims to propose and defend the *social conception of human rights* which, in turn, seeks to show and argue that the idea of human rights is born out of humanity's need to respond to practical social necessities affecting the life of individuals and groups of individuals in a

(Cambridge University Press 2013). See also René Wolfsteller and Benjamin Gregg, 'A Realistic Utopia? Critical Analyses of the Human Rights State in Theory and Deployment: Guest Editors' Introduction' (2017) 21 The International Journal of Human Rights 219; René Wolfsteller, 'The Institutionalisation of Human Rights Reconceived: The Human Rights State as a Sociological "Ideal Type"' (2017) 21 The International Journal of Human Rights 230; Benjamin Gregg, 'The Human Rights State: Theoretical Challenges, Empirical Deployments: Reply to My Critics' (2017) 21 The International Journal of Human Rights 359.

20 See particularly Jurgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464, 466ff.; see also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (Polity Press 1996) chapters 3 & 4 (reconstructing system of law and rights as practical normative principles for the regulation of practical social relationships). See also Chapter 3.4 below. The discussion under this section seeks to show that the original conception and hence historical root of human rights shows that the idea of human rights was developed as a normative language (instrument) of struggle against various forms of socioeconomic and political problems as indignation, exclusion, poverty and oppression. For instance, the principal targets of the 17th and 18th C philosophical discourses and the landmark legal documents issued during these periods were the then existing unfavourable socioeconomic, political and cultural institutions undermining the equal standing of humanity. The abstraction of the idea of human rights as being concerned with the inner citadel of human being poorly dissociated from the biological or physical aspect of being a human person is only a later development.

21 See Jeff Malpas and Norelle Lickiss, 'Introduction to a Conversation' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007) p.5; Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (n 20). Thus, as Malpas and Lickiss interestingly put, 'Dignity is not an idea abstracted from human action, but has life only in the actual relations between human beings. Dignity is, in the end, evident only in the concreteness of human life and practice, and the extent to which our life and practice can be seen as enabling of human dignity is perhaps the best measure of its humanity'. Ibid. See also Chapters 2 and 4 below.

22 See particularly Chapter 2 below.

political society. The history of human rights proves that it is coined as a language of struggle against various forms of socioeconomic and political oppressions.[23] Thus, using the social conception of human rights as a thought framework, this research seeks to advance the view that human rights are rooted in or originates from the practical and complex social relations that human beings constitute between themselves and their environment. That is, it seeks to develop arguments whereby human rights are conceived as normative principles constructed by human beings themselves with the view to provide practical solutions to specific life-questions of social, economic, cultural and political nature facing human beings in the process of living together as a political society[24]; in short, the view of human rights as practical normative ideals framed as tools of resistance against different forms of injustices, discrimination, exclusion, marginalisation and oppression: as tools (language) of struggle questing for the dignity of human being in a political society.[25] This entire endeavour, it is assumed, is based on or at

---

23 See particularly Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (n 20) 466ff.; see also Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) chapters 3 & 4 (reconstructing system of law and rights as practical normative principles for the regulation of practical social relationships). See also Chapter 3.4 below.

24 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20); David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discurse* (Kluwer Law International 2002); Milton Lewis, 'A Brief History of Human Dignity: Idea and Application' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007); Stephen Riley, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6 International Journal of Law in Context 117. Thus, following particularly Lewis and Riley, it is possible to note the historical evolution of the idea and value of human dignity and rights from the earlier narrow, exclusionary and discriminatory conception to a more robust modern equalised, universalised and generalised (abstract or idealised) conception. Behind this significant historical development lies the progressive self-awareness and as such self-idealisation of humanity over the course of time and hence the need to defend and promote human life and values both against and in the specific context of social, political, cultural, intellectual and economic environment. Riley states that 'The 'being' of dignity lies ultimately in human efforts to discern what is distinctive, and what is good, in humans, with dignity sitting at the intersection of metaphysical, anthropological, moral, legal and political discourses of human self-perception'. ibid. And Lewis put this same idea as follows. 'Since the Enlightenment and the great Revolutions of the 17$^{th}$ and 18$^{th}$ centuries (English, American, and French), democratization and universalization of the right to dignity has proceeded. Indeed, central to modernity is the rejection of political and moral hierarchies as normative ideals. Western societies over the last three centuries have come to give full political and moral status to non-noble and property-less men, non-Christians, women, and non-whites. This process culminated in the Universal Declaration of 1948 when equal moral status was accorded all human beings.' ibid (also citing Y. Arieli ibid).

25 Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (n 20); Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 29ff (arguing that the substance of fundamental moral rights is concerned with guaranteeing individuals against various kinds of standard threats); Shue (n 2); Sen (n 3) chapter 4 &5 (discussing poverty as question of capability deprivation and hence as being the practical question of freedom). Thus, social deprivations, oppressions and exclusions are at the epicentre of the development of the idea of human rights whereas ideal metaphysical arguments are only the consequent phenomena.

least have to do with the intrinsic moral value attributed to humanity (that is, to human life in general) and the general moral obligations (of humanity) to respect, protect, preserve and promote the welfare of humanity as a whole.[26]

In the modern human rights discourse, this intrinsic moral value of humanity is referred to as human dignity.[27] This value is often associated with the moral aspect of being human. However, having carefully examined its essence and implications in detail, this research argues that human dignity is a value that should be construed as pertaining both to the biological (physical) and moral aspect of being human and, hence, as justifying an unconditional respect for the inherent biological and moral needs of humanity. This ideal of unconditional respect then forms the basis for requiring the State and other relevant actors to realise both the moral and material conditions needed to live a dignified human life. This approach will assist in clarifying that the various kinds of human rights recognised at international and national level are nothing but the concretisation of what it means to respect the inherent value of humanity in the practical sense of the term: that is, whether referred to as civil, political, economic, social or cultural rights, all human rights are specifications or articulations of the principle of human dignity.[28] In turn, this understanding will helps us to effectively reject the categorisation arguments associated with the traditional conceptions and theories of human rights.[29]

Following from this, this research will then aim to show that the problem of ESC rights is not the problem of justification but rather the problem of implementation in practice. This problem, in turn, arises from two basic factors, leaving aside the ideological objections to their status as human rights. First, it arises from the fact that the practical realisation of ESC rights involves very complex and, at times, difficult policy choices that States have to make concerning the allocation of resources and responsibilities, and the prioritisation and balancing of competing interests in the society.[30] Second, the abstract human rights discourse has not

---

26 This argument is developed in Chapter 3.4 below.

27 Daniel P Sulmasy, 'Human Dignity and Human Worth' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007); Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) (discussing the moral idea); Kateb (n 5); Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012); Michael Rosen, 'Dignty: The Case Against' in Christopher McCrudden (ed), *Understanding Human Dignity (Proceedings of the British Academiy No. 92)* (Oxford University Press 2013).

28 Chapter 4 below.

29 Mary Neal, 'Respect for Human Dignity as "Substantive Basic Norm"' (2014) 10 International Journal of Law in Context 26; Stephen L Darwall, 'Two Kinds of Respect' (1977) 88 Ethics 36; Elizabeth Wicks, 'The Meaning of " Life ": Dignity and the Right to Life in International Human Rights Treaties' [2012] Human Rights Law Review 1; Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4).

30 Here I am not suggesting that there is an irreconcilable conflict between individual and collective interests as often suggested by traditional human rights theories. For more on this, see generally, Carol C Gould, *Marx's Social Ontology Individuality and Community in Marx's Theory of Social Reality* (MIT Press 1978); Gewirth, *The Community of Rights* (n 3); Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 International

yet produced a clear and concrete legal framework developed on the basis of the principle of human dignity which could guide the States parties in their efforts to implement ESC rights in practice. For instance, the practical implications of ESC rights for the States parties in fragile or poor economic conditions is still not clear. This problem even becomes more complicated if seen in the light of the rights of several socioeconomically vulnerable persons (and group of persons) such as persons with disabilities and those lacking basic minimum income indispensable to meet the material conditions of life.[31] Even the proponents of the justiciability of ESC rights could not so far develop concrete and coherent obligations which can be regarded as legitimate and compelling on the States parties.[32] Therefore, it is the main trust of this study that if the above questions

---

Journal of Constitutional Law (I.CON) 572; Basek Cali, 'Balancing Human Rights? Problems with Methodological Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251; Alastair Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289; Denise Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31 Melbourne University Law Review 801; Sandra Fredman, *Human Rights Transformed: Positive Rights and Negative Duties* (Oxford University Press 2008). I rather take the view that both individual and collective interests have substantive relationships as they are both justified on the basis of the same overarching normative principle as will be seen in the next chapters. In this regard, I follow the approach of, inter alia, Jeff Malpas, 'Human Dignity and Human Being' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007); Gould, *Marx's Social Ontology Individuality and Community in Marx's Theory of Social Reality*; Gewirth, *The Community of Rights* (n 3); Joseph Raz, *The Morality of Freedom* (Paperback, Clarendon Press 1986); Fredman; Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4).

31 Nolan (n 17); 'Safeguarding Human Rights in Times of Economic Crisis (Issue Paper Published by the Council of Europe Commissioner for Human Rights)'; 'The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe: Feasibility Study (Doc. No. CDDH(2015)R84 Addendum IV, Steering Comittee for Human Rights (CDDH), 84th Meeting, 7–11 December 2015)'; Dowell-Jones, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (n 17); Koser (n 17); 'Dialogue between Judges: "Implementing the European Convention on Human Rights in Times of Economic Crisis" (Seminar, 25 January 2013)' (2013); Ratjen and Satija (n 17); Way, Lusiani and Saiz (n 17); Edmiston, Patrick and Garthwaite (n 17); Edmiston (n 17); Wills and Warwick (n 17); Saiz (n 17); Dowler and Lambie-Mumford (n 17); 'Report on Austerity Measures and Economic and Social Rights (A Report of UNOHCHR Submitted Persuant to General Assembly Resolution 48/141)'.

32 There are of course several attempts in this direction. The most important ones are the contributions of such scholars as Henry Shue, Asbjorn Eide, Ida Koch and the general comments of the UN ESCR whereby the ESC rights obligations of the State are stated in terms of the obligation to respect, protect, fulfil (facilitate, promote and provide). See Shue (n 2); Asbjorn Eide, 'The World of Human Rights: As Seen from a Small, Industrialized Country' (1979) 23 International Studies Quarterly 246; Eide, Krause and Rosas (n 3); Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009); Koch (n 3); 'Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical Paper by the Chairperson-Rapporteur, Catarina de Albuquerque (UN Doc. E/CN.4/2006/WG.23/2)' (n 11); Riedel (n 3); Alston and Quinn (n 3); Ssenyonjo (n 3). Despite these attempts, the problem of the realisation of ESC rights, in particular, the absence of concrete legal standards to measure their legal enforcement, remains to be one of the critical problems of international human rights law. See Saiz (n 17); Gauri and Brinks (n 14); Landau

are addressed successfully, the overall arguments and approaches of this research will help us to bring coherence to our understanding of the justification, nature and implications of ESC rights as inherent human rights. As such, it will contribute to the development of academic debates regarding the content and scope of protections and the concrete State obligations flowing from ESC rights regime. In particular, this research is conducted with the aim of providing a fresh perspective on their essence as inherent human rights and certain specific normative frameworks useful to analyse their practical-legal significance in a coherent manner.

## 1.4. RESEARCH METHODOLOGY

In an endeavour to provide answers to the above questions, the study adopted two levels of analytical approaches. At the first level, it has attempted to examine the theoretical problems affecting the effective realisation of ESC rights. Thus, the discussion in Part one has focused, on the one hand, on analysing how different conceptions and theories of human rights have undermined the status of ESC rights and, on the other hand, on proposing an alternative perspective and justification which better explains their essence as inherent human rights. It has particularly made an in-depth analysis of how the principle of human dignity functions as the substantive justification of ESC rights and the practical normative demands that it signifies for the realisation of the material conditions of life guaranteed through ESC rights regime. To this end, the discussion drew on academic writings available in the field of legal theory, international human rights law and other relevant disciplines such as philosophy (especially moral and political philosophy) and international relations. This is however not to suggest that this research is an interdisciplinary inquiry. Reference to non-legal academic writing is rather justified on the fact that many of the issues in human rights discourse in general and those raised above are essentially cross-cutting in nature. Therefore, the researcher used perspectives from other relevant disciplines in order to have a comprehensive understanding of the issues under investigation and to come to a reasonable conclusion. In this regard, while an effort was made to exhaust all relevant major writings related to the topic (as long as they are available in English), the choice of the literature in this Part was guided especially by the particular orientation of this inquiry: that is, paying due regard to those academic writings which focus on and promote the practical understanding of the conception, justification and function of human rights, as opposed to those emphasising on abstract metaphysical arguments. In substance, the discussion

(n 12); Edward Anderson and Marta Foresti, 'Assessing Compliance : The Challenges for Economic and Social Rights' (2009) 1 Journal of Human Rights Practice 469; Roach (n 12); Gutto (n 12).

in this Part has clarified how we should conceive the normative essence and justification of ESC rights and their practical imports in the light of the principle of human dignity.

At the second level, the study then tried to assess the normative meaning and requirements of the principle of human dignity in the light of international ESC rights jurisprudence and hence the concrete and compelling legal obligations the State bears in the realisation of ESC rights as a matter of respect for the inherent value of human being. So, the discussion in Part Two has attempted to give substance to (concretise) what respecting human dignity, that is, ensuring a dignified human life entails in the legal sense of the term in the specific context of ESC rights. To this end, this research has adopted an inductive approach to analysing international ESC rights jurisprudence. A detailed explanation of the technics employed in the selection and analysis of the cases will be provided in the introduction to Part two of the study. Just to provide a general highlight here, the researcher has first undertaken a painstaking review of ESC rights case law of the four international human rights systems (European, African, Inter-American and the UN human rights systems) with the view to identify the general patterns of approach each takes when adjudicating ESC rights claims and the issues thereof. Then, these approaches were thematised and restated in terms of specific legal principles and systematically analysed. The discussion of the case law was also substantiated with relevant soft-laws, thematic reports and general comments. In this regard, the principal approach of the study was to analyse all ESC rights cases available before all international monitoring bodies. However, when this became practically impossible to manage due to the number of the cases dealt with by specific bodies (in particular the ECtHR), or when they are found to be repetitive and bring no substantive change to the already established jurisprudence, the emphasis was placed on the landmark cases and on recent judgments of the tribunal concerned. Moreover, a practical limitation for reviewing the cases especially in relation to the European and Inter-American human rights systems was that some of the cases are decided in languages other than English and that the English translation is sometimes not (readily) available. The researcher has tried to mitigate the gaps this might create in the overall analysis of this work by using the summaries provided by the respective organs if found to be available.

## 1.5. THE STRUCTURE OF THE RESEARCH

This research is divided in to two parts. Part one, which consists of three chapters, is concerned with basic theoretical issues relating to the normative status of ESC rights. Chapter two will identify and discuss two major conceptions of the notion and implications of human rights: the hierarchical and dichotomised conceptions. In doing so, the discussion in this Chapter has two main purposes. First, it tries

to show how both the hierarchical and dichotomised conceptions of human rights deny ESC rights of any normative relevance. Having shown the critical limitations in these two conceptions, the Chapter then goes on to introduce a counter argument against these views particularly by drawing on MacCallum's and Alexy's interesting discussions arguing that (human) rights and freedoms essentially signify a triadic – three-point – normative relationships.[33] At the core of the triadic conception of human rights is an intuitive ideal of a free human being, that is, what it practically means to be free or unfree, to have or be deprived of human rights for a human being living in a political society regardless of the source and nature of the unfreedom or deprivation.[34] Accordingly, it will be explained that the triadic conception of human rights introduces an interesting and alternative perspective to both the hierarchical and dichotomised views of human rights. Alexy succinctly summarises the central thesis of the triadic conception of human rights as follows. For him, 'liberty is not an object in the same way as a hat is,'[35] that is, it does not refer to a relationship between a human being and an object, as opposed to what is often depicted in the rights-discourse.[36] It rather and always signifies practical human relationships.[37] In other words, when we talk about the liberty or the rights of human being, it is always in terms of his or her relationship with other fellow human being defined by and in the context of certain underlying normative principles and frameworks.[38] This, in turn, perfectly goes with the social conception of human rights advanced in this research.

Chapter three then goes on to examine the problem of the conception of human rights in the light of the existing major theories of human rights.[39] The purpose

---

33 MacCallum, Jr. (n 1); Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4); see also William H Hay, Rex Martin and Marcus Singer, 'Gerald C. MacCallum, Jr. 1985–1987' (1987) 61 Proceedings of the Annual Meeting (American Society of International Law) 383.

34 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4); MacCallum, Jr. (n 1). Cf. UN GA Res 421(V) Section E.

35 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139.

36 In fact, for MacCallum, this picture in the traditional conception arises when one of the variables is not mentioned in the statement. MacCallum, Jr. (n 1); Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315; Jeremy Waldron (ed), *'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man (with Introductory and Concluding Essays by Jeremy Waldron)* (Methuen 1987).

37 This point is well argued by Alexy. 'Of course,' says Alexy, 'one can speak of the liberty that someone has, in the same way as the one can speak of the hat they have. But the idea of "having" in the case of liberty does not consist of a relation of possession between a person and an object. It would therefore seem appropriate to think of liberty as a quality which can be associated with persons, objects and society.' See Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139.

38 MacCallum, Jr. (n 1); Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4); John Rawls, *Political Liberalism* (Expanded E, Columbia University Press 2005).

39 Leo Strauss, *Natural Rights and History [1953]* (5th Impres, The University of Chicago Press 1965); See particularly Carol C Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (Cambridge University Press 1988) 4–18 (summarising central arguments in liberal, socialist and discourse theories of human rights). Brian Bix,

of this Chapter is not providing a detailed discussion of the theories but rather to identify and state their major limitations in justifying a comprehensive idea of human rights.[40] Having done this, the second-half of the Chapter then tries to develop an alternative justification of human rights using the idea of the social conception of human rights which, in substance, seeks to present and defend the idea of human rights as being rooted in and concerned with practical social relations constantly evolving with the history and progression of humanity.[41] In other words, it essentially doubts the possibility of constructing an abstract metaphysical justification of human rights suggested by the traditional theories, and rather argues for human rights to be understood as the practical social idea developed over a course of time through conscious intellectual endeavour especially aimed at introducing morality to society's complex social relations.[42] This will ultimately lead us to the understanding that human rights have fundamental social functions holding together both the individual and collective interests as an undivided whole, as opposed to what has been suggested through traditional human rights theories.[43]

---

*Jurispridence: Theory and Context* (6th edn, Sweet & Maxwell 2012); John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011); Ellen Frankel Paul, Jr Fred D. Miller and Jeffrey Paul (eds), *Natural Rights Liberalism from Locke to Nozick* (Cambridge University Press 2005); C Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (Palgrave Macmillan 2010); Christopher Wolfe, *Natural Law Liberalism* (Cambridge University Press 2006); See generally Nigel E Simmonds, *Central Issues in Jurisprudence* (4th edn, Sweet & Maxwell 2013); Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press 1992); Ellen Frankel Paul, Jr Fred D. Miller and Jeffrey Paul (eds), *Natural Law and Modern Moral Philosophy* (Cambridge University Press 2001); Ana Marta Gonzalez, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Ashgate 2008); Viktor J Vanberg, 'Liberal Constitutionalism, Constitutional Liberalism and Democracy' (2011) 22 Const Polit Econ 1; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20); Robert Alexy, 'Discourse Theory and Fundamental Rights' in Augestin J Menendez and Erik O Eriksen (eds), *Constitutional Rights through Discourse: On Robert Alexy's Legal Theory – European and Theoretical Perspectives, ARENA Report No.9/2004* (ARENA 2004).

40 Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39).

41 See particularly Chapter 3.4 below.

42 Kretzmer and Klein (n 24); Yehoshua Arieli, 'On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Joern Eckert, 'The Legal Roots of Human Dignity in Germany' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002). The spirit of the idea of human rights as reflective of humanity's progression is well-captured by Eckert, Arieli and Klein et al while discussing the notion of human dignity in contemporary human rights discourse. Thus, following Eckert et al, the progression over the course of time has led to what they call 'fundamental rethinking' of society and social institutions during intellectual revolutions of the 16th century and the following. In this way, we can also say that the 20th century UN project as well fits into this thinking: an intellectual project concerned with adding some form of morality and decency to both national and international relations of states and state-individuals at national treatment.

43 See for instance Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39); Gould, *Marx's Social Ontology Individuality and Community in*

Chapter four will provide an in-depth examination of the idea of human dignity as the normative foundation of human rights. In particular, it investigates and seeks to provide an answer to the question whether ESC rights can be justified on the same normative principle as civil and political rights; that is, whether they can be established as inherent and universally valid human rights signifying compelling State obligations, as opposed to the current perception that they are mere discretionary and contingent programmatic benefits essentially linked to the resource capacity of the State and the political will of the government concerned. To this end, the Chapter begins with the exploration of the notion of dignity in the historical-philosophical discourse and usage so as to uncover its deeper normative meaning and implications for the modern idea of human rights. The discussion will show that historically the term dignity had two principal connotations (first, as signifying rank or status and, later, as describing the inherent value of humanity) but the core normative meaning essentially associated with it, the ideal of respect, remained the same over the course of time and that it is this very same ideal that underlies its significance as the normative foundation of inherent and universally valid human rights. This is also to say that without this ideal of respect the notion of dignity would be of no use at all both in general moral and human rights discourse. Thus, it will be seen that the principle of human dignity particularly signifies the moral idea that, as the bearer of inherent and unconditional moral value, humanity ought to be treated with due and proper respect. That is, in essence, it entails an unconditional respect for the inherent moral value of human being.[44]

However, the question will arise: to what aspect of human being will this respect be due? This question will arise because in an intuitive and practical sense, human beings have both the biological (physical) and moral existence and that, as it will be seen below, the central arguments of the traditional theories essentially associate the question of rights and freedoms with the moral aspect of being human (and hence primacy to the so-called civil and political rights). But a close look at its core practical meaning reveals that the principle of human dignity asserts due and proper respect for both the biological and moral aspect of being

*Marx's Theory of Social Reality* (n 30); Finnis, *Natural Law and Natural Rights* (n 39); John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1998); John Finnis, *Reason in Action: Collected Essay: Volume I* (Oxford University Press 2011). Per Finnis, Aquinas's approach expressly recognises the mutuality between individuality and collectivity as he conceives rights as an object of justice wherein respecting the rights of individuals is seen as the substantive element of respecting the common good.

44 See Chapters 4.2 through 4.4 below. See also Neal (n 29); Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of Human Person (with Foreword by Aharn Barak)* (University of Pennsylvania Press 2013); Oliver Sensen, *Kant on Human Dignity* (Kantsudien 2011); Kateb (n 5); Malpas (n 30); Riley (n 24); Paulus Kaufmann and others (eds), *Humilation, Degradation, Dehumanization: Human Dignity Violated* (Springer 2011); William A Parent, 'Constitutional Values and Human Dignity' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992).

human and hence does not admit such categorisation approach to the nature of humanity.[45]

In addition, Chapter four also discusses the implications of the different usage of the principle of human dignity being invoked in different contexts. Thus, it will argue that the different usage of the idea of dignity in different contexts expresses an 'inflorescence'[46] of its core normative meaning through different 'family of terms' or 'dignity-languages'[47] which, in turn, establishes its conceptual richness. The discussion also reveals that the principle of human dignity possesses a relational and dynamic characteristic feature which goes well with the conception of human rights as emerging from practical social relations. Thus, it will be seen that the principle of human dignity not only implies but, in fact, requires the existence of dynamic and mutual relationships between human beings. This relational nature of the principle is expressed through its demand on everyone to be attentive to the inherent moral and biological needs of every person indispensable to live a dignified human life. Therefore, the principle of respect for the inherent value of human being specifically entails ensuring those moral and material conditions of life required to live a dignified human life.

Having examined all this in abstract, Chapter four will also assess the general normative (legal) functions attached to the principle of human dignity in international positive law and few national jurisdictions. This has two main purposes. First, it will provide a concise assessment of how the abstract understanding of the principle of human dignity has been applied in international positive law and jurisprudence. Second, it will lay a groundwork for the detailed examination of ESC rights jurisprudence in Part two.

Part two of the study turns to discussing the specific legal implications of the principle of human dignity in the context of ESC rights; that is, what the State should legally do in order to adhere to the normative demands of the principle of human dignity. To this end, Part two makes an in-depth and systematic analysis of international ESC rights case law. Based on the extensive review of international ESC rights case law, this Part argues that the State's core legal obligation to respect and ensure the material conditions of life consists of two principal elements. The first one is the procedural element which requires the State to ensure the due process guarantees indispensable for the effective protection of the basic material conditions of life. In relation to this, three basic procedural principles are identified and discussed: participation, access to justice and accountability. The second one is the substantive element which requires the State to secure the essential minimum material conditions required to live a dignified human life. This, in turn, treads on four core substantive human rights principles: dignified life, equality and

45 This argument is examined in detail under Chapter 4 (especially Chapt. 4.4 through 4.7) below.

46 This term is borrowed from Sulmasy (n 27).

47 Adopted from Parent (n 44).

non-discrimination, and the protection of individuals against (socioeconomic conditions of) vulnerability. The introductory section of Part two will provide a more detailed explanation of the reasons for focusing on these principles. But in selecting and formulating these procedural and substantive principles from each of the international ESC rights cases reviewed, the researcher was primarily guided by this question: what (background reason) led the monitoring bodies to arrive at the declaration of violation or no-violation of the right(s) under question. This was then refined and analysed using relevant soft-laws (resolutions, general comments, case digests and guidelines), available (thematic) reports and academic writings. In substance, Part two will show that these seven principles essentially give specific meaning (substance) to the State's generic legal obligation to respect the principle of human dignity in the context of ESC rights. That is, they are core procedural and substantive entitlements which the State is legally bound to ensure for every person within its jurisdiction in the realisation of ESC rights. They are also fundamental human rights principles and values creating unity and synergy between the approaches of different international human rights monitoring bodies dealing with ESC rights claims. The discussion in Part two is accordingly organised around these seven principles. The five chapters in this Part will make a detailed examination of the contents and implications of each of these principles turn-by- turn but it can be said from the outset that, in the context of ESC rights, the State's generic obligation to respect and ensure the material conditions required to live a dignified human life essentially entails guaranteeing, at the very least, these procedural and substantive elements both in law and in practice. This, in turn, means providing adequate and functioning domestic mechanisms through which (group of) individuals can meaningfully participate in the decision-making processes affecting their vital ESC rights and interests (Chapter five); ensuring access to effective remedy against violations of their ESC rights (Chapter six); holding the State and its agents accountable for their actions or omissions obstructing the effective realisation of ESC rights (Chapter seven); directly providing indispensable material conditions for those who are unable to secure for themselves (Chapter eight); and ensuring free, full and effective enjoyment of ESC rights for, above all, all vulnerable persons on the basis of equality and non-discrimination and as a matter of priority (Chapter nine).

Overall, this research seeks to show and defend that ESC rights constitute the essential integral elements of a dignified human life which the State must secure for everyone as a matter of the legal obligation to respect and ensure respect for the inherent life and value of human being.

# PART ONE

# THE CONCEPTIONS AND THEORIES OF HUMAN RIGHTS

# CHAPTER 2
# THE CONCEPTIONS OF HUMAN RIGHTS

## 2.1. INTRODUCTION

As indicated in Chapter one, the review of different academic writings reveals that there are varying conceptions of human rights in human rights discourse. There seems to be two basic problems behind the existence of the various conceptions of human rights. One underlying problem has by and large to do with the disagreement on the notion and implications of human rights. This problem is further complicated by the usage of various qualitative terms as 'fundamental', 'basic', 'legal', 'constitutional' and 'human' in association with the term 'right' which, in turn, suggest in one way or another the existence of different 'classes' or categories of human rights both in terms of their normative essence and hierarchical importance. The other problem concerns the disagreement on the normative justification of human rights. Both of these problems are essentially interlinked but, for ease of discussion, the first problem is discussed in this Chapter and the second problem will be addressed in the next Chapter. It has almost become a conventional wisdom that no two academics can have a similar view of the notion and implications of human rights.[48] This problem has significantly

[48] As many have for long been engaged in the extensive discussion of the concept of 'rights', it is not necessary to repeat the same here except indirectly when it is so relevant for the issue under consideration. See generally Costas Douzinas and Conor Gearty (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014); Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012); Michael Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16 Human Rights Quarterly 491; Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Polity Press 2002); Mordecai Roshwald, 'The Concept of Human Rights' (1959) 19 Philosophy and Phenomenological Research 354; Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 Annals of the American Academy of Political and Social Science 10; Christine Chwaszcza, 'The Concept of Rights in Contemporary Human Rights Discourse' (2010) 23 Ratio Juris 333; George W Rainbolt, *The Concept of Rights* (Springer 2006); RR Fennessy, *Burke, Paine, and the Rights of Man: A Difference of Political Opinion* (Martinus Nijhoff Publishers 1963); Waldron, *'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man (with Introductory and Concluding Essays by Jeremy Waldron)* (n 36); Richard Schmitt, *An Introduction to Social and Political Philosophy: A Question-Based Approach* (Rowman & Littlefield Pub 2009); John Christman, *Social and Political Philosophy: A Conteporary Introduction* (Routledge 2002).

inhibited the progress of academic discourse on human rights both generally and in relation to ESC rights. The discussion in this Chapter has accordingly two main objectives. First, it reviews the different conceptions of human rights and their implications on the normative status and significance of ESC rights. To this end, it identifies and discusses two major conceptions of human rights underlying the classification of human rights into different categories or classes: the hierarchal and dichotomised conceptions. It particularly examines the bases and limitations of these conceptions in explaining the holistic idea of human rights. Second, it provides a counter-argument against these views by relying on a more comprehensive and better alternative conception of human rights, the triadic conception put forward by MacCallum and Alexy.

## 2.2. THE HIERARCHICAL CONCEPTION

The hierarchical conception of human rights is essentially rooted in or flows from the legal positivist (constitutionalist) view of the legal system whereby the constitution is considered to be the basic law and at the highest apex in the hierarchy of laws within a given legal system. Some even go to the extent of claiming that the national constitution is hierarchically superior to international law.[49] Roughly, the basic argument behind this view stems from the abstract idea of sovereignty. In one sense, the constitution (often proclaimed through a constituent assembly, the highest law-making organ of a given country, direct popular referendum or through the combination of these two legislative processes) is regarded as the expression of the sovereign will of the people which the government must respect and realise in the exercise of its subsidiary legislative and administrative powers. In another sense, the constitution is also regarded as an expression of the sovereign will of the state and its people which must be respected by all other external (international) actors. The constitutional rights theorists draw on this view to argue that those rights recognised in the constitution (constitutional rights) are the fundamental (basic) and most important of all rights recognised in the legal system. This, in short, means that the medium of the recognition a given right determines its normative status and significance. For instance, if human rights are not given an express constitutional recognition, then, they are regarded as less fundamental or important than those enshrined in the constitution[50]; if human rights are not given any express legislative recognition within a legal system, then, they won't have any practical legal effect whatsoever, so it seems. Many of the arguments against the status and implications of ESC rights (the

[49] It is notable that this argument basically underlies the essence of the debate between the monist and dualist approach to international law.

[50] Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 Stanford Law Review 1863; Alexy, 'Discourse Theory and Fundamental Rights' (n 39).

view that considers them as non-basic, additive, welfare or programmatic rights) essentially flows from this constitutionalist-positivist conception as these rights are seldom recognised as fundamental human rights in the subsidiary legislations, let alone in the constitution.[51] Therefore, it must be assessed if there is any valid justification behind the hierarchical conception of human rights and the normative implications attached thereto particularly in relation to ESC rights. In making my arguments under this section, I particularly focus on two relevant publications, one by Robert Alexy and the other by Gerald Neuman, for they clearly expose the problem behind the hierarchical conceptions of human rights.

Robert Alexy, who has extensively published on[52], inter alia, constitutional rights and discourse-theoretical justification of human rights, suggests that there are important differences between the notion of 'fundamental rights', 'constitutional rights' and 'human rights'.[53] For Alexy, there are three concepts of fundamental rights: formal, substantial and procedural.[54] 'A formal concept is employed if fundamental rights are defined as rights contained in a constitution or in a certain part of it, or if the rights in question are classified by a constitution as fundamental rights, or if they are endowed by the constitution with special protection'. The formal concept thus concerns the status and nature of protection endowed to certain rights regarded as 'fundamental rights' by a constitution.[55] The procedural concept, on the other hand, concerns the institutional dimension of fundamental rights. As Alexy states,

> This concept mirrors the institutional problem of transforming human rights into positive law. Incorporating human rights into a constitution and granting a court the power of judicial review with respect to all state authority is to limit the power of parliament. In this respect, fundamental rights are an expression of distrust in the democratic process. They are, at the same time, both the basis and boundary of democracy. Corresponding to this, there is a procedural concept of fundamental rights holding that fundamental rights are so important that the decision to protect them cannot be left to simple parliamentary majorities.[56]

---

51 Vierdag, 'Some Remarks about Special Features of Human Rights Treaties' (n 2); Neier, *Taking Liberties: Four Decades in the Struggle for Rights* (n 6); Cranstson (n 2); Neier, *The International Human Rights Movement: A History* (n 6); Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief; Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (n 2); M Bossuyt, 'The Legal Distinction between Civil and Political Rights and Economic, Social and Cultural Rights' (1975) 8 Human Rights Journal 783; M Bossuyt, 'International Human Rights Systems: Strengths and Weaknesses' in K Mahoney and P Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1993); Kelley (n 2); Posner (n 1); Griffin (n 2).

52 For quick summary of Alexy's publications, Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012).

53 Alexy, 'Discourse Theory and Fundamental Rights' (n 1).

54 Ibid 15.

55 Ibid.

56 Ibid 17.

Thus, the procedural concept specifically deals with the nature of institutional protections that fundamental rights (must) have in a legal system. It especially determines the nature of constraints to which the legislative and executive branches of government should be subjected to in making decisions affecting fundamental rights.

However, it interesting to note that both the formal and procedural concepts do not provide the reason why certain rights are or should be considered as fundamental rights, nor do they provide the reason why they should be accorded a special protection, for this is the function of the substantial concept of fundamental rights. Per Alexy, 'a substantial concept of a fundamental right must include criteria that go above and beyond the fact that a right is mentioned, listed, or guaranteed in a constitution'.[57] That is, it goes further than the formal expression and nature of the institutional protection afforded to fundamental rights within a given legal, especially constitutional system; and by this Alexy is in fact speaking about a normative (philosophical) theory underlying his notion of fundamental rights. This is clear, for instance, from his criticism of the substantial concept of fundamental rights defended by such authors as Carl Schmitt and Ernst Forsthoff who, according to Alexy, argued that 'the only genuine fundamental rights are defensive rights of citizens against the state'.[58] Alexy rejected this view arguing that it merely represents a narrow libertarian conception of fundamental rights. For him, defensive rights certainly constitute part and parcel of the substantial conception of fundamental rights, but there are also strong justifications to argue that this conception must include equally genuine and significant rights as '[p]rotective rights, rights to organization and procedure, and social rights'.[59] This expansion of a narrow concept of a fundamental right to a more comprehensive substantial conception, Alexy argues, requires a criterion but for him 'only one criterion seems to be adequate to define a substantial concept of fundamental rights. It is the concept of human rights.'[60]

There is indeed a scenario in which the concept of human rights and fundamental rights becomes coextensive, that is, when both mean one and the same thing for all legal and practical purposes. But this occurs if and only if the whole catalogue of human rights, that is, when all (following Alexy's own classification) defensive rights, protective rights, the right to organisation and procedure and social rights are given the highest status (in the sense of the formal concept) and at the same time afforded a special protection (in the sense of the

57 Ibid 16.

58 Ibid.

59 Ibid. Thus, Alexy clearly departs from the traditional categorisation of human rights into civil and political rights, economic, social and cultural rights and group rights. He instead adopts defensive rights, protective rights, right to organisation and procedure and social rights. For more details on his approach, see Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4).

60 Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 16.

procedural concept) in a given constitution. In other words, this becomes true only when the formal and procedural concept of fundamental rights is equivalent to the formal and procedural concept of human rights. But it is possible that in a legal system, a given human right may be classified as a fundamental right, another as an ordinary right and still another as a mere programmatic right (directive policy principles) without any regard to the fact that all human rights flow from the same underlying normative principle. This, in turn, means that Alexy's concept of fundamental right is not always coextensive with that of human rights. In his view, a right becomes a fundamental right only if it is accorded a highest place in the ladder of hierarchy and at the same time afforded a special protection by a constitution.[61] It is the function of the substantial conception to provide justification or explanation as to why a given right is or should be granted such a highest status and special protection in or through a constitution. This is particularly the case when, let's say, a given human right is not recognised in a constitution at all or when it, though formally recognised in a constitution, is not afforded a special constitutional protection as required through his procedural concept. As long as a given human right does not fulfil these two elements, there always remains to be a gap between Alexy's fundamental rights, on the one hand, and the notion of human rights, on the other.[62]

Thus, Alexy's approach clearly maintains important distinctions between the concepts of constitutional rights, fundamental rights and human rights.[63] At the heart of this distinction lies whether or not a given right is accorded a constitutional recognition in legal system in the sense described above (both in the formal and procedural sense). But while the function of the formal concept is indicating whether a given right is accorded a constitutional protection or not, the function of the procedural concept is indicating the nature of constraint that should be placed on the decision-making organ. Seen in this way, we can say that, in essence, Alexy's procedural concept is also and for stronger reason a formal concept – it is difficult to see its relevance other than this. This, in turn, bends his three concepts of fundamental rights into two: formal and substantial concepts. Furthermore, it has been seen that the substantial concept of fundamental right is defined by the concept of human rights. This is in fact a point worth emphasising. Alexy himself stresses that there is no substantial concept of fundamental rights without the concept of human rights. 'The foundation of fundamental rights is essentially a foundation of human rights.'[64] For Alexy, this necessarily implies that if human rights can be justified, then, fundamental rights can be justified as

61 Ibid 22. But see Narain (n 2).

62 Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 16–17. For Alexy, when such a gap occurs, then the concept of human rights functions as a critique against the concept of fundamental rights thereby calling for constitutional reform.

63 Ibid 15–16.

64 Ibid 16–18.

well; but if it is not possible to justify human rights neither could it be possible to justify fundamental rights.[65]

If so, then, it is possible to argue that the difference between his formal and substantial concept, upon reflection, simply boils down to the old distinction between the concept of legal right and moral human right.[66] This argument directly flows from the fact that Alexy's 'three concepts' of fundamental rights discussed above basically concern their relationship with the constitution and from his description of the notion of human rights as, inter alia, 'moral rights'.[67] For instance, he expressly stated that 'Human rights are institutionalized by means of their transformation into positive law' and if this institutionalization or legalization 'takes place at a level in the hierarchy of the legal system that can be called 'constitutional', human rights become fundamental rights.'[68] The question which should be asked is, however, whether this formal difference should lead us to construe two different conceptions of human rights having significant normative implications (i.e. one as mere moral right and another as a fundamental right endowed with special normative status and protection just based on mere formal constitutional recognition within a legal system). This question is particularly important in relation to, though not necessarily limited to, economic, social and cultural rights which often have no constitutional or legal recognition and, if at all, are formulated as mere state policy objectives.[69]

I would argue that the criterion of the formal recognition should not lead us to such a conception of human rights and that it is even not possible to maintain this kind of distinction if we closely see the way Alexy himself characterised the notion of human rights while discussing the foundation of fundamental rights. He states that 'human rights are, first, universal, second, fundamental, third, abstract, and, fourth, moral rights that are, fifth, established with priority over all other kinds of rights'.[70] Here, we see Alexy employing two important qualitative terms – 'fundamental' and 'priority' – in providing his understanding

65 Ibid 18.

66 This distinction, in turn, bears a significant consequence specially in the theory of legal positivism who outrightly rejects the idea of human (moral) rights as phony and nonsense. For more on the positivist view of human rights, see generally Waldron, *'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man (with Introductory and Concluding Essays by Jeremy Waldron)* (n 36). See also Sen (n 36) 316.

67 Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 18 (providing discriptive definition of human rights).

68 Ibid 22.

69 This is of course not Alexy's view but his approach surely gives direct theoretical support for such arguments for these categories of rights are seldom recognized in the constitutions. On approaches of several countries, see for instance, Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (Abo Akademi University University Press 2011) 127ff; Danwood Mzikenge Chirwa, 'A Full Loaf Is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005) 49 Journal of African Law 207.

70 See Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 18. See also Alexy, 'Discourse Theory and Human Rights' (n 1).

of the notion and essence of human rights. This should, at least, suggest that human rights are by definition 'fundamental' and that they are superior to (i.e., must have priority over) all other kinds of rights, regardless of their formal location in the constitution or positive legal system. For this reason, the view that human rights would become fundamental rights only if they are afforded a special constitutional status and protection should be rejected altogether as there is no substantive theory supporting such a view other than, of course, arbitrary legislative choices or preferences made at a given point in time which, in turn, are more often influenced by interest-group political agenda than serious normative theories.

Let's now see Gerald Neuman's classification of human rights against that of Alexy. Neuman had distinguished between the concepts of 'fundamental rights', 'human rights' and 'constitutional rights' as indicated in the following paragraph. He says that

> [he] will use the term 'human rights' only in reference to internationally recognized human rights (including some rights enacted at the national level for the purpose of implementing international obligations), and will refer to individual rights protected by national constitutions as 'constitutional rights.' The same right, abstractly conceived, e.g., freedom of expression, may be both a human right and a constitutional right. For ease of reference, [he] will use the phrase 'fundamental rights' as an umbrella term including both the constitutional rights and human rights.[71]

From this we can say that Neuman's distinction is essentially employed for mere technical purpose (for 'ease of reference', as he refers to it) and thus does not create the kind of normative hierarchy suggested Alexy's approach. Behind Neuman's technical distinction lies the old debate between 'internationalists' and 'constitutionalists' regarding the structural relationship between international law and national legal system, the debate now carried over to the relationship between international human rights instruments and national constitution. But what is important here is that, as opposed to that of Alexy, the term 'fundamental rights' equally applies to all human rights regardless of whether they are recognised in a treaty or national constitution. In this approach, there will not be a scenario in which a human right is arbitrarily designated as fundamental right or mere human right. The distinction does not also warrant any normative conclusion of the type suggested in Alexy approach especially regarding the nature, status and importance of human rights. Moreover, in Neuman's analysis, the institutional implication of human rights does not flow from the medium of recognition (i.e. treaty or constitution) but rather from their normative essence as human rights.[72]

---

71 Neuman (n 50).

72 Ibid. This is contrary to Alexy's view that human rights become fundamental rights only if they are afforded a privileged status within a constitutional system. *Cf.* Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 22.

As stated from the outset, I raised Alexy and Neuman as typical examples showing the existence of divergent hierarchical conception of human rights employed in human rights discourse but, obviously, they are not the only ones. The common usage particularly by constitutional law scholars seems to go with the classification suggested by Alexy especially in relation to ESC rights based on the generally held assumption that the constitution and constitutional norms have utmost importance and precedence over all other normative principles. However, practical evidence from around the world proves that this is not necessarily true as the practice of the constitutional protection of but certain human rights is only a matter of recent history.[73] For instance, most constitutions recognise several civil and political rights such as the right to freedom of expression, association and assembly; nevertheless, these rights are constantly violated by governments around the world almost on a daily basis. It can also be added that although many countries have given a constitutional recognition to the rights of women to equal political participation, a great majority of women still suffer from systemic discrimination, marginalisation and underrepresentation. Furthermore, even though the judicial or constitutional review of legislative and executive acts may play some roles in ensuring respect for human rights, it is not something that exists everywhere, nor can it be taken for granted.[74] As Henkin notes, the judiciary is no doubt a necessary component of human rights protection but not a sufficient one in ensuring the actual realisation of human rights.[75]

Thus, in reality, the significance of the constitutional protection of human rights depends not on its formal existence but rather on several background factors including the society's social, political and legal culture. Neuman argues that

> the formal elevation of a human rights treaty to constitutional status does not have *any* consequences. In a society where the constitution is routinely violated, it may be an empty gesture. The actual effect depends on many other factors, both social and legal. Among the legal factors, one relevant question is how the constitutionalization affects the available remedies. Another is whether the right becomes directly applicable (or self-executing).[76]

---

73 'The Constitutional Protection of Human Rights (DIHR)' (2012); 'Human Rights and Constitution Making' (OHCHR 2018); Louis Henkin, 'Constitutional Rights and Human Rights' (1978) 13 Harvard Civil Rights-Civil Liberties Law Review 593; LWH Ackermann, 'Constitutional Protection of Human Rights: Judicial Review' (1989) 21 Columbia Human Rights Law Revew 59; Linda Camp Keith, 'Judicial Independence and Human Rights Protection around the World' (2002) 85 Judicature 195; Neuman (n 50).

74 Ackermann (n 73); Thomas Poole, 'Legitimacy, Rights and Judicial Review' (2005) 25 Oxford Journal of Legal Studies 697; Alon Harel, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22 Law and Philosophy 247; Yann Allard-Tremblay, 'Proceduralism, Judicial Review and the Refusal of Royal Assent' [2013] Oxford Journal of Legal Studies 1; David M Beatty, *The Ultimate Rule of Law* (2004); Tushnet (n 12); Neuman (n 50).

75 See Henkin, 'Rights: Here and There' (n 8) 1582–1610.

76 Neuman (n 50).

This is also the view that Henkin confirms: the practical conception of human rights and place they occupy in the normative system of a society by and large reflects the society's underlying background conditions which, in turn, significantly influence its 'rights-system'. The more the society's background conditions support the idea and value of human rights, the stronger its rights-system (that is, the laws and institutions thereof) would be in guaranteeing generally the effective realisation of those rights.[77]

If we however reject the formal usage suggested by constitutional scholars and instead focus on the normative essence of human rights, I believe that it is the conception suggested by Neuman that coheres with the basic understanding of the normative idea of human rights both generally and in the sense they are recognised in international law. The elementary and universal understanding of human rights underlying this conception is well expressed by Henkin, one of the prominent scholars in the modern study of human rights.[78] Henkin expresses this idea as follows:

> By rights I mean what are now called human rights, claims which every individual has, or should have, upon the society in which he/she lives. To call them human suggests that they are universal: they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of development. They do not depend on gender, race, class or status. To call them 'rights' implies that they are claims 'as of right,' not merely as appeals to grace, or charity, or brotherhood, or love; they need not be earned or deserved. They are more than aspirations, or assertions of 'the good,' but claims of entitlement and corresponding obligation in some political order under some applicable law, if only in a moral order under a moral law.

When used carefully, 'human rights' are not some abstract, inchoate 'good.' The rights are particular, defined, and familiar, reflecting respect for individual dignity and a substantial measure of individual autonomy, as well as a common sense of justice and injustice.[79]

---

77 Henkin, 'Rights: Here and There' (n 8) (For Henkin, it is this that explains certain divergence in content, scope and institutional implications of human rights in different traditions as in USA, France, USSR/China, the Third World).

78 Henkin has published several influencial articles and books in the area of international human rights. Few of them are Henkin, 'The Universality of the Concept of Human Rights' (n 48); Louis Henkin, *The Rights of Man Today* (Center for the Study of Human Rights, Columbia University 1978); Henkin, 'Rights: Here and There' (n 8); Henkin, 'Constitutional Rights and Human Rights' (n 73); Barbara Stark, 'Review of The Age of Rights by Louis Henkin' (1991) 85 The American Journal of International Law 733; Irwin P Stotzky, 'Review of the Rights of Man Today by Louis Henkin' (1979) 11 Lawyer of the Americas 229; Francisco Forrest Martin and others (eds), *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press).

79 Henkin, 'Rights: Here and There' (n 8) 1582. It is this conception of human rights that underlies a general conceptual framework for the arguments throughout this thesis. There are several compelling reasons in adopting Henkin's definition. It can be seen as providing an

Thus, in essence, human rights are fundamental moral entitlements of every human being *qua* human person. As such, such notions as 'fundamental rights', 'constitutional rights', 'basic rights' and 'human rights' should be construed as simply referring to the same normative concept signifying, in substantive sense, similar normative status and implications regardless of the form or medium through which they are recognised within a given legal system. That is, the normative status and significance of human rights do not emerge from the formal place they occupy in a legal system but rather from the principal normative principle upon which they are justified. The underlying justification for this argument will be presented in Chapter four below but for the purpose here the argument I would like to make is that the values, status and institutional implications of human rights in a socio-political and legal system primarily emerges from the principle of human dignity. So, the special constitutional status or protection afforded to human rights within a given legal system, if any, should be seen as the reflection or consequence of the recognition of this principle and the rights flowing from it. The hierarchical conception of human rights, which is essentially rooted in the legal positivist bias against the moral rights of a human being, should therefore be rejected. For one thing, the constitutional recognition of human rights around the world is neither a consistent universal practice nor is it justified on the basis of an objective normative theory. For the other thing, this conception creates arbitrary and unreasonable distinction not just between two different human rights in a given legal system but even in relation to the same human right in two different legal systems according different formal status to the right concerned for the reasons already explained above. Finally, it is against the general critical functions of the very idea of human rights which, among other thing, is to serve as a normative standard against which the legitimacy of laws and other actions of the states and societal behaviours should be evaluated.

## 2.3. THE DICHOTOMISED CONCEPTION

The categorisation of human rights into negative and positive rights has also posed another major problem in the conception of human rights. This dichotomisation is the result of academic disagreement concerning the notion of freedom or rights: whether the concept of freedom or rights in its 'true' sense pertains only to its 'negative' connotation or also entails its 'positive' connotation.[80] This question has divided scholars into two major camps. For some scholars, the notion of

accurate interpretation of the current international understanding of what human rights are as reflected in UN and regional human rights treaties and the VDPA (1993), para. 5.

80 MacCallum, Jr. (n 1); Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 120ff.

freedom or rights pertains only to its negative sense but for others the true sense of freedom or rights should equally include its positive sense.[81] This division has had a significant practical effect in the current normative and institutional structure of international human rights systems.

Berlin's '*Two Essays on Liberty*' is believed to have provided a conceptual background for this division, but the careful examination of the essence of Berlin's idea of liberty and the arguments in his '*Two Essays*' as well as in several of his subsequent publications (including replies to his critics) show that he has contributed very little, if any, to these divisions.[82] This is particularly so because Berlin's idea of liberty, stated in abstract, is robust and hence inclusive of both the negative and positive conception of human rights particularly if seen in the light of his position concerning the notion of positive liberty and, *a fortiori*, socioeconomic rights on the one hand and the proponents of the idea of negative liberty who, in turn, hold a rejectionist view of socioeconomic rights on the other. Based on this, one can argue that those who support the narrow liberal-negative conception of human rights can hardly attribute their view to Berlin's theory. In any case, it is certainly clear that Berlin's two basic notions of liberty, 'negative liberty' and 'positive liberty', have distinctively deeper historical and philosophical connotations and thus lend only very marginal support, if any, to the way both sides employ these terms.[83]

Having said this, it is not the aim of this discussion to examine in detail the merits of these debates, as this has already been done by many authors.[84] The purpose here is rather to argue, though in brief, that the conception of human rights in the terms of negative-positive rights does not reflect the normative

---

81 MacCallum, Jr. (n 1) p.321 at n 7.

82 For more on this, see particularly Isaiah Berlin, *Liberty (Edited by Henry Hardy) [2002]* (paperback, Oxford University Press 2013). Berlin's *Liberty* is a collection of various topics written by Berlin and published both during his lifetime and afterwards. In fact, Berlin himself attributes these two ideas of liberty to another author, Constant, who spoke of the liberty of the ancient and the moderns in one of his lectures. See Benjamin Constant, *Political Writings: Liberty of Ancients Compared with That of the Moderns (Speech Given at the Athenee Royal in Paris, Trans and Ed by Biancamaria Fontana)* (Cambridge University Press 1819).

83 The reason I say this is that Berlin's idea of negative and positive liberty is specially directed against Rousseau's position about complete fusion between the general will and private will such that whatever the body politique (the representative of the general will in Rousseau's theory) does is for the interest of the private person and that this body (state/government) may take decisions contrary to the will of the private persons so as to bring true liberty to the latter, the view Berlin completely rejects as monotonous, overreaching and dictatorial. In his reply to his critics, he emphasised that his arguments do not apply to the kind of positive liberty construed as ensuring the duty of ensuring education and health care to the vulnerable parts of the society. See particularly Berlin (n 82) 30–54 (correcting misconceptions about his views regarding the two notions and replying to his critics).

84 See particularly Shue (n 2); Eide, Krause and Rosas (n 3); Fredman (n 30); MacCallum, Jr. (n 1); Gewirth, *The Community of Rights* (n 3); Langford (n 3); Koch (n 3); Koch (n 32); Coomans (n 3); Sepulveda (n 13); Arambulo (n 13); Yeshanew (n 69).

essence and importance of the very notion of rights but the types of action or behaviour legitimately expected from an ideal duty-bearer in a given context.[85] For instance, MacCallum has strongly criticised the underlying assumptions and arguments behind the negative and positive view of freedom and instead introduced an alternative and a broader conception of what freedom entails.[86] Interestingly, MacCallum's conception of freedom has been subsequently adopted in the writings of many authors including Alexy[87], Rawls[88], Shue[89] and Gould.[90] This discussion also substantially draws on his and Alexy's analysis of this alternative conception of freedom. Thus, if we take a step back and look somewhat deeper into the arguments supporting 'negative' and 'positive' freedom, we will be able to see that they both merely express the type(s) of actions that a person is entitled to expect, as of right, from the state rather than the substantive ideals of freedom.[91]

For the proponents of negative freedom, a person is said to be free if he or she is not subjected to any kinds or forms of limitations ensuing especially from the state in making and pursuing his or her own autonomous choices; to be free is to be left alone by the state for all legal and practical purposes with respect to one's own private life and life-projects. For them, this is the only true or real sense of the ideal of freedom.[92] Per this conception, which generally reflects the liberal/ libertarian conception of freedom, the state is considered to be the principal source of unfreedom threatening individual rights and hence should be constrained by every available means.[93] The right to individual freedom thus requires the state and its agents to abstain from interfering in, obstructing, frustrating, directly or indirectly, the choices and decisions that individuals make as regards matters pertaining to their private life. This is, they contend, the only true right that individuals are justified to claim, as of right, against the state. This means that an assertion of the right to negative freedom functions as an antithesis to the power of the state vis-à-vis the individual subjects. As such, the proponents

85 See Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139ff.

86 See MacCallum, Jr. (n 1). Of course, MacCallum himself attributes the origin of this conception to Constant (n 82) who discussed in terms of the liberty of the ancient and the modern as noted above.

87 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4).

88 John Rawls, *A Theory of Justice* (Revised Ed, The Belknap Press of Harvard University Press 1999); Rawls (n 38).

89 Shue (n 2).

90 Carol C Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press 2004).

91 In the same vain, the notion of 'positive obligation' and 'negative obligation' is used to refer to the type of performance required from the obligation bearer (usually a state), that is, whether it is a performance of an action or an omission (no-action, forbearance). For detailed treatment of this, see particularly Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) (who also sees negative or positive right as a subclass of the generic right to something).

92 See MacCallum, Jr. (n 1) 320ff.

93 See Fredman (n 30) 10.

of the negative-liberal view of freedom rejects the notion of positive freedom as utterly nonsense.[94]

Adherents of positive freedom, on the other hand, approach the idea of freedom from its practical or factual imports, that is, they argue that a person is free if he or she is able to enjoy that freedom in fact. According to this view, the idea of freedom which does not entail the practical ability or possibility of individuals to exercise the same is valueless.[95] They contend that the true notion of freedom must necessarily include its positive sense which, in turn, requires the state not only to refrain but also to take certain positive measures towards ensuring the practical realisation of individual rights and freedom. Thus, for them, the right to freedom signifies both the right to non-interference against the state and the right to affirmative or positive actions from the state.[96]

Certainly, both sides agree on the abstract idea that freedom and the rights thereof concern the extent to which individuals are able to enjoy an autonomous life. Its dichotomised (negative-positive) conception therefore does not essentially concern its abstract notion but factors preventing individuals from enjoying their autonomous living and the corresponding role of the state vis-à-vis those factors, especially whether the state is normatively required to take affirmative action or not.[97] The division particularly concerns whether or not material (social and economic) conditions should be seen as constitutive element of the ordinary conception of human rights and freedom which the state must be required to ensure for everyone. The proponents of negative freedom reject this view. But the proponents of positive freedom argue that a human being without basic material conditions of life such as food, healthcare, housing, education, work, or social security cannot be considered as a free and autonomous person in the meaningful

---

94 Kelley (n 2); Cranstson (n 2); Neier, 'Social and Economic Rights: A Critique' (n 51); Neier, *The International Human Rights Movement: A History* (n 6); Bossuyt, 'The Legal Distinction between Civil and Political Rights and Economic, Social and Cultural Rights' (n 51); Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (n 2). See particularly Griffin (n 6) 96ff. See also Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 84–87 (discussing the orthodox liberal view of freedom).

95 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 337.; See also Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 87–88 (discussing Raeser's social conception of law and rights). Of course, there is also an extreme reading of positive freedom in the socialist (communist) theory of freedom which sees freedom from an economic perspectives thereby giving priority to economic liberty over political liberty. This discussion is however not followed here.

96 See particularly Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) Chapts 7 & 9; Gewirth, *The Community of Rights* (n 3) Chapts 1 & 2; Gould, *Globalizing Democracy and Human Rights* (n 90) 3–4& 31–42; Fredman (n 30) 9ff; Sen (n 3) 3–11 & 13–25; Sen (n 36) 318ff.

97 This is obvious with proponents of 'positive freedom' as they argue that the abstract idea of freedom is essentially connected with the freedom of choice and action. See particularly Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139–144.

sense of the term. The state should therefore be required to ensure these material conditions because without these being realised for those in need it can hardly be considered as fulfilling the practical demands of human rights and freedom.[98]

So, the dichotomised conception is merely a formal conception which cannot help us in answering the most basic substantive questions involved in the idea of human rights. In fact, it has turned away scholarly attention from the most fundamental and pressing issues to a rather less important and highly idealised formal discourse of human rights.[99] For instance, we cannot explain the holistic and practical aspect of human rights and freedom by merely focusing on the actions or inactions of the state, nor can we comprehend their essence through the notion of negative and positive rights and freedom. This does not mean that there is no merit in each of them but rather to argue that they both fall short of providing us with adequate answers regarding the nature and implications of human rights and freedom. One might be tempted to suggest abandoning these conceptions altogether and start over[100] but it is possible to modify and expand these conceptions and fit them into the holistic understanding of human rights and freedom as it can generally be seen from the following discussions. The idea of human rights and freedom go far beyond formal conception and signifies rather deeper substantive principles concerned with the regulation of highly complex and dynamic human relations.

## 2.4. THE TRIADIC CONCEPTION

As an alternative to the dichotomised view discussed above, scholars like MacCallum suggest that freedom and rights should be conceived as a 'triadic' or 'three-point' relationship.[101] In my view, while it was MacCallum who first

98 See Raz (n 30) 155ff; Rawls (n 88) 76–77 & 105–106.

99 Thus, MacCallum suggests that by abandoning such dichotomisation we are in a position to assess the merits and demerits of arguments from different sides and to assess the merits of proposals made from different angles in respect to different variables of freedom. See MacCallum, Jr. (n 1) 319ff. And drawing on Shue, Koch advises that we should beware of not to be taken away by the conceptualisation and reconceptualization of our words losing sight of practical issues that matter. See Koch (n 32) 25–28.

100 See for instance, Beitz (n 2); Charles R Beitz, 'Human Rights as a Common Concern' (2001) 95 The American Political Science Review 269 (who suggests that we should only look at the practice of politics and institutions and see what their functions are in international politics). Chwaszcza (n 48) 333, 335 and 348ff (arguing that human rights should be understood as standards of institutional legitimacy than as individual claim rights).

101 As will be seen shortly, the term triadic relation reveals that the traditional distinction of liberty into positive and negative does not concern the real structure or content of liberty as such (the object and purpose of it or how it is important to or ultimately connected to the dignity of person) but rather the subject-matter of liberty – a liberty-object, different variables in a triadic relationship and the weight given to such variables. See Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 141ff.; MacCallum, Jr. (n 1) 314–315.

introduced this robust and practical view of freedom and rights, it is however Alexy who gave it a more detailed treatment.[102] Thus, according to MacCallum,

> Whenever the freedom of some agent or agents is in question, it is always freedom from some constraint or restriction on, interference with, barrier to doing, not doing, becoming, or not becoming something. Such freedom is thus always of something (an agent or agents), from something, to do, not do, become, or not become something; it is a triadic relationship.[103]

Interestingly, it is also this very same idea of liberty underlying Rawls' theory of (social) justice as we can see from the following text.

> Therefore I shall simply assume that any liberty can be explained by a reference to three items: the agents who are free, the restrictions or limitations which they are free from, and what it is that they are free to do or not to do. Complete explanation of liberty provides relevant information about these three things. …The general description of a liberty, then, has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so.[104]

And, according to Alexy,

> A complete description [of liberty] must contain reference to three elements: the person lacking liberty, the obstacle to their liberty, and that which the obstacle makes difficult or impossible. This indicates that we should think of an *individual liberty* of a person as a three-point relation, the *liberty of a person* as the sum of their individual liberties, and the *liberty of a society* as the sum of the liberties of its members.
> The basis of the concept of liberty is thus a three-point relation between a liberty-holder, a liberty-obstacle, and a liberty-object.[105]

---

102 *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139–140 & 120ff.

103 MacCallum, Jr. (n 1) 314.

104 Rawls (n 88) 176–78 (citing Maccallum, Jr.).

105 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 138ff cum n 115 (drawing on Maccallum and Rawls). But as Alexy makes it clear, this very same is also true in relation to the normative concept of (human) rights. Thus, following the same analytical structure seen in relation to freedom, the normative statement the 'right to something' expresses the existence of normative relations between the 'right-holder', the 'addressee' of the right and the 'subject-matter' in respect of which the right is said to exist. This analysis also reveals that, as it is true with the notion of freedom, the traditional negative-positive right division is largely based on the actions or omissions of the addressee of a particular right, that is, whether the addressee of the right is expected to act directly or refrain from direct interference. In particular, drawing on his theory of deontic expressions, he argues that the normative idea of 'right to something' expresses the existence of normative relationships between persons (right-holders and right-addressees) with regard to certain actions or omissions which can, in turn, be described in the language of the three basic deontic modes: prohibition, command, and permission. ibid 120–38. For more on deontic expressions, see generally Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (Oxford University

Thus, the term triadic or three-point relation employed by MacCallum and Alexy respectively emerges from the three basic constitutive elements of the concept of freedom and rights. These are an individual person, the subject-matter of freedom and right (what one has freedom or right to, that which the right or freedom purports to guarantee), and the limitations (restrictions, obstacles, limitations) to the full and effective enjoyment of freedom and rights.[106] The triadic conception can thus be seen as expressive of the idea of freedom and rights as normative description or abstraction of complex individual relationships existing at different level of generality concerning their socio-economic, political and other relevant social matters. Accordingly, this view can also be construed as the social conception of freedom and rights. Alexy is quite emphatic in this regard. He argues that 'liberty is not an object in the same way as a hat is,'[107] that is, it does not refer to the relationship between a human being and an object; it rather and always signifies practical human relationships.[108] The same is also true with Finnis.[109] He basically sees rights as virtual expressions of all the requirements of practical reasonableness which, in turn, refers to practical considerations in relation to various kinds of juridical or moral relationships existing between individuals.[110] As Finnis himself notes, such relationships deny the reductionist expression of the two-way relationships between a person and a thing traditionally preferred by lawyers.[111] For him, the complex normative relationships expressed through the notion of rights is 'the relationships of justice'.[112] This remains to be true even if we take the formal understanding of freedom and rights as referring to the capacity of individuals to make autonomous choices and pursue those choices as

---

Press 1989). Thus, under this view, the right to life is seen as a negative right; a state is therefore negatively limited not to wilfully kill individuals whereas the right to health care is regarded as a positive right and which implies that the a state is required to take positive measures to ensure health care services to the individuals. But it is to be seen that this kind of characterisation is unsustainable under the triadic conception of rights.

106 MacCallum, Jr. (n 1) 314–315; Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 120–21 & 139–41.

107 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139.

108 This point is well argued by Alexy. 'Of course,' says Alexy, 'one can speak of the liberty that someone *has*, in the same way as the one can speak of the hat they have. But having in the case of liberty does not consist of a relation of possession between a person and an object. It would therefore seem appropriate to think of liberty as a quality which can be associated with persons, objects and society. But this is too crude and superficial. Someone who says that somebody else is free is saying that certain obstacles, limitations, and resistance do not exist for that person. Even this is not yet adequate […] A complete description must contain reference to three elements: the person lacking liberty, the obstacle to their liberty, and that which the obstacle makes difficult or impossible. This indicates that we should think of an *individual* liberty of a person as a three-point relation …' (*emphasis original*). ibid. See also MacCallum, Jr. (n 1) 315ff.

109 See Finnis, *Natural Law and Natural Rights* (n 39) 199ff.

110 Ibid 199.

111 Ibid 199–202.

112 Ibid 205–10.

the idea of choice itself, upon reflection, indicates the relational nature of rights and freedom.

This view of the idea of freedom and rights as normative abstraction of complex social relations is a crucial point emerging from the triadic conception. The significance of this conception particularly lies in the notion of the ideal of a free person presented through this conception, i.e. what it means to be a free human being in the practically meaningful sense of the term. So, in the triadic conception of freedom and rights, the primary question is this: for a human being living in a society organised under a system of rules and institutions, what does it mean to be a free person? In other words, what factors or conditions enable a person to be free or prevent one to be a free person?[113] In this regard, unlike the dichotomised conception, the source of unfreedom or obstruction to individual rights is immaterial. What is rather important is whether or not a person is free. To this end, the triadic conception takes a practical intuitive idea of human being defined by its relationality. In Chapter four, I will discuss this in detail and argue that a human being is both a biological and moral being endowed with inherent value and rights thereof. As biological and moral being, every human person has various kinds of inherent biological and moral needs without which it is not possible to live and lead a life worthy of human dignity. For now, I should simply state that, practically speaking, a free person is the one who enjoys those inherent moral and material (biological) conditions of life adequately and without any limitations. This approach is quite revealing for it shifts our focus from a formal discourse to a more robust and substantive view of human rights and freedom. It also expands our perspectives regarding the existence of different kinds of limitations to the enjoyment of human rights and freedom other than the state, for it becomes clearer that it is not just the action or inaction of the state but all forms of unfavourable economic, cultural, social, political and legal environment are equally factors negatively affecting the free and full enjoyment of human rights and freedom. In substance, therefore, human rights and freedom should be conceived as essentially consisting in the absence of wide-ranging types of 'obstacles, limitations, or resistances' existing as a matter of law, fact or both, regardless of whether they are deliberately intended or unintended, undermining the capacity and opportunity of individuals to live and lead a dignified human life in a political society.[114]

---

113 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 139 ff cum nn 114, 120–21 & 125 (citing Hobbes and others).

114 Ibid 139. In fact, there are ample scholarly works taking this approach to human freedom and rights. See for instance, Sen (n 3); Marta C Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (The Belknap Press of Harvard University Press 2006); Cynthia A Stark, 'Respecting Human Dignity: Contract versus Capabilities' (2009) 40 Metaphilosophy 366; Daly (n 44); Gould, *Globalizing Democracy and Human Rights* (n 90); Shue (n 2); Sanford Levinson, 'The Welfare State' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing Ltd 2010). But see Berlin (n 82) 32.

## 2.4.1. THE IMPLICATIONS OF THE TRIADIC CONCEPTION

The conception of freedom and rights as normative expression of triadic relationship brings significant conceptual transformation to the dichotomised views discussed above. As it will be explained below and following Alexy's very helpful analysis referred to above, the notion of negative freedom now refers to an expanded class of freedom whereas the notion of positive freedom refers only to a very limited notion of freedom.[115] And, the converse is true when this is applied to the notion of negative and positive rights: that is, the concept of negative rights is austericised whereas the concept of positive rights is significantly expanded. In fact, according to Alexy, both the right to negative and positive acts are the sub-class of the 'right to something' which, in turn, can be restated as the right to demand negative or affirmative actions from the addressees of the rights concerned. Let's us briefly see each of them one by one.

*a) On the Negative-Positive Freedom*

Thus, under the triadic view of freedom, the difference between negative and positive freedom pertains only to one component of the three-point relationship: the object of freedom. According to Alexy,

> the only difference between positive and negative liberty lies in their object. In the case of positive liberty, the object is a single act, whereas in the case of negative liberty it is a choice of actions. These concepts of positive and negative liberty do not correspond in every respect with normal usage. The concept of negative liberty is broader than usual, while the concept of positive liberty is narrower.[116]

As stated above, the central point in the triadic view of freedom is not the source or nature of obstacles to freedom but rather whether a person is free or not, that is, whether he or she is in a position to choose to do or not to do that which he or she wants or does not want to; to become or not to become the kind of person he or she wants to or does not want to; in short, whether a person has both the opportunity and capacity to choose between alternative courses of actions pertaining to matters affecting his or her private life. Accordingly, Alexy is of the

115 See for instance, MacCallum, Jr. (n 1) 330ff (arguing that freedom is always and necessarily to be free from a restraint or limitation). It is this notion of restraint or limitation that Alexy expands to great length. See particularly Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 288ff.

116 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 141–142; see also MacCallum, Jr. (n 1) 320ff.

opinion that the traditional notion of negative and positive freedom can easily be combined together and be referred to as 'negative freedom' in the wider sense.[117]

> A person can be described as negatively free to the extent that the alternative courses of action open to him [or her] are not limited by obstacles to action. Obstacles to action could be further differentiated. To the extent that they are positive acts of others, in particular the state, we are concerned with negative liberty in the narrow sense or liberal liberty. Negative liberty exists in its narrow liberal sense when positive acts obstructing liberty are not carried out. This is exactly the case when one is neither commanded nor prohibited from doing something.
>
> Negative liberty in its wide sense extends beyond this. It includes liberal liberty but extends beyond this to embrace things such as socioeconomic liberty which exists to the extent that the economic deprivation of the individual does not prevent him from realizing alternative courses of action.[118]

This transformation of the notion of negative liberty is quite interesting because the new wider sense of negative freedom goes further than its traditional narrow conception and cover other sources of unfreedom such as economic and social deprivations. In other words, as opposed to the traditional view which defines socioeconomic deprivations as the subject of positive freedom, they are now redefined as the subject of negative freedom. This is so because a person who lacks these material (biological) conditions of freedom is negatively prevented from becoming a free person as much the same as he or she can be prevented by unwarranted state interference. This in effect means the scope of negative freedom is quite wider than its traditional notion as it includes both the capacity to make choices and to pursue the choices towards their ends.[119]

The opposite is, however, true in the case of the notion of positive freedom. As stated above, Alexy makes it clear that the object of positive freedom is a single act. This in turn refers to the Hegelian-Kantian idea of rationality which holds that there is only a single, rational and correct way of acting and that positive freedom consists in the capacity of a person (a rational being) to identify this

---

117 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 142 cum 138–144. 'In order to avoid confusions, which is unlikely because the context of the discussion always plays a guiding role, one can refer to this as 'negative liberty in the wide sense' and thus the general right to liberty can be distinguished into 'negative liberty in the wide sense' and 'negative liberty in the narrow sense'.

118 Ibid 230 & 133–144 cum n 126.

119 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4). This, in turn, shows that the boundary erected between traditional negative and positive freedom is actually false and therefore serves no purpose. Per Alexy, by inserting different variables in the liberty-obstacle and liberty-object, it is possible to derive different conceptions of liberty as for instance, democratic liberty, economic liberty, political liberty, social liberty, cultural liberty and the like, not only legal or liberal ones. The possibility to derive different kinds of liberties derive by inserting different contents in the three variables shows the fruitfulness of the three-point or triadic conception of liberty. ibid 142–43.

correct way and act accordingly.[120] In other words, a person is considered to be positively free only if he or she is able to act in such a rational and correct way. Therefore, this notion of positive freedom is not only narrow but is also concerned with a very abstract state of mind of a person (monologues thinking) in respect of his or her ideal act, the subject this research is hardly concerned with.

*b) On the Negative-Positive Right*

In the same vain, the generic right to something gives rise to the right to negative and positive acts depending on the specific contexts of each right. The right to negative acts is referred to as defensive rights and the right to positive acts as entitlements.[121] Traditionally, defensive rights consist of the narrow negative liberal rights, and entitlements consist of those rights known under the name of welfare rights or economic, social and cultural rights. The central point of defensive rights is prohibiting the state from negatively affecting the human rights of the individuals through its legislative, administrative or policy actions. This entails that there are three types of defensive rights: 'the right that the state should not prevent or hinder certain *acts* of the right-holder', the 'right that the state should not adversely affect certain *characteristics or situations* of a right-holder' and the 'right that the state should not remove certain *legal positions* of the right-holder'.[122]

According to Alexy, the right to positive acts (entitlements), on the other hand, refers to requiring the state to perform certain affirmative actions and, thus, can simply be referred to as 'performance' rights.[123] This, in turn, gives rise to two categories of performance rights: those that concern the rights to factual acts (factual performance) and those that concern the right to normative acts (normative performance). The first category of performance rights requires the state to take certain factual measures such as administrative and policy measures whereas the second category of performance rights require the state to enact legislative measures providing for substantive, procedural and institutional mechanisms which are necessary for the free and full enjoyment of one's rights.[124]

It should be recalled that in the traditional view entitlements refer only to economic, social and cultural rights, but in the triadic view they refer to all classes of rights requiring the state to perform certain factual and normative actions. As Alexy puts, 'Every right to a positive action on the part of the state is an entitlement. The concept of an entitlement is thus the exact counterpart to that

120 Ibid 140–141 cum nn 120–121.
121 See ibid 120–122.
122 Ibid 122–126 (emphasis original). In the respective order, these are called rights to non-obstruction of acts, to non-affecting of characteristics or situations, to non-removal of legal positions.
123 Ibid 126–127.
124 Ibid.

of a defensive right, which includes every right to a non-action, or an omission, on the part of the state'.[125] This, in turn, indicates that the scope of entitlements cover wide-ranging classes of performance rights which can generally be stated as follows: all rights to protective measures as in the case of measures needed for the protection of life and property through legislations; to procedural and organisational measures providing for procedural and institutional mechanisms through which substantive rights can be realised; and to the direct provision of certain material goods and services such as social security, medical care, unemployment benefits, education subsidies and the like.[126] Therefore, under the triadic conception, the notion of negative or defensive rights is substantially narrower than that of performance rights or entitlements. The right to negative acts is significantly robbed of its traditional normative contents but the right to positive acts is significantly expanded. The only demand flowing from the right to negative acts is simply the obligation to abstain from acting. However, the right to positive acts are very broad and thus impose wide-ranging obligations on the addressee of the rights concerned.

## 2.5. CONCLUSION

The vocabulary of human rights and freedom is undoubtedly very popular but not everyone understands their normative meanings and institutional implications in the same way. Though the lack of consensus on the concept and conception of the normative idea of human rights and freedom can be attributed to several factors, the discussion in this Chapter has dealt only with two of the major factors: the hierarchical and dichotomised conception of human rights and freedom. It was seen that the hierarchical conception expresses the positivist-constitutionalist bias against the general moral idea of human rights and freedom whereas the ideological division between liberal-individualism and welfarism is clearly at the back of the dichotomised conception. The implications of both conceptions are particularly pervasive on the normative status and significance of ESC rights: both of the conceptions reject ESC rights as human rights. But it was seen that neither of the views coherently reflect the holistic understanding of the real essence and function of human rights and freedom justified on the basis of the principle of human dignity. The triadic conception, on the other hand, provides us with richer and more practical understanding of human rights and freedom in at least three respects. First, it helps us to conceive human rights and freedom

125 Ibid 294.

126 For the extensive discussion on this, see ibid 330–348. In order to distinguish between the traditional entitlements and the one suggested here, Alexy suggests, respectively, entitlement in the narrow sense (social rights) and entitlement in the wide sense (which is extensive than one expects).

in terms of the three-point normative relationship between individuals and their environment rather than the two-point relationship existing between a person and an object; second, it provides us with an interesting and a useful perspective of the ideal of free person (i.e. what it means to be a free human being) and, third, it significantly expands our understanding of the (potential) factors constituting limitations to the free and full enjoyment of human rights and freedom and the proper role of the state in addressing those limitations. This all lead us to define the triadic conception as a relational or social conception of human rights directly emerging from and at the same time reflecting the practical and complex socio-economic and political life of individuals in a political society.[127] The strength of the triadic conception is further supported by the letter and spirit of international human rights law. As briefly noted above, international human rights law provides that all human rights drive from human dignity and that it expressly rejects both the hierarchical and dichotomised view of human rights. As one of the often-quoted paragraph of the 1993 Vienna Declaration and Program of Action (VDPA) clearly provides, 'All human rights are universal, indivisible and interdependent and interrelated' that they ought to be given the same treatment and emphasis by everyone concerned regardless of economic, social, cultural and political differences existing in the world.[128] That is, there is neither a conceptual distinction nor a normative hierarchy that can rationally be established between the rights and freedoms recognised in international human rights law nor can we find any legal basis or objective normative theory justifying hierarchical and dichotomised reading of the rights and freedoms guaranteed therein be it civil, cultural, economic, political or social human rights. On the contrary, the conception of human rights enshrined in international human rights law best coheres with the triadic conception of human rights and freedom. This is so because, alike the triadic conception, the rights and freedom recognised in various human rights instruments clearly presuppose the existence of complex and dynamic relationship between individuals and their environment. In fact, it is within this dynamic and complex social relations that the rights and freedom guaranteed therein get their full practical meaning and significance.[129] In

127 See Chapter 3.4 below.

128 VDPA (1993), para 5. Taken in its entirety, VDPA, the outcome of the Third World Conference on Human Rights, plays an important role in the political history of human rights as it has reaffirmed and re-established the true essence and place of human rights in an international normative discourse by reinterpreting and correcting the historical error created during the codification processes of the International Bill of Rights basically owing to the political-ideological antagonism between different blocks.

129 Borrowing Finnis' interesting statement about the language of modern rights, we can say that the grand justification and goal of the rights recognised in international human rights law is to express the demands for social justice which should be realised in a political society. See Finnis, *Natural Law and Natural Rights* (n 39) 210ff (expressing the mondern grammar of rights as expressions of the demands of justice). Nickel's description of internationally recognised rights as expressive of, inter alia, reduced individualism and more egalitarian approach also goes with

addition, the rights recognised therein not merely concern those liberal-negative rights but also equally provides for the right to material conditions of life required to live and lead a life worthy of human dignity in a political society. Furthermore, international human rights law not only prescribes negative obligations but also the positive obligations of the State to take necessary measures required to ensure the effective realisation of the rights and freedom recognised for everyone within its jurisdiction. This all shows that the triadic conception of human rights and freedom better explains the conceptual and normative structure of the rights recognised under international human rights law.

this conception. James W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987) 6–12.

# CHAPTER 3
# THEORIES OF HUMAN RIGHTS IN BRIEF

## 3.1. INTRODUCTION

Although there are several theories of human rights, it has so far not been possible to come up with a universally valid human rights theory through which we can comprehend the holistic nature and implications of human rights in the contemporary world.[130] In particular, the controversy surrounding the normative foundation of human rights is longstanding and yet to be settled; and, admittedly, this is not an easy matter to be considered in detail in this study.[131]

---

130 Freeman, 'The Philosophical Foundations of Human Rights' (n 48); Freeman, *Human Rights: An Interdisciplinary Approach* (n 48); Nickel (n 129); Jerome J Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 Human Rights Quarterly 201; Heiner Bielefeldt, 'Philosophical and Historical Foundations of Human Rights' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2009); Claudio Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer 2012). But see Chwaszcza (n 48) 335–348 (criticizing the modern philosophical approach to the idea of human rights).

131 In Chapter, after making a limited review of dominant traditional theories and introducing an alternative practical narrative of the idea of human rights, I will present and examine in greater detail the principle of human dignity as a normative foundation of human right in chapter four. Thus, just as an indication of existence of different approaches to the theory of human rights, the reader is referred to the following publications. Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002); Chwaszcza (n 48); Joseph Raz, 'Human Rights Without Foundations' (2007) Working Paper No. 14/2007; Gerard A Hauser, 'The Moral Vernacular of Human Rights Discourse' (2008) 41 Philosophy & Rhetoric 440; Johannes A van der Ven, Jaco S Dreyer and Hendrik JC Pieterse, *Is There a God of Human Rights? The Complex Relationship between Human Rights and Religion: A South African Case* (Brill 2004); Issa G Shivji, 'The Concept of Human Rights in Africa'; Marie-bénédicte Dembour, 'What Are Human Rights? Four Schools of Thought' (2014) 32 Human Rights Quarterly 1; Kao (n 1); Patnaik (n 1); Oswald Hanfling, 'Rights and Human Rights' (2018) 58 Royal Institute of Philosophy Supplement 57; Alison Dundes Renteln, 'The Concept of Human Rights' (1988) 83 Anthropos 343; Tom Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 Journal of Law and Society 6; Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press Cambridge, 2010); Corradetti (n 130); Michael J Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998); Beitz (n 2); Griffin (n 6); Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 Human Rights Quarterly 391; Yingru Li and John McKernan, '"Achieved Not Niven": Human Rights, Critique and the Need for Strong Foundations' (2017) 21 The International Journal of Human Rights 252; Cole (n 10); Michael Ignatieff, 'Human Rights as Politics, Human Rights as

The idea of human rights touches almost every aspect of the life of human beings and their environment.[132] As such, an attempt to theoretically ground this idea of human rights inevitably faces very complex questions ranging from private relations to those highly sophisticated socioeconomic and political relations of the society. This obviously shows the difficulty to fully capture the whole aspect of the idea and significance of human rights through a narrow theoretical prism that concentrates on one or certain of the issues involved. In fact, it is not surprising to see the disagreements or controversies surrounding the theoretical justifications of human rights not just between scholars of different disciplines but even between scholars of a given discipline.[133]

For instance, it is possible that one may approach the justification of human rights from an ethical-moral point of view while another may address the same through procedural-democratic theory and so on. In legal theory, which in itself consists of very divergent strands concerning the law and legal institutions, one may employ various viewpoints such as natural law, legal positivism, legal pragmatism, sociological, anthropological and historical theory of law or discourse theory of law.[134] Surely each viewpoint has provided a valuable

---

Idolatry (The Tanner Lectures on Human Rights)'; Anita Jowitt, 'The Notion of Human Rights' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (ANU Press 2010); Rolf Kunnemann, 'A Coherent Approach to Human Rights' (1995) 17 Human Rights Quarterly 323; Gregg, *Human Rights as Social Construction* (n 19); Douzinas and Gearty (n 48); Michael J Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press 2007); Alexy, 'Discourse Theory and Human Rights' (n 1); Bryan S Turner, 'Outline of a Theory of Human Rights' (1993) 27 Sociology 489; Kohen (n 1); Shestack (n 130); A Belden Fields, 'Human Rights Theory: Criteria, Boundaries, and Complexities' (2009) 2 International Review of Qualitative Research 407; Biren Roy, 'In Defence of Human Rights' (1997) 32 Economic and Political Weekly 259; Micheline Ishay, 'What Are Human Rights? Six Historical Controversies' (2004) 3 Journal of Human Rights 359; Claudio Corradetti, *Relativism and Human Rights: A Theory of Pluralistic Universalism* (Springer 2009); Ellen Messer, 'Pluralist Approaches to Human Rights' (1997) 53 Journal of Anthropological Research 293; Cranstson (n 2); Richard Falk, 'Human Rights' Foreign Policy 18; Heiner Bielefeldt, '"Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28 Political Theory 90; Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (n 20).

132 See for instance Henkin, 'Rights: Here and There' (n 8) 1596 (who discribed the historical normative function of the concept of individual rights in US and France as forming part and parcel of the comprehensive theory of government). See also Raz (n 30) 261ff.

133 Dembour (n 131); Ishay (n 131); Perry, *The Idea of Human Rights: Four Inquiries* (n 131); Alexy, 'Discourse Theory and Fundamental Rights' (n 39); Dworkin, *Taking Rights Seriously* (n 8); Griffin (n 6); Ignatieff (n 131).

134 The contributions in the following legal theory textbooks indicate the presence of variates of theories of human rights in legal theory. See for instance, Simmonds (n 39); Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory (Blackwell Companions to Philosophy)* (2nd edn, Blackwell Publishing Ltd 2010); Finnis, *Aquinas: Moral, Political, and Legal Theory* (n 43); Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy Volume I & II (Blackwell Companions to Philosophy)* (2nd edn, Blackwell Publishing 2007). See also H Lauterpacht, *An International Bill of the Rights of Man (With an Introduction by Philippe Sands)* (Oxford University Press 2013); Roshwald (n 48) (discussing various kinds of conceptions and theories developed over a period of time).

perspective in the modern understanding of human rights but none of them has so far been able to provide us with an adequate and comprehensive justification of (the nature and implications) of the idea of human rights.

So, I believe, it is important to state the following three points regarding how we should approach the theoretical justification of human rights. First and foremost, we should always bear in mind that human rights issues permeate through the whole spectrum of individual and collective interests. This implies that we cannot approach a theory of human rights from purely idealised-narrow individualistic or collectivist perspective and present it as a comprehensive theory of human rights. In reality, a given question of human rights involves complex individual and collective interests inseparably interwoven with each other such that arguments pertaining to their practical realisation always oscillates between the two, of course, depending on the contexts in which it arises.

Second, we should recognise that human rights questions are essentially practical questions as opposed to abstract metaphysical ideals.[135] They are rooted in and concerned with the actual day-to-day life experiences of every human being and group of human beings living in a political society. There is, therefore, very little point which could be gained from hanging up in the air or, to borrow from Raz, 'over-intellectualisation'[136] of human rights discourses. We should not, of course, dismiss the ideal-metaphysical theory of human rights but it is very important to underscore that such an ideal theory might not as such be helpful in making relevant policy choices and actions in relation to practical human sciences as the (human rights) law if it fails to adequately take into account the real life-experiences of individuals within their society. Finally, it is possible to argue that the purpose of the theoretical-philosophical argument about human rights should not be seen as founding human rights anew but rather as an attempt to reflectively or retrospectively provide a comprehensive explanation and justification of the idea, functions and implications of human rights especially in the context of complex social relations in a given political society.

Having said this, this Chapter examines the controversies observed in the hierarchical and dichotomised conceptions of human rights discussed above in the light of the existing dominant theories of human rights. In particular, the

---

135 This draws on the approaches of authors like Rawls who for instance described his theory of justice as political, not metaphysics (Rawls (n 88). Alexy describes law and legal science as practical science. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105). Nino also argues that the relevant concept of human being in the construction of human rights is the idea of human being defined in empirical biological terms known to each of us as species being (Carlos Santiago Nino, *The Ethics of Human Rights* (Clarendon Press 1991) 34–37; see also Carlos Santiago Nino, 'The Concept of Moral Person' (1987) 19 Crítica: Revista Hispanoamericana de Filosofía, 47. Most importantly, Nussbaum sees humanity as animality understood in its practical and intuitive sense. See Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114).

136 Raz (n 30) 371. (Raz made this remark in connection with the ideal of personal autonomy).

discussion in this Chapter has two basic objectives. The first is identifying the underlying value assumptions driving the theories under consideration and the second is explaining their respective views of the relationship between individual human rights and interests, and the general societal interests usually embodied in the state function. I believe that these two points generally explain the disagreement on the idea, nature and functions of human rights. Accordingly, in the following few pages, this study will try to briefly discuss the central tenets of some of the traditional human rights theories (natural law, liberalism, utilitarianism and socialism) with the view to show the gaps and inconsistencies in their approaches to (the justification of) human rights. I will also examine somewhat closely the discourse theory of human rights advanced particularly by Alexy and Habermas. Discourse theory claims to be the most comprehensive rational justification of human rights founded solely on universal pragmatic discourse, that is, without assuming any value commitment whatsoever. Through this, it claims to have addressed the major weaknesses in other traditional theories such as natural law and natural rights, liberalism and socialism. So, I will pay close attention to its claims and see if it can indeed provide us with a robust and practical conception of human rights need in the contemporary world. Nevertheless, because of the reasons to be seen shortly, neither of the traditional theories nor the recently proposed discourse theory of human rights can be regarded as an adequate theory of human rights. I argue that it is not possible to construct a comprehensive justification of human rights without the idea of social relations and the principle of human dignity.

## 3.2. TRADITIONAL THEORIES

There have been many attempts to justify the idea of human rights through such normative theories as natural law, natural rights, liberalism, socialism and using such ideals as autonomy, will, utility, interest and entitlement.[137] In fact, depending on the kind of interest or value they seek to promote, it is possible to divide some of these traditional theories into individualist or autonomy-based and collective interest-based theories of human rights. The purpose here is not discussing each of these theories but to generally point out two of the major reasons why they cannot serve as a comprehensive theory of human rights. The first reason is that they all rely on narrow value assumptions and the second reason is that they all are based

[137] See for instance, Chwaszcza (n 48); Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39); Gould, *Marx's Social Ontology Individuality and Community in Marx's Theory of Social Reality* (n 30); Dworkin, *The Theory and Practice of Autonomy* (n 5); Nino, *The Ethics of Human Rights* (n 135).

on the separationist view of the individual and the society: that the individual rights and societal interests and values are separate and irreconcilable.[138]

## 3.2.1. AUTONOMY-BASED THEORIES

### *a) Natural Law and Natural Rights*

Following the natural law and natural rights theory of human rights, which is regarded as the oldest theory of human rights, a human being is viewed as transcendental and autonomous being endowed with certain natural (inherent) and inviolable rights that ought to be respected and ensured by the society and state.[139] This argument, in turn, draws on the narratives or assumptions about the state of nature, and the nature and capacity of human beings, the conditions or circumstances of individuals in the state of nature. Notwithstanding variations or disagreements regarding these narratives, it can be said that natural law theorists generally agree on the following major points.[140] Thus, in the state of nature every human being is, first and foremost, free to do or not to do whatever he or she likes to do or not to do and to this extent recognise no authority or limitation except the one flowing from natural law or natural reason itself. Second, everyone is equal in terms of the authority and power and of the rights and responsibilities they have under natural law; hence everyone is said to have the same measure of self-esteem and treatment under natural law. Third, they are self-loving or self-preserving being in the sense that they are all concerned primarily with their own welfare and well-being; accordingly, they not only perform activities essential to the preservation and promotion of their lives but also actively resist every forms of destructions directed against their life and well-being, both individually and in common. Fourth, they are sociable or egalitarian beings, that is, there is mutual or reciprocal recognition of each other and each other's interest, and that

---

138 See generally Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 26–35 & 48–53; Alan Ryan, 'Liberalism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. I)* (2nd edn, Blackwell 2007); Peter Self, 'Socialism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. I)* (2nd edn, Blackwell 2007); Peter Vallentyne, 'Distributive Justice' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. II)* (2nd edn, 2007) 556–559; Barry Hindess, 'Marxism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. I)* (2nd edn, Blackwell 2007).

139 See for instance, Shestack (n 130) 206–208; Freeman, 'The Philosophical Foundations of Human Rights' (n 48) 497–500; Nickel (n 129) 8; Lauterpacht (n 134) 16ff.

140 See particularly Brian Bix, 'Natural Law Theory' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell 2010) 211ff; Bix (n 39) chapts 5–7; Finnis, *Natural Law and Natural Rights* (n 39) 18–19 & 23–25; Mark C Murphy, 'Natural Law Theory' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005) 18–22.

they are naturally, inherently committed to live a peaceful and harmonious life with each other.[141] This characterisation, of course, necessarily presupposes that human beings have inherent capacity for rationality and communication. That is, it is assumed that human beings have inherent capacity both to give and receive reasons pertaining to their choices and actions and that this capacity inheres in each and every human being. In particular, it is argued that every human being inherently possesses the capacity to recognise and abide by the dictates of natural reason (law), which for some is equivalent to the law of God.[142]

It is on the basis of these accounts of the nature of human beings that natural law and natural rights theories justify several natural (i.e. inherent moral) rights of human beings, in particular, the right to self-preservation which includes the right to take and use the fruit of nature necessary to sustain and subsist his or her life and repel all physical threats directed against his or her own life; the right to freedom of choice and action – the right to autonomy; the right to equality which can be restated as the right to equal self-esteem, treatment, entitlement, equal power, equal standing and responsibility, etc.; and the right to mutual recognition and assistance. In this regard, it is argued that individuals are entitled to free and full enjoyment of their natural rights but only subject to the principle of mutuality (reciprocity) flowing from natural law.[143]

However, the natural law theory as well as its later version, natural rights theory is criticised for being too subjective and individualistic. In particular, it is argued that the theory conceives individuals and their private interests as superior to collective interests, and the modern state as subservient to the fulfilment of private interests of individuals. This especially flows from its view of individuals as autonomous beings endowed with inherent and inviolable rights that should be respected and ensured by the state and society regardless of the general collective interests.[144]

---

141 For more on the idea of the state of nature, law of nature and natural rights argument, see Thomas Hobbes, *Leviathan (Edited with an Introduction and Notesby J. C. A. Gaskin) [1996]* (Oxford Wol, Oxford University Press 1998); Craig L Carr (ed), *The Political Writings of Samuel Pufendorf (Trans Michael J. Seidler)* (Oxford University Press 1994); Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right (Trans by H.J. Tozer, Introduction by Derek Matravers)* (Wordsworth 1998); Christopher Hitchens, *Thomas Paine's Rights of Man: A Biography* (Atlantic Monthy Press); John Locke, *Second Treatise of Government [1690] (Edited, with an Introduction, by C. B. Macpherson)* (Hackett Publishing 1980); Nozick (n 138); Finnis, *Natural Law and Natural Rights* (n 39); Paul, Fred D. Miller and Paul, *Natural Rights Liberalism from Locke to Nozick* (n 39); Hugo Grotius, *The Rights of War and Peace: Book II (Edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac, Major Legal and Political Works of Hugo Grotius)* (Liberty Fund 2005).

142 This is explicitly stated in Pufendorf's discussion. See Carr (n 141) 74ff. at Observation 1 through 5).

143 Locke (n 141); Rousseau (n 141); Hobbes (n 141); Carr (n 141); Grotius (n 141).

144 Douglas J Den Uyl and Douglas B Rasmussen, 'Ethical Individualism, Natural Law, and the Primacy of Natural Rights' in Ellen Frankel Paul, Jr Fred D. Miller and Jeffrey Paul (eds), *Natural Law and Modern Moral Philosophy* (Cambridge University Press 2001) 34ff; Shestack (n 130) 206–208.

### *b) Liberal-Individualism*

Although this conception of human being and the rights thereof has initially originated from natural law and natural rights theory, it is more or less this very same view that underlies the liberal and libertarian theory of human rights and the state. In fact, there is no doubt that liberalism has emerged from natural rights theory[145] and, for this reason, most of the arguments presented as a justification of individual human rights overlap in many respects. Thus, similar to what has been said in the preceding paragraphs, the liberal conception of human rights places significant emphasis on the autonomy and inviolability of individuals: it claims that individuals are autonomous and the rights flowing therefrom are inviolable.[146] For instance, as autonomous beings, individuals are said to have the right to choose and decide what is best for them – they have the right to self-determination – and, as such, it is argued that the state has no legitimate reason to interfere in or dictate those choices whatsoever. It is argued that the role of the state is merely limited to what is often colloquially referred to as a 'night watchman' service.[147] The liberal theory of human rights (as advanced

---

145 This is so because both natural rights theory and liberalism claim their origin to Locke's theory of rights and civil society. For more accessible discussion on this, see Wolfe (n 39) especially pp 134–148 discussing the brief historical development of liberalism and its core tenets and tendencies. Although Wolfe states the first core principle of liberalism as the principle of dignity, this is in fact hardly the case in the modern strands of liberal theories. Liberalism's core claim is the principle of autonomy rather than dignity. Moreover, Wolfe preferred to state the individualistic orientation of liberal theories as one of its 'tendencies' as opposed to its coherent principle. But as manifested in its approach to economic institutions and, above all, the role of the state in the realisation of basic socioeconomic rights and social justice, we can strongly argue that individualism constitutes one of the identifiable core principles of liberalism and hence cannot simply be relegated to the status of tendencies. See also Paul, Fred D. Miller and Paul, *Natural Rights Liberalism from Locke to Nozick* (n 39); A John Simmons, *The the Lockean Theory of Rights* (Princeton University Press 1992); George Khushf, 'Inalianable Rights in the Moral and Political Philosophy of John Locke: A Reappraisal' in MJ Cherry (ed), *Persons and their Bodies: Rights, Responsibilities, Relationships* (Kluwer Academic Publishers 1999).

146 Griffin (n 6); Dworkin, *The Theory and Practice of Autonomy* (n 5); Raz (n 30). Also, most of Constant's description of what he called the 'liberty of the modern' essentially concerns the individual autonomy-based theory of liberty and rights. See particularly Constant (n 82) 310–311, 321 & 323ff. See also generally Levinson (n 114) 539ff (discussing, inter alia, some key arguments of liberal individualism's conception of freedom or rights); Christman (n 48).

147 That is, the state predominantly exists for and hence concerned with ensuring security and stability and to take care of market externalities. See Christman (n 48) (particularly Chapter 4, discussing the 'canons' of liberalism); Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39) 92–97; Nozick (n 138) chapt 3; Wolfe (n 39) 144–148; Ryan (n 138) 361–366. But see Levinson (n 114) 539–541 (comparing and contrasting the liberal and welfarist view of the functions of the state). Constant (n 82) 310–311, 321 & 323ff (describing the nature of the liberty of the moderns). See also generally Henkin, 'Rights: Here and There' (n 8) 1584–90 (discussing the liberal individualistic conception of rights in the U.S. legal system; Oliver De Schutter, 'The Protection of Social Rights by the European Court of Human Rights' in Peter Van der Auweraert and others (eds), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* [Maklu 2002] 208ff.

by many of its proponents), therefore, implies that the only genuine (real) rights that individuals can rightfully claim upon the state is the negative right of non-interference, i.e. the right to be left alone (*laissez faire*) with respect to all aspects of their private choices and actions and that the state is negatively required to abstain from interfering in those choices and actions of individuals pertaining to their life, liberty and property. Not only this, alike natural rights theory, it also suggests that the interests and rights of individuals have all-time primacy over the collective interests and values of society.[148] This, in turn, flows from two basic assumptions driving the theory: the view that the individual rights and social interests are distinctively separate and therefore have antagonistic relationship with each other and that the conflict between individual rights and collective interests are essentially irreconcilable (that it is not possible to realise one without sacrificing the other).[149] For all these reasons, both of these theories cannot be considered as a comprehensive justification of inherent human rights.

### *c) The Principle of Autonomy*

As just seen above, the fundamental claim of natural law (and natural rights theory) and liberal theory of human rights is that an individual person is an autonomous being thereby suggesting that the principle of autonomy constitutes an ultimate normative principle through which all human rights are or can be justified.[150] In my opinion, in order to accept the principle of autonomy as the normative foundation of human rights, it is necessary that it fulfils the following three conditions. First, autonomy should be inherent in all human beings; second, it should be present in equal measure and at all-time in every human being (i.e. it should neither be relative nor contingent); and, finally, it should be regarded as a universal normative value.

However, in all the three conditions, the principle of autonomy fails and hence cannot be regarded as the foundation of inherent, equal and universal foundation of human rights. With respect to the first point, some authors have already shown

148 See Gewirth, *The Community of Rights* (n 3) 1–2; Alexy, 'Discourse Theory and Fundamental Rights' (n 39); Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39) 92–97; Vallentyne (n 138) 558–559; Christman (n 48) 27–28 & 43–46. But Raz, a liberal scholar himself, rejects this view and offers interesting reconstruction of the liberal theory of rights as encompassing collective interests. See particularly Raz (n 30) 250–263. In this regard, three basic points in Raz's arguments are worth stating here: that while conflicts may be inevitable (not just between private and public interests but even also between a person's private interests), there is no mortal conflict between the two and that there is no rule which gives rights an automatic priority over collective interests and that individual rights and freedoms are part and parcel of the collective interests which in turn establish the reason for their entrenchment in the liberal constitutional norms. For comments on Raz's distinctive liberal conception, see generally Wolfe (n 39) 82ff.

149 Christman (n 48) 125ff; Vallentyne (n 138) 558–559; Wolfe (n 39) 144–148; Ryan (n 138) 361–366.

150 Alexy, 'Discourse Theory and Human Rights' (n 1) 210ff; Wolfe (n 39) chapts 4 & 5. Cf. Raz (n 30) 203–207 cum Chapt 14.

that autonomy or autonomous life cannot be regarded as inherent quality or value of human being but rather as a value that ought to be achieved through the realisation of various necessary social and material goods over a course of time.[151] For instance, according to Raz, there are two but interconnected senses of autonomy. In the first, primary, sense, it expresses the idea that a person can be considered as autonomous if he or she becomes an independent author of his or her own life. In the second sense, it concerns the conditions that must be available to the individuals (i.e. conditions of autonomy) for the achievement of an autonomous life (understood in the first sense).[152] The primary sense of autonomy (to become an autonomous person) is, therefore, the function of its second sense: that is, it calls for the availability of necessary and indispensable social and materials goods for it is impossible that a person would ever become an autonomous agent or live an autonomous life without the actual availability of the conditions of autonomy.

This could lead us to deduce at least two important conclusions in relation to the point at hand. One is that as long as autonomy is not an inherent value of a human being, it cannot be a ground for inherent rights of every human being. The other is that those indispensable social and materials conditions of autonomy are essentially integral elements of state public policy measures. This, in turn, indicates that there are deep substantive relationships (interrelatedness) between individual and social interests and that, as a consequence of this, both the society and state have an indispensable place in the comprehensive theory of human rights quite different from those expressed in the traditional human rights theories.[153] Seen in this light, it can even be argued that the principle of autonomy rather signifies the social and egalitarian conception of human rights, much less than it justifies the strict individualistic conception of human rights. This means that the idea of autonomy can be taken as implying human sociability (solidarity, mutuality, relatedness and interdependence) contrary to

151 Raz (n 30) 203–207 cum 154–157 & Chapt 14); Wolfe (n 39). The contingent and temporal nature of relative individual autonomy is well-expressed by Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 87–89.

152 Raz (n 30) 204ff. Thus, in order to realise this sense of autonomy, that is, for a person to live an autonomous life, he or she should be fully left alone – there should not be any form of interference, positive or negative, from the state. This reflects the version of liberal-individualistic conception of autonomy. However, the second sense of autonomy cannot be realised without the existence of various kinds of conditions of and therefore calls for positive measures from the state. Alexy in his part conceives the principle of autonomy as consisting of private and public dimensions. 'The essence of private autonomy is the individual choice and realization of a personal conception of the good. Public autonomy is defined by a collective choice and realization of a political conception of the right and the good entails two elements: the private and public conception of autonomy.' Alexy, 'Discourse Theory and Human Rights' (n 1) 209.

153 Raz (n 30) 207; Gould, *Globalizing Democracy and Human Rights* (n 90). See also Rob Buitenweg, 'Individual Freedom and ESOCUL Rights: The Illusions of Libertarianism' in Eva Nieuwenhuys (ed), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill 2006) 81–83.

individual atomism suggested by liberal-individualism. In other words, given all the necessary material and social conditions needed to achieve an autonomous life, it is difficult to hold the principle of autonomy as implying fundamental contradiction or mutual exclusivity (separated-ness) between individual human rights and general collective interests.[154]

In turn, this points us to the second reason why autonomy cannot serve as an ultimate justification of human rights: it is essentially a relative and highly contingent value. An autonomous individual life is simply a relative and contingent state of affairs. Thus, the principle of autonomy can only be a relative norm such that it cannot be a basis for the justification of absolute and equal rights of every human being. This is because, as both Raz and Griffin note, there are multiple factors that determine the achievement of an autonomous living such as economic, environmental, cultural, social and institutional factors: this is to say that whether and the degree to which a person may become and lead an autonomous life is highly contingent up on these and several other factors.[155]

Thus, there is no person in whose life autonomy can be taken for granted. For instance, there is no autonomy, in the meaningful sense of the term, in the life of those persons who constantly lack those conditions of autonomy (such as persons who struggle every day with lack of survival needs or suffer from different kinds of mental disabilities). This means that it is, strictly speaking, very difficult for them to make autonomous choices with respect to matters affecting their private life.[156] Hence, it is neither true that every person is born with (the same level of) autonomy nor is it true that every person leads an autonomous life throughout his or her entire lifetime. It is rather a self-evident fact that in every society there are persons with no or severely diminished level of autonomy due to their personal,

---

154 Raz (n 30) 206–207. Even Griffin, who holds human agency (which entails autonomous choice and liberty) as the foundation of human rights, recognises welfare rights ('minimum provision' as necessary conditions of autonomy. See generally Griffin (n 6) Chapts 2.4 & 8–10. '[Our agency] has parts: autonomy, liberty, and minimum provision.' ibid. 67.

155 'Not every human decision is autonomous. Many decisions are effectively determined by outside influences: by unconscious drives largely shaped by others, by genetic abnormalities such as males with two Y-chromosomes, and so on.' Griffin (n 6) 150. See also Raz (n 30) 154–157. 'The autonomous agent is one who is not always struggling to maintain the minimum conditions of a worthwhile life. The more one's choices are dictated by personal needs, the less autonomous one becomes. Of course, natural conditions may also force people to make choices determined by the need to secure the necessities of a worthwhile life. And it would be wrong to think that every such condition is in any way regrettable. Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility.' ibid. 155. Alexy recognises the private and public function of the principle of autonomy. For him, the principle of autonomy is only a prima facie principle which only gives rise to prima facie rights. Thus, it aims to guarantee a degree of autonomous life that can be achieved in given society where the realisation of different interests is necessarily subjected to the principle of reasonable balancing. Alexy, 'Discourse Theory and Human Rights' (n 1) 209ff. See also Nino, *The Ethics of Human Rights* (n 135) 138ff (discussing the principle of moral autonomy).

156 See Raz (n 30) 155–157 & 204–205.

social and environmental factors.[157] But it is absurd to say that persons with no or diminished level of autonomy lack inherent human rights in equal terms with all other persons. In order to avoid this kind of conclusion, it is obvious that one needs to come up with an alternative practical conception of human being contrary to the one suggested through such theories as liberal-individualism, the conception which better characterises the life of human being in terms of vulnerability which implies that human beings have inherent (an ever-present) need for security, care and solidarity.[158]

Finally, autonomy also lacks the quality to be a universal normative value upon which universally valid human rights can be justified. For instance, in some cultures, the notion of autonomy does not existent or, at least, is not often attached the kind of importance it has been given in the West. Such values as (social) solidarity, social justice, mutuality and care are said to instead provide stronger motivation for some societies in caring for the interests and well-being of their members. If particularly seen in the light of inherent vulnerability of human being and hence ever-present neediness for security, we can actually say that it is the value of social solidarity (and care) that provides stronger case for the universal validity of human rights.[159]

Thus, we can conclude that the principle of autonomy has inherent limitations with respect to all the three necessary conditions mentioned above and as such it cannot be considered as the normative foundation of inherent, equal and universally valid human rights. This however does not mean that the idea of autonomy is entirely irrelevant in human rights discourse. The value of autonomy, as Raz notes, consists not in the possession of the right of autonomy but rather in the exercising of autonomy itself. That is, to meaningfully talk about the rights of autonomy, it is necessary that one has autonomy available to her in the first place. And, as seen above, it is the primary responsibility of each society to ensure the availability of various social and material conditions (now also referred elsewhere as human capability needs[160]) through which individuals achieve some level of autonomy in their life. But it is not possible to justify this responsibility on the basis of the principle of autonomy for it lacks the quality and breadth required to adequately justify the holistic purpose of the institution of human rights: the protection and preservation of the inherent life and dignity of human being, in particular, of the most vulnerable members of the society.

---

157 See for instance, Griffin (n 6) 150.

158 Carr (n 141) 151. See generally Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Bryan S Turner, *Vulnerability and Human Rights* (The Pennysylvania State University Press 2006).

159 *Cf.* Alexy, 'Discourse Theory and Human Rights' (n 1) (who argues that autonomy is the foundation of human rights justified through rational discourse-theoretical theory. It remains to be seen in the discussion below if this claim by Alexy can indeed be accepted). The alternative theoretical argument for this draws on authors like Grotius, Pufendorf and recently on Nussbaum and Sen. See Carr (n 141) 81; Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Sen (n 3).

160 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Sen (n 3).

### 3.2.2. COLLECTIVE INTEREST-BASED THEORIES

Utilitarianism, socialism and communitarianism have reacted, in one way or the other, against the 'hyper-individualistic' claim of autonomy-based theories of human rights and sought to instead defend the primacy of collective interests over individual rights.[161] Generally, all of these theories deny the existence and, if any, the precedence of individual rights over collective interests. For them, individual interests are inseparably subsumed within the general interests of the society: individuality is essentially subsumed in the collectivity. Therefore, they are basically reactionary (in fact, rejectionist) theories advancing instead collective (general, communal) interests; and, for this reason, they are often criticised for their totalitarian tendencies supplying arguments sacrificing individual rights for the sake of collective interests.[162]

For instance, in utilitarianism, utility is regarded as the fundamental value through which state public policy should be guided.[163] It is often vaguely interpreted as generating the greatest amount of pleasure for the greatest number of the people. Thus, for utilitarianism, it is not only acceptable but the right mode of action to sacrifice individual rights or minority interests as long as a given measure is said to yield an aggregated greatest amount of pleasure for the majority of the people concerned, regardless of the nature of the interests in issue.[164] Similarly, socialism also rejects the very idea of individual rights.[165] Henkin notes that the only basic right individuals can have in socialism is to live in the socialist society and state where all means of production and distribution are owned in common. Any benefit individuals may enjoy in the socialist state is neither inherent nor inviolable claim-rights but rather a grant from the socialist state at its own will. It is thus socialism – collective ownership of land, labour and capital – that holds the central place in the socialist conception of the relationship between individuals and their society.[166]

---

161 See Christman (n 48) 125ff (discussing theories developed as critiques to the liberal theory).

162 Andrew Heywood, *Politics* (3rd ed, Palgrave Macmillan 2007) 48ff; Christman (n 48) chapts 5 & 7; Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39) 100–104; Simmonds (n 39) 17ff; Bix (n 39) 117–120; Vallentyne (n 138) 556–557; Kateb (n 5) 79ff (discussing problems with utilitarian view of human rights).

163 John Stuart Mill, *On Liberty and Other Essays (Edited and with Introduction and Notes by John Gray) [1991]* (Paperback, Oxford World's Classics 2008) 136–167 & 197–201; HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 182ff.

164 Sen (n 3); Hart (n 163); Raz (n 30) 222, 238–239 & 271. See generally Raz ibid, 267ff (examining consequantialism which is central to the utiitarian theory). As he notes, utilitarianism is often identified as leading to anti-liberal arguments justifying state's 'encroachment on individual freedom'. ibid 267.

165 Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39) 100–104.

166 Henkin, 'Rights: Here and There' (n 8) 1599ff; Shestack (n 130) 210–211; Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39) 13–16 & 100–104. Of course, these are not the only collective interest-based theories of human rights.

Obviously, this highly abstract description of the traditionally dominant theories of human rights does not fully capture many of the divisions within each of them, nor is it also the purpose of this discussion to fully analyse each and every segment of these theories. Nonetheless, the discussion has shown two major problems or limitations cutting-across these theories, that is, both autonomy-based and collectivist theories suggest that the relationship between individuals and society is inherently antagonistic and that individual and general societal interests are not only separate but also have an irreconcilable conflict (i.e., ensuring or promoting one necessarily means sacrificing the other). These problems are, in turn, the result of the narrow underlying assumptions as regards the kind of interests and values each theory seeks to promote in its own ways. Neither of these theories could, therefore, provide us with a comprehensive justification of inherent human rights recognised in various global and regional human rights instruments where both individual and collective interests are interwoven and given due recognition and protection. The holistic view of the idea, nature and implications of human rights needs a different assumption and argument than the ones put before us through these theories.

## 3.3. DISCOURSE THEORY

### 3.3.1. INTRODUCTION

It is not inaccurate to state that discourse theory[167] of human rights is born out of scholarly dissatisfaction on the inability of value-based traditional human rights as the ones discussed above to provide a rational and universally valid justification for human rights. As I have tried to show in the preceding discussions, all traditional theories of human rights make some kind of fundamental value assumption and commitment. Robert Alexy and Jürgen Habermas, the principal architects of the discourse theory, however, rejects the view that universal human rights can be justified on the basis of any of the traditional value-based human

---

The arguments based on cultural relativism also gives due emphasis on cultural values and individual duties than the human rights individuals have qua human being.

167 Discourse theory is also alternatively referred to as procedural theory, general practical discourse, rational practical discourse, practical discourse, rational discourse or practical rationality. For details on the topic see particularly Robert Alexy, 'Problems of Discourse Theory' (1988) 20 Crítica: Revista Hispanoamericana de Filosofía 43; Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105); Robert Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (1992) 5 Ratio Juris 231; Alexy, 'Discourse Theory and Human Rights' (n 1); Alexy, 'Discourse Theory and Fundamental Rights' (n 1); Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) chapts 3 & 5.3.

rights theories.[168] But, first, let me briefly introduce what discourse theory is so that one may understand the essence of discourse-theoretical justification of human rights. There are two stages in the discourse-theoretical justification of human rights. The first stage is concerned with the justification of discourse rules themselves. Then, these discourse rules, or discourse ethics as some refer to it, are used to drive individual human rights both directly and as a matter of necessity.[169]

Generally, discourses are sets of interconnected linguistic activities through which we test the truth or correctness of the things we say. Those discourses concerned with the correctness (i.e. rational validity or truth) of normative statements are referred to as practical discourses or, also, rational practical discourses. Thus, the theory of rational discourse is a normative theory of discourse addressing the question how the rules of rational discourse could be justified.[170]

In this regard, it is said that there are two groups of rational discourse rules: basic rules and rationality or justification rules.[171] Basic discourse rules are the ones generally concerned with the rules of non-contradiction, consistency, clarity, generality and the like. They are seen as the irreducible elements or atoms governing the possibility and validity of all kinds of general discourses such that no discourse can dispense with them.[172] The rationality rules, also referred to as general justification rules, on the other hand, have particular relevance for the practical rational discourse which, in principle, requires that everyone making assertions or claims of truth value ought to give reason(s) to that effect unless there is a reason not to do so.[173] Therefore, rationality rules are essentially concerned with '[securing] the impartiality of practical argumentation and therewith of any practical opinions resting on it'.[174] Accordingly, freedom and equality of argumentation are said to be the 'most important rules' falling under this category for they guarantee everyone's right to free, equal and universal participation in discourse. Thus, everyone capable may take part in discourse,

---

168 Alexy, 'Discourse Theory and Human Rights' (n 1) 209ff; Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 18–22; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 118–131.

169 See Alexy, 'Discourse Theory and Human Rights' (n 1) 211ff; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 118–131.

170 Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105) 14–20, 179–180 cum n 11; Alexy, 'Problems of Discourse Theory' (n 167) 44–48; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 107–111.

171 Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105) 187ff.

172 Ibid 189–91.

173 Ibid 191ff.

174 Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 235. See also Alexy, 'Problems of Discourse Theory' (n 167) 46.

introduce or question any assertion, express wishes, attitudes and needs without any limitations in any manner whatsoever.[175]

It should, however, be noted that these rationality rules are simply necessary presumptions which hold true for all practical rational discourse. They are neither deduced from nor implied by any *supra* normative principle.[176] This is the reason discourse theory is identified as one type of transcendental-pragmatic arguments which holds that certain categories of rules are necessarily valid for the very possibility of practical argumentation in the first place, for without them no rational discourse is said to ever exist.[177] For Alexy, this rational pragmatic discourse especially in its elementary form is part and parcel of everyday human life: every human being is essentially a discursive creature in that it is only in some serious exceptional situations as fatal accidents that individuals may lose the capacity to participate in general discourse.[178]

Alexy, nevertheless, makes it clear that there is no obligation to participate in discourse nor is it taken for granted that everyone actually takes part in practical discourse. Rationality rules are, thus, mere prescriptions that whosoever is interested in a given practical discourse ought to follow in order to judge the validity of the outcome thereof which is determined solely by the degree to which the discourse is carried out in accordance with the general

---

175 Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105) 191–194; Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 235–236; Alexy, 'Problems of Discourse Theory' (n 167) 46. Thus, Alexy underlines that the rationality rules express the Liberal/Kantian conception of universality and autonomy of practical rationality. From these, he formulates an abstract condition underlying the principle of universal agreement or consensus stated as follows: 'UA: In any discourse a norm can only find universal agreement when the consequences of generally following that norm for the satisfaction of the interests of each and every individual are acceptable to all by reason of arguments'. Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 236. 'A norm which finds universal agreement under this condition is in an ideal sense, correct. It therefore has ideal moral validity.' ibid. This principle of universal agreement is more or less similar with Habermas' abstract discourse principle which he states as follows: 'D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses'. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 107.

176 Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 239; Alexy, 'Discourse Theory and Human Rights' (n 1) 213; Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105) 185.

177 Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105) 112–115; 123–124 & 185–187.

178 Alexy, 'Discourse Theory and Human Rights' (n 1) 217–218; Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 21–22; Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 241–242. On this point, Alexy distinguishes his approach from other authors like Habermas and Hare in that he opted for what he calls 'a weak version' of transcendental pragmatic argument. For more details, see Alexy, 'Discourse Theory and Human Rights' (n 1) 216ff; Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 239ff.

rules of justification mentioned above.[179] Alike all kinds of procedural theories, Alexy states, 'the correctness [and thus validity] of a norm or the truth of a proposition' is defined in terms of its adherence to a certain predefined procedure and nothing else; other than this, there is no other mechanism for evaluating the validity or justness of certain decisions. In short, in discourse theory, validity or justness is simply the function of a predefined procedural correctness.[180]

Alexy, however, maintains that, even if participation in discourse is said to be merely voluntary, the argument for the universal validity of discourse rules or ethics can be strengthened through its two other elements. The first argument is the argument from utility which, according to Alexy, holds that, even for those who have no or little interest in discourse rules, adherence to them yields better advantage or utility than other means of dispute resolutions such as coercion, threat, domination, fraud or deception: discourse rules have better strategic importance irrespective of whether or not one honestly believes in the universal validity of such rules. The second argument is what he calls the argument from sociological-empirical evidence and it states that although it cannot be concluded for each and every person, there are sufficient number of persons with genuine interest in practical correctness concerning their everyday social life.[181] Having said all this, it is interesting to note that the principal driving force behind

179 This means that, in addition to the requirements of basic discourse rules, the extent to which the principle of autonomy, equality, freedom and universality are adhered to with respect to the topic of discourse and its outcomes determines the degree of its validity and justness. Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 235 & 241–243; Alexy, 'Discourse Theory and Human Rights' (n 1) 218–219.

180 Alexy, 'Problems of Discourse Theory' (n 167) 44. But Alexy notes that there is no one way of constructing a procedure through which a given norm can be generated and its validity be judged for differences may result from the requirements as regards the participants, the procedure itself, from the character of the norm which, in turn, is the function of the other two requirements. ibid 44–46.

181 Alexy here states that the argument for the universal validity of practical rational discourse has three interrelated components: the transcendental-pragmatic argument (which I have already described), the argument from utility and, finally, the argument from empirical evidence. In his own words, 'My thesis is that the universal validity of the rules of discourse can be substantiated by means of a three-part argument. The first part consists of a very weak version of a transcendental-pragmatic argument, then comes the second part-an argument which takes account of the maximisation of individual utility. This combination presupposes the third part in the form of an empirical premise'. Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 239ff. See also Alexy, 'Discourse Theory and Human Rights' (n 1) 213–220. The motivation for participation in discourse is not important for the validity of discourse rules does not rest on subjective (internal) behaviour of participants. For Alexy, what is decisive is the fact of engagement in argumentation. This is so because, as he maintains, the justification of discourse rules is mainly concerned with their objective (institutional) validity to which human rights and law belong and, in the field of law, compliance with the justified rules hardly depends on actual motive of the participants than on their externally displayed conducts. Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n 167) 242–243; Alexy, 'Discourse Theory and Human Rights' (n 1) 218–220.

discourse theory is designing and justifying mechanisms through which conflicts or disagreements can be resolved through discursively generated consensus of discourse participants. And for this to be possible, discourse theory says that all discourse participants, both real and future, are required to treat one another as autonomous, free and equal participants in relation to any discourse topics whatsoever.[182]

### 3.3.2. JUSTIFICATION OF HUMAN RIGHTS THROUGH DISCOURSE RULES

Alexy, in particular, believes that universally valid ideas of human rights cannot be justified on the basis of any of the traditional theories but discourse theory. He argues that the essence of the Kantian-liberal conception of human rights[183] can only be established completely through reasoning alone that raises a claim to objectivity, correctness or truth.[184] For him, neither of the traditional theories can offer any objective criteria of validity required for the rational justification of human rights. Discourse theory, Alexy argues, is able to provide the most comprehensive and stable basis for the justification of equal and universal validity of human rights for it is solely based on rules of practical reason (rationality). This is so because, it is argued, there is no prima facie value claim that could be made in discourse theory except the rules of discourse itself. And it is this aspect of the theory which makes it distinctive from other human rights theories proposed so far.[185] Of course, whether this claim of the discourse theory is valid and hence it is in fact able to successfully ground the equal and universally valid human rights remains to be seen but, at least for Alexy, there is no doubt that 'if anything can establish the universal validity of human rights, that is reasoning that establishes it. Discourse theory is a theory centred on the concept of reasoning. That is the most general ground for the view that discourse theory can contribute to the foundation of human rights'.[186]

---

182 See generally Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 107ff.

183 That is, human rights as originating from the principle of autonomy universally possessed by everyone. See Alexy, 'Discourse Theory and Human Rights' (n 1) 209–210.

184 Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 18–19 & 21.

185 Ibid 18–22; Alexy, 'Discourse Theory and Human Rights' (n 1) 209–2011. Habermas, for instance, states that 'postconventional morality provides no more than a procedure for impartially judging disputed questions. It cannot pick out a catalogue of duties or even designate a list of hierarchically ordered norms, but it expects subjects to form their own judgements'. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 114.

186 Alexy, 'Discourse Theory and Fundamental Rights' (n 1) 21; Alexy, 'Discourse Theory and Human Rights' (n 1) 210–211.

But the discourse rules seen above are only concerned with an ideal pragmatic conversation. Thus, so far nothing has been said concerning whether these rules are also equally valid as rules of human behaviour in practical actions. In ideal pragmatic reasoning, there is no immediate demand or consequence that would practically follow from accepting a given rule as valid. However, with respect to rules concerning practical action, once a given rule is judged as a valid norm, then everyone is expected to behave according to that norm under the pain of sanction; and, human rights norms, in essence, belong to norms of practical actions.[187] This entails that the justification of discourse rules does not automatically amount to the justification of human rights. In order to say this, it is necessary to show that the ideal discourse rules are also the rules of practical action (behaviour) as well.

According to Alexy, establishing discourse rules as the rules of practical actions requires further assumptions and arguments pertaining to the discourse theory. To this end, he has proposed three complementary arguments drawn from the principles of autonomy, consensus and democracy. It however appears that, of all the three, the argument from autonomy holds a central place in establishing the rules of discourse as the rules practical action. His argument from autonomy substantially draws on what Nino refers to as 'basic norm of moral discourse' which, in turn, is related to Kant's conception of (moral) autonomy.[188] For Nino, there is close affinity between Kant's idea of moral autonomy and basic feature of moral discourse. In his own words,

> moral autonomy in Kant's sense is intimately connected with a fundamental feature of moral discourse: with the fact that it does not operate through coercion, misrepresentation, or conditioning but through *consensus*. That is, moral discourse, unlike, for example, law, aims to obtain a convergence of actions and attitudes through the free acceptance of the same ultimate general principles of conduct.[189]

Thus, Nino is of the opinion that anyone who 'honestly' takes part in 'moral discourse' should be seen as attaching 'positive value to the autonomy which manifests itself in actions determined by the free adoption of moral principles'; this, in turn, reflects the kind of 'minimum tacit agreement' supposed to exist between those who chose to freely and sincerely participate in basic moral discourse,

---

187 See Alexy, 'Discourse Theory and Human Rights' (n 1) 220; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 114–116. This clearly distinguishes ideal discourse rules from legal rules (which itself is also a species of general discourse rules). See generally Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (n 105); Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 222ff.

188 Alexy, 'Discourse Theory and Human Rights' (n 1) 222 citing Nino, *The Ethics of Human Rights* (n 190) 138. For the different interpretation of Kant's notion of (the principle of) autonomy, see generally Rosen, *Dignity: Its History and Meaning* (n 27).

189 Nino, *The Ethics of Human Rights* (n 135) 138.

which can be stated as follows: that 'it is desirable that people determine their behaviour only by the free adoption of principles that, after sufficient reflection and deliberation, they judge valid.'[190]

Alexy refers to this basic norm of moral discourse as the 'principle of autonomy'[191] for it implies that whoever accepts this principle must not only accept the autonomy of others in ideal discourse but also in the context of practical action. That is, the demands of the principle of autonomy can only be fully realised if one participate in moral discourse with the view to resolve social conflicts only through a discursively generated and controlled consensus, and nothing else.[192] It follows from this that no one should be subjected to any norms adopted without his or her effective participation in and reflection thereupon whether it is at the level of discourse and actions. Through this, Alexy argues, 'discourse and autonomy become two sides of the same thing' effectively removing the dichotomy between ideal discourse and practical action. This, in turn, means that those discourse rules (rules of rationality) discussed above become, for all intents and purposes, the rules of behaviour as well.[193] Therefore, per Alexy, this principle of autonomy thus described can be seen as giving rise to 'the general right to autonomy, which is the most general human and basic right'.[194] This general right to autonomy, Alexy maintains, provides that '[e]veryone has the right to judge for [oneself] what is right and good, and to act accordingly'.[195]

This principle of autonomy is said to be consisted of two principal elements: 'private autonomy' and 'public autonomy'.[196] Private autonomy concerns freedom of choices and actions of individuals whereas public autonomy refers to the 'collective choice and realization of a political conception of the right and the good'.[197] As such, the right to autonomy entails only a prima facie right, that is, the right which remains valid as long as it is not constrained by legitimate and compelling public interest (implied by the public function of autonomy).

---

190 Ibid (internal citations omitted); Alexy, 'Discourse Theory and Human Rights' (n 1) 222 (quoting and discussing Nino's argument just cited).

191 Alexy, 'Discourse Theory and Human Rights' (n 1) 223.

192 Alexy defines discursively generated consensus as follows: 'Discursively generated consensus is a consensus that has come to existence on the basis of a discourse. It remains discursively controlled if it can be called into question at any time. If this happens, a new attempt must be made to generate a consensus discursively.' ibid.

193 Ibid 223–224.

194 Ibid 226 (which he also refers to it as the 'general right to freedom,' citing Kant).

195 Ibid.

196 Ibid 209. For Habermas' analysis of the notion of private autonomy and public (civic or political) autonomy and deduction of the system of rights, see Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 118–130. See also Nino, *The Ethics of Human Rights* (n 135) 137ff (discusses in terms of moral and personal autonomy).

197 Alexy, 'Discourse Theory and Human Rights' (n 1) 209; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 118ff. See also Henkin, 'Rights: Here and There' (n 8) 1584–85.

Interestingly, with this conception of the principle of autonomy, in sharp contrast with its orthodox liberal conception discussed earlier, both the individual rights and public interest are brought together as constituting one complete spectrum.[198] Nevertheless, it does not follow from this that the conflicts between (the implications of) private and public autonomy are entirely removed. It rather indicates that there is no irreconcilable or mortal conflict between individual rights and general societal interests. Potential conflicts especially ensuing from the legal, institutional and policy dimensions of the private and public functions of autonomy are naturally inevitable.[199] At the same time, the mediation or resolution of such conflicts goes to the heart of the public functions of autonomy: that is, designing and setting both generic and specific standards and procedures through which interests can be prioritised, mediated and continuously balanced against each other and defining procedural mechanisms through which conflicts, both real and future, between various interests can be resolved.[200]

Now, on the basis of the general right to autonomy, Alexy argues, the whole catalogue of specific human rights can be justified in at least two ways.[201] On the one hand, some categories of rights can be analytically justified as 'special cases' of the general right to autonomy but only 'in insofar as they are conceptually contained in it'. This will particularly give rise to concrete individual freedom and rights.[202] Other categories of rights can, on the other hand, be justified as a 'necessary means for acting autonomously' and this, in turn, will give rise to, for instance, 'the right to protection through the state and basic social rights, like the right to the basic means of living'.[203] Hence, although these two processes may not provide us with complete justification of the entire catalogue of human rights,

198 Alexy, 'Discourse Theory and Human Rights' (n 1) 226–227; Habermas (n 37) 120 ('Private autonomy extends as far as the legal subject does *not* have to give others an account or give publicly acceptable reasons for her action plans.' (emphasis original)). That is, the re-interpretation of the notion and principle of autonomy by authors like Nino, Alexy and Habermas as consisting of both individual and public dimension or function clearly opposes it with its narrow individualistic construction discussed above.

199 For an interesting treatment of the substantive relationship between individual rights and collective goods, see particularly Raz (n 30) 244–263. In substance, Raz argues that 'rights are not to be understood as inherently independent of collective goods, nor as essentially opposed to them. On the contrary, they both depend on and serve collective goods. Hence there is no general rule giving either rights or collective goods priority on cases of conflict'. ibid 255.

200 In particular, Alexy's further arguments from the principle democracy introduces interesting dimensions in relation to the institutional, procedural and policy implications of human rights justified through discourse rules. See Alexy, 'Discourse Theory and Human Rights' (n 1) 233; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 121ff. For some arguments on balancing, see generally Alexy, 'Balancing, Constitutional Review, and Representation' (n 30).

201 Alexy, 'Discourse Theory and Human Rights' (n 1) 227. For Habermas' approach and justification of rights, see Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 122–131.

202 Alexy, 'Discourse Theory and Human Rights' (n 1) 227.

203 Ibid.

they are able to establish certain fundamental rights as direct and necessary consequents of the general right to autonomy.

As stated above, Alexy maintains that the justification processes of human rights via the principle of autonomy is further strengthened through the principle of consensus and democracy. The argument from consensus helps to introduce the idea of 'universality in the form of equality and impartiality'. As such, it requires that the interests and rights of all persons, real and potential, be given impartial and equal consideration. But, as Alexy himself recognises, we cannot say that this is entirely a new element for the very idea of autonomy itself implies equality of all persons in the abstract sense.[204]

The argument from democracy in its part helps to further explicate the institutional dimension of the discourse-theoretical justification of human rights by establishing connection between their theoretical and practical validity. It should however be noted that there is dual relationship between discourse rules and democracy.[205] Generally, democracy and, hence, constitutional democratic structure is viewed as approximation of the practical, institutional realisation of ideal discourse rules. This is true only if the institutional democratic procedures are organised in accordance with rules of general discourse theory, in particular, the rationality rules. On the other hand, it is said that the very possibility of democracy or democratic structure itself demands the validity and practical realisation of certain fundamental rights of autonomy such as the right to equal, free and full participation, the right to freedom of expression and the like.[206] Nonetheless, though crucial, the argument from democracy should not again be considered as a new element in the justification of human rights through discourse theory because, as just seen above, the principle of autonomy already contains as one of its principal constitutive element the principle of collective or public decision-making. Thus, the principle of democracy does not justify any new right but sheds more light on how the public function of autonomy should be designed and structured so as to ensure the right to equal and free participation for all persons concerned.[207]

---

204 Ibid 227–233. 'Unequal human rights cannot be justified in an ideal discourse because under the ruling of freedom [that is autonomy], equality, and rationality in argumentation, arguments for an unequal distribution of human rights will not last.' ibid 229.

205 This dual substantive relationship between human rights and democracy is particularly well-recognised in Habermas which he describes as 'co-originality', that is, human rights and democracy are '*co-originally* constituted' and this, in turn, also constitutes what he calls the '*logical genesis of rights*' and in this way the principle of democracy is also considered to be 'at the heart of a *system* of rights' (emphasis original). Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 121–122.

206 Alexy, 'Discourse Theory and Human Rights' (n 1) 233.

207 But *cf.* Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 120–123.

In summary, discourse theory, especially as advanced by Robert Alexy, uses an ideal pragmatic speech situation as a vehicle to procedurally drive fundamental human rights. Thus, he asks us to imagine and contemplate on an ideal speech situation where an ideal speaker and audience are fully committed to resolve every disagreement on any subject through rational argumentation alone and, therewith, the necessary conditions for the very possibility of such situation. Closely looked at, the discourse process, from initiation to conclusion, cannot be carried out without first presupposing certain basic and necessary rules governing what ought to be accepted and excluded as regards the nature of argumentations and conduct of discourse participants. However, in the social world where every value assumption is relative, the discourse participants could only agree on mere procedural rules or criteria so as to judge the validity of both the process and outcome of their ideal discourse. In particular, we have observed that discourse participants ought to recognise free exchange of ideas and arguments, respect the autonomy of each other and treat each other as equal discourse partners throughout their discourse. These are accordingly regarded as basic rights and freedoms presumed to have been guaranteed for every ideal participants of the discourse. However, we have said that human rights norms are norms of practical actions and, hence, have little to do with ideal discourse situations. But Alexy argued that the dichotomy between rules of ideal discourse and of practical action (behaviour) is removed by the arguments from the principle of autonomy which is further strengthened through arguments from consensus and democracy. Having said this, it is now time to assess whether these central claims of the discourse theory are strong enough to establish it as an adequate and comprehensive theory of human rights.

### 3.3.3. ASSESSMENT

According to Alexy, the traditional theories cannot justify universally valid human rights because they are all premised on some kind of arbitrary and subjective values. Therefore, the discourse theory should at least be immune to this very same criticism in order to come closer to be considered as a comprehensive theory of human rights. That is, whether it is, in fact, a pure or neutral procedural theory of universal human rights, as it claims to be.

As we have seen above, there is no doubt that, Alexy was committed to providing a discourse theoretical foundation for the Kantian-liberal conception of human rights, in turn, based on the value of individual autonomy. In the face of this clear value commitment, it is hardly clear how it can be claimed that there is no preconceived value claim in discourse theory other than pure procedural rules necessary for the possibility of rational discourse itself. It is one thing to say that the Kantian-liberal conception of human rights can also be justified through hypothetical discourse procedure but it is another thing to say that there is no

value claim made in designing such a procedure in the first place. To say the least, it is essential that autonomy be accepted as a value, be as intrinsic or extrinsic, by all discourse partners to begin with. If there is no meeting of minds as regards the primacy of the value of autonomy in the way Alexy describes, that is, if there is a difference in the conception of what the ultimate guiding value is, then, we cannot see discourse being carried out between discourse participants. In other words, there must, first and foremost, be a prior value judgement about the primacy and significance of a value of autonomy by those concerned. In addition to this, there is also no compelling reason why participants should choose autonomy as a superior value over other, at least, equally significant values such as dignity, humanity, equality, solidarity, justice and equality of concern and respect.[208]

Also, Alexy did not establish autonomy as an inherent value equally present in the life of every human being, nor did he indicate that it is universally accepted as such everywhere. It has already been shown in some detail above that autonomy is not something that is inherently available but that which individuals achieve over the course of their life span through the realisation of various necessary social and material conditions: in short, it is relative, contingent and has limited cross-cultural validity.[209] So it cannot give rise to an inherent, equal and universal idea of rights that human beings (should) have qua human being, that is, regardless of the capacity for moral discourse or autonomous life. Inherent and equal human rights should be justified on anything except on something deeply reflecting the quality and value of being human, but as Torre clearly disputes, discursive capacity, one of the central assumptions of discourse theory – human beings as discursive creatures – is not one of such a quality.

> Indeed, Alexy's three steps strategy – moving from (1) a claim to correctness to (2) a claim to justifiability to eventually land into (3) a claim to justice – is bound to fail, since discourses are not the whole of human experience (one could even regret that human beings are not fully discursive beings, but still observe that this is the case).[210]

Even if we have a potential for rational discourse and, more generally, systematic thinking, it is the capacity which comes to pass only after socialisation being nurtured through education and training.

Furthermore, it is also questioned if there is in fact any fundamental human right that emerges through discourse theory, let alone it be regarded as a

---

208 *Cf.* Dworkin, *Taking Rights Seriously* (n 8) 198–199; Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 9–23; Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 67–81; Rawls (n 88) 52–56.

209 See Chapt 3.2.1(c) above.

210 Torre (n 2) 65.

comprehensive theory of human rights. For instance, Toddington argues that 'The fundamental impulse of Discourse Theory is to eschew the moral substantivism of ethical relationalism in favour of a pragmatic, procedural approach to theoretical analysis, issues of social justice and in the case of Alexy [also of] legal argumentation'. But in his view, despite its proceduralism claim, '[the] egalitarian permissions and prohibitions' that the rules of discourse ethics consisted of 'seem to exhibit a substantial character, yet they are presented as merely expressing a composited procedural maxim'.[211] It nevertheless stands to reason that 'The implementation of [the discourse rationality rules], and the exercise of the privileges they extend, presuppose that all participants already have rights to, and have indeed secured, the basic generic well-being that the agents minimally require to act purposively in the first place'. Thus, the discourse rules presented to us 'as discourse-participant rights presuppose basic agency rights to freedom and well-being' that 'all prospective communicators must claim' as 'generic rights validly and, obviously, acknowledge them mutually'.[212] This is so because, per Toddington,

> [t]he presuppositions of abiding by the communicative rules are, in effect, that each individual has sufficient practical wherewithal or, in Gewirthian terms, 'freedom and well-being' in order to be a participant. Again, these *substantial rights* to what is required to exercise agency in the form of participation in a discourse presuppose the fundamental validity of the [Principle of Generic Consistency[213]] and thus, as noted, its validity is logically prior to the *outcomes* of discourse procedures. Discourse ethics *procedures* cannot thus establish these rights and duties [but proceeds from presupposing that that they exist].[214]

For this reason, there is no (human) right of discourse participants emerging anew from prescriptions of discourse rules as such. Toddington thus maintains neither does the discourse ethics 'provide an *apodictic* demonstration of the rationality of final and subsistent ends: the intrinsic worth of persons' that is quintessentially 'required to establish the set of mutual rights and duties in question,' nor does it 'share [the] aspiration' of such methodology 'but claims to launch substantive ethics on the back of a procedural theory'.[215]

---

211 Stuart Toddington, 'The Moral Truth about Discourse Theory' (2006) 19 Ratio Juris 217, 218–219.

212 Ibid 223.

213 Gewirth, thus, argues that individuals recognize and value generic freedoms and well-being of other individuals in the light of and in accordance with that which they value for themselves. Hence, anyone who claims that she is entitled to have these rights and freedoms must at the same time acknowledge that all other persons have equally valid claims to have those same rights and freedoms under the pain of generic inconsistency, hence the principle of generic consistency.

214 Toddington (n 211) 223.

215 Ibid.

Therefore, we cannot look into a discourse theory as a substantive justification of the inherent rights of human beings. There is, however, one element of the theory that remains essential especially with respect to the practical institutional implications of human rights for a political society. That is, provided that there could be found an overarching theory and normative principle through which inherent human rights can be justified, it is possible to argue that the institutional and procedural mechanisms essential for the realisation of human rights may have to be designed in a manner that would approximate or at least be substantially informed by the procedural principles of discourse theory. In this regard, it is also important to particularly recognise two important points following from discourse theory: the first is that it helps us to appreciate the complementary relationship between the (substantive) idea of human rights and the principle of democracy and the second, but still related to the first point, is that it establishes economic, social and cultural rights as integral elements of the principle of autonomy and democracy and therewith confirms the falsity of the hierarchical and dichotomised conceptions of human rights discussed in chapter two above.

## 3.4. HUMAN RIGHTS AS A SOCIAL IDEA

Clearly, the major problems or limitations identified in relation to the traditional human rights theories call for the development of an alternative normative theory which can explain the idea, nature and implications of human rights in a more comprehensive manner. To this end, I would like to suggest that the idea of human rights should be construed as being deeply rooted in and directly emerging from practical social relations.[216] This view which can be referred to as the social conception of human rights, in substance, holds that the deep theory (i.e. the foundation and functions) of human rights can better be explained comprehensively and adequately with reference to their social essence. Developing this argument in detail of course deserves an independent inquiry of its own. The purpose here is simply to state some of the major assumptions and arguments providing the general thought-framework for the normative foundation of human rights centred around the principle of human dignity to be discussed in the next chapter.[217]

---

216 As has already been seen other theories make, but unsuccessfully, different sorts of propositions. Neither of the proposition should be outrightly rejected as long as there is useful argument for the justification of specific categories of human rights. Nevertheless, a comprehensive conception of human rights can only be explained by their very origin, that is, their being social in essence, and this is the approach followed by the social conception of human rights proposed in this subsection.

217 In developing this idea, I have been mainly influenced by, inter alia, the following authors: Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4); Habermas,

### 3.4.1. DEFINITION, NATURE AND IMPLICATIONS

The terms 'social' and hence 'social relations' are deployed in this study with somewhat a broad substantive meaning though not very different from their ordinary usage.[218] The phrase 'social relations' is used as a generic term to refer to wide-ranging modes, dimensions or levels of relationships or interactions between individuals and group of individuals in a political society or countries. Social relations take place in different forms, dimensions and levels. Thus, the notion of social relations embraces all forms, dimensions and levels of human relationships. Social relations can exist at different levels of generality and complexity ranging from simple personal relations to those highly abstract multidimensional relationships in a given political society. The structure of social relations can take different modes or forms as family, cultural, religious, economic, political and legal, and, finally, it can assume private (personal), group, public and institutional dimensions.

It is obvious that the basic atom of society and hence social relations is the individual human being. Thus, the adjective 'social' in 'social relations' signifies that both the subject and object of relations is essentially a human being. Of course, in the modern world, different kinds of socio-economic and political relations are institutionalised but this does not change the brute fact that the fundamental element in this relationship is still the individual human being. So, as long as the relationship is of and between human beings, it is necessarily and, hence, concerned with social relations. This, in turn, underlines the relational nature of human beings. That is, a human being is always and necessarily in some kind of relationship with one or more persons regardless of the nature and scope of that relationship.[219] Thus, participation in social relations is both a natural and

---

*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20); Gould, *Marx's Social Ontology Individuality and Community in Marx's Theory of Social Reality* (n 30); John Searle, 'The Construction of Social Reality' (1995) 62 1995 285; Gewirth, *The Community of Rights* (n 3); Alexy, 'Discourse Theory and Human Rights' (n 1); Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39); Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Rawls (n 38); Rawls (n 88); Sen (n 3); Dworkin, *Taking Rights Seriously* (n 8); Carr (n 141).

218 Note that on the Oxford Advanced Learner's Dictionary, the primary meaning of the term social is put as: '1. connected with society and the way it is organized'. And the term relation is defined as: '1. relations [pl.] … the way in which two people, groups or countries behave towards each other or deal with each other. This definition of relation(s) is the same as the primary meaning of the term relationship which is defined as '1. the way in which two people, groups or countries behave towards each other or deal with each other'.

219 This social or relational nature of human being has been recognized by many authors. See for instance, *Aristotle's Nicomachean Ethics (A New Translation by Robert C. Bartlett and Susan D. Collins)* (The University of Chicago Press 2011); Aristotle, *The Nicomachean Ethics (Trans by David Ross Revised with an Introduction and Notes by Lesley Brown)* (Oxford University Press 2009); Locke (n 141); Carr (n 141); Grotius (n 141); Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Christman (n 48); Gewirth, *The Community of Rights* (n 3).

necessary aspect of human life in the sense that, in the normal course of things, no human being can and will be able to avoid social relations and still be able to lead a normal human life. In short, the life of a human being begins and ends with social relations.[220]

The nature and implications of the idea of social relations thus described underscores the practical and fundamental idea that the substance and end of human life is essentially defined by its relationality: no single person can live a meaningful life nor can one pursue a personal fulfilment outside social relations.[221] However, owing to its abstract and complex nature, it is difficult to provide a straightforward description of how relations between individuals and their social environment practically determine their personal and collective beings. But, in abstract, it can be said that it essentially signifies the following major substantive point: it is not that an individual is because of the individual himself or herself, nor the society is because of the society itself (society understood in its organisational-collective sense). In my view, the individual is possible because of the society and the society is possible because of the individuals constituting the society.[222] This is the deep and abstract substantive idea that I would like to convey through the notion of social relations. It is understandable that this

220 This is somewhat reflected in communitarian view as well, as observed by Christman. 'Consider how such things as a relationship with another person, a family member, an ethnic heritage, or a religion have value for a person. It is often not that one looks around, considers the options and *chooses* any of these things. Rather one *finds oneself* in the midst of them and comes to see their virtues, thereby discovering aspects of the (already established) situation that were in no way chosen, but which have come to define one's outlook and value orientation'. And for communitarians, 'the source of the value of these connections, traditions, and belief systems is decidedly not the choice of the person involved; rather it is the intrinsic nature of the thing itself; reflection merely reveals this to the person'. (emphasis original). Christman (n 48) 135. See also generally Gewirth, *The Community of Rights* (n 3) 91–101.

221 In fact, Alexy argues that human beings are 'discursive creatures'. Thus, for him, 'someone who in his life has never participated in any moves of any discursive practice has not taken part in the most general form of life of human beings'. That is, 'It is not easy for them to forbear from participating in any discourse whatever'. According to him, human beings' participation in discourse is simply an existential question which cannot easily be foregone. In his own words, 'The choice of such a farewell to reason, objectivity, and truth is an existential choice'. Alexy, 'Discourse Theory and Fundamental Rights' (n 94) 22 & 21 (also citing Robert B. Brandom, *Articulating Reasons*, 2000, p 26). See also Alexy, 'Discourse Theory and Human Rights' (n 1) 223ff. Of course, other explanations are abound as well but for the purpose here it is suffice to state that social relations is a necessarily inherent nature of human being constituting literally every basic institutions of human society such as religion, culture, law and politics. See for instance, Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 17–22. As Christman notes, for instance, 'On the communitarian alternative, selves are fundamentally *social* both in their metaphysical constitution and their psychology'. (emphasis original). Christman (n 48) 131.

222 In fact, Samuel von Pufendorf, who developed the Grotius' idea of, inter alia, human nature and common sociability, argued that human being is inherently inclined towards sociality and this sociality or human sociability is one of the two fundamental constitutive elements of the universal law nature, the other being the right and duty of self-preservation (self-love). Carr (n 141) 80ff.

characterisation is very abstract and in its crude form but this is so because it is difficult to find any better way to restate the axiomatic truth about the relational nature of human life and, therewith, how both the individual and collective being of human life is so decisive for, in particular, the comprehensive theory of human rights: that it is not possible to imagine the possibility of one without the other.[223]

Of course, this view is by no means a new idea. In fact, it should by now be clear that the principal underlying assumption behind the notion of social relations is the age-old philosophical conception of human being as inherently social and political animal. The only thing that is new here, if at all, is the degree of emphasis put on it so as to show its importance for deep practical theory of human rights. Thus, to say that human beings are social animals is to suggest that they have inherent inclination or aptitude to live in common and (do in fact) value communal living. As such, the fundamental substantive implication of human sociability is social solidarity (mutuality) which, in turn, entails that human beings not merely lead life in common but do also make substantial interactions in the life and well-being of each other and hence provide one another with some form of mutual assistance, care and security.[224] This explains the main reason why many thinkers like Grotius and Pufendorf identify sociability as essential characteristic feature of humanity, as already been referred to above.[225] In abstract, sociability essentially entails the willingness to see the realisation of one's good (interest, well-being, happiness) in and in relation to that of others. It can thus be said that sociability is closely associated with such notions as mutuality, reciprocity and friendship (although it may not be literally equated with any of them). In fact, it is argued that mutuality, care and reciprocity are among key obligations flowing

---

223 In expounding this, Pufendorf has made the following observations. He stated, 'man would have been but little removed from beasts, and would not lead a much more cultured and commodious life than they, if there were not also implanted in him by nature another inclination, so that he enjoyed living in the society of those similar to himself […] Nothing is more miserable for man than perpetual solitude. He alone among living things has been given the ability to expound to others the perceptions of his mind by means of articulate sound, and there is no fitter instrument than this for contracting or preserving society. In no class of living things can the advantages of one be so greatly promoted by others as of men by one another. Such is the neediness of human life that it can be preserved only with difficulty if a number of persons do not conspire to be of service to one another'. ibid 80. Carr also notes Pufendorf's insistence that '[H]umans need the society of others in order to sustain themselves and to enhance their well-being'. ibid 9. And as Carr also points out, 'The rational acknowledgment of each person's inescapable need for the society of others is put forward as the basic principle of natural law; "Any man must, inasmuch as he can, cultivate and maintain toward others a peaceable sociality that is consistent with the native character and end of humankind in general"'. ibid 10. Based on this, Pufendorf interpreted the old Aristotelian-Stoic-Grotian view that 'Man is by nature a social animal' as implying that 'Man is destined by nature for the society of those similar to himself, and this society is to the highest degree congruent with and useful to him. He has also been endowed with such a disposition that he can through cultivation acquire the aptitude to conduct himself rightly in that society'. ibid 81 & 9–10.

224 Carr (n 141) 81.

225 Ibid 80ff.

from the dictate of natural law (reason). For instance, according to Pufendorf, who developed and defended Grotius's idea of sociability, human sociability constitutes the ultimate normative foundations of the principle of natural law. So the conception of human beings as political animals (itself flowing from the social nature of human beings) suggests that they are beings wherein mutual cooperation and communality are indispensable for human existence and overall well-being and flourishing.[226] This thinking, in turn, rests on the basic assumption as regards the inherent capacity of human beings to give and receive reasonable terms for mutual cooperation and abide by those terms of cooperation. Together, the social and political nature of human beings reveal that human beings are essentially rational moral beings: they are endowed with inherent capacity to judge between right and wrong, good and bad, just and unjust and so on.[227] This is indeed important because the social and political conception of human beings is neither possible nor relevant especially for our discussion concerning the social idea of human rights without this capacity for rationality and morality. In short, the social and political conception of human beings reaffirms the relational nature of human beings. And this is the reason why the idea of social relations is considered here as an elementary characteristic feature of humanity: practically speaking, it is from this elementary aspect of humanity that all other social values and institutions emerge. That is, social relations constitute the ultimate foundational framework through which all human values and institutions come into existence. There is no basic social institution which has no foundation in the idea of social relations, be it religion, culture, morality, law or state.[228]

Therefore, the idea of social relations provides us with an interesting framework in thinking about, for instance, the relationship between individual and collective values on the one hand and the importance or weight we ought to attach to each of them on the other. In particular, it introduces an alternative perspective to both the individualistic (atomistic) and collectivist (totalitarian) conceptions dominating, in one way or another, the modern thinking of human rights. This

---

226 See Carlos Eduardo Maldonado, *Human Rights, Solidarity and Subsidiarity: Essays toward a Social Ontology* (The Council for Research in Values and Philosophy 1997); Christman (n 48) 135ff; Carr (n 141) 80ff.

227 For instance, the conception of individuals and society as cooperative beings is also one of the underlying theoretical backbone of Rawls' Theory of Justice. But this fundamental presupposition can only rest on the basic idea that human beings are by nature sociable and hence inherently engages in complex form of social relations such as agreeing on fundamental political principles and installing basic social institutions. See Rawls (n 88) 491–496; Rawls (n 38) 15–22, 278–281, 299–304; Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) Chapt 3.

228 One of the central claims put forward by Gould in her 'Rethinking Democracy' is the argument for the primacy of social relations. See Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (n 39). See also Gould, *Marx's Social Ontology Individuality and Community in Marx's Theory of Social Reality* (n 30). See generally Carr (n 141) 99–108; Searle (n 217); John R Searle, 'Social Ontology: Some Basic Principles' (2006) 80 Papers 51; Carlos Eduardo Maldonado (n 226); Rawls (n 38) 15–22, 278–281 & 299–304.

idea of social relations does not follow the kind of individualistic relations assumed through the Hobbesian social contract thesis. Hobbes' view of the state of nature as an all-out war by all against all flows from his assumptions regarding the nature and circumstances of individuals that they are amoral, rational (prudent), mutually disinterested, egoistic and destructive beings driven only with their own self-interest in social cooperation.[229] Nor does it subscribe to the totalitarian conception of society and social values constructed on the basis of utilitarianism and socialism whereby (the value of) every relationship is viewed solely from the collectivist standpoint. As already discussed above, these ideals are at the back of the dichotomised, antagonistic and narrow construction of the relations between the individual and society and, as such, present to us a rather false picture of humanity and social relations constituting its social world. But as implied through such substantive values as dignity and sociability already defended by many authors (including Aristotle, Mirandola, Cicero, Thomas Aquinas, Grotius, Pufendorf, Paine and, more recently, Dworkin, Nussbaum, Sen and Gewirth), the life of humanity is essentially a life of community (relationality) whereby the individual and common (social) values are inseparably interwoven with one another.[230]

---

229 Of course, it is notable that there are two extreme views of social contract thesis. Hobbesian and Grotian views. The individualistic conception and construction of the thesis is often identified with Thomas Hobbes' view of the individuals and the circumstances in the state of nature. For Hobbes, individuals in the state of nature were in the state of perfect natural freedom, equality and power, recognised no (moral) rules and power, solely concerned with the protection of their life and interest and to this end had a natural right and power to use all available means. He saw them as egoistic, mutually disinterested, destructive beings who could be driven by nothing but their own personal interest. This in turn would lead them to the state of an all-out war against all. Thus, for Hobbes, the egoistic and asocial nature of individuals coupled with the absence of moral or positive authority would characterise the state of nature as the state of anarchy unfit for human living, paving the way for the emergence of civil society organised under strong sovereign power. But this view was harshly criticised by, in particular, Pufendorf, who argued that such way of the description of both the nature of individuals and the state of nature hardly fits to the true nature of human beings but beasts. As already noted, Pufendorf instead argued for Aristotelian-Grotian view of human sociability. And more recently, Nussbaum repeated similar criticism against this view while discussing Rawls' theory of justice who relied on Hobbes' conception of the nature of individuals and the society. See Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) Chapts 1 through 3. For Nussbaum, however, it is difficult to categorise Rawls' idea of (social) justice under the classical construction of social contract theory rooted in Hobbesian view of individuals and civil society. Even though Rawls' idea gives allegiance to some ideas developed in that traditions (his construction of basic liberty, priority of primary goods, the role of individual circumstances in the evaluation of the justness of a social system or basic structure of the society), his conception of the general idea of social justice and the role of social institutions puts him unease with that of the classical interpretation of the tradition. In any case, while the absence of formalised institution-based cooperation in the so-called the state of nature can be asserted with some degree of plausibility, it is not only difficult but would be absurd to maintain that there were no social relations whatsoever in the state of nature; if this were the case, then, the very possibility of the social contract hypothesis would also utterly collapse.

230 Gould, *Globalizing Democracy and Human Rights* (n 90) 4–5 & 31–39; Christman (n 48) 135–148; Sen (n 3) 282–298; Gewirth, *The Community of Rights* (n 3) 1–8, chapt 3.2, 3.6 & 3.7.This of

### 3.4.2. SOCIAL RELATIONS AS MORAL RELATIONS

The relational view of humanity presented through the notion of social relations can be objected on the bases of several compelling empirical facts as conflict, homicide, discrimination, exploitation and domination routinely present in everyday social life. However, the idea of social relations does not deny the existence of these and other similar facts; it rather treats them as deviations or social evils that should be struggled against by humanity itself. Judging certain behaviour as deviations or social evils, of course, presupposes the presence of some kind of moral standards or principles. In fact, it is counterintuitive to think that social relations in the sense described above could ever take place in a normative vacuum. It is thus indispensable to start with necessary and basic moral assumptions in thinking about human life and social institutions.[231]

In this regard, it has already been noted that the principal underlying assumption behind social relations ultimately rests on the moral capacity of humanity, that is, humanity's inherent capacity for rational moral thinking and action.[232] Hence, we should be able to generally agree that human relations are shaped by some kind of moral assumptions, principles and values although it is possible to disagree on the specifics of such assumptions, principles or values. Thus, while there is a fundamental moral assumption and judgment about

---

course does not suggest that there is no conflict between various interests in a society. While interests and goals of different kinds always compete in different forms and at different levels, such conflicts are settled, accommodated, structured and balanced through the application of various normative principles developed over the course of time. The central organising principle in this regard will be discussed in detail in the next chapter but here it is suffice to state that, following Nussbaum, for instance, human beings not only want to live together but they want to live together well in a manner compatible with the values of human life in dignity, justice, equality, rule of law, care, benevolence, compassion, altruism and etc.. See Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 81–91 & 155–160. The following Raz's argument is also in perfect concordance with this idea of substantive interconnectivity between individual and common values. Thus, for Raz, 'rights are not to be understood as inherently independent of collective goods, nor as essentially opposed to them. On the contrary, they both depend on and serve collective goods. Hence there is no general rule giving either rights or collective goods priority in cases of [for instance,] conflict'. Raz (n 30) 255. And so does Sen's interesting characterisation of individual freedom as a social commitment. Sen (n 3) 282ff.

231 Indeed, the idea of humanity as sociability can be countered with unfortunately very sorrow events and practices in the history of humanity such as slavery, genocide, holocaust, discrimination, oppression, barbaric wars and conflicts. However, endorsing these as normal practices of the society would be repugnant to the nature of human beings and society. The best approach is thus to treat them as deviations against which moral and legal norms and institutions are developed over the course of time.

232 This is one of the basic assumption in the writings of the following authors. Immanuel Kant, *Groundwork of the Metaphysics of Morals (Trans and Ed Mary Gregor and Jens Timmermann, Trans Revised Jens Timmermann, Introduction Christine M Korsgaard)* (Revised Ed, Cambridge University Press 2012); Gewirth, *The Community of Rights* (n 3); Rawls (n 38). For a rational justification of morality, see generally Alan Gewirth, *Reason and Morality* (The University of Chicago Press 1978).

humanity and social life in classifying certain activities, practices or behaviours as deviations or social evils, this judgment itself rests on the assumption as to the presence of an objective normative standard to this effect. However, I have already stated above that all normative values and social institutions emerge from social relations in the first place and, not vice versa.

The question worth asking is, therefore, in what sense do we say that social relations normally take place within some kind of moral assumption or principle? In my opinion, in social relations, the basic moral principle through which we can objectively discriminate between good and evil behaviour is nothing but the self-reflective consciousness and, hence, recognition of the status and value of humanity and human life. That is, the respect for, protection, preservation and promotion of the inherent and existential value of humanity constitute an ultimate underlying moral assumption behind social relations. Therefore, without going into details, this moral principle implies the kind of treatment that should be due to humanity and, as such, prescribes the way individuals ought to treat and behave towards one another in their private and collective relations. This all indicates that social relations are essentially moral relations par excellence: that is, relationships between moral beings on moral grounds. It is basically on the basis of this fundamental moral principle that we can be able to distinguish and judge between morally good and evil behaviours, activities or practices in the social world.[233] This provides a general, primordial, justification for humanity's continued effort to nurture and embrace morally good behaviours and activities and to reject those morally evil ones.[234] In other words, the protection, preservation and promotion of the life and inherent value of humanity as a whole constitute the elementary justification for the existence of basic social institutions such as morality, law and state in a society.[235]

---

233 If we think of ethics, and so also of a human being, in these interdependent, relational terms, then ethical thinking and acting will always involve thinking and acting in ways that are attentive to the complex set of relations in the midst of which our own life is constituted.

234 Aristotle for instance recognises the existence of vice and virtue as being present in individuals. See Aristotle (n 219) Book II-IV. It is notable that what is deviation and norm are defined by the society depending on the civilization of time and place but there are primordial values and facts which remain unchanged since the time in memorial as the one described. See for instance, Antonio Cassese, *Human Rights in a Changingg World* (Polity Press 1990), Chapts 1 through 3 (where he describes the struggle that humanity has passed through to come to terms with the idea of human rights now provided in international human rights instruments such as UDHR).

235 This is essentially the fundamental idea that cuts-across the legal philosophy of thinkers like Radbruch who sees law as essentially a cultural concept which gets its true compulsory nature from the idea of morals. Anton-Hermann Chroust, 'The Philosophy of Law of Gustav Radbruch' (1944) 53 Philosophical Review 23, 29ff. According to Radbruch, 'Law has as its prime object the social coexistence of men. Thus "legality" becomes something that is common to all values which have as their ultimate object the "common good" rather than the individual and his personal interests or motives. From this Radbruch infers that legal norms are in their original meaning not merely precepts or "commands" directed to the individual, but primarily standards or "patterns" by means of which the co-existence as well as the cooperativeness of different individuals may be "appraised" or evaluated. Consequently, law is in the first place a body of means or "instruments" by which a certain human behaviour can be "appraised" as to

In this regard, it should be axiomatic that the underlying social support for any basic social institution is essentially rooted in its perceived contribution, in one way or another, towards the furtherance of humanity's general welfare; it is hard to imagine the existence and validity of any basic social institution whatsoever without it serving some point in a society. We can, for example, say that the social justification for a legal system is nothing other than society's inherent existential need for security, stability and peace which is also implied (or even required) by the fundamental moral principle mentioned above.[236]

I strongly believe that this idea of social relations and of human rights that comes with it is true for every society. As such, it is not possible to portray the idea and function of human rights as only indigenous to certain specific culture. The basic argument behind the social conception of human rights is that humanity is held together by practical and complex social relations and that no social relations can be constituted without due and proper respect for the inherent life and value of human being. This, in turn, assumes that every society has the general moral capacity to appreciate the importance of human life and the minimal moral values attached to it. It further assumes that every society has some sense of moral judgment as regards what is good and evil, just and unjust in relation to human being and his or her environment.[237]

Surely, there is general epistemological problem that one encounters in this argument for there is no adequate account of each and every society's fundamental moral systems. But this problem is equally true for those who utterly deny the universal nature of human rights on account of cultural relativism. In the absence of tangible evidences concerning the underlying moral systems of different cultures around the world and their bearings on the idea of human rights, whatever argument is proposed on the basis of cultural relativism cannot be anything more than mere speculation or subjective interpretation.[238] Even then,

---

its social significance or importance; it is not simply a body of "commands" ordering human conduct.' ibid 34–35. Chroust also observes that, per Radbruch, 'Law serves morals primarily by guaranteeing certain personal rights, in order to enable man to comply with his moral duties, and not by imposing certain obligations and restrictions. Thus a "personal right" is, according to Radbruch, nothing but the right of every one to do what he considers his moral duty. In this the preservation and protection of "individual rights" becomes a moral duty, and is identical with the preservation of man's moral personality and dignity'. ibid 34.

236 Radbruch recognises the realisation of certainty, security (peace and order), and justice as among key constitutive justifications of the idea of law. Chroust (n 235); Gustav Radbruch, 'Five Minutes of Legal Philosophy (1945)' (2006) 26 Oxford Journal of Legal Studies 13. 'Law is the will to justice. Justice means: To judge without regard to the person, to measure everyone by the same standard.' ibid 14.

237 Cicero and Pufendorf among others believe that the sense of justice is a natural moral capacity. Kant also defends that every human being possesses this natural moral capacity. Dworkin also argues that morality is inherent. Rawls also endorses that individuals possess sense of justice and capacity for moral judgement.

238 Sen (n 3) 227ff (criticizing several aspects of the cultural relativist view of human rights as well as the problem of misconception of historical and cultural values of other societies by certain authors).

it is difficult to imagine or endorse the legitimacy and viability of any cultural or moral systems devoid of a minimal level of consciousness about the sanctity and respect-worthiness of the inherent life and value of human beings.

### 3.4.3. THE SOCIAL FUNCTION OF HUMAN RIGHTS

The idea and function of human rights are indissociable from that of other basic social institutions as morality, law and state. There is no such thing as the metaphysics of human rights other than those practical existential and inherent needs of humanity which should be recognised, respected and realised in and through the functioning of a political society. As already argued, the basic idea of human rights has a social foundation in the sense that it directly flows from and is closely intertwined with what humanity is and ought to be. And, in fact, it is possible to see the modern idea of human rights enshrined in several international treaties as an advancement of the moral and relational nature of humanity (its relationality and sociability), and human rights norms thereof as concretisation of the fundamental moral principles behind social relations. So, the primary social point or *raison d'être* of human rights and human rights norms in a given political society cannot be other than the protection, preservation and promotion of humanity and its inherent value.

Several authors have expressed this fundamental function of human rights in somewhat different but complementary manner. According to Dworkin, for instance, the point of the institution of human rights can be stated in terms of two interrelated normative ideals: the protection of human dignity and political equality – that is, equality of concern and respect.

> The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. … The second is the familiar idea of political equality.[239]

[239] So, for Dworkin, 'It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other value of personal consequence. It does not make sense otherwise'. Dworkin, *Taking Rights Seriously* (n 8) 198–199. See also Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and the American Values* (Cornell University Press 1992); Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (n 208); Gewirth, *The Community of Rights* (n 3).

Also, some of the institutional arguments that Raz puts forward regarding the justification behind affording entrenched constitutional protection for certain fundamental liberal (human) rights, as he refers to them, can be taken as also pointing to some of the primary function of human rights in a political society.[240] Raz denies that the role of entrenched liberal constitutional rights consists 'in articulating fundamental moral or political principles' or 'in the protection of individualistic personal interests of absolute weight.'[241] For him, the purpose of the constitutional entrenchment of such rights is rather 'to maintain and protect the fundamental moral and political culture of a community through specific institutional arrangements or political conventions'.[242] The principles flowing from fundamental rights and the institutional cultures (and jurisprudence) developed around the same contribute towards the mediation of various private and collective (and institutional) interests as well as ensuring balance of powers between different organs of government. This is particularly so because, following Raz, fundamental rights, inter alia, 'express values which should form a part of morally worthy political cultures' that should be placed far beyond and above ordinary decision-making procedures.[243] This does not mean that fundamental rights are devoid of private purposes such as the ones often claimed in liberal individualism.[244] He argues that while there are undoubtedly important private interests protected through fundamental rights, their ultimate values however rests essentially in the collective or public interests they are meant to serve.[245]

Also, Henkin's interesting historical account of the role of human rights in the socio-political and legal history of France and United States supports this view. According to him, in these two countries, the idea of human rights formed an integral element of 'a comprehensive theory of government'. In particular, having analysed the conception and institutional significances of human rights within the respective systems, Henkin made the following observations:

> France and the United States represent two strands in a single eighteenth century conception of rights. They have much in common, and some important differences. In

240 For his full discussion, see Raz (n 30). Here, I say some of his arguments because he thinks that the reason for such entrenchment is not entirely from their moral force or importance but largely political expediency, the point I would not share with him. His argument could be the case for those countries with privileged constitutional status or special judicial procedure for human rights. But in the end, such a practice even depends not on universal principle but rather on particular political culture of a given society. It is my view that, as a matter of principle, inherent human rights should, by definition, be afforded special constitutional, legislative and judicial protection regardless of the legal and political culture of any society.

241 Ibid.

242 Ibid.

243 Ibid.

244 It is worth noting that Raz expressly rejects the individualistic conception of liberal rights, rights as having only and strictly private interests conflicting with collective interests. See for instance his arguments at ibid.

245 Ibid.

> both, individual rights are part of a comprehensive theory of government. It includes representative government, with separated branches. It includes as well inherent individual rights, as ends in themselves, not merely as instrumental to some overriding conception of the good society. Important rights cannot be wholly sacrificed even for the general, public good.[246]

In fact, more can be said down this line, but for the purpose of this sub-section, it suffices to note that the holistic picture of the social function of human rights goes further than what is usually suggested through extreme individualistic and collectivist (totalitarian) views of human rights and covers basic questions of socioeconomic and political justice and institutional governance. In particular, human rights norms play significant roles in mediating and balancing competing interests in a society by, for instance, prescribing irreducible individual rights and freedom that ought to be guaranteed for each and every human being on the one hand and justifying institutional mechanisms through which private and public interests should simultaneously be promoted and realised as one undivided whole on the other.[247]

This general function of human rights, of course, involves very complex processes of weighing and prioritisation. At the same time, it presupposes the existence of overarching normative criterion through which these interests can be valued and ordered according to their relative weight on the ladder of priorities. This is crucial because without such foundational normative principle, the whole process of balancing would somehow rest on arbitrary and contingent ground. In this writing, the principle of human dignity is presented as rich and powerful normative principle justifying the relational nature of human rights through which the legitimacy of collective values and institutional decision-making processes can be assessed. But the major question is in what sense does the principle of human dignity serve as the normative foundation of human rights, and this is the subject to be explored in the next Chapter.

---

246 Henkin, 'Rights: Here and There' (n 8) 1597. See also Henkin, 'Constitutional Rights and Human Rights' (n 73).

247 For more on the arguments pertaining to the balancing of human rights with genera public interests, see generally Alexy, 'Balancing, Constitutional Review, and Representation' (n 30); Cali (n 30); Adrian Brockless, 'Human Rights and Individuality' (2013) 12 Think 69; Souleymane Bachir Diagne, 'Individual, Community, and Human Rights' (2009) 101 Transition 8. For more on the interface between human rights and constitutional norms, see Neuman (n 50); Henkin, 'Constitutional Rights and Human Rights' (n 73); Alexy, 'Discourse Theory and Human Rights' (n 1); 'Human Rights and Constitution Making' (n 73). But see for instance, Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (n 20) 121–122 (who argues that human rights and constitutional democratic principles are co-original, that is, they both co-originate from the operation of discourse procedure).

## 3.5. CONCLUSION

The assessment of the existing major human rights theories, though in brief, clearly indicates that the contemporary human rights discourse suffers from lack of deep substantive theory through which, among other things, the idea, nature and practical implications of inherent and universal human rights can be explained in a holistic manner. A holistic conception of human rights cannot be founded on the narrow and separationist value assumption for such could only lead us, as it already did, to a highly subjective and fragmented understanding of what human rights are and what they are for. Nor can a theory of human rights be derived from mere procedural construction of discourse ethics suggested by authors like Alexy for it eventually leaves the idea of human rights without any substantive moral foundation. At the same time, a deep theory of human rights cannot be dissociated from the social-political conception of human beings and the relations they constitute among themselves and their social environment. The social-political conception of human beings sees humanity as a whole as inherently relational (sociable, solidaristic) and mutually cooperative being. Accordingly, human beings naturally and necessarily constitute some form of relations between themselves and their complex social environment. At the heart of its complex social relations lies humanity's moral self-consciousness and neediness to protect, preserve and promote the inherent life and value of humanity. This, in turn, shows that, first, social relations are essentially moral relations and, second, behind these social relations stands an abstract and deep fundamental moral principle through which the legitimacy of different kinds of actions and behaviours are scrutinised and judged which, upon reflection, turns out to be the principle of human dignity. From this relational and moral nature of human beings and the fundamental moral principle underlying their complex social relations emerge a universal social idea of human rights. To this end, human rights are nothing but an advancement of the social-moral aspect of humanity and the further concretisation of the principle of human dignity. As such, their basic function, stated in abstract, is prescribing normative principles and institutional mechanisms through which a political society ensures basic moral and material conditions required to live and lead a life worthy of dignity, a dignified living for its members. In the final analysis, this abstract idea and function of human rights forms, to use Henkin's interesting expression, an integral element of a comprehensive theory of government of a political society which cannot be explained through a reductionist construction of individualistic and collectivist value assumptions.

# CHAPTER 4
# HUMAN DIGNITY

## 4.1. INTRODUCTION

The purpose of this Chapter is providing an in-depth examination of the idea of human dignity as the normative foundation of human rights. In particular, it seeks to analysis and show if and in what sense the principle of human dignity can and should be regarded as an underlying normative justification of ESC rights as inherent and universally valid human rights. But as noted in Chapter three above, defending human dignity as the normative foundation of human rights requires us to show, first, that it is itself an inherent (intrinsic) moral value of every human being; second, that it is present in each and every human being equally, unconditionally and at all-time; and, finally, that it is regarded as a universal moral value. Before doing this, it's important to first address the controversy affecting the notion of human dignity. On the one hand, the idea of human dignity holds a central place in human rights law, constitutional law, and jurisprudence.[248] It has received an

[248] Alan Gewirth, 'Human Dignity as the Basis of Rights' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992); Louis Henkin, 'Human Dignity and Constitutional Rights' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992); Christopher McCrudden (ed), *Understanding Human Dignity (Proceedings of the British Academiy No. 92)* (Oxford University Press 2013); Glenn Hughes, 'The Concept of Dignity in the Universal Declaration of Human Rights' (2011) 39 Journal of Religious Ethics 1; Neal (n 29); Wicks (n 29); Lorraine E Weinrib, 'The Charter in the International Context: Human Dignity as a Rights-Protecting Principle' (2005) 17 Nat'l J. Const. L. 325; Daly (n 44); Neomi Rao, 'Three Concepts of Human Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183; Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 Columbia Journal of European Law 201; Catherine Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 European Human Rights Law Review 190; Maxine D Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2006) 84 Nebraska Law Review 740; Riley (n 24); Paolo G Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 Texas Law Review 1031; David Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] Public Law 682; David Feldman, 'Human Dignity as a Legal Value: Part 2' [2000] Public Law 61; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655; Roberto Andorno, 'Human Dignity and Human Rights as a Common Ground for a Global Bioethics' (2009) 34 Jounral of Medicine and Philosophy 223; Henriette Sinding Aasen, Rune Halvorsen and Antonio Barbosa Da Silva (eds), *Human Rights, Dignity and Autonomy in Health Care and Social Services: Nordic Perspectives* (Intersentia 2009); Leslie Meltzer Henry, 'The Jurisprudence of Dignity' 160 University of Pennsylvania Law Review 160.

increasing attention in other fields including in moral and political philosophy.[249] It is a common phrase in social protest, activism and political rhetoric. In human rights law, it is regarded by many as a fundamental normative principle upon which inherent human rights are universally justified.[250] On the other hand, there is no or little consensus on its normative meaning, status and function both in theory and practice. In fact, some authors reject the assertion that human dignity is a foundation of universal human rights. For them, the popularity of the term in academic writing and practice conceals the existence of deep disagreement on what it entails not only between different legal systems but even within a given legal system.[251] There are even authors who argue that the term dignity is nothing but a mere place holder or a useless concept employed by tribunals to limit legitimate democratic conversation on important societal issues.[252]

---

249 Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007); Meyer, 'The Simple Dignity of Sentient Life : Speciesism and Human Dignity' (n 5); David Luban, *Legal Ethics and Human Dignity (Cambridge Studies in Philosophy of Law)* (Cambridge Univ Press 2007); Ulrich Eibach, 'Protection of Life and Human Dignity: The German Debate between Christian Norms and Secular Expectations' (2008) 14 Christian Bioethics 58; Doron Shultziner, 'A Jewish Conception of Human Dignity: Philosophy and Its Ethical Implications for Israeli Supreme Court Decisions' (2006) 34 Journal of Religious Ethics 663; Andrea Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press 2017); Kateb (n 5); Sabine C Carey, Mark Gibney and Stephen C Poe, *The Politics of Human Rights: The Quest for Dignity* (Cambridge University Press 2010); *Human Dignity and Bioethics: Essays Comissioned by the President's Council on Bioethics* (2008); R George Wright, 'Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively' (1995) 75 Boston University Law Review 1397; Rosen, *Dignity: Its History and Meaning* (n 27); Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009); Sensen (n 44); David Luban, 'The Rule of Law and Human Dignity : Re-Examining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29; Qianfan Zhang, 'The Idea of Human Dignity in Classical Chinese Philosophy: A Reconstruction of Confucianism' (2000) 27 Journal of Chinese Philosophy 299; Daryl Pullman, 'Human Non-Persons, Feticide, and the Erosion of Dignity' (2010) 7 Bioethical Inquiry 353; Kaufmann and others (n 44).

250 Preambles to ICCPR and ICESCR partly provides, 'Recognizing that these rights derive from the inherent dignity of the human person'. Similarly, the Preamble to VDPA (1993) partly provides 'Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms …'. See also the Preamble and Article 1 UDHR.

251 See for example an exchange between the following authors. Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (n 248); Paolo G Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 European Journal of International Law 931; McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 248); Conor O'Mahony, 'There Is No Such Thing as a Right to Dignity' [2012] International Journal of Constitutional Law (I.CON) 551; Conor O'Mahony, 'There Is No Such Thing as a Right to Dignity: A Rejoinder to Emily Kidd White' (2012) 10 International Journal of Constitutional Law (I.CON) 585; Emily Kidd White, 'There Is No Such Thing as a Right to Human Dignity: A Reply to Conor O ' Mahony' (2012) 10 International Journal of Constitutional Law (I.CON) 575. See also Waldron, 'Is Dignity the Foundation of Human Rights?' (n 5); Jeremy Waldron, 'Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)' (2007) XLVII Arch.europ.social 201; Schachter (n 5).

252 R Jame Fyfe, 'Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007) 70 Saskatchewan Law Review 1; McCrudden, 'Human Dignity and

However, it will be seen that the controversies or disagreements surrounding human dignity have, by and large, more to do with the competing historical-philosophical construction of the term than its current practical usage. In particular, it will be argued that human dignity should be conceived as practical and relational normative principle underlying our complex social relations. In one sense, this argument calls for the dissociation of the term from some of its past conception but in another sense, it also calls for the recognition and continuation, though in a more refined form, of the fundamental normative meaning associated with the very notion of the term from the inception. This, in turn, leads us to take an issue not only with its past religious, cultural and political interpretation but also with its philosophical conception as advanced by thinkers like Immanuel Kant.[253]

In order to develop this argument in detail, this Chapter begins with the discussion of the historical-philosophical conception and evolution of the idea of human dignity over the course of time and its normative significance for the current human rights discourse. To this end, it takes a practical approach to the notion and function of human dignity, that is, it seeks to understand its normative meaning and functions in terms of its current usage and in the light of the practical social relations previously described in Chapter three. This practical approach will help us to see and appreciate the practical-intuitive sense in which human dignity is regarded as the normative foundation of all human rights and, to this extent, the existence of significant coherence in its meaning and functions across various socioeconomic, cultural, political and legal contexts. In this regard, it is worth noting that the phrase 'human dignity as a normative foundation of human rights' is more or less used in the sense described by Rosen. According to Rosen, to say that human dignity constitutes the normative foundation of human rights would at least entail the following three basic things.

> First, it would explain and justify the claim that all human beings share 'inviolable' dignity and that they are 'free and equal' in that dignity. Second, it would show that it followed from this that they also have inviolable and inalienable rights. Third and finally, it would identify what those rights [are].[254]

To these, I would like to add as a fourth point that human dignity would also serve as a guideline (standard) for the regulation of social behaviours and practices especially by introducing an internal and external evaluative normative standard[255] to the way we ought to treat each other in the context of practical

Judicial Interpretation of Human Rights' (n 248); Ruth Macklin, 'Dignity Is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy' (2003) 327 BMJ 1419.

253 See particularly Chapt 4.3 below.

254 Rosen, *Dignity: Its History and Meaning* (n 27) 54.

255 See particularly Riley (n 24) 129–131.

social relations.[256] That is, as it will be explained below, it would serve as a critical standard of legitimacy against which various kinds of social behaviours and practices are evaluated and judged both at individual (personal) and institutional level.[257]

After discussing the conception, normative essence (character) and significance of human dignity for human rights discourse in detail, the Chapter then proceeds with assessing the way it is deployed in and the general normative functions attached to the same in the current international positive law and few national jurisdictions with the view to, first, see its coherence with the general conclusions reached in the first half of this Chapter and, second, provide a groundwork for the discussion in the Part two of the study wherein its specific legal implications for the obligations of the States will be assessed in the context of international ESC rights jurisprudence.

## 4.2. DIGNITY AS RANK AND STATUS

This view of dignity is related, on the one hand, to the socio-cultural stratification of a society into dignitaries and common (ordinary) people and, on the other hand, to the comparative evaluation of the value and status of humanity with that of other ordinary creatures in the universe. In both cases, the notion of dignity is hierarchical in the sense that those to which dignity is attributed are regarded as of higher value than the other and hence reflects the differentiation in rank or status between those who are said to have and those who do not have dignity. In the first sense (that is, in the hierarchical view of a society), dignity generally concerns the social worth, respect and privileges attributed to dignitaries of a society owing to the social ranks (statuses) they occupy in a society and the functions that flows from those ranks.[258] The ranks may be of a religious, cultural, tribal, or 'political' nature that persons normally occupy on socio-cultural factors which, normally, has nothing to do with the merits of those individuals holding the positions.[259] In a hierarchical society, therefore, dignity implies the value attached to the persona

256 See Kant (n 232) 40–48 at 4:431–4:442; Rosen, *Dignity: Its History and Meaning* (n 27) 26–27 & 149.

257 See particularly Chapter 4.7.2 *cum* 4.5 & 4.6 below.

258 See Joern Eckert, 'Legal Roots of Dignity in German Law' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Arieli (n 42); Lewis (n 24); Rosen, *Dignity: Its History and Meaning* (n 27); Waldron, 'Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)' (n 251). The discussions by Starck, Eckert, Arieli and Waldron are useful explorations into these two historical connotations of dignity especially how the Judio-Christian conception of human being has played a role in combination with the Stoic-Romanic legal thinking and the 18th century intellectual revolution of the Western societies in the evolution of the second connotation over the first one.

259 Eckert (n 258) 43; Rosen, 'Dignty: The Case Against' (n 27) 145 (addressing some objections to the notion of dignity).

and position of dignitaries (nobilities, clergies, tribal leaders, etc.) and hence, does not belong to every members of a society. This is the reason it is often referred to as dignity of rank or aristocratic dignity.[260]

In the second sense, dignity connotes the status of humanity in the universe. It is considered as a value that pertains solely to humanity for it is said that humanity occupies an elevated, higher position over all other creatures.[261] But we should note that this view is still hierarchical in nature because it compares humanity with other animals and says that because humanity is higher in status it has dignity. However, the difference from the dignity of rank is that it is seen as, at least generally, pertaining to every human being and not just few social dignitaries.[262] There are different arguments put forward to justify this conception of dignity among which the religious and humanistic arguments are the dominant ones.

In its religious (theological) construction, it is said that the dignity of human being flows from the relationship that exists between humanity and God who created humanity in His own likeness and images endowing it also with special authority to have dominion over all other creatures. This, it is said, shows the dignified, elevated status of human beings in the universe. For some, notably for those who follow the Christian doctrine, the special value that God endowed to humanity could also be deduced from the sacrificial works of salvation God accomplished through Jesus Christ. And for some time, this view has been one of the dominant views as regards the idea and value of humanity especially up until the period of humanistic movements. Perhaps, it is because of this that dignity is seen by some as typically expressing the Judeo-Christian theological understanding of human beings.[263] However, not all who write on the historical

---

260 Waldron, 'Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)' (n 251) 201–208 & 216–227; Rosen, *Dignity: Its History and Meaning* (n 27) 11; Michael J Meyer, 'Introduction' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992); Sensen (n 44) 152–161 (for Sensen, this view is a traditional paradigm of dignity).

261 This is what Kateb refers to as stature dignity of humanity, the dignity that humans have as a species. See Kateb (n 5) 123ff. David Feldman in his part states that 'Human dignity can operate on three levels: the dignity attaching to the whole human species; the dignity of groups within the human species; and the dignity of human individuals,' adding that 'The legal implications of each kind of dignity are slightly different'. See Feldman, 'Human Dignity as a Legal Value: Part 1' (n 248). But *Cf.* Martha Nussbaum, 'Human Dignity and Political Entitlements', *Human Dignity and Bioethics (Essays Commissioned by President's Council on Bioethics)* (2008) 354–357.

262 See generally, Kateb (n 5); Sensen (n 44); Lewis (n 24); Gewirth, 'Human Dignity as the Basis of Rights' (n 248); Parent (n 44).

263 See particularly Eckert (n 258); Arieli (n 42); Christian Starck, 'The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Michael Meyer, 'Human Dignity as a (Modern) Virtue' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Andrew Brennan and YS Lo, 'Two Conceptions of Dignity: Honour

evolution of dignity share the view that the term has biblical origin. According to Sulmasy, for instance, there is no evidence to back the assertion that the term dignity as used today has originated from 'Jewish and Christian Scriptures'.[264] Rosen also shows how the Catholic Church had struggled to reconcile itself with the notion of human dignity for a long period of time. According to Rosen, it is only recently that the Church adopted the term in its teachings.[265]

In the scholastic, and later humanistic, view, humanity is said to have dignity because of certain unique attributes and capacities it possesses. The whole approach behind this view therefore seems to be the articulation of those unique attributes said to have been possessed by human beings only.[266] However, different authors propose different attributes in justifying the dignity of human beings. It generally seems that the capacity for rational thinking, knowledge, language and moral actions are said to be the major distinguishing features relied on to show that humanity has an elevated status above all others and therefore has dignity.[267] For instance, Arieli notes that scholastic and humanistic writers relied on the idea of freedom and self-determination as among the 'necessary attributes' of humanity justifying its dignity. Thus, as he observed,

> Reformulated in the scholastic theology and the humanistic interpretation of the Renaissance, this view became the central message of Humanism. For Lorenco Valla, Marsilio Ficino, Pico della Mirandola, and Ludovico Vives the existential freedom, the potential powers of man to raise himself to the highest levels of excellence in understanding, virtue, holiness and creativity, his capacity of change and progress, raise man to the central position in the created world. This was the message of Maneti's De Excellencia et dignitate hominis and of the famous oration of Pico della Mirandola, De Dignitate Hominis which became the watchword and central message of Humanism.[268]

---

and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007); Zhang (n 249); Chana Safrai, 'Human Dignity in a Rubbinical Perspective' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Lewis (n 24).

264 Sulmasy (n 27) 10–11. In fact, he also disputes that the Western notion of dignity has anything to do with the sense of the term as used in ancient Greek philosophy. ibid.

265 Rosen, *Dignity: Its History and Meaning* (n 27) 47–54 & 90–100. See also Sulmasy (n 27) 12; Sensen (n 44) 157–159; Kateb (n 5) 24ff.

266 Kateb (n 5) 24ff; Nussbaum, 'Human Dignity and Political Entitlements' (n 261).

267 Kateb, who sought to defend the secular conception of human dignity, identifies two types of dignity – dignity of individuals (status dignity) and dignity of species (stature dignity) – arguing that these flow from the 'unique and non-natural traits and attributes, characteristics, and capacities' of human beings and humanity as a whole. Kateb (n 5) 5ff. But Nussbaum strongly criticizes such an approach to the justification of human dignity. See Nussbaum, 'Human Dignity and Political Entitlements' (n 261) 354–357 & 362ff (criticizing Stoic association of dignity with rationality and arguing instead for dignity based on animality, that is, on human animal nature, respectively). For Sensen, Kant's notion and use of dignity is rooted in Stoic conception of the term referring to an elevated position of something. Sensen (n 44) 143ff.

268 Arieli (n 42). Thus, for Arieli, this indicates that 'freedom and the possibility of self-determination are the necessary attributes of man and the rights follow logically from Man's

Eckert also notes that Mirandola, to whom major credit is owed in this tradition especially for providing a major background for the current discourse of human dignity, expresses these human qualities in the terms of rationality and autonomy.[269] According to Eckert, Mirandola 'regarded the human being as microcosm containing the aptitude for all kinds of behaviour. The destiny of man was to find a rational decision on the basis of his *anima rationalis*. Thus, *hominis dignitas* was constituted by man's ability to make autonomous decisions'.[270] Eckert also mentions Samuel von Pufendorf, another important figure next to Mirandola in this early intellectual conception and development of the idea of dignity, who is also well-known for his doctrine of natural law and natural rights and the natural equality of human beings.[271] Eckert notes that, for Pufendorf, 'man had human dignity because of his "immortal soul" and because he was "indu'd with the light of understanding". Since everyone was endowed with it, all human beings were equal by nature'.[272]

In spite of their differences in terms of the human attributes that each author relies on, it is possible to observe a common continuous intellectual effort to rationalise the dignity of human beings over a course of time. In this regard, it is said that the Stoic philosophy (of man and society) has had notable contributions not only in the attempt to rationalise the dignity of human beings but also in the wider socio-political discourses especially through its holistic understanding of the relationships between the individual (the self) and the society (the collectivity). In Stoicism, human beings are seen social (sociable) beings and hence sociability is presented as one of the important characteristic features of humanity.[273] The Stoic social philosophy, within which the scholastic and humanistic idea of dignity was largely developed, have had significant consequences in shaping the subsequent academic discourses on the conception of not just human dignity but also the general idea of society and its socio-political institutions.[274] And, in fact,

---

status of worth, dignity and creativity.' ibid. See also Sensen (n 44) 153ff (discussing the historical origin of dignity).

269 Pico Della Mirandola is generally regarded as the pioneering humanistic-renaissance writer who have elaborating the philosophical idea of the dignity of man and his work is believed to have been the bases for the subsequent and modern discussions of the concept of human dignity. See particularly Sensen (n 44) 159–161. See generally, Francesco Borghesi, Michael Papio and Massimo Riva (eds), *Pico Della Mirandola: Oration on the Dignity of Man: New Translation and Commentary* (Cambridge University Press 2012); Pico Della Mirandola, *On the Dignity of Man (Trans Charles Glenn Wallis)* (Hackett Publishing 1965). See also Eckert (n 258); Arieli (n 42); Kateb (n 5).

270 Eckert (n 258) 44.

271 For more on Pufendorf, see Carr (n 141). In addition to Mirandola, Sensen also discusses the historical/traditional use of dignity in the writings of Cicero and Leo the Great. Sensen (n 44) 155–161.

272 Eckert (n 258) 44.

273 Arieli (n 42); Eckert (n 258).

274 For instance, following Arieli, stoicism was a major reason for the Roman legal system to be able to maintain side-by-side the spiritual and secular systems which later became known as one of the unique feature of the Western European civilization. Arieli (n 42).

as Nussbaum's recent publication shows, stoicism has still important influence on the social and political philosophy of the modern society.[275] In the words of Arieli, 'Upon closer examinations one realizes that the stoic conception of man and mankind became the basis upon which all universal conceptions of political philosophy since the Renaissance were raised and it prepared the ground for the revolutionary change of the social and political thought in the Age of the Enlightenment'.[276]

Therefore, for the purpose of this discussion, we can say that the central tenet of this tradition is, on the one hand, the express rejection of the association of dignity with social ranks and, on the other, the intellectual reconstruction of dignity on some basic attributes possessed by all human beings. According to some authors, the hierarchical view of society and the dignity of rank associated with it could not be regarded as a viable theoretical construction upon which the idea and value of human society and its social institutions can be established. In particular, it was clear that the traditional appeal to such grounds as culture and religion as justification for social institutions were increasingly diminishing due to the secular tendency of the scholastic and humanistic writings. At the same time, it was necessary that the nature and dignity of humanity be established on stable and universal principles that could affirm the natural and inherent equality of every human being. This, however, required the revision of the approaches and the background social assumptions; in particular, it was necessary that the connotation of the status and ground from which this was said to emerge had to either be abandoned altogether or reconstructed in the light of the social philosophy of the time which saw every human being as equal in status and value.[277]

This attempt to dissociate dignity from social ranks and to instead restate it as dignity of humanity, that is, as a universal value pertaining to every human being, is indeed an important contribution of the scholastic and humanistic discourse. Nonetheless, there is still a major problem that remains with this view: that it concerns an effort to deduce dignity from some supposedly observable attributes believed to be distinguishing humanity from other animals. In this sense, it still remains to be a hierarchical view of some sort. As rank is used to differentiate one person from the other in justifying dignity of rank, those attributes are used to differentiate humans from other animals thereby justifying dignity of humanity, so it seems.[278]

This scholastic and humanistic approach to dignity can however be criticised on several grounds. One problem is the divergence of opinion on the kind of

275 See for instance Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114).

276 Arieli (n 42); Lewis (n 24).

277 Among many authorities, see Arieli (n 42); Eckert (n 258); Kateb (n 5); Lewis (n 24); Stark (n 114).

278 Eckert (n 258) 43–44.

human attribute that should be present in order to justify human dignity. This raises a related question as to how a certain attribute as rational thinking, language, morality, self-determination or any other human attribute is selected among the many attributes human beings possess. For some, this approach is appropriate for showing the characteristic difference between human beings and other animals (that they belong to different categories) and not for justifying humanity as a being elevated status with dignity. In my view, the difficult question that such an approach faces is its arbitrariness, contingency and inconsistency raised by Sulmasy and Nussbaum.[279] That is, it should be obvious that not every person may have, or is able to retain in his/her entire life those human attributes, qualities and capacities.[280] This may force us to conclude that persons with no sound faculty for rationality or language or morality do not have or retain their human dignity, which clearly is an absurd conclusion to follow at least for human rights scholars. Even then, no two persons may have the same degree of capacity for rational thinking, language, morality and the like. This may, in turn, force us to accept the conclusion that there is a degree or gradation of dignity, in turn, diminishing its status as a universal and equal value – a position difficult to accept. But, most importantly, these attributes are essentially the product of socialisation, that is, they are nurtured and developed in a particular social context: we learn to reason rationally and to distinguish between wrong and right and so on. In short, it is difficult to follow this method and establish the idea of equal and universal dignity and hence of human rights on those human attributes which are by definition arbitrary, contingent and would ultimately lead us to some sort of inconsistency.[281]

In fact, both dignity of rank and status reflect nothing more than the conventional creation and attribution of values. According to Sulmasy, this usage of dignity can better be referred to as '*attributed* dignity'. This is described as the 'worth or value that human beings confer upon others by acts of attribution. The act of conferring this worth or value may be accomplished individually or communally, but it always involves a choice. Attributed dignity is, in this sense, created. It constitutes a *conventional* form of value'.[282] Thus, it is necessary to carry out a major intellectual 'rethinking' in order to establish its true essence and provide a rational and stable ground for its justification as the value of humanity.[283] So while the scholastic and humanistic discourse has made important contributions

279 Sulmasy (n 27) 13–15; Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 85–88 & 159–160; Kateb (n 5) 123ff.

280 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 88–89.

281 Sulmasy (n 27) 13–15; Nussbaum, 'Human Dignity and Political Entitlements' (n 261) 362.

282 Sulmasy (n 27) 12. 'Thus we attribute worth or value to those we consider to be dignitaries, those we admire, those who carry themselves in a particular way, or those who have certain talents, skills, or powers. We can even attribute worth or value to our selves using this word'. Hence, for Sulmasy, the 'Hobbesian notion of dignity is attributed'. ibid. See also Sensen (n 44) 152–155.

283 Eckert (n 258); Lewis (n 24).

for our understanding of human dignity, it also had left some major issues that needed to be addressed for the subsequent intellectual discourse if dignity is to establish an equal and universal conception of human rights.

## 4.3. DIGNITY AS INHERENT VALUE OF HUMANITY

It is therefore safe to say that the cumulative effect of the scholastic and humanistic discourse on human dignity especially carried out with Stoic social philosophy as its backdrop has led to fundamental reconstruction and explication of the idea of human dignity in the Enlightenment and subsequent periods. For this, it is stated above, a major intellectual rethinking of the idea of humanity and the foundation of its basic social institutions such as state, law and authority had to be carried out. To this end, the Enlightenment period is seen by many as the era where this 'fundamental rethinking' of the socio-political system of a society has been carried out which eventually has resulted in the legitimacy crisis of traditional orders.[284] This is particularly evident from some landmark historical events as the French Declaration on the Rights of Man and the American Declaration of Independence, both closely related to the contemporary idea of human rights and the fundamental values underpinning them.[285] As Eckert clearly puts,

> At the beginning of the modern era, a process of fundamental rethinking led to a loss of legitimacy for the traditional orders based on dignity according to hierarchical ranks. This process was followed by the recognition of the universal and equal human dignity as a major principle of law and politics. Due to the crisis of the traditional orders, it became possible and necessary to give political and legal effect to the idea of human dignity in the meaning of universal human rights.[286]

Seen particularly in the light of the discourse on the idea and value of dignity, authors like Riley and Lewis describe the process it has passed over the course of time as the process of reification, codification, equalisation, democratisation, universalisation and generalisation.[287] That is, by expressly rejecting the pre-existing hierarchical and hence discriminatory and exclusionary construction of the term, the intellectual discourse of the Enlightenment period had sought to articulate the idea of dignity as the inherent value of human being regardless of such factors as social positions, race, gender, nationality, ethnicity or other markers of social hierarchies.[288] According to Eckert, 'The events of French Revolution'

284 Eckert (n 258); Lewis (n 24).
285 Sensen (n 44) 149–152 (discussing the use and conception of dignity in the UN major human rights documents).
286 Eckert (n 258) 44–45.
287 Riley (n 24); Lewis (n 24).
288 Meyer, 'Human Dignity as a (Modern) Virtue' (n 263) 196.

had, for instance, 'led to the realization that the idea of dignity could only be justified by separating dignity from rank and acknowledging dignity as an innate element of every human being'. In this respect, it is stressed that 'The universal and equal dignity of man had to be inviolable and inalienable.' And it was the same idea that was reflected in the American Declaration of Independence.[289]

### 4.3.1. IN KANT'S MORAL THEORY

However, some authors argue that the view of dignity as inherent and equal value of humanity was not fully articulated and defended up until the time of Immanuel Kant who, according to Rosen, was able to provide a natural conclusion to the idea of dignity as unconditional and inherent value of humanity.[290] So it is important to briefly look at Kant's notion of dignity and see to what extent it can indeed be regarded as an inherent value of human being and hence as a normative foundation of human rights. Here, there are at least two main reasons for paying special attention to Kant's notion of dignity: it is one of the influential, though complex, views of dignity especially in moral philosophy and human rights discourse. It has also been referred to by almost all human rights scholars as the normative foundation of human rights but with no or little attention to its specific meaning and implications of the Kant's use of the term.[291] As we proceed with our discussion, it should be clear that the sole concern here is to see the basis upon which Kant has justified (assuming he does that) dignity as intrinsic value of human being and what it means for the whole discourse of the current human rights; beyond this, it is neither necessary nor a right place to discuss its meaning and function in, for instance, his complex moral philosophy. In discussing Kant's notion of dignity, I mainly rely on a recent publication by Rosen as I found it more accessible and relevant for the question at hand especially in terms of its implications in the context of the current human rights discourse.[292]

---

289 Eckert (n 258) 44–45.

290 Rosen, *Dignity: Its History and Meaning* (n 27). For Meyer, the idea of inherent egalitarian account of human dignity drawn from Kant is 'a moral high-water mark of modern ethical and political thought'. Meyer, 'Human Dignity as a (Modern) Virtue' (n 263) 196.

291 See Rosen, *Dignity: Its History and Meaning* (n 27). Sensen (n 44). Meyer, 'Human Dignity as a (Modern) Virtue' (n 263) 196; Deryck Beyleveld and Roger Brownsword, 'Human Dignity, Human Rights, and Human Genetics' (1998) The Modern Law Review 661; Derek Parfit, *On What Matters (Edited and Introduced by Samuel Scheffler Vol 1)* (Oxford University Press 2011). See also Kretzmer and Klein (n 24); Malpas and Lickiss (n 249); Marcus Duwell and others (eds), *The Cambridge Hanbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014); McCrudden, *Underst. Hum. Dign. (Proceedings Br. Acad. No. 92)* (n 248); Meyer and Parent (n 239).

292 Rosen, *Dignity: Its History and Meaning* (n 27). But there is also equally interesting work on the same subject by Sensen (n 44).

Rosen notes that although there were different conceptions of dignity 'widespread through the seventeenth and eighteenth centuries, the concept played only a small role in political theory until the time of [Kant]' who, in his view, is largely responsible for the most part of the 'modern theory of human rights'.[293] Indeed, many would agree with Rosen that Kant's notion of dignity, a powerful and complex concept constituting the core of his moral philosophy, 'should stand at the centre of any historical account of dignity, for it has been the inspiration – rightly or wrongly – of very much of what has come later'.[294] Per Rosen, the term dignity (in German *Würde*[295]) is particularly central in his *Groundwork of the Metaphysics of Morals* (*Groundwork*). And, for him, it is not surprising that dignity is seen as constituting the core of Kant's moral theory given the frequency of the use of the term in the *Groundwork* which, in turn, is a foundation for his *Metaphysics of Morals*.[296]

In explaining the meaning of dignity as used in *Groundwork*, Rosen pays particular attention to one of the relevant passages where Kant distinguishes between two kinds of values: price and dignity. Thus, Kant says that

> In the kingdom of ends everything has either a **price**, or a **dignity**. What has a price can be replaced with something else, as its *equivalent*; whereas what is elevated above any price, and hence allows of no equivalent, has a dignity.
> What refers to general human inclinations and needs has a *market price*; what, even without presupposing a need, conforms with a certain taste, i.e. a delight in the mere purposeless play of the powers of mind, has a *fancy price*; but what constitutes a condition under which alone something can be an end in itself does not merely have a relative worth, i.e. a price, but an inner worth, i.e. *dignity*.
> Now, morality is the condition under which alone a rational being can be an end in itself; because it is possible only by this to be a legislating member in the kingdom of

---

293 Rosen, *Dignity: Its History and Meaning* (n 27) 19.

294 Ibid. See also generally Parfit (n 291) chapt 10; Sensen (n 44); Nussbaum, 'Human Dignity and Political Entitlements' (n 261); Schachter (n 5); Daly (n 44); Jack Donnelly, 'Human Dignity and Human Rights' 20–23.

295 Readers may find the following note by Rosen interesting: 'A German word for dignity is *Würde*, a word that is closely related etymologically to *Wert*, the term for 'worth' or 'value.' The adjectival form, *wurdig* means both 'valuable' and 'deserving' – as in 'deserving of reward' – and 'dignified.' (There is parallel here with Latin – *Domine, non sum dingus* – and English. 'Worthy,' which has, of course, the same root as *Würde*, has something of the same duality. We talk, for example, about 'local worthies' or 'dignitaries' as well as of 'worthy winners').' Rosen, *Dignity: Its History and Meaning* (n 27) 19. See Sensen (n 44) 147ff.

296 According to Rosen, the use of the term dignity is more frequent in Groundwork whereas in his other works it is used 'relatively infrequently'. In his counting, the term is said to have appeared sixteen times in the whole work and four times in the passage 4:434– 435 where Kant distinguishes between different kind of values that 'everything' can have 'in the kingdom of ends'. Rosen, *Dignity: Its History and Meaning* (n 27) 20ff; Sensen (n 44) 143–144. See also comment by Christine M Korsgaard, 'Introduction', *Immanuel Kant, Groundwork of the Metaphysics of Morals (edited by Mary Gregor and Jens Timmermann, introduction by Christine M. Korsgaard)* (Revised Ed, Cambridge University Press 2012) ixff.

> ends. Thus morality and humanity, in so far as it is capable of morality, is that which alone has dignity.[297]

This passage, according to Rosen, 'goes right to the heart of Kant's view of morality'.[298] One of the values expressed in this passage, price, concerns 'those that are fungible (can be substituted for)' whereas the other, dignity, concerns 'those that have an inner value and are raised above all price, or that have […] an unconditional, incomparable value'. He is in fact of the opinion that it is possible to replace most of Kant's use of the term dignity with the phrase 'unconditional and incomparable worth'. For instance, the statement that '*Autonomy* is thus the ground of the dignity of human nature' can be restated as saying in effect that 'autonomy is a ground of human nature's unconditional and incomparable value'.[299] He also argues that 'dignity, for Kant, is a *kind of* value rather than being a value itself'; it 'is a quality of a class of valuable things'.[300]

The basic question here is to whom (or what) does this kind of value belong and on what basis. According to Rosen, dignity in Kant's usage belongs only to human beings and nothing else. The reason for this is the basis of having dignity itself which is the capacity for morality.[301] For Kant, morality is an autonomous act of a rational being (which includes but not limited to human being) in conformity with maxims of a categorical imperative.[302] Rosen argues that the meaning of autonomy employed by Kant is quite different from the way it is understood currently, that is, as the capacity of individuals to freely choose and act as it pleases them. Kant conceives rational beings as autonomous beings that, as analogous to an ideal legislator, give law and by virtue of this and at the same time remain subjected to the command of the self-legislated law: an autonomous act in this sense consists in being at once both the subject (author) and object of self-legislated law. That is, 'it is, in the first instance, the lawgiving that has dignity'. Thus, 'What Kant has in mind as *autonomy* is the idea that the moral law which we must acknowledge as binding upon us is self-given,' which, according to Rosen, 'is something quite different from the modern understanding of autonomy as the capacity of individuals to choose the course of their own lives however they see it fit'.[303]

---

297 Kant (n 232) 4:434–4:435 at pp 46–44 (all emphasises are in the original); Rosen, *Dignity: Its History and Meaning* (n 27) 20ff.

298 Rosen, *Dignity: Its History and Meaning* (n 27) 21.

299 Ibid 21–22.

300 Ibid 22&23 (emphasis original). Sensen, however, argues that for Kant dignity is not the name for value. Sensen (n 44) 143–144.

301 Rosen, *Dignity: Its History and Meaning* (n 27) 22–27.

302 Kant's maxim of categorical imperative has two forms: the form which concerns the formula of the universality of law and that which concerns the formula of humanity. See Kant (n 232) 4:420ff at pp 33ff. For more on this, see Sensen (n 44) 96ff; Parfit (n 291) Chapts 9 & 10.

303 Rosen, *Dignity: Its History and Meaning* (n 27) 25. Rosen notes that 'The word "autonomy" is composed of 'two ingredients: (*autos* = 'self') and (*nomos*= 'law')'. See also Sensen (n 44) 147ff.

A rational moral action, that is, morality, in the sense used by Kant is the sole reason for every rational being to be an end in itself and as such have dignity: an intrinsic, inner, unconditional worth. As Kant himself explicitly states, 'morality is the condition under which alone a rational being can be an end in itself; because it is possible only by this to be a legislating member in the kingdom of ends' and from this he comes to the conclusion: 'Thus morality and humanity, in so far as it is capable of morality, is that which alone has dignity'.[304] But for Rosen the idea of autonomous rational being (a being capable of rational moral action of the kind Kant describes) is simply identical with human beings because 'only human beings (so far as we know) are capable of acting morally and feeling the force of morality's claims'. This also means that morality and hence dignity is necessarily exclusive to humanity. 'Only morality has dignity and only human beings carry the moral law within themselves'; in addition, Rosen is also of the opinion that dignity conceived in this way by Kant is a distinguishing moral watermark of human beings as well as a kind of 'deeply egalitarian' value that they intrinsically and inalienably possess within themselves regardless of their social position in a society.[305]

By looking at the relevant texts in which the term is used, the arguments thereof and the overall purpose of Kant's *Groundwork* and *Metaphysics*, I believe that Rosen's interpretation that dignity as used by Kant refers to a kind of value and that humanity is worthy of this kind of value only by virtue of its capacity for morality (in the sense expressed in the form of categorical imperative) is indisputable. However, the question I would like to raise is whether dignity understood in this manner (by Kant) is indeed an inherent, equal and hence egalitarian value unconditionally pertaining to every human being that can accordingly be regarded as a universal foundation of human rights. A related question I would also like to ask is if or at least in what sense is Kant's notion of dignity different from the scholastic and humanistic conception of dignity, that is, dignity as status.[306] These questions must arise because, as I have just presented,

304 Kant (n 232) 4:435; Rosen, *Dignity: Its History and Meaning* (n 27) 22, 24 & 26.

305 Rosen, *Dignity: Its History and Meaning* (n 27) 23–24. This point is repeatedly emphasised in other pages as well. 'Most importantly, for Kant, to say that something has dignity is not to attribute a substantive value to it but to say that it has value of a particular kind – intrinsic, unconditional, and incomparable. Only one thing, however, actually has this intrinsic, unconditional, and incomparable value: morality, and humanity insofar as it is capable of morality.' ibid 30. 'Human beings have dignity because of the moral, the unique intrinsically and unconditionally valuable thing there is, is embodied in us and in us alone, and this "inner transcendental kernel" is something that we all share equally.' ibid 31. It is by virtue of this dignity that humans are '"raised above" the natural world'. ibid 30. And for this reason, 'it would be wrong to think of human beings as part of the natural world in the way that rivers, trees, or dogs are'. ibid 24.

306 For Sensen, Kant's notion of dignity is in fact the Stoic conception of dignity which, in turn, is used to show the elevated position or status of humanity in the natural world. See Sensen (n 44) 143–145. For more on the Stoic account of dignity, see also ibid 153–161; Nussbaum, 'Human Dignity and Political Entitlements' (n 261) 352–357.

dignity of humanity (that is, the basis for a human person to have dignity) is directly connected with the capacity for morality – rational moral action – of some sort.

In Kant, I argue, the justification for the dignity of humanity is not as immediate as it first appears to be. In fact, up on close reflection, it becomes clearer that not every human being has dignity. This is so because only autonomous actions conforming to (actions taken on the grounds of the demands of) his categorical imperative can have the value of dignity. And only beings with a capacity for this kind of actions are considered to be persons (that is, rational beings) and are, therefore, regarded as ends in themselves. But in order to be a person, a rational being, it is necessary that one has to act in accordance with the demands of the moral law. Fulfilling the commands of the moral law, in turn, necessarily requires that a person has a sound rational faculty in the first place. Only then can a person be able to have the capacity for morality and only by virtue of this can a person be deemed to have dignity. This indicates that it is not possible to automatically declare Kant's idea of dignity as inherent and unconditional, unless of course one is referring to different sort of inherence and conditionality than what is being considered.

As Nussbaum argues, human being referred to as personhood (rational personality) and as mere animal being (animality) has two distinctive significances in Kant's moral theory.[307] In fact, for Kant, these two human natures belong to two different worlds. The first one belongs to the world of rational morality whereas the second to the world of sense or natural necessity. Personhood represents the rational nature of humanity which has a moral significance and hence a value as an end in itself but animality represents humanity as mere biological fact with no moral significance and end in itself. In other words, as long as a human being is guided by and acts upon his/her senses or natural dictation, it is a mere animal being in and subjected to the world of sense and, for this reason, cannot have a value in itself; it is only a person, a rational aspect of human being, which is an end in itself and therefore can have the special kind of moral value, dignity.[308]

---

307 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 130–131.

308 Kant discusses this distinction in the *Groundwork* starting at 4:446. The world of rational morality or freedom is also referred to as the world of understanding, deterministic, intellectual or noumenal world and the world of sense is also referred to as the world of appearance, sense, naturalistic or phenomenal world. According to Korsgaard, 'These two conceptions of the world arise from reflection on our cognitive relation to the world. The world is given to us through our senses, it *appears* to us, and to that extent we are passive on the face of it. We must therefore think of the world as generating, or containing something which generates, those appearances – something which is their source, and gives them to us. We can only *know* the world in so far as it is phenomenal, that is, in so far as it is given to the senses. But we can *think* of it as noumenal.' Korsgaard (n 296) xxxi (emphasis original). The implication of this on the conception of dignity is well-summarised by Nussbaum as follows. 'Therefore, for Kant, human dignity and our moral capacity, dignity's source, are radically separate from the natural world. Insofar as we exist merely in the realm of nature, we are not ends in ourselves and do not have a dignity; things in the realm simply have a price … Insofar

But this also means that the dignity that Kant has in mind is not, I argue, the kind of value that we all as animal human beings have in common. Dignity as conceived by Kant belongs only to persons who are able to simultaneously be both the subject and object of a moral law; it does not belong to those who cannot fulfil these conditions, for whatever reason they might fail to do so. For Kant, because of this conditionality of dignity on the capacity for morality, mere humanity is not enough to have dignity. If dignity is thus clearly conditioned on the capacity for morality of some sort (a 'rather complex capacity for moral and prudential reasoning', as Nussbaum refers to it) which, in turn, necessarily presupposes the possession of sound faculty and a special kind of rational moral disposition, it cannot automatically be an egalitarian (equal and universal) worth inhering in every human being. There is a clear empirical possibility that a human being may not always and necessarily act on maxims of categorical imperative; in addition, it is also a fact that not every person is born with this kind of capacity nor can every person retain the same throughout life time.

'The Kantian split between personhood and animality is deeply problematic', says Nussbaum. One problem, according to Nussbaum, is that 'it denies' 'the fact that our dignity just is the dignity of a certain sort of animal. It is the animal sort of dignity, and that very sort of dignity could not be possessed by a being who was not mortal and vulnerable'.[309] The other problem associated with this sort of thinking, according to Nussbaum, is that it 'wrongly denies that animality can itself have a dignity' by suggesting that it somehow lacks moral intelligence. In addition, it presents our rational personality as 'self-sufficient rather than needy, and purely active rather than also passive' thereby distorting or at least denying the fact that it can easily be inhibited by several factors including disease, accident, old age and disability.[310] Moreover, it also 'makes us think of the core of ourselves as atemporal' nature which is 'utterly removed, in its dignity, from […] natural events' while in fact the 'human life cycle', as a life of animal being, is constituted and bound by different stages of dependency and maturity.[311] Nussbaum particularly stresses that

> If we imagine a being who is purely rational and moral, but without animal neediness and animal capacities … we see, I believe, that the dignity of such a being, whatever it is, is not the same sort of dignity as the dignity of a human being, who is characterized throughout life … by [neediness for different sort of things].[312]

---

as we enter the realm of ends, thus far, and thus far alone, we have dignity and transcend the price … [it is] the person, seen as the rational/moral aspects of human being, [which has the end]. Animality itself is not an end.' Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 131.

309 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 132.

310 Ibid.

311 Ibid 132–133. Nussbaum notes that this suggestion is the result of Kantian conception of 'moral agency' which 'looks like something that does not grow, mature, and decline'. ibid 132.

312 Ibid 132.

I also argue that Kant's justification of dignity of humanity is not entirely different from the dignity of status, that is, as something which distinguishes humanity from the rest of creatures. It seems as if the status view of dignity has in fact remained unaffected in Kant's view although in a different, highly sophisticated and subtle form.[313] In my opinion, this difference, sophistication and subtlety has nothing to do with Kant's justification of dignity as a special kind of value pertaining to humanity but rather of morality, which indeed appears to be quite different from that of his predecessors (which is not the concern of my discussion here).[314]

As we have seen above, dignity as the status of humanity (as beings elevated above the rest of other creatures) is justified on certain attributes considered to be unique to humanity such as capacity for rationality and self-determination. The same is also true with Kant where, in his case, capacity for moral action is considered as the reason for humanity's dignity. Indeed, one may say that the way a particular human attribute is deployed by Kant and his predecessors is different but the essence of the whole argument in both cases is still a justification of dignity of humanity on the basis of a certain human attribute. In both cases the conclusion that flows from this approach is also similar: that dignity inheres in rational being alone. It is particularly seen that Kant's notion of dignity is essentially exclusive to rational beings because of the requirement of the capacity to fulfil the commands of moral law. Of course, for Rosen only human beings are capable of doing that: thus, the idea of rational being, according to Rosen, is simply synonymous with a human being. This ultimately leads him to conclude that a human being alone can have Kantian dignity and nothing else.[315] It is thus this substantive connection between dignity and capacity for rational moral action that makes Kant's notion of dignity unavoidably a conditional, distinctive, less egalitarian, and hierarchical (in fact, exclusive) kind of value. This in turn means it is impossible to automatically present (that is, without necessary substantive modification of the conception) Kant's conception of dignity as an unconditional and inherent value of every human being. For this very reason, Kant's notion of dignity cannot be regarded as the foundation of inherent, equal and universal human rights.

313 Ibid 130–133 & 159–160. For Sensen, Kant's notion of dignity concerns the expression of the elevation or highest status of mankind in the natural world and hence does not concern the inner or inherent value of humanity. Sensen (n 44) 165ff. Rosen seems to suggest that this connection between dignity and status in Kant is only appearance not of a substance. Rosen, *Dignity: Its History and Meaning* (n 27) 26. However, I argue that the dignity-status connection is in fact at the centre his overall argument which is very fundamental in his justification of morality and the respect due thereof.

314 For his critique of the previous approach to morality, see Kant (n 232) 4:432–4:433 at pp 44–45.

315 Rosen, *Dignity: Its History and Meaning* (n 27) 22–24, 41 & 114.

### 4.3.2 AN ALTERNATIVE PERSPECTIVE

In my view, dignity can only be accepted as the normative foundation of inherent, equal and universal rights of every human being if it can first be shown that it is itself an unconditional and inherent value that every human being has just by virtue of being a human person. In other words, for dignity to serve as a stable normative foundation of human rights, it should first be established that it is not something humans ought to earn or deserve by acting or thinking in a certain way but that inheres intrinsically in them just by virtue of being what they are, that they are humans. Only then can we say with some level of certainty and coherence that it is a supreme foundation of the practical conception of human rights. And, I believe this perspective can be deduced from the discussions by authors like, just to mention few, Sulmasy[316], Nussbaum[317] and Dworkin.[318] The notion of dignity presented in the writings of these authors is richer, more practical and coherent to be regarded as inherent value of human being and hence as a normative justification of all human rights.

In particular, I found that the discussion by Sulmasy can provide us with an interesting conceptual clarity as to how the idea of human dignity should be understood in its elementary and more practical sense. He argues that the idea of dignity as intrinsic value of human being can be substantiated on the basis of two but complementary arguments: moral consistency and axiology. According to Sulmasy, intrinsic dignity is

> the worth or value that people have simply because they are human, not by virtue of any social standing, ability to invoke admiration, or any particular set of talents, skills, or powers. Intrinsic value is the value something has by virtue of being the kind of thing that it is. Intrinsic dignity is the value that human beings have by virtue of the fact that they are human beings. This value is thus not conferred or created by human choices, individual or collective, but is prior to human attribution.[319]

316 Sulmasy (n 27).

317 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Nussbaum, 'Human Dignity and Political Entitlements' (n 261).

318 Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (n 208).

319 Sulmasy (n 27) 12. This definition is followed by Sulmasy's very short statement (intended to give a kind of example to his definition), but without any further explanation, that 'Kant's notion of dignity is intrinsic'. This cannot however be true given particularly his own plain description of the idea of intrinsic dignity and the subsequent substantive discussion he offers in support of this and that of Kant's conception and justification of dignity just discussed; in fact, there is an important tension between the two which I am to discuss shortly. In addition, I will argue that that Sulmasy's construction of the concept is particularly reflective of the current understanding of the term in both international and national legislative practices and jurisprudence; we cannot however say the same in relation to that of Kant without abandoning the predication of the dignity of humanity on the capacity for rational moral action. I rather think that Sulmasy is tempted to refer to Kant's dignity as intrinsic in terms of the idea of his influential justification of morality (and the complex role dignity plays therein).

In relation to his first line of justification, Sulmasy says that 'Consistency is at least a necessary condition of a valid moral argument' but he argues that it is not possible to achieve consistency in our moral arguments if intrinsic dignity (as a fundamental moral value of human being) is to be justified on account of any human attributes or qualities.[320] On the contrary, it necessarily 'leads to gross inconsistencies in our universally shared, settled moral sense'.[321] This is so because there are no two persons in the world who possess the same kind of attributes or qualities as skill, capacity, power, autonomy, intelligence, rationality and so forth and that these are essentially contingent and arbitrary in nature.

For him, if dignity is to be accepted as expressing the equal and universal moral value of human beings, it is imperative to dissociate the idea of dignity from such arbitrary human attributes and instead justify it on something each of us has in common. 'Thus, the argument from consistency claims that fundamental human dignity must therefore be something each of us has simply because we are human.'[322] The one stable thing that all humans have and share is simply being human. All the rest is highly contingent and a matter of arbitrary conventionalism and hence cannot give rise to objective and universally valid moral argument required to justify dignity as intrinsic fundamental moral value pertaining to every person *qua* human being. Being human must therefore be sufficient to say that humanity has a priori intrinsic dignity. Thus,

> No matter what value others may attribute to persons because of properties such as skin colour, or how free they are to do as they would like, they have dignity because they are *somebodies* – human beings. Being somebody; being a human being, is the foundation of the notion of human dignity.[323]

He is also of the view that intrinsic dignity can similarly be justified from the perspective of axiology (theory of value). Axiology, according to Sulmasy, primarily distinguishes between attributed and intrinsic values. Attributed value, which for him also includes instrumental value as one subclass, is described as a value conveyed by a certain external valuer. This clearly entails that 'Attributed

---

See for instance ibid 14–15 (commenting on the idea of moral objectivity and its implication for dignity).

320 In this regard, Sulmasy says that there are basically two options available to us. That is, in 'its fundamental moral meaning, the word 'dignity' can be defined as the value or worth that a human being has either: (a) in terms of some property, or (b) in terms of simply being human'. He rejects the first one as morally inconsistent and untenable and adopts the second one. ibid 13–14.

321 Sulmasy (n 27) 13.

322 Ibid 14. See also Malpas (n 30) 21–22.

323 Sulmasy (n 27) 14–15 (emphasis in the original). Sulmasy notes that the term 'somebody' comes from Martin Luther King, Jr. (which he in turn attributes to his grandmother telling him, 'Martin, don't let anyone ever tell you that you're not a somebody'). It carries the substantive notion of 'a human being'. ibid 14n21 (citing Garth Baker-Fletcher, Somebodyness: Martin Luther King, Jr. and the Theory of Dignity, Harvard Dissertations in Divinity, No. 31 [Fortress Press, 1993], p.23).

values depend completely upon the purposes, beliefs, desires, interests, or expectations of a valuer or group of valuers.'[324] Intrinsic value is, however, different from attributed values in at least two important aspects: first, it is 'the value something has of itself – the value it has by virtue of its being the kind of thing that it is. It is valuable independent of any valuer's purposes, beliefs, desires, interests, or expectations'; second (and because of what it is) it exists objectively and independently of any (role of) external valuer.[325] So something has an intrinsic value not because the value is attributed to it by an external valuer but simply because of what it is as a matter of natural fact or, in his own words, 'by virtue of its being the kind of thing that it is'.[326]

According to Sulmasy, 'if there are intrinsic values in the world, the recognition of the intrinsic value depends upon one's ability to discern what kind of thing it is'.[327] This is precisely the case in relation to 'natural kinds'.

> The fundamental idea behind natural kinds is that to pick something out from the rest of the universe, one must pick it out as a something. This leads to what its proponents call a 'modest essentialism' – that the essence of something is that by which one picks it out from the rest of reality as anything at all – its being a member of a kind. The alternative seems inconceivable – that reality is actually completely undifferentiated and that human beings carve up this amorphous stuff for their own purposes. It seems bizarre to suggest that there really are no actual kinds of things in the world independent of human classification – no such things, *de re*, as stars, slugs, or human beings. Thus, the intrinsic value of a natural entity – the value it has by virtue of being the kind of thing that it is – depends upon one's ability to pick that entity out as a member of a natural kind.[328]

In this regard, he stresses that the underlying logic behind natural kinds is that of extensionality and not of intensionality.

> Importantly, the logic of natural kinds suggests that one picks individuals out as members of the kind not because they express all the necessary and sufficient predicates to be classified as a member of the species, but by virtue of their inclusion under the extension of the natural kinds that, as a kind, has those capacities. The logic of natural kind is extensional, not intensional.[329]

From this follows the axiological definition of dignity as 'the intrinsic value of entities that are members of a natural kind that is, as a kind, capable of language, rationality, love, fee will, moral agency, creativity, and aesthetic sensibility'. For

---

324 Sulmasy (n 27) 15.
325 Ibid.
326 Ibid.
327 Ibid.
328 Ibid 16.
329 Ibid.

Sulmasy, this 'definition is decidedly anti-speciesist' in the sense that 'if there are other kinds of entities in the universe besides human beings that have, as a kind, these capacities, they would also have intrinsic dignity – whether angels or extraterrestrials'.[330]

Thus, in this way, the argument from axiology provides us with an interesting insight as to how we may understand ourselves as species belonging to a natural kind especially by making explicit the basic idea and value of humanity in a more descriptively articulated sense. This does not, however, mean that intrinsic dignity is justified on the ground of possessing certain attributes (which he categorically rejects in the first). On the contrary, the argument simply says that it is only a matter of natural fact that human beings, as a species, possess those general capacities; they are just historical-empirical facts about human 'species' as a member of a natural kind.[331] The description is clearly not meant to be exhaustive but mere explication of some of the (potential) attributes that human beings naturally possess as a species. There is however no suggestion that all of these attributes are or ought to be equally present in each and every member of human species.

Following Nussbaum, who, as seen above, also rejects the predication of dignity on the capacity for rational morality and the artificiality of the distinction between personhood and humanity as animal being, morality is important but it is not the only valuable attribute of our humanity. Thus, in her capabilities approach to social justice, Nussbaum expressly argues against dissociation of rationality (the rational moral nature) from humanity as animal being (that is, humanity as a biological fact) and the differentiation in status and moral values that follows this distinction in Kant's moral theory. As she argues, contrary to the Kantian conception, this approach 'sees rationality and animality as thoroughly unified'.[332] As I understand, Nussbaum suggests that the kind of dignity that ought to be justified as a basic moral value of human being should be rooted in (or at least draw on) the biological fact of our animality as a vulnerable being 'in need of a plurality of life-activities'[333] and in the conception of 'the human being as a political animal' where rationality is celebrated as just one aspect of our dignity rather than as something opposed with it.[334] Ultimately, it should be able to give us the underlying reason for valuing our humanity as such and to guide us (as evaluative normative principle) in the kind of practical actions we ought to take in respect of treating our humanity, that is, our human life as it is, as something worthy of dignity in itself.[335]

---

330 Ibid. George Kateb also adopts similar approach in justifying what he calls the secular conception of dignity of humanity as species. Kateb (n 5).

331 Sulmasy (n 27) 15ff; Gewirth, 'Human Dignity as the Basis of Rights' (n 248) 12–13; Riley (n 24) 131ff.

332 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 159–160. See also Nussbaum, 'Human Dignity and Political Entitlements' (n 261) 356ff.

333 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 159.

334 Ibid.

335 Ibid 70–71, 74–92 & 179–183.Nussbaum, frontiers, 70–71; 74–81; 179–183; see also pp 81–92.

This is the same line of practical thinking that Dworkin also calls for. He suggests that we 'look not to principles that are distinctly political or even moral but rather to principles that identify more abstract value in the human situation'. For Dworkin, the 'more abstract value' that could be found 'in the human situation' is the principle of human dignity, which he states as consisting of two intertwined basic elements: the principle of intrinsic value of a human life and the principle of personal responsibility of each person endowed with this intrinsic value (and it is only the first element which is of particular interest for our discussion here).[336]

Dworkin's first principle, the intrinsic value of human life, is precisely the same as what we have discussed above in connection with Sulmasy's axiological view of dignity as well as with the complementary idea of dignity as a moral value of a person *qua* human person. He argues that the conception of human life as having intrinsic value entails that 'each human life has a special kind of objective value' contained in its 'potentiality' in the sense that 'once a human life has begun, it matters how it goes. It is good when that life succeeds and its potential is realized and bad when it fails and its potential is wasted'. For him, 'this is a matter of objective, nor merely subjective value', that is to say, whether or not a human life has succeeded or failed is a matter of special concern not just to a particular person whose life it is but rather to all of us who have a reason to value life in itself.[337] According to Dworkin, a serious practical reflection on this principle must lead us to the realisation that the intrinsic and objective value of human life is the same and equal for every human being for we cannot offer any objective grounds to argue otherwise.[338] It 'cannot be thought to belong to any human life without belonging equally to all' human beings as such.[339] So we can clearly see that Dworkin's conception does not require us to predicate the idea of dignity as intrinsic value of human being on such grounds as rationality or capacity for moral action. It only asks us to reflect on what we can accept as the most abstract value (principle) that can be identified in the context of a practical human situation through which we all can then say that we have a reason to value a human life as an end in itself; and this turns out to be, at least in his understanding, the dignity of every human being.

So, I have shown the two principal options available to us in thinking dignity as the value of humanity: the one which draws on Kant and the alternative view I have presented above. In my view, it is the alternative view of dignity which should be referred to as the inherent, unconditional, equal and universal moral value of

336 Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (n 208) 9–11 (see generally 9–23). According to Dworkin, 'These two principles – that every human life is of intrinsic potential value and that everyone has the responsibility for realizing that value in his own life – together define the basis and conditions of human dignity, and I shall therefore refers to them as principles or dimensions of dignity'. ibid 10.

337 Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (n 208) 9–17.

338 Ibid.

339 Ibid 16.

humanity through which we can justify and explain the inherent and universal nature of concrete human rights in a comprehensive and coherent manner. The Kantian option cannot help us to do that but would rather lead us in the direction of committing some sort of grave moral inconsistency and relativism unless its premises are revised and accommodated within the second practical conception of dignity.

The implication of the whole argument behind the practical and alternative view of dignity is that humanity, as a natural kind, has an a priori intrinsic value in itself and that it is not necessary for each of its individual members to in fact possess all of the characteristic features or attributes that could be identified or associated with humanity so as to be considered as its full and equal member and by virtue of this have the intrinsic value of humanity. It is sufficient that one is born to human kind in order to have the value he/she ought to have by the logic of the being that he/she is. 'It is not the *expression* of rationality that makes us human, but our belonging to a kind that is capable of rationality that makes us human.'[340] It is simply this natural-empirical fact that settles the question of whether one is human and therefore has human dignity. The (capacity for) rational morality is just one among many characteristic features, aptitudes and capacities that humans may, as a kind, have along with, for instance, compassion, love, care, language, creativity. There is no objectively acceptable reason why one or more of these attributes (say, for instance, rationality or language) should be the only necessary precondition for having the intrinsic value of humanity.[341]

Therefore, I strongly believe that this approach settles the idea of dignity conceived as a priori, inherent and fundamental moral value of humanity on a stable and coherent ground, which is the biological fact of being a human person. The intrinsic value of humanity simply flows from this natural, biological fact – the fact of being somebody, as beautifully stated by Martin Luther King, Jr. – and nothing more.[342] In particular, the understanding of dignity as a priori and inherent (innate, intrinsic, natural, unconditional) value of humanity has far reaching implications for our moral and human rights discourse for it re-establishes humanity and its inherent value as a priori to and transcending over cultural, religious, legal, political or other social institutions. Understood in this sense, it is possible to assert that humanity and its dignity is not and should not be the product of certain form of sociocultural or intellectual conventionalism of some sort. In fact, the argument will be in the reverse order: that is, rather than sociocultural and political systems or conventional values being the determinants of the dignity of humanity, they themselves are required to be subjected to a critical scrutiny against the dignity of humanity. Moreover, this perspective also

340 Sulmasy (n 27) 16.

341 Ibid 15–16; Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (n 208) 9–17.

342 Sulmasy (n 27) 14 n21.

provides significant coherence to other concrete normative principles for it clearly places humanity and its inherent value at the centre of all normative discourses.[343]

As I have stated above, many have already tried to discuss the significance of human dignity in different contexts but not every author agrees with what it actually entails and how we should understand its implications. In my view, the main source of disagreement is rooted in the (re-)construction of the idea of dignity itself. Those who refer to Kant for the justification of dignity and hence human rights cannot help but inevitably end up in some sort of moral inconsistency and useless abstraction of its implications utterly detached from the reality of human life. Unless we approach dignity as pertaining primarily to our biological (physical) existence, any of the arguments we offer to explain its inherent, unconditional, egalitarian and universal nature cannot succeed for it is incorrect according to Kant's original conception and nor can any attempt to justify, on the basis of that conception, the inherent, equal and universal notion of human rights.

But how should we then look at Kant's view of dignity? One option is to abandon altogether and start afresh; the other option is to revise its use and try to accommodate it within a more practical alternative understanding of the dignity of humanity just presented above. I suggest to adopt the revisionist and accommodative approach. The reason for this (which of course I am not going to explain in detail but just state) is that it is wrong to treat Kant's use of dignity in both of his *Groundwork* and *Metaphysics* as the justification of the dignity of humanity in the sense we understand it today. The sole purpose for Kant in these celebrated publications revolves around identifying, justifying and articulating the supreme principle of morality which turns out to be the principle of autonomy (freedom of will). And, Kant actually attributes the value of dignity not to humanity per se but to a specific category of action and the mental disposition connected to it. According to Kant, a rational human being ought to think and act in conformity with a categorical moral imperative which requires that humanity in one's own and in other person be treated always as an end in itself and never merely as a means. A rational human being is, as a rational universal legislator, both and at the same time, the author (originator, subject) and object of the command of this categorical imperative. This however comes not out of fear, coercion, inclinations, impulse or any self-interest or advantage attached to it or even duty but rather out of due respect (awe, reverence) for the command of the moral law originating from within. In short, a rational human being is thought to be at once the subject and object of a moral law that one gives to oneself autonomously, that is, out of own free will.[344]

---

343 That is, in the sense reaffirmed in VDPA (1993) Recital 2 that 'Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms'.

344 Kant (n 232) 4:432–4:441 at pp 44–52.

It is to this and in fact only to this particular way of moral thinking and action, that is, to morality that Kant ascribes dignity: a special, incomparable, inner, unconditional and respect-worthy value. 'Morality,' he says, 'thus consists in referring all action to the legislation by which alone a kingdom of ends is possible' and that 'morality is the condition under which alone a rational [human] being can be an end in itself; because it is possible only by this to be a legislating member in the kingdom of ends'. From this, he concludes that 'morality and humanity, in so far as it is capable of morality, is that which alone has dignity'.[345]

This is, however, not the kind of dignity of humanity that we are talking about today in connection with human rights – it is a different notion of dignity used for different purpose. This in turn shows that it is not Kant who erred in suggesting that we attach intrinsic value to humanity on the basis or because of its capacity for morality but the subsequent conflation and extrapolation of his idea of the dignity of morality with the view of dignity of humanity used as a justification for inherent human rights. This conflation is not only wrong but also commits grave error of interpretation because the idea that it is only morality which has dignity is incoherent with the idea that every human being has inherent and unconditional dignity just by the mere fact of being a (biological) human person. For instance, when one says that Kant's use of dignity is inherent, he/she is actually saying that morality is inherent. And dignity in that context simply refers to the external valuation of the moral action of the rational being – the one who carefully thinks twice before acting. It is with this intermingling of the two different notions of dignity that the problem of conflation and extrapolation starts, ultimately leading us to counterintuitive, morally grave and inconsistent justification of the dignity of human being and the rights thereof as explained above.

So, the call for revision and accommodation here does not concern Kant's use of the notion but rather the subsequent wrong application or usage of his view in the current human rights discourse. To be sure, the function of dignity in Kant's moral theory has a fundamental, noble and complementary role to play in human rights discourse although not as a justification of the dignity of human being and the rights thereof but in providing us with significant insight into how we ought to see and treat each other, both in our private and public (institutional) relations.[346] Generally speaking, no one would deny that morality and moral values have important social functions, regardless of whether one accepts the natural, conventional or other kind of moral theory. But at the same time, it is obvious that the development of moral capacity in individuals requires the affirmative role of the society.[347] In this sense, we can say that the institution

345 Ibid 4:434–4:435 at pp 46–47.

346 This complementarity between dignity of morality and dignity of humanity becomes clearer as we consider the core normative principle signified by human dignity and the concrete implications it entails in practice under subsequent sections.

347 Rawls (n 38) 15–22 & 29–35; Peter Corning, *The Fair Society and the Pursuit of Social Justice* (The University of Chicago Press 2011) 84.

of morality and human rights are close relatives: they both serve certain social ends in a different but complementary angle.

This is precisely the reason I have repeatedly stated that the discussion of the idea of dignity as the inherent value of human being in this Chapter and throughout is quite different from its use in Kant's moral theory (the very reason I have refrained from commenting on it as well). Understood in this way, we cannot, for instance, accuse Kant of denying dignity of humanity to children, persons with mental disability, criminal offenders or anyone who, for whatever reason, fails to fulfil the commands of moral law for he never intended to use dignity in this sense. Thus, Kant must be right in saying that criminal offenders do not have his particular notion of dignity.[348] For Kant, a moral action worthy of dignity is that which is graceful and ought to be celebrated for the action is taken out of admiration and respect for the maxim of law. Thus, if by morality he is speaking of a specific form of moral action, that is, an action taken out of respect for the moral law, it must be true that we cannot celebrate disgraceful, at times, shocking criminal action, nor do we look both at such action and the doer of the action with respect; we rather react with the sense of rejection and condemnation; we even contemplate the kind of punishment that we think should fit (do justice to) the doer's action. In this sense, we are in fact agreeing with Kant that it is the graceful, respect worthy action and behaviour that deserve his special kind of value (in short, dignity of morality) 'for which,' as he says, 'the word *respect* alone makes a befitting expression of the estimation a rational being is to give of it'.[349]

But, as I have argued above, this view is completely different from the idea of human dignity conceived as unconditional and inherent value of humanity qua human being that even the doer of the worst crime possesses just by virtue of being a human person. Thus, while we reject the doer's action and behaviour and contemplate what we consider should be a fitting punishment for the same, we still continue to respect the value of his/her humanity. As a reflection of this, for instance, we should not, at least up on rational reflection, seek the ill-treatment or ill-punishment but should simply seek appropriate justice for the doer of a criminal act. That is, regardless of his/ her conduct, we still ought to respect the intrinsic value (dignity) of the mere humanity of the offender.[350]

The same can also be said in relation to the case of children and persons with mental disabilities. Roughly stated, we do not expect them to reason and act in accordance with the kind of moral imperative enshrined in Kant's moral law. To this extent we can say that Kant's theory of morality excludes children

348 For instance, in *Metaphysics*, he says that 'Certainly no man in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own *crime*, because of which, though he is kept alive, he is made a mere tool of another's choice […].' Immanuel Kant, *The Metaphysics of Morals (Introduction, Translation, and Notes by Mary Gregor)* (Cambridge University Press 1991) AK 330 at p 139 (emphasis in the original).

349 Kant (n 232) 4:436 at pp 47–48 (emphasis in the original).

350 Parent (n 44) 54–56.

and all other persons who lack mental conditions necessary for rational moral action as required by his categorical imperative because they do not have the actual capacity to rationally appreciate and abide by its demands. However, from a human rights point of view, we are required to respect and take good care of vulnerable persons for they have inherent dignity due to their mere humanity just like all other human beings: dignity of humanity is not and ought not to be defined in terms of age, physical or mental (in)capacity.[351]

Therefore, it is evident that Kant's notion of dignity is quite different from the notion of dignity currently used in human rights discourse. This, in turn, means that his notion of dignity cannot be defended as intrinsic, unconditional, egalitarian and universal value of human being through which equal and universal human rights can be justified. In fact, such a conception not only makes the idea of human dignity (and the rights thereof) completely detached from the practical situation of human life in a political society but also validates the position of the critics who deny its relevance altogether.[352] The best alternative perspective I presented above however dissociates the idea of human dignity from all arbitrary attributes such as rationality and rather conceives it as a value inherent in our mere humanity (which indivisibly exists as a biological and moral fact).[353] It is on this perspective that the holistic and universal idea of human rights can be constructed and defended.

## 4.4. THE PRINCIPLE OF HUMAN DIGNITY

The preceding two sections have critically examined the different conceptions of the notion of human dignity as a (moral) value. This section will now discuss the kind of core normative principle associated with it over the course of time and its substantive import for the justification of human rights. The discussion in the preceding sections has, in substance, shown that the notion of dignity is used to show a value attributed to some kind of elevated position.[354] In the aristocratic (rank) conception, this value pertains only to certain individuals (dignitaries) occupying the highest position in the social world whereas in the scholastic and humanistic (status) conception, it pertains to humanity because humanity was regarded as an elevated position in itself in the natural world.[355] Finally, the

351 Ibid.

352 Macklin (n 252); O'Mahony, 'There Is No Such Thing as a Right to Dignity' (n 251); Fyfe (n 252).

353 Parent (n 44) 54.

354 In the rank and status conception, this position pertains to that of social dignitaries (compared to the so-called ordinary persons) and humans (compared to that of nonhumans) respectively whereas in the case of dignity as inherent value of humanity, it pertains to humanity as a whole.

355 See generally, John Loughlin, 'Human Dignity: The Foundation of Human Rights and Religious Freedom' (2016) 19 Memoria Y Civilizacion 316ff; Sensen (n 44); Daly (n 44) 11ff.

conception of dignity as inherent value of humanity embraces the general idea of the status conception but rejects the justifications given for the elevation of humanity as arbitrary and inconsistent.

Having said this, I argue that human dignity won't have any substantive value in legal and human rights theory if there is no normative principle associated with the attribution of value to this elevated position. I believe that this principle can be deduced by closely looking at the objectives sought through such attribution of value to both the social position and humanity. In the aristocratic tradition, the purpose of the attribution was to show the importance and, hence, respect-worthiness of the valued social positions. So, the ordinary people were required or at least expected to show respect (reverence) to the position and persons holding the position (office). In the scholastic/humanistic and renaissance traditions, the attribution had the purpose of extending this respect (reverence) to every human being. This reconstruction was directed at the hierarchical, oppressive and discriminatory socio-cultural and political systems in which ordinary individuals were treated as a property or animal devoid of any moral personality (for example, as the history of slavery shows).[356] Thus, these traditions were specifically aimed at re-asserting and equalising (democratising) the moral respect-worthiness of every human being.[357] If this is so, I believe that the current practical conception of dignity as inherent value of humanity more or less signifies the same normative ideal.[358] Its difference is accordingly not in the objectives sought through the idea of dignity but in the justification of the attribution of the value itself for, as seen above, the current practical conception seeks to ground and re-assert an unconditional respect-worthiness of every human being on the mere fact of being a human person, that is, regardless of the capacity for rational thinking and morality.[359]

This all indicates that, despite the apparent variation in its historical and current usage discussed above, the basic normative principle associated with the idea of dignity has remained constant over the course of time. This turns out to

356 Lewis (n 24); Kateb (n 5); Bernard R Boxill, 'Dignity, Slavery, and the Thirteenth Amendment' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992).

357 See particularly Loughlin (n 355). See also Daly (n 44); Lewis (n 24); Riley (n 24). But in this regard, I personally do not think that they had the current philosophical debate in mind regarding whether animals, nature, etc. should have dignity or not especially in the sense currently debated by animal-rights movement and the right of nature. For arguments extending dignity to animals *see*, for instance, Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Nussbaum, 'Human Dignity and Political Entitlements' (n 261). While it is not necessary to engage with such discussions, I should state that I follow Riley's argument that the argument for dignity (and rights) of animals would entail a quantification and not qualification of the term for the very reason that, as Riley argues, while the concept of 'dignity *simpliciter* is predominantly applied to humans,' the argument to apply 'to [other ordinary] animals, or indeed any other specific group' is 'extending' the concept 'by analogy, not expanding [the substantive essence of] the concept'. Riley (n 24) 131.

358 Hughes (n 248).

359 Riley (n 24); Lewis (n 24); Daly (n 44); Parent (n 44).

be the principle of respect.[360] That is, in whichever way it has been used in the course of history, the ideal of respect remained to be the core conceptual essence and normative principle engrained in the very notion of dignity. This means that, strictly speaking, there is no substantive meaning or relevance of the concept of dignity without the ideal of respect not just in legal and human rights discourse but also in a wider academic debate. In particular, that the notion of dignity signifies the principle of respect unlocks several of the questions involved in relation to its current usage in human rights law. Here, I would like to mention two important points. First, it brings clarity to the questions why and how should a human being be respected in the practical context of the modern socioeconomic, legal and political systems.[361] As seen above, the traditional conception of dignity (in its rank and status sense) tried to give answers to these questions by looking outside humanity (comparing humanity with its social and natural world).[362] Kant had tried to reverse this view by connecting respect-worthiness of humanity with the capacity for morality.[363] But the practical view of human dignity presented and defended above, however, answers these questions by purely looking within humanity itself rejecting all other arguments based on external factors or human attributes as arbitrary and irrelevant. For this view, human beings ought to be respected for no other reason than their mere (bare) humanity. Thus, borrowing from Kant's idea of morality, this view holds that our mere humanity is and ought to be treated as an ultimate end in itself.[364] Seen in this light, human dignity emerges as a basic normative principle through which we can assert an unconditional respect for the inherent value of human being. Based on this, it is possible to articulate the specific legal and policy implications of what respect for the inherent value of human being entails or should entail in practice as will be seen in the subsequent sections and Part two of this study.

Second, it proves the stability (and continuity) of the normative meaning of human dignity, as opposed to what some critics try to argue.[365] That is, it shows

---

360 Neal (n 29); Gewirth, 'Human Dignity as the Basis of Rights' (n 248); Riley (n 24); Kateb (n 5); Parent (n 44) 56ff; Parfit (n 291) chapt 10; Rosen, *Dignity: Its History and Meaning* (n 27) 19ff. 'Th[e] requirement to respect all persons is one of Kant's greatest contributions to our moral thinking.' Parfit (n 291) 233. Parfit adds, 'When Kant explains the sense in which we must always treat rational beings as ends, he claims that such beings have dignity, by which he means a kind of supreme value'. ibid 235. For more on the treatment of the notion of respect see particularly Darwall (n 29).

361 Parfit examines these questions in relation to Kant's notion of dignity of rational beings. Parfit (n 291) chapt 10.

362 For instance, in the rank-based construction of dignity, the reason to respect dignitaries is determined by the underlying sociocultural conventional values. Thus, tribal leaders, royal families or nobilities and clergy men are said to have dignity and on that basis are owed respect. That is, being in that social position generates the right of respect for the status as well as the persona of those occupying it.

363 For more on this, see Kant (n 232) 4:429–4:436 at pp 41–48.

364 See ibid Ak 4:429ff at p 41ff; Parfit (n 291) chapt 10.

365 For a linguistic analysis of human dignity, see generally Doron Shultziner, 'Human Dignity: Functions and Meanings' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007). See also Darwall (n 29).

how its normative meaning has been purified (edified and reified) over the course of intellectual history and being made fitting to (relevant for) the specific socio-legal and political situations of human beings at a given time.[366] This is important because if it were seen as signifying different normative principle over different course of times, then it would have inevitably suggested that what dignity is nothing but in the eyes of the beholder. This, in turn, would have weakened its relevance for the theory of human rights. According to Riley, the '[rejection] of any continuity between "aristocratic dignity" and "contemporary dignity"' would also force us 'to deny that there is any conceptual or normative continuity in dignity claims at all.'[367] In his opinion, such evolutionary construction aimed at showing the existence of complete breakaway between the two notions puts 'us in the position of either accepting radical indeterminacy in meaning (i.e. accepting dignity simply means whatever people say it means), or conversely, stipulating that certain conceptions of dignity should be privileged as primary or definitive'.[368]

## 4.5. THE INFLORESCENCE OF THE PRINCIPLE

The preceding section has dealt with and answered the question how the idea of dignity as a normative concept can and should be understood in theory. In substance, it is argued that dignity implies an unconditional respect for human being. Accordingly, the principle of human dignity is just one and the same as the principle of respect for human being; so, from now on, I will use the two phrases interchangeably. But this still does not clearly explicate its concrete meaning and significance in the practical social contexts in which it is frequently used. Beyond the philosophical discourses regarding its meaning, a claim of respect for the dignity of human being is routinely invoked in almost every corner of social life essentially as a tool of resistance against acts and state of affairs undermining the value of humanity such as torture, murder, oppression, social exclusion, poverty and denial of basic conditions of life.[369] Admittedly, this does not mean that such 'dignity-based claims' always rely on the literal usage of the term dignity in making such assertions. Rather, this section aims to show that while the principle of respect engrained in the notion of human dignity is a generic normative concept, there are varieties of terms, also referred to as 'family

366 Riley (n 24) 133–136.

367 Ibid 119.

368 Ibid.

369 Notable and lively evidence is the invocation of the term by social and political activists against austerity measures following the 2008 economic crisis: from Spain's '*Indiginado*" to Greece '*solidarity*' movement and from the '*occupy*' movements in the Western major cities to the '*Arab Spring*' or '*Arab Awakening*' which, starting in Tunisia, covered most of the Middle East and North Africa countries.

of terms' or 'dignity-languages' through which its specific meanings and imports are further concretised in practice.[370]

So, it is necessary to consider how the theoretical understanding of the principle of human dignity coheres with the practice of dignity-based claims.[371] In this way, it is possible to clarify what the principle of respect for human dignity actually entails in these dignity-based practical claims expressed through the dignity-languages or family of terms to be discussed in this section. Here, the term 'inflorescence'[372] is employed as a central organising concept, a catch-all phrase, to refer to the specific inferences expressed through the apparently distinct family of terms. Interestingly, these family of terms or dignity-languages do not suggest variations in the meaning of human dignity but rather the inflorescence of its core normative principle, the principle of respect. This means that the principle of respect for human dignity unifies and gives substance to the specific assertions advanced through these terms in different context.

But first it should be mentioned that it is Sulmasy who has (as far I know) introduced the notion of '*inflorescent* dignity' as an overarching concept intended to capture the different interpretations or derivations of the central idea of human dignity[373], yet almost all authors in one way or another recognise the idea expressed through this construction.[374] Interestingly, the dictionary meaning of the term 'inflorescence'[375] is defined in a rather exemplary and symbolic way. For instance, the *New Shorter Oxford English Dictionary* provides the primary meaning of the term as 'the mode in which the flowers of a plant are arranged in relation to axis and to each other; the flower of a plant collectively'; its secondary meaning is also stated as 'the process of flowering or coming into flower'. Similarly, the *Mariam Webster Dictionary* (online version) defines it as 'the mode of development and arrangement of flowers on axis; the budding and unfolding of blossoms: flowering'; the *encyclopedic* article from Britannica accompanying this definition further explains its meaning as follows: 'Cluster of flowers on one

370 The phrase 'dignity claims' and 'family of terms' is taken from Riley (n 41) and Parent (n 326) respectively.

371 To this end, the discussion here draws particularly on very helpful discussions by Sulmasy (n 27); Rosen, *Dignity: Its History and Meaning* (n 27); Parent (n 44); Riley (n 24); Kaufmann and others (n 44).

372 This is the term used by Sulmasy while making important distinctions between three different historical conceptions or uses of the idea of human dignity: *attributed, intrinsic,* and *inflorescent*. See Sulmasy (n 27) 12–13.

373 Ibid 12 (emphasis in the original).

374 For instance, Meyer uses phrases such as 'sense of dignity' and 'dignity of virtue'. See Meyer, 'Human Dignity as a (Modern) Virtue' (n 263) 195ff. Rosen in his part identifies four strands of dignity: 'dignity as a valuable characteristic not restricted to human beings, dignity as high social status, and dignity as behavior with a certain respect-worthy character (or indignity as behavior lacking it)' and 'dignity-as-respectfulness'. See Rosen, *Dignity: Its History and Meaning* (n 27) 16, 19, 54, 57–58 & 11–115.

375 This term is said to have originated from New Latin *inflorescentia,* from late Latin *inflorescent, inflorescens,* present participle of *inflorescere* from Latin *in-* + *florescere* meaning to begin to bloom.

or a series of branches, which together make a large showy blossom. Categories depend on the arrangement of flowers on an elongated main axis (peduncle) or on sub-branches from the main axis, and on the timing and position of flowering'.

This being the lexical meaning of the term inflorescent, Sulmasy describes his notion of inflorescent dignity as follows.

> By *inflorescent* dignity, I mean the way people use the word to describe how a process or state of affairs is congruent with the intrinsic dignity of human being. Thus, dignity is sometimes used to refer to a virtue – a state of affairs in which a human being habitually acts in a way that expresses the intrinsic value of the human. This use of the word is not purely attributed, since it depends upon some objective conception of the human. Nonetheless the value itself to which this use of the word refers is not intrinsic, since it derives from the intrinsic value of the human. Aristotle's use of the word is *inflorescent*, as are some of the Stoic usages.[376]

Both the lexical definition of the term 'inflorescence' and Sulmasy's contextualisation of the same into the practical usage of the idea of dignity (inflorescent dignity) are quite illuminating. Thus, as a single seed of a tree form blossoms, masses of flowers, on its branches while remaining fixed to the main axis of the tree, so does the principle of human dignity when used in different contexts: that is, while the overarching abstract normative meaning of human dignity remains the same, the dignity-languages express the specific normative imports that flow from the main 'axis' (the principle of respect for human being) in a given practical context. Put differently, the dignity-languages make it possible to make dignity-based claims in a variety of ways without specifically resorting to the literal usage of the term dignity. And, it is such a usage that the phrase inflorescence dignity is intended to capture as a term of art unifying those usages manifesting the specific normative bearings of the principle of respect for human being in a given practical context.

Seeing the nature of conducts (actions and behaviours) generally expressed through dignity-languages, it is possible to distinguish them into two basic categories. On the one hand, there are family of terms which characterise actions and behaviours that are respectful to the dignity of human being and for this reason can be said to be 'dignified' conducts.[377] The following family of terms describe this category: honour, virtue, humane, elevation, exaltation, sublime, worth, self-determination and the like. On the other hand, there are family of terms which express those conducts utterly inconsistent with and hence disrespectful to the dignity of human being and accordingly regarded as 'undignified' conducts. The following are just some of this family of terms: humiliation, debasement, exploitation, slavery, degradation, dehumanisation, dishonouring, denigration,

376 Sulmasy (n 27) 12.

377 This also goes in line with Rosen's idea of 'dignity-as-respectfulness' mentioned above.

disgraceful, enfeeble, injustice, exploitation, incarceration, torture, rape, exclusion, inhumane, demeaning and impoverishment.[378]

These seemingly distinct but interrelated dignity-languages give specificity and concreteness to the abstract principle of human dignity when it is invoked in a given practical context. It should however be obvious that the elementary logic behind distinguishing conducts into dignified and undignified in relation to a human being essentially rests on the basic moral assumption that there must be a specific way of treatment that is due to the nature of human being and, as a corollary to this, a manner of treatment that is naturally antithesis to its nature.[379] Of course, this assumption in itself is of no practical value unless it is at the same time accepted that human beings in general have the elemental capacity to not only discern but also to make a choice between what is dignified and undignified in their day-to-day activities; if this were in fact not the case, the whole system of morality would rest on a shaky foundation, let alone the argument from human dignity.

Thus, the fundamental moral claim that the principle of human dignity and the family of terms associated with it clearly assert in general is this: that a human being ought to be treated with due and proper respect. As such, it is possible 'to speak of a single concept' of human dignity, on the one hand, and '[its] varying conceptions', on the other.[380] Regarding the relations between these varying conceptions of human dignity, that is, the inflorescence of its meanings and implications, Alexy stated the following. 'The different conceptions are hard to classify – there are no clear boundaries, only, what Wittgenstein called family resemblances: a complicated network of similarities, overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail'.[381] This characteristic feature of the principle of human dignity is very crucial in explaining its essence as a fundamental normative principle. In particular, the discussion in this section regarding its relationship with the variety of concepts referred to as dignity-languages reveals at least the following three important aspects of the principle of human dignity.

First, it shows that the idea of human dignity goes much deeper than it is commonly understood; in particular, it indicates its conceptual richness and

---

378 These are family of terms drawn from different publications on human dignity; I take that they all express the idea of inflorescent dignity as defined here. See particularly, Parent (n 44); Brennan and Lo (n 263); Daniel Statman, 'Humiliation, Dignity and Self-Respect' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Kaufmann and others (n 44).

379 Rosen, *Dignity: Its History and Meaning* (n 27) 57ff.

380 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 233ff; Riley (n 24) 133ff.

381 Alexy, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (n 4) 233 (citing L. Wittgenstein, Philosophical Investigations, trans. G.E.M. Anscombe, 2nd edn., 1958, p. 32; internal quotation omitted).

hence characteristic feature as a foundational norm.[382] Second, it reveals that the principle of human dignity is an evaluative and qualitative normative principle which helps us to distinguish between actions, treatments, behaviours or conducts due to the inherent value of humanity and those which are not; as it is stated above, the guiding principle behind such a moral judgment is the ideal of respect for the inherent value of human beings.[383] According to Rosen, the use of dignity as evaluative term (in the sense of what is dignified) relates the current usage of the notion of human dignity back to its historical usage.[384] Thus, as an evaluative and qualitative norm, the principle of human dignity functions as a tool of resistance against all forms of conducts and practices undermining the inherent value of human beings. This is essentially what underlies Rosen's idea of dignity-as-respectfulness which in turn signifies the moral right of every human being to be treated respectfully and the right not to be treated disrespectfully.[385] According to Chaskalson, 'In a broad and general sense, respect for dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner'.[386] Parent also provides as with equally powerful interpretation of what it means to have human dignity stressing its evaluative character.[387] He argues that 'To possess moral dignity is to be entitled not to be subject to or victimized by unjust attitudes or acts of contempt. It also embodies the right not to be unjustly victimized by contemptuous failures to act.'[388] Following Parent, the moral rights flowing from this ideal of moral dignity serve to prescribe the treatment which ought to and ought to not be due to a human being. They particularly seek to secure certain inviolable space for every human being against 'gratuitous invasion'.[389] And the principle of

> Moral dignity condemns those invasions that involves unfair personal devaluation. In doing so, it establishes a kind of moral inviolability for all human beings. It furnishes each one of us, whether strong or weak, politically powerful or disenfranchised, competent or retarded, and whatever our race, religion, sex, or sexual orientation, with an indefeasible moral standing to protest (or to have protested on our behalf) all insidious attempts to degrade our persons.[390]

---

382 See Chapt 4.7 below discussing different normative function of human dignity. See also Shultziner (n 365) 73–74.

383 Rosen, *Dignity: Its History and Meaning* (n 27) 57–58 & 30.

384 Ibid 30.

385 For full discussion of Rosen on this point, see ibid 54–62.

386 Arthur Chaskalson, 'Human Dignity as a Constitutional Value' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 134.

387 Parent (n 44) 48ff. Parent suggests that the concept of 'human dignity should be understood to be constituted by a particular, especially important moral right. It is a right that secures to each and every one of us an inviolable moral status'. ibid 48.

388 Ibid 62.

389 Ibid.

390 Ibid.

Third, the discussion in this section also shows that the principle of human dignity is practically a relational normative principle. This will be explained in detail in next section but, in short, the ideal of respect engrained in the notion of dignity not only signifies but clearly presupposes a rather dynamic relationship between human beings. This makes the principle of human dignity an essentially relational normative principle fitting for the social conception of human rights discussed in Chapter three above.

Therefore, it can be concluded that the principle of human dignity and the inflorescence of its meaning through different family of terms confirm that the principle of human dignity is characteristically a generic (an abstract) and practical normative principle whose essential meaning is both rooted in and makes sense in the context of concrete and lived experiences of individuals in a political society. This, in turn, establishes it as fundamental evaluative and qualitative normative principle against which the legitimacy (and appropriateness) of the society's socioeconomic, cultural and legal systems vis-à-vis the inherent value of human beings can be assessed and judged.

## 4.6. THE RELATIONAL NATURE OF THE PRINCIPLE AND ITS IMPLICATIONS

Having examined the principle of human dignity and the inflorescence of its meanings in various contexts, it is now time to explore one of its basic features that establishes it as a fittingly foundational normative principle for human rights. In this regard, we have already said that the conceptual connection between human dignity and the idea of respect reveals an important point relevant for our discussion. That is, as opposed to autonomy and equality, the principle of respect for human dignity does not in any way imply the idea of atomised individualism but rather presupposes the existence of deep substantive relationship between human beings.[391] This is so because the very idea of respect presupposes the existence of dynamic and meaningful individual interactions. The person who owes or is owed respect is situated in a complex and multidimensional relationship with other fellow persons.[392] This entails that the principle of human dignity is characteristically a relational normative principle. That is, the moral duty to unconditionally respect each other's inherent dignity can only make sense in the context of dynamic relationship that exists between individuals.[393]

---

391 For instance, Nino compares what he calls the principle of personal autonomy with the principle of human dignity and says that while the former is a static principle the latter is dynamic one. Nino, *The Ethics of Human Rights* (n 135) 176.

392 Carl Cranor, 'Toward a Theory of Respect for Persons' (1975) 12 American Philosophical Quarterly 303–319 (as cited by Darwall [n 46] 37).

393 The essence of the implication of this moral duty is well-recognised by Dworkin who argued that the principle of human dignity compels every human being to a moral duty to see to it that

Several authors have recognised the fact that (the principle of) human dignity signifies or requires the existence of deep and dynamic relationship between individuals. Malpas and Lickiss, for instance, employ the 'topographical' and 'ecological' views of human beings respectively to elucidate this relational nature of the principle of human dignity and the underlying values thereof.[394] In substance, both views seeks to show the practical understanding of human being as having open, complex, dynamic and situated interactions (individually and as species) with the 'self', 'the social' (i.e. with other fellow humans) and the surrounding environment.[395]

The discussion by Malpas particularly concerns the epistemological dimension of human dignity which he explains drawing on Davidson's theory of knowledge who, in turn, is responsible for introducing three types of human knowledge 'that are mutually implicated with one another: knowledge of the self, knowledge of others, and knowledge of the world'.[396] For Malpas, there is more to this 'merely epistemic' constructivism

> since who and what we are is so much bound up with our knowledge of ourselves, and since our knowledge of ourselves is interdependent with our knowledge of others and the world, so who and what we are is itself bound up with our knowledge of others and of the world.[397]

According to him, this is another way of picturing the '"topographical" character of human [being], since one way of understanding the interrelatedness that is at issue here is precisely in terms of a certain form of complex situatedness'.[398] Thus, this topographical view of human beings advanced by Malpas therefore rejects that individuals could meaningfully be viewed as atomised and self-enclosed beings.

> Rather than being somehow self-enclosed and separate, human being has to be understood in terms of his/her particular topos – in terms of the place in which he/she

a human life goes and be successful and should not be wasted. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (n 208) 9–16.

394 See Malpas (n 30); Norelle Lickiss, 'On Human Dignity: Fragments of an Exploration' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007).

395 In their Introductory chapter, Malpas and Lickiss characterise the idea of human dignity as 'conversation', a characterisation intended to especially explicate the relational nature of its practical normative imports (this revealing characterisation literally came out of the nature of the proceeding organized to have a 'genuine conversation' among scholars of wide-ranging disciplines). Malpas and Lickiss (n 21) 5.

396 As discussed and cited by Malpas (n 30) 21. 'It is Davidson's contention that no one of these is possible without the others – knowledge of self, for instance, of one's own attitudes, feelings, and so on, is thus interdependent with knowledge of others and with the knowledge of the world.' ibid.

397 Ibid.

398 Ibid (internal citation omitted).

> finds himself/herself – a topos or place that is formed through the interactions between individuals and groups of individuals, between individuals and the environments and things that surrounds them, and between individuals and themselves.[399]

According to Malpas, these complex topographic relations thus described have wider implications not just in relation to our epistemic lives but in relation to our entire ethical lives as well. More generally, it is possible to say that this view helps us to picture human being and its basic institutions such as language, ethics, morality and knowledge from the relational point of view.[400] Here, it is particularly interesting to see the relational nature of human dignity that emerges from this view, as Malpas clearly explains in the following text. Thus, he argues that

> If human being is indeed relational … then human dignity will, in turn, be similarly relational in character. What this means, first of all, is that dignity will play out across the three dimensions of relationship that are at issue here: there is a sense of dignity that obtains in terms of the sense of worth that we have in relation to ourselves, a sense of dignity that we have of ourselves in relation to others, and so also a sense of the worth of others in relation to ourselves, a sense of the worth of ourselves in relation to the wider world, and of that wider world as it stands in relation to us. That dignity is expressed here in terms of 'relation to' should not be taken to suggest that the dignity at issue does not belong to anything 'in itself', but rather that dignity always and only appears as something standing within a wider structure of relations since only then does something even appear.[401]

This, in turn, means that the principle of human dignity as relational normative principle is essentially concerned with how one ought to act and live in relation to other fellow human beings in a society. As Malpas and Lickiss state,

> Dignity is not an idea abstracted from human action, but has life only in the actual relations between human beings. Dignity is, in the end, evident only in the concreteness of human life and practice and the extent to which our life and practice can be seen as enabling of human dignity is perhaps the best measure of its humanity.[402]

Lickiss, in her part, presents the 'ecological' conception of human beings in the context of healthcare where she stresses the important role of the interpersonal relationship between a patient and physician.[403] As she argues, the idea of care, the

---

399 Ibid.

400 Ibid. Malpas here provides the conception of ethics that emerges from this and argues that most of our key ethical notions can only make sense in the context of the complex dimension of human relations.

401 Ibid 22.

402 Malpas and Lickiss (n 21) 5.

403 Lickiss (n 394) 35–41.

foundation of practical human science like medicine, primarily entails the idea of interpersonal relationship. Ensuring an effective care however requires that this relationship be established on the practical understanding of the person and his or her sociocultural environment. And Lickiss argues that a human being 'is a relational reality'.[404] As such, he or she is related not only to the internal self (one's inward environment) but also to the external world defined by its complex cultural, phenomenological, context.[405] The interpersonal relationship established on the appreciation of this complex situatedness plays a significant role in preserving the 'internal cohesiveness', the dignity, of those who are in the vulnerable positions like a patient suffering from severe pains. It is ultimately the value of this human relationship predicated on the idea of care that gives dignity its dynamic and living idea. As she interestingly puts it, 'Dignity is embedded in life's dynamism'.[406]

> Human dignity, the living idea, may be manifest in action, but that action is not, in the last analysis, directed inwards, but outwards, in relationship, even in surrender. Absolute autonomy may [be] the antithesis of dignity, the self-locked in (truly no exit). Human dignity, therefore, maybe incorrectly conceived as a static entity, or property, but rather as process, always a becoming and moving to what is not yet… as is life. Dignity is embedded in life's dynamism.

Therefore, the topographical and ecological conceptions of human being clearly underscore the relationality of humanity as well as the normative values underlying the principle of human dignity – this view is clearly in stark contrast with the one which sees human beings as self-enclosed, individualistic beings defined by their static relationships. That is, they provide us with interesting insights into the relationship between the relational conception of human beings and the principle of human dignity. Not only this, the topographical and ecological conceptions also play an important role in addressing the epistemological and axiological questions often raised in connection with the practical implications of the principle of human dignity.[407] One is that these conceptions signify the imperative nature of human (social) relations.[408] This is so because it is simply impossible for anyone to avoid participation in social relations: a child begins to make interactions with its surrounding environment no sooner than it is born to the social and physical world. Relationality is both an indispensable and inescapable attribute of humanity: that is, there is no one who can avoid social relations and at the same time be able to live as a human being. Human relationality involves, inter alia, a complex and substantive understanding of each other, that is, mutual recognition of each other's

404 Ibid 33ff.
405 Ibid 32–35.
406 Ibid 35.
407 In this regard, I draw on and follow Riley' useful discussion (see the discussion in the following pages).
408 See Chapt 3.4 above.

interests and values. This in turn gives dignity its practical and dynamic meaning. Following Malpas, for instance, one recognises his own dignity and the dignity of others via the complex interaction we make with ourselves, other persons and the wider cosmic world; the sense of value that we attribute to ourselves and others and the environment is the result of this highly intertwined relationship.[409]

In addition to the discussion by Malpas and Lickiss, the epistemic problem surrounding the notion of human dignity can also be further clarified by considering the relationship between human dignity and human body as well-captured in Riley's interesting analysis.[410] He says that 'We predominantly know dignity through the body. […] Dignity asserts the inviolability of the body'.[411] In this regard, it is possible to identify two basic aspects of the human body particularly relevant in the general normative discourse. In one sense, the body represents the biological, physical, constitution of humanness; it is the factual aspect of what it means to be human. Accordingly, it denotes the empirical or physical personality of a human being. This, in turn, plays a significant role in settling, to a great extent, the alleged epistemic problem associated with human dignity. That is, the body, being a mirror of what it means to be human, enables us to have a pictorial understanding of what dignity or indignity entails in the practically relevant sense of the term.[412] Because of this, we know and are able to know what actions or conducts are undignified and therefore prohibited or ought to be prohibited and what is required or ought to be required vis-à-vis a human being and vice versa. In other words, the reflexive function of the human body makes it possible to recognise and make sense of factors antithetic to the inherent dignity of human being in concrete terms such as pain, degradation, humiliation, insult, hunger, poverty, sickness, oppression and torture.

In another sense, the human body also functions as the 'site of normativity'.[413] This signifies the moral personality of human beings, that is, as beings with rights and obligations.[414] In this sense, the body represents a moral aspect of humanness and therefore denotes a moral personality of a human being. Moral personality, in essence, consists in the moralisation and hence idealisation of the factual personality of a human being through the system of rights and obligations. Accordingly, we are able to understand the practical bearings of such normative ideas as freedom, right, autonomy, responsibility, etc. by picturing the way they stand in association with the physical personality of a human being. So, the normative idea of a human body entails some sort of the concretisation and idealisation of a human being as

409 Malpas (n 30) 22.
410 Riley (n 24).
411 Ibid 132.
412 Ibid.
413 Ibid.
414 Riley here chose to discuss this in terms of the juridical concept of a person but for the purpose here there is no reason to limit the discussion to the juridical domain for the body also plays the same function in the moral domain as well. In fact, it is possible to argue that the juridical construction of the person is an extension of what it means to be a person in the moral sense of the term. Cf. ibid.

it represents humanness as consisting of both the physical (biological) and moral personalities. Human dignity as the inherent value of a human being therefore pertains to both the physical and moral aspect of humanness. As such, it asserts an unconditional and undivided respect-worthiness of a human being as it denies the division or gradation of these two aspects of human personalities.[415] For instance, it does not make sense to talk of the moral respect-worthiness of a human being in dissociation from his or her physical (biological) conditions and vice versa, for neither is possible without the other. Accordingly, the principle of human dignity signifies not only the moral and physical respect-worthiness of a human being but also the fact that its core normative demand (an unconditional respect for the inherent value of a human being) cannot be realised without ensuring due and proper respect for both aspects of humanness.

This practical understanding of a human being as particularly expressed through the topographical and ecological conceptions, and the normative function of the human body is crucial in explaining the relationality of the principle of human dignity for it gives clarity to the idea of respect, mutual recognition and attribution of values. It expresses not only how we see ourselves individually but also how we are related to other fellow human beings and the physical world. As Malpas argues, 'Who and what we are is not determined solely by our existence as independent beings, but is instead intertwined with the being of those others in relation to whom our lives are shaped, as well as with respect to the wider world in which our lives are played out.'[416] We see ourselves not only in relation to and in the eyes of ourselves but also in relation to and in the eyes of other fellow persons and vice versa. Most importantly, it is also another way of speaking about the unity of humanity and hence the universal imperativeness of the principle of human dignity. We ought to attribute the same value that we attribute to ourselves to our fellow persons; to treat in the same way as we would like to be treated by others, for we all possess within our person the same inherent and inalienable value by virtue of our mere humanity.

One may, however, simply reject the unity of humanity expressed through the practical understanding of human dignity and instead hold the gradation of dignity on such factors as wealth, religion or culture. In that case, one has to also face at least Nino's logic of 'performative contradiction' or Gewirth's 'principle of generic consistency'.[417] That is, one who rejects the unity of humanity established through the practical idea of human dignity must be able to show why he has dignity but not others; why his dignity is more important than that of others; and how his dignity is different from that of others. But, in my opinion, this is simply an inconceivable

415 Ibid 132–133; Parent (n 44) 62–64. In the words of parent, 'Moral dignity condemns those invasions that involve unfair personal devaluation. In doing so, it establishes a kind of moral inviolability for all human beings'. ibid 62.

416 Malpas (n 30) 20.

417 See generally Nino, *The Ethics of Human Rights* (n 135); Gewirth, *The Community of Rights* (n 3); Alexy, 'Discourse Theory and Human Rights' (n 1).

project to pursue.[418] As already argued above, the idea of human dignity conceived as the inherent value of a human being does not take such arbitrary and contingent factors into account. The 'dignity that belongs to a human life' cannot 'be accounted' on any other grounds than the 'worth of a human life which is given only through the articulation of that life in relation to self, others and world.'[419] That is why it is simply impossible to consistently and validly deny the relatedness of humanity and the universal imperativeness of the principle of human dignity. According to Malpas, 'inasmuch as human dignity is tied to human beings, then one's own dignity cannot be separated from the dignity that belongs to others'. By necessary implication, 'To treat one human being as without dignity is potentially to deny the dignity of every human being, even one's own, and so one may even say that an assault on the dignity of one is an assault on the dignity at all'.[420]

This view of human dignity as signifying human relatedness gives concreteness to its core normative principle (the principle of respect) by placing its importance in the context of complex and dynamic social relations between individuals. As Malpas argued, 'it is precisely the need to be attentive to human worth that is at the centre of ethical thought and action' which, in this case, entails the need to be 'attentive to the complex relatedness in which all human life consists; a relatedness that encompasses ourselves, the others with whom we live, and the wider world'.[421]

This attentiveness to the inherent value of human being as required by the principle of human dignity further elucidates the relational (social) conception of humanity which, as argued in Chapter three above, not only attributes an intrinsic moral value to human life but also strives to respect, protect, preserve and promote the same. The practical expression of humanity's attentiveness to the inherent value of human being should essentially consist in ensuring unconditional respect for those biological and moral conditions (needs) of life indispensable to live a dignified human life. These, in turn, concern basic material and moral conditions of life which must be fulfilled as a matter of respect for the inherent value of human being. So, the idea that the principle of human dignity asserts an unconditional respect-worthiness of every human being gets its substantive and practical meaning in relation to these material and moral conditions of human life. As explained above using the normative function of human body, the lack of these material and moral needs essentially destroys the dignified existence of a human being. This implies that, in order for a political society to comply with the basic requirements of the principle of human dignity, it is essential that every member of the society be guaranteed (has access to) these conditions of life, both in theory and in fact. It is practically impossible for the state and society to show respect for the inherent value of human being without ensuring these conditions at an adequate level.

---

418 Alexy, 'Discourse Theory and Human Rights' (n 1) 214.

419 Malpas (n 30) 23–25; Sulmasy (n 27) 13–17. According to Malpas, 'The question of human dignity is surely inseparable from the question what it means to be human'. ibid 19.

420 Malpas (n 30) 23.

421 Ibid 25.

It will briefly be noted in the following section that these material and moral conditions of life are now recognised in positive international law in the form of what has generally become economic, social, cultural, civil and political rights. But generally speaking, while those basic material conditions of life are legally guaranteed through ESC rights regime, those basic moral conditions of life are guaranteed through civil and political rights regime. And, interestingly, both regimes expressly provide that these conditions are an undivided constitutive elements of a dignified human life, that is, a life wherein all of its material and moral conditions are available to an adequate level. This, in other words, means that the various kinds of human rights currently guaranteed through different international positive law are nothing but specific articulation of what the principle of human dignity entails for a political society in concrete legal terms. As such, both civil and political rights, and ESC rights are justified upon and hence equally drive their normativity and substantive content from the principle of human dignity.[422] Hence, ESC rights are equally constitutive elements of a dignified human life which must be realised as a matter of respect for the inherent value of human being.

In conclusion, this section has addressed two important points. First, it has explained the normative character of the principle of human dignity especially by using the topographical and ecological conception of human beings, and the empirical and normative function of human body. It emerged from the discussion that the principle of human dignity is essentially a relational normative principle whose core normative demand gets its substantive meaning in relation to the intuitive understanding of what it means to be a human being and in the context of practical and dynamic human relationship. Second, it has also shown that from this conception of human dignity necessarily flows a general moral obligation to recognise (value) and be attentive to the inherent needs of human being which, in concrete terms, consists in ensuring basic material and moral conditions of life required to live a dignified human life.

## 4.7. ITS NORMATIVE FUNCTIONS IN PRACTICE

So far, the discussion in this Chapter has addressed the theoretical conception of the meaning and implications of (the principle of) human dignity. This section now examines the way the principle of human dignity is recognised in the general international human rights law and some national jurisdictions and the principal normative functions assigned to it. This will supplement the insights and perspectives gained through the theoretical analysis of the term in the preceding sections as well as provide important basis for the analysis of international ESC rights case law in the next chapters. It particularly identifies three interrelated uses

422 See particularly Section 4.7.1 below.

of the principle of human dignity in (international) positive law: as a foundational (constitutive) and regulative norm and as an absolute human right; these are, in turn, found to be expressive of and hence consistent with its normative meaning and implications seen the preceding sections.

### 4.7.1. AS A FOUNDATIONAL NORM

As generally implied through the preambles of UN Charter and UDHR, some of the socioeconomic conditions antecedent to the creation of the United Nations and UN human rights systems were antithetic to a dignified human life especially because of the scale of war, violence, systematic extermination, repression, colonisation, starvation and poverty. The creation of UN and other subsequent global and regional human rights institutions was aimed at countering the recurrence of such state of affairs and practices and ensuring respect for the inherent dignity and rights for all members of humanity.[423] In other words, reaffirming faith in the dignity and inherent rights of human beings was the *raison d'etre* of the new world order envisioned by international community through the UN and its human rights institutions and other regional human rights systems.[424] Chaskalson underscores this point as follows:

> The UN Charter, reacting to the horrors of the recent war, articulated aspirations for a new world order in which things would be different. It went beyond affirming faith

[423] See Arieli (n 42); Klaus Dicke, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Chaskalson (n 386); Thaddeus Metz, 'African Conceptions of Human Dignity : Vitality and Community as the Ground of Human Rights' (2012) 13 Human Rights Rev 19; Daly (n 44).

[424] See Marcel Brus, 'Social Sustainable Globalisation and International Law: In Need of a New International Constitutional Balance' in Eva Nieuwenhuys (ed), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill 2006) 146–148. Also, according to Arieli, there was no other normative principle other than human dignity to effectively reflect the rejection of the past practices and instead install the beginning of new hope and value systems of the world embodied by the new Organisation (the UN). Arieli (n 42). Of course, an argument could be made against this reading of the object and purposes of the UN and other regional institutions. For instance, one may say that the primary interests of the then states were the creation of peace, protection of national sovereignty and economic growth. It is possible to respond to this argument with a question: what is the value of all these without a human being? The discussion in the previous sections about the principle of human dignity and its practical implications however clearly accommodates all these and many more of them but it expressly rejects an attempt to attach an independent value to anyone of these. Seen in the light of the practical conception of human dignity, peace, security, democracy, rule of law, economic growth and social progression are all integral part of what ensuring respect for human dignity entails. They are necessary means to the ultimate end as Spijkers interestingly puts: 'A world in which the intrinsic human dignity of all the world's citizens is respected and secured is a better world for all.' Otto Spijkers, *The United Nations, the Evolution of Global Values and International Law* (Intersentia 2011) 352.

> in human rights and dignity. It required, also, from all member states that adopted the Charter, a pledge to promote respect for, and observance of, human rights and fundamental freedoms and to take joint and separate action in cooperation with the United Nations for the achievement of this purpose.[425]

Spijkers, who carried out an in-depth study of the evolution of global values through the architecture of the United Nations Systems, also confirms this point when he states that the 'importance of universal respect for the global value of human dignity' was established against such a background of the dehumanisation of 'the entire groups of people' that the world witnessed at the time of WWII. 'Just after the war,' Spijkers writes, 'there was some dispute about the exact interpretation of the value, and […] about the best way to secure its promotion and respect. But there was no objection to the value itself. The basic idea that all human beings had to be treated with dignity precisely because they were human beings, was universally accepted'.[426]

In my opinion, this clearly speaks to the foundational role of the principle of human dignity which can be explained by referring to several of the constitutive acts of the principal international organisations, various international human rights treaties and other legislative and adjudicative practices of relevant international institutions. In this regard, the UN Charter is recognised as being the first international instrument providing human dignity as a foundational norm.[427] This does not however mean that the idea of human dignity was entirely new to international law but rather to state that the UN Charter was the first in assigning this crucial normative status and function to the principle of human dignity as far as positive international law is concerned.[428] This function can be seen as the recognition in the positive law of the meaning and practical implications of the principle of human dignity discussed above: that is, asserting an unconditional respect for the inherent value of human being. This in practical terms entails that everyone must have available to him or her all those essential material and moral conditions indispensable to live and lead a dignified human life. To this end, the removal of socioeconomic and other conditions antithetic to a dignified human life is indispensable. This, in turn, requires the presence of necessary legislative, institutional and policy measures within a given system.

---

425 Chaskalson (n 386) 133–134.

426 Spijkers (n 424) 352.

427 Dicke (n 423) 111ff; Chaskalson (n 386); Jochen Abr Frowein, 'Human Dignity in International Law' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 121–123.

428 See for instance, Frowein tracing the historical role of the notion of human dignity in international law back to the early 16th century discussions of Spanish school of thought in relation to whether conversion of Indians to Christianity was justified. Frowein (n 427); Chaskalson (n 386). See generally Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999); Spijkers (n 424).

This was essentially the promise provided in the Preamble of the UN Charter as partly stated below.

> We the peoples of the United Nations determined *to save* succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and; *to reaffirm* faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and; *to establish* conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and; *to promote* social progress and better standard of life in larger freedom;

These dignity-based Charter promises were since then reaffirmed in many subsequent international treaties, particularly in all human rights instruments adopted at the UN and regional level. For instance, Spijkers observed that the UN General Assembly 'has been very consistent and explicit in its use of human dignity as the source of all human rights'.[429] The most important human rights instrument in this regard is the Universal Declaration of Human Rights (UDHR). Here, it suffices to see how human dignity is provided in the Preamble and Article 1 of the UDHR which expressly state the core values and principles inspiring the formulation of its substantive provisions. Its Preamble partly provides that

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, peace and justice in the world, [w]hereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people … [w]hereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, … the promotion of universal respect for and observance of human rights and fundamental freedoms … proclaims [the declaration and the freedoms and rights constituted therein] as a common standard of achievement for all peoples and all nations.

And, Article 1 of the same partly provides that 'All human beings are born free and equal in dignity and rights'. Its Article 2 further underscores the implication of this grand principle enshrined in Article 1, that is, by virtue of being equal in dignity and the rights flowing therefrom, 'Everyone is entitled to all the rights and freedoms set forth in [the] Declaration' and to this extent there can be no distinction or exclusion of any kind be made between human beings in relation

[429] Spijkers (n 424) 456 (and generally chapt 6). He also notes that 'The idea that human dignity constitutes a universally shared foundation of the human rights movement has also been accepted in the literature.' ibid.

to the enjoyment of those rights and freedoms flowing from the inherent human dignity. And these statements of principles enshrined in the UDHR have been consistently reiterated in the binding human rights treaties. In particular, the Preamble of the ICESCR reaffirms the foundational function of the principle of human dignity as follows.[430]

> States Parties to the present Covenant,
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [r]ecognizing that these rights derive from the inherent dignity of the human person, [r]ecognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, [c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms […]

Some authors argue that the proclamation of human dignity as a foundational norm of the new international legal order embodied by the UN clearly marked a fundamental breakaway (at least a promise to do so) of humanity from its past. In particular, it is said to represent the rejection of the antecedent ideologies, values and practices, on the one hand, and the advent of new values concerned with ensuring respect for the inherent rights of mankind.[431] According to Arieli, 'Standing on the threshold of twenty-first century, one is permitted to say that the conception of humanity as expressed by the [UDHR] has become the only valid framework of values, norms and principles capable of structuring a meaningful and yet feasible scheme of national and international civilized life.' For him, 'no other ideological frameworks could have become the basis for the reconstruction of the world community' than the principle of human dignity. But human dignity is able to function as such especially 'because the inherent justice and equity of its human message as well as its seemingly self-evident truth defined in the meta-language of rational categories of universal generalizations bestowed upon it a particular force of persuasion'.[432] Drawing on Klein, we can therefore say that this foundational function of the principle of human dignity provides a

---

430 The same is also true with ICCPR which recognises the foundational nature of the principle of human dignity in similar words as ICESCR except the minor difference in terms of the order of reference to the specific rights at the third Recital as can be seen in the next sentence. 'Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying *civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights*'. (emphasis added).

431 Chaskalson (n 386) 133–134.

432 Arieli (n 42). See also Brus (n 424) 146–148.

new legitimacy basis for international and national legal systems regarding the realisation of fundamental human rights for all.[433]

It is the same function (and vision) of human dignity that was recognised in the founding instruments of the respective regional organisations. For instance, the Preamble to the Statute of the Council of Europe (although it did not literally refer to human dignity) states that the Contracting Parties were concerned with 'the preservation of human society' through the provision of basic conditions of life which, in turn, form integral elements of human dignity. Hence,

> The Governments of [the Contracting Parties],
>
> Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation; Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy […][434]

The Charter of the former OAU and the new AU Constitutive Act also provide similar statements to this effect. Thus, the Preamble to the OAU Charter states that the Heads of African States and Governments

> Conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples […] [c]onvinced that, in order to translate this determination into a dynamic force in the cause of human progress, conditions for peace and security must be established and maintained […] [p]ersuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States […][435]

---

433 Dicke (n 423). As just seen, this is particularly true in relation to all international human rights instruments adopted at the UN and regional level which in one way or another recognise the dignity of human being as the foundation of not only inherent human rights but also of justice and peace in the world and for the ultimate realisation of the ideal of free human beings enjoying basic biological and moral conditions of life.

434 Preamble of the Statute of the Council of Europe, *CETS No. 001*. To this end, Art 3 of its Statute particularly states that 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms […].'

435 These are more or less repeated in the Constitutive Act of the new continental organization but with further additional purposes and principles. In particular, the AU Constitutive Act provides respect for democratic principles, human rights, the rule of law and good governance, promotion of social justice to ensure balanced economic development; and respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities as among its core organizational principles. See Art 4 (m – o) the AU Constitutive Act.

Similarly, the Preamble to the Charter of the Organisation of American States (OAS), to the extent relevant here, states the following:

> Convinced that the historic mission of America is to offer to man a land of liberty and a favorable environment for the development of his personality and the realization of his just aspirations […] [c]onfident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man; [p]ersuaded that their welfare and their contribution to the progress and the civilization of the world will increasingly require intensive continental cooperation; [r]esolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm; [c]onvinced that juridical organization is a necessary condition for security and peace founded on moral order and on justice […]

However, it is worth noting that these international instruments are essentially not concerned with providing a lexical definition of what human dignity is but rather with the creation, promotion and preservation of a legal, social, economic, cultural, political and institutional environment in which a dignified human life is universally possible for every human being. That is, in order to respect and ensure a dignified life for every human being, it is necessary that States parties and all other relevant actors respect and guarantee, jointly and severally, the equal and inherent rights of everyone, the rule of law, democratic participation, constitutionalism, peace, social justice as well as just political, economic, and social order.[436] Thus, we can say that the idea of 'Respect for human dignity' envisioned through these instruments 'encompasses a broader area' in which complex international and national socioeconomic, political and legal actions should be taken. This, in turn, indicates that human dignity functions not only as a *raison d'etre* of each of these global institutions but also as an ultimate aspirations and achievements for all nations in the world.[437]

Furthermore, various national legal systems expressly provide human dignity as the foundational norm.[438] According to Chaskalson, the value of human

---

436 Brus (n 424) 138–147.

437 Brus (n 424); Dicke (n 423); Arieli (n 42). In fact, human dignity and the values thereof has already been defended in detail by some authors as constituting the core of international public policy. See Myres S McDougal, Harold D Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980).

438 See particularly Eckert (n 258); Duwell and others (n 291) chapts 36 through 46 (discussing the place of human dignity in various national constitutions or legal systems); Riley (n 24); Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (n 248); Rao, 'Three Concepts of Human Dignity in Constitutional Law' (n 248); Daly (n 44); Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (n 248); David Kretzmer, 'Human Dignity in Israeli Jurisprudence' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International

dignity constitutes an underlying new normative framework of the new South Africa which represents, on the one hand, a breakaway from its old discriminatory, demining, degrading and exclusionary system of apartheid and, on the other hand, a new constitutional order based on the respect for the inherent rights and freedoms of its citizens.[439] The same is also true with respect to the German Basic Law which erects human dignity as a foundational constitutional principle. In relation to this, many argue that the recognition of human dignity in such a foundational manner is a clear evidence to the fact that the Basic Law constitutes a new legal order built upon the fundamental value of human dignity.[440]

Besides this, international and national human rights jurisprudence also confirms this normative function of human dignity. For instance, Carozza observed that the practice of jurisprudential cross-fertilisation in the adjudication of human rights issues around the world is essentially predicated upon the principle of human dignity and this, in turn, has given rise to the emergence of global *ius commune* of human rights.[441] Interestingly, the discussion by Carozza and other authors confirms that the function of human dignity as a foundational norm is regardless of whether or not it is expressly recognised as such in a given positive law system because it is itself regarded as a 'suprapositive norm'; that is, as an assumed fundamental norm from which the legitimacy of a modern (positive) legal system itself flows.[442] According to Carozza, in particular, there is clear evidence as to the existence of a transnational judicial dialogue predicated upon the understanding of common humanity and human dignity. And 'clearly the real centre of gravity of the global jurisprudence is in the affirmation of the dignity of the human person and the principle that human rights law exists to protect that dignity'. This does not however mean that judicial cross-fertilisation solely concerns issues of human rights or dignity. It is rather to say that the intensity is much stronger when cases involve inherent human dignity and rights. 'In every region, and in almost every case,' he argues, 'the courts' language shows that their capacity to compare with, and to borrow and benefit from, the jurisprudence of

---

2002); Chaskalson (n 386); Henkin, 'Human Dignity and Constitutional Rights' (n 248); Parent (n 44); Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013); Henry (n 248).

439 Chaskalson (n 386) 139.

440 Eckart Klein, 'Human Dignity in German Law' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002); Eckert (n 42).

441 Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (n 248); Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 251). See also Paolo G Carozza, 'Human Rights, Human Dignity and Human Experience' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

442 The term 'suprapositive norm' is coined by Neuman to signify that the normative value of human dignity goes beyond the fact of being posited by a specific provision of a positive law. For more on this, see Neuman (n 50).

foreign legal systems has the most traction when it grips the ground of human dignity'.[443]

The principle of 'Human Dignity in this way serves as the basis for the "suprapositivity" of borrowed principles of human rights'. Thus, 'By appealing to the principle of human dignity, courts establish the basic ground of commonality and comparability of their decisions with those of courts in other jurisdictions, despite whatever other differences may exist in their positive law or political and historical context'.[444] The implication of this is pretty clear and, at the same time very powerful, especially in relation to the point under consideration. As Carozza argues,

> More generally, then, we can reasonably say that the normative force of the transnational jurisprudence we have examined is premised upon the recognition of the common humanity of all persons. The universality of this sentiment, in principle, complements and supports the transnational character of the discourse and practice, and consistently provides a justification for courts to take foreign sources into account despite constraints of constitutional form, historical contexts, or political and social practice. The courts treat the idea of human dignity as the common thread to be followed across all those contingencies. In doing so, they never suggest that a dignified, human life means anything fundamentally different in the otherwise variable contexts of different cases. To put this idea in another way, it is very clear that one of the strongest, most central foundations of the transnational jurisprudence of human rights in these cases is the recognition of our common humanity, our shared human nature.[445]

This suprapositive (that is, the foundational) function of human dignity can also be explained with reference to Touri's view of the structure of modern legal system.[446] Touri characterises modern law as a 'multi-layered' normative system.

---

443 Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (n 248) 24. This is contrasted with other forms of judicial borrowing, i.e. 'Cases comparing the formal language of constitutions and statutes, or comparing the pragmatic experiences of criminality and deterrence, for instance, stand out because they are exceptions to that rule'. This is, however, different when foreign materials are invoked in relation to the principle of human dignity. Thus, 'when courts invoke foreign sources, we see a familiar pattern, a movement from the formal aspects of a case to the general principles in play and specifically to the concept of human dignity' to the effect that 'those cases within a global jurisprudence that most fully and directly invoke the foundational principle of human dignity tend to be relied upon more frequently and fully by other courts'. ibid.

444 Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (n 251) 932–933. *Cf.* McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 248).

445 Carozza, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (n 248) 24. In his intervention in the debate between Carozza and McCrudden, Riley, while generally accepting the substance of Carozza's conclusion, however seems to suggest that this should not mean the shared understanding of the ontological, epistemological or axiological meaning of dignity but it is the grammar of dignity that led to such global consensus regarding the normative function of human dignity. See Riley (n 24) 121.

446 Kaarlo Tuori, 'Fundamental Rights Principles: Disciplining the Instrumentalism of Policies' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006) 33–51.

That is, 'Law, as a symbolic normative phenomenon, does not consist merely of the surface level of explicit, discursively formulated normative material, such as statutes and other legal regulations, and court decisions; it also includes "deeper," sub-surface layers, [which is referred to as] "the legal culture" and "the deep structure of law."'[447] According to Touri, the difference between these levels or layers of the modern legal system could be assessed in terms of, inter alia, the rates of change that each layer undergoes. Touri notes that 'the surface is the level of incessant movement, caused by ever new regulations and decisions; the legal culture also evolves, but according to slower rhythm; and finally, even the deep structure, although constituting the most stable layer in law, is not immune to change'.[448] Touri also identifies three essential elements of his 'deep structure,' the sub-surface level of modern law which he refers to them as: conceptual, methodological and normative elements. The 'Normative elements consist of the most fundamental principles characterising modern law'; and, without going into details, it is mainly, if not only, constituted by the 'fundamental-rights principles'.[449] As Touri explains, the main characteristic feature associated with the sub-surface level is its function as the constitutive and regulative principle and as censorship of the surface-level legal practices – such as law-making, adjudication and application practices.[450]

Interestingly, the foundational function of the principle of human dignity can analogously be identified with all the layers of Touri's modern law though in a complex way. For the purpose of this discussion, his idea of deep-level normative element, especially the function that he identifies with this level, is particularly revealing because it can be equated with the idea of the suprapositive function of the principle of human dignity. Similar to what Touri argues about the deep-level of his idea of modern law, the principle of human dignity determines the legitimacy of the surface level legal practices.[451] In this way, I argue that it brings a critical dimension to the modern legal system by indicating to us the kind of actions, argumentations or interpretations that ought to be prohibited, required or permitted vis-à-vis the inherent value of human being. This, without doubt, is the basic function that the modern international law assigns to the principle of human dignity. Thus, as a principal foundational norm, the principle of human dignity stands as an underlying justification of the new world order constituted on the universal recognition, protection and promotion of inherent human rights and as a suprapositive normative principle against which the legitimacy of the socioeconomic, cultural, political and legal systems and values of the world should be assessed.

447 Ibid 42.
448 Ibid.
449 Touri, p. 42. And, for Touri, the difference between the modern law and traditional law could essentially be explained by the specificities of their respective deep structures. ibid.
450 Tuori (n 446) 43ff.
451 Ibid 43–44.

### 4.7.2. AS A REGULATIVE NORM

The regulative function of human dignity means that it serves as an evaluative and qualitative normative principle through which the legitimacy of various social practices in a society can be assessed. This function is particularly critical with regard to the practical implementation of human rights where the sphere of individual freedom of action and legitimate state intervention are in constant flux. As a regulative norm, the principle of human dignity points to the limits of the legitimacy of State actions in relation to the inherent rights of human beings by prescribing an absolute limitation on State actions and indicating the boundaries between permissible and impermissible spheres of actions for its legislative, executive and adjudicative functions.[452]

Admittedly, one may find difficulty in clearly maintaining this distinction in practice but it is crucial especially in clarifying some of the inconsistencies and confusions concerning the principle of human dignity and its relationship with specific human rights that it gives rise to. This is so because simply declaring the principle of human dignity as an absolute norm may not fully express its holistic essence especially when invoked as a justification of certain rights of a relative nature. But the central guiding idea behind this distinction seems to be that the more closely related a given interest (right) to the core aspect of the dignity of human being, the less justified it is to balance that interest or right against some kind of public policy measures whatsoever. Thus, to the extent that the interest or right in question concerns an indispensable minimum level of material and moral conditions of life, the principle of human dignity can be considered as signifying an absolute requirement and as such precluding any kind of balancing against the interest or right under question. In other cases, the principle of human dignity requires the fulfilment of particularly weighty reasons to override the inherent rights of a human being.[453] It is essentially this idea that coherently explains the hierarchical structures underlying the right to life, the right to be protected against torture, inhuman and degrading treatment, the right to privacy and the right to be protected against poverty and social exclusion.

This regulative function of human dignity can also be illustrated using Riley's idea of 'internal' and 'external' critique that it brings to the legal system.[454] First, human dignity introduces important 'internal critique' to a legal system by pointing to a certain minimum substantive requirements that a just legal system

---

452 Frowein (n 427) 123–124.

453 For more on the idea of balancing of fundamental rights, see generally Alexy, 'Balancing, Constitutional Review, and Representation' (n 30); Cali (n 30); Fredman (n 30).

454 See Riley (n 24) 129–131. 'In the light of this we can not only separate dignity as a positive norm and as a normative heuristic, but even more fundamentally, *as a normativity located within and without law.* Such a division is no doubt conceptually problematic, but it does serve to distinguish functions and phenomena which themselves point to an origin which is not legal normativity or legal positivity.' (emphasis mine). ibid 129.

must meet in order to be compatible with the requirement of unconditional respect for the inherent value of a human being. We have already said that the principle of human dignity asserts unconditional respect for both the biological and moral being of a human person. To this extent, the principle of human dignity functions as an internal evaluative critique to the (adequacy of) legal, institutional and policy measures which ought to be adopted for the realisation of these material and moral conditions of life within a given legal system. Second, it also functions as an 'external critique' to a legal system. That is, it imposes an absolute limitation on the scope of the State's legislative, executive and judicial authority vis-à-vis the inherent values of human being; in other words, it provides us with an ideal standard for demarcating a normative boundary which the state should never be permitted to cross.[455]

Some critics argue that this limiting function of the principle of human dignity is characteristically undemocratic for it inhibits legitimate public policy debates under the guise of its claim of absoluteness.[456] However, this is a mistaken view because by pointing to the boundary between what ought and ought not be permitted in relation to the inherent value of human being, the principle of human dignity enables us to assess and judge, that is, to critique the legitimacy of public policy measures. This, in turn, furthers the continued validity and legitimacy of social and democratic values in a political society rather than undermining them. Of course, this does not suggest that this ideal cut-off point envisioned by the principle of human dignity is always clear to everyone. Nevertheless, reference to the regulating function of human dignity definitely makes it clear that there is a necessary limitation with respect to society's conversation regarding such issues as legality and socio-political legitimacy.[457] Therefore, it can be concluded that the critical normative dimension that human dignity brings to the legal system as an internal and external regulative norm is important particularly in guaranteeing the effective protection of inherent human rights by enabling us to evaluate and judge the normative contents and legitimacy of a given legal system and practice.

### 4.7.3. AS AN ABSOLUTE HUMAN RIGHT

In addition to being a foundational and regulative norm, human dignity is also recognised as an absolute human right in its own right. This flows from its basic feature as qualitative and evaluative principle just discussed above. As already argued, the ideal of respect engrained in the notion of human dignity makes it possible for us to distinguish between dignified and undignified conducts vis-à-vis the inherent value of a human being. This, in turn, suggests that there is a treatment

455 Ibid 129–131.
456 Fyfe (n 252) 11 (citing Robin Gibbins).
457 See particularly Riley (n 24) 131–132.

or behaviour which is naturally due to a human being as well as that antithetic to the same. In other words, the principle of human dignity asserts that a human being ought to be treated in a certain manner: that is, as a bearer of a supreme, inalienable and inviolable moral value, every human being ought to be treated with due and proper respect. This, in essence, is another way of stating that every human being has an unconditional moral right to be respected or to be treated humanely or respectfully. Thus, according to Rosen, there are two aspects to this most basic right: one is the right of everyone to be treated with dignity or the right to a dignified treatment; the other, in fact, the corollary of the former, is the right not to be treated disrespectfully, i.e. in a manner contrary to one's inherent dignity. Understood in this way, the right to dignity is typical of an absolute human right as it goes to the inner most and inviolable core of a human being that one possess just by virtue of being a human person; we can also say that it is the substantive core of all other inherent human rights.[458]

Human dignity as an absolute right has been well-recognised both in human rights law and jurisprudence. For instance, Rosen refers to Article 3 paragraph 1(c) of the Geneva Convention III which asserts an absolute prohibition of 'outrages upon dignity, in particular, humiliating and degrading treatment'. This, in other words, means prohibition of 'violations of dignity, exemplified by humiliating and degrading treatment'.[459] For Chaskalson, this right to be treated with dignity is neither new nor is it recognised only under international law.[460] 'To legal systems based on Roman law, the concept of dignity as a right is not strange. Roman law treats dignity as a right of personality, and provides civil and criminal remedies for its infringement'.[461] According to Klein, the function of dignity in German Basic Law clearly goes beyond its foundational value for it is also recognised as a basic right in its own right.[462] In particular, he notes that the Federal Constitutional Court 'expressly qualifies [the Basic Law's] phrase "the dignity of man shall be inviolable" as a legal right'.[463] This, states Klein, is the same as saying that 'Everybody has the right to his or her inviolable dignity'. Thus, Klein argues, the fundamental 'right to human dignity is the right not to be treated in specific ways. It is a modal right.'[464] Similarly, Kretzmer shows that the right to dignity is well-recognised in the jurisprudence of the

458 Rosen, *Dignity: Its History and Meaning* (n 27) 57–61. He argues that 'a right to dignified treatment is potentially a universal right' but his analysis clearly shows that this right without doubt admits no form of exception in that it belongs to every human being irrespective of who he or she is and how one behaves in a society: 'everyone – even those of us who don't have a moral strength to behave in a dignified way when we are faced with moral challenges – should be treated 'with dignity.' They should be treated 'with respect' – that is, most importantly, they should not be treated disrespectfully by being humiliated or degraded'. ibid 60.

459 Ibid 60.

460 Chaskalson (n 386) 134ff.

461 Ibid 135.

462 Klein (n 440).

463 Ibid 147.

464 Ibid 152.

Israeli Supreme Court. According to Kretzmer, the Court clearly 'regards the right to human dignity as a specific right that exists alongside other classic rights, such as the general right to personal liberty, the right to property, freedom of movement, and the right to privacy'.[465] As already seen above, the foundational and regulative functions of the principle of human dignity do not automatically suggest its absoluteness. But the right to be treated with dignity (humanely, respectfully) establishes an absolute and inviolable core of other basic human rights precluding any sort of balancing or compromise whatsoever. As such, it can be said that, borrowing Riley's terms, the right to dignity is a 'peremptory' and 'conclusory' right from which the legal system should not be allowed to derogate under any circumstance.[466]

In summary, this section has distinguished and discussed three basic ways in which the principle of human dignity is being used in modern (international) positive law and jurisprudence. First, human dignity is enshrined as an overarching justification of both the institutional structures and specific human rights. Second, it is used as a standard of legitimacy against which the practices of the States and other actors are evaluated. Third, it is also recognised as an absolute human right. All these functions of the principle of human dignity identified in this section are essentially reflective of (and consistent with) its characteristic feature as the most basic, relational and an evaluative normative principle examined in detail in the preceding sections.

## 4.8. CONCLUSION

The main task of this Chapter was examining whether and in what manner the idea of human dignity provides a viable justification for ESC rights guaranteed under international law. To this end, it has examined in detail three major points in relation to human dignity. First, it has explored its different conceptions and the arguments offered in favour of these conceptions. Second, it has identified its core normative principle and the nature and implications of the same both generally and for the justification of human rights. Third, it has analysed the way it is being used in (international) positive law and jurisprudence. In relation to the first point, having shown its historical-philosophical conceptions as rank and status, and as the inherent value of humanity and the critical limitations in these conceptions, it was argued that the justification of human dignity as inherent value of humanity and foundation of specific human rights should be approached in the light of the practical-intuitive understanding of the nature of human being. This practical approach reveals that humanity is constituted of two inseparable beings (and hence personalities), that is, the moral and biological (physical) beings (and personalities). This necessarily implies that dignity as

465 Kretzmer (n 438) 169.
466 Riley (n 24) 131–132.

inherent value of humanity pertains equally and at once to both aspects of our humanity. This leads us to the second crucial point of this Chapter, that is, the implication of this conclusion for the normative principle signified through the notion of human dignity. In this respect, it was shown that, despite the presence of different conceptions over the course of time, the core normative principle engrained in the very notion of human dignity has remained to be the principle of respect which, in turn, generally asserts an unconditional respect for the inherent life and value of every human being. It was argued that this ideal of respect should be construed as pertaining both to the biological and moral aspect being human. Interestingly, it was seen that the one who owes and is owed respect is a human being situated in the context of practical social relations. So, the principle of human dignity is essentially a relational normative principle in the sense that it gets its full substantive meaning in the context of dynamic and mutual relationships that naturally exist between human beings in a political society. As such, it prescribes how human beings ought to see and treat themselves in relation to the three dimensions of human life in social relations: the self, the social and wider environment. And the principle of human dignity injects a fundamental moral imperative to this relationality of humans by requiring them to see and treat themselves with due and proper respect. From this also follows the evaluative and qualitative nature of the principle of human dignity through which the legitimacy of actions and behaviours in the society can be scrutinised vis-à-vis the inherent value of human beings. Admittedly, this construction of the principle of human dignity can lead us to several legal, institutional and policy arguments but for the purpose of this study, it was held that respecting and ensuring the inherent life and value of human being essentially consists in ensuring those indispensable moral and material (biological) conditions of life required to live a dignified human life. As these moral and material conditions of life are now recognised and articulated in the form of specific human rights under international human rights law, the States parties also bear a compelling (international) legal obligation to ensure the same for every human being within their jurisdictions. To this extent, the argument from the principle of human dignity and the specific human rights recognised in international law does not suggest any form of hierarchy between the moral and material conditions of life. As such, the status and implications of ESC rights guaranteeing those material conditions of life are generally the same as that of civil and political rights providing for those moral conditions of life, for both human rights regimes drive their normative essence and substantive content from the principle of respect for the inherent life and value of human being. This conclusion is also supported by the specific normative functions of human dignity recognised in international human rights law and jurisprudence, the third major point discussed under this Chapter. For instance, it was seen that its foundational and regulative functions give a justification and legitimacy basis for the socioeconomic, legal and policy measures aimed at the realisation of a

life of dignity for every member of human society. And as an absolute human right (the right to be treated with due respect), human dignity can also be seen as providing for a peremptory normative basis through which we can continue to insist and argue for the unconditional obligation of the State to realise the minimum essential core of each of the substantive human rights inherent in our humanity. Having said all this, what remains to be seen is the specific contents of the State's legal obligation to respect and ensure the material conditions of life required to live a dignified human life. This will be the topic for Part two of the study.

# PART TWO

# THE LEGAL OBLIGATIONS OF THE STATE UNDER ESC RIGHTS IN THE LIGHT OF INTERNATIONAL ESC RIGHTS JURISPRUDENCE

# A BRIEF INTRODUCTION TO PART TWO

Part one of this study has dealt with the problem of the conception and justification affecting the human rights status of ESC rights. In substance, it argued for the social conception of human rights which can be justified on the basis of the principle human dignity. In particular, it argued that the principle of human dignity asserts an unconditional respect for the inherent life and value of human being which, in practical terms, means respecting and ensuring the inherent biological (material) and moral conditions required to live a dignified human life. Now the main purpose of this Part is examining the specific legal obligations the State in relation to the realisation of the material conditions guaranteed through ESC rights regime by taking international ESC rights jurisprudence as a subject of inquiry. The investigation in this Part is based on the understanding that international human rights law imposes on States parties the generic obligation to respect and ensure the free, full and effective enjoyment of all human rights within their jurisdiction. This is a generic international legal obligation assumed by all the States parties to a given human rights convention that applies to all the rights therein.[467] It is a broad

[467] Customarily these obligations are stated in the preamble and the first two or three paragraphs of international human rights instruments. For instance, see African Charter on Human and Peoples Rights (ACHPR) and the protocols there to; American Convention on Human Rights (ACHR) and the protocols there to; the European Convention on Human Rights (ECHR) and the protocols there to; European Social Charter (1961) and The Revised European Social Charter (1996); ICESCR and related UN treaties protecting ESC rights including UDHR and CRPD. See also ICCPR, CERD, CEDAW, CRC and CPMW. While it is to be recalled the academic distinction between negative and positive State obligations, tribunals have, however, clearly rejected such a distinction in practice stating that the generic obligation to secure the free, full and effective enjoyment of all human rights has wide-ranging implications on the part of the State and that the distinction between negative and positive obligation is only a matter of context than a substance. See particularly *Airey v. Ireland (Application No. 6289/73), Judgment of 9 October 1979*, paras 25–26; *López Ostra v. Spain (Application No. 16798/90), Judgment of 9 December 1994*, para 51. This obligation has also been well-recognised and emphasised by all human rights monitoring bodies particularly in connection with the scope of the State's obligations under the respective human rights instruments. Thus, for ECtHR, see for instance, *Al-Dulimi and Montana Management Inc. v. Switzerland (Application no. 5809/08), Judgment of 26 November 2013; M.S.S. v. Belgium and Greece (Application No. 30696/09) [GC], Judgment of 21 January 2011; Rantsev v. Cyprus and Russia (Application No. 25965/04), Judgment of 7 January 2010; D.H. and Others v. the Czech Republic (Application No. 57325/00), Judgment of 13 November 2007; Orsus and Others v. Croatia (Application No. 15766/03) [GC], Judgement of 16 March 2010;* for

obligation covering a wide-range of legal, institutional and policy measures that States should take in order to give effect to the rights they recognise within their jurisdictions.

The IACtHR has interpreted the generic human rights obligation of the State in terms of the obligation to respect and ensure (guarantee) the free, full and effective exercising and enjoyment of all human rights without any kind of discrimination.[468] The obligation to respect signifies the limitations on the power of the State party which, in turn, 'derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State'.[469] The obligation to ensure or guarantee 'implies the duty of the States party to organize all the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[470] It particularly 'requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights'.[471] This also means that 'any exercise of public power that violates the rights recognized by the Convention is illegal'.[472] So 'Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention'.[473] Similarly, the African Commission also considers that the generic obligation of the States parties enshrined under Article 1 of the African Charter entails the duty to take specific measures necessary to give effect to the rights and freedoms within their domestic legal system. Per the Commission, if any State party neglects its generic obligation to secure the rights recognised in the Charter,

---

IACtHR, see *Case of Velásquez-Rodríguez v. Honduras, merits, judgment of 29 July 1988; The 'Street Children' (Villagran-Morales et al.) v. Guatemala, Merits, Judgment of 19 November 1999 (hereafter 'Street Children' v. Guatemala); The Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgement, 17 June 2005; Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 29 March 2006; Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment 27 June 2012 (hereafter Sarayaku v. Ecuador); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 24 August 2010; Ximenes-Lopes v. Brazil, Merits, Reparations and Costs, Judgment of 4 July 2006; Baena-Ricardo et al v. Panama, Merits, Reparations and Costs, Judgment of 2 February 2001;* for African Commission on Human Rights, see Communication 368/09: *Abdel Hadi, Ali Radi & Others v Republic of Sudan, decision on merits, 54th Ordinary Session of the African Commission on Human and Peoples' Rights, 22 October to 5 November 2013 (hereafter Abdel Hadi et al v. Sudan); Communication 279/03–296/05: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan (joined) (hereafter Darfur case v. Sudan); Communications 147/95 and 149/96 (joined), Sir Dawda K Jawara / The Gambia, decision on merits of 11 May 2000 (hereafter Jawara v. Gambia);*

468 *Velásquez-Rodríguez v. Honduras,* paras 164ff.

469 *Velásquez-Rodríguez v. Honduras,* para 165.

470 *Velásquez-Rodríguez v. Honduras,* para 166.

471 *Velásquez-Rodríguez v. Honduras,* para 167.

472 *Velásquez-Rodríguez v. Honduras*, para 169.

473 *Velásquez-Rodríguez v. Honduras*, para 169.

it in itself would constitute an independent violation of the Charter, even if the State or its agents are not the immediate cause of the violation.[474]

The generic legal obligation to secure all human rights is recognised in human rights case law as constituting the bedrock of the States' international human rights obligations: that is, any claim of the violation of a specific human right always directly entails an alleged violation of the generic legal obligation of the State to respect and ensure the effective realisation of the right in question.[475] Thus, while this generic legal obligation also gives rise to other concrete and specially aggravated (heightened) human rights obligations in relation to the specific rights and needs of vulnerable persons, every State bears the obligation to design its legislative and institutional measures necessary to ensure and give effect to the rights within its jurisdiction just by virtue of being party to a given human rights convention.[476] In fact, international human rights courts and monitoring bodies now consider that the failure to adhere to this generic legal obligation in itself constitutes an independent violation by the State of its international *erga omnes* human rights obligations.[477]

However, the problem is that the scope of the State's generic legal obligation is essentially determined by the substantive content(s) of each of the rights recognised under a given human rights convention. This is basically the critical challenge raised against the nature of the State's obligations flowing from ESC rights recognised under international human rights law. That is, for some, the

---

474 *Communication 295/04: Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe, merits, 51st Ordinary Session, 18 April to 2 May 2012 ((hereafter Noah Kazingachire et al v. Zimbabwe),* para 141 *(citing also Commission NDL v. Chad Communication 74/92,* para 20*).*

475 See *Velásquez-Rodríguez v. Honduras*, para 162 stating, 'Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) [to respect and ensure all rights and freedoms] of the Convention has also been violated'. See *Ireland v. UK*, paras 238–241, discussing the significance of Article 1 particularly stressing that it is one of the many provisions attesting the binding character of the Convention, setting apart the Convention undertaking from other classic treaties by requiring the States to secure the rights and that its violation flows automatically from failure to secure one of the substantive rights guaranteed in the Convention. See *Abdel Hadi et al v. Sudan*, para 91 where the AfCoHPR held, 'a violation of any provision of the [African] Charter [on Human and Peoples' Rights] by a State Party automatically engages its responsibility under Article 1'. See *Jawara v. Gambia*, para 46, stressing the fact that 'Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore, a violation of any provision of the Charter, automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter'.

476 *Velasquez-Rodriguez v. Honduras, para 166ff; Yakye Axa Indigenous Community v. Paraguay,* para 61ff*; Sawhoyamaxa Indigenous Community v. Paraguay,* para 109ff*; Ximenes-Lopez v. Brazil,* para 170–174. See *Abdel Hadi et al v. Sudan*, para 191–192; *Noah Kazingachire et al v. Zimbabwe,* para 140–142.

477 See for instance, the '*Street Children' v. Guatemala*, para 235; *Five Pensioners,* paras 136–137 (citing also *Magna (Sumo) Awas Tingni Com*, para 113; *Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment of February 6, 2001,* para 136–137; *Sarayaku v. Ecuador*, para 261).

way these rights are formulated in the relevant treaties such as the ICESCR indicates that they are programmatic rights which only give rise to contingent and discretionary policy measures as opposed to compelling legal obligations.[478] The present study has nevertheless argued in the previous chapters that the nature of ESC rights (as it is also true with all other human rights) essentially ensues from the underlying normative principle upon which they are justified: the principle of human dignity. It was particularly shown in Chapter four that the principle of human dignity signifies the generic obligation to respect and ensure the inherent life and value of human being which, in turn, entails the obligation to ensure indispensable moral and material (biological) conditions required to live a dignified human life. The substantive ESC rights recognised under international law are designed to provide everyone with legal entitlements to those critical material (socioeconomic) conditions of life. These material conditions are indispensable constitutive elements of the conception of a dignified human life which should be secured for every person as a matter of respect for the inherent life and value of every human being.

The major question that remains to be discussed in this Part is, therefore, the kind of concrete legal obligations the State bears for the realisation of these critical material conditions of life guaranteed through ESC rights and the way these obligations are specifically reflected or addressed in the jurisprudence of international human rights courts and monitoring bodies. The discussion in this Part accordingly aims to provide an in-depth and systematic analysis of international ESC rights jurisprudence with the view to see how international human rights courts and monitoring bodies entrusted with the mandate to adjudicate ESC rights claims have given effect to the generic legal obligations of the State in practice.

To this end, the investigation in this Part had started with an extensive review of ESC rights case law of the European, African, Inter-American and UN human rights systems so as to identify how the respective human rights courts and monitoring bodies have generally approached the adjudication of these rights. On the basis of this review, their approaches were thematised and restated in terms of specific legal principles so as to present the discussion in a systematic and coherent manner. In this regard, the principal approach of this Part was discussing all the relevant ESC rights cases available before each of the human rights courts and monitoring bodies under consideration. However, some exceptions to this principal approach had to be accepted. First of all, when it is practically impossible to discuss all cases due to the large number of cases decided by the specific human rights bodies (e.g. ECtHR); it may also be not necessary as often the decision in a given case may merely repeat and apply the principle(s) already established in previous jurisprudence. In these situations,

478 See for instance, Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (n 2).

the discussion was limited to the landmark cases and recent judgments of the tribunal concerned. Furthermore, some judgments are delivered in the languages other than English and that the English translation of the case was not available at the time of the research. In such a case, the researcher had referred to the case summary offered by the respective court so as to at least appreciate its general finding(s) and conclusion(s) and mitigate the gaps this might create on the overall conclusion of this study.

Although the main target of the Part two of this study is international ESC rights case law from across jurisdictions, reference was also made to some relevant general comments, resolutions and reports in order to compliment the discussion of the case law. In particular, reference was made to the general comments of the UN human rights committees, the resolutions of the UN Human Rights Council, and the reports of the UN Office of High Commissioner for Human Rights, UN Secretary General and the Inter-American Commission on Human Rights. These additional materials were particularly important in shedding more clarity on the contents of and in showing the general orientation of the respective jurisdictions in relation to each of the topics discussed in this Part. While it is not the interest of this study to make any judgement on their normative values, it is important to note that the general comments have been used as authoritative sources of interpretations of human rights provisions. The reports referred to in this Part provide a general overview of the jurisprudence of the relevant human rights courts, monitoring bodies and, at times, some national jurisdictions concerning their respective topics. Both the resolutions and reports were also helpful in providing us with the general state of the law and what the international community consider to be the responsibility of the State under the relevant topics.

All the cases discussed in this Part are selected from the respective court's or monitoring body's database using different technics and strategies. The European Human Rights Database provides the option to search cases using relevant treaty provisions also by combining it with different other search options such as the level of importance of the case and date of the judgement. The ECtHR and ECSR also publishes guides to certain provisions and case digests respectively. The researcher accordingly applied all of these options in order to identify the relevant cases for the study. Particularly, in relation to the ECtHR's jurisprudence, Articles 2, 3, 6, 8 and 14 are key provisions through which socioeconomic rights and claims are often adjudicated before the Court and these are accordingly the focus of this study in searching and selecting the Court's cases. In relation to the case law of the ECSR, the researcher scanned through each of the cases one by one as the Committee has decided only few cases so far. The UN human rights database also provides us with the option to search for cases using the specific treaty provisions and human rights (treaty) body or the combination of both. The African Commission's database provides us with the option to search for cases using specific provisions of the African Charter on Human and Peoples' Rights.

Again, for there were only few relevant cases decided by the African Commission and the two most important UN human rights committees with the mandate to adjudicate ESC rights claims within the UN system (the Committee on ESC Rights (CESCR) and Committee on the Rights of Persons with Disabilities (CRPD)), the researcher adopted the same strategy employed in relation to ECSR. In addition, the researcher relied on relevant provisions of ICCPR (e.g. non-discrimination, equality, participation, prohibition of torture, inhumane and degrading treatment) in finding the relevant cases of the UN Human Rights Committee dealing with ESC rights issues. With respect to the Inter-American human rights system, the researcher, first, relied on the academic works (books and journals) and the relevant thematic reports of the Inter-American Commission on Human Rights (IACoHR) in order to get an overview of the Court's general approach to ESC rights claims[479] and, then, went through each of its judgements one by one to select the relevant cases for the discussion in this Part.

The review of the relevant international ESC rights case law and the identification of the general patterns cutting-across the approaches of each of the courts and monitoring bodies under consideration, has led to the conclusion that, in the context of ESC rights, the legal obligation of the State to ensure the material conditions of life has two major constitutive dimensions: procedural and substantive. The procedural dimension deals with due process (procedural justice) guarantees flowing from ESC rights. Under this dimension, three core procedural principles are identified and discussed: participation, access to justice and accountability. The substantive dimension concerns essential minimum (irreducible) guarantees flowing from ESC rights. Under this dimension, four core substantive principles are identified and discussed: dignified life, equality and non-discrimination and the protection of vulnerable persons. As far as this study is concerned, these seven principles essentially summarise the core principles developed over the course of time by international human rights courts and monitoring bodies regarding the State's legal obligations flowing from international ESC rights recognised under international law.

In each of the chapters below, these principles are identified, restated and analysed taking into account the background behind each case and the corresponding arguments and findings of the respective human rights court or monitoring body. For instance, a given case may concern a complaint of an

479 This was because there is a general impression that the IACtHR does not (or has refused to) directly deal with ESC rights. Although this might have been true during the earlier periods of the Court, recent academic discussions however clearly document significant changes to the Court's approach. The cases and analysis in this study overwhelmingly confirms that the Court's approach has in fact been generating landmark judgments and rich jurisprudence in the area of ESC rights claims. For instance, it is the Inter-American Court of Human rights which for the first time had come up with the notion of the 'the right to dignified existence' as necessarily including ESC rights which the State must realise for every person within its jurisdiction as a matter of respect for inherent life and dignity of human being (see Chapt 8 below).

alleged violation of the right to health. But it is clear that the right to health, like all other human rights, is an abstract right providing for bundles of freedoms and entitlements which, in turn, can be stated in terms of specific procedural and substantive rights. Getting to the heart of the matter requires one to investigate the background leading to the (alleged) violations of the right under consideration and the specific legal analysis and conclusion(s) of the court or monitoring body. The outcome then can be evaluated in terms of the procedural and/or substantive principles required to respect and ensure the material conditions of life signified by the underlying principle of human dignity. Following this approach enabled a systematic and coherent analysis of international ESC rights jurisprudence in this Part of the study.

On this basis, Part two argues that, in relation to ESC rights, satisfying the concrete demands of the principle of human dignity (that is, respecting and ensuring essential material conditions of life) practically consists in guaranteeing: the right to participate and have a say in the decision-making processes (Chapter five), the right to have access to and obtain effective remedy (Chapter six), the right to have effective mechanisms through which the State agents and other actors can be held accountable (Chapter seven), the right to essential threshold level of material conditions of life commensurate with the ideal of dignified human life (Chapter eight), and the direct provision of essential minimum material conditions of life for the vulnerable persons both as a matter of priority and on the basis of the principles of equality and non-discrimination (Chapter nine). This reconstruction of the State's concrete legal obligations for the realisation of ESC rights (as having both procedural and substantive dimensions as civil and political rights) counters the dominant perception that ESC rights are merely contingent programmatic rights. In essence, the procedural and substantive principles identified and discussed in this Part confirm that ESC rights are predominantly about ensuring due process guarantees and in certain specific contexts also concern substantive legal obligations to ensure certain outcomes for those vulnerable persons as a matter of respect for the inherent life and value of every human being.

# CHAPTER 5
# PARTICIPATION

## 5.1. INTRODUCTION

This Chapter discusses the right to participation as one of the procedural dimensions of the State's obligation to ensure the inherent material conditions of life guaranteed through ESC rights regime. To this end, it examines how the right to participation has been recognised and approached in international ESC rights case law and its specific significance in ensuring the substantive ESC rights required to live a dignified human life. It will be seen that guaranteeing this right is regarded as a critical element of the State's obligation to realise ESC rights both generally and for the vulnerable members of the society such as minorities, women, children, indigenous peoples and persons with disabilities. In particular, this Chapter will show that the right to participation is indispensable in reaffirming the equal and inherent dignity of all vulnerable persons. To this end, it will focus on those major international ESC rights cases in which the right to participation (in the sense described below) is directly or indirectly involved, and on other soft laws available especially in the practices of UN human rights bodies.

## 5.2. THE CONCEPTION OF PARTICIPATION

Traditionally the right to participation was considered as falling under the category of civil and political rights; even then the focus has been on the narrow notion of participation in the electoral process. However, it will be seen below that the right to participation[480] not only constitutes an integral element of ESC rights enshrined in various international human rights instruments[481] but also a fundamental prerequisite for the effective realisation of ESC rights as well.[482]

480 It should be noted that the term participation is a broad concept and includes such notions as consultation, constructive (meaningful) engagement and the right to be heard which therefore has wide-ranging applications beyond participation in the electoral processes.

481 See Arts 21(1–3) and Art 27(1) UDHR; Art 25 ICCPR; Arts 1, 2, 4, 13 & 15(a) ICESCR; Arts 13 & 22 ACHPR; Art 23 & 26 ACHR; Art 14 Ad-Prot. ACHR; Art 45 (c, d, f, g) OAS Charter.

482 For instance, HRC, General Comment No. 25 and CEDAW, General Recommendation No. 25; Shue (n 2) 71–78; Fredman (n 30); Nussbaum, *Froniters of Justice: Disability, Nationality*

It is also regarded as one of the most important human rights establishing the indivisibility and interrelatedness of all human rights.[483] It has been defended as one of the universal basic human rights[484] and central human capability needs flowing from human dignity.[485] The right to participation is essentially a procedural right but with fundamental substantive implications. It seeks to guarantee the right of everyone to take part and have a meaningful say in a decision-making process affecting one's rights or interests. As such, it does not directly concern itself with achieving a certain predefined outcome of a process much less it prejudges the specific content(s) of the outcome concerned. It rather concerns the manner and process of arriving at a certain outcome or decision. Accordingly, the principal and most relevant question that arises in relation to the right to participation is the extent to which those affected by a certain socioeconomic, policy, administrative or political decision have or have had a reasonable opportunity to effectively take part in and have a meaningful contribution to the relevant decision-making process concerned.[486] It should however be noted that, in human rights law, the essence of the right to participation puts heavy emphasis on its effectiveness (that is, constructive or meaningful participation) as opposed to mere formal participation. As the following discussion shows, in order for the right to participation to be effective, it is essential that the process and manner of participation should be accompanied by certain essential minimum guarantees. While the specific implications of each of its elements may have to be assessed in terms of the specific context in which it is applied, it is necessary that a given participation in a decision-making process should adhere to the following constitutive elements: it should be relevant to a proposed decision, timely, transparent, respectful to the rights and dignity of the persons concerned, meaningful, conducted in good faith (i.e. with the view to constructively engage the participants and arrive at a fair and just solution) and in accordance with a

*and Species Membership* (n 114) 77ff; Gewirth, *The Community of Rights* (n 3) chapt 8; Gould, *Globalizing Democracy and Human Rights* (n 90).

483 See HRC General Comment No. 25; CEDAW General Recommendation No. 25; CRC General Comment No. 12; *European Roma Rights Centre (ERRC) v. France (Complaint No. 51/2008), decision on merits of 19 October 2009* (*hereafter ERRC v. France* (*Complaint No. 51*); *Centre on Housing Rights and Evictions (COHRE) v. Italy* (*Complaint No. 58/2009*), *decision on merits of 25 June 2010 (hereafter COHRE v. Italy (Complaint No. 58/2009); Centre on Housing Rights and Evictions (COHRE) v. France (Complaint No. 63/2010), decision on merits of 28 June 2011* (*hereafter COHRE) v. France* (*Complaint No. 63/2010).*

484 Shue (n 2) 71–78.

485 Martha C Nussbaum, *Women and Development: The Capabilities Approach* (Cambridge University Press 2000) 80; Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Harvard University Press 2011) 34; Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114) 77–78.

486 See particularly *Human Development Report 1993; HRC General Comment No. 25: Article 25 (Participation in the Public Affairs and the Right to Vote), adopted in its Fifty-seventh Session (1996); CEDAW General Recommendation No. 23: Political and Public Life, adopted in Sixteenth Session (1976); CRC General Comment No. 12: The Right of The Child to Be Heard, adopted in Fifty-first Session (2009).*

clear and pre-established procedure or standard (the rule of law). That is, failure to ensure these essential minimum guarantees will significantly undermine the value and effectiveness of the right to participation and ultimately the effective protection of the substantive rights it is intended to safeguard.[487]

## 5.3. JURISPRUDENCE

### 5.3.1. IACtHR

The *Sarayaku* case provides us with the most recent and authoritative examination of the right to participation in international law in relation to the protection of ESC rights. In summarising its general conclusion on the legal status of the right to participation in international law with respect to the specific context of the right of indigenous peoples, the IACtHR stated the following.

> The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.[488]

The *Sarayaku* case is particularly interesting because it provides us with an authoritative, up-to-date and detailed treatment of the right to effective participation in the Inter-American Human Rights System and in international law in general. So, it is important to closely examine the facts of this case and the reasoning of the Court in a relatively brief manner as follows.

As far as it is relevant here, the *Sarayaku* case concerns a complaint against the concession agreement between the Respondent State and an oil company for the purpose of exploration of hydrocarbon and exploitation of crude oil in the area

487 See for instance, *Sarayaku v. Ecuador*, paras 178–232.
488 *Sarayaku v. Ecuador*, para 177 (internal citations omitted). See also ibid, paras 178–232.

encompassing large part (over two-third) of the territory of the *Kichwa Indigenous Peoples of Sarayaku*, home to over one-thousand two hundred people, without any form of effective and genuine consultation with and against the express will of the population. Following the agreement, the people were forcefully removed from their territory, denied re-entrance to their land on which their entire livelihood and well-being has been based for a long period of time. There were also heavy explosives (for seismic exploration) placed in their territory with the permission and protection of the State, therewith endangering their lives and security.[489] This, in turn, resulted in violation of several of their rights enshrined in the American Convention, most importantly here, their right to property, life, integrity and liberty.[490] The State denied that it had any legal obligation to conduct prior consultations with indigenous peoples and communities at the time of the concession agreement.[491] It argued that it has a sovereign authority and right to carry out development activities in any part of its territory and to exploit all natural resources which belong to its full and exclusive ownership.[492] While recognising the general importance of the participation of the indigenous communities for their social and cultural development, they had no right to veto its decision nor did it have any legal obligation to engage with them prior to taking the impugned decision.[493]

Therefore, the primary question for the Court was to determine the existence of an international norm prescribing a legal obligation of the State to ensure the right to effective participation (in the sense of the right to prior consultation) of the Sarayaku People at the time the said decision was taken and, if so, the content and scope of that obligation.[494] In addressing these questions, the Court's analysis drew largely on two substantially interrelated points: on the one hand, the unique features of the indigenous peoples way of life generally and in relation to their communal (ancestral or traditional) land and, on the other hand, the normative principles applicable to their way of life and communal land.[495]

With respect to the first part of the question, it is interesting to note that, unlike other similar prior cases heard by the Court[496], there was no dispute as to

489 Ibid para 244ff.

490 Unlike other similar cases decided by the Court, the right of the Sarayaku People to the territory under question was an undisputed fact in the case as the State has already acknowledged fully during the domestic judicial proceedings. See, inter alia, paras 55, 61, 62, 124 & 149.

491 Ibid paras 124 & 128.

492 Ibid para 129.

493 Ibid paras 124 & 130.

494 For the Respondent State also argued that even if it could be argued that there is such an obligation some of the activities of the company dubbed as 'socialization' had satisfied the requirement of prior consultation, the Court had to also assess whether indeed the practice of the so-called socialization had indeed satisfied the right to prior consultation as defined under international law. See ibid paras 178–211.

495 See ibid paras 145–232.

496 The Court had already entertained similar issues concerning indigenous peoples and their right to communal land decided prior to the current case. See *Mayagna (Sumo) Awas Tingni*

the fact that the Sarayaku People have close intrinsic relationship with and a legal right over their traditional land. What remains to be established is the interaction between this intrinsic relationship and the general right to participation. Thus, the Court considered it proven (both from the State acknowledgement before the Court and at different fora as well as from other evidence submitted to it) that land and communal land ownership represent a distinctive feature of the Sarayaku People in the same way as it is in many other indigenous communities.[497] Based on this, the Court considered that 'the Kichwa People of Sarayaku have a profound and special relationship with their ancestral territory, which is not limited to ensuring their subsistence but rather encompasses their own worldview and cultural and spiritual identity'.[498]

So, for indigenous peoples like Sarayaku, land represents every aspect of their life, physical and spiritual existence, livelihood, development and identity (social, cultural, political, and religious beliefs), self-conception and world view. It has indispensable economic value for it serves as the source of subsistence including for their livestock; it has important social and medicinal value; it is the foundation of their cultural and spiritual identity from which their unique way of life and world view (their identities par excellence emerges).[499]

With these characteristic features, indigenous and tribal communities constitute 'distinct social and political actors in multicultural societies' that 'must receive particular recognition and respect in a democratic society'. It follows from this that respect for their right to consultation (participation) is inextricably interlinked with the right to recognition of and respect for their own culture and way of life (identity) which must also be respected and guaranteed in its own right 'in a pluralistic, multicultural and democratic society'.[500] For the Court, 'one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation'.[501] In other words, the right to participation of indigenous and tribal peoples in matters affecting their general life and welfare and communal property first and foremost inherently stems from their distinctive identities and unique way of life particularly manifested in their intrinsic relationship with their communal land. Conversely, the obligation of the State to ensure their effective participation in decisions affecting their rights and interests is nothing more than the recognition and reaffirmation of their identity as distinctive and equal socioeconomic and political actor in and of a democratic society. In this

*Community v. Nicaragua; Yakye Axa Indigenous Community v. Paraguay; Sawhoyamaxa Indigenous Community v. Paraguay; Xákmok Kásek Indigenous Community v. Paraguay.*

497 *Sarayaku v. Ecuador,* paras 124 cum 145–155.

498 Ibid para 155.

499 Ibid paras 145–155.

500 Ibid para159 (internal citation omitted).

501 Ibid para 160.

regard, having reviewed extensively the legislative and judicial practices of both domestic[502] and international legal systems, the Court came to the conclusion that this right to (prior) consultation of indigenous and tribal peoples flows not only from positive domestic and international law but also from a general principle of international law.[503] 'In other words, nowadays the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are about to be affected is an obligation that has been clearly recognized' both in express legal provisions, national and international, and as general principle of international law.[504]

According to the Court, the practical implication of the right to prior consultation and hence effective participation is far-reaching. It applies not just to a certain project but rather to all legislative, administrative or policy decision-making processes in their respective countries.

> The obligation to consult the indigenous and tribal communities and peoples on any administrative or legislative measure that may affect their rights, as recognized under domestic and international law, as well as the obligation to guarantee the rights of indigenous peoples to participate in decisions on matters that concern their interests, is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1(1)). This entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights. This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions.[505]

And it also implies that it should be conducted in a manner that is compatible with its essential minimum guarantees so as to be regarded as effective participation both in law and in practice. Thus,

> Given that the State must guarantee these rights to consultation and participation at all stages of the planning and implementation of a project that may affect the territory

502 There are also plenty of cases from domestic jurisdictions recognising significance of the right to participation in the context of ESC rights such as the right to housing, water, education, welfare (social assistance) programs, health, and the protection of the rights of indigenous and vulnerable persons. See several of the publications in Langford (n 3); Coomans (n 3).

503 Ibid para 164 & 165. For its extensive review of the relevant documents and practices, see particularly ibid paras 161–164 & 168 and the accompanying references.

504 Ibid para 165.

505 Ibid para 166 (citing also *Velásquez-Rodríguez v. Honduras,* para 166; *the Barrios Family v. Venezuela, Merits, Reparations and Costs*, Judgment of 24 November 2011, para 47 at n 216).

> on which an indigenous or tribal community is settled, or other rights essential to their survival as a people, these dialogue and consensus-building processes must be conducted from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. In this regard, the State must ensure that the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests. Therefore, as applicable, the State must also carry out the tasks of inspection and supervision of their application and, when pertinent, deploy effective means to safeguard those rights through the corresponding judicial organs.[506]

The second question to be answered is how the general right to participation, essentially flowing from their identity as distinctive socio-political and economic actors in a democratic society, positive law and general principle of international law, is related to their right to communal or traditional land ownership. In this regard, the Court relied on two principal norms of human rights law: the right to culture and the right to property recognised both in Inter-American and other international human rights law. In the light of the special and profound relationship between indigenous and tribal communities and their traditional territories, there is fundamental and substantive overlap between the normative principles governing the right to property and cultural identity. First, we have already noted the broad cultural and religious significance of ancestral land. This means that it is of paramount importance for the full and effective enjoyment, survival and development of their right to culture including their language and cultural heritage recognised under international law.[507] Failure to respect and ensure this right for the said communities would raise fundamental question vis-à-vis the principle of equality and prohibition of non-discrimination in the enjoyment of all human rights including, here, the right to culture broadly construed.[508]

With respect to the right to property, the Court has already established that in the context of indigenous and tribal communities, the notion of property has a different connotation than in a liberal conception of private property.[509] It has

---

506 Ibid para 167. 'Such processes must respect the particular consultation system of each people or community, so that it can be understood as an appropriate and effective interaction with State authorities, political and social actors and interested third parties.' ibid para 165.

507 Ibid paras 212–220. 'The Court considers that the right to cultural identity is a fundamental right – and one of a collective nature – of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society. This means that States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization.' ibid para 217.

508 Ibid para 213.

509 Ibid paras 145–157. As opposed to the notion of private property, communal land ownership is one of the fundamental features of indigenous and tribal peoples in the sense that 'land is not

made clear that, as a matter of human rights law both generally and in relation to safeguarding the rights of indigenous and tribunal communities, the communal conception of the right to property also deserves equal and effective protection in its own right.[510] Flowing from the above discussions, the reasons for this now seems self-evident. For one thing, denying this right will directly amount to denial of their identity and existence altogether which also makes their right to culture devoid of any substantive content. This also implies discrimination on the basis of socio-cultural background or status and lack of equal protection of law and equality before the law for it evidently amounts, as the Court clearly noted, the imposition of the conception of private property on the communities as the only norm worthy of legal protection. In particular, such conception and approach 'would render protection under Article 21 of the Convention [the right to property] illusory for millions of people' for such a notion has no place in and, therefore, of no practical value for the indigenous and tribal communities: it would simply be reduced to a vacuous notion devoid of any substantive meaning whatsoever.[511]

It is equally meaningless if this right to property (communal land ownership) is to be construed as excluding their right to have control over and the ability to freely use and dispose all the natural resources present within their ancestral territory, that is, if it is to be understood as a bare (naked or empty) right of communal land ownership. Stated differently, it is impossible to ensure the effective protection of their material and other vital interests inextricably associated with their communal land. For instance, reiterating its earlier judgments, the Court stated that a measure which denies free access to their communal territory or prevents them from using those natural resources indispensable for their subsistence, medicinal and other crucial purposes can have a devastating impact on the communities such as exposure to poor or substandard living conditions, increased vulnerability to diseases and epidemics or situations of extreme vulnerability and suffering that can lead to violation of various human rights

owned by individuals but by the group and their community as a whole and its use, enjoyment and value are rooted in the culture, customs, beliefs and practices each community. It is also described above that its connotation and value go beyond the narrow economic value and goes to their whole life and well-being broadly construed. ibid.

510 Thus, it is now a well-established jurisprudence of the IACtHR that the *sui generis* relationship of the indigenous and tribal peoples and their communal land is protected by ACHR. As it consistently held, 'Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these'. ibid para 145 (citing *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para 140 and *Xákmok Kásek Indigenous Community v. Paraguay,* paras 85–87). In establishing this, the Court found support from two important principles: the principle of evolutive (dynamic) and non-restrictive (pro-human rights) approach to the interpretation of human rights and human rights treaties. For detail arguments of the Court on these, see ibid paras 161–16 & 171 and the accompanying references.

511 Ibid para 145–147.

as well as undermining their ability to preserve their way of life, customs and language.[512] The following paragraph clearly summarises what is especially at stake in relation to the protection of the right to communal property of the indigenous and tribal communities.

> Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.[513]

In this way, we can say that the IACtHR has established the inherent right of, in this case, the indigenous and tribal peoples to full and effective participation in decision-making processes affecting their life, well-being and vital socioeconomic and survival interests.

However, this does not mean that the elements of the right to participation identified by the Court in the *Sarayaku* case is only applicable to the case of indigenous and tribal peoples. The only relevant and necessary caveat in reading *Sarayaku* and other similar cases concerning indigenous and tribal peoples is the unique conception of and association with ancestral land and its rich socio-cultural and economic significance to the respective communities. Other than this, all the substantive principles of the right to participation are undoubtedly significant for the effective protection of ESC rights of, in particular, vulnerable persons or group of persons such as women, persons with disabilities, children and ethno-linguistic or religious minorities. In this regard, it should be noted that the specific structure and manner of participation of these vulnerable groups are essentially matters to be determined by the domestic legal system but the argument for the applicability of the substantive principles of participation established by the Court in the *Sarayaku* case can be justified on two basic grounds.

---

512 *Sarayaku v. Ecuador,* para 147. See also *Yakye Axa Indigenous Community v. Paraguay,* para 164; *Sawhoyamaxa Indigenous Community v. Paraguay*, paras 73.61–73.74; *the Xákmok Kasek Indigenous Community v. Paraguay*, paras 205–208.

513 *Sarayaku v. Ecuador*, para 147.

The first flows from the grand principle of human rights which prescribes the equal rights of everyone in a political society to have and enjoy the same opportunity and protection of law. The abstract principle behind the Court's reasoning as well as the core essence and contents of the right to participation identified in cases like *Sarayaku* have, without doubt, a universal application. The underlying justification standing behind the Court's reasoning can be abstracted and stated as follows: that everyone in a political society whose right or interest is (being) affected in an essentially relevant manner by a given decision of his or her government (legislative, policy etc.) must have a general right to effective participation in the process. This requires, among other things, the right and opportunity to make one's views heard in all matters pertaining to one's right and fundamental interest. In this regard, the most relevant consideration is whether a certain decision or measure has undermined (in the relevant and meaningful sense of the term) one's human rights or not. And, as it is to be seen below, this is the very reason behind the recognition of the right to participation in all other ESC rights case law.[514]

This, in turn, gives rise to the second justification which considers that ensuring the right to effective participation is an integral element of the general obligation of the State to respect and guarantee the full and effective enjoyment of all human rights. For instance, the IACtHR repeatedly emphasised that the State obligation to ensure the right to effective participation directly flows from the generic obligation of the State to respect and ensure (guarantee) the full and effective enjoyment of all the rights enshrined in the American Convention on Human Rights.[515] By virtue of this, we can say that the State bears the obligation to, on the one hand, respect and guarantee the right to full and effective participation both in law and in practice. This entails both negative and positive obligations that should be assessed in the light of the contexts of the persons concerned and nature of the issues involved in a given case. On the other hand, it also means the State has the obligation to ensure the right to participation of all persons whose substantive ESC rights (for instance, right to health, housing, education, work, etc.) are or are about to be affected by certain proposed measure. These justifications imply that, as a matter of general human rights law and ESC rights, the State has a clear legal obligation to give practical legal effect to the right to participation by providing, for instance, relevant legislative and institutional

514 Among others, the right to participation in the decision-making process was an issue in the following cases. *Buckley v. United Kingdom (Application No. 20348/92), Judgment of 29 September 1996*; *Chapman v. United Kingdom (Application No. 27238/95, Judgment of 18 January 2001;Fadeyeva v. Russia (Application No. 55723/00), Judgment of 9 June 2005; Complaints No.58/2009, Complaints No.63/2010*; *Communication 276/03 – Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, merits, 46th Ordinary Session of the AfCoHPR, 11 to 25 November 2009 (hereafter the Endorois v. Kenya).*

515 See Introduction to Part two above.

mechanisms through which individuals and groups can participate, directly or indirectly, in the decision-making processes affecting their rights and interests. Understood in this way, the right to participation particularly provides an important procedural safeguard for the protection of the rights and interests of the vulnerable members of the society.[516] The *Sarayaku* case therefore provides us with an authoritative account of the right to participation in international law. The principles developed in this case have already provided important jurisprudential inspirations in the resolution of various ESC rights both in the Inter-American and other international human rights system. Nevertheless, it is worth noting that it is not the first judgment of its type in underscoring the importance of the right to participation in relation to ESC rights for the theoretical backdrops and the normative standards employed in the *Sarayaku* case had already been developed in the Court's earlier case law.[517]

### 5.3.2. AfCoHPR

The importance of the right to participation for the effective realisation of ESC rights is also well-recognised in the practice of the AfCoHPR. Perhaps the *Endorois* case, which deals more or less with similar issues as the *Sarayaku* case, is the most significant one especially in elucidating the interaction between the procedural and substantive dimension of ESC rights. Thus, it is worth paying attention to the reasoning of the Commission in this particular case as it also updates and brings together its earlier jurisprudence on the subject-matter.

In substance, the *Endorois* case concerned a complaint by Endorois Indigenous Community (Endorois Community or Peoples) against the Respondent State for designation of their ancestral dwelling place as a wildlife game reserve and its subsequent effects on their life and well-being without involving the Community or taking due and proper account of their social, economic and cultural interests and well-being. They stated that subsequent to the decision, they were forcefully evicted from their ancestral lands; denied access to the site even for cultural, religious and economic purposes; did not receive any compensation for their loss and the unnecessary damages they suffered. They stressed that the decision and the subsequent conducts of the State had effectively destroyed their well-being and pastoralist way of life.[518] They also complained that the State's concession agreement with a private company for the purpose of ruby mining would have

516 See also Chapts 8 and 9 below.

517 Hence, the *Sarayaku* case is rooted in and developed the jurisprudence of the IACtHR in the cases of *Mayagna (Sumo) Awas Tingni v. Nicaragua; Yakye Axa Indigenous Community v. Paraguay; Sawhoyamaxa People v. Paraguay; Saramaka People v Suriname; Xāknok Kasek Indigenous Community v. Paraguay* (all concerned with the rights of indigenous and tribal peoples to their ancestral land and other rights effectively associated with the same).

518 *Endorois v. Kenya,* paras 71ff.

a serious negative consequence on their life especially as it might result in the pollution of the water they have long been relying on for consumption and in the destruction of their cultural and religious sites. Accordingly, they argued that these activities of the State have contravened several of their human rights guaranteed in the African Charter on Human and Peoples' Rights.[519]

As far as it is relevant here, the State did not offer any major substantive argument but simply denied that the Community could be regarded as 'indigenous people' in the sense of the Charter or general international law and hence their right to special protection ensuing from or associated with that status under international (human rights) law.[520] In its opinion, the land in question was legally designated as a Trust Land and administered by a council representing the populations residing in the specific administrative region(s) including the applicants before the Commission.[521] In connection with this, it has made an interesting (though rhetorical and political in essence) argument which somehow reflects its interpretation of the right to participation. It argued that the task of communities or peoples in a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one's own community at risk of others. It considers that the right to participation of the Complainant is fully ensured through its participatory political system based on universal adult suffrage wherein all ethnic groups in the Country freely elect representative members of their councils.[522]

The Commission in its part, having examined the arguments of the parties and the evidence before it, concluded that the manner in which the State designated the Game Reserve and the measures it has subsequently taken or failed to take have violated all those rights alleged by the Complainants. For our purpose here, the Commission discussed the right to participation of the Community in connection with other substantive rights particularly the right to development.[523] In its understanding, the right to development has two components: substantive (constitutive) and procedural (instrumental); it is useful both as a means and as an end. 'A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two [elements] will not satisfy the right to development'.[524] The Commission noted with affirmation

519 In particular, the right to religion (art 8), the right to property (art 14), the right to culture (art 17), the right to free disposal of their natural resources (art 21) and the right to development (22) ACHPR.

520 *Endorois v. Kenya,* para 145.

521 Ibid, paras 175–181.

522 Ibid, paras 270 & 274–276.

523 Ibid, paras 277ff. See *particularly* ibid paras 289–298.

524 Ibid para 277. This definition/conception is of course supported by, inter alia, the substantive provisions of the Banjul Charter particularly the right of a people to economic, social and cultural development (Art 22), to freely dispose their wealth and natural resources (art 21), of every citizen to freely participate in the government (art 13) and in the cultural life of the (art 17 (2)); Art 2(3) the UN Declaration on the Right to Development.

that the realisation of the right to development must therefore adhere to the basic requirements of equity, freedom of choice, non-discrimination, transparency, accountability and participation. It particularly stressed that equity and freedom of choice are the overarching themes of in the right to development.[525]

By equity the Commission is specifically referring to a fair (re-)distribution of the benefit accruing from the development process[526], including the right to obtain an adequate compensation for the loss they incurred due to the implementation of a given development project. It particularly concerns the extent to which a community affected by certain development project is said to have, in fact, benefited from the development outcomes in the terms of fairness and justice.[527] Per the Commission, the ultimate object and purpose of development should be the empowerment and improvement of the well-being, capabilities and choices of the communities concerned.[528] Hence, the 'right to development will be violated when the development in question decreases the well-being of the community'.[529]

The right to freedom of choice, the fundamental substantive element of the right to participation and development, concerns the extent to which the community have had the opportunity to participate in and meaningfully contribute to the decision-making process itself. Generally speaking, the right to freedom of choice has both negative and positive connotations. In the negative sense it implies absence of any sorts of external pressure, coercion, intimidation or fraud with respect a certain choice whereas in the positive sense it implies the actual ability to make free choices especially on matters affecting one's life or interest. As the Commission emphasised, it is not sufficient that the community concerned receive certain material aid from authorities nor is it compatible with the requirement of the right to development for them to arbitrarily choose and enforce their choice or decision against the will of the community. In particular, it must respect and be based on free, prior, and informed consent of the communities at hand. This characterises the right to participation as an essential and integral element of the right to development which must be present throughout the entire development process.[530]

Alike the IACtHR, it also stressed that the community's participation should be genuine and effective than being a mere formality. Drawing on its own previous practices and various international reports and jurisprudence, the Commission underlined that for the right to participation to be effective it is necessary that

525 Ibid.

526 Ibid para 297: 'It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the game reserve'.

527 Ibid paras 294–296.

528 Ibid paras 283 & 294. 'The result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.' ibid para 283.

529 Ibid para 294.

530 See particularly ibid paras 278–79, 283, 289 and 293.

certain essential guarantees be ensured in the development process. First and foremost, the requirement that it should be based on free, prior and informed consent of the communities in itself entails the responsibility of the State to provide full information on the benefits and impacts of a proposed project and to this extent guarantee free, adequate and transparent communication between the community and its agents. In order to be meaningful, the process and manner of consultation or engagement with the community should particularly be conducted 'in good faith, through culturally appropriate procedures and with the objective of reaching an agreement'.[531] This also means that neither the members of the community or their representatives be subject to any form of intimidation, coercion, threat, deception or fraud concerning their position on the proposed development project; nor should their participation be of mere formality, that is, with no substantive effect on the terms or content of the project including the liberty to reject the terms incompatible with their vital interests.[532]

The requirement that participation should be culturally appropriate directly speaks to the nature of the procedure that should be followed in order to effectively and legitimately engage with the community. Culture and cultural heritage are the defining feature of indigenous and tribal communities like Endorois, as also recognised by the Commission. It is the principal substantive notion that defines their identity including their social organisation and decision-making structure.[533] And as already noted in *Sarayaku* and many other cases, the principal means of manifestation of this cultural identity, values and organisation is often through the unique physical and spiritual bond they have with their ancestral land or territories including its forests and ritual sites.[534] It is thus imperative for the State to fully respect and effectively guarantee, both as a matter of human rights law and justice, the integrity and development of the right to culture of indigenous and tribal peoples. Conversely, failure to respect and ensure the free and practical enjoyment of their right to culture would effectively tantamount to denial of their existence and well-being contrary to fundamental human rights and values including human dignity, life, equality and non-discrimination.[535] This entails both negative and positive obligations. Thus, it not only requires the State to abstain from directly encroaching upon their right to culture through, for instance, destruction of their cultural, religious, ancestral sites and denial of access to such sites but also to positively protect an encroachment by other third

531 Paras 289–292. 'The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the game reserve.' (emphasis in the original). ibid para 281.

532 Ibid para 279–281 & 289–292.

533 Ibid paras 241–251 (discussing the right to culture of the Endorois Community).

534 Ibid para 243.

535 Ibid paras 241, 248 & 260–261.

parties and take all necessary and reasonable legislative, institutional and other practical measures to promote its enjoyment and development.[536]

It is in this context that one should appreciate the obligation to respect their cultural structures and values in engaging the communities in decision-making procedures. It is necessary that the manner of participation should be respectful of the traditional structure and cultural values of the community.[537] For example, it is not appropriate for the State to impose its own complicated procedures or select certain individuals from among the community to merely inform them about its decisions or secure the divided opinion of the community. It should be for the community itself to decide how to participate and, in case of representation, to freely choose who should represent them according to their own customary decision-making process. In addition, it should also take into account their practical socioeconomic circumstances vis-à-vis the proposed measures. For instance, it is impossible to consider the participation of the community effective if it is not in a position to properly understand the pros and cons of the project and the technicalities and complications involved therein especially owing to the level of education and expertise available to them.[538]

Above all, any proposed decision affecting the interest of indigenous and tribal communities should not be repugnant of their basic human rights, above all, their right to a dignified existence, the ultimate reason upon which their general right to participation is justified. So, it would be contrary to the principle of respect for their dignity and life if the implementation of a development project or any measure would result in impoverishing the community's well-being, denial of access to such basic necessities as food, water, shelter or in destroying their cultural and religious practices.[539] As the Commission expressly stated, it is incumbent upon a given State to primarily ensure that any development project will primarily bring improvement to the well-being, capabilities and choices of the community affected by such project.[540] Impoverishing or subjecting a community to harsh, substandard socioeconomic condition in the name of development is utterly illegitimate and can never be justified in the eyes of fundamental human rights.

It is, therefore, certainly clear that lack of effective participation is the major underlying reason for violations of several of the ESC rights of the Endorois Community particularly the right to culture (including religion), communal

536 Ibid paras 241–251.

537 Ibid para 267, 281, 289 & 291.

538 Ibid paras 267, 279–281, 289–291. The Community had no choice but to forcefully leave their land. ibid para 279. 'The African Commission is,' therefore, 'convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people.' It thus 'agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.' ibid para 297.

539 Ibid paras 283, 286, 288, 297 & 298.

540 Ibid para 283.

property, natural wealth and resources and the right to development. Contrary to all the basic requirements outlined above, it was ascertained in the case that the community did not have the opportunity to effectively participate in the designation of their ancestral land for the purpose of game reserve and later in the concession for the purpose of mining activities; nor did the State take necessary positive measures to safeguard their vital socioeconomic and cultural interests and reasonably mitigate the undue sufferings they had to endure for so long. For instance, the case shows that the authorities refused to register the representative body of the Community but opted to selectively engage with few individuals not approved by the Community. The Community had no choice but leave their ancestral place and homes. In fact, they were subjected to forced evictions and subsequently denied any access to the area even for subsistence, grazing, religious and other cultural purposes; those who had desperately attempted to re-enter the land were met with violence and forced relocation. Furthermore, the Community were not paid any due compensation for the damage they suffered due to the designation of their ancestral place as game reserve nor did they share in any of the revenues accruing from any of the development activities being carried out within their territory.

However, unlike the case of *Sarayaku*, the African Commission failed to address the right to participation in its own right but only in relation to the substantive ESC rights mentioned above. There is no good explanation for this. As clearly indicated in the facts of both cases, it is evident that the overarching reason behind all the violations had, in fact, to do with the absence of effective participation, directly or indirectly, by the respective communities in the decision-making process concerned. It is this that resulted in the long-term (over thirty years of) confrontation between the Endorois Community and the Respondent State and it is this very same reason that cuts-across each of the rights claimed by the Complainants. The Community did not argue that the Government should not have created the game reserve nor did they argue that the concessions should never have been granted in the area. The only thing they were claiming was that, despite its direct effect on their livelihood, survival and development, they were not consulted over the proposed projects as a result of which their vital socioeconomic and cultural interests were severely impoverished. It is true that they also claimed lack of compensation for the damage they suffered due to the implementation of the project but this is only ancillary to their main claim: lack of genuine and effective participation. In my opinion, it would have been more logical and sensible to address the issue of the right to participation, generally and in the context of the Endorois Indigenous Community, in its own right. This would have, in turn, provided us with a more authoritative interpretation of the essence, content and significance of the right to participation in the context of the protection of socioeconomic rights both generally and in relation to the African Human Rights System.

In addition to *Endorois* case, the right to participation was also referred to by the Commission in other cases concerned with ESC rights violations. In the (in)famous *SERAC* case[541], it had advanced more or less a similar view when it, in connection with Art 21 of the Charter (right of peoples to freely dispose their wealth and natural resources), criticised the Respondent State for its chronic failure to involve the Ogoni Communities in the decision-making process pertaining to an oil exploitation within their territory. It was complained that the manner through which the then military junta embarked on the oil exploitation in the Niger Delta region had resulted in the massive and systematic violations of 'wide range of rights guaranteed under the African Charter on Human and Peoples' Rights'.[542] It was argued that the implementation of the project had severe impacts on the health and well-being of the Communities due to pollution of the environment especially resulting from toxic wastes and oil spills contaminating their water, soil and air. The Government however did not submit any formal reply to the Complaint but only made some general admissions regarding the allegations in a *Note Verbale* sent to the Commission, also stating the steps it had been taking in order to address some of the issues raised in the Complaint.[543]

The *SERAC v. Nigeria* case was the first case in which the Commission began to properly outline the obligations of the States under the African Charter in relation to socioeconomic rights. Hence, following the suits from elsewhere, the Commission stated, 'Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights, both civil and political rights and social and economic, generate at least levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights'.[544]

For the Commission, the African Charter, being a human rights instrument, is not alien to these concepts, the implication being that the Commission would without doubt analyse the State's human rights obligations in the light of these frameworks as it in fact did in *SERAC* case.[545] It stressed that these obligations universally apply to all rights and entail combinations of both negative and positive duties which must be analysed in the context of each circumstances. In this case, having examined the facts (including its first-hand observation in the field), the Commission concluded that the Respondent State was directly responsible for violation of numerous ESC rights expressly and implicitly recognised in the

---

541 *Communications 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, decision on merits, 30th Ordinary Session,13 to 27 October, 2001 (hereafter SERAC v. Nigeria).*

542 Ibid para 43 *cum* 1–9.

543 Ibid para 30 & 42. But still today the case of Niger Delta and its resultant human and environmental disaster are yet to be finally resolved.

544 Ibid paras 44–49.

545 Ibid paras 44, 48 & 49. (Interestingly, the Commission stated that the different layers of obligations do not have nor suggest any form of priority. That means their application and implication are merely contextual).

Charter including the right to health, housing, food, water, health environment, free disposal of wealth and natural resources, and development.[546]

While it is true that the ruthless actions of the junta, through its own security forces and other private agents it had sponsored, had resulted in the massive violations of numerous civil, political, social, economic rights recognised under the Charter, I would argue that the essential backdrop of the *SERAC* case and the violations thereof concerns a complete exclusion of Ogoni people from the decision-making process affecting their existential and vital socioeconomic interests: it is the root-cause of what could be considered as one of the egregious forms of human rights violations.[547] According to the relevant provisions of the African Charter and other major international instruments, the right over natural resources belongs to the peoples. Hence, pursuant to Article 21 of the Charter, 'All peoples shall freely dispose of their wealth and natural resources'. The Commission is right in saying that this is a birth right of peoples, i.e. a right that they are naturally and collectively entitled to just by virtue of being what they are. And in the eyes of the Charter, this right is even an absolute right of peoples in the sense that it 'shall be exercised in the exclusive interest of the peoples. In no case shall a people be deprived of it'. But in essence this right would be of no practical value unless peoples have a mechanism through which they can control any legislative and policy decisions affecting their natural wealth and resources. That is why the right of participation is a vital ingredient of the right to free disposal of their wealth and natural resources and the related right to development expressly recognised in the Charter. So, it is imperative and indispensable that the peoples' right to participation be respected and effectively guaranteed so that they shall have a meaningful say in all matters pertaining to the utilisation of their wealth and natural resources as well as in a development process.[548]

However, as it can clearly be observed from the facts in the *SEARC* case, the Ogoni Communities were absolutely excluded not just from the decision-making processes but also from the benefits as well; they only had to suffer from the costs and negative consequences thereof. Even though the Community and its members had sought to bring their concerns to the attention of the authorities including through peaceful demonstrations, their demands were met with nothing but

546 Ibid paras 53–54, 58, 62–63, 66–67.

547 For more on this, see my discussion in Mosissa (n 15) 76ff.

548 One may say that a state has the sovereign right to exploit natural resources within its territory. While there is element of truth in such a view it is ultimately the case that such exploitation must be in accordance with and for the interest of the peoples constituting the said state. This is what is implied when the Commission stated, 'Undoubtedly and admittedly, the government of Nigeria […] has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians'. But, the Commission noted, this should be carried out within the limits of the appropriate legal regimes governing the same. *SERAC v. Nigeria,* para 54.

series of ruthless military and paramilitary operations employed by the junta aimed at terrorising and silencing the Community and dissenting voices.[549]

Ironically and despite all of the facts, the Commission did not expressly discuss the right to participation as such but only in relation to those substantive rights. This in itself is very interesting but it should have done more in establishing the inherent human right of the peoples to participate in the conduct and affairs of their country and particularly in all matters affecting their life and interests as in *SERAC*. So, in indicating some of the measures that the State party ought to take in order to comply with the requirements of the right to health and healthy environment enshrined in the Charter, the Commission stated that they must '[provide] meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities' and 'provide information to those communities exposed to hazardous materials and activities'.[550] Also, in relation to Art 21, the Commission criticised the State for its failure to involve the Ogoni Communities as follows: 'in all their dealings with the oil consortiums, the [G]overnment did not involve the Ogoni [C]ommunities in the decisions that affected the development of Ogoniland'. It added that '[t]he destructive and selfish role played by oil development in the Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21'.[551]

More generally, the Commission has recognised the importance of the right to participation in its Principles and Guidelines on the Implementation of ESC rights in the continent which, in turn, is basically a consolidation of the wide-range of jurisprudences and practices pertaining to ESC rights as well as in its State Party Reporting Guidelines for ESC rights. Thus, in outlining the substantive ESC rights and the corresponding State obligations, the Commission clearly stressed the fact that the right to effective participation is an indispensable prerequisite for

549 Among others killing the community leaders and community members, burning houses, attacking villages, forced evictions, polluting water sources and environment, destroying foods, etc. See particularly para 8 & 42 as to Government's admissions to such tactics. Elsewhere, taking into account the manner and nature of the violation of basic human rights enshrined in international human rights instruments, I have argued that SERAC case is typical of human rights violations in the context of what could be dubbed as humanitarian crisis which in turn could be the result of either basic constitutional crisis or armed conflict. As I argued there, the Ogoni People had experienced double suffering: first because they could not enjoy their elementary human living and second because they had no recourse whatsoever as regards those violations. Mosissa (n 15) 78–79.

550 *SERAC v. Nigeria, p*ara 53.

551 Ibid para 55. See also para 58: 'in the present case, despite its obligation to protect persons against interference in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, [it] has given green light to private actors and, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter'.

the effective realisation of each of the ESC rights recognised in the Charter and other relevant human rights instruments.[552]

### 5.3.3. ECSR

The practices of the European Committee of Social Rights (ECSR) and European Court of Human Rights (ECtHR) also provide us with rich evidence regarding the significance of the right to participation in the realisation of ESC rights. To begin with ECSR, it is interesting to note that its appreciation of the importance of the right to participation and hence interpretation of the European Social Charter (ESC)[553] as including this right has come in somewhat evolutionary manner. This is said because in its earlier decisions raising more or less similar issues to those in which it has expressly recognised the right to participation, the Committee did not, directly or indirectly, mention the right to participation.[554] It is in *ERRC v. France (Complaint No. 51/2008)* that the Committee for the first time recognised that the rights guaranteed in the European Social Charter, in particular, Article 30 necessarily include the right to (civil and political) participation. This position has since then been repeatedly and emphatically reaffirmed in several of its subsequent decisions including in the *COHRE v. Italy (Complaint No. 58/2009)* and *COHRE v. France (Complaint No. 63/2010)*. Thus, in *ERRC v. France (Complaint No. 51/2008)*,

> [t]he Committee considers that the reference to the social rights enshrined in Article 30 should not be understood too narrowly. In fact, the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes a special importance. In this regard, the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by article 30.[555]

---

552 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted by the African Commission on Human and Peoples' Rights at its 50th Ordinary Session, 26 May 2010 (hereafter ACoHPR Principles and Guidelines on ESC Rights); State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) adopted by the African Commission on Human and Peoples' Rights on 24 November 2011 (hereafter Tunis Reporting Guidelines).

553 It should be noted that I use 'European Social Charter' or 'ESC' throughout this writing to refer to both the 1961 and the 1996 Revised Social Charter unless a specific reference is necessary in the text.

554 For instance, it will be seen below that *Austin-Europe v. France (Complaint No.13/2002), decision on merits of 4 November 2003*; *European Roma Rights Center v. Greece (Complaints No.15/2003), decision on merits of 4 December 2004 (hereafter ERRC v. Greece (Complaints No.15/2003)* and *Mental Disability Advocacy Center (MDAC) v. Bulgaria (Complaints No.41/2007), decision on merits of 3 June 2008 ((hereafter MDAC v. Bulgaria (Complaints No.41/2007)* are similar to *ERRC v. France (Complaint No. 51/2008)*, *COHRE v. Italy (Complaint No. 58/2009),* and *COHRE v. France (Complaint No. 63/2010)* where the ECSR recognised the right to participation as constituting an integral element of the Social Charter guarantees.

555 Para 99.

*ERRC v. France (Complaint No. 51/2008)* concerns, among other things, the lack of access to housing and other basic social services particularly affecting the Travellers, the Roma and Sinti populations in the Respondent State. The Committee ascertained that only very few houses were made available to these communities over a period of eight years; even then some of the houses were of substandard quality as they lacked water, electricity and the required sanitary standards.[556] In addition, people living in Caravan houses (their traditional house) could not access essential services as banking, mortgage because the law did not consider Caravan dwelling as a house.[557] Furthermore, and most importantly here, they were also excluded from participation in the political life of their municipalities due to a quota system on the number of Travellers that could be admitted to a municipality coupled with the uninterrupted period of three years a person is required to reside in a municipality in order to be able to vote in the municipal election. According to the Committee, the combination of these factors has created the fact of social and political exclusion and has resulted in a racial discrimination against Travellers in the Respondent State in the enjoyment of the right to housing and other ESC rights guaranteed in the Charter.[558]

This is even more so in the cases of *COHRE v. Italy (Complaint No. 58/2009)* and *COHRE v. France (Complaint No. 63/2010)* where the Committee arrived on the conclusion that the Respondent States have committed what it referred to as an 'aggravated violation' of the Charter. In substance, these Complaints concern the practice of racial discrimination against Roma and Sinti Peoples in relation to housing. Particularly the Complaints indicate the difficulty of accessing housing and family benefits and the inhumane, cruel and violent methods employed against them during eviction procedures. At the backdrop of all these was the so-called 'security measures' specifically targeting the Roma and Sinti population living in the Respondent State. The said measures practically justified the segregation, 'ghettoization' of the populations into camping sites mostly characterised by

556 Paras 38–41, 49–50 & 60.

557 See paras 59–61 (discussing the consequences of failure to recognise Caravan-housing as a house).

558 See particularly paras 29–31, 46–50, 59–61, 69–70 & 84. According to the Committee, the measures taken by the State Party theoretically comply with the requirement of the Revised Social Charter for it takes a more of generalised approach to the housing problems. However, the discriminatory aspect of such approach comes to picture when applied to a concrete situation of the peoples affected as for instance the case of lack of non-recognition of Caravan Houses and the requirement of quota to be able to participate in municipalities' election (i.e. to be able to vote). For these groups, no legal recognition for mobile houses (caravans) as houses means practically no access to social and administrative benefits (as banking, mortgage, loan). This, in turn, means, those who want to buy houses cannot access mortgage or loan services. In effect, therefore, it is very difficult for such people to have effective access to housing. Added to this is the fact that the groups concerned were also evicted from their camping (stopping) sites arbitrary and violently in the hands of State agents. It is for this reason that the Committee emphasised that 'Article E imposes an obligation to take due account of the relevant differences and to act accordingly'. ibid para 84 cum paras 67–67.

substandard and inhuman living conditions. And, there was no adherence to the elementary due process of law in eviction of the same from their dwelling places or camping sites. It was also noted that they were victims of systematic and generalised violence including from police and other administrative organs, the practice the State neither denounced nor investigated. Not only this, the Committee also observed that measures designed to address the housing needs of those most in need were paralysed simply because of local political oppositions and administrative obstacles.[559]

The Committee underscored that the adoption of measures specifically targeting and affecting vulnerable groups and most seriously the active involvement of public authorities in the violence against such groups makes the violation of the Charter an aggravated one. That is, the nature and intensity of the breach goes beyond the ordinary violation of the Charter affecting not only the vertical relationship between the State and the victims but also shaking the widely shared values of the international (European) community.[560] In this regard, the principal factor is not just the State's failure to positively 'adopt an overall and coordinated approach' towards ensuring access to housing and other basic ESC rights for those who live or risk living in poverty and social exclusion but its direct and active involvement in the creation of such conditions of vulnerability and impoverishment affecting the populations in question.[561]

It is following this conclusion that the Committee begun to underline the importance of the right to participation in the protection of substantive ESC rights in the Charter. For instance, it observed that

> the segregation and poverty situation affecting most of the Roma and Sinti population in Italy (especially those living in the nomad camps) is linked to a civil marginalisation due to the failure of the authorities to address the Roma and Sinti's lack of identification documents. In fact, substandard living conditions in segregated camps imply likewise a lack of means to obtain residency and citizenship in order to exercise civil and political participation.[562]

---

559 *COHRE v. Italy (Complaint No. 58/2009)*, paras 41– 47 & 71–78; *COHRE v. France (Complaint No. 63/2010),* paras 41–55, 66 & 73–79.

560 Ibid, paras 75–78; COHRE *v. France (Complaint No. 63/2010)*, paras 53–54. 'Having regard to the adoption of measures, which are incompatible with human dignity and specifically aimed at vulnerable groups, and taking into account the active role of the public authorities in framing and implementing this discriminatory approach to security, the Committee considers that the relevant criteria […] have been met and that there was an aggravated violation of human rights from the standpoint of Article 31§2 of the Revised Charter. In reaching this conclusion, the Committee also took into consideration the fact that it has already found violations in its decision [in *ERRC v. France (Complaint No. 51/2008)*]'. *COHRE v. France (Complaint No. 63/2010)*, para. 53. For a more detailed discussion on the Committee's decision in *COHRE v. Italy (Complaint No. 58/2009)* and its jurisprudential importance, see Aoife Nolan, '"Aggravated Violations", Roma Housing Rights and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System' (2011) 11 Human Rights Law Review 343.

561 *COHRE v. Italy (Complaint No. 58/2009)*, paras 57, 84–86, 93–94, 98–99 & 101–102.

562 *COHRE v. Italy (Complaint No. 58/2009)*, para 103.

For the Committee, ensuring the right to participation is a principal and an effective mechanism to safeguard individuals against, inter alia, poverty, exclusion, marginalisation and discrimination. 'In fact,' it emphasises, 'the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes a special importance'.[563]

As mentioned above, one of the issues complained in *ERRC v. France (Complaint No. 51/2008)* was the unreasonable limitation on their right to vote in the municipalities' election. The Committee responded to this by saying that 'the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by article 30' of the Charter.[564] The implication of this interpretation is that arbitrary denial of the right and opportunity to vote not only violates their political rights but also systematically reinforces the already existing structural socioeconomic impoverishments particularly affecting the communities concerned. In other words, it is not possible to effectively ensure social integration and inclusion without also ensuring the right to participate in the political and social life of the society.

Accordingly, the State has, under Article 30, a positive obligation to 'encourage citizen's participation in order to overcome obstacles deriving from the lack of represe3ntation of', here in particular, the 'Roma and Sinti [population] in the general culture, media or the different levels of government, so that these groups perceive that there are real incentives or opportunities for engagement to counter the lack of representation'.[565] Of course, one should note that the effectiveness of the right of participation in itself depends on the extent to which the structure and manner of participation pay due regard to, inter alia, the particular contexts and needs of the individuals concerned. In relation to the Roma, Sinti and Travellers, this entails that their ethnic identities and cultural choices, in general, their specific lifestyles, should be taken into account and promoted for without such considerations the right to participation will simply be a mere formality devoid of any practical value whatsoever.[566]

So, it can be seen that the right to participation being conceived beyond its instrumental value as an integral constitutive element of all ESC rights guaranteed in the Social Charter. As we shall see later especially in connection with the protection of the rights of vulnerable persons (which we have in fact been indirectly referring to so far), the right to participation is consistently linked

563 *ERRC v. France (Complaint No. 51/2008)*, para 99ff; *COHRE v. Italy (Complaint No. 58/2009),* paras 103ff.

564 Para 99 (cited also in *COHRE v. Italy (Complaint No. 58/2009)),* para 105).

565 *COHRE v. Italy (Complaint No. 58/2009)*, par 107.

566 *COHRE v. Italy (Complaint No. 58/2009)*, paras 106–109. See also *ERRC v. France (Complaint No. 51/2008)*, paras 101–104.

to the values of democracy and solidarity in the social rights jurisprudence.[567] This in turn reaffirms that socioeconomic injustices are usually the function of systematic exclusion of persons (or group of persons) from the decision-making processes rather than from mere deprivation of material resources. It certainly seems that material deprivation is often the result of exclusion and marginalisation from socioeconomic and political processes of a society. That is why ensuring the right to participation is a decisive and necessary dimension of the realisation of all ESC rights and of ensuring social integration and inclusion as well.[568]

For similar reasons, it can retrospectively be argued that the Committee should or, at least, could have applied the same reasoning in *Austin-Europe v. France (Complaint No.13/2002), ERRC v. Greece (Complaints No.15/2003)* and *MDAC v. Bulgaria (Complaints No.41/2007). ERRC v. Greece (Complaints No.15/2003)* was the earliest collective complaint in which the Committee examined serious violations of several ESC rights of Roma People, in particular, their right to adequate standard of housing. It was complained that lack of sufficient number of permanent dwellings of an acceptable quality and camping sites as well as the practice of systematic eviction disproportionately affected a large number of Roma People in the Country.[569] It is established that these problems were essentially due to the deliberate actions and inactions of the State authorities themselves. The Committee observed that the State did not take any significant measures intended 'to improve the living conditions of the Roma' nor did the measures adopted achieved what was required by the Charter. The result was the segregation of unacceptably excessive number of Roma people to substandard living conditions.[570] Nevertheless, unlike the complaints discussed above raising exactly the same violations as the one here, the Committee did not discuss the violations in terms of how lack of participation or exclusion from the socio-political process led to or reinforced the continued impoverishment of the population concerned. Also, the same can be said in relation to *Austin-Europe v.*

---

567 See for instance, *Austin-Europe v. France (Complaint No.13/2002)*, para 53, *ERRC v. Greece (Complaints No.15/2003*, paras 19–26; I*nternational Movement ATD Fourth World v. France (Complaint No. 33/2006), decision on merits of 5 December 2007 (hereafter IMATDFW v. France (Complaint No. 33/2006))*, paras 60, 67, 128–30 & 163–69; *MDAC v. Bulgaria (Complaints No.41/2007)*, para 39.

568 See *ERRC v. France (Complaint No. 51/2008)*, para 99; *COHRE v. Italy (Complaint No. 58/2009),* paras 105–106. See also UN Declaration on Right to Development, GA Res. 41/128; Art 25 ICCPR; Nolan (n 560) 354–355.

569 The fact that there were, at the material time, over hundred thousand Roma populations in substandard housing and living conditions in the Respondent State is corroborated further by reports of different international human rights bodies. *ERRC v. Greece (Complaints No.15/2003*, para 40. As regards evictions, the Committee observed the presence of the practice of 'collective evictions of Roma both settled and itinerant without provision of alternative housing and sometimes involving the destruction of personal property'. ibid paras 37, 42, 46 & 50.

570 Ibid para 42 & 43. In paragraph 42 the Committee refers to 'a significant number' whereas in para 43 it employed a stronger phrase 'excessive numbers of Roma living in substandard conditions'.

*France (Complaint No.13/2002)* and *MDAC v. Bulgaria (Complaints No.41/2007)*. In both complaints, though the types of disabilities involved therein are different, the central point is the failure of the respective States to ensure the realisation of the right to education of persons with disabilities. In *MDAC v. Bulgaria (Complaints No.41/2007)*, it was found that the education system of the Respondent State was inaccessible to children with intellectual disabilities as it was neither designed nor adapted to respond to their special needs; the Committee also observed that there was no prospect that the situation would change in a reasonable future.[571] And in *Austin-Europe v. France (Complaint No.13/2002),* it was noted that there has been chronic failure on the part of the State in advancing the provision of education for persons with autism to the effect that the proportion of autistic children in either general or specialist schools was much lower than other children, whether disabled or not.[572] The crucial fact in both of these Complaints was the total neglect by the States parties of the fundamental interests the respective vulnerable persons as a whole. We read no indication as to the extent to which they have had the opportunity to participate in and influence the national political and policy debates regarding their fundamental socioeconomic interests but the Committee did not expressly refer to this point. Admittedly, in *Austin-Europe v. France (Complaint No.13/2002)*, it has made a passing reference to participation as one of the underlying values of Article 15 of the Social Charter (providing for the rights of persons with disabilities) but it failed to make any substantive assessment on that basis.[573]

Having said this, the jurisprudence of the ECSR clearly shows that right to participation is expressly regarded as an integral element of the substantive ESC rights guaranteed in the Social Rights Charter. The Committee considers that ensuring the right to participation of, in particular, the vulnerable persons is indispensable in redressing the problem of systematic social and political exclusion, segregation, marginalisation, discrimination and structural poverty generally affecting these groups as it provides them with the equal opportunity to affirmatively engage in the process of socioeconomic and policy decision-making in their respective countries.

### 5.3.4. ECtHR

The right to participation has also been attached a significant place in the case law of the European Court of Human Rights (ECtHR) especially in relation to the protection of ESC rights and interests under certain provisions of the Convention. This is especially true in the context of the positive obligations of the States

571 Paras 37 & 43–47.
572 Para 54.
573 Para 48.

arising in relation to the protection of the socioeconomic rights and interests of individuals. In such cases, it is evident from many of its judgements that the Court normally begins its assessment in the light of the procedural safeguards available to the individual. In particular, it primarily asks if the 'decision-making process leading to the measures of interference' could be considered as 'fair and such as to afford due respect to the interests safeguarded to the individual' by the relevant provision of the Convention.[574] This clearly underscores the significance attached to the procedural guarantees in the protection of particularly substantive ESC rights and interests.

In fact, Luzuis Wildhaber, the former president of the Court, has argued on various occasions that the Convention's guarantees have largely a procedural bias. That is, the Convention essentially requires the States to primarily ensure the availability and accessibility of procedural mechanisms necessary for the effective realisation of each of the rights recognised in the Convention within their domestic systems and defers the specific policy choices (the means through which the rights should be realised) to the discretion of the respective national authorities.[575] This precisely goes with our conception of the right to participation as a procedural dimension of substantive ESC rights. In practice, this has been the principal approach adopted by the Court with respect to the protection of ESC rights and interests of the individuals under the Convention as confirmed in several of its judgements including *Chapman v. UK*, *Buckley v. UK* and *Fadeyeva v. Russia*. For instance, in the case of *Buckley v. UK*, the Court made it clear that

> Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case law that, whilst Article 8 (art. 8) contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (art. 8).[576]

Four years later, this was reiterated in the case of *Chapman v. UK*.[577] And almost ten years later, the Court once again underscored the same in the case of *Fadeyeva*

574 See for instance, *Chapman v. UK*, para 92; *Buckley v. UK*, para 76; *Fadeyeva v. Russia*, para 128.

575 Luzuis Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' in Luzuis Wildhaber (ed), *The European Court of Human Rights 1998–2006: History, Achievements, Reform* (NP Engle 2006) 113–114; Luzuis Wildhaber, 'Changing Ideas about the Tasks of the European Court of Human Rights' in Luzuis Wildhaber (ed), *European Court of Human Rights 1998–2006* (NP Engle 2006) 136–149; Luzuis Wildhaber, 'The European Court of Human Rights: The Past, the Present, the Future' 20 National Journal of Constitutional Law 188–190.

576 Para 76.

577 Para 92.

*v. Russia* stating that in cases involving socioeconomic and policy choices its primary task is to first 'examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual under the Convention' adding that 'only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities'. These exceptional situations include, inter alia, the existence of manifest error of appreciation and the imposition of unnecessarily undue burden on the individual on behalf of the rest of the population.[578]

In both *Buckley v. UK* and *Chapman v. UK,* the Court was satisfied that there were such safeguards both in law and fact and that the respective applicants have in fact availed themselves of those safeguards vis-à-vis the impugned measures. According to the Court, the national authorities were within their margin of discretion in balancing the interests of the community for the preservation of the environment and that of the individual to respect for their home, family and private life: in other words, the Court found that the measures of interference in both cases were necessary and proportionate to the legitimate aim pursued.[579] In the case of *Fadeyeva v. Russia*, however, the Court 'concluded that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life'.[580] According to the Court, 'the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community'.[581] However, it did not find any clear evidence as to how the State had balanced between the economic interests of the entire population and of those residing within the proximity of a polluting plant. Nor could it find any evidence as to the concrete steps the authorities had taken to address the dire health condition of the applicant ensuing from the pollution.[582] In other words, there were no clear procedural safeguards aimed at ensuring the specific interests of the applicant nor was there any indication that she had participated in the decision-making process in issue.

In general, the jurisprudence of the Court show that, in relation to ESC rights or interests, its central focus is on the availability of procedural safeguards afforded to those affected by a given policy or administrative decision. That is, should a dispute arise before the Court alleging an interference with the rights or interests guaranteed in the Convention due to certain socioeconomic and policy

578 Para 105 & 128.

579 *Buckley v. United Kingdom,* para at 79–80 & 84; *Chapman v. United Kingdom*, para 106 & 114. But see the Joint Dissenting Opinion of seven judges in *Chapman v. United Kingdom* criticising the majority for merely relying on procedural matters and ignoring fundamental substantive issues affecting the applicant.

580 Para 134.

581 Para 128.

582 See paras 129–133.

measures of the State concerned, the primary consideration of the Court is to first review whether the national decision-making process leading to the alleged interference has been conducted with due regard to not just the general interests of the public but also to those individuals affected by the measure. This, if taken seriously, requires that the national decision-making systems should have some kind of built-in or self-regulative mechanism from the start through which the various interests of both the individuals and the general public can properly be weighed and balanced with each other. It compels the authorities to also provide necessary mechanisms through which those affected can make their views heard both during and after the decision-making process. This, in turn, adds a crucial perspective to the notion of the right to participation. Generally stated, there are two basic elements that emerge from the Court's approach: first, whether the national authorities have given due and proper regard (i.e. whether they have attached a proper weight) to the individual interests concerned in arriving at a certain (policy) decision and, second, whether those affected have had the necessary means and opportunity to challenge the decision of the authorities.[583] Interestingly, it has been seen above that if these conditions are satisfied, the Court would rarely proceed to assessing the substantive issues; and this rare occasion would generally seem to be when the available due process guarantees fail to provide the individual with meaningful protection of their rights in the Convention.[584]

The question whether the national authorities have given due regard to the interests of the individuals in adopting a measure interfering in the rights of an individual, in turn, falls within the Court's assessment of the necessity of the measure. According to the Court, a measure of interference is said to be necessary in a democratic society if it responds to a pressing social need and if it is particularly proportionate to the legitimate aim pursued.[585] In this regard, the Court considers that it is for the national authorities to make an initial assessment of the necessity of a given measure in the light of their local needs and conditions. A justification for this is that, for the Court, the national authorities are in a better position to make such assessments particularly 'because of their direct and continuous contacts with the vital forces of their countries' and that there are inherently multitude of factors involved in the socioeconomic and policy decision-making process of a given country.[586] This is, however, not an absolute

583 See *Chapman v. United Kingdom*, para 92; *Buckley v. United Kingdom*, par 76; *Fadeyeva v. Russia*, paras 102–105.

584 *Fadeyeva v. Russia*, para 105.

585 For the latest approach in the Court's assessment of necessity and proportionality in relation to positive obligations of the States under socio-economic rights, *Fadeyeva v. Russia,* paras 94–105. See also *Chapman v. UK*, para 90; *Buckley v. United Kingdom*, para 76; *Fadeyeva v. Russia*, paras 102–105.

586 See *Chapman v. United Kingdom,* para 91; *Buckley v. United Kingdom,* para 75; *Fadeyeva v Russia,* para 102.

discretion as they only make an initial assessment of the necessity of adopting a given measure. The scope of this discretion will be restricted based on the nature of the right interfered with and its importance to the individual, the nature of activities restricted, and the existence of an international (European) consensus in relation to the issue involved in a given case. Therefore, it is ultimately for the Court to make a final assessment of whether the authorities have achieved a reasonable balance between the competing interests in the light of both the procedural and substantive guarantees enshrined in the Convention.[587]

In principle, whether the assessment is made by the national authorities or the Court, it is clear that the general guiding principle is the same: whether the measure can be regarded as 'necessary in a democratic society'. The nature of a 'democratic society' and, hence, what is necessary in such a society at a particular time and place may vary from case to case. Nevertheless, it cannot be disputed that such norms as the rule of law (including absence of arbitrariness), accountability, pluralism and respect for human rights including the right to participation are among few of the characteristic features of a democratic society.[588] It is, therefore, indispensable that decision-making processes in such a society respects the right to participation of individuals in matters affecting their essential ESC rights and interests and, to this end, ensures a fair and reasonable balance between competing interests involved therein.[589]

### 5.3.5. UNHRS

The practices of the UN human rights organs and its other relevant institutions also attest the importance of the right to participation in the realisation of, in particular, ESC rights. In fact, it is possible to state that the right to participation has now become one of the common phrases in any of the UN official documents such as reports, resolutions, declarations and treaties concerned, directly or indirectly, with the protection and promotion of human rights. It has also been referred to in several general comments of the human rights treaty bodies and in the reports UN independent experts. It is recognised that the right to participation has a paramount importance not just for the effective realisation of ESC rights but also for the realisation of all human rights and for ensuring the rule of law, development, democracy and social justice. It also appears that ensuring full and

587 *Buckley v. United Kingdom*, para 74; *Chapman v. United Kingdom,* para 90–91; *Fadeyeva v. Russia,* para 102.

588 For more on the Court's view of the values of democratic society and its relation with the Convention rights, see particularly (*mutatis mutandis*) *Refah Partisi (The Welfare Party) and Others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) [GC]), Judgment of 13 February 2003 (hereafter Welfare Party et al v. Turkey),* para 86ff; *United Communist Party of Turkey and Others v. Turkey (133/1996/752/951), Judgement of 30 January 1998 (hereafter United Community Party et al v. Turkey), para 43ff.*

589 *Cf. Buckley v. United Kingdom,* para 76; *Chapman v. United Kingdom,* para 92.

effective right to participation of individuals in the political and public affairs of their countries will be one of the principal focuses of the UN and its human rights institutions in the post-millennium development agenda. In this regard, greater emphasis is placed especially on promoting the right to participation of women and other vulnerable individuals and groups in a society.

However, this increased recognition of and attention to the importance of the right to participation has not yet been matched with a clear articulation and development of its normative contents. This is even more so with respect to its role in the protection of socioeconomic rights. So far, there are only two general comments and one general recommendation specifically discussing the concept and implications of the right to participation; even then none of this is purely about the right to participation per se. The oldest one is General Comment No. 25 of the Human Rights Committee (HRC) entitled 'Participation in Public Affairs and the Right to Vote' adopted in 1996. Therein the Committee addressed the right to take part in the political and public conduct of one's own country and to this extent it mainly focused on expounding the right to vote and stand for election under Article 25 of the ICCPR. Other than briefly explaining the notion of political and public conduct and the nature of the obligations of the States in ensuring the rights of everyone to participate in election, it did not pay much attention to developing the general concept, status and content of the right to participation in international human rights law. It also did not discuss its specific significance in the protection of the rights of those disadvantaged and marginalised individuals and groups in a society.

In its General Comment No. 12[590], the Committee on the Rights of the Child (CRC) discussed few important aspects of the right to participation in relation to the rights of the child. In this General Comment, the Committee did not use the phrase 'the right to participation' but rather 'the right to be heard'. It is only in the substantive discussion that it used the notion of participation, but not the right to participation. At some point it even seems to have suggested that the concept of participation is an evolving concept, somehow indicating the reason why it might have hesitated to formulate its general comment in terms of the right to participation. Such suggestion, if intended, would however be misplaced especially in the light of the rich body of law and jurisprudence as seen in the preceding discussions. The best that can be said is that in this General Comment, the Committee was essentially discussing the right to fair trial of the child and not the general right of participation. Indeed, the right of the child to be heard in all administrative, judicial and quasi-judicial decision-making process was the central focus of the General Comment although it did make some brief but important comments on certain of the elements constituting the general right to participation of children.

590 Adopted in its Fifty-first Session (2009).

General Recommendation No. 23[591] issued by the Committee on Elimination of all forms of Discrimination against Women (CEDAW) also deals with the right to participation in the context of the States parties' obligation to eliminate *de jure* and *de facto* discrimination against women and girls and to instead ensure equality of participation in the political and public affairs at various levels (local, national, regional and global). To this end, the Recommendation provides various steps and measures that should be taken to ensure the equal participation of women at all levels. Though crucial in itself, the Committee also did not provide us with the general notion, status and normative contents of the right to participation in international human rights law.

However, the Committee on Economic, Social and Cultural Rights (CESCR), an international body directly responsible for the universal monitoring of the realisation and further development of the normative contents of ESC at the UN level, has not yet issued a specific general comment on the right to participation and its importance for the protection of ESC rights. This is somewhat surprising given its vital role in the protection of substantive ESC rights. It is true that the Committee has tangentially referred to the importance of ensuring the participation of individuals and groups and the general public in all of its previous general comments. But this does not replace the normative value of a separate general comment expounding the right to participation as a right in itself and its significance in the effective realisation of substantive ESC rights and basic social justice – the primary, in fact, the grand objective of ESC rights regime.

It seems that the extensive efforts of the Office of High Commission on Human Rights (OHCHR) in relation to the promotion and protection of ESC rights that have finally brought attention to the right to participation within the UN system. The OHCHR has put an immense effort in synthesising and creating logical synergy between all the references made to the right to participation in various works of the UN organs including the General Assembly and Human Rights Bodies. In this regard, the series of the relevant reports prepared by the OHCHR at different times are worth mentioning.[592] For instance, in its report concerning the implementation and monitoring of ESC rights, the OHCHR stated that international human rights standards prescribe that institutional and procedural frameworks be put in place by the States because the implementation of these rights should include mechanisms for, inter alia, the participation of the relevant stakeholders. It added that failure by a State to duly include such mechanisms to satisfy the procedural requirements of these rights may also

591 Adopted in its Sixteenth Session (1976).

592 In this regard, the OHCHR has prepared and submitted to the HRCo/ECOSOC under different topics. Pursuant to HRCo's Resolution 27/24 (A/HRC/RES/27/24, para 6), it had also submitted an interesting report focusing on the best practices available and challenges and ways to address those challenges in the realisation of the right to participation during the 30th Regular Session of the HRCo. See A/HRC/30/26.

amount to violation of its international obligations flowing therefrom.[593] In another report which it submitted a year later concerning preventable maternal mortality and morbidity and human rights, participation was presented as one of the seven core principles flowing from the human rights values of dignity and non-discrimination, forming the bedrock of a human rights-based approach to, in this case, addressing maternal mortality and morbidity.[594] It was specifically regarded as an operational principle of a rights-based approach that has come to be recognised as a right in itself. In stating this, the report drew on the Almata Declaration on Primary Healthcare and the works of the Independent Expert on the Right to Health.[595] Also, in its 2011 report on the role of indicators for the implementation and monitoring of socioeconomic and cultural rights, participation is considered as one of the cross-cutting human rights principles (together with non-discrimination, equality, accountability and the right to remedy, all of which are the subject of discussion in this thesis) that must be taken into account in the collection and analysis of a given data of indicators on a certain right.[596]

A relatively detailed analysis by the OHCHR of the right to participation is presented in its 2014 and 2015 reports to the Human Rights Council (HRCo).[597] Interestingly, the reports recognise the fact that political and public participation rights play a crucial role in the promotion of democratic governance, the rule of law, social inclusion and economic development, advancement of all human rights, empowering individuals and groups, and as one of the core elements of human rights-based approaches aimed at eliminating marginalisation and discrimination.[598] Read together, they address, inter alia, the concept, legal frameworks, challenges affecting and best practices in the realisation of the right to participation. In particular, the right to equal and effective participation in the public and political life is construed as constituting a central feature or hallmark of inclusive democracy and for the realisation of all human rights and human

593 See E/2009/90, para 33 cum n19. In addition to this, it also mentions other important principles which have crucial relationships with the right to participation such as access to information, accountability, due process of law, and access to justice. ibid.

594 A/HRC/14/39, paras 32 and 59. As it stated, 'The practical implications of the human rights values of dignity and non-discrimination result in a set of working principles that form the basis of a human rights approach. The treaty bodies and United Nations experts have clarified the importance of seven such principles: accountability, participation, transparency, empowerment, sustainability, international cooperation and non-discrimination. These principles have particular application when examining a human rights-based approach to addressing maternal mortality and morbidity as discussed in this section.' ibid para 32. It is also interesting to note that these principles have expressly been endorsed by Human Rights Council and referred to it as underlying human rights principles in a number of its resolutions concerned with the realisation of socioeconomic and cultural rights. See particularly A/HRC/RES/22/5, para 9, A/HRC/RES/22/11/, Preamble.

595 A/HRC/14/39, para 39.

596 OHCHR Report for HRCo, E/2011/90, para 21.

597 See A/HRC/27/29 & A/HRC/30/26.

598 A/HRC/27/29, para 2.

rights-based strategies aimed at eradicating discrimination and inequalities. This is an interesting contribution to the conception of the role and notion of the right to participation. But both reports did not go deep enough in establishing its assertions on a more solid theoretical and legal foundation. Even if it made reference to some of the UN and regional human rights treaties recognising the right to participation, it failed to articulate the general legal status and constitutive elements of the right to participation under international human rights law. In fact, it seems to have been highly influenced by the works of some of the UN treaty bodies and independent experts, in particular, General Comment No. 25 of HRC and General Recommendation No. 23 of CEDAW; moreover, a great deal of the discussions in both reports were unnecessarily eschewed towards the 'electoral rights'.[599]

In addition to the works of the OHCHR, the UN Office of the Secretary-General has also been making important contributions to the clarification of the concept and significance of the right to participation both generally and in relation to the protection of ESC rights including the right to development. As many of the reports of the Secretariat pertaining to the right to participation draw on the works of the OHCHR just mentioned, it is not necessary to repeat the discussion here. It is sufficient to mention that in its 2012 report to the HRCo, the Secretariat had made reference to the right to participation along with six other human rights principles underlying the promotion and protection of the women's ESC rights especially with respect to human rights-based approach to the problem of maternal mortality and morbidity.[600] Similar reference was made to the right to participation in its 2014 report on the importance of the social protection floors in the realisation ESC rights in which it underlined the importance of ensuring, inter alia, the right to participation of the beneficiaries in the process of designing, implementation and monitoring of social protection programs.[601]

As already referred to above, HRCo has also been playing an important role through series of its resolutions recognising the right to participation and demanding each Member States to effectively ensure the same for everyone within its jurisdiction and providing a normative basis for the works of other relevant UN bodies including those just mentioned above.[602] It has repeatedly reaffirmed

---

599 It would have been better had the High Commission further developed its conception of participation mentioned in paras 2 and 6 of the report with more theoretical and practical evidence.

600 A/HRC/22/24, para 60 (citing the works of High Commission) submitted per HRCo Resolution A/HRC/RES/19/5).

601 Report of the Secretary-General on the Question of the Realization in all Countries of Economic, Social and Cultural Rights, A/HRC/28/35, para 24–28.

602 For instance, it has already been noted that the aforementioned reports of both the High Commission and the Secretariat on the right to participation and generally on the question of the realisation of ESC rights are mostly initiated by specific resolutions of the HRCo; at times its resolution are inspired by certain relevant reports thereby giving normative force to the substance of the report. See for instance A/HRC/RES/4/1; A/HRC/RES/10/11; A/HRC/

that every citizen shall have the right and the opportunity to take part, directly or indirectly, in the conduct of public affairs without any form of distinction and unreasonable restrictions and to have equal access to public service in his or her country. It has also emphasised that the right of everyone to equal and effective participation in the political, public and other affairs of the society has a critical importance for democracy, the rule of law, social inclusion, development, gender equality and for the realisation of all human rights and social justice.[603] In particular, in one of its resolutions on human rights, democracy and the rule of law, the Council underlined that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives as well as the symbiotic relationship between democracy, human rights and the rule of law. That democracy includes respect for all human rights and fundamental freedoms including, inter alia, the right to directly or indirectly take part in the conduct of public affairs and respect for the rule of law and that democracy is vital for the promotion and protection of all human rights.[604]

Therefore, it is possible to conclude here by stating that the volume of works being done and the level of coordination and concerted efforts towards the promotion and implementation of the right to participation at various levels indicate the clear recognition of its vital importance for the effective realisation of, in particular, ESC rights and social justice. Similar to the case law discussed above, the UN system has been paying due attention to the equal rights of all persons (men, women, minorities groups, indigenous, the disadvantaged, the marginalised, the deprived, the child, the elderly, people with disabilities) to directly or indirectly take part in all the political and public affairs of their countries without any form of unjustifiable discrimination. This includes the equal right and opportunity of everyone to have a meaningful say in and contribution to all decision-making processes affecting their socioeconomic, political and other vital interests. In this regard, the right to participation is seen as essentially flowing from (or as an extension or specification of) the right of the people to freely determine their own socioeconomic, political and governance system and from the principle that recognises the freely expressed will of the people as the basic foundation of the authority of government.

RES/19/5, A/HRC/RES/19/11; A/HRC/RES/19/36; A/HRC/RES/22/4; A/HRC/RES/22/5; A/HRC/RES/24/8; A/HRC/RES/25/11; A/HRC/RES/27/24.

603 See for instance, A/HRC/RES/19/11; A/HRC/RES/19/36; A/HRC/RES/27/24; A/HRC/RES/24/8; A/HRC/RES/22/4.

604 A/HRC/RES/19/36, Preamble & paras 1–5.

## 5.4. CONCLUDING SUMMARY

This Chapter has shown that one of the important legal obligation of the State to respect and ensure the material conditions of a dignified life consists in guaranteeing the effective participation of the individuals and groups in its decision-making processes affecting their vital socioeconomic rights and interests. In fact, guaranteeing this right is considered as a necessary and fundamental procedural prerequisite for the effective protection of substantive ESC rights. In addition, it also constitutes one of the practical expressions of the State's respect for the equal rights and inherent dignity of all persons. In this regard, the discussion has shown the recognition by human rights courts and bodies that this right is both a cross-cutting right attesting to the indivisibility and interdependence of all human rights and an integral constitutive element of all ESC rights. Its paramount importance is underscored in relation to the protection of ESC rights of vulnerable persons as it provides them with the opportunity to control their affairs in equal terms with other members of the society. It particularly plays a critical role in safeguarding their interests against various conditions of vulnerability by ensuring, inter alia, inclusive democracy, the rule of law and social inclusion. It reaffirms the equal and inherent dignity of human being and the emancipatory function of the very idea of human rights which asserts the rights of every person be treated with due and proper respect regardless of his or her identity and socioeconomic background. There is no specific requirement under international law concerning the structure or manner of participation but it is required participation in a given decision-making process be effective. This, in turn, obliges the State to ensure that it is relevant, meaningful, timely, transparent, respectful to the dignity and rights of participants and is conducted in good faith and in accordance with a pre-established legal procedure. The State therefore bears both negative and positive obligations to guarantee the free, full and effective exercising and enjoyment of this right by taking necessary and concrete measures.

# CHAPTER 6
# ACCESS TO JUSTICE

## 6.1. INTRODUCTION

There is no doubt, the right to access to justice holds a central place in the entire human rights protection system. It is in fact seen as the fulcrum of the effectiveness of the protection of human rights and the test (evidence) of the existence of the rule of law within a given State. This Chapter has accordingly two main purposes. First, it identifies the major elements of the right to access to justice developed in the case law. Second, it develops a critical position on how each of these elements should be applied in the context of ESC rights. Given these two main purposes of the Chapter, it is necessary to somehow depart from the general structure of analysis adopted in the rest of the chapters in Part two, that is, referring to the case law of each tribunals and monitoring bodies turn by turn. Here, first, the major elements of the right to access to justice are identified and, then, their meaning and implications are discussed in the light of international ESC rights from across the jurisdictions. However, it should be noted that there is no substantive departure from the general methodological approach adopted in this Part but only in the structure of analysis.

## 6.2. THE RIGHT TO ACCESS TO JUSTICE FOR ESC RIGHTS?

For many years, the right to access to justice has been identified only with those rights commonly referred to as civil and political rights or the so-called negative rights. ESC rights were considered as mere programmatic rights which do not give rise to justiciable claims before the court of law or another tribunal. That is, ESC rights were not seen as 'real' human rights giving rise to the right to access to justice. This view, in turn, was behind the whole justiciability discourse which mainly concerned the question whether ESC rights bestow on individuals the right to claim and obtain remedy against violation of these rights.[605] Interestingly, the debate on the justiciability of ESC rights is now

[605] Roach (n 12); Squires, Langford and Thiele (n 3).

exhausted and, hence, of no interest for the discussion here.[606] More importantly, the substantive argument on the justification of ESC rights has already been provided in Chapter four. In substance, it was argued that all human rights drive their normative justification from the principle of human dignity and that ESC rights are essentially concerned with guaranteeing basic material conditions of life which, in turn, are the constitutive element of a dignified human life. As such, it is indispensable that individuals have access to justice in relation to their fundamental ESC rights. Moreover, the number of cases reviewed and discussed in Part two of this study as a whole even makes the argument against justiciability of ESC rights counterfactual. However, as a matter of principle, the following two points are worth emphasising. First, denying the applicability of the right to access to justice in relation to ESC rights is in effect denying individuals the right and opportunity to challenge the choices and decisions of their governments although it is indubitable that such choices and decisions will have significant direct and immediate impacts on their lives. Second, it also undercuts the basic principle of the rule of law effectively leaving the fate of fundamental ESC rights of individuals in the unfettered discretion of government (politicians).[607] In this regard, it should be noted that (also observable from the cases seen in Chapter five and in the next chapters) the ever-increasing socioeconomic inequalities, exclusions and impoverishments have, by and large, to do with the choices and decisions of governments. These are just few of the practical reasons making the right to access to justice indispensable in relation to ESC rights. From the perspective of human rights, it is quite unacceptable that the governmental discretionary power of such magnitude would go unchecked or that individuals

606 See, inter alia, Langford (n 3); Langford and Nolan (n 3); Tara J Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press 2008); Squires, Langford and Thiele (n 3); Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System : A Manual on Presenting Claims* (n 13); Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas' (n 12); Melish, 'Counter-Rejoinder: Justice Vs. Justiciability?: Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation' (n 12); Courtis (n 3); Dennis and Stewart (n 3); Coomans (n 3); Tinta (n 3); James L. Cavallaro & Emily Schaffer (n 12); Leila Choukroune, 'Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social And Cultural Rights' (2005) 19 Colubia Journal of Asian Law 30. For the historical genesis of the question of justiciability within the UN human rights drafting history, see Annotations on the text of the draft International Covenants on Human Rights (prepared by Secretary General), GA Doc A/2929 (July 1955); Commission on Human Rights Drafting Committee, International Bill of Rights, ECOSOC Doc E/CN.4/AC.1/3/Add.1 (11 June 1947); Report of the Commission on Human Rights to ECOSOC, Third Year Six Session, E/600 (December 1947); Morsink (n 428).

607 CESCR General Comment No. 9 The Domestic Application of the Covenant, adopted in the Nineth Session (1998), para 3, 9–10.

be denied the right and opportunity to vindicate against choices affecting their life and dignity. As the cases discussed in this study show, it is utterly impossible to ensure the effective protection of ESC rights without the right to access to justice. This means, the idea that the right to access to justice is alien to ESC rights is now a matter of the past. Therefore, what is worthy of exploration is not about its applicability but rather about its basic contents and practical implications in the context of ESC rights.[608] So the next section will examine, first, the relationship between the State's generic human rights obligation and the right to access to justice and, then, the basic elements and implications of this right in the context of international ESC rights case law.

608 There is now rich body of case law and there are analytical reports concerning the significance of the right to access to justice in relation to the protection of ESC rights. At the UN level, OHCHR and SG have issued different reports. HRCo has also issued several resolutions emphasising the obligation to ensure the right to access to justice. With respect to the Inter-American Human Rights System, there is a rich body of case law, advisory opinion and analytical reports directly or indirectly dealing with the right to access to justice. In particular, the Inter-American Commission's report on *Access to Justice* is one of its kind for it not only brings together important principles being developed through the system but also makes a sound legal and theoretical justification of the (individual and collective) right to access to justice and the corresponding States party's obligation to ensure the right within their respective jurisdictions. See IACoHR, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007 (hereafter cited as IACoHR's Report on Access to Justice in ESCR (OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007)). In addition, the following thematic reports of the Commission are also equally important in showing the significance of the right to access to justice especially with respect to ESC rights. Access to Justice for Women Victims of Sexual Violence: Education and Health, OEA/Ser.L/V/II. Doc. 65, 28 December 2011 (hereafter cited as IACoHR's Report on Access to Justice for Women Victims of Violence (OEA/Ser.L/V/II. Doc. 65, 28 December 2011)); Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009 (hereafter cited as IACoHR's Report on the Rights of Indigenous and Tribal Peoples (OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009)); The Work, Education and Resources of Women: the Road to Equality in Guaranteeing Economic, Social and Cultural Rights, OEA/Ser.L/V/II.143 Doc. 59, 3 November 2011 (hereafter cited as IACoHR's Report on the Road to Gender Equality in ESCR (OEA/Ser.L/V/II.143 Doc. 59, 3 November 2011)); Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application, OEA/Ser.L/V/II. 143 Doc. 60, 3 November 2011 (hereafter cited as IACoHR's Report on Legal Standards Related to Gender Equality and Women's Rights (OEA/Ser.L/V/II. 143 Doc. 60, 3 November 2011)); The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, 5 December 2011 (hereafter cited as IACoHR's Report on People of African Descent (OEA/Ser.L/V/II. Doc. 62, 5 December 2011)); Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights, OEA/Ser.L/V/II.132 Doc. 14, 19 July 2008 (hereinafter cited as IACoHR's Guidelines for Progress Indicators in ESCR (OEA/Ser.L/V/II.132 Doc. 14, 19 July 2008)).

## 6.3. JURISPRUDENCE

### 6.3.1. THE OBLIGATION TO GUARANTEE THE RIGHT TO ACCESS TO JUSTICE

Before identifying and discussing its constitutive elements, it is important to first see the connection between the States' generic human rights obligation stated above and the right of to access to justice. Thus, as already argued above, international human rights law essentially prescribes certain generic obligations of the States: the obligation to respect and ensure (guarantee or give full domestic legal effect to) all the rights and freedoms for everyone within their jurisdictions. These generic obligations give rise to other concrete obligations with respect to each of the substantive rights and the special needs and circumstances of the individuals concerned. One aspect of the generic obligation to ensure the free, full and effective exercise and enjoyment of all human rights is the obligation to guarantee the right to access to justice. That is, the right to access to justice directly flows from the States' undertaking to respect and guarantee all human rights. It is one of the primary and immediate steps that the States are legally bound to take to ensure within their domestic legal systems.[609] As the UN Secretary General's report on access to justice for ESC rights clearly states, the right to remedy for violations of human rights is fundamental to the very notion of human rights.[610] In the words of the African Commission, 'Human rights law and the international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations'.[611] This means, the right to access to justice is an integral element of the very idea of human rights. As will be argued in this Subsection, the very fact of being party to a given human rights treaty necessarily implies the State's legal obligation to ensure the right to access to justice through which individuals may avail themselves of the rights in order to assert and claim against acts of violations.

In this regard, there is no evidence in the case law that there should be a specific legal text or provision providing for (attesting to the existence of) the right to access to justice in a given human rights treaty. In the above-mentioned report[612], the Secretary General seems to have advanced the old critic's view of the absence of specific provision providing for the right to access to justice as a weakness of ICESCR but this is a misplaced view. In fact, the right to access

609 See Introduction to Part Two above.
610 See Report of the Secretary-General on the Question of the Realization in all Countries of Economic, Social and Cultural Rights, A/HRC/25/31.
611 *Noah Kazingachire et al v. Zimbabwe*, para 127.
612 A/HRC/25/31, paras 2–6.

to justice is now part and parcel of the customary international law norm.[613] A well-established jurisprudence of the IACtHR also shows that the obligation to guarantee human rights 'implies the duty of the States party to organize all the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[614] In this way, the obligation to guarantee complements the obligation to respect human rights by requiring them to adopt all necessary measures to give practical effect to the rights and freedoms within their domestic systems.[615] In this regard, there is no question that the manner of giving full domestic effect to human rights is relatively discretionary to each State. For one State, it may entail enactment of a new law; for another State, it may be revision of the already existing one to make it consistent with their international obligation. At the same time, it is equally important that each State ensures that the measure taken with the view to give practical effect to a human right complies with all the procedural and substantive principles of guaranteeing the free and full exercise of the rights and that the measure taken be effective.[616] Above all, no State has a discretionary power to refuse to give a domestic legal effect to the rights it has recognised in various international treaties, for the failure to do so

---

613 See generally, Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as Human Rights* (Oxford University Press 2007); Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 European Journal of International Law; Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005). See also *Golder v. the United Kingdom (Application No. 4451/70), Judgment of 21 February 1975* (*hereafter Golder v. United Kingdom*), para 35.

614 See for instance, *Velasquez-Rodriguezv. Honduras,* para 166*; Yakye Axa Indigenous Community v. Paraguay,* para *61ff; Sawhoyamaxa Indigenous Community v. Paraguay,* para 109–110*; Ximenes-Lopes v. Brazil,* paras 170–174.

615 *Velasquez-Rodriguez v. Honduras*, para 168 cum paras 170–181. The Court stated this in explaining the function of Art 2 (Domestic Legal Effects) and Art 1(1) (obligation to respect and ensure) of ACHR. Comparing the obligations of the State enshrined in these two provisions, the Court stated that the obligations of the States under Art 1(1) is 'more direct' than the one in Art 2 because while the former directly requires that the rights be respected and ensured the later simply requires that States adopt mechanisms through which these be given effect to which, at a certain level, is discretionary to each State (ibid at 168). According to the Court, Art 2 is thus part and parcel of the substantive requirements implied by the obligation to respect and ensure the free and full exercise of the rights. For more on Court's analysis of Arts 1 and 2 of ACHR, see for instance, *Yakye Axa Indigenous Community v. Paraguay*, para 99–104 & 153; *Sawhoyamaxa Indigenous Community v. Paraguay*, para 109–110 & 142–144; *'Street Children' v. Guatemala*, paras 224–225; *Vera Vera v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of 19 May 2011*, paras 41–42; *Ximenes-Lopes v. Brazil*, paras 83–85; *Xákmok Kásek Indigenous Community v. Paraguay,* paras 265–268; *the 'Five Pensioners' v. Peru, Merits, Reparations and Costs, Judgment 28 February 2003,* para 161–168.

616 *Yakye Axa Indigenous Community v. Paraguay*, para 99–108 & 153; *Sawhoyamaxa Indigenous Community v. Paraguay*, para 109–110*;* CESCR General Comment No. 9.

would in itself constitute a clear violation of its obligation to guarantee human rights within its domestic legal system.[617]

The review of the case law shows that ensuring effective access to justice requires that the domestic remedial mechanisms be designed in the light of its basic procedural and substantive elements.[618] For instance, with respect to the substantive dimensions of the right to access to justice, the Secretary General's report mentioned above states that a remedy should be adequate. A remedy is said to be adequate if it is accessible, affordable, prompt, effective, legitimate, predictable, transparent and compatible with the nature of the right in issue. It also adds that a remedy must be designed on the basis of equity in the sense that it is designed by taking into account the needs and interests of the 'poorest and most disadvantaged and marginalized' persons in a society. In relation to the procedural and institutional aspects, the report mentions the requirement of prompt, expeditious, effective, impartial and independent adjudication of a human right complaint by a remedial institution.[619] The case law of the ECtHR also shows that everyone with arguable claims must have access to effective remedies.[620] And the same is also true in the case law of the IACtHR. Per IACtHR, a remedy must comply with the requirements of due legal procedure and effectiveness. So, any remedy available at a domestic level must be substantiated in accordance with the rules of due process and be able to ensure effective recourse for violations of human rights. In particular, it requires that a remedy be accessible, simple, prompt, and effective and that the remedial institution (which can be either judicial or any other organ) be competent and independent to effectively redress the alleged violation, while also emphasising the indispensable nature of judicial

617 See Introduction to Part two above. See particularly Arts 26 & 27 VCLT; CESCR General Comment No. 3: the Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), adopted in Fifth Session (1990); HRC General Comment No. 31: the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted in Eightieth Session (2004); the '*Street Children' v. Guatemala,* para 235; *Five Pensioners' v. Peru*, para 136–137 (citing, inter alia, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment of August 31, 2001*, para 113), *Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment of February 6, 2001*, paras 134–137; *Kichwa Indigenous People of Sarayaku v. Ecuador*, para 261.

618 See *Xákmok Kásek Indigenous Community v. Paraguay,* paras 140–141 cum nn 163–166; *G.R. v. the Netherlands (Application No. 22251/07), Judgment of 10 January 2012,* paras 44–50; *McFarlane v. Ireland (Application No. 31333/06) [GC], Judgement of 10 September 2010,* paras 107–108; *Aksoy v. Turkey (Application no. 21987/93), Judgment of 18 December 1996,* paras 51–54; *M.S.S. v. Belgium and Greece [GC],* paras 288–293*; M.S. v. the United Kingdom (Application No. 24527/08), Judgment 3 May 2012*, para 49*; Noah Kazingachire et al v. Zimbabwe,* paras 129–131.

619 See A/HRC/25/31, paras 25–26. cum nn 103–115 (referring to the practices of CESCR and other UN Committees and other regional human rights systems).

620 See, inter alia, *M.S.S. v. Belgium and Greece,* para 288; *G.R. v. the Netherlands,* para 44; *McFarlane v. Ireland,* para 108; *Golder v. United Kingdom*, para 36.

review under certain circumstances.[621] The AfCoHPR in its part states that a remedy must fulfil three general but basic criteria: it should be available, effective and sufficient. For the Commission, availability of a remedy essentially concerns whether it can be pursed without impediment; effectiveness is whether it 'offers a prospect of success' and sufficiency is about whether it is capable of redressing the alleged violation, that is, whether it is appropriate and adequate.[622]

Another important point to note under this subsection is the scope of the State obligation to guarantee the right to access to justice. The question is whether the obligation to ensure the right to access to justice only applies to matters falling within the judicial proceedings (court of law) or to all kinds of proceedings such as administrative and other quasi-judicial proceedings. The general principle from the case law of international tribunals is that the State obligation to guarantee access to justice extends to all kinds of proceedings (that is, judicial, administrative or any other quasi-judicial bodies) dealing with arguable human rights claims of individuals although the specific application of each of the elements to be discussed below may need to be assessed on case-by-case basis. According to the ECtHR, it is not about the nature of the proceeding or institution that should be considered but rather whether a person has an arguable claim/ dispute concerning the determination of his/ her civil rights and obligations. Per the Court, the notion of civil rights and obligation has an autonomous meaning and, hence, does not depend on the classification made by the respective national legislation. For instance, the main question involved in *Feldbrugge v. The Netherlands* and in *Deumeland v. Germany* was whether Article 6 para 1 is applicable to the decision concerning social security (health insurance) benefits regulated under public law schemes.[623] According to the Court, the decisive element is not the formal

---

621 '*Street Children' v. Guatemala,* para 234–238; *Yakye Axa Indigenous Community v. Paraguay*, para *99–102; Sawhoyamaxa Indigenous Community v. Paraguay*, para 110ff; *The Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2006,* paras 126 & 128–132*; the Constitutional Court v. Peru, Merits, Reparations and Costs, Judgment of 31 January 2001*, paras 88–91 & 66–75*; the 'Five Pensioners' v. Peru,* paras 161–168; *the 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment of 5 July 2004, para 180–194*; *Cesti-Hurtado v. Peru, merits, judgment of 29 September 1999,* paras 164–168 & 121; *Ximenes-Lopes v. Brazil, Merits, Reparations and Costs, Judgment of 4 July 2006,* paras 170–174; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, paras 112–114 & 131, 134–135; *Ivcher-Bronstein v. Peru,* para 135; *Xákmok Kásek Indigenous Community v. Paraguay,* para 141*; Sarayaku v. Ecuador,* para 263*; Furlan And Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2012,* para 209–212.

622 See *Noah Kazingachire et al v. Zimbabwe,* paras 129–131; *Jawara v. Gambia*, para 31; *Communication 241/01: Purohit and Moore v. Gambia, decision on merits, 33rd Ordinary Session of the African Commission, May 2003 (hereafter Purohit and Moore v. Gambia); Communication 323/06: Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt, decision on merits, 10th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, 12 to 16 December 2011.*

623 *Feldbrugge v. The Netherlands (Application no. 8562/79), Judgment of 29 May 1986*, 29 May 1986; *Deumeland* v. *Germany (Application No. 9384/81), Judgment of 29 May 1986.*

characterisation of the scheme as private or public law as such but the nature of the entitlement and the substantive impact of the outcome of a certain decision-making procedure on the private life of the individual beneficiary.[624] In addition, the case law of the IACtHR and several reports of the IACoHR strongly establish that the State obligation to guarantee the right to access to justice applies to any kind of procedure and jurisdiction involving the determination of the rights and obligations of individuals regardless of the nature of the proceeding and the type of the institution concerned.[625] Furthermore, this obligation is also not limited to the rights enshrined in international human rights treaties. It should also be guaranteed in relation to all the rights recognised through national legislations as well. That is, the State's obligation to guarantee access to justice holds true irrespective of whether the right exists at national or international level. This in effect means that the State cannot justify its failure to ensure the right to access to justice on the basis of the fact that a given right is not recognised at an international level.[626]

Therefore, with respect to the point at hand, it can be concluded that the obligation to guarantee the right to access to justice is an integral element of the State's generic obligation to ensure the free, full and effective exercise and enjoyment of all human rights within its jurisdiction. While the existence of a positive law expressly providing for the right to access to justice may be useful, the consistent position established in the case law is that this right does not only flow from mere positive law but also and above all from the general principle of law and the rule of law governing democratic societies.[627] Thus, the State is required to ensure this right in all kinds of proceedings involving the determination of the rights and obligations of individuals – the only necessary and sufficient condition

---

624 See *Feldbrugge v. the Netherlands,* paras 18–20, 29, 37 & 43; *Deumeland* v. *Germany,* paras 59–60.

625 *Xákmok Kásek Indigenous Community v. Paraguay,* para 126ff; *Velásquez-Rodríguez v. Honduras,* paras 170–181; '*Street Children*' *v. Guatemala,* para 222ff; *Baena-Ricardo et al v. Panama, Merits, Reparations and Costs, Judgment of 2 February 2001*, paras 123–134 & 137; *Yakye Axa Indigenous Community v. Paraguay,* paras 61–63 *cum* 99–104, 108–109 & 117–118ff; *Sawhoyamaxa Indigenous Community v. Paraguay,* paras 77–112; IACoHR's Report on Access to Justice in ESCR (OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007). See also IACoHR's Report on Access to Justice for Women Victims of Violence (OEA/Ser.L/V/II. Doc. 65, 28 December 2011); IACoHR's Report on the Rights of Indigenous and Tribal Peoples (OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009); IACoHR's Report on the Road to Gender Equality in ESCR (OEA/Ser.L/V/II.143 Doc. 59, 3 November 2011); IACoHR's Report on Legal Standards Related to Gender Equality and Women's Rights (OEA/Ser.L/V/II. 143 Doc. 60, 3 November 2011); IACoHR's Report on People of African Descent (OEA/Ser.L/V/II. Doc. 62, 5 December 2011); IACoHR's Guidelines for Progress Indicators in ESCR (OEA/Ser.L/V/II.132 Doc. 14, 19 July 2008).

626 See for instance, *Dismissed Congressional Employee v. Peru,* paras 106–107 & 119–132; *Constitutional Court v. Peru,* paras 66–85 & 88–96; *IACoHR's Report on Access to Justice in ESCR*.

627 *Golder v. United Kingdom*), paras 34–37; *Xákmok Kásek Indigenous Community v. Paraguay,* para 139.

for a given State to guarantee the right to access to justice in human rights law. It is, to this end, imperative that the domestic proceedings be designed in accordance with the fundamental procedural and substantive elements of access to justice (discussed in detail below).

### 6.3.2. BASIC ELEMENTS OF THE RIGHT TO ACCESS TO JUSTICE

The discussion in the preceding subsection indicates that there are certain substantive and procedural elements of the right to access to justice developed in the case law. In general, it is possible to categorise these elements into the following five basic elements: right to fair hearing (which, in turn, includes the right to accessible procedural and institutional framework, right to enjoy equality of arms and opportunities including the right to counsel, transparency and publicity), the right to prompt hearing (reasonable time), right to suitable and effective redress, the right to a competent, impartial and independent organ, and the right to full and prompt compliance.[628] As it can be seen, while some of these elements concern the process (procedural aspect) of a remedy, others govern the substantive quality of a remedy; and still others govern the nature, conduct and organisation of the institution entrusted with a power of remedy. These are basic constitutive elements of the right to access to justice in the sense that failure to adequately give effect to any one of these may seriously undermine the right to access to justice and, hence, the effective protection of the substantive rights it is meant to safeguard. Following the ECtHR, we can say that these guarantees together constitute the whole sum of the broad notion of the right to fair trial guaranteed under Art 6 and 13 of the ECHR which, in turn, is a foundation of the rule of law and the effective protection of human rights in a democratic society.[629] And per IACtHR, they are the constitutive elements of the due process and judicial protection guaranteed under Articles 8 and 25 of the ACHR.[630]

#### *a) The right to a fair hearing*

The first important element is the right to a fair hearing, that is, the right to have access to (institute a claim or initiate a proceeding) and have one's cause heard

628 These elements are in one way or another generally recognised in academic writings on access to justice especially written in the context of civil and political rights. However, there is only a handful of literature on this topic written in the context of ESC rights in the sense and depth presented in this Chapter. The most interesting publication is the report of the IACoHR already cited above (IACoHR's Report on Access to Justice in ESCR (OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007)). See also generally Shelton (n 613); Squires, Langford and Thiele (n 3); Roach (n 12).

629 *Golder v. United Kingdom*, paras 34–36.

630 See Introduction to Part two above.

by a competent organ. It is a gateway to the right to effective remedy. The most important authority in this regard is the judgment of the ECtHR in the *Golder* case. According to the ECtHR, the right to be heard, that its, the right to institute a complaint and hence initiate a proceeding before a competent tribunal for the purpose of asserting one's right and obtaining an appropriate redress is the first and primary element of the right to a fair trial.[631] What is interesting in this case is that there is no specific text or provision in the Convention which specifically guarantees the right to initiate a proceeding. The Respondent State was keen to stress this point saying that the guarantees pertaining to the right to a fair trial applies only to the proceeding before a tribunal and, thus, does not extend to the one which the tribunal has not yet seized with. But according to the ECtHR, the right to access to a court is an integral element of the right to a fair trial which should be construed particularly in the light of the object and purpose of the Convention and the fundamental values of the rule of law and democracy enshrined in its preamble.[632]

Other human rights tribunals have also consistently followed the same suite. According to the case law of the IACtHR, for instance, the general obligation to respect and guarantee human rights implies, inter alia, 'the rights to be heard by the Courts'.[633] The African Commission also interprets the notion of a fair trial as being analogous with the concept of access to appropriate justice and thus requires that a cause be heard by a court.[634] Particularly implied in this conception of the right to a fair hearing is first and foremost the right to have access to a tribunal. This, in turn, touches upon a variety of issues including the accessibility of the institution and relevant laws and the fairness of the process and system as a whole. Thus, while it should be obvious that the existence of an institution and the system thereof is an important precondition for the right to a fair hearing and hence access to justice, its accessibility is also crucial to those in need. Seen in this light, the right to a fair hearing requires or even presupposes the positive obligation of a State to remove physical, procedural, and financial or other kinds of barriers which may in one way or another hinder, diminish or frustrate the right to access to justice. Generally stated, physical accessibility means the remedial institutions should be available within a reasonable proximity whereas financial accessibility entails that the expenses and fees related to the institution and conduct of a proceeding should be reasonable and affordable.[635]

However, in relation to ESC rights cases, physical and financial accessibility are often intertwined. The reason is that violations of these rights disproportionately

631 *Golder v. United Kingdom,* paras 34–36.
632 Ibid paras 25–36.
633 *Constitutional Court v. Peru,* paras 66–85; *the 'Street Children' v. Guatemala,* para 227; *Baena-Ricardo et al v. Panama*, paras 123ff; *IACoHR's Report on Access to Justice in ESCR,* p 34ff.
634 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, paras 216–217.
635 See for instance, A/HRC/25/31, paras 16–24; *Furlan and Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August* 2012, paras 228–230.

affect persons living in desperate socioeconomic conditions. A typical example for this is the case of people residing in a rural community who, though they constitute a sheer majority in their respective countries (particularly in the Global South), have rare access to the justice systems. They are often forced to travel for several hours or days in order to have the first contact with a tribunal. This is further exacerbated by their poor economic conditions often characterised by a struggle for survival. In addition, accessibility is also a crucial factor in the context of persons affected by other conditions of vulnerability such as disability, social exclusion, gender, marginalisation and poverty. For instance, absence of physical infrastructure suitable to accommodate the needs of persons with disability has been an overdue problem in all parts of the world and the worst in poor nations.[636] Violence against women too often goes unaddressed because of different factors working together including lack of close-by institutions, poverty and underlying cultural factors.[637] In *Purohit and Moore v. Gambia*, the African Commission criticised the Respondent State because the remedies were accessible only to wealthy persons who can afford a private lawyer but not to persons with (mental) disability and poor economic background.[638] It is in the light of all such compelling factors that one should appreciate the significance of physical and financial accessibility of the remedial institutions in addressing socioeconomic and cultural rights.[639] Tthe UN Secretary General's report has rightly emphasised that the physical and financial accessibility are very important factors in the realisation of the right to access to justice in socioeconomic and cultural rights.[640] Not only this, the remedial mechanisms should also be designed on the basis of equity (that is equality and fairness) and affordability taking particularly into account the needs of the vulnerable persons; otherwise, it is likely that it may fall foul of the requirement of non-discrimination.[641] The right to a fair hearing itself can be analysed in terms of the following four elements it specifically gives rise to.

i) Simple, Clear and Objective Procedural Framework

One of the basic implications of the right to a fair hearing concerns accessibility of the procedural frameworks. This is to say that it requires the existence of clear, simple and objective procedural frameworks usable by every ordinary person in a society.[642] The IACtHR considers that the right of all persons to simple and prompt

636 A/HRC/25/31, paras 16–24.
637 See particularly IACoHR's Report on Access to Justice for Women Victims of Violence (OEA/Ser.L/V/II. Doc. 65, 28 December 2011), p 45ff.
638 Paras 35–38.
639 See for instance *G.R v. The Netherlands,* paras 46–55 (addressing, inter alia, the financial barriers to access to court).
640 See A/HRC/25/31, 17.
641 A/HRC/25/31 para 32; *Purohit and Moore v. Gambia*, paras 35–38.
642 A/HRC/25/31 para 16ff.

recourse or any other effective remedy against violation of a right constitutes one of the basic pillars of the human rights protection system and the rule of law in a democratic society.[643] So mere existence of a system is not sufficient to say that there is a right to fair hearing; it should also be designed in such a way that any ordinary person interested to assert his or her right can make use of the system. This among other things entails the removal of unnecessary and inaccessible formality requirements and linguistic complications often engrained in judicial and other proceedings. This is particularly important in relation to the protection of the rights of vulnerable persons. 'The right to reasonably simple proceedings especially benefits those who have been historically discriminated against or those who are in particular circumstances of vulnerability'. This requires the 'States to avoid proceedings that are complex, overly legalistic or employ legal jargon or use languages that make it difficult for disadvantaged people to understand the proceedings and its consequences and interfere with their ability to demand the fulfilment of their rights'.[644] The requirement of a fair hearing also implies that the procedural frameworks should be stated with sufficient clarity and certainty not just in theory but also in practice. In particular, individuals should be able to know with relative ease where, how and when to present their claims and reasonably expect an appropriate resolution to their arguable claims. As it will be seen shortly, this is also a crucial factor in assessing the promptness, suitability and effectiveness of a remedy as a whole. For instance, a vaguely formulated remedy or the one whose availability is doubtful may not qualify as a remedy at all for such remedies lack the requisite of accessibility and effectiveness.[645]

In essence, one of the critical impediments laying at the heart of the denial of access to justice in ESC rights has to do with an unjustifiable legislative and administrative complications in or, at times, prohibition against filing complaints before the relevant and competent judicial institution.[646] For instance, in the *Purhoit and Moore v. Gambia* case, the African Commission found that there was no clear law providing for persons with disabilities the right to challenge and have a judicial review of the decision of medical experts of the assessment about their mental state leading to detention; in addition, it also found that some of the remedies said to be available were inaccessibility to the applicants for they were scattered in various laws and require skilled legal expertise to make

643 *Sarayaku v. Ecuador,* para 260–264; *Xákmok Kásek Indigenous Community v. Paraguay,* paras 139–142; *Furlan and Family*, para 211; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* para 112.

644 A/HRC/25/31, para 33 *cum* n137.

645 *McFarlane v. Ireland,* para 107; *Purohit and Moore v. Gambia,* paras 32–38; *Jawara v. Gambia,* paras 34–35. *Communication 334/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, decision on merits, 9th Extra-Ordinary Session, 23 February to 3 March 2011*, paras 87 & 93.

646 See A/HRC/25/31, para 23; CESCR General Comment No. 9: The Domestic Application of the Covenant, adopted in its Nineteenth Session (1998).

use of them.[647] In another case, the African Commission also declared that in the presence of a legislation prohibiting an appeal from a military court to a regular court, the remedy available at the domestic level cannot be regarded as an effective remedy.[648] Also, according to the IACtHR, a legislative or any other prohibition to have access to judicial recourse (especially when other mechanisms are ineffective) is contrary to due process guarantees.[649] As it underscored in the *Dismissed Congressional Employees v. Peru* case, there should not be any law in a democratic society which prohibits a contestation by any interested person of the effect of the application or interpretation of the law or denies a genuine and effective access to justice of those affected by the law in question for the right to access to justice 'cannot be arbitrarily restricted, reduced or annulled'.[650] In this case, the Court stated that lack of judicial protection and legal certainty due to the legislative prohibition of a legal action clearly made the victims not to have any recourse for several years.[651] Accordingly, the violations they suffered 'took place within the framework of practical and normative impediments to a real access to justice and a general situations of absence of guarantees and ineffectiveness of the judicial institutions to deal with the facts such as the instant case'.[652]

The *Airey* case also sheds important light on the effect of indirect legislative hurdles to the right to access to justice. In this case, the existence of stringent, complicated and prohibitive procedural hurdle concerning judicial separation and divorce was one of the crucial factors in the complaint, in addition to of course the financial constraints in meeting the requirements. It appears that this legislative hurdle was intentionally installed with the view to discourage divorce and separation. The level of complication was of such a nature that it could not be utilised by ordinary persons like Airey without assistance from a qualified legal expert which the applicant could not afford owing to her personal economic situations (unemployed and dependent on state support for living). In effect, both the legal and factual conditions have resulted in lack of practical access to justice

647 Paras 50–54.

648 See *Egyptian Initiative for Personal Rights and Interights v. Egypt,* paras 87–98.

649 *'Five Pensioners' v. Peru*, para 138. see also *Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits and Reparations, Judgment of 26 May 2010,* para 166.

650 *The Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2006*, para 119 *cum* n70.

651 Ibid para 121.

652 Ibid para 129. Thus, having analysed all the prevailing legal and institutional circumstances underlying the violations of their right to access to justice, the Court concluded that because of the legal and practical impediments to a real access to justice and particularly because of 'the climate of legal uncertainty promoted by the norms that restricted complaints against the evaluation procedure and the eventual dismissal of the alleged victims, it is clear that the latter had no certainty about the proceeding they should or could use to claim the rights they considered violated, whether this was administrative-law, or by an action for *amparo'*. ibid. (emphasis in the original).

to assert her right to respect for her private or family life.[653] The same can be said with respect to most of the land-related violations of the rights of indigenous and tribal communities entertained in the Inter-American and African human rights systems. One of the crucial facts present in each case is the absence of clear and simple procedural and institutional mechanisms required to address their claims as well as an indirect, systematic prohibition of their right to access to justice due to lack of proper legal recognition of their specific circumstances. As a result, they often do not have a forum through which they can assert their ESC rights and seek remedies against infringement by their respective States or other agents.[654] Thus, it is obvious that the State's action to install laws with the intention to make the right to access to justice difficult or impossible and thereby to avoid scrutiny and accountability by and before an independent organ is simply a flagrant and serious violation of its clear international obligation to respect and guarantee the full and effective enjoyment of human rights by everyone within its jurisdiction.[655]

A related problem that could be mentioned here is the case of abrupt and unjustified changes to domestic legislations aimed at or having the effect of denying basic ESC rights. This, of course, is not an argument against a legal change or progression. It is rather to argue that a sudden change to a law with the effect of denying individuals their basic ESC rights and the opportunity to challenge its impact would certainly offend the requirement of objectivity signified by the right to a fair hearing. Thus, although there may be no right to an established legal system, there is necessarily the right not to have one's right and legal position abruptly removed without due process of law because the principle of legal certainty and objectivity are among the crucial elements of the rule of law standing at the back of the right to access to justice.[656]

ii) Fair and Equal Process

The right to a fair hearing also entails the State's obligation to ensure the fairness of the process and equality of the parties. Generally speaking, the principle of procedural fairness and equality of arms are well-established principles of the

653 *Airey v. Ireland*, paras 24–28. 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […] This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.' (internal citations omitted). ibid para 24.

654 For instance, this is particularly the central problem in *the Yakye Axa Indigenous Community v. Paraguay; Xákmok Kásek Indigenous Community v. Paraguay; the Mayagna (Sumo) Awas Tingni Community v. Nicaragua; Sawhoyamaxa Indigenous Community v. Paraguay; Kichwa Indigenous People of Sarayaku v. Ecuador; Endorois v. Kenya*.

655 See generally *Xákmok Kásek Indigenous Community v. Paraguay*, paras 127–146; *'Five Pensioners' v. Peru,* paras 125–126; *Dismissed Congressional Employee v. Peru,* paras 122–132.

656 *Dismissed Congressional Employee v. Peru,* paras 122–132; *Constitutional Court v. Peru,* paras 66–85; *'Five Pensioners' v. Peru*, paras 93–121.

right to a fair trial but their significance to the protection of ESC rights is not properly appreciated. It is clear that these principles require that all parties to a given proceeding be treated in a fair and equal manner. Thus, the parties must enjoy the same right and opportunity throughout the proceedings in terms of, for instance, production, examination and rebuttal of evidences; access to necessary information or files; and correction of errors and disadvantages in the submission of relevant documents and so on. To this extent, the principles are closely related to and reinforce the requirement of the impartiality of those in charge of a given proceeding. In this regard, it should also be noted that the question of the fairness of a proceeding (judicial, administrative, etc.) refers to the entire process taken as a whole including an appellate and other subsequent procedures available within a legal system.[657]

In this regard, it is worth noting that the requirements flowing from both principles are essentially formal. But with respect to ESC rights this strictly formal approach may, though crucial, not always hold true or be advantageous from a human rights point of view. In fact, it is even doubtful if this formal approach should be a rule or an exception in relation to these rights. There are two major reasons for this view. First, as already been stated above, ESC rights claims usually involve vulnerable members of the society and, often, the principal condition of vulnerability behind such claims has more to do with poverty and related socioeconomic factors. Second, ESC rights complaints are often directed against the State who are not only in a better place to access relevant information and official documents but also have a great deal of influence in dictating what should be publicly accessed or not particularly with respect to certain relevant policy documents, decisions or other measures which, in turn, are normally technical to be understood by ordinary persons. Added to this problem is the complex nature of the issues, both in legal and factual terms, involved in the institution and litigation of a case concerning ESC rights claims. The effect of this is even greater if it is difficult to access or produce certain relevant information indispensable to a given case but which is under the control of the authorities. Thus, the complex nature of the issues and lack of access to relevant information may effectively function as serious barrier to the right to access to justice. The intersection of these factors with other socioeconomic conditions of vulnerability would even create a far greater disadvantage for individuals concerned in terms of their ability to exercise their right to access to justice.[658] For all these reasons, it is very difficult to strictly follow the principle of the presumption of fairness and equality in disputes involving the State and vulnerable members of a society for whom the State also bears a special responsibility under human rights law. In this regard, the State is responsible to ensure that individuals are not

---

657 '*Street Children' v. Guatemala,* para 222ff; *Feldbrugge v. The Netherlands,* paras 44–46; *IACoHR's Report on Access to Justice in ESCR*, pp 48–52; A/HRC/25/31, paras 22–24.

658 See *Airey v. Ireland*, paras 24–26; *Purohit and Moore v. Gambia*, paras 50–54.

disadvantaged and hence unfairly treated (in the substantive sense of the term) by lack of access to vital information or expertise to assert their ESC rights claims. This responsibility applies to its judicial and other organs which must take due care that neither the State's nor the individual's position unduly undermines the existence of substantive equality and fairness of the proceeding.

Therefore, it has instead been suggested that there should be a presumption of inequality and hence shifting of a burden of proof especially in a dispute concerned with a matter under the exclusive or partial control of the authorities.[659] In the case law, this has been referred to as the principle of reverse presumption or adverse inference. Human rights tribunals have relied on this principle when it comes to the production of necessary evidence under the knowledge or control of authorities. According to this approach, if an individual makes a prima facie allegation against the State in relation to violation of his or her rights, it falls upon the State concerned to establish the veracity of such allegation by adducing necessary evidence. If the State fails to adduce necessary evidence against the claim, the tribunals will normally consider as being established to the advantage of the individual. In this way, the presumption of inequality and reverse presumption against the State can play an important role in furthering the effectiveness of the right to access justice in cases concerning ESC rights given particularly the vulnerability of individuals, the dominant position of the State, the nature of issues and the structure of litigation.[660] In addition, it is also possible that a tribunal may, out of its own motion, establish a commission for the purpose of producing expert evidence on the relevant dispute between parties. Judicial and other quasi-judicial practices, both national and international, clearly show that court-appointed experts or amicus curie briefs are often used for the purpose of clarifying and establishing certain facts essential to disposing a given case. There is no reason why this approach cannot be applied in the adjudication of ESC rights claims. In fact, in the case of ESC rights litigation, the importance of experts or *amicus curie* briefs cannot be limited to the resolution of a specific dispute for they can also play a positive role in enhancing the standard of legitimacy of the outcomes for future State actions and in inducing some form of legislative or policy reforms.[661]

---

659 A/HRC/25/31, para 33 *cum* n 138: 'In considering the principle of equality of arms, United Nations experts have signalled the importance of not presuming conditions of equality between the parties in a dispute when practice and experience have shown otherwise. The Committee on Economic, Social and Cultural Rights has stressed the need to include measures to balance inequalities between parties, including provision for shifting the burden of proof. The Committee has stated, in that regard, that "where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively."' ibid.

660 See *Fadeyeva v. Russia,* para 131; *D.H. and Others v. the Czech Republic,* paras 178–181.

661 For more on this, see generally, Christopher Tarver Robertson, 'Blind Expertise' (2010) 85 New York University Law Review 174; Karen Butler Reisinger, 'Court-Appointed Expert

### iii) The Right to Legal Counsel (Legal Aid)

The right to legal counsel or legal aid is one of the basic constitutive elements of the right to effective access to justice in general and fair hearing in particular. This is seen as among the fundamental procedural rights of accused persons in criminal cases. The justification for this essentially draws on the nature of the interest at stake (life, security and liberty of the individual) as well as on the *de facto* position of the State. It is seen as an indispensable prerequisite for ensuring both the formal and substantive equality of arms between the parties and the fairness of the proceeding.[662]

However, it is also argued above that the interests that ESC rights seek to guarantee are also equally vital especially when it concerns the critical material conditions of life such as health care for a patient in critical health condition and the survival in3come (basic necessities) for the poor. In fact, for some, such material conditions of life are often a matter of life and death. At the same time, the *de facto* position of the individual and the State in the general structure of ESC rights litigation is also quite similar to that of criminal litigation: as it is the case with the latter, the litigation is between the State and the individual where the State is *de facto* in a better position in every sense of the term. Thus, it should be said that the right to counsel in ESC rights claims can be as important as it is in criminal cases particularly in guaranteeing real equality of arms between parties and the fairness of the process thereby in avoiding those undue disadvantages and injustices that may result from the *de facto* position of the individual compared to that of the State. This is not to suggest that there should be an automatic entitlement to the right to counsel. As it is true with most of the rights, the right to counsel can and should be subject to certain conditions. Among other things, the identity of the person as to his or her age, economic status, social background and literacy level and the complexity of the case are all relevant factors in assessing whether one should be provided with some form of legal assistance or not. But as a matter of human rights, fairness and justice, it cannot be denied that the right to counsel also constitutes a crucial element of the right to access to justice in ESC rights claims. As stated by the IACtHR, the right to counsel or adequate representation is particularly crucial for the effective presentation and defence of the individuals' vital socioeconomic interests and claims before a tribunal.[663] This is even more so in relation to those cases involving vulnerable persons who

---

Panels: A Comparison of Two Models' (1998) 32 Indiana Law Review; Daniel Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' [2014] The British Yearbook of International Law 1.

662 See generally *Guide on Article 6: The Right to Fair Trial (crim limb)* (ECtHR, 2014), pp. 276–298; *Egyptian Initiative for Personal Rights and Interights v. Egypt,* paras 179–185; *Abdel Hadi et al v. Sudan*, paras 85–90.

663 *Yakye Axa Indigenous Community v. Paraguay, para 108, not sure, 117–119 cum nn80–85.*

may not be able to assert their rights without some form of legal assistance from the government or other institutions.

This, in turn, establishes a vital linkage between the right to access to justice and other substantive ESC rights. Hence, it is arguable that a failure by the State to ensure the right to counsel may raise issues of discrimination on the basis of economic or social status in the exercise of the right to access to justice thereby engaging the positive obligation of the State.[664] The principle is that the right to access to justice must be available to everyone on equal footing. This, in turn, implies that the State is obliged to take certain positive measures such as providing free or affordable legal assistance to those in need and to remove economic and other barriers to the right to access to justice. But if, for instance, individuals cannot avail themselves of their right to access to justice because of financial reasons or poverty, then there is a clear case of discrimination on the basis of economic status which can hardly be justified under human rights law. In this respect, it is not sufficient that formal laws or systems guaranteeing access to justice exist in theory, for these systems are, in fact, inaccessible and hence unusable by those without adequate financial means.[665]

In this regard, the cases of *Airey*, and *Purohit and Moore* are important authorities in shedding some light on how lack of access to counsel may significantly undermine the full and effective enjoyment of substantive ESC rights. In *Airey*, the facts of the case show that the applicant, at the material time, did not have adequate income to meet her subsistence needs let alone to afford a private lawyer. At the same time there was no free legal assistance or other affirmative measure available in her Country for cases like hers. Although the State argued that the applicant could have appeared in person before the relevant domestic court, the ECtHR noted that owing to the complexity of the issues involved therein her personal appearance could not have been a viable choice. The State also denied that it had a legal obligation to positively provide a free legal aid to the applicant but according to the Court the obligation to ensure effective access to courts (access to justice) directly flows from its undertaking to guarantee the effective respect for the rights and freedoms enshrined in the Convention. The Court underscored that this obligation not merely compels the State to abstain from arbitrary interference but may also require it to positively take some necessary practical measures. In this regard it is worth mentioning that the positive obligation to provide free legal assistance was only one part of the positive obligation to guarantee access to justice for the applicant; the State could have achieved similar result through other alternative measures such as removal of excessively restrictive procedural hurdles including the reduction of the standard of proof required in judicial separation and divorce proceedings.[666]

---

664 See A/HRC/25/31, para 19 *cum* n74; *IACoHR's Report on Access to Justice in ESCR,* pp 9–13; *Guide on Article 6: Right to Fair Trial (civil limb)* (ECtHR, 2013), paras 61–70.

665 A/HRC/25/31, para 22–24; *Airey v. Ireland,* paras 24–26; *McFarlane v. Ireland,* para 124; *G.R v. the Netherlands*, paras 46–55; *Purohit and Moore v. Gambia*, paras 50–54.

666 *Airey v. Ireland,* paras 24–28. See also *G.R v. the Netherlands,* paras 46–55.

In *Purohit and Moore*, absence of free legal assistance for vulnerable persons was one of the reasons behind violation of their right to access to justice. Although the applicants wanted to contest the decision to detain them at a psychiatric institution, they were unable to do so because there was no automatic right to judicial review or appeal procedure and that some of the other available remedies were only accessible to wealthy persons.[667] As noted earlier, in addition to their health conditions, the applicants were of poor economic and social background with no assistance whatsoever. As a result, they could not use other available avenues to challenge their detention and the conditions thereof without legal aid. But it was noted that only persons charged with 'Capital Offences' were entitled free legal assistance from the Government.[668] For this reason, the African Commission concluded that there was no effective remedy available for vulnerable persons like the applicants affected by such conditions as mental disability and poverty.[669]

iv) Transparent and Public Process

The final point which can be identified with the right to fair hearing is the right to have a transparent and public proceeding. In the context of access to justice, transparency is not just about the mere proceeding but also of the justification for arriving on certain outcomes. This requires the tribunals to provide an adequate reason and explanation for the positions taken in a given decision. To this extent, it can be said that transparency is essentially about the quality of a decision. However, in relation to ESC rights, it is also part and parcel of the right to meaningful participation and accountability. In particular, it should be noted that the purpose of the right to access to justice is not merely limited to its immediate outcomes but also concern securing the non-recurrence of similar violations in the future. In addition, a transparent and open proceeding is also a form of public accountability of the State and its agencies. So, it is important that such proceedings be conducted openly so that everyone interested can have access to the process and outcomes and that everyone including the authorities could know the underlying normative and factual justifications supporting a judicial argument in a case. In this way, a transparent decision can contribute to the entrenchment and penetration of ESC rights within a given legal system.[670] There may be some good reasons to avoid public proceeding of a human rights litigation in certain exceptional cases. But those common grounds of limitations as privacy, public morals or national security can hardly justify the private nature of the proceedings concerned with ESC rights claims. Accordingly, there should always be a strong presumption in favour of a transparent and public nature of the

667 Paras 50–54 *cum* 72.
668 Ibid para 52.
669 Ibid paras 37–38, 53 & 72.
670 A/HRC/25/31, para 34.

proceeding especially given the contribution of the public proceeding in ensuring the overall accountability the State and its officials in the realisation of ESC rights in general. In other words, the State should be required to make a strong case as to why a given ESC rights litigation should not be conducted in public.

*b) Competent, Impartial and Independent Organ*

The second basic element of the right to access to justice concerns the nature, composition and organisation of the remedial institutions. Thus, the right to access to justice implies the existence of a competent, an independent and impartial organ entrusted with the power to make a final determination on the complaints concerning the rights and obligations of the individuals and to provide an adequate remedy in case a violation is established. These requirements refer both to the institution and the personnel of the remedial institution.[671]

The idea of competence relates to the mandate or power of the institution to address and make a final determination on all the facts and merits of the issues involved in certain human rights complaints and to enforce its decisions against all persons and entities responsible for a given violation. Related to this is the competence (qualification) of the personnel responsible for the effective functioning of the remedial institutions. In order to ensure the right to access to justice in practice, it is also essential the that State assigns qualified personnel who have an adequate understanding of the issues and evidences and are therefore capable of settling a given human rights dispute. In this respect, the State has a positive obligation to provide judges with adequate, comprehensive and continuous training programmes on human rights in general and ESC rights in particular.[672]

The requirement of impartiality and independence are closely related to each other. Impartiality requires that individuals should be heard and treated objectively in presenting their complaints as well as throughout the entire proceeding. Hence, it is imperative that no prejudice or arbitrariness be allowed or tolerated in a case and that all decisions should be rendered in accordance with the available legal rules and facts.[673] Independence concerns absence of any form of external pressure or influence on the institution and its personnel including direct or indirect political or administrative interference in the decision-making

671 For instance, in the *Golder v. United Kingdom,* para 35, it was clearly underscored that the right to fair trial under Article 6 paragraph 1 of the ECHR does not just imply the right to any tribunal but to an impartial, independent and competent tribunal entrusted with the power to determine the rights and obligation of the individuals and can provide an effective redress. To this extent, it is said that the provision in question also regulates the organisation, composition and mandate of the tribunal in question.

672 A/HRC/25/31, para 27 nn 116–118.

673 See for instance, the *'Street Children' v. Guatemala*, paras 199ff (where the IACoHR put before the Court an argument regarding the arbitrary nature of domestic judicial proceedings).

process. Human rights adjudications and remedies thereof should not be affected by fear, threat or any other factors from higher officials of the State. This is so because, as stated elsewhere, the very purpose of adjudicating alleged violations of a right is to have a credible and independent organ monitoring the legal compliance of a State and its actors with its human rights obligations.[674] This of course touches upon wide-ranging practical factors such as budgetary and functional independence of the institution from the executive organ of the State as well as the appointment and security of tenure of its personnel. In this regard, the existence of legislation is not sufficient per se. It is required that impartiality and independence of the remedial institutions and their personnel be guaranteed in practice as well.[675]

In ESC rights cases, the importance of these requirements is crucial particularly because it is the State's act or omission in the area of its social, economic, administrative and policy programmes and performance which directly or indirectly comes under judicial or quasi-judicial scrutiny. Sometimes, violations of ESC rights may in fact be due to deliberate actions or omissions of authorities. So, while a judicial scrutiny of such conducts can be seen as a sensitive issue, it is also a test not just of the independence and impartiality of the institution but also of the functioning of the rule of law and accountability system as a whole in the country concerned. This is because, as emphasised by the IACtHR, 'the safeguard of the individual in the face of the arbitrary exercise of the powers of the State is the primary purpose of the international protection of human rights' and this is even more the case when it directly or indirectly concerns the assessment of the actions or omissions of the authorities in question.[676] For instance, lack of institutional independence of the judiciary and the personal independence and impartiality of the judges were among critical issues in several cases entertained by the IACtHR. For instance, in the *Constitutional Court* and *Dismissed Congressional Employees* cases, the Court stated that because of the general situation created by the actions of the Respondent State directly affecting the independence of the judiciary and judges, none of the remedies available to the applicants were effective but rather illusory.[677] In the *Dismissed Congressional Employees* case, it was stated as one of the proven facts that the 'independence and impartiality of the Constitutional Court, as a democratic institution guaranteeing the rule of law, were undermined by the removal of some of its justices, which violated *erga omnes* the possibility of exercising the control of constitutionality and the consequent examination of the

674 *'Five Pensioners' v. Peru*, para 126ff; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, paras 111–113; *Constitutional Court v. Peru,* paras 89–99.

675 A/HRC/25/31, para 28.

676 '*Five Pensioners' v. Peru,* para 126 cum nn 151–152 (citing, inter alia, *Constitutional Court v. Peru,* paras 89); *Bámaca-Velásquez v. Guatemala, merits, judgment of 25 November 2000*, para 191ff); *Dismissed Congressional Employees v. Peru,* paras 107ff.

677 *Constitutional Court,* paras 89–97; *Dismissed Congressional Employees v. Peru,* para 107–132.

adaptation of the State's conduct to the Constitution'.[678] According to the Court, the judiciary in the State party 'lacked total and absolute independence from the Government'.[679] This in turn, the Court noted, had 'resulted in a general situation of absence of guarantees and the ineffectiveness of the Courts to deal with the facts such as those of the instant case, as well as the consequent lack of confidence in these institutions at the time'.[680] Thus, the competence, independence and impartiality of the remedial institutions are decisive in ensuring the right to access to justice both in law and practice and hence the effective protection of ESC rights. Without these institutional guarantees being put in place, the protection of ESC rights simply becomes nothing but illusory.

*c) Promptness*

The principle of promptness implies the resolution of human rights complaints within a reasonable time framework. It has been well-recognised in the case law that time is one of the most important determinant factors of a fair trial particularly in cases concerning the life, well-being, security and liberty of a human being. As mentioned above and also to be seen below, in ESC rights claims, the life, dignity, survival and well-being of vulnerable persons are at stake because such complaints mostly concern such vital interests as access to food, health, water, housing and education. It is for this very reason that the principle of promptness, that is, timely disposal of ESC rights claims, should be seen as one of the most important elements of the procedural aspect of ESC rights regime. Stated differently, lack of promptness in ESC rights decision-making process will not only frustrate the whole system of access to justice but can also result in an irreparable damage to the life, dignity and well-being of the claimants. The UN Secretary General's report on access to justice for ESC rights clearly appreciates this fact when it states that for 'the fulfilment of economic, social and cultural rights is often linked to the livelihood of rights holders, remedies require special diligence, celerity and expeditious decisions in order to be effective'.[681] So the State has an utmost responsibility to make sure that claims involving vital socioeconomic interests are handled and resolved with exceptional due diligence implied by the principle of promptness.

To this end, human rights tribunals have particularly identified four general factors or standards through which the reasonableness of the time taken in disposing a given human rights claim should be assessed. These are the nature or complexity of a case, the procedural conduct of the parties including State's authorities with relevant contact with a case, the nature of the right and interest at

678 Para 109.
679 Ibid para 127.
680 Ibid paras 109–110 cum 127 & 129.
681 A/HRC/25/31, para 30 cum n126.

stake and the adverse impact of the passage of time on the claimant(s).[682] While these are important standards for assessing the due diligence of the conducts of the State and its remedial institutions, the specific significance and implications of each of these elements is a matter to be determined in relation to the context of all the relevant circumstances in a given case. In this regard, it is specifically recognised in the case law that even when delay is foreseeable in a given proceeding on account of, for instance, the complexity involved in the case, the State concerned is bound to provide a provisional or preventive remedy aimed at safeguarding the life and dignity of the individuals especially the vulnerable persons.[683] This is particularly important when the claim in issue concerns, for instance, the right to access to medical treatment, life-saving medicines, food, water, shelter, basic social security and assistance and education. In relation to this, the principal approach adopted in the case law is that the more serious impacts the passage of time will have on the parties, the more diligence and the shorter the time period the authorities should take to resolve the human rights dispute in question.[684] It is also a well-established principle in the case law of the ECtHR that States must show exceptional diligence if what is at stake is fundamental to the parties in a given case.[685] This is because in such cases the conditions of vulnerability threaten the life and dignity of human being and may result in unnecessary and irreparable damage to the individual concerned. The State bears a special responsibility to safeguard, as a matter of priority, the rights and interests of those vulnerable persons in a society.[686]

Seen in this light, the lack of due diligence and hence promptness has been one of the major reasons behind the violation of the right to access to justice and effective remedy in several cases. For instance, in *Ximenes-Lopez,* despite the nature of the right (life, dignity and health of a vulnerable person) and the gravity of the situation (death of the victim in a health care institution), the State party failed to discharge its duty of exceptional due diligence required by the urgency of the case which, in turn, was essentially due to the utter failure of the authorities to investigate the death of the victim as well as lack of due diligence from judicial authorities.[687] The IACtHR noted that the judicial procedure in the *Ximenes-Lopez* case was flawed with a combination of inactions and lengthy and unnecessary adjournments for a number of years without taking any measures whatsoever. For the Court, the case was neither complex to require extraordinary action nor could the conduct of the complainants justify excessive inactions or delays on the part

682 Ibid, paras 30–31; *Xákmok Kásek Indigenous Community v. Paraguay,* paras 132–138; *Furlan and Family v. Argentina,* para 152 cum 156–159, 164–175, 179–190, 194–205; *Yakye Axa Indigenous Community v. Paraguay,* paras 65–98; *Sawhoyamaxa Indigenous Community v. Paraguay,* paras *82–98; Bámaca-Velásquez v. Guatemala,* para 191; *Ximenes-Lopes v. Brazil,* paras 195–205.

683 A/HRC/25/31, para 9.

684 *Furlan and Family v. Argentina*, para 194; *Xákmok Kásek Indigenous Community v. Paraguay,* para 136.

685 See generally *Guide on Article 6: Right to Fair Trial (civil limb)* (ECtHR, 2013), paras 270–302.

686 *Furlan and Family v. Argentina,* para 196.

687 Paras 189–106.

of the judicial authorities.[688] The same was true in the case of *Furlan and Family*. This case concerned the right to health and medical treatment and well-being of a minor who was rendered disabled at the age of fourteen due to a fault attributed to the State party. In this case, the Court, reiterating its earlier judgments and that of the ECtHR, particularly emphasised the adverse impact that failure to dispose the claim for compensation has had on the life, well-being and integrity of the victim as well as on the well-being of the victim's family.[689] The authorities were fully aware of the gravity of the victim's sufferings and yet they failed to provide the victim with timely medical treatment. Nor were there any mechanisms to remedy the defects and resultant damages to his health particularly on account of the failure of the relevant proceedings. There was no due diligence taken by authorities required by the special vulnerability of the victim.[690]

In almost all of the complaints concerning indigenous communities, lack of due diligence on the part of the authorities (both administrative and judicial) to resolve the claims within a reasonable time was one of the major factors resulting in the violation of the right to effective remedy and other substantive ESC rights. As will also be seen in the next chapters, although the central element of these complaints was the right to restitution of their ancestral territories, it was obvious that their claims were also intimately and immediately linked with matters very essential for the life, survival and development of their respective members and community as a whole. This, in turn, obviously engages the positive obligation of the State to take necessary measures including the adoption of provisional measures to address the vital needs of the respective communities and those vulnerable members in need of special protection and care such as minors, elderlies, women and those who had fallen ill. On the contrary, the conduct of the authorities in many of these cases were characterised by such terms as passivity, inactivity, little diligence and lack of responsiveness, lack of sensitivity, and systematic and protracted delay; the authorities were in fact said to be taking deliberate measures with the view to obstruct or systematically delay or frustrate the communities' right to access to justice even though in many of these cases their situations were subjected to the state of emergency.[691]

### *d) Suitable and Adequate Remedy*

The suitability and adequacy of a remedy are also recognised in the case law as essential constitutive elements of the right to access to justice. In abstract, a given remedy is said to be both suitable and adequate if it is able to guarantee the result it is designed to achieve. In the context of the right to access to justice, suitability

688 Paras 195 *cum* 199. See also '*Five Pensioners v. Peru,* para 141.

689 Paras 152–205 (examining each of the elements of reasonable time frame).

690 *Furlan and Family v. Argentina*, para 204.

691 *See for instance, Xákmok Kásek Indigenous Community v. Paraguay, para 134; Yakye Axa Indigenous Community v. Paraguay, paras 85–89.*

and adequacy are inextricably related to each other. Both are also regarded as important determinants of the effectiveness of a remedy: a remedy which is unsuitable or inadequate cannot be regarded as effective by any standard. This is the main reason why these two elements are often mentioned together and also equated with the notion of effectiveness of a remedy both in the literature and case law. 'The right to effective remedy entails that the remedy must be capable of providing adequate reparations for the violations'.[692] But it is generally worth noting that suitability specifically refers to the appropriateness and practical relevance of a remedy to a specific violation in question whereas adequacy refers to whether a remedy is sufficient enough to prevent a violation and proportional to fully redress (restore, repair) the damage suffered by the individual, and whether it is capable of guaranteeing the non-recurrence of similar violations in the future and thereby ensuring the full and free enjoyment of the right concerned. Thus, taken together, suitability and adequacy determine the effectiveness of a remedy and of the very essence of the right to access to justice in general.[693]

In essence, therefore, these principles make clear that a given remedy may not always be suitable and adequate for all kinds of human rights violations and hence there should not be a one-size-fits all approach to remedies; nor can its mere existence in a certain legislative and institutional form always satisfy the requirement of adequacy and suitability. Generally speaking, a remedy can be provided through legislative, judicial or administrative mechanisms and its contents may vary from preventive measures to material compensation (both financial and in kind), restitution, just satisfaction and guarantees of non-repetition (injunction).[694] It is in fact less relevant as to the kind of mechanisms the State establishes (administrative, judicial or legislative) for redressing human rights violations. What is more important is rather the extent to which a given mechanism can be regarded as suitable in establishing a meaningful institutional accountability of the State concerned for its acts or omissions resulting in human rights violation and accordingly provide an adequate reparation for the victim(s) and thereby guarantee its full and effective enjoyment.[695] Thus, the suitability and adequacy of a remedy in terms of its form, content and scope

---

692 A/HRC/25/31, at para 11; *Velásquez-Rodríguez v. Honduras,* paras 63–66; *Jawara v. Gambia*, paras 31–35.

693 *McFarlane v. Ireland,* para 107–108; *G.R v. the Netherlands,* para 44; *Vintman v. Ukraine (Application No. 28403/05), merits, judgment of 23 October 2014* paras, 66, 110 & 115–116; *Al-Dulimi and Montana Management Inc. v. Switzerland (Application No. 5809/08), Judgment of 26 November 2013 [not final due referral to GC],* paras 123–125*; Esmukhambetov and Others v. Russia (Application No. 23445/03), Judgment of 29 March 2011,* paras 97 & 158–159; *Aksoy v. Turkey*, paras 95 & 98; *Xákmok Kásek Indigenous Community v. Paraguay,* paras 139–168. See also *Yakye Axa Indigenous Community v. Paraguay,* para 61ff; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* para 113; *Velásquez-Rodríguez v. Honduras,* paras 62–63*; Manuel Cepeda Vargas v. Colombia,* paras 136–137.

694 A/HRC/25/31, paras 11–12.

695 See *Vintman v. Ukraine*, para 110; *Manuel Cepeda Vargas v. Colombia,* paras 139; A/HRC/25/31 para 13.

are essentially matters that should be assessed relative to the context in which it operates including, inter alia, the nature of a right in question, its importance to the person(s) and the degree of violation thereto and the identity of the person(s) affected, that is, whether he or she is a minor, persons with disabilities and other vulnerable persons.

Having said this, lack of suitability and adequacy also accounts as among the major reasons behind the State's violation of the obligation to ensure effective remedy. For instance, in one case, the ECtHR held the following in responding to the State's contention of lack of exhaustion of domestic remedy by the applicant. According to the Court, the 'only remedies which [should be] exhausted are those that relate to the breach alleged and are available and sufficient'. Interestingly, it emphasised that 'existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness'. And per the Court, the burden is on the State to show with clear evidence that the remedy available within its domestic system satisfies the conditions of availability, certainty, accessibility and effectiveness, that is, being suitable and adequate.[696] An assertion of or a reference to the existence of some form of abstract or vague remedies may not be compatible with the positive obligation of the State to effectively ensure the practical enjoyment of human rights within its domestic legal system. It is particularly incumbent upon the State concerned to show that such remedies also function in practice.[697]

In this regard, there are several cases in which violations were found despite the existence of formal remedies at the national level. For instance, *López Ostra* and *Fadeyeva*, there was no dispute that the applicants have had available to them various kinds of formal remedies (legislative and institutional). Nevertheless, the ECtHR found that because of combinations of factors attributable to the respective national authorities including lack of sensitivity to the interests of the individuals, unresponsiveness of the officials and the narrow construction of States' human rights obligations by the national tribunals, those remedies were neither suitable nor effective to redress substantive complaints asserted by the applicants. In *López Ostra*, the domestic tribunals held the view that the Convention did not impose a positive obligation on the State to protect her private and family life from the nearby polluting plant.[698] In *Fadeyeva*, which was more or less similar with the former, after series of domestic legal battles, the only remedy the applicant could obtain was nothing other than to be placed on a waiting list which was in fact declared to be of no practical value whatsoever.[699] According to the ECtHR, in both of these cases, the appropriate and adequate remedy could have been either the relocation of the applicants from the pollution sites, regulation of the conducts

696 *McFarlane v. Ireland*, para 107.
697 *Vintman v. Ukraine*, para 110 & 115–116.
698 For domestic court's view, see for instance, *López Ostra v. Spain,* para 11, 14 & 15.
699 *Fadeyeva v. Russia,* paras 27, 28 & 63.

of the plants or adequate pecuniary compensations for the damages they suffered as a result of the resultant pollution.[700]

The same can be said in relation to the case of *Oyal*. In this case, the ECtHR acknowledged that the applicants have had formal remedies but given the extent of the suffering of the victim and the consequent costs of his continued treatment for his family due to the faults directly attributable to the State, the Court declared that the redress afforded to the applicants was far from satisfactory in the light of the State's positive obligation to protect the right to life. It was neither suitable nor adequate in order to be considered as effective. In the opinion of the Court, the most appropriate remedy in the circumstance of the case should have been for the domestic courts to have ordered the payment of all treatment and medication expenses of the victim to be borne by the State during his lifetime, in addition to the non-pecuniary damage.[701]

There are numerous cases in which the IACtHR declared violations due to the ineffectiveness of certain formally available remedies. For instance, having examined several forms of remedies said to be available to the victims in the cases of '*Five Pensioners*', *Dismissed Congressional Employees* and *Constitutional Court*, the Court declared that they were both ineffective and illusory especially due to the subsequent norms which rendered them practically useless. As the Court observed, the victims in these cases were simply put in the situation of legal uncertainty as far as the right to seek an appropriate remedy to their infringed rights was concerned.[702] It goes without saying that a resort to an ineffective and illusory remedy is nothing but a useless formality. That is why it is imperative for the State to ensure the effective functioning of the remedies in practice. The Court emphasises that a remedy 'must be truly effective in establishing whether there has been a violation of human rights and in providing redress' to those in need.[703] Among many authorities, its judgement in the *Sarayaku* case clearly expresses the Court's position on this point. Thus,

> the Court has indicated that Article 25(1) of the Convention establishes, in general terms, the obligation of the States to guarantee effective judicial remedies for acts that violate fundamental rights. When interpreting the text of Article 25 of the Convention, the Court has held on other occasions that the obligation of the State to provide a judicial remedy is not satisfied by the mere existence of courts or formal procedures or even the possibility of having recourse to the courts. Rather, the State has the duty to adopt affirmative measures to guarantee that the judicial remedies it provides are truly effective in establishing whether or not a human rights violation has occurred

700 *López Ostra v. Spain,* paras 56–58*; Fadeyeva v. Russia,* paras 88, 123 & 134 (and generally para 116ff).

701 See *Oyal v. Turkey (Application No. 4864/05), Judgment of 23 March 2010*, paras 67–77.

702 '*Five Pensioners' v. Peru,* paras 35–138; *Dismissed Congressional Employees v. Peru,* para 129; *Constitutional Court v. Peru*, paras 93 & 96–97.

703 '*Street Children' v. Guatemala,* para 235 cum n44.

> and providing redress. Thus, the Court has declared that the inexistence of an effective remedy for violations of the rights recognized by the Convention constitutes a violation of the Convention by the State Party in which this situation occurs.[704]

The suitability and adequacy of a remedy and hence its practical effectiveness can be undermined by several factors. Here, in addition to those already discussed under other elements of the right to access to justice, lack of sensitivity to the specific contexts and needs of a person or group of persons can be mentioned especially in terms of its significance for the protection of the ESC rights of vulnerable persons. In fact, it can be said that the requirement of sensitivity on the part of the State authorities including the judiciary is the most important factor determining their responsiveness to a given human rights violation. Here, it is worth noting that to be sensitive means to take human rights claims and all the relevant circumstances of the case (the nature of claim, its urgency or gravity, the identity of parties concerned) very seriously and to accordingly respond to the claim by taking necessary appropriate and proportional measures to avert the situation and to effectively redress the violation(s) thereof. It is particularly one of the decisive factors in assessing the principle of promptness.

In this regard, we have already seen the impact of lack of sensitivity on the part of the State organs in several of the cases discussed so far. To stress the point further, sensitivity as an element of suitability and adequacy of a remedy requires the State to take due account of the specific circumstances and needs of, in particular, vulnerable persons. There is no question that all human rights claims should be responded to within a reasonable period of time but it is even more so when the right in question threads on vital and urgent needs of vulnerable persons who, by virtue of their specific situation, may suffer an irreparable harm to their life, dignity and well-being.[705] Not only this, sensitivity to the background situations leading to ESC rights violation is also very important in designing a suitable (an appropriate and relevant) remedy for it compels the authorities to closely look at the nature and structure of the problems resulting in the violations and, if necessary, to review the adequacy of the reparation in place. In particular, in determining the suitability and effectiveness of a given remedy, it is necessary that a question be asked as to whether the root-cause of a given violation has to do with structural problems affecting a large number of persons or is simply an isolated individual case. Remedies designed to provide an individual redress for violations rooted in structural, systemic defect may not be regarded as a suitable

---

704 *Sarayaku v. Ecuador,* para 261 *cum* nn 318–319.

705 See for instance, *Yakye Axa Indigenous Community v. Paraguay*, para 63 & 93–98 (the Court reaffirming its established position on the kind of obligation that Article 25 of ACHR imposes taken together with Articles 1(1), 2 and 8 of the same); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para 113; *Ivcher-Bronstein v. Peru,* para 136; *19 Merchants v.* Colombia, para 191; S*awhoyamaxa Indigenous Community v. Paraguay*, paras 83*–102; Xákmok Kásek Indigenous Community v. Paraguay,* paras 140–168*; Sarayaku v. Ecuador,* para 262; *Oyal v. Turkey,* para 89.

and effective remedy because it is neither appropriate (does not address the major issue behind the violation but merely treats the symptoms) nor adequate for it can hardly guarantee the non-recurrence of the violation in the immediate future. In relation to this, we should note that a 'failure to comply with State obligations in the field of economic, social and cultural rights often affects groups of right holders in a similar situation, allowing for collective or group remedies is, in many cases, indispensable for the realization of the right to effective remedy'.[706] Thus, designing appropriate and adequate remedies for violations of ESC rights requires sensitivity to the background conditions leading to such violations.

*e) Prompt and Effective Compliance*

The final element worth mentioning is the principle of prompt and effective compliance with reparation orders given by the competent remedial institutions. This is also referred to as the principle of enforcement or execution of judgement. Undoubtedly, the State's compliance with the decisions of a remedial organ is a crucial aspect of the right to access to justice. In fact, it is the very object and purpose of the right to access to justice and as such an integral element of the right to fair trial.[707] Hence, without prompt and effective compliance with a given ruling redressing a human rights violation, the idea of the right to access to justice would lose its essence. In addition to this, the principle of compliance is also directly connected to the practical test of independence, integrity and power of the remedial institutions and, ultimately, it is a fundamental constitutive element and proof of the effective functioning of the rule of law in the state concerned. Promptness should be understood here as implying a reasonable time period to be assessed in the light of the relevant factors mentioned above, in particular, the nature of the right violated and its importance to the party, the gravity of the violation in question and the urgency of the need affected through the act of violation. Effective compliance entails that the integrity of the redress (reparation) afforded to the victim of a human rights violation should be maintained: it requires that the implementation of a reparation order must be complete, perfect and comprehensive.[708]

---

706 A/HRC/25/31, para 8.

707 A/HRC/25/31, para 35 *cum* n142.

708 *Oyal v. Turkey*, para 74ff; *Furlan and Family v. Argentina,* para 210ff;*'Five Pensioners' v. Peru,* para 138ff; In *Furlan and Family*, the Court clearly referred to it as the principle of execution of judgement, also outlining the standards that should be followed in this respect (raised in connection with the principles as judicial protection, due process, legal certainty, judicial independence, and the rule of law). Drawing on the case law of ECtHR, it stated that for the full effectiveness of a judgment, its implementation must be complete, perfect, comprehensive and without delay. ibid para 210 *cum* n348. According to the Court, the question of the due implementation of the judgment, essentially an integral element of the guarantees and consequent to the obligations enshrined in Articles 1(1), 2, 8 and 25, are constitutive elements or directly connected to the independence and integrity of the judicial or other

It should be emphasised that the relationship between prompt and effective compliance, the rule of law and the denial of access to justice is fundamental especially in the context of the protection of ESC rights. This is so because, as noted above, most ESC rights claims directly or indirectly involve a review of the State's actions and omissions including, to a certain extent, its socioeconomic and policy programs. So, ESC rights claims bring the performance of the government and its agencies under direct scrutiny which, for some officials, can be seen as personal trial. This, in turn, tests the practical existence of judicial independence and the rule of law at two levels. The first, as already discussed, is at the level of the examination of the merits of the case. The second is at the level of ensuring prompt and effective compliance with the reparation order against the government or entity responsible for the violation. Accordingly, the lack of compliance with the reparation order, including through unnecessary and systematic delay, not only creates frustration of the right to access to justice of a given victim but also undermines the effectiveness of the entire human rights protection system and the very foundation of the due process of law and the rule of law in a democratic society. The reason for this is that,

> a final judgment (*res judicata*) provides certainty concerning the right or dispute examined in the specific case and, therefore, one of its effects is the requirement or obligatory nature of compliance. The proceedings should lead to achieving the protection of the right recognized in the judicial ruling, by the proper application of that ruling. Consequently, the effectiveness of the judgments and the judicial orders depends on their execution. Anything to the contrary would entail the denial of the right concerned.[709]

Hence, without State's prompt and effective compliance with the judgements of human rights tribunals and the reparation orders thereof, the right to access

---

remedial institutions. Accordingly, it is imperative that the independence of the judicial order be guaranteed and that timely execution of their judgements be ensured without any form of interference or delay from other branches of the government and that the binding and obligatory nature of the decisions of last resort also be guaranteed. ibid para 211. That the judicial decisions are taken seriously by everyone concerned and ensure their prompt executing without hindering the scope, content and purpose of the decision is the principal foundation and guarantee of the system based on the rule of law and judicial integrity. ibid.

709 *Sarayaku v. Ecuador,* para 263. In *'Five Pensioners'* case, for instance, the Court noted that there was clear evidence of non-compliance by the Government of Peru with several domestic rulings in violation of both the substantive and procedural rights including the right to judicial protection. As noted by the Court, compliance with the rulings of the judiciary was merely discretionary to the relevant Peruvian authorities; the judiciary did not have a mechanism to enforce its judgements against the relevant authorities implied in its rulings. It stressed that lack of compliance with the decisions of the relevant remedial institution, literally translates itself as denial of justice by the State in practical transgression of its international obligation to respect and ensure the full and effective enjoyment and exercise of all the rights it has undertaken to guarantee for everyone within its jurisdiction (ibid). *'Five Pensioners' v. Peru,* paras 138 & 141.

to justice is simply an empty and illusory notion. The effectiveness of the entire human rights protection system in fact depends on the degree to which the State takes the rulings of the tribunals establishing human rights violations seriously and complies with its obligation to effectively execute the judgements in due time. In relation to ESC rights in particular, lack of effective compliance with the judgements of tribunals should be taken very seriously as it is not only the question of the rule of law and democratic accountability but also of fundamental social justice especially given the fact that, as repeatedly argued above, such claims usually reflect certain existing background socioeconomic injustices affecting a great deal of persons or group of persons as opposed to isolated individual problems existing at a given point in time.

## 6.4. CONCLUDING SUMMARY

The rich body of case law from across international jurisdictions clearly establish that the right to access to justice is an integral element of the State's generic human rights obligation to respect and ensure the free, full and effective enjoyment of all human rights within its jurisdiction. The right to access to justice is not only indispensable for the effective protection of human rights but also a practical expression of the existence of the rule of law and democratic values within a given legal system. It is a fundamental procedural right providing for the right to assert an arguable claim before and obtain an effective redress from an organ entrusted with a remedial power. Although there is no evidence in the case law (nor in human rights law) that there should be a specific form of organ entrusted with the remedial power, it is required that the organ and its procedure should be designed in terms of the bundles of basic procedural and substantive elements of the right to access to justice. In this regard, the principal approach in the case law is that the State is obliged to guarantee this right for all persons with arguable claim concerning an alleged violation of their rights regardless of the nature of the institution or proceeding concerned.

The elements of the right to access to justice discussed above essentially apply to all human rights but this Chapter has argued for a contextual treatment of each of the elements in relation to the State's obligation to realise the inherent material conditions of life. Thus, having carefully examined each of the elements and their implications, it is concluded that there is a need to take a more cautious and proactive approach in applying these elements into the adjudication of ESC rights. The reason is that the adjudication of ESC rights often concerns the claim against the State by vulnerable persons who often suffer from multiple forms of marginalisation, discrimination, exclusion and structural poverty resulting in one way or another from the choices and decisions taken by the State itself. A narrow and formal application of each of these core elements of the right to access to

justice may therefore result in frustrating the very interest that the right to access to justice seeks to protect in the first place. For instance, it was argued that the State's obligation to provide an accessible procedural framework should be construed as also implying the special positive obligation of the State to ensure that those individuals in need are either exempted from the cost of litigation or are provided with free legal aid. It was also shown that, given the dominant position of the State and its exclusive control on some decisively relevant information and evidence as well as the vulnerable position of the individuals concerned, the right to fair and equal process should be supported by the principle of reverse presumption, the presumption of inequality of the parties and the appointment of experts by the tribunals concerned.

Overall, the contextual treatment of the essential elements of the right to access to justice has indicated the following three points. First, they directly or indirectly engage the positive obligations of the State to take necessary and special care to make sure that the strict procedural application of the principles would not result in destroying the very essence and purpose of the right to access to justice. Second, they require the State to be sensitive and responsive to the needs and interests of the specially vulnerable individuals in a given case. Third, they also compel the State to ensure and guarantee the principle of the rule of law and democratic accountability by promptly and effectively complying with the reparation orders for the violations established in a given case.

# CHAPTER 7
# ACCOUNTABILITY

## 7.1. INTRODUCTION

Accountability is both an essential ingredient and the ultimate objective of all human rights. As Hunt (the former UN Special Rapporteur on the right to health) repeatedly emphasised, without effective system of 'accountability human rights can become no more than window-dressing'. According to Hunt, in which ever socioeconomic and political context they are applied, accountability remains to be the core essence of the effective protection and realisation of human rights, or else, they would risk to be left to the unfettered discretion of national authorities contrary to the very object and purpose of international human rights norms.[710] Accountability is an ubiquitous term especially in the academic writings focusing on public administration, political science, administrative, constitutional and international (human rights) law. However, there is no agreement on its specific meaning and implications nor will this Chapter engage in its conceptual debate. Consistent with the overall aim of this Part of the study, the purpose of this Chapter is to discuss how international human rights courts and monitoring bodies have dealt with the question of the State accountability for the realisation of ESC rights. For the reasons to be explained shortly, the realisation of the material conditions of life raises particularly complex issues with the accountability of the State. So, the specific concern of this Chapter is to discuss the justification and implications of the human rights accountability of the State. The cases discussed in this Chapter particularly distinguish between individual (subjective) and institutional (objective) form of accountability and establish the latter as the central aspect of international human rights monitoring system.

[710] See for instance, UN Doc. A/63/263, para 8. 'Whether human rights are applied to development, poverty reduction, trade, health systems, neglected diseases, maternal mortality, HIV/ AIDS or anything else, they require that accessible, transparent and effective mechanisms of accountability be established'.

## 7.2. THE CONCEPTION OF ACCOUNTABILITY

But first it is important to introduce its general conceptual notion. Accountability is a broad normative concept with 'ever-expanding' meanings and implications.[711] In fact, scanning through different academic writings seems to give the impression that its meaning and implications vary with the specific purpose and context in which it is raised or discussed. Sometimes it is used with the sense of (or as interchangeable with) responsibility, public explanation (transparency), liability, bureaucratic (administrative) control, transparency, (public, open, democratic) dialogue or deliberation, or bearing shame and blame in public for or in relation to a given act or omission.[712] However, there is a general agreement that the core concept of accountability presupposes the existence of relationship (formal, informal, moral) between two parties whereby one party holds a power to (or is entitled to) demand from another party to account for its action or omission (performance) in relation to certain task(s) assigned to the latter. This shows that the accountability relationship is predicated upon the duty of one party to execute (implement, perform) a given task or set of tasks with the view to achieve a certain result(s), objective(s) or outcomes in accordance with pre-established procedures and performance standards and the power (right, entitlement) of the other party

711 Richard Mulgan, '"Accountability": An Ever-Expanding Concept?' (2000) 78 Public Administration 555.

712 See, for instance, Jonathan GS Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65 Public Administration Review 94; Anna Grear and Burns H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 Human Rights Law Review 21; Federico Fabbrini, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14 Human Rights Law Review 85; Helen Potts, *Accountability and the Right to the Highest Attainable Standard of Health* (University of Essex Human Rights Centre 2008); Peter Newell and Joanna Wheeler (eds), *Rights, Resources and Politics of Accountability* (Zed Books 2006); Siri Gloppen, Roberto Gargarella and Elin Skaar, 'Introduction: The Accountability Function of the Courts in New Democracies' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass 2004); Richard Mulgan, 'The Processes of Public Accountability' (1997) 56 Australian Journal of Public Administration 25; Mulgan (n 711); Burt Perrin, 'Bringing Accountability up to Date with the Realities of Public Sector Management in the 21st Century' (2015) 58 Canadian Public Administration / Administration Publique Du Canada 183; Gisela Hirschmann, 'Guarding the Guards: Pluralist Accountability for Human Rights Violations by International Organisations' (2019) 45 Review of International Studies 20; Jenny M Lewis, 'Individual and Institutional Accountability: The Case of Research Assessment' (2015) 73 Australian Journal of Public Administration 408; Jonathan Kuyper, Karin Backstrand and Heike Schroeder, 'Institutional Accountability of Nonstate Actors in the UNFCCC: Exit, Voice, and Loyalty' (2017) 34 Review of Policy Research 88; Anders Hanberger, 'Democratic Accountability in Decentralised Governance 1' (2009) 32 Scandinavian Political Studies 1; Kate Macdonald, 'The Meaning and Purposes of Transnational Accountability' (2015) 73 Australian International Law Journal 426.

to hold the former accountable for the achievement of the goal(s) against the prescribed procedures and performance standards.[713]

Based on this description, it is possible to distinguish between different forms or types of accountability. For example, based on the degree of control implied in the relationship, it is possible to distinguish between strong and weak (loose) form of accountability; based on the mechanism governing the relationship, one can differentiate between political, democratic, legal, professional, social and ethical form of accountability; and, based on the nature of accountability bearer, it is possible to distinguish between individual (subjective, personal) and institutional (objective) accountability. The merits in the analysis of each form or type of accountability depends on the purpose it is purported to serve. There is no doubt that for the effective realisation of human rights the combination of the different forms of accountability has important role to play. However, given the overall objective of this Part and specific purpose of this Chapter, the concern here is the strong sense of accountability signified by international human rights law and jurisprudence in which the institutional accountability of the State occupies the central place. This strong sense of the State accountability, in turn, draws on the traditional narrow sense of accountability.[714] In its traditional narrow sense, the core meaning of accountability entails a hierarchical relationship in which the party entrusted with the power (authority) is justified to rightfully request an explanation or a justification about the steps taken and the performance thereof from the party entrusted with certain task(s). The authority holder uses information (accounts) gained through the process to monitor and evaluate the performance of the party entrusted with the task, rectify the problems and sanction the failures thereof. To this end, it has the power of inquiry, investigation, monitoring, evaluation and sanction the agent's performance against the procedures and specified expectations.[715]

In international human rights law, this accountability relationship refers to the relationship between the State and individuals whereby the former is obliged to respect and ensure the effective enjoyment of all human rights recognised within its jurisdictions.[716] The right-holders are entitled to make a demand on the State that these rights be duly realised and the State bears the overall responsibility to put in place the systems or mechanisms through which individuals can demand

---

713 And the variation in the literature results from the interpretation of the elements of the core concepts in the definition and the nature or model of accountability and the mechanisms and consequences thereof.

714 This view was explained in detail and defended by, inter alia, Mulgan (n 711). But see Perrin (n 712).

715 Perrin (n 712) 184ff; Hirschmann (n 712) 22; Lewis (n 712) 408–409; Kuyper, Backstrand and Schroeder (n 712) 89; Hanberger (n 712) 3–6; Macdonald (n 712) 427–428; Mulgan (n 711).

716 See Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda (OHCHR and Centre for Economic Social and Cultural Rights, 2013) (hereafter, OHCHR, Who Will Be Accountable?), pp ix-x & 10–12. See generally A/HRC/14/39, paras 32ff.; Fredman (n 30) 103–113.

justifications, rectifications and sanctions for failure to give effect to the rights in issue. In short, the idea of human rights accountability involves a complex system for governing the process through which the effectiveness of the State's human rights legal, institutional and policy measures are formally justified and failures are corrected and sanctioned.

This sense of human rights accountability is well-recognised by many authors.[717] For instance, according to Potts, accountability is described as a process which requires the government to show, explain and justify how it has discharged its obligations and through which rights-holders understand how it has discharged its obligations as well as to vindicate their rights to effective remedies if it is established that it has failed to do so. To this end, Potts identifies two dimensions of accountability. On the one hand, accountability is said to have a prospective (proactive) dimension in the sense that 'it draws attention to its potential to improve performance: to identify what works, so it can be repeated, and what does not, so it can be revised'. On the other hand, it is also said to have a retrospective dimension in the sense that 'it draws attention to the remedies that should be available when there has been failure on the part of government to fulfil its obligations'.[718]

For the OHCHR, the principle of accountability is recognised as one of the seven core international human rights principles. In fact, it considers accountability as one of the core fundamental human rights principles flowing from the values of human dignity and non-discrimination.[719] It also conceives accountability as signifying a complex process essentially concerned with addressing past grievances and correcting systemic failures to prevent future human rights violations, as can be seen from the following text.

> Accountability from a human rights perspective refers to the relationship of Government policymakers and other duty bearers to the rights holders affected by their decisions and actions. Accountability has a corrective function, making it possible to address individual or collective grievances, and sanction wrongdoing by the individuals and institutions responsible. However, accountability also has a preventive function, helping to determine which aspects of policy or service delivery are working, so they can be built on, and which aspects need to be adjusted. Accountability principles and mechanisms can improve policymaking by identifying systemic failures that need to be overcome in order to make service delivery systems more effective and responsive.[720]

---

717 See OHCHR, Who Will Be Accountable?; HDR (2002): Deeping Democracy in a Fragmented World, p 65; Siri Gloppen and others, *Courts and Power in Latin America and Africa* (Palgrave Macmillan 2010) 12–18; Gloppen, Gargarella and Skaar (n 712) 1; Fredman (n 30) 103–105; Potts (n 712) 13; Newell and Wheeler (n 712) 1–30.

718 Potts (n 712) 13–16.

719 See A/HRC/14/39, para 32.

720 OHCHR, Who Will be Accountable? pp ix & 10.

This makes it clear that, unlike other procedural principles identified above, human rights accountability, properly understood, essentially concerns systemic (macro-level) issues more than specific individual (micro-level) problems. For instance, the principle of accountability does not, strictly speaking, concern itself with the kind of remedy that should be provided for the violation of a given right of an individual nor does is it concern itself with ensuring the right of an individual to participate in a given decision-making process affecting his or her right. It rather deals with fundamental overarching questions affecting the overall designing and operationalisation of the mechanisms (legal and institutional systems) and the effectiveness of the same in ensuring the practical realisation of all human rights recognised by the State.

Therefore, understood in this sense, accountability is not only crucial but also raises several complex issues in relation to, in particular, the positive obligation of the State to give practical effect to ESC rights. The reasons for the complexities involved in this regard are well-captured by Fredman.

> This is because positive duties require action to be taken in a context where several choices might be available. Taking action in one direction might foreclose other policy choices; it may require distributive decisions; and it may necessitate removing resources from some to give to others. In addition, because the steps have yet to be taken, decisions are based on prognosis or the ability to judge the future. This is particularly true when positive duties are programmatic, in the sense that the duty requires the State to 'roll out' its programme progressively over time.[721]

That is, in order for the State to discharge its positive human rights obligations, there is not a single course of action but rather many competing networks of actions. To this extent, accountability cannot be used to dictate a specific form of action or policy choice upon the State. The principle of accountability only requires that, first, the measures taken should be justified as reasonable (supported by weighty public policy arguments) and effective, second there should be an effective mechanism (system) through which all relevant actors can be held to account for their respective performances in the realisation of human rights. So, even if accountability processes may not lead to specific individual remedies, the availability of the system through which the State and its agents can be compelled to justify their choices, rectify the failures and hold those entities or officials responsible for the failures is of paramount importance for the overall realisation of human rights.[722]

721 Fredman (n 30) 103.
722 Ibid 103–105.

## 7.3. JURISPRUDENCE

The *Velásquez-Rodriguez* case is an interesting authority wherein the IACtHR distinguished between subjective and objective approach to the international human rights accountability of the State. In this case, the Court held that

> Violations of the [American Convention on Human Rights] cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant – the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention.[723]

The ideals reflected in this case in fact reflect a consistent and unified position of all international human rights tribunals. The Court's judgment compares and contrasts two major types of accountability: individual and institutional accountability.[724] The individual accountability draws on the personal fault of individuals, officials or entities directly responsible for the failure to ensure the effective realisation of human rights. For the Court, the international human rights accountability of the State cannot depend on the nature of the conduct or intent of its agents or officials.[725] The institutional accountability in its part flows from the generic human rights obligations of the State discussed above.[726] This means that, under international law, the State bears a total responsibility both for the action and omission of its officials and institutions, regardless of the legality of the action or omission in issue and of the nature and function (public and private) of the institutions concerned, and for all actions and behaviours of private persons and entities affecting human rights within its jurisdictions. Thus, the sole and

---

723 *Velásquez-Rodríguez v. Honduras*, paras 173. See also generally ibid paras 160–188.

724 The notion of individual and institutional accountability has been deployed by several authors. See Lewis (n 712); Kuyper, Backstrand and Schroeder (n 712). However, the sense in which the Court deployed in the *Velásquez-Rodriguez* case is somewhat different from Lewis' and others.

725 See for instance, *Ximenes-Lopez v. Brazil,* paras 83–90.

726 See the discussion in the Introduction to Part II above. See also *Al-Dulimi and Montana Management Inc. v. Switzerland; Ireland v. UK, M.S.S. v. Greece and Belgium [GC],* para 287*; Rantsev v. Cyprus and Russia,* paras 206 & 232*; Ximenes-Lopez v. Brazil,* para 83ff; *Sarayaku v. Ecuador*, paras 260–263; *Vera v. Ecuador, preliminary objections, merits, reparations and costs, judgment of 19 May 2011,* paras 41–42; *Abdel Hadi et al v. Sudan,* paras 91–92; *Darfur case v. Sudan*, para 227; *Communication 379/09: Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, decision on merits, 15th Extra Ordinary Session of the AfCoHPR, 07 to 14 March 2014 (hereafter Monim Elgak et al v. Sudan),* paras 139–141.

relevant question in relation to the objective responsibility of the State is not the identity or fault of the actor but rather whether there is an act or omission which can be attributable to the State or not under international (human rights) law.[727] The State is of course free to establish any system it deems appropriate (judicial, administrative or any other) but it remains to be fully accountable for the action or omission of its agents and private entities within its jurisdiction.

The obligation to realise ESC rights forms part and parcel of an integral element of the institutional function of the State in a political society. This, in turn, makes the institutional accountability of the State particularly significant especially in countering arguments associated with the problem of diffusion of accountability within the State's administrative structures or the privatisation of some essential public functions.[728] That is, although specific measures relevant for the realisation of ESC rights are obviously carried out through various departments and agencies, (both private and public) – making it difficult to determine who should account for what, how and when – the idea of institutional accountability of the State does not concern itself with these complexities as it can be seen from the following cases. Generally speaking, international ESC rights jurisprudence shows the existence of three basic scenarios leading to the institutional accountability of the State: accountability for the acts of agents, for private parties with formal-functional relationship with the State and for private parties with no formal relationship with the State.[729] Each of this is treated one by one as follows.

---

727 For instance, *Velásquez-Rodríguez v. Honduras*, para 162, the IACtHR held that 'Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) [to respect and ensure all rights and freedoms] of the Convention has also been violated'. In *Ireland v. UK*, paras 238–241, the ECtHR also held that Article 1 ECHR is one of the many provisions attesting its binding character of the Convention, setting apart the Convention undertaking from other classic treaties by requiring the States to secure the rights and that its violation flows automatically from failure to secure one of the substantive rights guaranteed in the Convention. In *Abdel Hadi et al v. Sudan*, para 91, the AfCoHPR also held that 'a violation of any provision of the [African] Charter [on Human and Peoples' Rights] by a State Party automatically engages its responsibility under Article 1'. And in *Jawara v. Gambia*, para 46, it also stressed that 'Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore, a violation of any provision of the Charter, automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter'.

728 For more on privatization and human rights, see generally Antenor Hallo De Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011).

729 Among many authorities, see *Ximenes-Lopes v. Brazil,* paras 83–90; *Oyal v. Turkey*, paras 53–56 & 58; *Velásquez-Rodriguez v. Honduras*, para 169–185; *Marangopoulos Foundation for Human Rights (MFHR) v. Greece (Complaint No. 30/2005)*, paras 191–193 & 203.

### 7.3.1. ACCOUNTABILITY FOR ACTS OF STATE AGENTS

The first is when the act or omission resulting in violation of human rights is due to its own organs. In this case, it is immaterial as to which organ or department of the State is said to be actually responsible for the violation of a given human right because all acts of its agents are the acts of the State for all legal intents and purposes.[730] Indeed, various State departments and agencies are responsible for designing and implementing relevant laws, policies, programmes and strategies deemed necessary for the realisation of ESC rights. For instance, it is common that States assign the provision of health services to a specific entity or department. But this functional (administrative) division is irrelevant under international human rights law for the failure of the organ to effectively realise the right to health still falls on the shoulder of the State. It is even immaterial whether or not the entity acted in line with the relevant domestic laws and guidelines.[731] According to the IACtHR, the human rights obligation of the State 'is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority' because 'under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law'.[732] It is the responsibility of the State 'to organize' its 'governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[733] Per the Court, 'any exercise of public power that violates the rights recognised by the Convention is illegal'. Thus, '[w]henever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in [human rights instruments]'.[734]

Seen in this light, we can say that complaints alleging human rights violations by the actions or omissions of its officials or within its institutional apparatus and functions (that is, legal, administrative, executive and judicial functions) all necessarily concern direct human rights accountability of the State. For instance, in *Adam v. Saudi Arabia* case[735], the CRPD found that the prison authorities failed to provide the applicant with urgent surgery needed for the injury he sustained in the prison on his right ear. As a result, the applicant completely lost his hearing

730 Ibid.

731 Following the AfCoHPR, it should be noted that the human rights obligation of the State is not limited to mere recognition of the rights and freedoms enshrined in the relevant international instruments but rather includes the obligation to give practical legal effect to those rights and freedoms within its legal system. See *Noah Kazingachire et al v. Zimbabwe,* para 141.

732 *Velásquez-Rodriguez v. Honduras*, para 170.

733 Ibid para 166–167.

734 Ibid para 169.

735 *Munir al Adam v. Saudi Arabia (Communication No. 38/2016, UN Doc. CRPD/C/20/D/38/2016), decision on merits of 20 September 2018 (hereafter Adam v. Saudi Arabia).*

on his right ear and became permanently disabled. In this case, the accountability of the State was engaged on account of four major reasons.

First, the injury was caused by the prison officials who tortured the applicant to secure confession from him; second, the officials refused to provide the applicant with urgent medical care which could have prevented his hearing disability; third, being a person under custody, the duty to care for the health and well-being of the applicant completely rest on the shoulder of the prison institution; finally, despite repeated complaints from applicant's family and representative, the State did not conduct any meaningful investigation into the case and provide him with effective remedy. All these engaged the general obligation of the State to respect all human rights and the specially heightened obligation to care for the health and well-being of the vulnerable persons under its custody.[736]

In connection with this, it should be noted that the act of the State or State organs also covers judicial procedures and decisions. Thus, the State bears the ultimate responsibility to ensure that all its legislative, administrative and judicial institutions operate in compliance with its international human rights obligations. For instance, the violations found by the CRPD in the cases of *J.H. v. Australia*[737], *Beasley v. Australia*[738], *Lockrey v. Australia*[739], *Given v. Australia*[740], *H.M. v. Sweden*[741], *Bujdoso et al v. Hungary*[742], *Makarov v. Lithuania*[743], *F v. Austria* and *Bacher v. Austria*[744] were all due to the direct actions of the State parties' legislative, administrative and/or judicial organs. In the case of *Bacher v. Austria*, the responsibility of the State was in part engaged because of the judicial practices completely ignoring the special needs of persons with disabilities in disputes involving their interests and fundamental rights.[745] For the CRPD, the failure

---

736 Paras 11.6 cum 11.2–11.5

737 *J.H. v. Australia (Communication No. 35/2016, UN Doc. CRPD/C/20/D/35/2016) decision on merits of 31 August 2018.*

738 *Gemma Beasley v. Australia (Communication No. 11/2013, UN Doc. CRPD/C/15/D/11/2013) decision on merits of 1 April 2016 (hereafter Beasley v. Australia).*

739 *Michael Lockrey v. Australia (Communication No. 13/2013, UN Doc. CRPD/C/15/D/13/2013) decision on merits of 1 April 2016 (hereafter Lockrey v. Australia).*

740 *Fiona Given v. Australia (Communication No. 19/2014, UN Doc. CRPD/C/19/D/19/2014) decision on merits of 16 February 2018 (hereafter Given v. Australia).*

741 *H.M. v. Sweden (Communication No. 3/2011, UN Doc. CRPD/C/7/D/3/2011) decision on merits of 19 April 2012.*

742 *Zsolt Bujdoso et al v. Hungary (Communication No. 4/2011, UN Doc. CRPD/C/10/D/4/2011) decision on merits of 9 September 2013 (hereafter Bujdoso et al v. Hungary).*

743 *Boris Makarov v. Lithuania (Communication No. 30/2015, UN Doc. CRPD/C/18/D/30/2015) decision on merits of 18 August 2017 (hereafter Makarov v. Lithuania).*

744 *Simon Bacher v. Austria (Communication No. 26/2014, UN Doc. CRPD/C/19/D/26/2014) decision on merits of 16 February 2018 (hereafter Bacher v. Austria).*

745 Paras 9.7 & 9.9. 'In the present case, the role of the Committee is to assess whether the decisions adopted by the courts of the State party have enabled the respect of the rights of [the applicant] under article 9, read alone and in conjunction with article 3 of the Convention'. ibid para 9.7. See also para 9.9 where the Committee noted the fact that the impugned decision of the given State party's court 'adopted the same line as the previous decisions of the courts of the State party in the present case: it did not make a thorough analysis of the special needs of

to adequately take into account the special needs of persons with disabilities in any dispute between them and other private or public parties amounts to denial of justice. Thus, in reaching its conclusion in *Bacher v. Austria*, the Committee stated that

> The multidimensional consequences of the decisions adopted by State party's authorities on the accessibility rights of [the applicant] were therefore ignored, leaving to his family the responsibility of finding ways to enable his access to his home and to the external public services that he needs for his daily life. The Committee therefore considers that the decision of the [Court in issue], read in the context of the previous judicial decisions adopted by the courts of the State party in the case, constitutes a denial of justice for [the applicant], in violation of article 9, read alone and in conjunction with article 3 of the Convention.[746]

It is therefore incumbent upon the State to structure its institutional governance system in such a way that all its agents, institutional apparatuses and procedures function in accordance with its international human rights obligations. The State cannot absolve itself from being accountable for the violations by raising, for instance, that the impugned action was taken or prohibited because of the order of the court of law nor can it be exonerated on account of the fact that the action concerned was illegally taken by an official.

### 7.3.2. ACCOUNTABILITY FOR ACTS OF ENTITIES WITH FUNCTIONAL RELATIONSHIP WITH THE STATE

The second scenario concerns the acts or omissions of certain private entities or agencies authorised through legislative or other arrangements to perform some public functions such as the provision of health care, housing, education, electricity and water to the public. When the acts or omissions of these private entities result in the violation of ESC rights, it is a consistently held position of all human rights courts and monitoring bodies that the delegation by the State of such essential public functions to third parties cannot be considered as a transfer of its international human rights obligations. Nor does it absolve the State from

---

[the applicant], despite the fact that they had been clearly referred to by his parents, as in all previous court hearings and summons. The State party's authorities instead considered that the subject matter of the judicial proceedings "had nothing to do with the rights of persons with disabilities" and focused on the resolution of the property rights issue at stake'. (internal citation omitted).

746 Para 9.9. *Cf. Marie-Louise Jungelin v. Sweden (Communication No. 5/2011, UN Doc. CRPD/C/12/D/5/2011) decision on merits of 2 October 2014 (hereafter Jungelin v. Sweden)*, paras 10.5–10.6; *A.F. v. Italy (Communication No. 9/2012, UN Doc. CRPD/C/13/D/9/2012) decision on merits of 27 March 2015*, paras 8.4–8.5 (where the Committee concluded that the respective tribunal/court thoroughly and objectively assessed all the elements submitted by the respective applicants).

accountability for the conducts of such entities are still deemed to be the conducts of the State for all legal and practical purposes. The basic reason for this is that the State retains or should retain effective supervisory role over the conducts and operations of the third parties acting on its behalf. For instance, in the *Oyal* case, per the ECtHR, the responsibility of the State was engaged because the agent directly responsible for the contamination of the blood of the victim with HIV/AIDS was acting on behalf of the State as a service providing entity within certain legislative framework.[747] In *SERAC* case, the African Commission found the State's violation of its positive obligation to protect the right to health, housing, food, development and healthy environment because, in addition to directly participating through its security agents in the violation, it had also failed to regulate the activities of the oil company (a joint venture between Nigeria's National Oil Company and Shell) in the Ogoniland.[748] In *Marangopoulos Foundation for Human Rights (MFHR) v. Greece (Complaint No. 30/2005)*, the Respondent State argued that the acts of pollution and its effects could not be attributed to the State as the plant emitting pollution operates under its domestic private law.[749] The facts of this case indicate that the Respondent State was the majority shareholder of the plant and hence may raise issues as to whether it is purely a private organ or not. But for the Social Rights Committee, these facts are irrelevant because irrespective of the domestic legal status of economic actors whose conduct is in issue, the State is required to ensure the compliance of all actors (entities) within its jurisdictions with its undertakings under the Social Charter. The State was therefore held accountable for its failure to act with reasonable due diligence to regulate the plant's operations and thereby prevent the risks created to the life and health of the surrounding populations from the excessive pollution emissions emanating from the plant.[750]

And the same was also true in the case of *Ximenes-Lopez v. Brazil* whereby a privately owned hospital was contracted by the State to provide psychiatric services within its single health care system in the sense that the hospital's activities were conducted on behalf of the State. Interestingly, the State acknowledged its international responsibility for failure to take necessary measures to prevent the conditions that allowed the mistreatments, sufferings and subsequent death of the victim at the hospital. According to the Court, the State did not discharge its positive duties required by the circumstances of the case, namely, the duty to care and ensure decent hospitalisation for patients with particular vulnerability as the victim; to regulate and properly supervise the operation of the hospital; and to investigate and bring proper accountability for the death of the victim.[751]

This all makes it clear that under the second scenario the accountability of the State essentially draws on the State's obligation to regulate, supervise (monitor)

747 *Oyal v. Turkey,* para 53–56.
748 *SERAC v. Nigeria,* paras 53–55, 58, 62–63 & 66–67.
749 *MFHR v. Greece (Complaint No. 30/2005)*, para 191.
750 Ibid paras 192–221.
751 Paras 63, 66 & 131–150.

and evaluate the operation and performance of the entities entrusted with the responsibility to provide those essential services and to investigate and remedy the failures (violations) identified therein.

### 7.3.3. ACCOUNTABILITY FOR ACTS OF PRIVATE PARTIES

The third scenario concerns the accountability of the State for the conducts of the private parties within its jurisdiction but with no specific formal relationship with the State. Human rights scholars have extensively been debating the scope of the application of human rights obligations to private parties, the so-called the horizontal application of human rights.[752] Theis is particularly interesting in relation to the positive obligation of the State arising from ESC rights with substantial resource implications. While the academic debate especially in relation to the obligation to directly provide essential goods and services is yet to settle, it is clear that private parties have the negative obligation not to interfere with or obstruct the free and full exercise of these rights. Even in this latter case, the State remains ultimately responsible for making sure that all actors within its jurisdiction conduct themselves in a manner compatible with human rights standards.[753] This accountability of the State draws on its general obligation of due diligence which consists in taking necessary reasonable steps required to prevent, investigate and remedy the conducts of the entities from encroaching upon human rights.

There are many cases in which States were found in violation of its due diligence obligation to regulate, investigate or remedy the acts of private entities infringing ESC rights. Just to mention some of them, it was noted above that the case of *Fadeyeva* concerned the violation of the right to home and private life guaranteed under Article 8 of the ECHR due to pollution emission from a close by plant. The ECtHR noted that at the relevant time the said plant was not owned, controlled, or operated by the State.[754] Thus, the complaint was not about direct interference by the State but rather by a private entity. Referring to its earlier case law, the Court reiterated that 'the State's responsibility in environmental cases may arise from a failure to regulate private industry'. This, in turn, engages a positive duty of the 'State to take reasonable and appropriate measures to secure' the rights guaranteed, in this case, under Article 8 paragraph

752 See generally John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (1st edn, WW Norton and Company 2013); Wolf (n 728) 185–195; John H Knox, 'HORIZONTAL HUMAN RIGHTS LAW' (2008) 102 The American Journal of International Law 1; DJ Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd ed, Oxford University Press 2009) 18–21.

753 Ruggie (n 752) 81ff; Wolf (n 728) 195–197 & 351–352.

754 *Fadayeva v. Russia*, para 89.

1 of the Convention.[755] Having analysed all the material evidences in the case with respect to the measures taken by the State, the Court held, inter alia, that the State failed to approach the problem with the required due diligence vis-à-vis the polluting activities of the plant affecting the applicant and the surrounding communities.[756] The Court had already held the same in its earlier judgment in *López Ostra* case where the authorities failed to regulate the pollution activities of a waste-treatment plant just few metres away from the applicant's home which had severe impact on the health of her family and her private life.[757]

The above mentioned *Ximenes-Lopez* case also provides us with important principles to draw on as far as the institutional responsibility of the State is concerned both generally and in relation to health care and detention institutions. In this case, the Court identified three important obligations of the State with respect to the acts of private parties encroaching upon human rights within its jurisdiction: the duty to regulate and supervise, the duty to ensure the existence of adequate quality of care for all patients in health care and psychiatric institutions and the duty to investigate and remedy those acts (or omissions) found to be incompatible with basis human rights of the service recipients.[758] In this case, it was noted that the State was fully aware of the precarious conditions at the care institution in terms of the physical violence regularly committed against mental patients; the maintenance, preservation and sanitary conditions; inadequacy of proper rooms both qualitatively and quantitatively; chronic shortage of necessary health equipment, facilities, and professionals; and the existence of mismanagement by the owner of the hospital; and, more specifically, the fact that the death of the victim was directly attributable to violence, neglect and lack of proper care. In addition, the State was also fully aware of similar previous cases in the same institution.[759] It was accordingly held accountable for its failure to

755 Ibid.

756 Ibid paras 124ff.

757 *López-Ostra v. Spain*, para 56–58.

758 *Ximenes-Lopes v. Brazil,* paras 137–148. In this regard, it should be mentioned here that the health care institution where the act was committed is a private hospital contracted by the State to provide psychiatric services within the scheme of the Single Health Care System. It operated as a public health care unit in the name and on behalf of the State. It was, at the material time of this Judgement, the only institution, public or private, offering inpatient or outpatient services for persons with mental disabilities in the region of Sobral (ibid paras 112(55) cum para 142). The analysis of the Court therefore takes largely into account the public aspect of the hospital for all intents and purposes. Nevertheless, the principles (except duty of care – the duty to directly care for the patients) are essentially the same and hence are directly applicable to any acts of private entities providing similar services.

759 Ibid paras 120–122, 141–148 & 112 (56–59). In particular, the Court established as one of the proven facts in the submissions of the parties that 'At *Casa de Reposo Guararapes* (Guararapes Rest Home) there was an atmosphere of violence, aggression, and maltreatment, where many inpatients frequently suffered injuries to their upper and lower extremities, which were inflicted by the employees of *Casa de Reposo Guararapes*; nurses' aides and security guards used patients to restrain others; applied the "gravata" (a restraint method which carries the risk of asphyxiation) to some patients, who thought that such practice "was the law" or was intended

regulate, investigate and remedy the activities of the private health institution concerned.[760]

The *Sarayaku* case is also very important in this regard. We have already discussed this case extensively in the previous chapter but with respect to the issue at hand it was argued that the State knowingly allowed a private oil company to install heavy explosives in the territory of the Sarayaku People putting their life and survival at risk. The American Commission on Human Rights particularly argued that the detonation of the explosives resulted in, inter alia, the destruction of their forests, water sources, and sacred cultural sites as well as in the migration of animals significantly impairing their ability to secure their subsistence and disrupting their life cycle.[761] It was well-established in the case law of the Court that the right to life imposes both negative and positive obligations. The *Sarayaku* case engaged the positive obligation of the State to protect the risks posed to the life and survival of the Community due to the placement of explosives in their ancestral land and its subsequent impact on their livelihood and cultural life. According to the Court, the State will be held responsible particularly if it can be established that it knew or should have known the existence of the situation threatening the life of an individual or a group but failed to take necessary reasonable measures to avert the risk posed by the situation.[762] In this case, the Court observed that the State allowed the oil company to place the explosives in the said territory with full acquiescence and protection. Not only this, the also failed to protect the Community from violence from other indigenous groups or investigate and punish the perpetrators of the violence against them. This all denied them access to their traditional land upon which their subsistence, medicinal and cultural life essentially depends. It therefore held the State accountable for the acts of the private parties which endangered the life, survival and well-being of the Community as a whole.[763]

Moreover, it is also possible to see the accountability of the State being engaged in several of the cases decided by UN human rights monitoring bodies.[764] In both *Djazia and Bellili v. Spain* and *Bacher v. Austria* cases, the respective State party argued that the issues raised by the applicant involved a purely private dispute (matter) between the applicant and another individual which the State should

---

"to maintain order"; physical restraint was indiscriminately used, regardless of whether such procedure had been ordered by the physician in charge, and physical confrontations between patients were encouraged'. ibid para 112(56).

760 Ibid para 150.

761 *Sarayaku v. Ecuador*, para 233.

762 Ibid para 245.

763 Ibid paras 246–249 & 265–271.

764 See for instance *Bacher v. Austria*. See also *Y v. United Republic of Tanzania (Communication No. 23/2014, UN Doc. CRPD/C/20/D/23/2014) decision on merits of 31 August 2018*; *X v. United Republic of Tanzania (Communication No. 22/2014, UN Doc. CRPD/C/18/D/22/2014) decision on merits of 18 August 2017; Mohamed Ben Djazia and Naouel Bellili v. Spain (Communication No.5/2015, UN Doc. E/C.12/61/D/5/2015) decision on merits of 20 June 2017 (hereafter Djazia and Bellili v. Spain).*

not interfere. At the domestic level, the *Djazia and Bellili v. Spain* case concerned an eviction enforcement measure following the expiry of the rental contract whereas the *Bacher* case concerned the refusal of the applicant's neighbour to allow him construct the passage (easement) to his home and public life which was, in turn, needed because of his disability condition. However, in both cases, it was underscored that while every private legal relationships and disputes are regulated through its legal order, the State remains ultimately responsible to guarantee that the human rights it has recognised are respected by all actors within its jurisdiction and 'that the decisions adopted by its authorities do not infringe upon the rights of the Convention'.[765] According to the CESCR,

> States parties do not only have the obligation to respect Covenant rights, and, it follows, to refrain from infringing them, but they also have the obligation to protect them by adopting measures to prevent the direct or indirect interference of individuals in the enjoyment of these rights. If a State party does not take appropriate measures to protect a Covenant right, it has a responsibility even when the action that undermined the right in the first place was carried out by an individual or a private entity. Thus, although the Covenant primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Covenant extends to relations between individuals. An eviction related to a rental contract between individuals can, therefore, involve Covenant rights. Accordingly, the State party's argument that the communication deals with a dispute that is exclusively between individuals and therefore does not fall under the Covenant does not stand.[766]

The CRPD applied the above reasoning to the *Bacher* case. It held that

> States parties are obliged not only to respect Convention rights and, it follows, to refrain from infringing upon them, but also to protect those rights by adopting measures to prevent the direct or indirect interference of individuals in the enjoyment of those rights. Thus, although the Convention primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Convention extends to relations between individuals. […] A property right issue linked to the exercise of a contract between individuals and the conflict arising from it therefore has to be interpreted through the Convention. Accordingly, when the courts of the State party intervened to resolve the conflict between the parties, they were bound by the Convention. The State party's argument that the communication deals with a dispute that is exclusively between individuals and therefore does not fall under the Convention therefore does not stand.[767]

It is, therefore, not possible for the State to rely on private law regimes (contractual, property or other private law rights) as an excuse for their failure to protect the violation of ESC rights of individuals ensuing from private parties. It also does not

765 *Bacher v. Austria*, para 9.2; *Djazia and Bellili v. Spain,* para 14.1.
766 *Djazia and Bellili v. Spain,* para 14.2.
767 *Bacher v. Austria*, para 9.3.

suffice to put legislative and judicial procedures in place. It indispensable for the State to make sure that the laws and judicial decisions governing private relations also practically uphold the human rights of individuals. In other words, it should effectively regulate, monitor, investigate and remedy the behaviours and actions of the private parties and the official decisions thereof in the light of international human rights norms.[768] Otherwise, it will be held accountable regardless of the fact that its agents are not directly responsible for the impugned actions of the private entities contravening the human rights of individuals.

## 7.4. CONCLUDING SUMMARY

The effective realisation of the inherent material conditions of life cannot be possible without the existence of the system through which the State can be held accountable for its actions or omissions as well as for the actions and omissions of the private parties within its jurisdiction. This is what has been confirmed in international ESC rights case law from across jurisdictions. In particular, the principle of accountability gives practical procedural expression (concreteness) to the State's obligation to respect and ensure the material conditions of life required to live a dignified life, for without it the promises of human rights would remain only empty rhetoric.[769] In particular, the principle of accountability constitutes the core overarching procedural obligation of the State to put in place the system through which individuals and group of individuals can demand justifications for its choices, rectification of the failures in making the choices or in the implementation of the measures adopted, and sanctioning agents or entities responsible for the failures. It flows from the generic obligation of the State to respect and ensure the free, full and effective enjoyment of human rights for all persons within its jurisdictions. But while there are various conceptions of accountability in play, international human rights law and jurisprudence put special emphasis on the strong and institutional form of the State accountability whereby it bears an ultimate legal responsibility for all the acts or omissions obstructing the effective realisation of human rights within its jurisdiction, that is, regardless of its internal constitutional and administrative division of powers and functions and the identity of the entities in question. The discussion in this Chapter has particularly shown the justifications and the three major scenarios leading to the institutional accountability of the State. It is argued that, taken together, this idea of the institutional accountability of the State responds to the problem of diffusion of accountability inherent in the practical realisation of ESC rights.

---

768 See also *Y v. United Republic of Tanzania,* paras 8.1ff.; *X v. United Republic of Tanzania*, paras 8.1ff.

769 See A/HRC/14/39, para 32.

# CHAPTER 8
# DIGNIFIED LIFE

## 8.1. INTRODUCTION

The preceding three chapters have examined the procedural dimension of the State obligation to give practical legal effect to the inherent material conditions of life. This and the next chapter will continue to discuss its substantive dimension in the light of ESC rights jurisprudence. As explained in the introductory section of Part two, the substantive dimension of the State obligation to respect the material conditions of life basically concerns ensuring the essential minimum guarantees provided through ESC rights regime. The core aspect of this obligation particularly consists in the State's obligation to secure, both in law and fact, a dignified life (dignified existence) for every human being within its jurisdiction. This, in turn, has two major components. The first component concerns the general obligation of the State to ensure these essential material conditions of life for every person; the second component concerns the specially aggravated obligation of the State towards vulnerable persons. This Chapter will deal with the first one and the second one will be considered in the next Chapter. Accordingly, this Chapter will examine the content and scope of the State's obligation to ensure a dignified life in the light of ESC rights jurisprudence. The discussion starts with brief explanation of the conception of a dignified life with the view to help the reader appreciate the justifications behind the selection of the cases discussed in this Chapter and the nature and scope of the State obligations examined in the subsequent sections. However, because of the broad nature of the notion of the dignified life and its implications on the scope of the obligation of the State, it is hardly possible to exhaustively discuss all the relevant cases to this effect. So, the discussion here will focus mainly only on the general and major aspects of its contents and implications. Then, the next Chapter will examine its further imports in the context of the rights of vulnerable persons.

## 8.2. THE CONCEPTION OF DIGNIFIED LIFE

The notion of a dignified life deployed in this Chapter and throughout this study is drawn from the case law of the IACtHR. There are also other terms which

signify similar meaning such as dignified existence, decent living, humane life, humane or dignified treatment, dignified living and life in dignity.[770] But I found that the notion of a dignified life not only embraces all these terms but also better expresses the substantive idea of the principle of human dignity defended in Chapter four above. In Chapter four, it was particularly argued that, practically speaking, there is no dignity in human life if its moral and material conditions are not adequately available and that it is not possible to ensure respect for the dignity of human being without first securing the basic moral and material conditions of human life. This is the basic underlying justification driving the holistic approach to the protection of human rights since its inception at the UN level.[771] And it is this substantive relationship that the notion of dignified life is intended to express both in this Chapter and throughout this writing. That is, the notion of a dignified life is deployed as an overarching notion expressing a rather broad interpretation given to the idea and inherent value of human life in the case law: the life in which all of its moral and material conditions are available and enjoyable fully and freely. It denotes, following Nussbaum and Sen, a human life worth living, a life worthy of human dignity, a life in which all of its basic capability needs are fulfilled to a certain threshold level (a level below which it is not worth living).[772]

Human rights courts and monitoring bodies have used this idea of a dignified life to develop the traditional academic conception of the right to life and the right to dignity under international human rights law.[773] Traditionally, the right to life was narrowly construed as implying the negative obligation of the State to refrain from causing unlawful or arbitrary loss of life.[774] That is, the State would be held responsible if its agents, particularly security forces, arbitrarily killed or caused an unlawful loss of life of a person. In addition, the right to dignity (sometimes also the right to be treated with dignity, the right to humane treatment) was narrowly construed as prohibiting the State from physically torturing or mistreating

770 See for instance, *Xákmok Kásek Indigenous Community v. Paraguay; 'Street Children' v. Guatemala*.

771 For instance, as it was mentioned earlier, rejecting the political-ideological categorisation arguments during the codification process of International Bill of Rights, the UN General Assembly issued a resolution underscoring the indivisibility and interdependence of all human rights aimed at ensuring the ideal of free human being. It stated that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent" and that "when deprived of economic, social and cultural rights man does not represent the human person whom the Universal Declaration regards as the ideal of the free man". GA Resolution 421(V), Section E (adopted at its 5th Session, 1950). See also GA Resolution 543 (VI) (adopted at its 6th Session, 1952) (emphasising the unity of the aim of civil, political, economic, social and cultural rights which is ensuring universal respect for and observance of inherent dignity and life of human being).

772 Nussbaum, *Froniters of Justice: Disability, Nationality and Species Membership* (n 114); Sen (n 3).

773 See also Chapt 4.7.3 above (discussing the sense of dignity as an absolute human right).

774 See particularly Jo M Pasqualucci, 'The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings International and Comparative Law Review 1; Wicks (n 29).

(abusing) individuals. In effect, both the right to life and the right to dignity were narrowly conceived as falling within the traditional liberal understanding of civil and political rights. For this reason, they did not have any role in the protection of ESC rights.

However, human rights courts and monitoring bodies have progressively moved away from this narrow construction to also embrace the socioeconomic conditions of life and dignity. This approach has, in turn, played a great role in the development of the jurisprudence of ESC rights. This robust understanding of the right to life and the right to dignity, and the corresponding obligations of the State have now been well-established in international human rights jurisprudence. As such, the notion of a dignified life refers to a quality of life or existence in its full sense.[775] It expresses an ideal of human life wherein all its basic material and moral conditions are available and freely enjoyable by every human being regardless of his/ her identity and status. In this way, it has justified to take an integrated (holistic) approach to the protection of civil, political, economic, social and cultural rights by rejecting the traditional academic divide between these categories of human rights.[776]

This jurisprudential development is essentially the reflection of the normative status and value attached to the right to life and dignity of human being. In particular, it has been reaffirmed in the case law that the right to life and dignity constitute the bedrock, the *raison d'être* of human rights law and the rule of law. For instance, the '*Street Children*' case is one of the earlier cases clearly indicating the importance attached to the right to life and dignity in the practice of the IACtHR.[777] According the Court, the right to life is a fundamental human right. It is the mother and fundamental basis of all other human rights. Without the right to life being duly and effectively respected and guaranteed, all other human rights will lose any sense or meaning at all[778] or as it puts in another important case, they 'disappear, because the person entitled to them ceases to exist'.[779] This position, established first in the '*Street Children*' case, is now a solid foundation of the Inter-American System of Human Rights upon which essentially all other substantive ESC rights are grounded.[780]

---

775 Pasqualucci (n 774) 2 & 31.

776 Pasqualucci (n 774); Wicks (n 29).

777 However, the right to life and dignity were also addressed in the earlier judgments of the Court. See for instance *Velasquez-Rodriguez v. Honduras,* paras 154–158, 175 & 187–188.

778 *'Street Children' v. Guatemala*, para 144.

779 *Yakye Axa Indigenous Community v. Paraguay*, para 161. See also *Sawhoyamaxa Indigenous Community v. Paraguay*, para 130.

780 Hence, among many authorities, see *Sarayaku v. Ecuador*, para 244*; Sawhoyamaxa Indigenous Community v. Paraguay*, paras 150–155*; Yakye Axa Indigenous Community v. Paraguay*, para 161*; Ximenes-Lopez v. Brazil,* para 124*; Xákmok Kásek Indigenous Community v. Paraguay*, para 186*; 19 Merchants v. Colombia;* para 153; *the "Juvenile Reeducation Institute" v. Paraguay, preliminary objections, merits, reparations and costs, judgment of 2 September 2004,* paras 156 – 163; *Vera Vera v. Ecuador,* para 18.

Likewise, the right to life and the norms protecting the life and dignity of human being are attached the utmost importance in the European Human Rights System.[781] In particular, the ECtHR regards Articles 2 (the right to life) and 3 (prohibition of torture) of the ECHR as among the most fundamental provisions of the Convention expressing the most basic values of the democratic societies making up the Council of Europe.[782] The ECSR also sees human dignity as one of the fundamental underlying values of the European Social Rights Charter[783] and more generally as 'the fundamental value and indeed the core of positive European human rights law [both] under the European Social Charter [and] the European Convention of Human Rights'.[784]

The same is also true in relation to the African Human Rights System. As already referred to above, in the *SERAC* case, the African Commission referred to the right to life as 'the most fundamental of all human rights'.[785] In another case, the Commission referred to it as 'the supreme right of the human being'. 'It is basic to all human rights and without it all other rights are without meaning'. In the same paragraph it also noted with affirmation that 'the term "life" itself has been given a relatively broad interpretation … to include the right to dignity and the right to livelihood'.[786] For the Commission, the 'right to life constitutes a norm of customary international law and is one of the

781 In particular the Court considers that 'The very essence of the Convention is respect for human dignity and human freedom and the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees'. *Jehovah's Witnesses of Moscow and Others v. Russia (Application No. 302/02), Judgment of 10 June 2010*, para 135; *I. v. The United Kingdom (Application No. 25680/94), Judgment of 11 July 2002*, para at 70; *Orchowski v. Poland (Application No. 17885/04), Judgment of 22 October 2009*, paras 120 & 153; *M.S.S. v. Greece and Belgium [GC],* paras 220–221, 233, 253 & 263.

782 *M.S.S v. Belgium and Greece [GC],* para 218: 'The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct'.

783 *Defence for Children International (DCI) v. the Netherlands (Complaint No. 47/2008), decision on merits of 20 October 2009 (hereafter DCI v. the Netherlands (Complaint No. 47/2008))*, para 34, stating that 'The Committee recalls that the Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality, solidarity and other generally recognised values. It must be interpreted so as to give life and meaning to fundamental social rights'. (internal citation omitted). In the same Complaint, it also held the following in relation to the right to shelter: 'The Committee considers that the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity'. ibid para 47.

784 *The International Federation of Human Rights Leagues (FIDH) v. France (Complaint No. 14/2003), decision on the merits of 8 September 2004 (hereafter FIDH v. France (Complaint No. 14/2003)*, para 31. See also *DCI v. the Netherlands (Complaint No. 47/2008)*, para 73 ('human dignity, which is a recognised fundamental value at the core of positive European human rights law, must be respected').

785 *SERAC v. Nigeria,* para 67.

786 *Darfur case v. Sudan*, para 147.

central rights recognized in international human rights treaties'.[787] Reiterating its decision in *Forum of Conscience v Sierra Leone*, it stressed that 'the right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow and any violation of this right without due process amounts to arbitrary deprivation of life. The right to life is therefore the foundational, or bedrock human right'.[788]

In short, because of the fundamental nature of the right to life and dignity and the core position the norms thereof occupy, it is universally held that no restrictive approach should be admitted in construing the content and the nature of the obligations it gives rise to.[789] This approach has significantly expanded the scope of the State obligation both generally and in relation to vulnerable persons. It particularly enjoins the State to continuously create, preserve and promote, at the very minimum, socioeconomic and political conditions necessary to live a life worthy of human dignity.[790] So, while the State should negatively refrain from causing arbitrary loss of life and physically abusing individuals, it is also required to ensure the material conditions of life such as food, health care, education, safe and healthy environment, potable water and the like.[791]

The following discussion and the next Chapter show that the scope of this obligation is constantly expanding. It has particularly been applied in various areas including in the context of detention and prison conditions, health care, social security, refugee, immigration, environmental pollution, housing, eviction, extreme poverty (destitution) and education. Thus, in addition to its negative sense, it is seen as signifying wide-ranging positive obligations of the State including the duty to prevent a (threat to) loss of life, to diligently investigate the arbitrary loss of life, to prosecute the perpetrators, and to remedy the arbitrary

787 *Noah Kazingachire et al v. Zimbabwe*, para 137.

788 Ibid para 138.

789 See for instance, *Xákmok Kásek Indigenous Community v. Paraguay*, para 186 ('The Court has indicated that the right to life is a fundamental human right, whose full enjoyment is a prerequisite for the enjoyment of all other human rights. Should this right be disrespected, all other rights are meaningless. Therefore, restrictions on this right are not admissible.'); *Yakye Axa Indigenous Community v. Paraguay*, para 161 ('This Court has asserted 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. Due to the basic nature of this right, approaches that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.').

790 For more, see Pasqualucci (n 774); Wicks (n 29); Steven R. Keener and Javier Vasquez, 'A Life Worth Living: Enforcement of The Right to Health through the Right to Life in the Inter-American Court of Human Rights' (2009) 40 Columbia Human Rights Law Revew 595.

791 See particularly *Xákmok Kásek Indigenous Community v. Paraguay*, paras 186–214; *'Street Children' v. Guatemala,* para 144, 191 & 196. See also Pasqualucci (n 774); Wicks (n 29); Steven R. Keener and Javier Vasquez (n 790).

loss of life regardless of the source and nature of factors threatening a dignified human life.[792] These obligations, undoubtedly, imply wide-ranging measures that the State should take in order to effectively secure the enjoyment of dignified life but the focus of this Chapter is to show that at the heart of such necessary measures also falls the obligation to ensure the essential material conditions of life.

## 8.3. JURISPRUDENCE

### 8.3.1. IACtHR

In *Xákmok Kásek Indigenous Community v. Paraguay*, which is one of the most important cases in which the IACtHR dealt with ESC rights in great detail in the light of the right to life and humane treatment, the direct responsibility of the State was engaged essentially because it failed to ensure the effective protection of the right to ancestral land of the Community, the basis for the livelihood and well-being (subsistence, medicinal, cultural and ways of life) of its members. It also failed to effectively attend to the subsequent events that unfolded threatening their life and survival despite its declaration of the state of emergency following their relocation to different places due to the precarious and life-threatening conditions. Underlining the preeminent and fundamental nature of the right to life, the Court reiterated that the generic obligations of States enshrined in Article 1(1) of the ACHR, read together with Article 4 of the same, entails 'the obligation to guarantee the creation of the conditions that are required to prevent violations of this inalienable right', which among other things, 'requires States to take all appropriate measures to protect and preserve the right to life'.[793]

---

792 The landmark case in this development is particularly *McCann and others v. United Kingdom (Application No 18984/91), Judgment of 27 September 1995* where the Court outlined for the first time that the right to life enshrined under article 2 ECHR implies the duty to refrain from unlawful killing (by Agents of a State), the duty to investigate suspicious deaths and, if required, prosecute the perpetrators of unlawful killing (by private party or entity) and the positive duty to take steps to prevent the avoidable loss of life. In the *'Street Children' v. Guatemala,* para 144, the IACtHR underscored that 'the right to life is a fundamental human right. It is the mother and fundamental basis of all other human rights. Other rights makes no sense without it at all or their values disappear' and held that the right consists of 'not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence'. In *SERAC v. Nigeria,* para 67, the ACoHPR referred to the right to life as 'the most fundamental of all human rights'. See generally, Pasqualucci (n 774); Wicks (n 29); Robin CA White and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010); Harris and others (n 752); Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson 2010); Jayawickrama (n 3).

793 Para 187. 'For this reason, States have the obligation to guarantee the creation of the conditions that are required to prevent violations of this inalienable right and, in particular, the duty to prevent its agents from threatening that right. The observance of Article 4 with relation to

The Court has already made it clear that not every condition, including social and economic conditions, threatening the life of individuals would give rise to State obligation. It is of the opinion that due to inherent complexity and difficulty in socioeconomic planning and execution, it is not possible to hold the authorities to an absolute standard. Nevertheless, the State is responsible for those life-threatening conditions resulting from its direct or indirect conducts as well as for those in which, though it has or, at least, ought to have the knowledge of their existence and real and immediate effects, it has failed to take necessary reasonable measures of due diligence to avert the risks posed to the life of persons within its jurisdictions.[794] In the *Xákmok Kásek* case, it was established by the Court that the precarious living conditions threatening their life and survival were the result of both actions and inactions of the State authorities. The State authorities to the highest level had full knowledge of the situations and the precarious living conditions unfolding over years. In particular, the authorities knew that the Community had no access to those conditions required for their 'dignified existence' such as water, food, health care, and education. Even the state of emergency meant to address the situation as a matter of priority failed to produce any adequate and effective results especially in meeting their urgent needs for food, water, health care and medical facilities.[795]

These findings of the Court are more or less the same with its judgments in similar cases concerning several indigenous communities. For instance, in the case of *Sarayaku*, the State violated the right to life of the Community by, among other things, deliberately allowing the placement of explosives and subsequently preventing them from having access to their traditional land on which they fully depended for their livelihoods and well-being.[796] In the *Sawhoyamaxa* case, the Community was subjected to extremely unbearable living conditions on the roadside. The Community was forced to abandon their traditional estates (which was owned by a private party) especially because of the extreme poverty characterised by poor health conditions and medical care, exploitative working conditions, and the restrictions imposed on them to own crops and rear cattle and on their freedom to exercise their traditional subsistence activities by the owners of their estates.[797] Since then, they were living in extreme destitution

---

Article 1(1) of the Convention not only assumes that no person should be arbitrarily deprived of life (a negative obligation), but that in addition, it requires States to take all appropriate measures to protect and preserve the right to life (a positive obligation), in keeping with the duty to guarantee the full and free exercise of the rights of all individuals under their jurisdiction, without discrimination.' ibid.

794 Ibid para 188 (also citing, inter alia, *Sawhoyamaxa Indigenous Community v. Paraguay,* para. 155); see also *Sarayaku v. Ecuador,* para 245; *Yakye Axa Indigenous Community v. Paraguay,* para 161.

795 *Xákmok Kásek Indigenous Community v. Paraguay*, paras 194–234.

796 *Sarayaku v. Ecuador*, para 246–249.

797 *Sawhoyamaxa Indigenous Community v. Paraguay*, para 73(61ff) describing their living conditions at the material time.

without having access to any type of essential goods such as shelter, food, water, health and medical care, sanitation and education[798]; nor did the authorities (though fully aware of the extreme poverty and hardship on their estates as well as subsequent to their settlement) take adequate and sufficient measures to avert the risk created to the life of the Community.[799] At one point, the Court even described their extreme living conditions as follows.

> In the instant case, together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes.[800]

We have already noted in the Chapter seven above the nature of State's positive obligation flowing from the right to life and dignity outlined in some detail while discussing the case of *Ximenes-Lopez v. Brazil* in relation to the right to health. This case underlined that owing to the fundamental nature of the right to life, the 'States have the duty to ensure the creation of conditions required to prevent the violations of this inalienable right'. This ranges from the duty to maintain effective regulatory and supervisory standards required to ensure the practical existence of adequate standard of health care and treatment both in qualitative and quantitative terms to the duty to directly, as ultimate guarantor of human rights, provide medical care and other treatments for all persons in need.[801] Also in the *Vera Vera* case, reiterating its earlier jurisprudence, the Court held that the right to access to appropriate health care is directly and closely linked to the right to life, personal integrity and humane treatment. Thus, 'lack of appropriate medical care' is contrary to 'the minimum material requirements of humane treatment due because of a person's nature as a human being'.[802] In this regard, it should be noted that the *Vera Vera* case concerns the death of the victim in the State custody as a result of lack of an appropriate and timely medical care proportionate to the wound he suffered by a gunshot during his arrest and the complications following therefrom. The Court particularly observed the existence

798 Ibid para 73 (61ff) cum 156ff.

799 Ibid particularly at paras 156–159, 166–169 & 177–178. 'The Court finds that the State violated Article 4(1) of the American Convention, as regards to Article 1(1) thereof, since it has not adopted the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of the Sawhoyamaxa Community.' ibid para 178.

800 Ibid para 168.

801 Para 125. See also ibid paras 124–150.

802 *Vera Vera v. Ecuador*, para 44. See also ibid paras 39–44 (where it addressed medical care as part of the right to life and personal integrity of detainees and prisoners).

of gross neglect and medical negligence in the hands of the State agents (the police and medical experts).[803]

The case of *Furlan and Family* also adds important perspectives to the scope of the positive obligation of the State to protect the right to life. In this case, the victim, Sebastián Furlan, had suffered health damage at the age of fourteen and became disabled when a heavy beam belonging to the State military fell on him rendering him unconscious and, subsequently, disabled for his entire life. The accident happened at the time the victim, who was playing in the field, was trying to hang on one of the crossbeams in the vicinity of the installation. There was no fence or warning sign to prevent those like the victim from the faulty installation.[804] Although the victim and his family filed an application for compensation due to the damage suffered, the extreme passivity, inactivity and lack of due diligence on the part of the State agents frustrated the claim for several years.[805] Also, his families did not have the means to cover those medical expenses required by his condition. As the result, the victim was unable to receive adequate health care and psychiatric treatments.[806] According to the Court, 'health care must be available to everyone who needs it'.[807] And, in principle, the health care service and treatment should be proportionate to the care required by the nature of their specific conditions and needs. In relation to persons with disability, for instance, it underscores that 'all treatment for people with disabilities should be in the best interest of the patient, should aim to preserve their dignity and independence, reduce the impact of the disease, and improve their quality of life'.[808] In this case, it was found that the State was responsible both for the damage to the victim's health and subsequent sufferings by the victim and his family. Therefore, the Court ordered the State to provide the victim with comprehensive measures aimed at rehabilitating the health of the victim and restoring to the extent possible his life projects as well as psychological and other necessary treatments for the sufferings endured by the victim's family free of charge.[809]

### 8.3.2. AfCoHPR

There are several cases in which the African Commission found grave violation of the positive obligation to guarantee a dignified life. Particularly noteworthy are its decisions in the following communications: *Malawi Africa Association*

803 See particularly paras 48–79.
804 *Furlan and Family v. Argentina,* paras 71–77.
805 See for instance ibid paras 189–190 *cum* 196, 202–204, 211–212, 261, 265 & 283.
806 Ibid paras 197 & 283.
807 Ibid para 282.
808 Ibid (citing also the case of *Ximenes-Lopes v. Brazil,* para 109).
809 Ibid paras 282–288.

*et al, Darfur case, SERAC and DRC case*.[810] Elsewhere, I have already described these cases as concerning the situation of humanitarian crisis (in fact, human crisis) resulting from a constitutional crisis (systemic failures) or armed conflict. This characterisation flows from the nature of the facts of each case and all the background circumstances leading to the violations therein including the scope and manner of the respective States' participation.[811] For instance, in *Malawi Africa Association et al,* the Commission held, inter alia, that denying the people access to food and medical attention, burying them in sand and subjecting them to torture to the point of death show a shocking lack of respect for life.[812] At the background of this case lies a massive and wide-spread act of, among other things, detention, torture, killings, discriminations, expulsions, confiscations and destructions of livestock, harvests and villages, all with the active participation of the State machineries particularly military forces just because the victims happen to be members of a certain ethnic groups other than those in power.[813]

The violation of the right to life and dignity recorded in *SERAC* case is equally grave and egregious. In deciding to embark on the oil exploration project, the then military junta had no regard to the basic rights and interests of the population living in the Ogoniland. As I argued elsewhere, the Ogoni population had endured double sufferings.[814] One was the suffering from contamination of their air, soil and water by the toxic substances and hazardous wastes from the oil exploration and hence practically destroying their wellbeing and livelihoods. This had, as the case shows, exposed the population to serious short- and long-term health impacts including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems. In fact, the Commission, having visited the area, observed that the pollution and environmental degradation was to the level humanly unacceptable that it practically made living in the region a nightmare.[815] The other suffering was caused by ruthless military operations and other agents who engaged in destruction of homes, villages, source of foods (farms, water sources, crops and

---

810 *Communications 54/91–61/91–96/93–98/93–164/97–196/97–210/98, Malawi Africa Association et al v. Mauritania (joined), decision on merits, 27th Ordinary Session of ACoHPR, 11 May 2000 ((hereafter Malawi Africa Association et al v. Mauritania)*; *Darfur case v. Sudan; SERAC v. Nigeria; Communication 27/99, Democratic Republic of Congo/Burundi, Rwanda, Uganda, decided on merits, 33rd Ordinary Session of ACoHPR, 03 May 2003 (hereafter DRC v. Burundi et al).*

811 Mosissa (n 15) 76–80.

812 *Malawi Africa Association et al v. Mauritania*, para 120; ibid 77–78.

813 Ibid paras 115–122. Overall, the Commission 'Declare[d] that, during the period 1989–1992, there were grave or massive violations of human rights as proclaimed in the African Charter; and in particular of Articles 2, 4, 5, 6, 7(1)(a), 7(1)(b), 7(1)(c) and 7(2)(d), 9(2), 10(1), 11, 12(1), 14, 16(1), 18(1) and 26,' essentially finding violation by the State party of the entire substantive provisions of the African Charter for all practical intents and purposes.

814 Mosissa (n 15) 78–79.

815 *SERAC v. Nigeria,* para 42 *cum* paras 51–54 & 67.

animals) and causing massive displacements, evictions, detentions, torturing, killings and other forms of ill-treatments and terrorisations.[816] According to the Commission, these and similar brutalities not only persecuted individuals in Ogoniland but also shattered the life of the Ogoni population as a whole contrary to their right to life, dignity, health, food, shelter and healthy environment.[817]

The *Darfur case* also concerns violent acts directed against the Darfur population by State agents and militias sponsored by the State.[818] The facts of the case show that these agents had carried out forced displacements, evictions, looting, destruction of homes, villages, foodstuffs, crops, livestock; poisoned their wells as well as denied access to other water sources; and destroyed public facilities and private properties.[819] According to the Commission, these acts and State's failure to protect the population clearly amount to cruel and inhuman treatment which threatened the very essence of their dignity, right to life and humane treatment guaranteed under the African Charter.[820] And in the *DRC case*, the Commission found that the Respondent States were responsible for violation, inter alia, of life, dignity, health and education of the people by conducting such acts as besieging and damaging of the hydro-dam; stopping of essential services in the hospital leading to deaths of patients; and the general disruption of the life of the population under their control contrary to their obligation under the African Charter and Geneva Conventions.[821]

### 8.3.3. ECSR

As stated above, human dignity is at the core of ECSR's jurisprudence as well. In several of its decisions, it has consistently held that effective access to adequate health care, shelter and minimum income as well as the protection against homelessness, poverty and social exclusion are essential prerequisites to guarantee respect for human life and dignity.[822] For instance, it has already been

816 Ibid paras 55 & 61–67.

817 Ibid paras 54, 55, 58 & 62–67.

818 Mosissa (n 15) 79–80.

819 *Darfur case v. Sudan,* particularly paras 145–168 *cum* 205–216.

820 Ibid para 164.

821 *DRC v. Burundi et al,* paras 79–89; Mosissa (n 15) 78.

822 See for instance, *FIDH v. France (Complaint No. 14/2003*, para.30; *DCI v. the Netherlands (Complaint No. 47/2008*; *ERRC v. France (Complaint No. 51/2008)*; *COHRE v. Italy* (*Complaint No. 58/2009)*; *COHRE v. France (Complaint No. 63/2010)*; *IMATDFW v. France (Complaint No. 33/2006)*; *European Federation of National Organisations working with the Homeless (FEANTSA) v. France (Complaint No. 39/2006), decision on merits of 5 December 2007 (hereafter FEANTSA v. France (Complaint No. 39/2006))*; *European Roma Rights Centre v. Bulgaria (Complaint No. 31/2005), decision on merits of 18 October 2006 (hereafter ERRC v. Bulgaria (Complaint No. 31/2005))*, *MFHR v. Greece (Complaint No. 30/2005)*; *ERRC v. Greece (Complaints No.15/2003)*; *European Roma Rights Centre v. Italy (Complaint No. 27/2004), decision on merits of 7 December 2005 (hereafter, ERRC v. Italy (Complaint No. 27/2004)).*

shown above that respect for human dignity was at the core of its assessments in *COHRE v. Italy* (*Complaint No. 58/2009)* and *COHRE v. France (Complaint No. 63/2010)* where it found an aggravated violation of the Social Charter owing to the nature and gravity of the acts committed against the Roma and Sinti populations. Drawing on the jurisprudence of the IACtHR[823], the Committee stated that an aggravated violation occurs when there are measures specifically aimed at certain vulnerable groups and that public authorities not only fail to prevent but also directly contribute to a violence against certain groups.[824] It was found that in both complaints there were series of targeted legislative, policy and other administrative measures taken against the said groups. In particular, they were subjected to manifest discrimination in housing and other essential public services; exposed to segregation and extreme substandard living conditions in camps or 'ghettos'; had suffered extreme violence and inhumane treatment in the hands of police and other agents who forcefully evicted them without any regard to their dignity or due process of law. In addition, the authorities actively incited violence against them through, for instance, public speech and mass media.[825] So 'In view of the information available in the case file, the Committee holds that these criteria are met in the instant case, and finds an aggravated violation of the Revised Charter'.[826] In this regard, it reiterated that although it had already found violations of the rights of the same ethnic groups by the respective Respondent States (Italy and France) in other complaints[827], both States failed to bring the situation into conformity with the Revised Social Charter but rather exacerbated the situation. In the words of the Committee as stated in *COHRE v. France (Complaint No. 63/2010)*, para 53,

> Having regard to the adoption of measures, which are incompatible with human dignity and specifically aimed at vulnerable groups, and taking into account the active role of the public authorities in framing and implementing this discriminatory approach to security, the Committee considers that the relevant criteria [*COHRE v. Italy (Complaint No. 58/2009)*, para 76] have been met and that there was an aggravated violation of human rights from the standpoint of Article 31§2 of the Revised Charter. In reaching this conclusion, the Committee also takes into consideration the fact that it has already found violations in its decision of 19 October 2009 on the merits of [*ERRC v. France (Complaint No. 51/2008)*].

In addition, the Committee also held that the manner they were treated and the conditions in which they were evicted from camps as well as the accompanying

---

823 See *COHRE v. Italy* (*Complaint No. 58/2009)*, para 75.

824 Ibid paras 74–79; *COHRE v. France (Complaint No. 63/2010)*, paras 48–55.

825 *COHRE v. Italy* (*Complaint No. 58/2009)*, para 66–78; *COHRE v. France (Complaint No. 63/2010)*, paras 41–54.

826 *COHRE v. Italy (Complaint No. 58/2009)*, para 77. See also *COHRE v. France (Complaint No. 63/2010)*, paras 53.

827 *ERRC v. Italy (Complaint No. 27/2004)*; *ERRC v. France (Complaint No. 51/2008).*

violence against them were incompatible with the obligation to respect the dignity of human being and the prohibition of non-discrimination.[828] In fact, the Committee went further to indicate that the gravity of the violations not just affected the rights of the victims but also the very foundation of the values and interests of the Council of Europe. It therefore urged the Member States to take certain immediate measures to avert the situation.

> The measures in question also reveal a failure to respect essential values enshrined in the European Social Charter, in particular human dignity, and the nature and scale of these measures set them apart from ordinary Charter violations. These aggravated violations do not simply concern their victims or their relationship with the respondent state. They also pose a challenge to the interests of the wider community and to the shared fundamental standards of all the Council of Europe's member states, namely those of human rights, democracy and the rule of law. The situation therefore requires urgent attention from all the Council of Europe member states.[829]

### 8.3.4. ECtHR

As it has already been seen, the ECtHR also attaches a significant place to the norms protecting the right to life and dignity. The Court emphasises that the very essence of the Convention is the protection of the life and dignity of human being.[830] So the principle of dignified life (that is respect for life and dignity of human being), thus, serves as a principal regulative principle in its assessment of both the procedural and substantive guarantees enshrined in the ECHR and the protocols thereto. This is, for instance, true in the case of *M.S.S.* It is well-recognised principle that Article 3 of ECHR (where the principle of respect for human dignity constitutes the conceptual essence of the prohibition of torture and inhuman or degrading treatment or punishment)[831] prescribes an absolute obligation of the States. This means that no reason whatsoever can be adduced as a justification or excuse for failure to discharge the obligations enshrined under this provision.[832] The case law of the Court clearly shows that this absolute prescription of Article 3 is not limited to physical treatment but also extends to socioeconomic conditions. As such, Article 3 has been interpreted as requiring the State to ensure that the detention facilities are compatible with the principle of respect for the dignity of human being. This, among other things, entails

828 *COHRE v. France (Complaint No. 63/2010),* paras 45–53; *COHRE v. Italy (Complaint No. 58/2009)*, paras 58–59, 71 & 73–75.

829 *COHRE v. France (Complaint No. 63/2010)*, para 54; *COHRE v. Italy (Complaint No. 58/2009)*, para 78.

830 See for instance, *I v.UK*, para 70; *Jehovah's Witness of Moscow and others v. Russia*, para 135.

831 Para 218–220.

832 Ibid paras 218 & 223.

the obligation to secure the health and well-being of detainees; to provide the detainees with adequate food, sanitation, recreation and family visitation.[833]

In *M.S.S* case, the fact that the applicant was subjected to material poverty and extreme destitution was particularly crucial in the Court's assessment of Greece's obligation under Article 3.[834] According to the Court, owing to both the deliberate action and inaction of the authorities, the applicant was exposed to an extreme material poverty which reached the level of severity and anguish required under this Article: the deprivation was incompatible with human dignity and the applicant had therefore suffered a degrading treatment. As it observed, the applicant had to live in the most extreme poverty for months without being able to cater for his basic needs such as food, hygiene and place to live, in addition to the ever-present security threats to his life and uncertainty about the likelihood of improvement to his extreme destitution. The authorities did not examine his asylum applications nor did they provide him with alternative solutions pending his application; he had no other source of support whatsoever and also faced other practical issues as language and unfavourable job market.[835] For all these reasons,

> the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.[836]

---

833 Ibid 221. In connection with the detention of asylum seekers, the Court has particularly held that the following conditions are contrary to the obligation of the State to respect the dignity of human being: confining an asylum seeker to a prefabricated cabin for two months with no communication with relatives; absence of the opportunity to take an open air; lack of clean sheets and sufficient hygiene conditions; detention for six days in a confined space with no possibility of outside walk; lack of free access to a toilet; detention of an asylum seeker for three months with no access to any recreational facilities and without proper meals; detention of an asylum seeker for three months in an overcrowded place in appalling hygiene conditions with broken and unusable sanitary facilities; letting the asylum seeker to sleep in extremely filthy and crowded conditions. ibid para 221–222. See also ibid paras 225–233 (describing in detail the applicant's specific situations vis-à-vis the obligations under Article 3 of ECHR). These all situations in one way or the other describe violations of ESC rights guarantees such as right to food, right to health, right to recreation, right to clean and healthy living environment.

834 Ibid para 251 cum 231 & 263.

835 Ibid para 252–264.

836 Ibid para 263.

In addition, the Court has time and again indicated that the scope of the State's positive obligation under Article 2 of the ECHR (the right to life) to take necessary appropriate steps to safeguard the lives of those within its jurisdiction has wide-ranging applications.[837] For instance, in the case of *Oyal*, reiterating its jurisprudence regarding the applicability of the obligation to public health sectors[838], the Court stated that pursuant to Article 2 the State is required, inter alia, to provide legislative frameworks compelling hospitals, whether public or private; to adopt necessary measures and standards for the protection of the lives of patients; to establish effective mechanisms required to address infringements to the life and well-being of patients; and to provide adequate medical treatments for those who suffered life threatening diseases.[839] In *Oyal*, there was no dispute that the State was directly responsible for its failure to protect the life by not taking preventive measures against the spread of HIV through blood transfusions and by not conducting an effective investigation against those responsible for the infection of the first applicant.[840] The major source of contention before the Court pertains to the effectiveness of the remedy (adequacy and appropriateness) offered to the victim and his family at the domestic level compared to the nature of the violation in question. The ineffectiveness of the remedy was expressed in such a way that the pecuniary damage awarded by the domestic courts could not even cover a one-year medical expenses and treatment of the victim. As the result, 'the family was left in debt and poverty and unable to meet the high costs of the continued treatment and medication'. In view of all the circumstances of the case and, in particular, the right and interest of the victim that was at stake and the degree of State responsibility engaged under Article 2, the Court held that the State must be liable 'to pay for the treatment and medication expenses of the [victim] during his lifetime' as well as for the 'non-pecuniary damages'.[841]

The cases of *Budayeva* and *Oneryildiz* are important authorities with respect to the State's positive obligation to protect individuals against the risks posed to their lives and well-being ensuing from such factors as dangerous activities or disaster.[842] In *Budayeva*, which basically developed the principles in *Oneryildiz*[843], the State was held responsible for the loss of life and threat to the physical integrity of numerous others affected by the massive mudslide disaster

---

837 Among many authorities, see *Oyal v. Turkey*, paras 53–56; *Budayeva and others v. Russia (Applications Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) (joined), Judgment of 20 March 2008,* paras 128–145; *Öneryildiz v. Turkey (Application no. 48939/99) [GC], Judgment of 30 November 2004*, paras 69, 71–73 & 89–96.

838 *Oyal v. Turkey*, para 54.

839 Ibid paras 54–56.

840 Ibid paras 69, 72 & 74–77.

841 Ibid 69–72.

842 *Budayeva and others v. Russia; Oneryildiz v. Turkey [GC].*

843 *Budayeva and others v. Russia,* paras 128–145 (summarising its jurisprudence pertaining, in particular, to the scope of State's positive obligation flowing from the right to life guaranteed under Article 2 of ECHR). See also *Oneryildiz v. Turkey [GC]*, paras 71–73 & 89–96.

because the authorities failed to provide an adequate mud-defence infrastructure, establish effective early warning systems or any other effective measures which could have prevented or at least mitigated the impact of the disaster on human life.[844] Although the authorities were fully aware in advance of the fact that certain level of devastation was to come, they 'ended up by taking no measures at all up to the day of the disaster'.[845] As stated above, the robust understanding of the State's obligation to ensure a dignified life implies, inter alia, the obligation to take necessary steps to avoid unnecessary and preventable loss of life regardless of the source or nature of the threat or risks to life. In these cases, the State was, therefore, found in violation of both the substantive and procedural aspects of the positive obligation enshrined under Article 2 of the ECHR to protect and safeguard the lives and physical well-being of the individuals concerned.[846]

### 8.3.5. UNHRS

As argued in the Chapter four above, the principle of respect for the inherent life and dignity of human being is expressly provided as the foundation of all human rights recognised within UN human rights system. It has also been seen that the realisation is directly linked to the States parties' obligation to create socioeconomic and political conditions necessary for ensuring the dignified life for all human beings.[847] The general comments, resolutions and case law of different UN human rights bodies relating to ESC rights consistently underscore this obligation of the State. For instance, the HRC has identified violations the right to life (Art 6), prohibition of torture, and the right to humane treatment (Art 10) on the ground of, inter alia, poor detention and prison conditions. In several of the cases brought against Algeria, the Committee held that 'The Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the inherent dignity of the human person'. In particular it emphasised that 'persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity'.[848] It also reached the same conclusion in the case of *Abdullayev v. Turkmenistan*.[849] For the Committee, subjecting inmates to deplorable prison

844 *Budayeva and others v. Russia*, paras 146–160. See also *Oneryildiz v. Turkey [GC]*, paras 97–110.

845 *Budayeva and others v. Russia*, para 156. See also *Oneryildiz v. Turkey [GC]*, paras 100–103.

846 *Budayeva and others v. Russia,* paras 161–165. See also *Oneryildiz v. Turkey [GC]*, paras 111–118.

847 See Chapter 4.7 above.

848 HRC Annual Report (2015), para 105 (discussing its findings in the cases of *Boudehane v. Algeria*, *Bouzeriba v. Algeria*, *Fedsi v. Algeria*, *Bousseloub v. Algeria*, *Zaier v. Algeria*, *Kroumi v. Algeria*, *Dehimi and Ayache v. Algeria*, *Ammari v. Algeria*, *Louddi v. Algeria*, *Allioua and Kerouane* v. *Algeria*).

849 Annual Report (2015), para 108. In this case, 'the Committee noted the author's detailed claims concerning the deplorable prison conditions [where he was held]. He claimed, for example,

conditions is a violation of the right to be treated with humanity and respect for the inherent dignity of the human person.[850] In *Quliyev v. Azerbaijan*, having considered the size of prisons cells, absence of opportunities for work, education, vocational training or sports for individuals serving life sentences and the strict limitations imposed on the same regarding family visitations, the Committee concluded that 'the author's conditions of detention […] violated his right to be treated with humanity and with respect for the inherent dignity of the human person, and were therefore contrary to article 10 (1)'.[851] In more general sense, it emerges from the case law of the Committee that the principle of human dignity (humane treatment) requires the State parties to ensure access to, inter alia, hygiene prison conditions (such as clean toilet, bath rooms, sleeping places, clothing, etc.), basic health care, including regular visitation from physicians, adequate and nutritious food, clean water (both for drinking and cleaning purposes) and to the outside world (including regular family contact and open air and sun).

Similar to other human rights courts and monitoring bodies discussed above, the CRPD's emerging jurisprudence is also generating interesting principles in connection with the nature of treatment that persons with disabilities ought to have in and in relation to detention or prison centres. In this regard, the CRPD reiterates the State party's obligation to ensure, inter alia, accessible infrastructures, facilities and public services relative to their specific disability conditions and individualised needs in the light of the principle of reasonable accommodation.[852]

---

that the isolation block lacked basic hygiene, there were around 40 inmates in one cell, a metal barrel emptied once a day served as a toilet in the cell; and that, during the day, inmates had to sit on the concrete cell floor and that at night-time they were given dirty blankets, insufficient in number. These allegations were not contested by the State party. The Committee recalled that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty […]'.

850 Ibid.

851 HRC Annual Report (2015), para 107.

852 In this regard, it should be noted that accessibility and reasonable accommodation runs throughout the substantive rights of vulnerable persons enshrined in the CRPD. Article 9(1) partly provides that 'To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas'. And per Article 2 of the same, '"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. This same provision also states that denial of reasonable accommodation is an aspect of discriminatory treatment. According to the CRPD, accessibility is unconditional and therefore should be ensured when it is requested. Reasonable accommodation is personal and requires making every effort without however incurring undue burden or cost. *See F v. Austria (Communication No. 21/2014, UN Doc. CRPD/C/14/D/21/2014) decision on merits of 21 August 2015*, para 8.4–8.5; *H.M. v. Sweden*, paras 8.3–8.4; *Bacher v. Austria*, paras 9.4–9.5.

It is incumbent upon the State party to ensure that they are treated humanely and with due respect for the inherent dignity of human being. These, among other things, imply the duty to care for their security and to provide adequate safeguard against ill-treatment, abuse, exploitation and violence and the provision of customised health care and support services required by each of persons with disabilities in custody. Failure to ensure a reasonable accommodation in all fields of life on the basis of equality and without any kind of discrimination would result in the violation of their right to a dignified treatment. This was, for instance, the conclusion the CRPD reached in the cases of *Adam v. Saudi Arabia*, *X v. Argentina*[853] and *Noble v. Australia*[854] where it found violation of the obligation to ensure reasonable accommodation within the detention and prison centres.[855]

Moreover, the CRPD has also consistently held that the State party has the obligation to ensure that persons with disabilities have 'equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity' both in the public and private sector.[856] That is, the fact of their disability should not in any way disadvantage or lead to excluding them from equally enjoying their fundamental rights and freedoms. The principles and values and the specific rights recognised in the Convention require that the State laws, policies and practices should be guided by the principle of respect for the inherent dignity and, as such, should aim at promoting the autonomy, independence, full and effective participation and inclusion in the society in equal terms with other members of the society.[857]

The CESCR[858] also recognises that ensuring access to, at the very least, minimum socioeconomic conditions without any form of discrimination and irrespective of the level of available resources is a fundamental principle of ESC rights guaranteed

---

853 *Communication No. 8/ 2012, UN Doc. CRPD/C/11/D/8/2012, decision on merits of 11 April 2014.*

854 *Marlon James Noble v. Australia (Communication No. 7/2012, UN Doc. CRPD/C/16/D/7/2012), decision on merits of 2 September 2016 (hereafter Noble v. Australia).*

855 See generally *Adam v. Saudi Arabia*, paras; 11.2–11.6; *X v. Argentina*, paras 8.5–8.6 & 8.9; *Noble v. Australia,* paras 8.3–8.10.

856 *Bacher v. Austria*, para 9.6 *cum* paras 9.4–9.4–9.5.

857 See for instance *Liliane Gröninger v. Germany (Communication No. 2/2010, UN Doc. CRPD/C/D/2/2010) decision on merits of 4 April 2014 (hereafter Gröninger v. Germany)*, para 6.2. And, among several other authorities, see *Bacher v. Austria; F v. Austria; Bujdoso et al v. Hungary; H.M. v. Sweden; Szilvia Nyusti and Péter Takács v. Hungary (Communication No. 1/2010, UN Doc. CRPD/C/9/D/1/2010) decision on merits of 16 April 2013 (hereafter Nyusti and Takács v. Hungary); J.H. v. Australia; Gemma Beasley v. Australia; Lockrey v. Australia.*

858 For an interesting discussion of the Committee's emerging jurisprudence under the Optional Protocol to the ICESCR, see particularly Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 Human Rights Quarterly 48 (who provides a helpful account of the Committee's overall approach to the individual communications under the Optional Protocol including the four landmark cases discussed below. See particularly pp 65–82). I am particularly grateful to Prof. Ssenyonjo for bringing this material to my attention.

under ICESCR. For instance, in *Calero v. Ecuador*[859] and *Rodríguez v. Spain*[860] which concerned the right to social security, the CESCR in substance held that guaranteeing 'the satisfaction of, at the very least, minimum essential levels of this right' by designing and implementing 'a social security scheme that provides a minimum essential level of benefit, without discrimination of any kind' is essential in ensuring an adequate standard of living compatible with the dignity of human being. To this end, it is imperative that the State party guarantees the rights of individuals to have equal access to benefits which must be adequate to enable them to enjoy at least basic health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.[861] Similarly, in *Djazia and Bellili v. Spain* and *I.D.G. v. Spain*[862] which, in turn, concerned the right to housing (eviction related complaints in particular), it underscored that 'The human right to adequate housing is a fundamental right central to the enjoyment of all' human rights recognised in ICESCR and ICCPR. As such, it 'should be ensured to all persons irrespective of income or access to economic resources' and that any eviction enforcement measures for whatever reasons must pay due regard to the principle of respect for the dignity of human being and necessary procedural safeguards. In particular, the CESCR stresses that eviction should not under any circumstances result in rendering individuals homeless.[863] Interestingly, in all these cases, the CESCR reiterated the views it has already established in the general comments that the State obligation to ensure the minimum essential level of benefits protected by the Covenant rights does not depend on the level of resource or development. 'In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations'.[864]

Therefore, the State's obligation to respect and guarantee the dignified life for all persons generally and for those in a particularly vulnerable position including detainees, prisoners, persons with disabilities (see also next chapter) is well-recognised in the jurisprudence of UN human rights bodies. It has been seen that this obligation requires, inter alia, ensuring, at the very least, minimum essential economic and social benefits which must be adequate to guarantee access to basic health care, food, housing, clean water and education as well as removing legal and structural barriers to full and effective participation in all fields of societal life.

---

859 *Marcia Cecilia Trujillo Calero v. Ecuador (Communication No. 10/2015, UN Doc. E/C.12/63/D/10/2015) decision on merits of 26 March 2018 (hereafter Calero v. Ecuador).*

860 *Miguel Ángel López Rodríguez v. Spain (Communication No.1/2013, UN Doc. E/C.12/57/D/1/2013) decision on merits of 4 March 2016 (hereafter Rodríguez v. Spain).*

861 *Calero v. Ecuador*, paras 11.1–11.2 & *Rodríguez v. Spain*, paras 10.1–10.4.

862 *Communication No. 2/2014, UN Doc. E/C.12/55/D/2/2014, decision on merits of 17 June 2015.*

863 *Djazia and Bellili v. Spain*, paras 13.1–13.4 & *I.D.G. v. Spain*, paras 11.1–12.4 *cum* 10.5.

864 *Calero v. Ecuador*, para 14.3 *cum* 13.3. See *Rodríguez v. Spain,* para 10.6; *Djazia and Bellili v. Spain,* paras 13.1 & 15.3–15.5; I.D.G. *v. Spain*, para 11.1; CESCR General Comment No. 3, paras 11–12.

## 8.4. CONCLUDING SUMMARY

The discussion in this Chapter has shown in detail that international human rights courts and monitoring bodies consider that ensuring a dignified life for every human being constitutes one of the core substantive human rights obligations of the State. In relation to the ESC rights regime, this obligation particularly consists in securing for every person access to minimum essential material conditions required to adequately enjoy the substantive core of such rights as health care, food, housing, drinking water, sanitation and education without any kind of discrimination. In particular, it was seen that the right to a dignified life, which is based on the richer conception of the right to life and the right to dignity, signifies a holistic approach to the protection of all human rights thereby expanding the scope of the State negative and positive obligations. This means that, on the one hand, the State has a negative obligation to refrain from interfering directly or indirectly in the dignified life of individuals; on the other hand, it is positively required take all necessary and appropriate measures with the view to ensure that all individuals within its jurisdiction have access to these conditions of life. The ESC rights cases discussed above show that these basic obligations of the State have been applied in wide-ranging socioeconomic contexts wherein the life and dignity of human being is said to be threatened by such factors as extreme destitution (poverty), ill-health, homelessness, pollution, natural disaster, displacement, unemployment, detention and prison conditions. In substance, it is a well-established principle that the State should not under any circumstances cause, tolerate or let any person within its jurisdiction to inhuman and degrading treatment on account of lack of basic material conditions.

# CHAPTER 9

# EQUALITY, NON-DISCRIMINATION AND THE PROTECTION OF VULNERABLE PERSONS

## 9.1. INTRODUCTION

As it was seen in Chapter four, the principle of human dignity signifies an unconditional respect for the inherent life and value of human being. It accordingly proscribes any form of hierarchical or discriminatory treatment of human beings both generally and in relation to the realisation of the essential material conditions of life. In particular, it requires that a special attention be given to the socioeconomic needs of vulnerable persons in a society.[865] It was also seen that international human rights law compels the States to respect and ensure to ensure the free, full and effective enjoyment of all human rights for everyone within their jurisdiction.[866] This implies that the States are required to guarantee the rights on the basis of the principle of equality and non-discrimination. The principles of equality and non-discrimination have special significance particularly in ensuring the ESC rights of vulnerable persons both in their procedural and substantive aspects.[867] We have already considered above their procedural aspects in connection with the procedural dimensions of the protection of ESC rights (Chapters five through seven). And some of their substantive imports were also considered, though indirectly, while discussing the right to dignified life in Chapter 8 above. The purpose of this Chapter is now to provide a detailed examination of international ESC rights jurisprudence with the view to see their specific substantive implications in understanding (the scope of) the obligation of the State in the realisation of the essential material condition of life of the vulnerable persons. But before discussing this, it is necessary to first clarify the sense in which the notion of equality and non-discrimination and vulnerable persons are deployed in ESC rights case law.

---

865 Malpas (n 30) 25.

866 See Introduction to Part two above.

867 Yeshanew (n 69) 344ff.

## 9.2. THE CONCEPTION OF EQUALITY AND NON-DISCRIMINATION

As it can be seen from the discussion below, the notions and implications of equality and non-discrimination have significantly expanded over the course of time. In my view, this interesting development can be justified as an accurate understanding (reflection) of the nature and implications of the underlying principle of human dignity. Thus, following Dworkin, everyone in a political society has the right to equality of respect and concern in the designing of the institutions that govern their socioeconomic and political life; to equally benefit from the fruits of these institutions; to have equal concern and care for the interest of others; and to rightfully expect the same level of concern and care from other fellow human beings.[868] This also implies that by virtue of being a member with equal dignity and rights, every person is equally entitled to have access and opportunity to enjoy all the material resources and opportunities available in his/her country. Gould elucidates this point using her notion of equal positive freedom. And according to Gould, the principle of equal positive freedom, that is, the right to have equal access to and practically enjoy those material and social conditions necessary for the realisation of one's short-term and long-term projects of life is the substantive foundation of social justice and democracy.[869] This explains the close normative relationship between the principle of equality, non-discrimination and the protection of vulnerable persons against various conditions of vulnerability. Interestingly, this relationship is also well-recognised and developed in ESC rights jurisprudence. The substantive relationship between the principle of equality and non-discrimination has already been established elsewhere and that these two principles are often regarded as interrelated and mutually reinforcing human rights norms. In fact, one is seen as the corollary of the other and, for this reason, they are often referred to as the twin human rights principles.[870]

---

868 Dworkin, *Taking Rights Seriously* (n 8) 180–182.

869 Gould, *Globalizing Democracy and Human Rights* (n 90) 37–39 & 71–74.

870 See CESCR General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural rights (art. 3), adopted in its Forty-fourth Session (2005), para 10; CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), adopted in its Forty-second Session (2009), paras 1–6; HRC General Comment No. 18: Non-discrimination, adopted in its Thirty-seventh session (1989); General comment No. 28: Article 3 (The Equality of Rights between Men and Women), adopted in its Sixty-eighth session (2000) (which updated and replaced its former General Comment No. 4: Article 3 (Equal right of Men and Women to the Enjoyment of All Civil and Political Rights), adopted in its Thirteenth session (1981)); CRPD General Comment No. 1: Article 12 (Equal Recognition before the Law), adopted in its Eleventh Session (2014). For more on the principle of equality and non-discrimination, see generally OHCHR Report, UN Docs E/2008/76; Fredman (n 30); Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40 Industrial Law Journal

The principle of equality is based on and, at the same time, prescribes the normative ideal that likes be treated alike and unlikes be treated differently.[871] In human rights jurisprudence, this is understood as implying two broad but interrelated notions of equality: formal (*de jure*) and substantive (*de facto*). The distinction between the two notions may not always be bright but it is clear at least in theory that formal equality is said to be mainly concerned with ensuring the equality of everyone before the law and the equal protection of law regardless of the social, economic or other kinds of differences between individuals. The fundamental aspect of formal equality is therefore ensuring the neutrality and objectivity of the legal systems, that is, the proscription of discrimination against individuals through legislations. Substantive equality, on the other hand, is concerned more with equality of practice or equality on substantive grounds.[872] This is based on the understanding that formal equality may not necessarily result in or effectively guarantee the achievement of equality of persons in fact. Formal equality is thus simply an important means but not an end in itself. Accordingly, the function of substantive equality is to point to this impotence of formal equality and to prescribe that all relevant differences and circumstances negatively affecting the full and effective enjoyment by everyone of his or her human rights should also be taken into account in redressing socioeconomic conditions of inequality. If not, formal equality would merely result in the perpetuation of the *status quo* of inequality and injustice already in place.[873]

The principle of non-discrimination complements the principle of equality from a different angle. According to the CESCR, discrimination can be defined as 'any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of covenant rights.'[874] This can occur both in law (*de jure* discrimination) and in practice (*de facto* discrimination). So, the principle of non-discrimination has both a formal and a substantive aspect. In the formal sense, it concerns the existence of discrimination justified through legislations whereas in the substantive sense it concerns the existence

405; Mathew Craven, *International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford University Press 1995).

871 CESCR General Comment No. 16, CESCR General Comment No. 20; HRC General Comment No. 18; HRC General Comment No. 28. See also Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (n 17) 58–59; Craven (n 870) 155; Fredman (n 30) Chapt 7.

872 CESCR General Comment No. 16, CESCR General Comment No. 20; HRC General Comment No. 18; HRC General Comment No. 28.

873 CESCR General Comment No.16, paras 6–15. See also E/2008/76; *Bacher v. Austria*, paras 9.4–9.5; *J.H. v. Australia*, para 7.7; *Beasley v. Australia*, paras 8.4–8.6; *Lockrey v. Australia*, paras 8.4–8.6.

874 CESCR General Comment No.16, para 10–14; CESCR General Comment No.20, para.7.

of discrimination in practice usually engrained in the historical, socioeconomic, cultural, political and institutional backgrounds and practices of a society.[875]

Discrimination can also be categorised as direct, indirect or systemic. Direct discrimination occurs when an individual or a group is treated less favourably than those in a similar situation whereas indirect discrimination takes place when a practical application of a seemingly neutral measure (law or policy) practically results in discriminating certain individuals or group of individuals. This particularly results from laws or policies adopted without taking due account of unfavourable background conditions disproportionately affecting vulnerable persons in a society.[876] According to the ECSR, indirect 'discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.'[877] Thus, the adoption of legislative or other measures without the effective participation of vulnerable persons would certainly perpetuate the disadvantaged positions of the vulnerable persons and as such fall foul of the prohibition of indirect non-discrimination, however neutral such measures may seem on their face value.[878] For this reason, it has been underscored that 'In a democratic society, human difference should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality'.[879]

Finally, discrimination is regarded as systemic when it is engrained not just in legislations and practices but has also become pervasive, persistent and deeply entrenched in the social and organisational behaviours, attitudes, perceptions and practices in a society.[880] According to the CESCR,

> discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organisation, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.[881]

---

875 CESCR General Comment No. 20, paras 8–9; *Xákmok Kásek Indigenous Community v. Paraguay,* paras 268–274; *YATAMA v. Nicaragua, preliminary objections, merits, reparations and costs, judgment of June 23, 2005,* paras 184–187.

876 CESCR General Comment No. 20, paras 10 & 12; *Xákmok Kásek Indigenous Community v. Paraguay,* para 271; *YATAMA v. Nicaragua,* para 185; *X v. United Republic of Tanzania,* para 8.4; *Y v. United Republic of Tanzania*, para 8.4; *H.M. v. Sweden*, paras 8.3–8.4; *Bujdoso et al v. Hungary,* para 9.3–9.4; *Bacher v. Austria*, paras 9.4–9.5; *J.H. v. Australia*, para 7.3; *Beasley v. Australia*, paras 8.3; *Lockrey v. Australia*, paras 8.3; *Noble v. Australia*, para 8.3; *V.F.C. v. Spain*, paras 8.4–8.5; *Nyusti and Takács v. Hungary,* para 9.4; *F v. Austria*, para 8.5; *Given v. Australia*, pars 8.5–8.9.

877 *ERRC v. France (Complaint No. 51/2008)*, para 83.

878 CESCR General Comment No. 20, paras 10–14.

879 *ERRC v. France (Complaint No. 51/2008)*, para 83.

880 *X v. United Republic of Tanzania*, paras 8.2–8.3; *Y v. United Republic of Tanzania,* para 8.2–8.3.

881 CESCR General Comment No. 20, paras 12. See also HRC General Comment No. 28, para 5.

Individuals may also suffer from multiple forms of discrimination (and therefore referred to as multiple discrimination, intersectional discrimination or cross-sectional discrimination) because of their identity and social status.[882] For instance, a disabled Roma women may suffer multiple forms of discrimination due to her identity as a female, as a women of Roma origin and as women with disability and on account of her poor economic situation and the like.[883] This implies the State's obligation to take due and positive account of individual circumstances in designing effective measures aimed at redressing different forms and practices of discrimination in a society. In particular, it should be emphasised that the State obligation to respect and ensure all human rights for all persons on the terms of equality and non-discrimination is now considered as a fundamental rule of general international law.[884] This position is well-summarised by the IACtHR as follows.

> The principle of the equal and effective protection of the law and of non-discrimination constitutes an outstanding element of the human rights protection system embodied in many international instruments and developed by international legal doctrine and case law. At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on it and it permeates the whole juridical system.
>
> This principle is fundamental for the safeguard of human rights in both international and national law; it is a principle of peremptory law. Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual. A distinction that lacks objective and reasonable justification is discriminatory.[885]

---

882 See for instance, *Calero v. Ecuador*, paras. 19.1–19.6 (where the CESCR analysed the applicant's right to social security in terms of gender, health, age, economic condition and unpaid former domestic worker).

883 CESCR General Comment No. 20, paras 17 & 27. 'Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.' ibid para 17. 'A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.' ibid para 35. See generally, ibid paras 15–35 (discussing several prohibited grounds of discrimination under ICESCR).

884 VDPA 1993, para.15; CESCR General Comment No. 20, paras 2–3 & 7; HRC General Comment No. 28, para 3; HRC General Comment No. 18, paras 1 & 3; CRPD General Comment No. 1, para 1.

885 *YATAMA v. Nicaragua,* paras 184–185 *cum* nn 154–155 (listing international instruments recognising the right to equality and non-discrimination, and its jurisprudence). See also *Xákmok Kásek Indigenous Community v. Paraguay*, paras 268–274.

Thus, equality and non-discrimination are fundamental principles of higher normative status and profound practical implications permeating through the entire national and international legal order. Taken together, they prescribe multifaceted obligations of the State especially in addressing both the root-causes and effects of inequalities and discrimination.

## 9.3. IMPLICATIONS FOR THE PROTECTION OF VULNERABLE PERSONS

What are the implications of the principle of equality and non-discrimination in understanding the notion of socioeconomic vulnerability and the corresponding rights of vulnerable persons? First, it should be noted that while there is so far no clear and comprehensive definition of vulnerable persons under international human rights law, it is generally understood that the phrase vulnerable persons encompasses those persons or group of persons who have suffered or continue to suffer from historical disadvantages, exclusions, discriminations or marginalisation and as a result are prevented from participating in or benefiting from all socioeconomic advantages and opportunities available within their society on equal terms with others. The list of persons falling under this category is constantly changing but it generally includes women, children, persons with disabilities, older (elderly) persons, indigenous communities, minorities, migrants, internally displaced persons, HIV/AIDS victims, the poor and so on.[886]

[886] For instance, the ACoHPR defines as follows: 'Vulnerable and disadvantaged groups are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS, and other persons with terminal illnesses, persons with persistent medical problems, child and female-headed households and victims of natural disasters, indigenous populations/communities, persons with disabilities, victims of sexual and economic exploitation, detainees, lesbian, gay, bisexual, transgendered and intersex people, victims of natural disasters and armed conflict, refugees and asylum seekers, internally displaced populations, legal or illegal migrant workers, slum dwellers, landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture, persons living in informal settlements and workers in irregular forms of employment such as home-based workers, casual and seasonal workers.' See ACoHPR Principles and Guidelines on ESC Rights, para 1(e). The synthesis of the European Committee of Social Rights' understanding of vulnerable persons as indicated in its *Conclusions* and *Statement of Interpretations* and jurisprudence gives as the following lists: women, children, people with disabilities, young people with problems, young offenders, young and older workers, unskilled or semi-skilled workers and migrants, invalids, large families and elderly persons, children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant

The socioeconomic and political consequences of the the practices of inequality and discrimination are particularly pervasive on the vulnerable members of society. The principles of equality and non-discrimination aims to counter such negative impacts by requiring that persons in an identical situation be treated identically and those in a different situations be treated differently.[887] Hence, in the context of ESC rights, the practical importance of the principles of equality and non-discrimination lies in the fact that they are able to clearly point to the specific needs of the vulnerable persons and the protections that should be afforded to them by the States concerned. This is true especially with respect to ensuring *de facto* equality and the prohibition of *de facto* discrimination which directly point to the negative effects of the conditions of vulnerability on the enjoyment of human rights. Thus, while these principles prohibit all forms of arbitrary and unjustified differential treatment of individuals or groups situated in similar socioeconomic conditions, they also require the adoption of necessary and objective measures specifically aimed at preventing, eliminating or remedying the disadvantages suffered by the vulnerable persons.[888]

Therefore, as far as the substantive protection of ESC rights are concerned, we can say that the principles of equality, non-discrimination, and the protection of individuals against socioeconomic conditions of vulnerability (in short, the protection of vulnerable persons) are all concerned with ensuring the rights of the most disadvantaged and marginalised persons or group of persons in a society. To this extent, these principles require that due and special emphasis be placed on the specific circumstances or background factors affecting all vulnerable persons and hence jeopardising the free, full and effective enjoyment of their ESC rights in equal terms with other persons in a society. One may say that the difference between these principles is only a matter of viewpoint and emphasis than of substantive content but this in itself is crucial as far as the practical protection of ESC rights is concerned.

---

teenagers, teenage mothers, children deprived of their liberty, individuals and families suffering exclusion and poverty, low-income persons, unemployed, single parent households, persons with disabilities including mental health problems, persons internally displaced due to wars or natural disasters. See Digest of the Case Law of the European Committee of Social Rights, 1 September 2008, paras 287, 420, 450, 463, 502, 666(67) & 668. See also its Conclusions XIV-2, Statement of Interpretation on Article 9, p. 56–61; Conclusions 2006, Moldova, pp. 122 – 123; Conclusions 2005, Statement of Interpretation on Article 14§1; Conclusions 2005, Bulgaria, pp. 32–33; Conclusions 2003, Statement of interpretation on Article 17, France, p. 174; *Autisme Europe v. France (Complaint No. 13/2002)*, para 53; Conclusions 2003, Italy, p. 342.

887 See *ERRC v. France (Complaint No. 51/2008)*, paras 81–83; See also *Confédération Française Démocratique du Travail (CFDT) v France (Complaints No.50/2008), decision on merits of 9 September 2009 (hereafter CFDT v France (Complaints No.50/2008)*, paras 38 & 42; *Xákmok Kásek Indigenous Community v. Paraguay,* para 271; *YATAMA v. Nicaragua,* para 185.

888 See *ERRC v. France (Complaint No. 51/2008)*, paras 81–83; *Confédération Française Démocratique du Travail (CFDT) v France (Complaints No.50/2008), decision on merits of 9 September 2009 (hereafter CFDT v France (Complaints No.50/2008)*, paras 38 & 42; *Xákmok Kásek Indigenous Community v. Paraguay,* para 271; *YATAMA v. Nicaragua,* para 185; *YATAMA v. Nicaragua,* paras 185–186.

It should be stressed that while equality and non-discrimination put due emphasis on the nature of treatments that ought to be prohibited or promoted through legislative and other practical measures, the principle of the protection of vulnerable persons enables us to identify those negative practical socioeconomic conditions of vulnerability undermining the free and effective enjoyment of ESC rights and hence ought to be redressed both in law and practice. It should also be noted that the most common conditions of vulnerability such as marginalisation, exclusion, stigma, poverty, gender, age, health, ethnicity, language, culture, religion and other barriers usually originate from and operate in complex historical, sociocultural, political or structural factors affecting vulnerable persons.[889] This, in turn, makes it clear that, in one sense, the principle of the protection of vulnerable persons has to do with the practical extension and application of the normative ideals of equality and non-discrimination to the specific economic, social, cultural, political or institutional circumstances undermining the enjoyment of ESC rights by vulnerable persons. In another sense, it implies the obligation of the State to take due and positive account of and hence promote the specific socioeconomic interests of individuals or groups affected by various conditions of vulnerability.[890] This, in turn, expresses the principle of solidarity (mutuality) which should exist between members of a society constituted on the value of respect for the inherent life and dignity of human being.[891] In a modern political society, the State principally shoulders this solidaristic function towards the vulnerable persons as an ultimate defender and guarantor of the inherent life and dignity of human being and the rights thereof. In substance, it can be argued that the principles of equality and non-discrimination signify the special obligation of every State to take positive measures aimed at ensuring the full and equal enjoyment by the vulnerable persons of their ESC rightsn as a matter of priority.[892] As it can be seen from the

889 See particularly CESCR General Comment No. 20, paras 15–35; ACoHPR Principles and Guidelines on ESC Rights, paras 19, 31–38 & Part IV (under sections entitled '*Vulnerable Groups, Equality and Non-Discrimination*').

890 See generally CESCR General Comment No. 16; CESCR General Comment 20; UN Doc. E/2008/76; Mosissa (n 15) 53–54.

891 For general discussion on solidarity in the context of international law, see Vicente Marotta Rangel, 'The Solidarity Principle, Franscisco de Victoria and the Protection of Indigenous Peoples' in Holger P Hestermeyer and others (eds), *Co-existence, Cooperation and Solidarity* (Martinus Nijhoff 2012); Abdul G Koroma, 'Solidarity: Evidence of Emerging International Legal Principle' in Holger P Hestermeyer and others (eds), *Co-existence, Cooperation and Solidarity* (Martinus Nijhoff 2012); Holger P Hestermeyer, 'Reality or Aspiration? Solidarity in International Environmental Law and World Trade Law' in Holger P Hestermeyer and others (eds), *Co-existence, Cooperation and Solidarity* (Martinus Nijhoff 2012); Pier Francesco Lotito, 'Solidarity' in William BT Mock and Gianmario Demuro (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2010); Holly Cullen, 'The Collective Complaints Systems of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61.

892 CESCR General Comment No. 3, para 12; *Xákmok Kásek Indigenous Community v. Paraguay,* paras 271–273.

following discussion, this special obligation of the States towards all vulnerable persons has been well-developed in international ESC rights jurisprudence.

## 9.4. JURISPRUDENCE

### 9.4.1. IACtHR

The IACtHR has found violation of the rights of vulnerable persons in many cases especially in the context of indigenous communities, persons with disabilities and children and in such contexts as detention conditions and reproductive health programmes. As noted in the introduction to this Part, in all cases, it is the principled approach of the Court that by virtue of Article 1(1) and Article 2 of the American Convention, States parties have a generic obligation to respect and guarantee the free and full enjoyment of all the rights and freedoms within their domestic legal system.[893] From this follow other special obligations on account of the particular needs of the right holders due to either unfavourable personal circumstances or the specific situations in which they find themselves such as extreme poverty, destitution, social exclusion, childhood and so on.[894] And, the Court has increasingly been developing the practical implications of these generic obligations and the specially aggravated responsibility of each State towards vulnerable persons in its contentious and advisory jurisdictions.

Thus, in the case of *YATAMA v. Nicaragua*, the central theme of the application was about the applicants who could not participate in their country's electoral process representing their indigenous communities because of the electoral law requirement that all candidates be members of a certain political party. The applicants argued that such a requirement constituted, inter alia, a violation of the right to non-discrimination both against the victims and their communities which are the indigenous and ethnic communities of the Atlantic Coast of Nicaragua.[895] The fact that the victims were members of the indigenous and ethnic communities and that indigenous and ethnic communities generally suffer from 'serious difficulties that place them in a situation of vulnerability and marginalization' were among the important considerations in the Court's analysis.[896] It held that requiring members of indigenous and ethnic groups to form a political party as a precondition for candidacy is an undue restriction constituting an act of a discrimination against candidates proposed by YATAMA

893 See for instance, *Sawhoyamaxa Indigenous Community v. Paraguay,* paras 152–155 & 109–111.

894 *Sawhoyamaxa Indigenous Community v. Paraguay*, para 154–155; *Sarayaku v. Ecuador*, para 244; *Yakye Axa Indigenous Community v. Paraguay*, para 161ff; *Ximenes-Lopes v. Brazil*, para 125ff; *Xákmok Kásek Indigenous Community v. Paraguay*, para 187 (check); *Vera Vera v. Ecuador*, paras 39–44.

895 Paras 178–179.

896 Para 202.

(an organisation representing the said communities). This, in turn, affected not only the candidates in question but also their communities who differ from the rest of the population in terms of their customs, language and organisation and to whom the notion of a political party is alien to their tradition. Thus, by failing to take their unique situation into account, the requirement has indirectly denied them the right and opportunity to participate in the election process and hence systematically prevented them from taking part in the government and public affairs of their country. The State is obliged to take all necessary positive measures including the removal of the legal and practical discrimination affecting different social groups to guarantee full and effective exercise of the right to participation. To this end, it is essential that the State pays due regard to the specific obstacles or barriers preventing the indigenous communities from equal participation in decision-making process affecting their rights and development in the society.[897]

The Court has extensively dealt with the violation of several ESC rights in *Xákmok Kásek Indigenous Community v. Paraguay* case, also referred to in the previous chapters. This case particularly indicates the significant relationship between socioeconomic conditions of vulnerability and the violation of the right to dignified existence of individuals and their Community. In this regard, it is important to see the way the Court characterised the gravity of the living conditions of the Community. In several places in the case, it referred to their condition using the following phrases: 'acute vulnerability,' 'misery,' 'extreme and particular vulnerability,' 'extreme vulnerability,' 'miserable living conditions,' 'demonstrated condition of extreme vulnerability,' 'special vulnerability'. These characterisations by the Court clearly express the gravity of their extreme conditions that the members of the Community were exposed to which, in turn, not only threatened but actually violated their 'right to dignified existence'.[898] As previously noted, the main reason behind the violation of their ESC rights was the loss of their traditional land and, subsequent to their displacement, the failure of the State to ensure access to basic conditions of life required by the degree of their vulnerability. The loss of their traditional land and access to the natural resources therein had deprived the Community of all the traditional sources of food, water, shelter, and medicine. The State also did not take necessary and adequate measures to avert the conditions threatening their dignified existence.[899]

Similarly, the Court has also given due consideration to the extremely vulnerable situations of *Sawhoyamaxa Indigenous Community* in finding violation of, inter alia, the right to life. In this case, the State was fully aware of the actual risk posed by their situation of vulnerability especially to their children, pregnant women and the elderly.[900] This, in turn, should have triggered its

897 Paras 201–229.
898 *Xákmok Kásek Indigenous Community v. Paraguay*, paras 214, 215, 227, 239, 244, 259, 270 & 273.
899 Ibid para 196.
900 Para 156–159.

responsibility to take prompt and special positive measures aimed at responding to their urgent needs and reversing the risks posed to their lives.[901] Also in this case, the principal cause of their vulnerability was attributable to the State's failure to promptly resolve their ancestral land claims as well as to unacceptable levels of unemployment, illiteracy, illnesses and lack of access to essential services such as shelter, food, health care services, water and sanitation while they were living on the roadside. More generally, it is the result of a long-term marginalisation of the Community as a whole. These conditions, in turn, had severe and disproportionate impacts on the lives of their children and pregnant women which the State failed to address in any meaningful manner.[902] Owing to all of these problems, the Court ordered the State to, inter alia, establish within two years a community development fund specifically responsible for implementing educational, housing, agricultural and health projects as well as for providing drinking water and building sanitation infrastructure for the benefit of the Community.[903]

In a related *Yakye Axa Indigenous Community v. Paraguay* case, the Court's analysis also drew heavily on the special vulnerability of the Community and the corresponding heightened responsibility of the State to ensure a decent living condition compatible with human dignity. According to the Court, lack of access to the right to health, food and clean water have a major impact on the right to a decent existence and the exercising of other human rights such as the right to education and culture. With respect to indigenous communities, in particular, to deny them access to their traditional land and natural resources is to effectively deprive them of the ability to obtain those basic conditions of life.[904] In this case it was a proven that the Community was living in extremely destitute conditions as a consequence of lack of land and access to natural resources and that they were living in a dire temporary settlement conditions (along a roadside) without having access to adequate food, water, health care, shelter, sanitation and education. The State party was therefore held responsible for failure to provide the Community with decent living conditions compatible with their inherent dignity.[905] In addition, the Court also held that the State did not take additional

901 Ibid para. 189. 'Specially, the State is bound to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law.' ibid.

902 Ibid para 168–78. 'Thus, on the one hand, the State must undertake more carefully and responsibly its special position as guarantor, and must adopt special measures based on the best interest of the child. The aforesaid cannot be separated from the likewise vulnerable situation of the pregnant women of the Community. States must devote special attention and care to protect this group and must adopt special measures to secure women, especially during pregnancy, delivery and lactation, access to adequate medical care services.'

903 Ibid para 224. See also ibid paras 204–247.

904 Paras 167–168.

905 Ibid para 164 & 168.

special measures towards most vulnerable groups in the Community such as children, the elderly and those who have fallen into illness.[906] As whole, it held that none of the steps taken by the State were commensurate and appropriate with the gravity of their vulnerability.[907] Consequently, and similar to *Sawhoyamaxa case*, the State was ordered to, inter alia, establish a community development fund devoted to providing the community with essential public services and, in the meantime, to immediately and on a regular basis provide them with water, food, medical care, medicines, and school facilities.[908]

Beyond these structural problems affecting indigenous communities, there are also other contexts in which the special responsibility of the States was engaged. In particular, the Court has held in several occasions that the State bears a special kind of responsibility towards persons under its custody (including those in the medical and detention institutions) to ensure their physical health and welfare compatible with their right to life and dignity. For instance, in *Ximenes-Lopez*, the Court held that

> Due to their psychological and emotional condition, persons with mental illness are particularly vulnerable to any health treatment, and such vulnerability is greater when they are admitted to mental health institutions. This increased vulnerability is due to the imbalance of power between patients and the medical staff responsible for their treatment, as well as to the high degree of intimacy which is typical of the treatment of psychiatric illnesses.[909]

The existence of conditions of vulnerability, of course, applies to all patients at all levels and all kinds of health care institutions and to all persons within the State custody. According to the Court, this fact generates a special positive duty of care to provide for essential conditions of life necessary to lead a decent human life.[910] It is because of this fact that, in the context of prison or detention institutions, the State assumes the utmost responsibility for the basic needs and physical health of the prisoners and detainees.[911] And, in relation to medical institutions, this special responsibility of the State includes the obligation to adopt legislative and other practical measures required to guarantee the availability of adequate care and treatment and to safeguard all patients against different kinds of potential risks of abuses.[912] Thus, it was already seen in chapter 7 above that in *Ximenes-Lopez* case, the State was held responsible for failure to positively prevent abuses and maltreatments committed against the victim by the health care workers and

906 Ibid para 174–176.
907 Ibid paras 169 & 176.
908 Ibid paras 205 & 234.
909 Para 129.
910 Ibid para 138–140.
911 See for instance, *Vera Vera v. Ecuador*, paras 42.
912 *Ximenes-Lopes v. Brazil* paras 137–150.

to improve the substandard conditions of the care institution which was found to be practically lacking the qualities required to provide the patients with proper care and decent hospitalisation.[913]

### 9.4.2. AfCoHPR

There are also several decisions of the AfCoHPR dealing with the rights of vulnerable persons. However, and as I have indicated elsewhere in relation to the right to health, most of these decisions concern complaints made in the context of detention situations whereas few of them concern complaints filed in relations to violations committed during certain humanitarian crisis or civil unrest in a given State party as opposed to pure claim for ESC rights.[914] The Commission emphasises that the very 'concept of human rights is based on a typical recognition that every human being is equal and also recognizes the inherent dignity and worth of every human being'.[915] It recognises the principle of equality and non-discrimination as constituting the 'core principles in international human rights law' and hence as underlying the protection of all human rights guaranteed in the African Charter.[916] In the view of the Commission, the equality and non-discrimination guarantees under the Charter 'are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter'.[917]

The substantive meaning and implications of both principles have been elaborated in several of its decisions. Thus, for instance, it held that the right to equality before the law and to equal protection of the law recognised under the Charter 'guarantees fair and just treatment of individuals within the legal system of a given country, whereby every individual is equal before the law and guaranteed equal protection of the law'.[918] In relation to the right to equality before the law, it held that

> The most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State

913 Ibid para 150.

914 Mosissa (n 15) 73ff.

915 *EIPR and Interights v Egypt (Communication 323/06),* para 155.

916 *EIPR and Interights v Egypt (Communication 323/06)*, para 175; *Communication 294/04: Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (IHRDA) (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe, 6th Extra-Ordinary Session of the ACoHPR, April 2009 (hereafter Zimbabwe Lawyers for human Rights and other v. Zimbabwe)*, para 91, 96–97 & 99–100.

917 *Purohit and Moore v. Gambia*, para 49. See also Articles 2 and 3 ACHPR.

918 *Zimbabwe Lawyers for human Rights and other v. Zimbabwe,* para 96; *EIPR and Interights v Egypt (Communication 323/06),* para 77 & 73.

> should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.[919]

And with respect to the right to equal protection of the law, the Commission stated that this right guarantees 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances' in relation to 'their lives, liberty, property and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law.'[920]

The Commission therefore underscores that the principles of equality and non-discrimination entails that those persons in factually or objectively similar situations must be treated alike and those affected by different conditions of vulnerability should be treated accordingly both in law and in practice. Both principles, the Commission notes, call for the equal, fair and just treatment of all persons due to their inherent dignity, that is, regardless of their social, economic and other factors.[921] The State party is therefore obliged to outlaw any form of discrimination and to guarantee to all individuals equal and effective protection against discrimination on any of the prohibited grounds of discrimination under international human rights law. To this end, the State has a negative duty to refrain from directly engaging in acts of discrimination or inciting discrimination against any person or group of persons within its jurisdiction and a positive duty to take all necessary measures to prohibit discrimination and instead ensure equality of all both in law and practice.[922]

Also, the Commission gives due emphasis to the fact that the principles of equality and non-discrimination have close substantive relationships. For instance, in the case of *EIPR and Interights v Egypt*, where gender-based violence against women political activists were seen as the central theme of the complaint, it expressed this relationship stating 'that freedom from discrimination is also an aspect of the principles of equality before the law and equal protection of the law under Article 3 of the African Charter because both

---

919 *Zimbabwe Lawyers for human Rights and other v. Zimbabwe,* para 96; *EIPR and Interights v Egypt (Communication 323/06),* para 73.

920 *Zimbabwe Lawyers for human Rights and other v. Zimbabwe,* para 99; *EIPR and Interights v Egypt (Communication 323/06),* para 74.

921 See for instance, *Purohit and Moore v. Gambia,* paras 49 *cum* 57.

922 *Zimbabwe Lawyers for human Rights and other v. Zimbabwe,* paras 95–100; *EIPR and Interights v Egypt (Communication 323/06),* paras 173–177.

present a legal and material status of equality and non-discrimination'.[923] In the case of *Purohit and Moore v. Gambia*, where the State party failed to give equal protection to persons with mental disability or judicially interdicted persons owing to their mental health conditions, the Commission held that such a discriminatory treatment is contrary to the obligation of the State to respect and guarantee the equal and inherent dignity of every person guaranteed in the Charter and in international human rights law.[924] This is particularly so because

> Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.[925]

In *EIPR and Interights v Egypt* case stated above, the Commission agreed with the complainants' arguments that all the different kinds of ill-treatments the women-victims suffered at the hands of the security agents during the civil riots and subsequently in the detention centre amounts to gender-based violence, that is, their special vulnerability is based on the fact that they were all women and this was the very reason they were all targeted by the perpetrators. This, in turn, constituted a discriminatory and inhuman and degrading treatment.[926] Not only this, the State was also found in violation of its special duty towards vulnerable persons (in this case, women-victims) to respect and protect their right to health enshrined under Art. 16(1) of the Charter. According to the Commission, the '[v]ictims were physically and emotionally traumatized as a result of sexual violence and assaults on their person' and '[t]he trauma and injuries sustained has affected their physical, psychological and mental health clearly in violation of Article 16(1) of the African Charter'.[927]

In relation to persons under detention, the Commission, like all other human rights tribunals, specifically stresses that the special vulnerability of detained persons flows from the fact of detention itself because it creates the situation of complete and absolute dependency of these persons on the State. Accordingly, the State bears an aggravated responsibility to care for their entire livelihood and well-being including the provision of adequate food, water, health care and hygiene services. This responsibility even becomes more aggravated if detention

923 *Communication 323/06,* para 179.
924 Para 49 *cum* 57.
925 Ibid para 57.
926 *Communication 323/06,* paras 159–166, 178–180 & 201–208.
927 Ibid 261–266.

intersects with other conditions of vulnerability as disability, old age, chronic ill-health, pregnancy and the like.[928]

Furthermore, the Commission has also considered the implications of the principle of equality and non-discrimination and the obligation to protect vulnerable persons in the context of complaints where certain parts of the population were rendered vulnerable due to direct, indirect or systematic actions of the States parties to the Charter.[929] For instance, in the series of complaints lodged against Mauritania, the Commission found gross and widespread violations of, inter alia, ESC rights of certain ethnic communities following the military coup in the Country.[930] In this case, the Commission, among many others, found that some of the persons arrested were detained in extremely harsh, deplorable and inhumane conditions referred to as 'death camps'; that the livestock, harvests and villages of individuals were destroyed simply because they were members of certain ethnic groups in Mauritania.[931] The violations of, inter alia, various ESC rights found by the Commission in the *SERAC v. Nigeria* case had also occurred in the context of the then military junta's decision to embark in oil exploration in Niger Delta against the opposition of the Ogoni people owing particularly to the impact of the project on their health and physical environment. This, in turn, resulted in the gross violations of various ESC rights of the individuals and of Ogoni people such as the right to food, shelter, water, health and healthy environment through such systematic acts as destruction of their homes, villages and crops; contamination of water sources; killing of animals; evictions, detentions and other forms of ill-treatment.[932] Similarly, in the *Darfur case v. Sudan*,, the Commission found violations of several ESC rights due to the Respondent State's active role in such acts as forced displacement and evictions of civilians, destruction of crops, killing of livestock, contamination of water sources and the like.[933]

As discussed in Chapter five above, in the case of *Endorois v. Kenya*, it was found that the Respondent State failed to give due and proper regard to the unique way of life and needs of the Endorois Indigenous Peoples before embarking into

928 See *Purohit and Moore v. Gambia,* 50–54, 60, 70–72 & 81–85*; Communications 105/93–128/94–130/94–152/96 – Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project/Nigeria (joined), decided on merits, 24th Ordinary Session, 31 October 1998 (hereinafter Media Rights Agenda et al v. Nigeria.),* para 91*; Communications 137/94–139/94–154/96–161/97 – International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria (joined), decided on merits, 24th Ordinary Session, 31 October 1998 (hereinafter International PEN et al v. Nigeria.),* para 112*; Malawi Africa Association et al,* para 120 and 122*; EIPR and Interights v Egypt (Communication 323/06),* paras 163–190 and 209–232.

929 See *Malawi Africa Association et al v. Mauritania; DRC v. Burundi et al; SERAC v. Nigeria; Darfur case v. Sudan*. For more on these, see also Mosissa (n 15) 74ff.

930 *Malawi Africa Association et al v. Mauritania.*

931 See *Malawi Africa Association et al v. Mauritania*, paras 115–122; Mosissa (n 15) 77–78.

932 See at paras 54–67 *cum* paras 1–9; ibid 78–79.

933 See, for instance, at paras 145–168, 205, 224 & 216.

designating their ancestral land and forest as game reserve. As the result, they lost access to their traditional land up on which their livelihood depended for many years.[934] Accordingly, the Commission held that 'the respondent state has a higher duty' not only to take 'positive steps to protect groups and communities like Endorois, but also to promote cultural rights including creation of opportunities, policies, institutions or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities'.[935] In particular, it stressed the fact that 'the respondent state bears the burden for creating conditions favourable to [the] people's development' and to ensure that 'they are not left out of development process or benefit'.[936] Summarising the core of some of the critical challenges due to their vulnerability as indigenous peoples, the Commission stated the following.

> These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.[937]

Above all, and most interestingly, the Commission has extensively dealt with the principle and implications of the protection of vulnerable persons in the context of ESC rights in its Principles and Guidelines on ESC Rights in the African Charter and in the Tunis Reporting Guidelines.[938] In substance, both the Principles and Guidelines, and the Tunis Reporting Guidelines underscore the following important points. First, the Commission considers the principle of the protection of vulnerable persons as the corollary or at least fundamental aspect of the principles of equality and non-discrimination. This is particularly indicated by the fact that, in relation to each generic state obligations (as obligations to respect, protect, fulfil) and the substantive rights recognised in and through the Charter, the Commission has provided for specific statements of principles and recommendations concerning the rights of vulnerable persons under a separate section designated as '*Vulnerable Groups, Equality and Non-Discrimination*'.[939]

---

934 For instance, in connection with art 22, the Commission stated that the Endorois community 'faced substantive loss – the actual loss in well-being and the denial of benefits accruing from the game reserve. Furthermore, the Endorois have faced significant loss in choice since their eviction from the land'. ibid para 297.

935 Ibid para 248.

936 Ibid para 298.

937 Ibid para 248. See also paras 290ff (in relation to their right to development under Article 22 ACHPR).

938 As I have mentioned elsewhere, these two documents are the notable products of the Commission's Working Group on ESCR. See Mosissa (n 15) 82.

939 See generally ACoHPR Principles and Guidelines on ESC Rights; see also Tunis Reporting Guidelines.

For instance, in the part dealing with equality and non-discrimination, the Commission underscored that 'ensuring effective equality in the enjoyment of economic, social and cultural rights,' requires the States parties to the Charter to 'pay particular attention to members of vulnerable and disadvantaged groups.' In this regard, it notes the fact that 'Such individuals are often disproportionately affected by a failure of the State to ensure economic, social and cultural rights and/or are direct victims of discriminatory laws, policies and customary practices'. Thus, in order to ensure equal access to and protection of ESC rights requires the States to provide 'basic social services (such as water, electricity, education and health care) and equitable access to resources (such as land and credit) to members of vulnerable and disadvantaged groups'.[940]

Second, the Commission treats the principle of the protection of vulnerable persons as constituting one of the core elements of each of the ESC rights guaranteed in and through the African Charter and its protocols. To this end, the Commission requires the States to specifically indicate, particularly with disaggregated data to different kinds of conditions of vulnerability, the extent to which the ESC rights of vulnerable individuals and groups within their jurisdiction are ensured under each substantive provisions of the Charter.[941]

Third, the Commission sees that the prioritisation of the interests and needs of vulnerable persons forms one of the key contents of the States' minimum core obligations which should be realised immediately and regardless of their level of economic development. This, in turn, means that when it comes to the protection of essential ESC rights of vulnerable persons, States cannot rely on the defence of progressive realisation, that is, as something which can be met over the course of time, because it is imperative that the 'essential needs of members of vulnerable and disadvantaged groups should be prioritised in all resource allocation processes' and at all times.[942] As the following paragraph makes it clear, this obligation remains intact even during dire economic situations affecting a given country.

> Where the State does suffer from demonstrable resource constraints, caused by whatever reason, including economic adjustment, the State should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions. While the obligation to realise the minimum core content of the rights means that the state should prioritise the realisation of the rights for the poorest and most vulnerable in society it does not remove the obligation to progressively realise the rights for all individuals.[943]

940 ACoHPR Principles and Guidelines on ESC Rights, paras 32–33.
941 Ibid Part IV (dealing with substantive contents of ESC rights recognised in the Charter); Tunis Reporting Guidelines, para 3.
942 Ibid para 14.
943 Ibid para 17.

Finally, the Commission, alike other tribunals, makes it clear that the principle of the protection of vulnerable persons signifies the specially compelling or aggravated obligation of the States. This in essence means that States are required to treat the particular interests and needs and hence the realisation of the ESC rights of the vulnerable persons within their jurisdiction with utmost priority. This includes but not limited to the adoption of special temporary measures or affirmative action programmes. The fundamental aim of such measures is achieving *de facto* or substantive equality and removal of structural or systemic obstacles particularly affecting each vulnerable persons and groups. The special measures should therefore aim at, inter alia, removing the conditions of vulnerability hampering the effective enjoyment of their ESC rights; accelerating the improvement of their positions so that they can enjoy effective and equal access to different kinds of opportunities and resources open to everyone within their society; and securing the free, full and equal enjoyment of their ESC rights without discrimination of any kinds other than those objectively permitted under relevant provisions. Thus, compliance with the special obligations flowing from the principle of the protection of vulnerable persons functions as a litmus test in the assessment of the States' human rights obligations both generally and under each substantive ESC rights.[944]

### 9.4.3. ECSR

As noted above, in some sense, the principle of equality, non-discrimination and protection of vulnerable persons signify the value of solidarity. This is expressly recognised in the case law of the ECSR and ECtHR especially in connection the principle of non-discrimination. The ECSR considers solidarity as one of the principal underlying values of the European Social Charter along with human dignity, equality, non-discrimination and autonomy.

> The Committee emphasises that one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion. It follows that States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion. This requirement is exemplified in the proscription against discrimination […] and in its interaction with the substantive rights of the Charter.[945]

Cullen, who rightly notes the fact that the value of solidarity puts due emphasis on the social nature of human beings, refers to this view of the Committee, that

944 Ibid paras 31–38.

945 *ERRC v. Greece (Complaints No.15/2003)*, para 19; *Roma Rights Centre v. Portugal (Complaint No. 61/2010), decision on merits of 30 June 2011 (hereafter ERRC v. Portugal (Complaint No. 61/2010))*, para 18.

is, its recognition as one of the core values of the Charter, as remarkable.[946] In this regard, two important points deserve attention. The first is the relationship between solidarity and non-discrimination. Drawing on the jurisprudence of the ECtHR and ECSR, solidarity is considered as one of the higher values of the democratic society that ought to be promoted and achieved. Hence, similar to equality and non-discrimination, solidarity also puts special emphasis on the particular circumstances of the vulnerable persons.[947] The second, but related to the first point, is the fact that the linkage of solidarity to democratic values shows that the principle of solidarity has important substantive relationship with the right to participation which the Committee considers as a fundamental instrument for overcoming systematic or structural exclusion and marginalisation of vulnerable persons from socioeconomic decision-making processes.[948] In fact, for the Committee, the right to participation is not just a decisive element of the effective realisation of ESC rights but also an integral element of each of the rights guaranteed in the European Social Charter. Accordingly,

> The Committee considers that the reference to the social rights enshrined in Article 30 should not be understood too narrowly. In fact, the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes a special importance. In this regard, the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by article 30.[949]

---

946 Cullen (n 891) 80–81.

947 For instance, the ECSR found violations because of lack of proper regard to the particular situations of the respective vulnerable persons in the following set of cases: *ERRC v. France (Complaint No. 51/2008)*, paras 84, 89, 95 & 102–104; *COHRE v. Italy* (*Complaint No. 58/2009)*, paras, 58–59, 74, 84–86, 98–100, 113 & 115–116; Complaints No.52/2008, para 87, *ERRC v. Italy (Complaint No. 27/2004)*, para 46; *ERRC v. Bulgaria (Complaint No. 31/2005)*, paras 55–57; *Austin-Europe v. France (Complaint No.13/2002)*, para 54; *MDAC v. Bulgaria (Complaints No.41/2007)*, para 54; *European Roma Rights Centre (ERRC) v. Bulgaria (Complaint No. 48/2008), decision on merits of 18 February 2009 (hereafter ERRC v. Bulgaria (Complaint No. 48/2008)*, para 45; *European Roma Rights Centre (ERRC) v. Bulgaria (Complaint No. 46/2007) decision on merits of 3 December 2008 (hereafter ERRC v. Bulgaria (Complaint No. 46/2007))*, para 51; *Fédération européenne des Associations nationales travaillant avec les Sans-abri (FEANTSA) v. Slovenia (Complaint No. 53/2008), decision on merits of 8 September 2009 (hereafter FEANTSA v. Slovenia (Complaint No. 53/2008))*, para 74.

948 For instance, this is what has been established by the ECSR in *Austin-Europe v. France (Complaint No.13/2002)*, para 53; *ERRC v. Greece (Complaints No.15/2003)*, paras 19–26; *IMATDFW v. France (Complaint No. 33/2006)*, paras 60, 67, 128–130 & 163–169; *MDAC v. Bulgaria (Complaints No.41/2007)*, para 39. See also Cullen (n 891) 92. Per Cullen, the Committee's elaboration of solidarity as a value supporting inclusion and protection against vulnerability constitutes among the generous interpretation of the rights guaranteed in the Social Charter (Revised) based on its understanding of the values of the Charter. ibid.

949 *ERRC v. France (Complaint No. 51/2008)*, para 99. See also *COHRE v. Italy* (*Complaint No. 58/2009)*, para 105.

In this regard, *Complaint No.51/2008* and *Complaint No.58/2009* are particularly important. As already discussed in Chapter five above, in both complaints, the Committee found that the fact of segregation and poverty affecting most of the Roma and Sinti population in the respective States was specifically linked to the fact of civil marginalisation. Consequently, it held that the States concerned should take comprehensive empowerment strategies which would encourage their participation in the society in order that they would be able to overcome those disadvantages ensuing from lack of representation.[950] Nolan notes that this interpretation of the Committee is consistent with the view of the UN human rights bodies that participation forms the heart of all economic and social rights. According to Nolan, 'The implications of the Committee's identification of a right to civil and political participation under the Revised Charter are wide ranging. Perhaps the most significant, however, is that move's confirmation of the indivisibility and interdependence of all civil, economic, political, cultural and social rights.'[951]

There are also many other cases in which the Committee found violation of the equality, non-discrimination, and protection of vulnerable persons in relation to the right to education, health, housing, social assistance, protection against poverty and social exclusion. For instance, the Committee has found serious violations of the right to non-discrimination in many complaints concerning the right to housing.[952] In *Complaint No.15/2003*, the substandard and inhumane living condition of large number of Roma People in camps was regarded as racial-discrimination[953] which is also true in numerous subsequent complaints on behalf of the Roma, Sinti and Travellers.[954] In *Complaint No.13/2002* and *Complaint No. 41/2007*, where lack of access to education for persons with disability was an issue, the Committee emphasised that the principle of equal citizenship, independence, social integration and participation in the lives of the community are the underlying principles of the provisions of the Social Charter guaranteeing the rights of persons with disabilities. Thus, in *Complaint No.13/2002*, it held that the State had failed to make any measurable progress over a long period of time towards ensuring the right to education

950 *ERRC v. France (Complaint No. 51/2008)*, para 93–96 & 99–105; *COHRE v. Italy* (*Complaint No. 58/2009)*, paras 103–110.

951 Nolan (n 560) 354–355.

952 *ERRC v. Greece (Complaints No. 15/2003); ERRC v. France (Complaint No. 51/2008); COHRE v. Italy* (*Complaint No. 58/2009); COHRE v. France (Complaint No. 63/2010); FEANTSA v. Slovenia (Complaint No. 53/2008)*; *DCI v. the Netherlands (Complaint No. 47/2008); ERRC v. Bulgaria (Complaint No. 48/2008); FEANTSA v. France (Complaint No. 39/2006); IMATDFW v. France (Complaint No. 33/2006).*

953 *ERRC v. Greece (Complaints No. 15/2003),* paras 42–43.

954 See for instance, *ERRC v. France (Complaint No. 51/2008); COHRE v. Italy* (*Complaint No. 58/2009);* COHRE *v. France (Complaint No. 63/2010); ERRC v. Bulgaria (Complaint No. 48/2008); FEANTSA v. France (Complaint No. 39/2006); IMATDFW v. France (Complaint No. 33/2006).*

accessible for children and adults with autism on terms of equality with other children.[955] And, in *Complaint No. 41/2007*, it found that the education system in the Respondent State was neither accessible to children with intellectual disabilities nor was it adapted to respond to their special needs. In fact, it noted with regret that there was no prospect that the condition would improve in the foreseeable future.[956]

In this regard, it is the principal approach of the Committee that the protection of vulnerable persons must always remain a matter of priority in all socioeconomic policies of the States.[957] It accordingly stresses that social and economic benefits must target those vulnerable persons and therefore be designed by taking due account of their specific needs.[958] The degree to which the vulnerable persons are afforded adequate protection within a given national system, both in theory and practice, is thus one of the major considerations in its assessment of the conformity of the national practices to the States parties' obligations under the Social Charter. In fact, this is regarded as an irreducible minimum threshold requirement which functions as a litmus test that a given measure should pass in order to be deemed reasonable under the Charter.[959] Even when the realisation of a given ESC right is said to be complex and expensive, the Committee requires, while of course allowing for progressive realisation, that a proper protection be afforded to the rights and interests of vulnerable persons as a matter of priority. Otherwise, it is very likely that any State actions will be regarded as falling short of their basic obligations under the Charter.[960]

For instance, in relation to the right to housing, the Committee has consistently held that this right entails the State's obligation to prevent, reduce and eliminate homelessness; to make housing prices affordable to those without adequate resources and, to this extent, the need to primarily reserve social housing for the poorest households and individuals.[961] Thus, in *Complaint No. 53/2008*, it stated that in order to establish that measures taken to make the price of housing

---

955 *Austin-Europe v. France (Complaint No.13/2002)*, para 48–49.

956 *MDAC v. Bulgaria (Complaints No.41/2007),* para 35–37.

957 *Centre on Housing Rights and Evictions (COHRE) v. Croatia (Complaint No. 52/2008), decision on merits of 22 June 2010 (hereafter COHRE v. Croatia (Complaint No. 52/2008))*, paras. 87–89; *FEANTSA v. Slovenia (Complaint No. 53/2008)*, para 72; *IMATDFW v. France (Complaint No. 33/2006)*, paras 63–65; *ERRC v. Bulgaria (Complaint No. 48/2008)*, para 37–38.

958 See for instance *ERRC v. Bulgaria (Complaint No. 48/2008)*, para 37–43; *ERRC v. Bulgaria (Complaint No. 46/2007),* paras 41–45 & 47–51.

959 *See COHRE v. Croatia (Complaint No. 52/2008)*, paras 64–66 & 85–89; *FEANTSA v. Slovenia (Complaint No. 53/2008)*, paras 70–72; *IMATDFW v. France (Complaint No. 33/2006)*, paras 60, 67 & 163–174.

960 This has been particularly the case in the following complaints: *Austin-Europe v. France (Complaint No.13/2002); MFHR v. Greece (Complaint No. 30/2005); ERRC v. Bulgaria (Complaint No. 31/2005); MDAC v. Bulgaria (Complaints No.41/2007); COHRE v. Croatia (Complaint No. 52/2008); FEANTSA v. Slovenia (Complaint No. 53/2008); COHRE v. Italy* (*Complaint No. 58/2009).*

961 See particularly *IMATDFW v. France (Complaint No. 33/2006)*, paras 130–133; *FEANTSA v. France (Complaint No. 39/2006)*, paras 142–147.

accessible to those without adequate resources, it is not sufficient for the State to show the average affordability ratio of all those applying for housing but whether the affordability ratio of the poorest applicants is compatible with their level of income or not.[962] Moreover, it also considers that the right to housing implies the State obligation to protect individuals against eviction or when eviction is necessary and justified on objective grounds, the eviction process be carried out with due regard to the respect for human dignity and due process of law. In any event, it is the well-established position of the Committee that States should not create homelessness through eviction.[963] This is particularly important because, in the context of vulnerable persons, the affordability of housing and the risks of eviction are substantially interconnected in that eviction is quite often the result of poverty and its impact is even more grave when it intersects with other conditions of vulnerability such as illness.[964] It is also related to the obligation of the State to protect individuals against poverty, social exclusion and discrimination on economic grounds. For these reasons, States are required to adopt an overall and coordinated policy and strategic measures that specifically target those vulnerable members of their society by duly taking into account their individual circumstances and differences.[965] In fact, in all of its decisions, States parties have been found in violation of the Charter because of their failure to satisfy this underlying requirement in their social and economic policies or programmes.[966]

---

962 *FEANTSA v. Slovenia (Complaint No. 53/2008)*, para 72.

963 *IMATDFW v. France (Complaint No. 33/2006)*, paras 77–78; *FEANTSA v. France (Complaint No. 39/2006)*, paras 87–88. *See also particularly CESCR General comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), adopted in its Sixth Session (1991) (hereafter CESCR General Comment No. 4),* paras 8(a), 17 & 18*; CESCR General comment No. 7: The right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions, adopted in its Sixteenth Session (1997) (hereafter CESCR General Comment No. 7),* paras 13–16.

964 *IMATDFW v. France (Complaint No. 33/2006)*, para 78; *FEANTSA v. France (Complaint No. 39/2006)*, para, 88 (defining eviction as the deprivation of housing which a person occupied, on account of insolvency or wrongful occupation). See also CESCR General Comment No. 7, para 3; CESCR General Comment No. 4, para 8(c) & 18.

965 See *Austin-Europe v. France (Complaint No.13/2002)*, para. 52; *COHRE v. Italy* (*Complaint No. 58/2009)*, paras 113–116 *cum* 34–47; *IMATDFW v. France (Complaint No. 33/2006)*, para 150; *COHRE v. Croatia (Complaint No. 52/2008)*, paras 87 & 163–169. See also *DCI v. the Netherlands (Complaint No. 47/2008)*, paras. 29, 37, 47–48 & 66.

966 The following complaints concern, inter alia, the problem of poverty and social exclusion for which reason the respective State parties were found in violation of their Charter obligations due to absence of overall and coordinated policy and strategic measures specifically targeting the most vulnerable (group of) persons within their jurisdiction: *Austin-Europe v. France (Complaint No.13/2002)*; *COHRE v. Italy* (*Complaint No. 58/2009)*; *IMATDFW v. France (Complaint No. 33/2006)*; *COHRE v. Croatia (Complaint No. 52/2008); FEANTSA v. Slovenia (Complaint No. 53/2008); ERRC v. Bulgaria (Complaint No. 31/2005); FEANTSA v. France (Complaint No. 39/2006); ERRC v. Bulgaria (Complaint No. 46/2007); ERRC v. Italy (Complaint No. 27/2004); ERRC v. Bulgaria (Complaint No. 48/2008); ERRC v. Greece (Complaints No.15/2003); ERRC v. France (Complaint No. 51/2008).*

### 9.4.4. ECtHR

The ECtHR has a rich jurisprudence concerning the protection of vulnerable persons via the principle of non-discrimination, the right to life, prohibition of torture, inhuman and degrading treatment, the right to respect for private and family life, the right to property and education guaranteed under the ECHR. And it is worth recalling that many of the Court's cases discussed in the previous chapters were all decided in the context of the rights of vulnerable persons.[967] Moreover, the constantly increasing number of cases alleging the violation of various ESC rights of vulnerable persons before the Court clearly shows the fundamental and cross-cutting nature of the State's obligation to ensure the rights of vulnerable persons within their jurisdictions. This can be seen from the following categories of vulnerable persons that the Court has increasingly been seized with for the protection of, inter alia, their ESC rights through the Convention system in different contexts: detained persons, persons with disabilities, elderly persons, women, migrants, accompanied and unaccompanied migrant children in detention, Roma and Travellers, persons living with HIV/AIDS and persons deprived of basic minimum income (i.e., persons living in extreme poverty).[968]

For instance, the case of *Gaygusuz v. Austria*[969] concerned an application against the State party's refusal to grant to the applicant an emergency assistance on the ground of nationality.[970] The facts of the case show that in the Respondent State, unemployed persons and persons considered to be unfit for work are generally entitled to receive unemployment benefits and, having exhausted other unemployment benefits, to receive emergency social assistance. The applicant's claim for emergence assistance was rejected because he was not a national of the State party nor did he fall under any category excepted from this requirement. In its judgement, the Court agreed with the applicant that this act of the State constituted an unreasonable discriminatory treatment within the meaning of

967 This is, for instance, true in the cases of *Golder v. the United Kingdom; Airey v. Ireland; G.R. v. the Netherlands; Oyal v. Turkey; Feldbrugge v. The Netherlands; Deumeland v. Germany; D.H. and Others v. the Czech Republic; M.S.S. v. Belgium and Greece; McFarlane v. Ireland; Fadeyeva v. Russia* already discussed in Chapts 5 through 8.

968 The following series of factsheets are just indicative of the volume of cases appearing before the Court. See *Factsheet on Detention Conditions and Treatment of Prisoners (ECtHR, January 2018)*; *Factsheet on Prisoners' Health-Related Rights (ECtHR, November 2017); Factsheet on Detention and Mental Health (ECtHR, July 2017); Factsheet on Persons with Disabilities and the European Convention on Human Rights (ECtHR, January 2018); Factsheet on Elderly People and the European Convention on Human Rights (ECtHR, October 2016); Factsheet on Gender and Equality (ECtHR, January 2018); Factsheet on Roma and Travellers (ECtHR, January 2018); Factsheet on Austerity Measures (ECtHR, December 2017).*

969 *Application No. 17371/90, Judgment of 16 September 1996.*

970 Ibid paras 33 & 10–11.

under Articles 14 ECHR taken in conjunction with Article 1 Protocol No. 1.[971] The Court also reached the same conclusion in the case of *Andrejeva v. Latvia*[972] which involved the same issues as *Gaygusuz*. In substance, the applicant argued that the denial of access to social security benefits in equal terms with the nationals of the Respondent State constitutes a discriminatory treatment under Article 14 ECHR and taken in conjunction with Article 1 Protocol No. 1.[973] According the Court, the difference of treatment exclusively based on the sole requirement of nationality failed to satisfy the requirement of reasonableness and hence violated the applicant's right to non-discrimination in respect of social security benefits.[974] In relation to this, it is also worth mentioning here the case of *Klein v. Austria*[975] where the Court balanced a complete deprivation of an old-age pension benefit against disciplinary (professional) regulation. Admittedly, this case involved the applicant's loss of social security benefit as a consequence of his conviction.[976] But still it can be argued that the Court's emphasis on the nature of the interest in issue (an old-age pension benefit) and the gravity of the measure on the life of the applicant (that is, the complete deprivation of the benefit) show that the vulnerability of the applicant was the underlying reason behind its substantive conclusion. Thus, the Court, in substance, held that the complete deprivation of the applicant of all of his entitlements to a pension imposed an excessive burden on the applicant and therefore violated his pecuniary right guaranteed under Article 1 of Protocol No. 1.[977]

In the *Belane Nagy v. Hungary*, decided in the line of cases like *Gaygusuz, Adrejeva* and *Klein* concerning social security benefits, the Court addressed an important issue as to whether the State party can justify a total deprivation of the rights of vulnerable persons to receive pension benefits by introducing a new legislation with more onerous eligibility criteria.[978] As the facts of the case show, the applicant was assessed as disabled person unfit to work and accordingly was receiving a disability pension for some time. But owing to the new law which introduced new disability assessment methods and hence eligibility criteria,

971 Ibid paras 42–52. 'It considers, like the Commission, that the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification".' Ibid 50.

972 *Application No. 55707/00 [GC] Judgment of 18 February 2009.*

973 Although it is not a fundamental requirement in the Court's case law, the applicant in this case has the status of a 'permanently resident non-citizen' of Latvia. See ibid para 88.

974 Ibid paras 85–90.

975 *Application No. 57028/00), Judgment 3 March 2011.*

976 The applicant was a former lawyer who was convicted of embezzlement which subsequently resulted in his loss of the right of membership to his former professional association (Vienna Chamber of Lawyers). At the material time, the relevant domestic law governing the association required that in order for a member to be entitled to an old-age pension benefit, a lawyer should be a member of the association at the time of the application. For details, see ibid paras 7–29.

977 Ibid 41–57.

978 *Application No. 53080/13) [GC] Judgment of 13 December 2016.*

her health condition was reassessed and finally declared ineligible to receive the pension because her level of disability was said to be lower than the standard required by the law.[979] This was however despite the fact that there was no significant improvement in her health conditions.[980] It was also observed that the applicant was not given any alternative social security allowances or source of income to subsist on given particularly her special conditions.[981]

According to the Court, in this particular case, the national authorities should have carefully weighed and fairly balanced the special need and interest of the applicant as a disabled person against the legitimate public interest pursued through the new legislation. This would have meant a proportional reduction of the amount she used to receive by the number of days she fell short of (her social-security cover was only 148 days short of the required length) under the new legislation rather than 'a complete deprivation of any entitlements' under the old regime. To this end, the Court paid particular attention to the fact that she 'did not have any other significant income on which to subsist' and that she clearly 'had difficulties in pursuing gainful employment and' and therefore 'belonged to the vulnerable group of disabled persons'.[982] Thus, alike other cases discussed above, the Court's reasoning makes it clear that a complete denial of a vulnerable person to receive essential minimum material support would offend the core principles of the rule of law and legal certainty inherent in each of the rights recognised by the Convention and hence would make the guarantees thereof mere theoretical and illusory.[983] In particular, the Court reiterated its established principle that social security schemes are not merely concerned with designing mechanical eligibility conditions; rather, they 'are an expression of a society's solidarity with its vulnerable members'. This, inter alia, entails that any decision to withdraw or reduce such a crucial benefit or to reform the system conferring the benefits should not only focus on the numerical amounts received by individuals but also the overall circumstances surrounding each cases and the subsequent impacts it would have on the rights and lives of certain individuals affected or likely to be affected through a given decision. In particular, it is imperative to make sure that no person bears excessive burden compared to the rest of the society as the result of the measures taken by the State concerned.[984]

In the case of *Sahin v. Turkey*[985], the Court found violation of the obligation to guarantee the right to education of persons with physical disabilities on equal

979 Ibid paras 97 *cum* 101–109.
980 Ibid para 97.
981 Ibid paras 123–124 *cum* 117 & 104. For instance, although it was recommended by the domestic tribunals that the applicant be rehabilitated and thus be provided with rehabilitation allowance, the benefit the Court considered to be closely related to disability pension benefit and therefore could have resolved here issues, the authorities never acted up on this recommendation. ibid.
982 Ibid paras 123–126.
983 See particularly ibid para 89 & 99.
984 Ibid paras 112–118.
985 *Application No. 23065/12, Judgement of 30 Jan 2018.*

footing with other persons. As the facts of the case show, Mr. Sahin, a first-year university student of mechanics, became a paraplegic due to an injury he sustained in an accident in 2005. As the result, he was forced to suspend his education awaiting his recovery. In 2007, he requested the university to adapt the facilities to his new situation so that he could resume his studies. However, the university authorities replied that they could not adapt the facilities within the short-term citing budgetary reasons and instead offered to appoint him a personal assistance. But the applicant refused this university's offer as it would amount, inter alia, to invasion of his right to privacy. His application to domestic administrative tribunals for review of the university's decision was also in vain.[986]

In this case, the Court underlined the importance of the rights of 'persons with a disability to live independently and fully develop their sense of dignity and self-worth' and this goes with the very essence of the Convention which is concerned with ensuring 'respect for human dignity and human freedom, which necessarily includes a person's freedom to make his or her own choices'.[987] Based on this, the Court observed that the university's offer to appoint a personal assistant to help the applicant move around its three-story building could not be regarded as reasonable under Article 8 of the Convention. In this regard, the Court could not find any evidence in the case as to whether or not the said university's measure was proposed by taking due account of the actual needs of the applicant and the measure's 'potential impact on his safety, dignity and independence'; it rather appears to have 'disregarded the applicant's need to live as independent and autonomous a life as possible'.[988] Furthermore, the Court also criticised the domestic tribunals for failing to make sufficient assessment of the right to education and corresponding needs of the applicant as well as the possible mechanisms through which the State party may comply with its obligation to make a reasonable accommodation 'that would have enabled the applicant to resume his studies under conditions as close as possible to those provided to students with no disability'.[989] Accordingly, the Court, found that the facts in the case disclose a violation of the right to non-discrimination guaranteed under Article 14 of the Convention read in conjunction with the right to education enshrined under Article 2 Protocol No. 1.[990]

---

986 For more on the background of this case, see ibid paras 6ff. See also *'Impossibility for a Paraplegic Person to Gain Access to University Buildings: Discrimination Regarding the Right to Education,'* Press Release, ECHR 037 (2018), Registrar of ECHR (30 January 2018); *Factsheet on Persons with Disabilities and the European Convention on Human Rights (ECtHR, January 2018).*

987 *Sahin v. Turkey,* para 63.

988 Ibid paras 64–65.

989 Ibid paras 66–67.

990 Ibid para 68. 'Consequently, the Court found that the Government had not demonstrated that the national authorities, and in particular the university and judicial authorities, had reacted with the requisite diligence in order to ensure that Mr Şahin could continue to enjoy his right to education on an equal footing with other students. The fair balance to be struck between the competing interests at stake had thus not been achieved, and the Court found a violation

In the *M.S.S. v. Belgium and Greece* case, discussed in detail in Chapter eight above, the Court particularly stressed the fact that it 'attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'.[991] Not only this, it also emphasised that the sufferings the applicant had endured for several months were all linked to his status as an asylum seeker which the State's party authorities should have seriously taken into account.[992] It particularly held that

> the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.[993]

For the Court, given the authorities' awareness of the applicant's particular state of insecurity and vulnerability, they should have duly taken positive steps and resolved his asylum requests as well as other positive measures which could have prevented him from living in the situation of most extreme poverty for several months.[994] It concluded that by deliberately failing to act, the authorities deliberately subjected the applicant to 'humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation' contrary to their obligations under Article 3 of the Convention.[995]

Finally, the failure of national authorities to take adequate account of the vulnerable position of individuals belonging to ethnic Roma, Gypsies and Travellers and to provide special consideration to their interests and needs in measures affecting these groups such as eviction orders and demolition of their houses were the major reasons in finding violations under Article 8 of the Convention guaranteeing the right to private and family life.[996] According to the Court, serious interference with the individual's rights under Article 8 requires 'particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded

---

of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention.' ibid.

991 Para 251.

992 See ibid particularly paras 249–264.

993 Ibid para 263.

994 Ibid para 259. 'In any event, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.' ibid.

995 Ibid paras 262–264 *cum* 259.

996 See for instance *Connors v. United Kingdom (Application No. 66746/01), Judgment of 27 May 2004*.

as correspondingly narrowed' as it is especially concerned with guaranteeing 'rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'.[997] Therefore, in striving to strike a fair balance between the rights of the individuals and the legitimate public interest through a given socioeconomic policy measures, the States parties have the duty to take into account the particular circumstances of the individuals concerned and their special needs.[998] The Court specifically stressed that 'The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases'.[999] To this end, Article 8 of the Convention imposes on each State party a positive obligation to, inter alia, facilitate the gypsy way of life.[1000] Moreover, in series of cases concerning the systemic segregation of Roma children in the so-called special schools or classes or Roma-only classes, the Court found violations of the State obligation to prohibit discrimination in relation to the right to education guaranteed under Article 2 of Protocol No.1.[1001] According to the Court, the national authorities have the duty to give due considerations to the special needs of Roma children as members of a disadvantaged group and to adopt measures which will prevent them against social exclusion and promote their full integration into the general society.[1002]

Overall, whether it concerns detention, disability, age, minority or other socioeconomic conditions of vulnerability, it is clearly established in the case law of the Court that the State has an additional (aggravated) responsibility to take due and adequate account of the special needs of the vulnerable persons in the society while taking socioeconomic policy decisions and other measures substantially affecting their ESC rights and, to this extent, should strive to strike a reasonable and fair balance between the needs of the individuals and general public interest. In addition, the Court has also recognised the State's duty of care for the vulnerable persons as directly flowing from the principle of respect for the dignity of human being and the principle of solidarity associated with it.

997 Ibid para 82.

998 Ibid.

999 Ibid para 84; *Orsus And Others v. Croatia [GC],* para 148; *D.H. and Others v. the Czech Republic [GC],* para 182; *Chapman v. the United Kingdom* [GC], para 96; *Buckley v. United Kingdom* paras 76.

1000 *Connors v. United Kingdom*, para 84.

1001 See among many authorities, *D.H. and Others v. the Czech Republic [GC]; Orsus And Others v. Croatia (Application no. 15766/03) [GC], Sampanis and Others v. Greece (Application No. 32526/05, Judgment of 5 June 2008*.

1002 See *D.H and Others v. the Czech Republic*, paras 205–210; *Orsus and Others v. Croatia*, paras 143ff.

### 9.4.5. UNHRS

The UN human rights bodies have played a significant role in articulating and promoting the State party's general obligations towards the vulnerable persons especially through series of general comments. We have also seen that the Human Rights Committee pays due regard to special obligation of the State to guarantee the availability of adequate socioeconomic conditions (health care, diet, clothing, sleeping space, hygienic conditions, contact with family and outside world, etc.) for persons under its custody.[1003] In addition, there also interesting emerging case law of the CESCR and CRPD concerning the rights of vulnerable persons. Thus, in the *Rodríguez v. Spain* case, the Committee underscored the importance of ensuring the rights of individuals to receive minimum essential levels of socioeconomic support in such forms as social security schemes so as to enable every person and his or her families 'to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.[1004] Reiterating the principles developed in its various general comments regarding the obligation of the States parties towards vulnerable persons, it particularly stated that

> States parties are also obliged to provide the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realize that right themselves, within the existing social security system with the means at their disposal. To this end, they must establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection.[1005]

The *Rodríguez* case concerned a complaint by a person with disability held in prison against the reduction of his disability benefits. The State argued that the reduction in the amount of the disability benefit was proportional to the complainant's cost of upkeeping during his stay in prison. In providing its underlying approach to the matter concerning the rights of persons with disability to such benefits as social security, the Committee held that

> In the case of persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities or have a permanent disability, social security and

---

1003 See particularly Chapter 8.3.5 above.

1004 *Rodríguez v. Spain,* para 10.3. 'The Committee recalls that while the realization of the right to social security carries significant financial implications for States parties, the latter have an obligation to ensure the satisfaction of, at the very least, minimum essential levels of this right enunciated in the Covenant. Among other things, they are required to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.' ibid.

1005 Ibid para 10.4.

> income-maintenance schemes are of particular importance and should enable such persons to have an adequate standard of living, to live independently and to be included in the community in a dignified manner. The support provided should cover family members and other individuals who undertake the care of a person with disabilities.[1006]

Alike other human rights monitoring bodies, the Committee underscored that, with respect to the right to social security benefits, the State's emphasis should not be on the reduction in the amount of benefits granted to individuals but rather whether the amount they receive in fact are compatible with the principle of respect for the dignity of human being and hence enables every person concerned to lead and maintain an adequate standard of living on equal footing with other persons. As such, States parties are required to 'pay full respect to the principle of human dignity' and 'the principle of non-discrimination' in all their decisions concerning especially the ESC rights of vulnerable persons 'so as to avoid any adverse effect on the levels of benefits and the form in which they are provided'. The Committee underscores that ensuring the rights of individuals to have access to and receive minimum essential level of income plays 'an important role in preventing social exclusion and promoting social inclusion'.[1007]

In the case of *Calero v. Ecuador*, the Committee also addressed the State's obligation to ensure the right to social security for all persons regardless of his or access to income or resources. In its decision, the Committee took an issue with the reasonableness of the conditions and, more, generally with the State's obligation to ensure social security for those deemed vulnerable persons.[1008] On the one hand, it stressed that the State has the general obligation to ensure that its social security (retirement) systems are efficient, sustainable and accessible for everyone and that the conditions set for contributory social security systems are reasonable, proportional and transparent. On the other hand, it has also a special obligation to design and implement alternative comprehensive social support and assistance system for those persons who cannot benefit from contributory systems. The vulnerability of the applicant in this case resulted from three intersectional factors: she spent most of her life time in unpaid domestic work (thus unable to make regular

---

1006 Ibid para 10.5 *cum* nn. 11–13.

1007 Ibid paras 10.1–10.2. See also generally ibid 10.1–11.3.

1008 *Calero v. Ecuador*, paras 16.1ff. As far as it is relevant here, although the applicant had made voluntary contribution to the special retirement pension, the relevant national authority refused to grant her request for special retirement pension stating that she did not comply with all the conditions of the relevant law. The decision for refusal was particularly based on the fact that the applicant did not at some point make her voluntary contributions for consecutive six months and this, according to the authority concerned, led to her being disqualified from the membership. However, it was not disputed before the CESCR that the decision was not timely communicated to the applicant and that at the time she was informed of the decision she had already made contributions for over five years. In effect, the authority's decision retrospectively invalidated the five years contribution and, consequently her right to legitimate expectations for special retirement pension. In general, the facts of the case show that she had complied with most part of the requirement.

contribution); she is a female mostly affected by burden of unpaid domestic work; and she could no longer be able to re-enter the labour market due to old-age.[1009] All these conditions signify the special obligation of the State to guarantee that the applicant and other persons in similar situations have access to alternative measure that can guarantee an adequate standard of living during an old age.[1010] In relation to the applicant in particular, the Committee found that the legal conditions (which were deemed unreasonable and disproportional) imposed on the applicant failed to take into account her specific circumstances (gender and nature of work) and, therefore, constituted a discriminatory treatment.[1011] In short, the State violated its obligation towards the applicant for failing to ensure the reasonableness and proportionality of the contributory conditions as well as for failing to provide an alternative social security schemes required by her specific condition.[1012]

Moreover, in the cases of *Djazia and Bellili v. Spain* and *I.D.G. v. Spain*, the State obligation towards vulnerable persons was engaged in the context of the right to housing. In the former case, the applicants and their children were rendered homeless due to eviction enforcement measures following the termination of their rental contracts. The applicants did not have adequate income to look for another rent nor were they offered alternative social housing, despite their repeated requests to the authorities. According to the CESCR, in general, eviction of persons in rental housing may be justified if it is prescribed by law, carried out as a last resort and accompanied by adequate procedural safeguards.[1013] However, these does not in any way absolve the State from its core general obligation to ensure access to adequate housing for everyone regardless of income or access to resources and, to this extent, provide access to those persons and families in need of special protection and to protect everyone against homelessness.[1014]

> In particular, evictions should not render individuals homeless. Where those affected do not have the means to acquire alternative housing, States parties must take all appropriate measures to ensure, where possible, that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. States parties should pay particular attention to evictions that involve women, children, older persons, persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination. The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, irrespective of whether the eviction is initiated by its authorities or by an individual such as the lessor.[1015]

---

1009 *Calero v. Ecuador*, paras 19.1–19.6.
1010 *Calero v. Ecuador*, para 18.
1011 *Calero v. Ecuador*, para 19.6.
1012 Calero v. Ecuador, paras 18 *cum* 16.3–17.1.
1013 *Djazia and Bellili v. Spain*, paras 15.1 *cum* 13.2–14.2. See also *I.D.G. v. Spain*, para 11.2 & 12.1–12. 2.
1014 *Djazia and Bellili v. Spain*, paras 13.1 & 15.3–15.5; *I.D.G. v. Spain,* paras 11.1 & 11.3.
1015 *Djazia and Bellili v. Spain*, para 15.1.

In this regard, it should be noted that even though the scope of this obligation, like in all other rights, is determined by the extent of its available resources, the burden is on the State to demonstrate with clear and strong evidence that it has taken all necessary measures to the maximum of all available resources by taking due and prior account of the specific needs of the vulnerable persons within its jurisdictions. It is especially bound to show that it has taken measures which could be deemed specific, targeted and effective (as opposed to mere general legislative and policy frameworks) in addressing the housing rights of those most in need.[1016] Therefore,

> In the event that a person is evicted from his or her home without the State granting or guaranteeing alternative accommodation, the State party must demonstrate that it has considered the specific circumstances of the case and that, despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned.[1017]

The case law of the CRPD particularly shows that the obligation of the State towards persons with disabilities, as a specially vulnerable categories of persons, consists in affording them the right to accessibility and reasonable accommodation which are prerequisites in order to enable them effectively enjoy all their fundamental human rights in all fields of life on the basis of equality and without discrimination of any kind. This approach has wide ranging implications and significant role especially in giving practical relevance and effect to the Convention guarantees in different socioeconomic and political contexts, as seen in several of its decisions.[1018] In both the general comments and case law, the Committee reiterates that while accessibility is an unconditional obligation pertaining to persons with disabilities as whole, reasonable accommodation is assessed against the requirements of reasonableness (necessary and appropriate) and proportionality of accommodation measures (no disproportionate or undue burden). Both principles aim at achieving equality and elimination of all forms of discrimination affecting persons with disabilities in all socioeconomic and other fields of life.[1019] It follows from this that the State party is obliged to identify and eliminate all legal, technical, physical, structural and other barriers existing both

---

1016 *Djazia and Bellili v. Spain*, paras 15.4–15.5.

1017 *Djazia and Bellili v. Spain*, para 15.5.

1018 For instance, the Committee has expressly referred to the State's obligation to ensure accessibility and reasonable accommodation in the following several decisions. *Bacher v. Austria, F v. Austria; Bujdoso et al v. Hungary; H.M. v. Sweden; Nyusti and Takács v. Hungary; J.H. v. Australia; Beasley v. Australia; Lockrey v. Australia; Noble v. Australia; Adam v. Saudi Arabia; X v. Argentina; Gröninger v. Germany; V.F.C. v. Spain (Communication No. 34/2015, UN Doc. CRPD/C/21/D/34/2015) decision on merits of 2 April 2019; Given v. Australia*.

1019 See, for instance, Given v. Australia, para 8.5ff.; *Bacher v. Austria*, paras 9.4–9.7; *V.F.C. v. Spain*, para 8.4ff.

in private and public sectors particularly undermining their right to independent, equal and dignified life in the society.

Thus, in *Nyusti and Takács v. Hungary*, the State party was found in violation of its obligation to ensure electronic banking services (ATM cards) for visually impaired customers.[1020] In *H.M. v. Sweden*, the State party was found in violation of its obligation to ensure reasonable accommodation in its planning and building permits. In this case, the applicant requested a permit to build a hydrotherapy pool deemed to be the only effective means to meet her critical health conditions but the authorities refused to grant the permit on the ground that it was against its relevant law. However, for the Committee, the decision of refusal did not pay due regard to the applicant's specific conditions and health needs as required by the principle of reasonable accommodation.[1021] In the case of *Given v. Australia*, the Committee held that failure to provide a visually impaired applicant with electronic voting platform (already available within the country) which could have enabled the same to cast a vote without revealing her choice to a third party is contrary to the State's obligation to, inter alia, reasonable accommodation and accessibility.[1022] And, finally, in three other cases against Australia which concerned the authorities' decision to exclude them from jury service owing to their request to be provided with translator, the Committee held that the failure to provide them with translation service so that they could discharge their professional and public functions effectively and in equal terms with others was contrary to the requirement of reasonable accommodation and prohibition of discrimination.[1023]

Therefore, it can certainly be seen that the principles of equality and non-discrimination have been interpreted by UN human rights bodies as signifying wide-ranging special obligations of the State towards vulnerable persons. In particular, these principles have served as a justification for the respective Committees to require the States to make sure that all vulnerable persons have access to those essential material conditions indispensable to enjoy an adequate standard of living compatible with their inherent human dignity and to eliminate all forms of socioeconomic and structural barriers preventing them from free and full enjoyment of their fundamental rights in equal terms with others.

---

1020 Paras 9.2–9.6.

1021 Paras 8.2–8.9.

1022 Paras 8.5–8.10. See also *Bujdoso et al v. Hungary,* paras 9.2ff (where the Committee held that automatic disqualification of the applicants from electoral register and hence participation in the voting process on the ground of their mental disability, whether actual or perceived, is contrary to the State's obligation to ensure equal and non-discriminatory access to voting).

1023 *J.H. v. Australia,* paras 7.2ff; *Beasley v. Australia,* paras 8.2ff; *Lockrey v. Australia,* paras 8.2ff.

## 9.5. CONCLUDING SUMMARY

It follows from the discussion in this Chapter that, in the context of ESC rights, the twin principles of equality and non-discrimination get their substantive meaning in the practical context of the rights of vulnerable persons. As shown, these principles have multifaceted socioeconomic and policy implications which the State must take with the view to ensure their full and effective participation in all fields of life by, in particular, removing all legal, technical, physical, socioeconomic, structural and attitudinal barriers undermining the enjoyment of their human rights. In this regard, reforming institutional and procedural obstacles hindering vulnerable persons from effectively enjoying their ESC rights is particularly crucial. It can be inferred from the cases discussed that human rights courts and monitoring bodies justify this obligation of the State on the fundamental principle that all vulnerable persons have equal right to be treated with due respect for their inherent dignity and, to this extent, must have access to all goods and services in equal terms with others and without any kind of discrimination. At the same time, it was shown that the principle of respect for human dignity also prescribes a specially compelling (an aggravated) obligation of the State to take due and proper account of the specific needs of each categories of vulnerable persons in all of its socioeconomic measures as a matter of priority. This, among other things, requires that its legislative, policy or administrative measures should not impose an undue burden on the vulnerable members of the society. It also obliges the State to safeguard the vulnerable persons against poverty, social exclusion and marginalisation. This, in turn, implies the obligation to provide, promote and facilitate the provision of essential material conditions for all persons who cannot afford or are unable to secure for themselves and their families due to reasons beyond their control. In particular, the State bears an utmost responsibility to guarantee that the vulnerable persons are in no case denied or deprived of, at the very least, their basic subsistence level. In ESC rights jurisprudence, this obligation constitutes an unconditional and irreducible minimum core obligation of the State.

# CHAPTER 10
# GENERAL SUMMARY AND CONCLUSIONS

## 10.1. GENERAL SUMMARY

The principal question raised and examined in this research is what normative justification can be provided for economic, social and cultural human rights (ESC rights) guaranteed under international law and how can or should this justification impact the State obligations emerging from these rights. The specific research questions needed to be answered in this regard were whether and in what manner human dignity provides a viable normative justification for economic, social and cultural human rights guaranteed under international law, and what concrete legal obligations of the State party flow from these rights and how these obligations are reflected in the jurisprudence of international human rights monitoring bodies from across jurisdictions. This also implied the question concerning the kind of legal obligations the State bears towards the vulnerable persons within its jurisdiction. These questions are born out of the current limitations and lack of substantive progress in both the academic debate and practical enforcement of ESC rights. This study has accordingly examined in detail the nature, justification and scope of the State obligations flowing from ESC rights enshrined in international law.

To this end, the study had first examined the different conceptions of human rights and their implications on ESC rights as human rights. It then undertook a brief assessment of the existing major human rights theories. Next it analysed in detail if and in what sense the principle of human dignity can and should be considered as the normative foundation of ESC rights and, finally, analysed the concrete State's legal obligations flowing from these rights. The research background, questions, objectives, methods and the structure of the dissertation are provided in detail in the Chapter one of the study.

Addressing the above research questions required the step-by-step development of a chain of arguments. The first step was a careful re-examination of how different existing conceptions of the idea of human rights have negatively impacted the ESC rights regime in general. It has shown the difficulties in justifying the human rights status of ESC rights within the existing dominant conceptions of human rights. This required an alternative conception that fully

captures the practical and holistic view of human rights. This study suggests and defends such alternative. The second step was conducting a brief excursion into the existing human rights theories with the view to identify the basic value assumptions behind their conception of human rights and explain the critical limitations of these theories and the assumptions thereof in justifying ESC rights as inherent human rights. To provide a more robust theoretical understanding of the idea and function of human rights, and as a third and in fact the most important step, a detailed examination of the idea and principle of human dignity as a normative foundation of all human rights was conducted. As a fourth and final step this study has analysed what can be considered as the specific legal content of ESC rights if approached on this normative basis. The first three steps were accomplished in Part one of the study containing chapters two through four whereas the final step was undertaken in Part two of the study containing chapters five through nine.

Chapter two has identified two important interrelated conceptions of human rights that have directly and indirectly affected the normative status and practical significance of ESC rights. The first is the hierarchical conception. Rooted in the positivist-constitutionalist view of rights, the hierarchical conception of human rights considers any moral rights not recognised in the positive law (such as in the constitution) as devoid of any normative (legal) significance. The implication of this view is particularly pervasive for ESC rights as they are rarely recognised in the constitution or any positive law as fundamental human rights. Against this view, it was argued that the status and significance of a given human right should be assessed and determined in the light of the underlying normative (moral) principle upon which it is justified, and not according to its formal place in the ladder of hierarchies within a given legal system.

The second is the dichotomised conception of human rights. It was shown that at the back of this conception mainly stands an ideological division between liberal-individualist and collective-welfarist view of human rights. According to this liberal-individualist view, real (true, genuine) human rights are only those which require negative actions (forbearance, abstention or no action) from the State. It thus sees human rights as negative rights of individuals which essentially provide them with the right (power) to keep the State away from their life. For this view, ESC rights are not real human rights for they essentially require the State to take certain positive actions as opposed to abstaining from actions; if any, they are mere discretionary policy programs and, hence, do not provide individuals with any entitlement against the State. However, it was argued that this formal understanding of the idea and function of human rights does not help us in addressing the most fundamental questions of human life in a political society: it is a view which is too abstract and highly disconnected from the practical social life of individuals. Accordingly, this study, especially relying on the interesting contribution of MacCallum and Alexy, suggested that human rights should better

be conceived as a triadic (three-point) normative relationship between individuals and their (social) environment. It was shown that, for the triadic view of human rights, the basic question is not the action or in action of the State but rather whether a given person is free to live a dignified human life or not. Thus, if a given human being lacks access to essential material conditions such as food, health care and housing, that person is neither free nor living a dignified human life, regardless of the reason(s) for the lack of access to these conditions. The triadic conception is therefore found to be a more robust and comprehensive view of the idea of human rights which takes into account several factors undermining the life and dignity of human being and the corresponding role of the State as a principal social institution in addressing those factors. In addition, it was also noted that this triadic conception fully embraces the general idea of human rights recognised under international law.

Chapter three went further and examined the controversies raised by the hierarchical and dichotomised conceptions in the light of the existing major theories of human rights. The discussion in Chapter three was essentially concerned with two basic points: the first was identifying the underlying value assumptions (claims) driving each of the theories and the second was understanding their views of the relationship between individual rights and interests and the State (general public) interests. This is based on the conviction that, in essence, the disagreement on the idea, nature and function of human rights revolves around these two basic points. In relation to the first point, it was found that while some of the theories are based on and, hence, seek to promote the idea of an autonomous human being, others are concerned with and, hence, seek to defend and promote the collective interests. But it was shown that both the idea of autonomy and collective interest are too narrow to explain and justify what human rights are and what they are for in a comprehensive manner. In relation to the second point, it was found that both autonomy-based and collective interest-based theories promote, in one way or another, a separationist (antagonistic) view of the relationship between individual human rights and collective interests. It was therefore concluded that because of these two inherent major limitations none of the theories can provide us with a holistic understanding of the nature and practical implications of human rights for a political society.

This implies that there is a need for a theory of human rights which should be (re-)constructed on the basis of richer and inclusive value assumption justifying both the individual human rights and collective interests as one coherent and undivided whole. But this also requires us to, first, reconceive and explain the idea of human rights as a social idea and, second, examine and defend the practical-intuitive understanding and implications of the principle of human dignity. To this end, this study introduced and discussed the idea of the social conception of human rights in the second-half of Chapter three. The social conception of human rights was a valuable thought framework in developing the central tenets and

orientation of the practical social idea of human rights, that is, the idea of human rights as essentially having a social foundation and function. The narrative for this was explained as follows: the idea of human rights is born out of humanity's need to respond to practical social necessities affecting the life of human being in a political society. It is thus rooted in and originated from the practical and complex social relations that human beings constitute between themselves and their environment. It is mainly coined as a normative language of struggle and resistance against various forms of indignation, exclusion, abuse, discrimination, injustices and the like affecting human beings in the process of living together as a political (relational) beings. In substance, therefore, it was shown that, per this view, human rights are nothing but the result of social relations.

This argument, in turn, assumed and relied on the relational nature of human beings. Based on this, Chapter three presented and defended the idea of social relations as essentially moral relations defined by humanity's need for the protection, preservation and promotion of its inherent moral value. It was accordingly maintained that the modern idea of human rights recognised in several human rights instruments are essentially the advancement of this relational-moral nature of humanity and that the human rights norms thereof are reflections and further specifications of the underlying moral principle and assumptions behind social relations. This also led us to argue that the primary social function or *raison d'être* of human rights and human rights norms in a given political society are nothing but the protection, preservation and promotion of human life and its inherent value. However, the justification of the idea of social relations as moral relations (in the sense relevant for the social conception of human rights) is not possible without a central organising and an overarching normative (moral) principle.

Chapter four was accordingly concerned with the detailed examination of the fundamental moral principle behind social relations and hence the social idea of human rights: the principle of human dignity. But as already noted in Chapter three, in order to consider the principle of human dignity as a foundation of human rights, it should be shown, first, that dignity is itself an inherent moral value of every human being; second, that it is present in each and every person equally unconditionally and at all-time and, finally, that it is regarded as a universal value. With this in mind, it was necessary to discuss in detail the historical-philosophical conception and current practical usage of the idea of human dignity. The historical-philosophical excursion revealed that there were two basic conceptions of dignity developed over the course of time: as rank and status, and as inherent (intrinsic) moral value of humanity. It was shown that the transition in its conception as rank and status to as inherent moral value of every human being had passed through complex processes of intellectual history. Nevertheless, it was seen that the fundamental normative meaning engrained in its very notion, the principle of respect, remained unchanged over the course of

time. The difference was that in the rank and status dignity the ideal of respect was said to be due only to a certain category of persons (such those who occupy a given social position or possess such attributes as rationality) whereas in the case of dignity as inherent moral value of humanity, this ideal of respect was considered to be the due of every human being regardless of his or her rank (status) or capacity for rational thinking or morality.

The discussion in Chapter four has also shown that there are several competing theoretical arguments concerning the justification of dignity as unconditional and inherent moral value of humanity, ranging from religious arguments to that of highly abstract metaphysical arguments offered by Immanuel Kant. Having indicated the critical problems and limitations associated with such arguments, this study has offered an alternative perspective arguing that the justification of dignity as inherent value of humanity requires us to take a more practical approach which should start from a practical-intuitive understanding of the nature of human being and the complex social relations they constitute between themselves and their environment. This meant that the idea of dignity should be dissociated from abstract, arbitrary and contingent factors and, instead, be justified on a rather stable and universally valid ground commonly possessed by every human being. In this regard, it was stressed that the only one thing that human beings naturally and invariably possess in common is the fact of being human or their humanity. So, relying on the views of Sulmasy and Nussbaum, it was argued that dignity should be conceived as an inherent and unconditional value that pertains to every human being just by the mere fact of being a human person. That is, to be human is the only necessary and sufficient condition to have this inherent and unconditional value for it is the value that humans have by virtue of being the kind of being that they are: that they are humans.

Thus, it was argued that in the practical-intuitive sense, humanity (the fact of being human) is constituted of two indissociable fundamental natures: the biological (physical) and moral nature. Hence, humanity is a being which, at once, has both the biological and moral existence. The biological fact of humanity explains its animal nature. As an animal being, humanity has physical existence and personality and hence the corresponding inherent biological needs constituting necessary and indispensable material conditions of dignified human life. The moral fact of humanity, on the other hand, explains its moral nature. Humanity has accordingly a moral existence and personality and therewith the corresponding inherent moral needs constituting necessary and indispensable moral conditions of dignified human life. Humanity's moral personality particularly consists in the idealisation of the physical personality of humanity through the operation of the system of rights and obligations underlying the structure of every legal system. Interestingly, it is also this moral nature that defines humanity as necessarily a relational being for morality is essentially concerned with human being's relationship with the self, the social and the wider

world. In short, dignity as fundamental, inherent and unconditional value of humanity pertains equally and at once to both the biological and moral aspect of being human.

In addition, it was shown that the normative principle engrained in the notion of human dignity, the principle of respect, asserts an unconditional respect for the inherent life and value of humanity. The discussion in this Chapter particularly indicated that the principle of respect is a relational normative principle which not only requires but also presupposes the existence of dynamic relationship between human beings. In addition, it was also shown that this principle of human dignity is characteristically an evaluative normative principle in the sense that, on the one hand, it prescribes actions and treatments which ought to be compatible with the value of humanity and, on the other hand, it proscribes those which are disrespectful or antithetic to the value of humanity. In this way, the principle of human dignity introduces a fundamental ethical-moral dimension to the idea of social relations through which permissible and impermissible actions, behaviours and practices can be distinguished across all spectra of human life and relations.

Upon close reflection, the ideal of unconditional respect for the life and value of humanity consists in being attentive to the inherent biological and moral needs of humanity. This, in turn, implies that both the biological and moral needs of humanity are indissociable constitutive elements of a dignified human life. That is, they are basic material and moral conditions which must be fulfilled as a matter of respect for the inherent life and value of humanity. It follows from this that the fundamental demands of the principle of respect is concerned with asserting an unconditional respect for these inherent biological and moral conditions required to live a dignified human life. This forms the normative basis for insisting on the obligation of the State and other relevant actors to ensure the inherent material and moral conditions required by the principle of human dignity.

Now these core demands of human dignity are by and large articulated in the form of specific human rights guaranteeing economic, social, cultural, civil and political rights both at international and national level. Generally speaking, the inherent material conditions (biological needs) of human beings are essentially the central subjects of guarantees provided through economic, social and cultural rights regimes whereas those inherent moral needs of human beings are the core subjects of guarantees provided through civil and political rights regimes. This, in turn, established two crucial points central to this research. First, various kinds of human rights (economic, social, cultural, civil or political rights) recognised in various human rights instruments are nothing but specific articulations of what the principle of respect for the life and value of human being entails for a political society. Second, economic, social and cultural human rights are rooted in (flow from) the same underlying normative principle as civil and political rights and, hence, equally prescribe compelling human rights obligations of the State. In essence, these obligations of the State essentially consist in securing for

every human being those material conditions required to live a dignified human life. This, in turn, implies that the problem of ESC rights cannot be the problem of justification (substance) but rather the problem of articulating their specific implications in practice: that is, it has to do with the problem of identifying the concrete legal obligations the State bears in order to fulfil the normative demands of the principle of human dignity in the context of ESC rights. This was the topic systematically addressed in detail in Part two of the study.

It is one thing to say that the principle of human dignity entails the obligation to respect for the inherent material conditions of life but it is another thing to identify the concrete legal obligations which the State has to adhere to in order to satisfy the very demands arising from the principle of human dignity. In this regard, this study chose to take a practical inductive approach to this issue. Part two of this study therefore provided an in-depth analysis of the legal obligations of the State as developed in international ESC rights jurisprudence. Thus, having extensively reviewed the practices of international human rights tribunals entrusted with the mandate to adjudicate ESC rights claims, this research has identified that, in concrete terms, the State's legal obligation to ensure the essential material conditions of life guaranteed through ESC rights regime has two principal constitutive dimensions: procedural and substantive.

The procedural dimension is concerned with ensuring the due process guarantees indispensable for the effective protection of ESC rights. In relation to this, it was identified that there are three fundamental procedural rights constituting the core of the due process guarantees: the right to participation, access to justice and accountability.

Participation seeks to guarantee the rights of everyone to take part in and have a meaningful say in all decision-making processes affecting one's rights and vital interests. It is recognised as forming part and parcel of the general principle of international law and as a fundamental principle aimed at eliminating or at least countering the practices of exclusion, marginalisation and discrimination. In other words, guaranteeing the right to participation is the practical expression and reaffirmation of the equal dignity and rights of all human beings in a political society. As shown in Chapter five, it plays a significant role especially in safeguarding the vulnerable persons against discrimination, social exclusion and marginalisation. In terms of its scope, it was seen that the State is obliged to ensure the effective participation of all those affected in all of its decision-making processes affecting their vital socioeconomic interests. The effectiveness of the participation of individuals in a given decision-making process is determined by the extent to which it is conducted in accordance with its basic constitutive elements. That is, participation in a given decision-making process is of no practical effect unless it is relevant, meaningful, timely, transparent, and respectful of the dignity and basic rights of individuals concerned and is conducted in good faith and in accordance with pre-established legal standards. In this regard, the

discussion under this Chapter has clearly shown how the State's failure to engage, in particular, the vulnerable persons in its decision-making processes in the light of these requirements has resulted in the violations of several ESC rights.

Access to justice is considered to be the core of the very notion of human rights. It directly flows from the generic legal obligation of the State to guarantee the free, full and effective enjoyment of all human rights for everyone within its jurisdiction. It seeks to guarantee that everyone with an arguable claim has access to a remedy against violation of one's human rights. Generally speaking, access to justice contains bundles of procedural and substantive requirements, also referred to as the whole sum of the right to fair trial, which the State is bound to ensure in all cases involving the determination of the arguable claims of individuals regardless of the nature of the institution or proceeding concerned. International human rights law indeed does not prescribe any specific form of institution or procedure but it clearly requires the State to ensure that both the institution and its procedures be designed in the light of the basic elements of access to justice (examined in detail in this study). In Chapter six, having carefully examined the contents and implications of the elements of access to justice in general, this study has shown the need to take a more cautious and contextual approach in applying them to ESC rights adjudications. This, in turn, is justified on the basis of the nature of issues involved in the ESC rights claims and the vulnerable position of the (group of) individuals claiming these rights. On the one hand, ESC rights claims are by and large claims against the State and its socioeconomic choices and decisions over which it often has exclusive access to the relevant information or evidence. On the other hand, the claims are usually brought by those persons often suffering from poverty, discrimination, exclusion, or marginalisation. Thus, the State bears a positive obligation to make sure that the narrow and formal approach to access to justice would not result in the frustration of the very interests it seeks to protect. The State is also required to be sensitive and responsive to the special needs and interests of the vulnerable persons in ESC rights proceeding and to uphold the principle of the rule of law and democratic accountability by promptly and effectively complying with reparation orders, if any. Overall, the discussion under Chapter six has underscored that, in relation to ESC rights, access to justice particularly signifies the obligation of the State to carefully design both the institutional structures and procedural requirements by taking due and proper account of the rights and specific needs of the different categories of vulnerable persons within its jurisdiction. The cases discussed under this Chapter clearly show the problem of both the denial of access to justice and the failure of the State to properly take a cautious and contextual approach to each of the elements of the right to access to justice in relation to ESC rights claims.

The principle of accountability generally entails a complex normative relationship between human rights holders and the State. It is a fundamental principle justified on the basis of the State's generic legal obligation to respect and

ensure the free, full and effective enjoyment of human rights for all persons within its jurisdictions. It is essentially concerned with and hence gives concreteness to the overall (overarching) human rights obligation of the State. It as such requires the State to design and put in place the system through which individuals and group of individuals can demand justifications for its choices, rectification of the failures in making the choices or in the implementation of the measures adopted, and for sanctioning its agents or other entities responsible for the failures. In addition, the principle of accountability also requires the State to make sure that the conducts of the private entities within its jurisdiction do not obstruct the enjoyment of ESC rights. Thus, the effective protection of any human rights without the existence of the system of accountability is utterly impossible. This is even more so in the context of ESC rights claims in which the socioeconomic choices and decisions of the State and its agents are the main causes of or at least background reasons for those claims. Chapter seven has examined the approaches of international human rights courts and monitoring bodies to the accountability of the State for ensuring the material conditions life. It was accordingly shown that the human rights courts and monitoring bodies particularly draw on the ideal of the institutional (objective) accountability of the State as opposed to that of subjective accountability. The main tenet of this approach is that it does not concern itself with the internal constitutional and administrative divisions of powers and functions of the State. Nor does it concern itself with the fault of the (public) officials, institutions and other entities in establishing the overall human rights accountability of the State. It rather concerns itself with whether or not the (group of) individuals are effectively guaranteed the right to have access to and enjoy their ESC rights. This Chapter has underscored the paramount importance of this approach especially for the realisation of ESC rights. The cases discussed under this Chapter has provided the justifications for and three major scenarios underlying this institutional human rights accountability of the State under international law.

The substantive dimension of the State's legal obligation in its part is concerned with securing the essential minimum guarantees of the basic material conditions of life required to live a dignified human life. In relation to this, this study has identified and discussed four basic human rights principles constituting the substantive core of ESC rights guarantees. These are the principle of dignified life, equality, non-discrimination and the protection of individuals against vulnerability. In general, the discussion in Chapters eight and nine has shown that there are essentially two interrelated obligations of the State flowing from the substantive dimension of the State obligation to respect and ensure the material conditions of life. First, the State is required to make sure that every human being has access to an essential threshold level of the material conditions of life on the basis of equality and without any kind of non-discrimination. Second, it is

required to give due and proper regard to the minimum essential socioeconomic needs of the vulnerable persons.

It was seen in Chapter eight that the State's obligation to ensure a dignified life entails a broad substantive human rights obligation of the State. It was particularly noted that this ideal of dignified life underscores the richer view of the right to life and dignity and, to this extent, the holistic approach to the protection of all human rights. It especially requires the State to guarantee that all individuals have an unconditional access to those minimum essential material conditions needed to live a life worthy of human dignity. This, in turn, entails wide-ranging negative and positive obligations of the State in relation to socioeconomic conditions or circumstances threatening the life and dignity of human being regardless of the nature and sources of these conditions. In particular, the State is bound to make sure that its socioeconomic choices and decisions do not under any circumstance deprive the (group of) individuals of the enjoyment of the substantive core of their ESC rights and to take all necessary and effective measures to avert the conditions or circumstances threatening human life and dignity. The cases discussed under this Chapter has shown how human rights courts and monitoring bodies have applied the State's obligation to respect and ensure a dignified life in ever-expanding socioeconomic conditions ranging from prison (detention) conditions to environmental factors.

Chapter nine has shown the multifaceted implications of the principles of equality and non-discrimination and the obligation to guarantee a dignified life in relation to the vulnerable persons. Thus, by virtue of these principles, the State is especially bound to remove all forms of obstacles or impediments hampering their equal participation in all fields of life in equal terms with other persons; to ensure that all vulnerable persons have access to and enjoy all goods, services and opportunities open to all persons; to take due and proper account of the specific needs and interests of each categories of the vulnerable persons in all of its socioeconomic decisions; to guarantee that its decisions do not impose unnecessary and undue burden on the vulnerable persons within its jurisdiction; and to safeguard all vulnerable persons against social exclusion, marginalisation and poverty. In particular, Chapter nine has shown that human rights courts and monitoring bodies consider that the State has an aggravated obligation to ensure a dignified life for all vulnerable persons as a matter of priority. That is, it bears an utmost responsibility to take due and proper account of the negative socioeconomic conditions affecting different categories of vulnerable persons and to design concrete and targeted positive measures aimed at removing or mitigating the impacts of these conditions on their ability to freely and fully enjoy their ESC rights in equal terms with other persons. Above all, it is obliged to make sure that the specific needs of the vulnerable persons are given due priority in the provision of basic goods and services even at the time of dire economic conditions. This, in turn, is regarded as an irreducible minimum core obligation of the State and as

a litmus test for the overall legitimacy of its general socioeconomic policies and institutional measures.

## 10.2. CONCLUDING REMARKS

The main conclusions reached in this study are provided as follows. The holistic and practical conception of the nature and implications of human rights necessarily needs the governing ideal of what it means to be and live as a free and dignified human being in a political society and the recognition and critical reflection on the social-political (relational) nature of human beings. The social conception of human rights thus takes a practical approach to the idea of human rights and freedom, and of a dignified human life by locating their origin and significance within the complex relationality that defines human life. In a political society, the entire aspect of human life is constituted by complex and practical social relations. In essence, the social relations constituting human life are essentially moral relations in that they are rooted in humanity's self-consciousness and self-attribution of values and, hence, concern the need for the protection, preservation and promotion of its inherent life and value. Within this idea of social relations, the essential characteristic feature of humanity, both collective and individual interests and values are inseparably interwoven and hence exist as one undivided whole. It is this that provides a more robust and coherent foundation for the normative theory of human rights than the narrow formal or ideological approach identified in relation to the traditional and discourse theories of human rights.

In this approach, the idea of human dignity emerges as a foundational and an evaluative normative principle. That is, it serves as a justification for the inherent rights and freedoms individuals should have and enjoy in a political society *qua* human beings and as a standard against which the legitimacy of actions, behaviours and practices in the society vis-à-vis the life and value of human beings can be assessed and judged. In particular, the principle of human dignity prescribes an unconditional (absolute) right of every human being to be respected and treated with humanity, that is, in the manner compatible with the inherent value of a human being. In other words, the principle of human dignity prescribes how we should see and treat ourselves and other fellow human beings in all fields of our personal, socioeconomic, cultural, political and institutional relations. However, this idea of respect does not have any meaningful effect unless it is shown how it charts with the practical-intuitive view of the inherent nature (being) of humanity. In essence, the inherent being of humanity consists in its physical and moral being. Accordingly, it was concluded that the ideal of respect for human being must be construed as pertaining both to the physical (biological) and moral aspect of being human. Therefore, in practical terms, respecting and ensuring respect for the inherent life and value of human being indistinguishably

(inseparably) consists in guaranteeing those basic material and moral conditions required to live a dignified human life.

Upon reflection, these material and moral conditions of life refer to those socioeconomic, cultural and political interests guaranteed through ESC rights and civil and political rights regimes. This means that, alike moral conditions guaranteed through civil and political rights, the material conditions guaranteed through ESC rights equally constitute part and parcel of the inherent life and value of human being. That is, without securing these material conditions at an adequate level, it is utterly impossible to respect or ensure respect for the inherent life and value of human being. This has, on the one hand, proved the invalidity of the hierarchical and categorisation arguments voiced against ESC rights and, on other hand, established ESC rights on the same underlying normative principle as civil and political rights. Understood in this way, all specific human rights currently recognised in the form of civil, cultural, economic, political and social human rights in various international human rights instruments give concreteness to the meaning and implications of what it means for the State to practically respect and ensure respect for the inherent life and value of human being.

However, what does the obligation to respect and ensure the material conditions of life required by the principle of human dignity actually entail for the State in concrete legal terms? This study has answered this question by taking an inductive approach. Thus, after an in-depth review and analysis of the relevant international ESC rights jurisprudence, it concluded that the State's obligation to respect and ensure the material conditions of life has the procedural and substantive aspects. The procedural obligation of the State is restated in terms of the three basic human rights principles concerned with due process guarantees: participation, access to justice and accountability. The substantive obligation of the State to guarantee the material conditions of life is, in turn, restated in terms of four basic human rights principles (dignified life, equality, non-discrimination and the protection of vulnerable persons) signifying the State's legal obligation to guarantee an unconditional access to minimum essential material conditions for every human being and to safeguard vulnerable persons against conditions of vulnerability as a matter of priority. These procedural and substantive requirements, taken as a whole, give meaning (concreteness) to the State's generic legal obligation to respect and ensure the essential material conditions of life signified by the principle of human dignity. The detailed examination of the international ESC rights case law from across jurisdictions has overwhelmingly shown that the violations of the ESC rights were, in one way or another, due to the State's failure to adhere to one or more of these procedural and substantive legal requirements.

I believe that the approaches, analyses, findings and conclusions of this study instils a fresh and structured way of thinking about the contents and scope of

protections guaranteed through international ESC rights regimes. The arguments developed on the basis of the principle of human dignity and the rich body of case law from across the jurisdictions certainly bring coherence to the academic discourse regarding their nature and status and practical legal implications. The argument from the principle of human dignity has effectively established the substantive linkage between the inherent life and value of human being and ESC rights. The arguments inductively generated from the international ESC rights jurisprudence have interestingly restated their contents and implications in terms of a well-established legal principles. This suggests that it is not possible for the State to easily dismiss these rights as programmatic rights nor can it evade its obligation on account of the charge of ambiguity or resource scarcity (affordability).

Thus, notwithstanding its other inputs for the general human rights scholarship, the specific contributions of this study can be stated in terms of the following major points. First, it can provide solid justifications for the courts and the tribunals at all levels to assume jurisdictions over and effectively dispose the ESC rights claims. Second, it can assist human rights lawyers and advocates in making a strong case against the State in relation to its legal obligations under specific ESC rights. Third, it can serve as the source of inspiration in the struggle against poverty, discrimination, inequality, exclusion and marginalisation and in the quest for social justice for all. Fourth, it can guide the State agents and other decision-making organs in (re-)assessing the legitimacy or impacts of their socioeconomic choices and decisions against the ESC rights of those affected by the outcome of their choices and decisions. Fifth, it can help the (national and international) human rights bodies to take a viable and coherent approach in monitoring the practical performance of the State in the realisation of these rights and in providing trainings to the relevant actors dealing with ESC rights.

Having said these, there are however much works to be done especially in order to make the findings of these research practically useful at the grassroots (national) level. The main one is conducting a (comparative) legal research into each of the procedural and substantive principles identified above from the national legal systems' point of view. The other is enriching the contents and implications of each of the principles through further academic discourse. The next is developing the principles into an accessible and usable toolkit for the policy makers and civil society organisations working in the area of, in particular, ESC rights.

# BIBLIOGRAPHY

## BOOKS AND ARTICLES


Aasen HS, Halvorsen R and Silva AB Da (eds), *Human Rights, Dignity and Autonomy in Health Care and Social Services: Nordic Perspectives* (Intersentia 2009)

Ackermann LWH, 'Constitutional Protection of Human Rights: Judicial Review' (1989) 21 Columbia Human Rights Law Revew 59

Alexy R, 'Problems of Discourse Theory' (1988) 20 Crítica: Revista Hispanoamericana de Filosofía 43

—, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification (Trans Ruth Adler and Neil MacCormick)* (Oxford University Press 1989)

—, 'A Discourse-Theoretical Conception of Practical Reason' (1992) 5 Ratio Juris 231

—, 'Discourse Theory and Human Rights' (1996) 9 Ratio Juris 209

—, 'Discourse Theory and Fundamental Rights' in Augestin J Menendez and Erik O Eriksen (eds), *Constitutional Rights through Discourse: On Robert Alexy's Legal Theory – European and Theoretical Perspectives, ARENA Report No.9/2004* (ARENA 2004)

—, 'Balancing, Constitutional Review, and Representation' (2005) 3 International Journal of Constitutional Law (I.CON) 572

—, 'Discourse Theory and Fundamental Rights' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (SAGE Publications, Inc 2006)

—, *A Theory of Constitutional Rights [1986] (Trans. Julian Rivers, 2002)* (pb, Oxford University Press 2010)

Alford CF, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (Palgrave Macmillan 2010)

Allard-Tremblay Y, 'Proceduralism, Judicial Review and the Refusal of Royal Assent' [2013] Oxford Journal of Legal Studies 1

Alston P and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156

An-Na'im A, 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004)

Anderson E and Foresti M, 'Assessing Compliance : The Challenges for Economic and Social Rights' (2009) 1 Journal of Human Rights Practice 469

Andorno R, 'Human Dignity and Human Rights as a Common Ground for a Global Bioethics' (2009) 34 Jounral of Medicine and Philosophy 223

Arambulo K, *Strengthening the Supervision of the International Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Intersentia 1999)

Arieli Y, 'On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

*Aristotle's Nicomachean Ethics (A New Translation by Robert C. Bartlett and Susan D. Collins)* (The University of Chicago Press 2011)

Aristotle, *The Nicomachean Ethics (Trans by David Ross Revised with an Introduction and Notes by Lesley Brown)* (Oxford University Press 2009)

Baderin M and Mccorquodale R (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007)

Barak A, 'Human Dignity: The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013)

Beatty DM, *The Ultimate Rule of Law* (2004)

Beitz CR, 'Human Rights as a Common Concern' (2001) 95 The American Political Science Review 269

—, *The Idea of Human Rights* (Cambridge University Press 2009)

Berger J, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008)

Berlin I, *Liberty (Edited by Henry Hardy) [2002]* (paperback, Oxford University Press 2013)

Beyleveld D and Brownsword R, 'Human Dignity, Human Rights, and Human Genetics' (1998) The Modern Law Review 661

Bhagwat A, *The Myth of Rights: The Purposes and Limits of Constitutional Rights* (Oxford University Press)

Bielefeldt H, '"Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28 Political Theory 90

—, 'Philosophical and Historical Foundations of Human Rights' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2009)

Bilchitz D, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine: A Rejoinder to Xenophon Contiades and Alkmene Fotiadou' (2014) 12 International Journal of Constitutional Law (I.CON) 747

—, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 International Journal of Constitutional Law (I.CON) 710

Bix B, 'Natural Law Theory' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell 2010)

—, *Jurispridence: Theory and Context* (6th edn, Sweet & Maxwell 2012)

Borghesi F, Papio M and Riva M (eds), *Pico Della Mirandola: Oration on the Dignity of Man: New Translation and Commentary* (Cambridge University Press 2012)

Bossuyt M, 'The Legal Distinction between Civil and Political Rights and Economic, Social and Cultural Rights' (1975) 8 Human Rights Journal 783

—, 'International Human Rights Systems: Strengths and Weaknesses' in K Mahoney and P Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1993)

Boxill BR, 'Dignity, Slavery, and the Thirteenth Amendment' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992)

Brennan A and Lo YS, 'Two Conceptions of Dignity: Honour and Self-Determination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

Brest P, 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship' (1981) 90 The Yale Law Journal 1063

Brockless A, 'Human Rights and Individuality' (2013) 12 Think 69

Brus M, 'Social Sustainable Globalisation and International Law: In Need of a New International Constitutional Balance' in Eva Nieuwenhuys (ed), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill 2006)

Buitenweg R, 'Individual Freedom and ESOCUL Rights: The Illusions of Libertarianism' in Eva Nieuwenhuys (ed), *Neo-Liberal Globalism and Social Sustainable Globalisation* (Brill 2006)

Cabal L, Roa M and Sepúlveda-oliva L, 'What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?' (2003) 7 Health and Human Rights 50

Cali B, 'Balancing Human Rights? Problems with Methodological Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251

Caliari A, 'Human Rights Law: How Has It Been Relevant to Austerity and Debt Crises?' (2016) 110 American Society of International Law Proceedings 129

Campbell T, 'Human Rights: A Culture of Controversy' (1999) 26 Journal of Law and Society 6

Capps P, *Human Dignity and the Foundations of International Law* (Hart Publishing 2009)

Carey SC, Gibney M and Poe SC, *The Politics of Human Rights: The Quest for Dignity* (Cambridge University Press 2010)

Carlos Eduardo Maldonado, *Human Rights, Solidarity and Subsidiarity: Essays toward a Social Ontology* (The Council for Research in Values and Philosophy 1997)

Carozza PG, '"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 Texas Law Review 1031

—, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19 European Journal of International Law 931

Carozza PG, 'Human Rights, Human Dignity and Human Experience' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013)

Carr CL (ed), *The Political Writings of Samuel Pufendorf (Trans Michael J. Seidler)* (Oxford University Press 1994)

Cassese A, *Human Rights in a Changingg World* (Polity Press 1990)

Cavallaro JL and Schaffer EJ, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas' (2004) 56 Hastings Law Journal 217

Chapman A and Russel S (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002)

Chaskalson A, 'Human Dignity as a Constitutional Value' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Chirwa DM, 'A Full Loaf Is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005) 49 Journal of African Law 207

Choukroune L, 'Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social And Cultural Rights' (2005) 19 Colubia Journal of Asian Law 30

Christman J, *Social and Political Philosophy: A Conteporary Introduction* (Routledge 2002)

Chroust A-H, 'The Philosophy of Law of Gustav Radbruch' (1944) 53 Philosophical Review 23

Chwaszcza C, 'The Concept of Rights in Contemporary Human Rights Discourse' (2010) 23 Ratio Juris 333

Cole WM, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981–2007' (2014) 117 American Journal of Sociology 1131

Constant B, *Political Writings: Liberty of Ancients Compared with That of the Moderns (Speacj Given at the Athenee Royal in Paris, Trans and Ed by Biancamaria Fontana)* (Cambridge University Press 1819)

Coomans F (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006)

Corning P, *The Fair Society and the Pursuit of Social Justice* (The University of Chicago Press 2011)

Corradetti C, *Relativism and Human Rights: A Theory of Pluralistic Universalism* (Springer 2009)

— (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer 2012)

Courtis C, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (2008)

Cranor C, 'Toward a Theory of Respect for Persons' (1975) 12 American Philosophical Quarterly

Cranstson M, *What Are Human Rights?* (The Bodley Head Ltd 1973)

Craven M, *International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford University Press 1995)

Crotty J, 'The Great Austerity War: What Caused the US Deficit Crisis and Who Should Pay to Fix It?' (2012) 36 Cambridge Journal of Economics 79

Cullen H, 'The Collective Complaints Systems of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 Human Rights Law Review 61

Daly E, *Dignity Rights: Courts, Constititions, and the Worth of Human Person (with Foreword by Aharn Barak)* (University of Pennsylvania Press 2013)

Dankwa V, Flinterman C and Leckie S, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 705

Darwall SL, 'Two Kinds of Respect' (1977) 88 Ethics 36

Dembour M, 'What Are Human Rights? Four Schools of Thought' (2014) 32 Human Rights Quarterly 1

Dennis MJ and Stewart DP, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 The American Journal of International Law 462

Diagne SB, 'Individual, Community, and Human Rights' (2009) 101 Transition 8

'Dialogue between Judges: "Implementing the European Convention on Human Rights in Times of Economic Crisis" (Seminar, 25 January 2013)' (2013)

Dicke K, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Donnelly J, 'Human Rights as Natural Rights' (1982) 4 Human Rights Quarterly 391

—, 'Human Dignity and Human Rights'

Douzinas C and Gearty C (eds), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014)

Dowell-Jones M, 'The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014)

—, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (2015) 15 Human Rights Law Review 193

Dowler E and Lambie-Mumford H, 'Introduction: Hunger, Food and Social Policy in Austerity' (2015) 14 Social Policy and Society 411

Dupre C, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 European Human Rights Law Review 190

Duwell M and others (eds), *The Cambridge Hanbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014)

Dworkin G, *The Theory and Practice of Autonomy* (Cambridge University Press)

Dworkin R, *Taking Rights Seriously* (Bloomsbury Academic 1997)

—, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006)

Eckert J, 'Legal Roots of Dignity in German Law' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

—, 'The Legal Roots of Human Dignity in Germany' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Edmiston D, 'Welfare, Austerity and Social Citizenship in the UK' (2017) 16 Social Policy and Society 261

Edmiston D, Patrick R and Garthwaite K, 'Austerity, Welfare and Social Citizenship' (2017) 16 Social Policy and Society 253

Egede E, 'Bringing Human Rights Home : An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51 Journal of African Law 249

Eibach U, 'Protection of Life and Human Dignity: The German Debate between Christian Norms and Secular Expectations' (2008) 14 Christian Bioethics 58

Eide A, 'The World of Human Rights: As Seen from a Small, Industrialized Country' (1979) 23 International Studies Quarterly 246

Eide A, Krause C and Rosas A (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd Revise, Martinus Nijhoff Publishers 2001)

'Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical Paper by the Chairperson-Rapporteur, Catarina de Albuquerque (UN Doc. E/CN.4/2006/WG.23/2)'

Fabbrini F, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism' (2014) 14 Human Rights Law Review 85

Falk R, 'Human Rights' Foreign Policy 18

Feldman D, 'Human Dignity as a Legal Value: Part 1' [1999] Public Law 682

—, 'Human Dignity as a Legal Value: Part 2' [2000] Public Law 61

Fennessy RR, *Burke, Paine, and the Rights of Man: A Difference of Political Opinion* (Martinus Nijhoff Publishers 1963)

Fields AB, 'Human Rights Theory: Criteria, Boundaries, and Complexities' (2009) 2 International Review of Qualitative Research 407

Finnis J, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1998)

—, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011)

—, *Reason in Action: Collected Essay: Volume I* (Oxford University Press 2011)

Francioni F, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as Human Rights* (Oxford University Press 2007)

—, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 European Journal of International Law

Fredman S, *Human Rights Transformed: Positive Rights and Negative Duties* (Oxford University Press 2008)

—, 'The Public Sector Equality Duty' (2011) 40 Industrial Law Journal 405

Freeman M, 'The Philosophical Foundations of Human Rights' (1994) 16 Human Rights Quarterly 491

—, *Human Rights: An Interdisciplinary Approach* (Polity Press 2002)

Frowein JA, 'Human Dignity in International Law' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Fyfe RJ, 'Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007) 70 Saskatchewan Law Review 1

Gauri V and Brinks DM (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008)

—, 'Introduction' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008)

Gearty C and Douzinas C (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012)

George RP (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press 1992)

Gewirth A, *Reason and Morality* (The University of Chicago Press 1978)

—, 'Human Dignity as the Basis of Rights' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992)

—, *The Community of Rights* (The University of Chicago Press 1996)

Ghai Y and Cottrell J (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004)

Gloppen S and others, *Courts and Power in Latin America and Africa* (Palgrave Macmillan 2010)

Gloppen S, Gargarella R and Skaar E, 'Introduction: The Accountability Function of the Courts in New Democracies' in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass 2004)

Gonzalez AM, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Ashgate 2008)

Goodin RE, Pettit P and Pogge T (eds), *A Companion to Contemporary Political Philosophy Volume I & II (Blackwell Companions to Philosophy)* (2nd edn, Blackwell Publishing 2007)

Goodman MD, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2006) 84 Nebraska Law Review 740

Goodman R and Jinks D, 'Measuring the Effects of Human Rights Treaties' (2003) 14 European Journal of International Law

Gould CC, *Marx's Social Ontology Individuality and Community in Marx's Theory of Social Reality* (MIT Press 1978)

—, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (Cambridge University Press 1988)

—, *Globalizing Democracy and Human Rights* (Cambridge University Press 2004)

Grear A and Weston BH, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15 Human Rights Law Review 21

Gregg B, *Human Rights as Social Construction* (Cambridge University Press 2013)

—, 'The Human Rights State: Theoretical Challenges, Empirical Deployments: Reply to My Critics' (2017) 21 The International Journal of Human Rights 359

Griffin J, 'Welfare Rights' (2000) 4 The Journal of Ethics 27

—, *On Human Rights* (Oxford University Press 2008)

Grotius H, *The Rights of War and Peace: Book II (Edited and with an Introduction by Richard Tuck, from the Edition by Jean Barbeyrac, Major Legal and Political Works of Hugo Grotius)* (Liberty Fund 2005)

Gutto SBO, 'Beyond Justiciability: Challenges of Implementing/ Enforcing Socio-Economic Rights in South Africa' (1998) 4 Buffalo Human Rights Law Review 79

Habermas J, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Trans William Rehg)* (Polity Press 1996)

Habermas J, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464

Hanberger A, 'Democratic Accountability in Decentralised Governance 1' (2009) 32 Scandinavian Political Studies 1

Hanfling O, 'Rights and Human Rights' (2018) 58 Royal Institute of Philosophy Supplement 57

Harel A, 'Rights-Based Judicial Review: A Democratic Justification' (2003) 22 Law and Philosophy 247

Harris DJ and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd ed, Oxford University Press 2009)

Hart HLA, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983)

Hathaway OA, 'Do Human Rights Treaties Make a Difference?' (2002) 111 The Yale Law Journal 1935

Hauser GA, 'The Moral Vernacular of Human Rights Discourse' (2008) 41 Philosophy & Rhetoric 440

Hay WH, Martin R and Singer M, 'Gerald C. MacCallum, Jr. 1985–1987' (1987) 61 Proceedings of the Annual Meeting (American Society of International Law) 383

Henkin L, 'Constitutional Rights and Human Rights' (1978) 13 Harvard Civil Rights-Civil Liberties Law Review 593

—, *The Rights of Man Today* (Center for the Study of Human Rights, Columbia University 1978)

—, 'Rights: Here and There' (1981) 81 Columbia Law Review 1582

—, 'The Universality of the Concept of Human Rights' (1989) 506 Annals of the American Academy of Political and Social Science 10

—, 'Human Dignity and Constitutional Rights' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992)

Henry LM, 'The Jurisprudence of Dignity' 160 University of Pennsylvania Law Review 160

Hestermeyer HP, 'Reality or Aspiration? Solidarity in International Environmental Law and World Trade Law' in Holger P Hestermeyer and others (eds), *Co-existence, Cooperation and Solidarity* (Martinus Nijhoff 2012)

Heywood A, *Politics* (3rd ed, Palgrave Macmillan 2007)

Hill Jr. DW., 'Estimating the Effects of Human Rights Treaties on State Behavior' (2010) 72 The Journal of Politics 1161

Hillebrecht C, 'Rethinking Compliance: The Challenges and Prospects of Measuring Compliance with International Human Rights Tribunals' (2009) 1 Journal of Human Rights Practice 362

Hindess B, 'Marxism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. I)* (2nd edn, Blackwell 2007)

Hirschmann G, 'Guarding the Guards: Pluralist Accountability for Human Rights Violations by International Organisations' (2019) 45 Review of International Studies 20

Hitchens C, *Thomas Paine's Rights of Man: A Biography* (Atlantic Monthy Press)

Hobbes T, *Leviathan (Edited with an Introduction and Notesby J. C. A. Gaskin) [1996]* (Oxford Wol, Oxford University Press 1998)

Howard RE and Donnelly J, 'Human Dignity, Human Rights, and Political Regimes' (1986) 80 The American Political Science Review 801

Hughes G, 'The Concept of Dignity in the Universal Declaration of Human Rights' (2011) 39 Journal of Religious Ethics 1

*Human Dignity and Bioethics: Essays Comissioned by the President's Council on Bioethics* (2008)

'Human Rights and Constitution Making' (OHCHR 2018)

Ignatieff M, 'Human Rights as Politics, Human Rights as Idolatry (The Tanner Lectures on Human Rights)'

Ingram D, 'Between Political Liberalism and Postnational Cosmopolitanism : Toward an Alternative Theory of Human Rights' (2003) 31 Political Theory 359

Ishay M, 'What Are Human Rights? Six Historical Controversies' (2004) 3 Journal of Human Rights 359

James L. Cavallaro & Emily Schaffer, 'Rejoinder: Justice before Justiciability: Inter-American Litigation and Social Change' (2006) 39 N.Y.U. Journal of International Law and Politics 345

Jayawickrama N, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002)

Jowitt A, 'The Notion of Human Rights' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (ANU Press 2010)

Kalantry S, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators : A Focus on the Right to Education in the ICESCR' (2010) 32 Human Rights Quarterly 253

Kant I, *The Metaphysics of Morals (Introduction, Translation, and Notes by Mary Gregor)* (Cambridge University Press 1991)

—, *Groundwork of the Metaphysics of Morals (Trans and Ed Mary Gregor and Jens Timmermann, Trans Revised Jens Timmermann, Introduction Christine M Korsgaard)* (Revised Ed, Cambridge University Press 2012)

Kao GY, *Grounding Human Rights in a Pluralist World* (Georgetown University Press 2011)

Kateb G, *Human Dignity* (The Belknap Press of Harvard University Press Cambridge, 2011)

Kaufmann P and others (eds), *Humilation, Degradation, Dehumanization: Human Dignity Violated* (Springer 2011)

Keith LC, 'Judicial Indipendence and Human Rights Protection around the World' (2002) 85 Judicature 195

Kelley D, *A Life of One's Own: Individual Rights and the Welfare State* (Cato Institute 1998)

Khushf G, 'Inalianable Rights in the Moral and Political Philosophy of John Locke: A Reappraisal' in MJ Cherry (ed), *Persons and their Bodies: Rights, Responsibilities, Relationships* (Kluwer Academic Publishers 1999)

Klatt M (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012)

Klein E, 'Human Dignity in German Law' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Knox JH, 'HORIZONTAL HUMAN RIGHTS LAW' (2008) 102 The American Journal of International Law 1

Koch IE, 'The Justiciability of Indivisible Rights' (2003) 72 Nordic Journal of International Law 3

—, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009)

Kohen A, *In Defense of Human Rights: A Non-Religious Grounding in a Pluralistic World* (Routledge 2007)

Koppell JGS, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65 Public Administration Review 94

Koroma AG, 'Solidarity: Evidence OF Emerging International Legal Principle' in Holger P Hestermeyer and others (eds), *Co-existence, Cooperation and Solidarity* (Martinus Nijhoff 2012)

Korsgaard CM, 'Introduction', *Immanuel Kant, Groundwork of the Metaphysics of Morals (edited by Mary Gregor and Jens Timmermann, introduction by Christine M. Korsgaard)* (Revised Ed, Cambridge University Press 2012)

Koser K, 'The Impact of the Global Financial Crisis on International Migration' (2010) 11 The Whitehead Journal of Diplomacy and International Relations

Kretzmer D, 'Human Dignity in Israeli Jurisprudence' in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Kretzmer D and Klein E (eds), *The Concept of Human Dignity in Human Rights Discurse* (Kluwer Law International 2002)

Kunnemann R, 'A Coherent Approach to Human Rights' (1995) 17 Human Rights Quarterly 323

Kuyper J, Backstrand K and Schroeder H, 'Institutional Accountability of Nonstate Actors in the UNFCCC: Exit, Voice, and Loyalty' (2017) 34 Review of Policy Research 88

Landau D, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 401

Langford LM, 'The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity' (2013) 26 Harvard Human Rights Journal 217

Langford M (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008)

Langford M and Nolan A (eds), *Litigating Economic, Social and Cultural Rights (Legal Practioners Dssier)* (Centre on Housing Rights and Evictions (COHRE) 2006)

Lauterpacht H, *An International Bill of the Rights of Man (With an Introduction by Philippe Sands)* (Oxford University Press 2013)

Leo Strauss, *Natural Rights and History [1953]* (5th Impres, The University of Chicago Press 1965)

Lester, Lord and Colm O'Cinneide, 'The Effective Protection of Socio-Economic Rights' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004)

Levinson S, 'The Welfare State' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing Ltd 2010)

Lewis JM, 'Individual and Institutional Accountability: The Case of Research Assessment' (2015) 73 Australian Journal of Public Administration 408

Lewis M, 'A Brief History of Human Dignity: Idea and Application' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

Li Y and McKernan J, '"Achieved Not Niven": Human Rights, Critique and the Need for Strong Foundations' (2017) 21 The International Journal of Human Rights 252

Lickiss N, 'On Human Dignity: Fragments of an Exploration' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

Liebenberg S, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 Law, Democracy & Development 159

Liebenberg S, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010)

—, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 Human Rights Quarterly 48

Locke J, *Second Treatise of Government [1690] (Edited, with an Introduction, by C. B. Macpherson)* (Hackett Publishing 1980)

Lotito PF, 'Solidarity' in William BT Mock and Gianmario Demuro (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2010)

Loughlin J, 'Human Dignity: The Foundation of Human Rights and Religious Freedom' (2016) 19 Memoria Y Civilizacion

Luban D, *Legal Ethics and Human Dignity (Cambridge Studies in Philosophy of Law)* (Cambridge Univ Press 2007)

—, 'The Rule of Law and Human Dignity : Re-Examining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29

MacCallum, Jr. GC, 'Negative and Positive Freedom' (1967) 76 The Philosophical Review 312

Macdonald K, 'The Meaning and Purposes of Transnational Accountability' (2015) 73 Australian International Law Journal 426

Macklin R, 'Dignity Is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy' (2003) 327 BMJ 1419

Macmillan CM, 'Social versus Political Rights' (1986) 19 Canadian Journal of Political Science 283

Malpas J, 'Human Dignity and Human Being' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

Malpas J and Lickiss N, 'Introduction to a Conversation' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

— (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

Mapulanga-Hulston JK, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6 International Journal of Human Rights 29

Marks SP, 'The Past and Future of the Separation of Human Rights into Categories' (2009) 24 Maryland Journal of International Law 209

Martin FF and others (eds), *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge University Press)

McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655

— (ed), *Understanding Human Dignity (Proceedings of the British Academiy No. 92)* (Oxford University Press 2013)

McDougal MS, Lasswell HD and Chen L, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980)

Melish T, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System : A Manual on Presenting Claims* (2002)

Melish TJ, 'Counter-Rejoinder: Justice Vs. Justiciability?: Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation' (2006) 39 N.Y.U. Journal of International Law and Politics 385

—, 'Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas' (2006) 39 N.Y.U. Journal of International Law and Politics 1

—, 'The Inter-American Court of Human Rights: Beyond Progressivity' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press 2008)

Menendez AJ and Eriksen EO (eds), *Constitutional Rights through Discourse: On Robert Alexy's Legal Theory – European and Theoretical Perspectives, ARENA Report No.9/2004* (ARENA 2004)

Messer E, 'Pluralist Approaches to Human Rights' (1997) 53 Journal of Anthropological Research 293

Metz T, 'African Conceptions of Human Dignity : Vitality and Community as the Ground of Human Rights' (2012) 13 Human Rights Rev 19

Meyer M, 'The Simple Dignity of Sentient Life : Speciesism and Human Dignity' (2001) 32 Journal of Social Philosophy 115

—, 'Human Dignity as a (Modern) Virtue' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Meyer MJ, 'Introduction' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992)

Meyer MJ and Parent WA (eds), *The Constitution of Rights: Human Dignity and the American Values* (Cornell University Press 1992)

Meyerson D, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31 Melbourne University Law Review 801

Mill JS, *On Liberty and Other Essays (Edited and with Introduction and Notes by John Gray) [1991]* (Paperback, Oxford World's Classics 2008)

Mirandola P Della, *On the Dignity of Man (Trans Charles Glenn Wallis)* (Hackett Publishing 1965)

Morsink J, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999)

Mosissa GA, 'Ensuring the Realization of the Right to Health through the African Union (AU) System: A Review of Its Normative, Policy and Institutional Frameworks' in B Toebes and others (eds), *The Right to Health: A Multi-Country Study of Law, Policy and Practice* (TMC Asser Press 2014)

Mowbray A, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights' (2010) 10 Human Rights Law Review 289

Moyn S, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press Cambridge, 2010)

Mulgan R, 'The Processes of Public Accountability' (1997) 56 Australian Journal of Public Administration 25

—, '"Accountability": An Ever-Expanding Concept?' (2000) 78 Public Administration 555

Muller A, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights Law Review 557

Muralidhar S, 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate'' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (Interights 2004)

Murphy MC, 'Natural Law Theory' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005)

Mutua M, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002)

Narain J, 'Human and Fundamental Rights: What Are They About?' (1993) XV The Liverpool Law Review

Neal M, 'Respect for Human Dignity as "Substantive Basic Norm"' (2014) 10 International Journal of Law in Context 26

Neier A, *Taking Liberties: Four Decades in the Struggle for Rights* (Public Affairs 2003)

—, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief

—, *The International Human Rights Movement: A History* (Princeton University Press 2012)

Neuman GL, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 Stanford Law Review 1863

Neumayer E, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 Journal of Conflict Resolution 925

Newell P and Wheeler J (eds), *Rights, Resources and Politics of Accountability* (Zed Books 2006)

Nickel JW, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987)

Nino CS, 'The Concept of Moral Person' (1987) 19 Crítica: Revista Hispanoamericana de Filosofía, 47

—, *The Ethics of Human Rights* (Clarendon Press 1991)

Nnamuchi O, 'Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria' (2008) 52 Journal of African Law 1

Nolan A, '"Aggravated Violations", Roma Housing Rights and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System' (2011) 11 Human Rights Law Review 343

— (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014)

Nozick R, *Anarchy, State, and Utopia* (Blackwell 1974)

Nussbaum M, 'Human Dignity and Political Entitlements', *Human Dignity and Bioethics (Essays Commissioned by President's Council on Bioethics)* (2008)

Nussbaum MC, *Women and Development: The Capabilities Approach* (Cambridge University Press 2000)

Nussbaum MC, *Froniters of Justice: Disability, Nationality and Species Membership* (The Belknap Press of Harvard University Press 2006)

Nussbaum MC, *Creating Capabilities: The Human Development Approach* (The Belknap Press of Harvard University Press 2011)

O'Mahony C, 'There Is No Such Thing as a Right to Dignity: A Rejoinder to Emily Kidd White' (2012) 10 International Journal of Constitutional Law (I.CON) 585

O'Mahony C, 'There Is No Such Thing as a Right to Dignity' [2012] International Journal of Constitutional Law (I.CON) 551

Oette L, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 669

Ortiz I and others, 'The Decade of Adjustment: A Review of Austerity Trends 2010–2020 in 187 Countries' (2008)

Parent WA, 'Constitutional Values and Human Dignity' in Michael J Meyer and William A Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992)

Parfit D, *On What Matters (Edited and Introduced by Samuel Scheffler Vol 1)* (Oxford University Press 2011)

Pasqualucci JM, 'The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings International and Comparative Law Review 1

Patnaik JK, 'Human, Rights: The Concept and Perspectives: A Third World View' (2004) 65 The Indian Journal of Political Science 499

Patterson D (ed), *A Companion to Philosophy of Law and Legal Theory (Blackwell Companions to Philosophy)* (2nd edn, Blackwell Publishing Ltd 2010)

Paul EF, Fred D. Miller J and Paul J (eds), *Natural Law and Modern Moral Philosophy* (Cambridge University Press 2001)

—(eds), *Natural Rights Liberalism from Locke to Nozick* (Cambridge University Press 2005)

Peat D, 'The Use of Court-Appointed Experts by the International Court of Justice' [2014] The British Yearbook of International Law 1

Perrin B, 'Bringing Accountability up to Date with the Realities of Public Sector Management in the 21st Century' (2015) 58 Canadian Public Administration / Administration Publique Du Canada 183

Perry MJ, *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998)

—, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press 2007)

Pillay A, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014) 63 International and Comparative Law Quarterly 385

Poole T, 'Legitimacy, Rights and Judicial Review' (2005) 25 Oxford Journal of Legal Studies 697

Posner EA, 'Human Welfare, Not Human Rights' (2008)

Potts H, *Accountability and the Right to the Highest Attainable Standard of Health* (University of Essex Human Rights Centre 2008)

Pullman D, 'Human Non-Persons, Feticide, and the Erosion of Dignity' (2010) 7 Bioethical Inquiry 353

Radbruch G, 'Five Minutes of Legal Philosophy (1945)' (2006) 26 Oxford Journal of Legal Studies 13

Rainbolt GW, *The Concept of Rights* (Springer 2006)
Rangel VM, 'The Solidarity Principle, Franscisco de Victoria and the Protection of Indigenous Peoples' in Holger P Hestermeyer and others (eds), *Co-existence, Cooperation and Solidarity* (Martinus Nijhoff 2012)
Rao N, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 Columbia Journal of European Law 201
—, 'Three Concepts of Human Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183
Ratjen S and Satija M, 'Realizing Economic, Social, and Cultural Rights for All' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014)
Rawls J, *A Theory of Justice* (Revised Ed, The Belknap Press of Harvard University Press 1999)
—, *Political Liberalism* (Expanded E, Columbia University Press 2005)
Raz J, *The Morality of Freedom* (Paperback, Clarendon Press 1986)
—, 'Human Rights Without Foundations' (2007) Working Paper No. 14/2007
Rehman J, *International Human Rights Law* (2nd edn, Pearson 2010)
Reisinger KB, 'Court-Appointed Expert Panels: A Comparison of Two Models' (1998) 32 Indiana Law Review
Renteln AD, 'The Concept of Human Rights' (1988) 83 Anthropos 343
'Report on Austerity Measures and Economic and Social Rights (A Report of UNOHCHR Submitted Persuant to General Assembly Resolution 48/141)'
Riedel E, 'Economic, Social and Cultural Rights' in Catarina Krause and Martin Scheinin (ed), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights 2009)
Riedel E, Giacca G and Golay C (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014)
Riley S, 'Human Dignity: Comparative and Conceptual Debates' (2010) 6 International Journal of Law in Context 117
Roach K, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press 2008)
Robertson CT, 'Blind Expertise' (2010) 85 New York University Law Review 174
Robertson RE, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources "to Realizing Economic, Social, and Cultural Rights' (1994) 16 Human Rights Quarterly 693
Robinson M, 'Advancing Economic, Social, and Cultural Rights: The Way Forward' (2004) 26 Human Rights Quarterly 866
Rosen M, *Dignity: Its History and Meaning* (Harvard University Press 2012)
—, 'Dignty: The Case Against' in Christopher McCrudden (ed), *Understanding Human Dignity (Proceedings of the British Academiy No. 92)* (Oxford University Press 2013)
Roshwald M, 'The Concept of Human Rights' (1959) 19 Philosophy and Phenomenological Research 354
Roth K, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by Human Rights Organization' (2004) 26 Human Rights Quarterly 63

Rousseau J-J, *The Social Contract or Principles of Political Right (Trans by H.J. Tozer, Introduction by Derek Matravers)* (Wordsworth 1998)

Roy B, 'In Defence of Human Rights' (1997) 32 Economic and Political Weekly 259

Ruggie JG, *Just Business: Multinational Corporations and Human Rights* (1st edn, WW Norton and Company 2013)

Ryan A, 'Liberalism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. I)* (2nd edn, Blackwell 2007)

'Safeguarding Human Rights in Times of Economic Crisis (Issue Paper Published by the Council of Europe Commissioner for Human Rights)'

Safrai C, 'Human Dignity in a Rubbinical Perspective' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Saiz I, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1 Journal of Human Rights Practice 277

Sangiovanni A, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press 2017)

Schachter O, 'Human Dignity as a Normative Concept' (1983) 77 American Journal of International Law 848

Schmitt R, *An Introduction to Social and Political Philosophy: A Question-Based Approach* (Rowman & Littlefield Pub 2009)

Schutter O De, 'The Protection of Social Rights by the European Court of Human Rights' in Peter Van der Auweraert and others (eds), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (Maklu 2002)

Schutter O De, *International Human Rights Law: Cases, Materials,Commentary* (Cambridge University Press 2010)

Searle J, 'The Construction of Social Reality' (1995) 62 1995 285

Searle JR, 'Social Ontology: Some Basic Principles' (2006) 80 Papers 51

Self P, 'Socialism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. I)* (2nd edn, Blackwell 2007)

Sen A, *Development as Freedom* (paperback, Oxford University Press 2001)

—, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315

Sensen O, *Kant on Human Dignity* (Kantsudien 2011)

Sepulveda M, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003)

Shelton D, *Remedies in International Human Rights Law* (Oxford University Press 2005)

Shestack JJ, 'The Philosophic Foundations of Human Rights' (1998) 20 Human Rights Quarterly 201

Shivji IG, 'The Concept of Human Rights in Africa'

Shue H, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996)

Shultziner D, 'A Jewish Conception of Human Dignity: Philosophy and Its Ethical Implications for Israeli Supreme Court Decisions' (2006) 34 Journal of Religious Ethics 663

—, 'Human Dignity: Functions and Meanings' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)

Simmonds NE, *Central Issues in Jurisprudence* (4th edn, Sweet & Maxwell 2013)

Simmons AJ, *The the Lockean Theory of Rights* (Princeton University Press 1992)
Spijkers O, *The United Nations, the Evolution of Global Values and International Law* (Intersentia 2011)
Squires J, Langford M and Thiele B (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press 2005)
Ssenyonjo M, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009)
Starck C, 'The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)
Stark B, 'Review of The Age of Rights by Louis Henkin' (1991) 85 The American Journal of International Law 733
Stark CA, 'Respecting Human Dignity: Contract versus Capabilities' (2009) 40 Metaphilosophy 366
Statman D, 'Humiliation, Dignity and Self-Respect' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)
Steven R. Keener and Javier Vasquez, 'A Life Worth Living: Enforcement of The Right to Health through the Right to Life in the Inter-American Court of Human Rights' (2009) 40 Columbia Human Rights Law Revew 595
Stotzky IP, 'Review of the Rights of Man Today by Louis Henkin' (1979) 11 Lawyer of the Americas 229
Sulmasy DP, 'Human Dignity and Human Worth' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity: A Conversation* (Springer 2007)
'The Constitutional Protection of Human Rights (DIHR)' (2012)
'The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe: Feasibility Study (Doc. No. CDDH(2015)R84 Addendum IV, Steering Comittee for Human Rights (CDDH), 84th Meeting, 7–11 December 2015)'
Tinta MF, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights : Beyond Traditional Paradigms and Notions' (2007) 29 Human Rights Quarterly 431
Toddington S, 'The Moral Truth about Discourse Theory' (2006) 19 Ratio Juris 217
Tomasevski K (Katarina), 'Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998–2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson' (2005) 27 Human Rights Quarterly 709
Torre M La, 'Nine Critiques to Alexy's Theory of Fundamental Rights' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006)
Tuori K, 'Fundamental Rights Principles: Disciplining the Instrumentalism of Policies' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006)
Turner BS, 'Outline of a Theory of Human Rights' (1993) 27 Sociology 489
Turner BS, *Vulnerability and Human Rights* (The Pennysylvania State University Press 2006)
Tushnet M, 'A Response to David Landau' (*Opinio Juris*) <opiniojuris.org/2012/01/23/hilj_tushnet-responds-to-landau/> accessed 13 September 2017

—, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008)

Udombana NJ, 'Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39 Cornell International Law Journal 181

Uyl DJ Den and Rasmussen DB, 'Ethical Individualism, Natural Law, and the Primacy of Natural Rights' in Ellen Frankel Paul, Jr Fred D. Miller and Jeffrey Paul (eds), *Natural Law and Modern Moral Philosophy* (Cambridge University Press 2001)

Vallentyne P, 'Distributive Justice' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy (Vol. II)* (2nd edn, 2007)

Vanberg VJ, 'Liberal Constitutionalism, Constitutional Liberalism and Democracy' (2011) 22 Const Polit Econ 1

Ven JA van der, Dreyer JS and Pieterse HJC, *Is There a God of Human Rights? The Complex Relationship between Human Rights and Religion: A South African Case* (Brill 2004)

Vierdag EW, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69

—, 'Some Remarks about Special Features of Human Rights Treaties' (1994) 25 Netherlands Yearbook of International Law 119

Waldron J (ed), *'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man (with Introductory and Concluding Essays by Jeremy Waldron)* (Methuen 1987)

—, 'Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)' (2007) XLVII Arch. europ.social 201

—, 'Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley' (2009) 09–50

—, 'Is Dignity the Foundation of Human Rights?' (2013)

Way S-A, Lusiani N and Saiz I, 'Economic and Social Rights in the "Great Recession": Towards a Human Rights-Centred Economic Policy in Times of Crisis' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014)

Weinrib LE, 'The Charter in the International Context: Human Dignity as a Rights-Protecting Principle' (2005) 17 Nat'l J. Const. L. 325

White EK, 'There Is No Such Thing as a Right to Human Dignity: A Reply to Conor O ' Mahony' (2012) 10 International Journal of Constitutional Law (I.CON) 575

White RCA and Ovey C, *Jacobs, White, and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010)

Wicks E, 'The Meaning of " Life ": Dignity and the Right to Life in International Human Rights Treaties' [2012] Human Rights Law Review 1

Wildhaber L, 'The European Court of Human Rights: The Past, the Present, the Future' 20 National Journal of Constitutional Law

—, 'A Constitutional Future for the European Court of Human Rights?' in Luzuis Wildhaber (ed), *The European Court of Human Rights 1998–2006: History, Achievements, Reform* (NP Engle 2006)

—, 'Changing Ideas about the Tasks of the European Court of Human Rights' in Luzuis Wildhaber (ed), *European Court of Human Rights 1998–2006* (NP Engle 2006)

Wills J and Warwick BT, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights' (2016) 23 Indiana Journal of Global Legal Studies 629

Wolf AH De, *Reconciling Privatization with Human Rights* (Intersentia 2011)
Wolfe C, *Natural Law Liberalism* (Cambridge University Press 2006)
Wolfsteller R, 'The Institutionalisation of Human Rights Reconceived: The Human Rights State as a Sociological "Ideal Type"' (2017) 21 The International Journal of Human Rights 230
Wolfsteller R and Gregg B, 'A Realistic Utopia? Critical Analyses of the Human Rights State in Theory and Deployment: Guest Editors' Introduction' (2017) 21 The International Journal of Human Rights 219
Wright RG, 'Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively' (1995) 75 Boston University Law Review 1397
Yeshanew SA, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (Abo Akademi University University Press 2011)
Zhang Q, 'The Idea of Human Dignity in Classical Chinese Philosophy: A Reconstruction of Confucianism' (2000) 27 Journal of Chinese Philosophy 299

# CASES

## INTER-AMERICAN COURT OF HUMAN RIGHTS

– *Baena-Ricardo et al v. Panama, Merits, Reparations and Costs, Judgment of 2 February 2001*
– *Bámaca-Velásquez v. Guatemala, Merits, Judgment of 25 November 2000*
– *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment of August 31, 2001*
– *Cesti-Hurtado v. Peru, Merits, Judgment of 29 September 1999*
– *Furlan And Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2012*
– *Furlan and Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment of 31 August 2012*
– *Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment of February 6, 2001*
– *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment 27 June 2012 (hereafter Sarayaku v. Ecuador)*
– *Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits and Reparations, Judgment of 26 May 2010*
– *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 29 March 2006*
– *The "Street Children" (Villagran-Morales et al.) v. Guatemala, Merits, Judgment of 19 November 1999*
– *The 'Five Pensioners' v. Peru, Merits, Reparations and Costs, Judgment of 28 February 2003*
– *the 'Five Pensioners' v. Peru, Merits, Reparations and Costs, Judgment 28 February 2003*

- *The "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 September 2004*
- *The 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment of 5 July 2004*
- *The Barrios Family v. Venezuela. Merits, Reparations and Costs, Judgment, 24 November 2011*
- *The Constitutional Court v. Peru, Merits, Reparations and Costs, Judgment of 31 January 2001*
- *The Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2006*
- *The Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgement, 17 June 2005*
- *Velásquez-Rodríguez v. Honduras, Merits, Judgment of 29 July 1988;*
- *Vera Vera v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of 19 May 2011*
- *Vera Vera v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of 19 May 2011*
- *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 24 August 2010*
- *Ximenes-Lopes v. Brazil, Merits, Reparations and Costs, Judgment of 4 July 2006*
- *YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 June 2005*


## AFRICA COMMISSION ON HUMAN AND PEOPLES' RIGHTS


- *Communications 54/91–61/91–96/93–98/93–164/97–196/97–210/98: Malawi Africa Association et al v. Mauritania (joined), decision on merits, 27th Ordinary Session of ACoHPR, 11 May 2000*
- *Communication 27/99: Democratic Republic of Congo/Burundi, Rwanda, Uganda, decided on merits, 33rd Ordinary Session of ACoHPR (03 May 2003)*
- *Communication 368/09: Abdel Hadi, Ali Radi & Others v Republic of Sudan (hereafter Hadi et al v. Sudan)*
- *Communication 279/03–296/05: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan, decided on merits, 45th Ordinary Session (13 to 27 May 2009)*
- *Communications 147/95 and 149/96 (joined): Sir Dawda K Jawara / The Gambia: Jawara v. Gambia, decision on merits of 11 May 2000*
- *Communications 105/93–128/94–130/94–152/96: Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project/Nigeria (joined), decided on merits, 24th Ordinary Session (31 October 1998)*
- *Communications 137/94–139/94–154/96–161/97: International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria (joined), decided on merits, 24th Ordinary Session (31 October 1998)*
- *Communication 223/98: Forum of Conscience v Sierra Leone, decision on merits*

- *Communication 323/06: Egyptian Initiative for Personal Rights and Interights v Egypt, 10th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, 12 to 16 December 2011*
- *Communication 368/09: Abdel Hadi, Ali Radi & Others v Republic of Sudan, decision on merits, 54th Ordinary Session of the African Commission on Human and Peoples' Rights, 22 October to 5 November 2013*
- *Communication 334/06: Egyptian Initiative for Personal Rights and Interights v. Egypt, decision on merits, 9th Extra-Ordinary Session, 23 February to 3 March 2011*
- *Communication 294/04: Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (IHRDA) (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe, 6th Extra-Ordinary Session of the ACoHPR, April 2009*
- *Communication 241/01: Purohit and Moore v. Gambia, decision on merits, 33rd Ordinary Session of the African Commission, May 2003.*
- *Communication 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, merits, 46th Ordinary Session of the AfCoHPR, 11th–25 November 2009*
- *Comunications 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, decision on merits, 30th Ordinary Session,13th to 27th October, 2001*
- *Communication 379/09: Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, decision on merits, 15th Extra Ordinary Session of the AfCoHPR, 07 to 14 March 2014*
- *Communication 295/04: Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe, merits, 51st Ordinary Session, 18 April to 2 May 2012*


## EUROPEAN COURT OF HUMAN RIGHTS


- *Airey v. Ireland (Application No. 6289/73), Judgment, 9 October 1979: Airey v. Ireland*
- *Aksoy v. Turkey (Application no. 21987/93), Judgment of 18 December 1996*
- *Al-Dulimi and Montana Management Inc. v. Switzerland (Application No. 5809/08), Judgment of 26 November 2013*
- *Andrejeva v. Latvia (Application No. 55707/00) [GC] Judgment of 18 February 2009*
- *Béláné Nagy v. Hungary (Application no. 53080/13) [GC], Judgment of 13 December 2016*
- *Buckley v. UK (Application No. 20348/92), Judgment, 29 September 1996*
- *Budayeva and others v. Russia (Applications Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) (joined), Judgment of 20 March 2008*
- *Case of United Communist Party of Turkey and Others v. Turkey (133/1996/752/951), Judgement of 30 January 1998 (hereafter United Community Part et al v. Turkey)*
- *Chapman v. UK (Application No. 27238/95) [GC], Judgment, 18 January 2001*
- *Connors v. The United Kingdom (Application No. 66746/01), Judgment of 27 May 2004*
- *D.H. and Others v. the Czech Republic (Application No. 57325/00), Judgment of 13 November 2007*
- *Deumeland v. Germany (Application No. 9384/81), Judgment of 29 May 1986*

- *Esmukhambetov and Others v. Russia (Application No. 23445/03), Judgment of 29 March 2011*
- *Enver Şahin v. Turkey (Application No. 23065/12), Judgment 30 Of January 2018*
- *Fadeyeva v. Russia (Application No. 55723/00), Judgment, 9 June 2005*
- *Feldbrugge v. The Netherlands (Application no. 8562/79), Judgment of 29 May 1986*
- *G.R. v. The Netherlands (Application No. 22251/07), Judgment of 10 January 2012*
- *Gaygusuz v. Austria (Application No. 17371/90), Judgment of 16 September 1996*
- *Golder v. the United Kingdom (Application No. 4451/70), Judgment of 21 February 1975*
- *v. The United Kingdom (Application No. 25680/94), Judgment of 11 July 2002*
- *Jehovah's Witnesses of Moscow and Others v. Russia (Application No. 302/02), Judgment of 10 June 2010*
- *Klein v. Austria (Application No. 57028/00), Judgment 3 March 2011*
- *López Ostra v. Spain (Application No. 16798/90), Judgment of 9 December 1994 (hereafter López Ostra v. Spain)*
- *M.S. v. the United Kingdom (Application No. 24527/08), Judgment 3 May 2012*
- *M.S.S. v. Belgium and Greece (Application No. 30696/09), Judgment of 21 January 2011*
- *McCann and others v. United Kingdom (Application No 18984/91), Judgment of 27 September 1995*
- *McFarlane v. Ireland (Application no. 31333/06), Judgement of 10 September 2010*
- *Öneryildiz v. Turkey (Application no. 48939/99) [GC], Judgment of 30 November 2004*
- *Orchowski v. Poland (Application No. 17885/04), Judgment of 22 October 2009*
- *Orsus and Others v. Croatia (Application No. 15766/03) [GC], Judgement of 16 March 2010*
- *Oyal v. Turkey (Application No. 4864/05), merits, judgment of 23 March 2010*
- *Rantsev v. Cyprus and Russia (Application No. 25965/04), Judgment of 7 January 2010*
- *Refah Partisi (The Welfare Party) and Others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) (joined) [GC]), Judgment, 13 February 2003 (Welfare Party et al v. Turkey)*
- *Sampanis and Others v. Greece (Application No. 32526/05, Judgment of 5 June 2008*
- *Vintman v. Ukraine (Application No. 28403/05), Judgment of 23 October 2014*


## EUROPEAN COMMITTEE OF SOCIAL RIGHTS


- *Austin-Europe v. France (Complaint No.13/2002), decision on merits of 4 November 2003;*
- *Centre on Housing Rights and Evictions (COHRE) v. Croatia (Complaint No. 52/2008), decision on merits of 22 June 2010*
- *Centre on Housing Rights and Evictions (COHRE) v. Italy (Complaint No. 58/2009), decision on merits of 25 June 2010*
- *Centre on Housing Rights and Evictions COHRE v. France (Complaint No. 63/2010), decision on merits of 28 June 2011*
- *Confédération Française Démocratique du Travail (CFDT) v France (Complaints No.50/2008), decision on merits of 9 September 2009*

- *Defence for Children International (DCI) v. the Netherlands (Complaint No. 47/2008), decision on merits of 20 October 2009*
- *European Federation of National Organisations working with the Homeless (FEANTSA) v. France (Complaint No. 39/2006), decision on merits of 5 December 2007*
- *European Roma Rights Center v. Greece (Complaints No.15/2003), decision on merits of 4 December 2004*
- *European Roma Rights Centre (ERRC) v. Bulgaria (Complaint No. 46/2007) decision on merits of 3 December 2008*
- *European Roma Rights Centre (ERRC) v. Bulgaria (Complaint No. 48/2008), decision on merits of 18 February 2009*
- *European Roma Rights Centre (ERRC) v. France (Complaint No. 51/2008), decision on merits of 19 October 2009*
- *European Roma Rights Centre v. Bulgaria (Complaint No. 31/2005), decision on merits of 18 October 2006*
- *European Roma Rights Centre v. Italy (Complaint No. 27/2004), decision on merits of 7 December 2005*
- *European Roma Rights Centre v. Portugal (Complaint No. 61/2010), decision on merits of 30 June 2011*
- *Fédération européenne des Associations nationales travaillant avec les Sans-abri (FEANTSA) v. Slovenia (Complaint No. 53/2008), decision on merits of 8 September 2009*
- *International Federation of Human Rights Leagues (FIDH) v. France (Complaint No. 14/2003), decision on the merits of 8 September 2004*
- *International Movement ATD Fourth World v. France (Complaint No. 33/2006), decision on merits of 5 December 2007*
- *Marangopoulos Foundation for Human Rights (MFHR) v. Greece (Complaint No. 30/2005), decision on merits of 6 December 2006*
- *Mental Disability Advocacy Center (MDAC) v. Bulgaria (Complaints No.41/2007), decision on merits, 3 June 2008*


## COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS


- *I.D.G. v. Spain (Communication No. 2/2014, UN Doc. E/C.12/55/D/2/2014) decision on merits of 17 June 2015*
- *Marcia Cecilia Trujillo Calero v. Ecuador (Communication No. 10/2015, UN Doc. E/C.12/63/D/10/2015) decision on merits of 26 March 2018*
- *Miguel Ángel López Rodríguez v. Spain (Communication No.1/2013, UN Doc. E/C.12/57/D/1/2013) decision on merits of 4 March 2016*
- *Mohamed Ben Djazia and Naouel Bellili v. Spain (Communication No.5/2015, UN Doc. E/C.12/61/D/5/2015) decision on merits of 20 June 2017*

## COMMITTEE ON RIGHTS OF PERSONS WITH DISABILITIES


- *A.F. v. Italy (Communication No. 9/2012, UN Doc. CRPD/C/13/D/9/2012) decision on merits of 27 March 2015*
- *Simon Bacher v. Austria (Communication No. 26/2014, UN Doc. CRPD/C/19/D/26/2014) decision on merits of 16 February 2018*
- *F v. Austria (Communication No. 21/2014, UN Doc. CRPD/C/14/D/21/2014) decision on merits of 21 August 2015*
- *Fiona Given v. Australia (Communication No. 19/2014, UN Doc. CRPD/C/19/D/19/2014) decision on merits of 16 February 2018*
- *Gemma Beasley v. Australia (Communication No. 11/2013, UN Doc. CRPD/C/15/D/11/2013) decision on merits of 1 April 2016*
- *H.M. v. Sweden (Communication No. 3/2011, UN Doc. CRPD/C/7/D/3/2011) decision on merits of 19 April 2012*
- *J.H. v. Australia (Communication No. 35/2016, UN Doc. CRPD/C/20/D/35/2016) decision on merits of 31 August 2018*
- *Liliane Gröninger v. Germany (Communication No. 2/2010, UN Doc. CRPD/C/D/2/2010) decision on merits of 4 April 2014*
- *Boris Makarov v. Lithuania (Communication No. 30/2015, UN Doc. CRPD/C/18/D/30/2015) decision on merits of 18 August 2017*
- *Marie-Louise Jungelin v. Sweden (Communication No. 5/2011, UN Doc. CRPD/C/12/D/5/2011) decision on merits of 2 October 2014*
- *Marlon James Noble v. Australia (Communication No. 7/2012, UN Doc. CRPD/C/16/D/7/2012), decision on merits of 2 September 2016*
- *Michael Lockrey v. Australia (Communication No. 13/2013, UN Doc. CRPD/C/15/D/13/2013) decision on merits of 1 April 2016*
- *Munir al Adam v. Saudi Arabia (Communication No. 38/2016, UN Doc. CRPD/C/20/D/38/2016), decision on merits of 20 September 2018*
- *Szilvia Nyusti and Péter Takács v. Hungary (Communication No. 1/2010, UN Doc. CRPD/C/9/D/1/2010) decision on merits of 16 April 2013*
- *V.F.C. v. Spain (Communication No. 34/2015, UN Doc. CRPD/C/21/D/34/2015) decision on merits of 2 April 2019*
- *X v. Argentina (Communication No. 8/ 2012, UN Doc. CRPD/C/11/D/8/2012) decision on merits of 11 April 2014*
- *X v. United Republic of Tanzania (Communication No. 22/2014, UN Doc. CRPD/C/18/D/22/2014) decision on merits of 18 August 2017*
- *Y v. United Republic of Tanzania (Communication No. 23/2014, UN Doc. CRPD/C/20/D/23/2014) decision on merits of 31 August 2018*
- *Zsolt Bujdoso et al v. Hungary (Communication No. 4/2011, UN Doc. CRPD/C/10/D/4/2011) decision on merits of 9 September 2013*

## HUMAN RIGHTS COMMITTEE


- *Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of Communications Received under the Optional Protocol to the International Covenant on Civil and Political Right, Adopted at its 113th Session, 16 March-2 April 2015, Annual Report 2015, UN Doc. CCPR/C/113/4*
- *Consideration by the Human Rights Committee at its 114th, 115th and 116th sessions of Communications Received under the Optional Protocol to the International Covenant on Civil and Political Right, Adopted at its 116th Session, 7–31 March 2016, Annual Report 2016, UN Doc. CCPR/C/116/3*
- *Consideration by the Human Rights Committee at its 117th, 118th and 119th sessions of Communications Received under the Optional Protocol to the International Covenant on Civil and Political Right, Adopted at its 119th Session, 6–29 March 2017, Annual Report 2017, UN Doc. CCPR/C/119/3*


## GENERAL COMMENTS, RESOLUTIONS AND REPORTS


- *ACoHPR, Principles and Guidelines on Implementation of Economic Social and Cultural Rights in the African Charter adopted by the African Commission on its 50th Ordinary Session, 24 October 2011*
- *ACoHPR, State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) adopted on 24 November 2011*
- *CEDAW General Recommendation No. 23: Political and Public Life, adopted in Sixteenth Session (1976);*
- *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12), adopted in its Twenty-second Session (2000)*
- *CESCR General Comment No. 16: The equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural rights (art. 3), adopted in its Forty-four Session*
- *CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), adopted in its Forty-second Session (2009)*
- *CESCR General Comment No. 3: The nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), adopted in Fifth Session (1990)*
- *CESCR General comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), adopted in its Sixth Session (1991)*
- *CESCR General comment No. 7: The right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions, adopted in its Sixteenth Session (1997)*
- *CESCR General Comment No. 9: The Domestic Application of the Covenant, adopted in its Nineteenth Session (1998)*
- *CRC General Comment No. 12: The Right of The Child to Be Heard, adopted in Fifty-first Session (2009);*

- *CRPD General Comment No. 1 Article 12: Equal Recognition before the Law, adopted in Eleventh Session (2014);*
- *CRPD General Comment No. 1: Article 12 (Equal Recognition before the Law), adopted in its Eleventh Session (2014)*
- *GA Res 60/1. 2005 World Summit Outcome, A/RES/60/1*
- *General comment No. 28: Article 3 (The Equality of Rights between Men and Women), adopted in its Sixty-eighth session (2000)*
- *General comment No. 4: Article 3 (Equal right of Men and Women to the Enjoyment of All Civil and Political Rights), adopted in its Thirteenth session (1981)*
- *HRC General Comment No. 18: Non-discrimination, adopted in its Thirty-seventh session (1989)*
- *HRC General Comment No. 25: Article 25 (Participation in the Public Affairs and the Right to Vote), adopted in its Fifty-seventh Session (1996);*
- *HRC General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted in Eightieth Session (2004)*
- *HRCo Res 19/36: Human Rights, Democracy and the Rule of Law, A/HRC/RES/19/36 (19 April 2012);*
- *HRCo Res 19/11: Rights of Persons with Disabilities: Participation in Political and Public Life, A/HRC/RES/19/1*
- *HRCo Res 24/8: Equal Political Participation, A/HRC/RES/24/8;*
- *HRCo Res 27/24: Equal Participation in Political and Public Affairs, A/HRC/RES/27/24;*
- *Human Development Report (UNDP 1993)*
- *IACoHR, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007*
- *IACoHR, Access to Justice for Women Victims of Sexual Violence: Education and Health, OEA/Ser.L/V/II. Doc. 65, 28 December 2011 (hereafter IACoHR's Report on Access to Justice for Women Victims of Violence);*
- *IACoHR, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights, OEA/Ser.L/V/II.132 Doc. 14, 19 July 2008.*
- *IACoHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009*
- *IACoHR, Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application, OEA/Ser.L/V/II. 143 Doc. 60, 3 November 2011*
- *IACoHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, 5 December 2011*
- *IACoHR, The Work, Education and Resources of Women: the Road to Equality in Guaranteeing Economic, Social and Cultural Rights, OEA/Ser.L/V/II.143 Doc. 59, 3 November 2011*
- *OHCHR Report on Factors That Impede Equal Political Participation and Steps to Overcome Those Challenges, A/HRC/27/29 (30 June 2014);*
- *OHCHR Report on Preventable Maternal Mortality and Morbidity and Human Rights, A/HRC/14/39*
- *OHCHR Report, E/2008/76*

- *OHCHR Report, Promotion, Protection and Implementation of the Right to Participate in Public Affairs in the Context of the Existing Human Rights Law: Best Practices, Experiences, Challenges and Ways to Overcome Them, A/HRC/30/26*
- *OHCHR, Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda (OHCHR and Centre for Economic Social and Cultural Rights, 2013)*
- *Report of the Secretary-General on the Question of the Realization in all Countries of Economic, Social and Cultural Rights, A/HRC/22/24*
- *Report of the Secretary-General on the Question of the Realization in all Countries of Economic, Social and Cultural Rights, A/HRC/28/35*
- *Report of the Secretary-General on the Question of the Realization in all Countries of Economic, Social and Cultural Rights, A/HRC/25/31*
- *WHO Report, The Health of the People: the African Regional Health Report (WHO 2006)*
- *WHO Report, The World Health Report 2008: Primary Health Care, Now More Than Ever (WHO 2008)*
- *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, South Africa, Durban, 31 August – 8 September 2001 (hereafter Durban Declaration)*


## HUMAN RIGHTS TREATIES AND DECLARATIONS


- *Additional Protocol to the American Convention on Human Rights on the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted 14 November 1988, entered into force 16 November 1999*
- *African Charter on Human and Peoples' Rights, adopted 17 June 1981, entered into force 21 October 1986*
- *African Charter on the Rights and Welfare of Child, adopted 11 July 1990, entered into force 29 November 1999*
- *American Convention on Human Rights, signed 1969 entered into force 18 July 1978*
- *Charter of the Organization of the American States, signed in 1948 and amended by the Protocol of 'Buenos Aires' in 1967, of Cartagena de Indias in 1985, of Washington in 1982, and of Managua in 1993*
- *Charter of the Origanisation of African Unity, signed 25 May 1963, entered into force 13 September 1963*
- *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 1989, entered into force 1991*
- *Convention on Elimination of All Forms of Discrimination against Women, adopted 18 December 1979 by General Assembly Resolution 34/180, entered into force 3 September 1981*
- *Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008*
- *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14*
- *European Social Charter (Revised), adopted and opened for signature 3 May 1996, entered force 1 July 1999*

- *European Social Charter, 18 October 1961, entered into force 26 February 1965*
- *European Union Charter on Fundamental Rights signed and proclaimed in 2000*
- *International Covenant on Civil and Political Rights, adopted 16 December 1966 by General Assembly Resolution 2200 A (XXI), entered into force 23 March 1976*
- *International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 by General Assembly Resolution 2200 A (XXI), entered into force 3 January 1976*
- *Optional Protocol to the Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008*
- *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted o 10 December 2008, GA Res A/RES/63/117, entered into force 5 May 2013*
- *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005*
- *The Constitutive Act of the African Union, adopted 11 July 2000, entered into force 2001*
- *The Declaration on the Rights to Development, adopted 4 December 1986 by General Assembly Resolution 41/128*
- *The International Convention on the Protection of All Migrant Workers and Members of Their Families, signed 18 December 1990, entered into force 1 July 2003*
- *The Statute of the Council of Europe as amended by Protocols Nos. 6, 7, 8 and 11, opened for signature 05 May 1949, entered into force 03 August 1949*
- *United Nation Convention on the Rights of Child, signed 20 November 1989, entered into force 02 September 1990*
- *United Nations Declaration on the Rights of Indigenous Peoples, adopted 13 September 2007 by General Assembly Resolution 61/295*
- *Universal Declaration of Human Rights, adopted 10 December 1948 by General Assembly Resolution 217 (III)*

# SAMENVATTING

De centrale vraag in dit onderzoek was welke normatieve rechtvaardiging kan worden gevonden voor in het internationaal recht gegarandeerde economische, sociale en culturele mensenrechten (ESC rechten) en hoe deze rechtvaardiging van invloed is, of zou moeten zijn, op verplichtingen van Staten die voortvloeien uit deze rechten. De specifieke rechtsvragen de beantwoord moesten worden waren of en op welke wijze menselijke waardigheid (*human dignity*) een aanvaardbare normatieve rechtvaardiging kan zijn voor internationale ESC rechten, welke concrete verplichtingen hieruit voortvloeien voor Staten en op welke wijze deze verplichtingen zichtbaar zijn in de jurisprudentie van internationale instellingen die toezicht houden op de naleving hiervan. Dit omvatte ook de vraag naar de aard van de juridische verplichtingen van Staten ten opzichte van kwetsbare personen binnen hun jurisdictie. Deze vragen komen voort uit de huidige beperkingen en inhoudelijke voortgang in het academische debat, alsmede de beperkte afdwingbaarheid van ESC rechten in de praktijk. De doelstelling van deze studie was om een nieuw perspectief te bieden op de normatieve rechtvaardiging en de effectieve implementatie van ESC rechten in de praktijk; in andere woorden de studie beoogde om te verduidelijken hoe we de normatieve rechtvaardiging en de aard van ESC rechten moeten begrijpen en wat de concrete juridische verplichtingen zijn die hieruit voortvloeien zowel in algemene zin als in de specifieke context van kwetsbare groepen.

De beantwoording van bovenstaande vragen en het verwerkelijken van de doelstelling van de studie vereisten een stap-voor-stap ontwikkeling van een keten van argumenten. Ten eerste, is onderzocht hoe de verschillende bestaande opvattingen over het idee van mensenrechten een negatieve impact hebben gehad op het regime van ESC rechten in het algemeen. In dit opzicht liet het de moeilijkheden zien om binnen de gangbare mensenrechtenopvattingen de status van ESC rechten als mensenrechten te rechtvaardigen. Hieruit volgde de behoefte aan een alternatieve opvatting die een praktische en holistische kijk op mensenrechten omvat. Daarom werd in deze studie een alternatief voorgesteld en verdedigd. Ten tweede omvatte deze studie een beknopte bespreking van de belangrijkste mensenrechtentheorieën. De reden voor deze bespreking was het identificeren van de essentiële waarden die ten grondslag liggen aan de kijk op mensenrechten in deze theorieën en om te laten zien wat de tekortkomingen zijn van deze theorieën en hun waarden voor de rechtvaardiging van ESC rechten als inherente mensenrechten. Als derde, en in feite de meest belangrijke stap, is in deze studie een

gedetailleerd onderzoek gedaan naar het idee en beginsel van menselijke waardigheid als de normatieve grondslag van alle mensenrechten om hiermee een steviger theoretisch onderbouwing van het idee en de functie van mensenrechten te geven. Tot slot analyseerde deze studie de specifieke inhoud van de juridische verplichtingen voor de Staat die voortvloeien uit ESC rechten indien benaderd op basis van het beginsel van menselijke waardigheid. De eerste drie stappen werden in Deel 1 van de studie uitgewerkt in Hoofdstukken 2 t/m 4 en de laatste stap in Deel 2 van de studie, in Hoofdstukken 5 t/m 9.

Om dit te kunnen doen werden twee niveaus van analyse (onderzoeksmethoden) gebruikt. Op het eerste niveau, in Deel 1 van de studie, werden de theoretische problemen bij de effectieve realisering van ESC rechten besproken. De bespreking in dit Deel verduidelijkte hoe we de normatieve kern en rechtvaardiging van ESC rechten kunnen opvatten en wat hun praktische belang is in het licht van het beginsel van menselijke waardigheid. Op het tweede niveau werd een inductieve benadering gekozen om de internationale ESC rechten jurisprudentie te analyseren om de normatieve betekenis en vereisten van het beginsel van menselijke waardigheid te beoordelen, alsmede de concrete en dwingende juridische verplichtingen voor Staten bij de verwerkelijking van ESC rechten op basis van respect voor het leven en waarde van mensen. De discussie in Deel 2 probeerde daarmee inhoud te geven (te concretiseren) wat Statelijke verplichtingen zijn om een waardig menselijk leven te respecteren en te verzekeren in het kader van ESC rechten.

Hoofdstuk 2 benoemde twee belangrijke en gerelateerde opvattingen over mensenrechten die direct en indirect de normatieve status en praktische betekenis van ESC rechten hebben beïnvloed. De eerste is de hiërarchische opvatting die, geworteld in de positief-constitutionalistische kijk op rechten, geen juridisch belang toekent aan morele rechten die niet zijn erkend in het positieve recht. Aangezien ESC rechten zelden worden erkend in moderne constituties of positief recht als fundamentele mensenrechten, is het nauwelijks mogelijk om deze rechten als inherente mensenrechten te rechtvaardigen en te verdedigen op basis van deze hiërarchische opvatting over mensenrechten. Als tegenargument is betoogd dat de status en betekenis van een mensenrecht beoordeeld en bepaald zou moeten worden op basis van de onderliggende normatieve (morele) beginselen waarmee het wordt gerechtvaardigd in plaats van de formele plaats op de hiërarchische ladder in een rechtssysteem. De tweede opvatting vloeit voort uit het gedichotomiseerde ideologische onderscheid tussen de liberaal-individualistische en collectief-welfaristische kijk op mensenrechten. Volgens de liberaal-individualistische opvatting zijn de enige individuele rechten de negatieve rechten die de Staat verplichten individuen met rust te laten. ESC rechten zijn geen werkelijke mensenrechten omdat zij van de Staat vereisen om positieve actie te ondernemen in plaats van zich te onthouden van activiteiten. Echter, beargumenteerd is dat een formeel begrip van mensenrechten dat gestoeld is op deze opvatting niet helpt

bij het oplossen van de meest fundamentele vraagstukken van menselijk leven in een politieke maatschappij, aangezien het een opvatting is die te abstract is en in hoge mate ontkoppeld is van het praktische sociale leven van individuen. Daarom suggereerde deze studie, daarbij ondersteund door MacCallum en Alexy, dat mensenrechten beter gezien kunnen worden als een normatieve triadische verhouding (driehoeksverhouding) tussen individuen en hun (sociale) omgeving. In de triadische kijk op mensenrechten is de belangrijkste vraag of een persoon vrij is om een waardig menselijk leven te leiden. Iemand die geen toegang heeft tot essentiële materiële voorwaarden om te leven zoals voedsel, gezondheidszorg en huisvesting, is noch vrij, noch in staat een waardig menselijk leven te leiden, ongeacht de reden(en) voor het gebrek aan toegang tot deze voorwaarden. Derhalve geeft de triadische opvatting een robuustere en praktischere kijk op het idee van mensenrechten en de rol van de Staat in een politieke maatschappij.

Hoofdstuk 3 onderzocht de controverses die voortkwamen uit de hiërarchische en gedichotomiseerde kijk op mensenrechten in het licht van de belangrijkste bestaande mensenrechtentheorieën. De bespreking in dit Hoofdstuk was vooral gericht op door het benoemen van de drijvende kracht van de onderliggende waarden in elk van deze theorieën om daarmee inzicht te verwerven hoe in elk van deze theorieën de relatie is tussen individuele rechten aan de ene kant en algemene publieke belangen aan de andere kant. Dit is gebaseerd op de overtuiging dat het fundamentele verschil van mening over het idee, aard en functie van mensenrechten in de kern draait om deze twee kernpunten. Met betrekking tot het eerste punt is gevonden dat waar sommige van deze theorieën het idee van autonomie en autonome mensen verdedigen en ondersteunen, andere theorieën collectieve (algemene publieke) belangen benadrukken. Echter, aangetoond werd dat zowel op autonomie gebaseerde als de op het collectieve belang gebaseerde theorieën te beperkt zijn om in veelomvattende zin te kunnen verklaren en rechtvaardigen wat mensenrechten zijn en waarvoor zij bedoeld zijn. Met betrekking tot het tweede punt is gevonden dat zowel de op autonomie gebaseerde theorieën als de op collectieve belangen gebaseerde theorieën op enigerlei wijze een onderscheidende (antagonistische) kijk op de relatie tussen individuele mensenrechten en collectieve belangen bevorderen. Aangezien dit ernstige beperkingen vormen van de besproken theorieën, kan geen daarvan een holistische verklaring geven voor de aard en functies van mensenrechten in een politieke maatschappij. Dit impliceert dat er behoefte is aan een mensenrechtentheorie die ge(re)construeerd zou moeten worden op basis van diepere en inclusieve waarden en die individuele mensenrechten en collectieve belangen als een samenhangend en ongedeeld geheel kan rechtvaardigen.

Om dit te kunnen bereiken is het noodzakelijk om, ten eerste, het idee van mensenrechten als een sociaal idee te herformuleren en uit te leggen en, ten tweede, om het begrip en implicaties van een praktisch-intuïtieve benadering van menselijke waardigheid te onderzoeken en te verdedigen. Het tweede deel van

Hoofdstuk 3 introduceerde en besprak hiervoor het idee van een sociale opvatting van mensenrechten als een waardevol gedachtenkader voor de ontwikkeling van de kernelementen en doeleinden van het praktische sociale idee van mensenrechten. De sociale opvatting van mensenrechten beschouwt het idee van mensenrechten als geworteld in de menselijke behoefte te reageren op praktische sociale noden die het leven van mensen in een politieke maatschappij beïnvloeden. Dit vloeit voort uit de praktische en complexe sociale relaties die mensen opbouwen tussen elkaar en met hun omgeving. Als zodanig is het idee van mensenrechten vooral gemunt in een taal van strijd en verzet tegen verschillende vormen van vernedering, uitsluiting, misbruik, discriminatie, onrechtvaardigheid enzovoorts, die mensen raken in het proces van samenleven als een politiek (relationeel) wezen. Deze benadering veronderstelt en steunt op het relationele karakter van het menszijn. Beargumenteerd werd dat dit sociale relaties opvat als in wezen morele relaties aangezien deze noodzakelijkerwijs gevormd worden door de menselijke behoefte aan bescherming, voortbestaan en bevordering van hun inherente morele waarde. Dit verklaart ook de primaire sociale functie of de raison d'être van de normatieve idee van mensenrechten in een politieke samenleving. Op deze wijze is het mogelijk om het moderne idee van mensenrechten zoals erkend in verschillende mensenrechten instrumenten, te zien als de bevordering van de relationeel-morele aard van mensen, en de specifieke mensenrechten normen daarin als een weerslag en verdere concretisering van onderliggende morele beginselen en vooronderstellingen in sociale relaties.

De rechtvaardiging van het idee van sociale relaties als morele relaties vereist een centrale organiserend en overkoepelend moreel beginsel. Derhalve werd in Hoofdstuk 4, het belangrijkste hoofdstuk van de studie, dit fundamentele morele beginsel in detail onderzocht: het beginsel van menselijke waardigheid. Echter, om het beginsel van menselijke waardigheid de normatieve grondslag te laten zijn van mensenrechten, moet aangetoond worden, ten eerste, dat waardigheid zelf een inherente morele waarde is van ieder mens; ten tweede, dat waardigheid gelijkelijk, onvoorwaardelijk en altijd aanwezig is in iedere persoon; en ten slotte dat waardigheid gezien wordt als een universele morele waarde.

Dit maakte het noodzakelijk om in detail de historisch-filosofische opvatting en het hedendaags praktisch gebruik van het idee van menselijke waardigheid te onderzoeken. Het historisch-filosofische onderzoek liet zien dat er twee kernopvattingen zijn ontwikkeld in de loop der tijd: waardigheid als rang en status en waardigheid als een inherente (intrinsieke) morele menselijke waarde. De overgang van waardigheid als rang en status naar waardigheid als inherente morele waarde heeft zich voltrokken in een complex proces in de intellectuele geschiedenis. Echter, ondanks deze in de loop van de tijd ontwikkelde verschillende opvattingen, werd aangetoond dat de normatieve kernbetekenis van deze notie hetzelfde bleef, namelijk het beginsel van respect. Het verschil was dat waar waardigheid in rang en status verwijst naar respect voor bepaalde categorieën van per-

sonen (zij die een bepaalde sociale positie bekleden of over bepaalde kenmerken beschikken zoals de rede), verwijst waardigheid als een inherent moreel menselijk beginsel naar respect voor elk mens, ongeacht zijn of haar sociale rang (status) of (beperkte) capaciteit tot rationeel denken (zoals kinderen of geestelijk beperkten). Er zijn inderdaad verschillende tegenstrijdige theorieën over de rechtvaardiging van waardigheid als inherent morele menselijke waarde, variërend van religieuze argumentaties tot de metafysische argumentaties van Immanuel Kant. Hoofdstuk 4 liet de ernstige tekortkomingen en beperkingen zien die samenhangen met deze benaderingen en bood een alternatief perspectief door te beargumenteren dat de rechtvaardiging van waardigheid als een inherente waarde ons verplicht een meer praktische benadering te kiezen gebaseerd op een intuïtieve interpretatie van de aard van mensen en de complexe sociale relaties die zij onderhouden met elkaar en hun omgeving. Dit betekende dat het idee van waardigheid zou moeten worden losgemaakt van dergelijke abstracte, arbitraire en beperkende factoren en daarentegen zou moeten worden gerechtvaardigd op basis van een stabiele en universeel geldige grondslag die gewoonlijk elk mens bezit. Het werd benadrukt dat het enige natuurlijke en onveranderlijke bezit van mensen het feit is van hun menszijn of hun menselijkheid. In navolging van Sulmasy en Nussbaum betoogde Hoofdstuk 4 dat waardigheid gezien moet worden een inherente en onvoorwaardelijke waarde die toebehoort aan elk mens vanwege het zijn van een menselijke persoon. In de praktisch-intuïtieve zin, bestaat menselijkheid (het feit van het mens zijn) uit twee onlosmakelijk verbonden elementen: het biologische (fysieke) element en het morele element. Het biologische element van menselijkheid volgt uit zijn dierlijke karakter. Mensen hebben een fysiek bestaan en persoonlijkheid en daarmee overeenkomende biologisch noodzakelijke en onmisbare materiele behoeften waaraan moet worden voldaan voor een waardig menselijk leven. Het morele aspect van menselijkheid, aan de andere kant, verklaart haar morele karakter. Mensen hebben een moreel bestaan en persoonlijkheid en daarmee de overeenstemmende noodzakelijke en onmisbare morele voorwaarden voor een waardig menselijk leven. Op deze wijze claimt het beginsel van menselijke waardigheid een onvoorwaardelijk respect voor zowel het biologische (fysieke) als het morele aspect van menszijn.

Dit laat zien dat het beginsel van menselijke waardigheid zowel een relationeel als een in essentie evaluatief normatief beginsel is. Als relationele norm vereist en zelfs veronderstelt het de aanwezigheid van dynamische en wederzijdse relaties tussen mensen; als een evaluatieve norm vereist het activiteiten en handelingen de overeenstemmen met de waarde van menselijkheid en verbiedt deze wanneer ze tegenstrijdig zijn aan de waarde van menselijkheid. Op deze wijze voegt het beginsel van menselijke waardigheid een fundamenteel ethisch-morele dimensie toe aan het idee van sociale relaties waarin toegestane en verboden activiteiten, gedragingen en praktijken onderscheiden kunnen worden in alle spectra van het menselijk leven en sociale relaties. Diepgaande beschouwing liet zien dat het ide-

aal van onvoorwaardelijk respect voor het leven en de menselijke waardigheid bestaat uit het zorg dragen voor de biologische en morele behoeften van menszijn. Hieruit volgde dat het beginsel van menselijke waardigheid (dan wel het ideaal van respect) een onvoorwaardelijk respect veronderstelt voor de biologische en morele voorwaarden voor een waardig menselijk leven.

Tegenwoordig zijn de kernvereisten voor menselijke waardigheid grotendeels geformuleerd in de vorm van specifieke nationale en internationale economische, sociale, culturele, burgerlijke en politieke mensenrechten. Het is daarmee mogelijk om te stellen dat, in het algemeen, de materiële (biologische) voorwaarden een centraal voorwerp zijn van garanties op het gebied van economische, sociale en culturele rechten, terwijl de inherente morele voorwaarden de kern vormen garanties op het gebied van burgerlijke en politieke rechten. Hieruit volgden twee cruciale punten die centraal stonden in dit onderzoek. Ten eerste, verschillende soorten mensenrechten (economisch, sociaal, cultureel, burgerlijk of politiek) die erkend zijn in diverse mensenrechteninstrumenten zijn niets meer dan de specifieke verwoording van wat het beginsel van respect voor het leven en de menselijke waardigheid betekent in een politieke maatschappij. Ten tweede, ESC rechten zijn gegrondvest in (volgen uit) hetzelfde onderliggende normatieve beginsel als burgerlijke en politieke rechten en schrijven Staten derhalve evenzeer dwingende verplichtingen voor. Deze verplichtingen van Staten bestaan in essentie uit het voor ieder mens verzekeren van de materiële voorwaarden voor een menswaardig leven. Daarom kan het probleem van ESC rechten niet het probleem van de rechtvaardiging (inhoud) zijn, maar veeleer het probleem van het verwoorden van de specifieke praktische toepassing; in andere woorden, het probleem betreft de moeilijkheid om te identificeren welke concrete juridische verplichtingen er rusten op Staten om de vereisten van het beginsel van menselijke waardigheid te verwezenlijken waar het de ESC rechten betreft. Dit onderwerp werd systematisch onderzocht in Deel 2 van de studie.

Het is inderdaad één ding om te stellen dat het beginsel van menselijke waardigheid een onvoorwaardelijk respect voor de inherente materiële voorwaarden voor leven betekent, maar het is iets anders om aan te geven waaruit de verplichtingen de Staat bestaan ter verzekering van de specifieke vereisten die uit het beginsel van menselijke waardigheid voortkomen. In deze studie is gekozen voor een inductieve benadering van dit probleem. Derhalve werd in Deel 2 een diepgravende analyse gemaakt van de juridische verplichtingen van Staten zoals ontwikkeld in ESC jurisprudentie. Na een grondige analyse van de praktijk van internationale mensenrechten tribunalen belast met de beslechting van geschillen over ESC rechten, concludeerde en argumenteerde deze studie dat de juridische verplichtingen van Staten om zorg te dragen voor de essentiële materiële levensvoorwaarden zoals gegarandeerd in ESC rechten regimes, twee dimensies omvatten: procedureel en inhoudelijk.

De procedurele dimensie bestaat uit de het zorgen voor eerlijke procedures (due process) die onmisbaar zijn voor de effectieve bescherming van ESC rechten. In verband hiermee onderscheidde deze studie drie fundamentele procedurele rechten waaruit de kern van het recht op eerlijke procedures bestaat: het recht op participatie (participation), toegang tot de rechter (access to justice) en verantwoording (accountability). Participatie ziet toe op het recht van iedereen om deel te nemen aan en een betekenisvolle stem te hebben in alle besluitvormingsprocessen die iemands rechten en vitale belangen raken. Het is erkend als een onderdeel van internationaal recht en als een fundamenteel beginsel gericht op de uitbanning of op zijn minst het tegengaan van uitsluitingspraktijken. Het verzekeren van het recht op participatie geeft daarmee een praktische invulling en bevestiging van de gelijke waardigheid en rechten van alle mensen in een politieke maatschappij. In Hoofdstuk 5 werd aangetoond dat het een betekenisvolle rol speelt in de bescherming van kwetsbare personen tegen discriminatie, sociale uitsluiting en marginalisatie. Met betrekking tot de reikwijdte werd vastgesteld dat de Staat verplicht is om te effectieve participatie bewerkstelligen van iedere betrokkene in alle besluitvormingsprocedures die essentiële sociaaleconomische belangen betreffen. De effectiviteit van participatie van individuen in een bepaald besluitvormingsproces wordt evenwel bepaald door de wijze waarop het wordt uitgevoerd in overeenstemming met de onderdelen waaruit het beginsel bestaat. Dat wil zeggen dat de participatie van (een groep van) individuen in een bepaald besluitvormingstraject betekenisloos is tenzij het relevant, zinnig, tijdig, transparant, met respect voor de waardigheid en de fundamentele rechten van de betrokken individuen en te goede trouw wordt uitgevoerd in overeenstemming van tevoren vastgestelde juridische standaarden. De bespreking in Hoofdstuk 5 liet duidelijk zien hoe het falen van Staten om bepaalde kwetsbare groepen te betrekken in besluitvormingsprocessen in het licht van deze vereisten heeft geresulteerd in ernstige schendingen van diverse ESC rechten.

Toegang tot de rechter vormt de kern van alle mensenrechten. Het vloeit direct voort uit de generieke juridische verplichting van de Staat om het vrije, volledige en effectieve uitoefening van mensenrechten te verzekeren voor iedereen binnen zijn jurisdictie. Het kerndoel is om te garanderen dat iedereen met een klacht betreffende de schending van mensenrechten toegang heeft tot een effectieve remedie. Het internationaal recht schrijft niet een specifieke institutionele of procedurele vorm voor. Het vereist niettemin dat, zoals in Hoofdstuk 6 in detail besproken, de Staat moet verzekeren dat zowel de instituties als de procedures ingericht zijn op basis van de basiselementen waaruit het recht op toegang tot de rechter bestaat. Daarom werd in Hoofdstuk 6, na grondige analyse van de inhoud en gevolgen van de elementen van toegang tot de rechter, beargumenteerd dat bij toepassing op rechtspraak betreffende ESC rechten het nodig is een weloverwogen en contextuele benadering te kiezen welke is gebaseerd op de aard van de problemen met ESC rechten en de kwetsbare positie van de (groepen van) indivi-

duen die klagen. Aan de ene kant zijn er klachten over ESC rechten op grond van sociaaleconomische keuzes of besluiten van de Staat waarbij de Staat exclusieve controle of toegang heeft tot de relevante en noodzakelijke informatie of bewijs die noodzakelijk is om de schending van de rechten vast te stellen; aan de andere kant worden dergelijke klachten vaak ingediend door personen die gebukt gaan onder armoede, discriminatie, uitsluiting of marginalisatie. Om deze redenen rust op de Staat een positieve verplichting om te zorgen dat een strikte en formele benadering van het recht op toegang niet resulteert in de een ondermijning van het specifieke te beschermen belang; dat de toegang passend en tegemoetkomend is voor de specifieke noden en belangen van kwetsbare personen in procedures over ESC rechten; en dat recht gedaan wordt aan het beginsel van rechtsstatelijkheid (rule of law) en democratische verantwoording door zorg te dragen voor prompte en effectieve naleving van toegekende van schadevergoeding. De besproken zaken in dit Hoofdstuk lieten duidelijk de problemen zien met betrekking tot zowel het weigeren van toegang tot de rechter als het falen van de Staat om een adequate weloverwogen en contextuele benadering te kiezen voor elk van de elementen van het recht op toegang in relatie tot ESC rechten.

Het beginsel van verantwoording omvat in het algemeen een complexe normatieve relatie tussen houders van mensenrechten en de Staat. In essentie betreft en geeft het concrete inhoud aan de algemene (overkoepelende) mensenrechtenverplichtingen van de Staat. Als zodanig verplicht het de Staat om een systeem te ontwerpen en te realiseren dat (groepen van) individuen in staat stelt om een rechtvaardiging te vragen voor zijn keuzes, om fouten recht te zetten bij het maken van de keuzes of in de implementatie van maatregelen, en voor het sanctioneren van zijn vertegenwoordigers of andere entiteiten die verantwoordelijk zijn voor gemaakte fouten. Het beginsel van verantwoordelijkheid verplicht de Staat ook om ervoor te zorgen dat het gedrag van particuliere entiteiten binnen zijn jurisdictie niet de uitoefening van ESC rechten belemmeren. Het is absoluut onmogelijk om een effectieve bescherming van mensenrechten te realiseren zonder een systeem voor verantwoordelijkheid. Dit geldt juist ook voor ESC rechten waarbij sociaaleconomische keuzes en besluiten van de Staat en zijn vertegenwoordigers meestal de oorzaak zijn of achtergrond vormen van schendingen van deze rechten. Met dit in gedachten onderzocht Hoofdstuk 7 de benaderingen van internationale mensenrechtenhoven en toezichthoudende instellingen van de verantwoordelijkheid (accountability) van de Staat bij het verzekeren van de materiële levensvoorwaarden. Dit liet zien dat de mensenrechtenhoven en toezichthoudende instellingen in het bijzonder terugvielen op het ideaal van de institutionele (objectieve) verantwoordelijkheid van de Staat in plaats van op de inhoudelijke verantwoordelijkheid. Het belangrijkste kenmerk van deze benadering is dat het zich niet bezighoudt met de interne verdeling van constitutionele en bestuurlijke bevoegdheden en functies van de Staat; ook houdt het zich niet bezig met fouten van (publieke) gezagsdragers of andere actoren. Het richt zich vooral op de vraag

of de rechthebbenden een effectief recht hebben op toegang tot en naleving van ESC rechten. Aangetoond werd hoe deze benadering van verantwoordelijkheid van groot belang is voor in het bijzonder de realisatie van ESC rechten. Bovendien lieten de zaken besproken in Hoofdstuk 7 in het bijzonder de rechtvaardigingen en de drie belangrijkste scenario's zien die leiden tot de institutionele verantwoordelijkheid van de Staat. Zo geeft de in de mensenrechtenjurisprudentie ontwikkelde gedachte van institutionele verantwoordelijkheid van de Staat een effectief antwoord op het probleem van de verdeling van verantwoordelijkheid bij de praktische realisatie van ESC rechten.

De inhoudelijke dimensie van de verplichting van Staten om de materiële levensvoorwaarden te respecteren en te verzekeren richt zich op essentiële minimumstandaarden om een menswaardig leven te leiden. Deze studie onderscheidde en besprak vier fundamentele mensenrechtenbeginselen die de inhoudelijke kern van het ESC rechten vormen. Dit zijn het beginsel van een waardig leven, gelijkheid, non-discriminatie, en de bescherming van individuen tegen kwetsbaarheid. In dit opzicht lieten Hoofdstukken 8 en 9 zien dat er uit de materiële verplichtingen van de Staat in essentie twee onderling samenhangende verplichtingen van de Staat voortvloeien. Ten eerste, de verplichting om te zorgen dat elk mens binnen zijn jurisdictie op basis van gelijkheid en zonder enige vorm van discriminatie toegang heeft tot een minimum niveau van materiële levensvoorwaarden. Ten tweede, de verplichting om voldoende en passende aandacht te hebben voor de minimaal noodzakelijk sociaaleconomische behoeften van kwetsbare personen in de samenleving.

De verplichting van de Staat om een waardig leven te verzekeren omvat een brede inhoudelijke mensenrechtelijke verplichting van de Staat. Zoals Hoofdstuk 8 liet zien, onderstreept het ideaal van een waardig leven een veelomvattender kijk op het recht op leven en waardigheid en in dit opzicht de holistische benadering van de bescherming van alle mensenrechten. Het vraagt in het bijzonder de Staat om te verzekeren dat alle individuen een onvoorwaardelijke toegang hebben tot minimum levensvoorwaarden om met menselijke waardigheid hun leven te leiden. Dit omvat brede negatieve en positieve verplichtingen van de Staat met betrekking tot sociaaleconomische voorwaarden en omstandigheden die het leven en de waardigheid van mensen bedreigen, ongeacht de aard en oorzaken van deze bedreigingen. De Staat is verplicht om te zorgen dat zijn sociaaleconomische keuzes en beslissingen onder geen enkele omstandigheid (groepen van) individuen de kern van de ESC rechten ontnemen. De in Hoofdstuk 8 besproken zaken geven een overtuigend bewijs hoe mensenrechtenhoven en toezichthoudende instanties de verplichtingen van de Staat om een waardig leven te garanderen hebben toegepast binnen de steeds uitbreidende sociaaleconomische vereisten variërend van omstandigheden in gevangenissen (detentie) tot milieuvoorwaarden.

Hoofdstuk 9 onderzocht de veelzijdige toepassingen van het beginsel van gelijkheid en non-discriminatie en de verplichtingen van de Staat om kwetsbare

personen een waardig leven te garanderen. Op grond van deze verplichtingen dient de Staat alle obstakels en beperkingen te verwijderen die een belemmering zijn om op voet van gelijkheid met anderen te deel te nemen aan alle aspecten van het leven; te verzekeren dat alle kwetsbare personen toegang hebben tot en gebruik kunnen maken van alle goederen, diensten en kansen die open staan voor alle mensen; om voldoende en passende aandacht te geven aan de specifieke behoeften van elke categorie van kwetsbare personen bij al zijn sociaaleconomische beslissingen; te verzekeren dat zijn besluiten geen onnodige en oneigenlijke last vormen voor kwetsbare personen; en om alle kwetsbare personen te beschermen tegen sociale uitsluiting, marginalisatie en armoede. In het bijzonder liet Hoofdstuk 9 zien dat mensenrechtenhoven en toezichthoudende instanties de opvatting hebben dat de Staat een zware verplichting heeft om prioriteit te geven aan de zorg voor een waardig leven voor alle kwetsbare personen. Voor alles is de Staat verplicht om ervoor te zorgen dat passende prioriteit gegeven wordt aan hun specifieke behoeften, zelfs onder moeilijke economische omstandigheden. Dit wordt bij uitstek gezien als een minimum kernverplichting van de Staat en daarmee als een lakmoesproef voor de algehele legitimiteit van zijn algemene sociaaleconomische beleid en maatregelen.

Op grond van al deze theoretische en jurisprudentiële argumenten heeft deze studie in Hoofdstuk 10 een aantal aanbevelingen geformuleerd. Een holistische en praktische opvatting van mensenrechten behoeft noodzakelijkerwijs een ideaalbeeld van wat het betekent om te zijn en te leven als een vrij en waardig mens in een politieke maatschappij, evenals voorkennis van en kritische reflectie op de relationele aard van mensen. Dit is een belangrijke bijdrage vanuit de sociale opvatting van mensenrechten omdat deze benadering het idee en de functie van mensenrechten plaatst in de context van sociale relaties in een politieke maatschappij. Sociale relaties zijn in essentie morele relaties geworteld in menselijke zelfbewustzijn en zelfattributie van waarden en de behoefte aan bescherming, behoud en bevordering van een waardig leven. Opmerkelijk is dat in de relationele kijk op menselijkheid er geen onderscheid of tegenstelling is tussen individuele en collectieve rechten en belangen aangezien beide bestaan als een ongedeeld geheel. Dit geeft een sterkere en meer samenhangende basis voor een veelomvattende mensenrechtentheorie dan welke wordt geboden door de traditionele en discourse theorieën die in Deel 1 van de studie zijn besproken.

De belangrijkste reden voor het vasthouden aan het beginsel van menselijke waardigheid als normatief fundament van mensenrechten is het ideaal van respect dat het vertegenwoordigd. In theorie bestaat het ideaal van respect uit het verzekeren van fundamentele materiele en morele levensbehoeften om een menswaardig leven te kunnen leiden. In juridische zin omvat de verplichting van de Staat om materiële levensbehoeften te verzekeren een procedurele en een inhoudelijke dimensie. De procedurele verplichting van de Staat is geherformuleerd in termen van drie fundamentele mensenrechtenbeginselen op het gebied van zorgvuldige

procedures (due process): participatie, toegang tot de rechter en verantwoording. De inhoudelijke verplichtingen van de Staat om de levensbehoeften te verzekeren zijn geformuleerd in termen van vier fundamentele mensenrechtenbeginselen (waardig leven, gelijkheid, non-discriminatie, bescherming van kwetsbare personen) welke duiden op de juridische verplichting van de Staat on onvoorwaardelijke toegang tot essentiële levensbehoeften te verzekeren en prioriteit te geven aan het beschermen van kwetsbare personen. Daarmee geven deze procedurele en inhoudelijke vereisten, in samenhang, een concrete invulling van de generieke verplichtingen van de Staat die voortvloeien uit ESC rechten.

Het is te hopen dat de benaderingen en argumenten in deze studie een vernieuwend en samenhangend inzicht geven in het denken en discussiëren over de inhoud en reikwijdte van de bescherming die wordt geboden door internationale ESC rechte regimes. In ieder geval geeft het coherentie in het academisch discours over hun aard, status en praktische juridische implementatie. De argumentatie op basis van het beginsel van menselijke waardigheid heeft duidelijk vastgesteld dat er een inhoudelijke verbinding is tussen de waarde van mensen en ESC rechten. De argumenten uit de internationale ESC jurisprudentie maakten het ons mogelijk om de inhoud en implicaties van ESC rechten opnieuw te formuleren in termen van breed gedragen juridische beginselen. Daarom is het nauwelijks mogelijk voor de Staat om simpelweg ESC rechten als programmatische rechten af te doen en ook niet om de juridische kernverplichtingen te ontlopen door zich te beroepen op de ambiguïteit van de normen of het gebrek aan middelen.

Naast een algemeen wetenschappelijk belang voor de mensenrechten, kan de specifieke bijdrage van deze studie als volgt geformuleerd worden. Ten eerste, als een degelijke rechtvaardiging voor gerechtshoven en tribunalen op alle niveaus om rechtsmacht te aanvaarden en ESC zaken betekenisvol te behandelen. Ten tweede, ter assistentie van mensenrechtenjuristen en -advocaten om een sterke zaak te hebben tegen de Staat betreffende de juridische verplichtingen die volgen uit specifieke ESC rechten. Ten derde, als bron van inspiratie in de strijd tegen armoede, discriminatie, ongelijkheid, uitsluiting en marginalisatie en in het bereiken van sociale rechtvaardigheid voor iedereen. Ten vierde, als gids voor vertegenwoordigers van Staten of andere besluitvormingsinstanties in de (her)beoordeling van de legitimiteit van hun sociaaleconomische keuzes en beslissingen aangaande ESC rechten; ten vijfde, als ondersteuning van nationale en internationale instellingen voor toezicht op mensenrechten bij het formuleren van een uitvoerbare en samenhangende benadering in het toezicht op de uitvoering door de Staat van deze rechten en bij het geven van trainingen aan relevante actoren die te maken hebben met ESC rechten.

Er is aan aantal vervolgstappen die ondernomen zouden moeten worden om de uitkomsten van dit onderzoek praktisch bruikbaar te maken, in het bijzonder op nationaal grassroots niveau. Meer specifiek zou er een vergelijkend juridisch onderzoek binnen nationale rechtssystemen gedaan moeten worden naar de pro-

cedurele en inhoudelijke beginselen die in deze studie zijn besproken. Ook zou er een verder academische debat moeten volgen gericht op het verrijken van de inhoud en gevolgen van elk van de beginselen. Voorts zouden deze beginselen moeten worden ontwikkeld in de vorm van toegankelijke en bruikbare gereedschappen, in het bijzonder voor beleidsmakers en maatschappelijke organisaties.

# CURRICULUM VITAE

**Getahun Alemayehu Mosissa** (born in 1982) attended his first Law Degree (LL.B) at the Addis Ababa University (Aug 2006) and his LL.M Degree in *International Law and Law of International Organisations with specialization in Human Rights* at the University of Groningen and graduated with distinction '*cum laude*' (July 2009). He started his PhD research in international human rights law in February 2010. After graduating from his LL.B Degree in August 2006, he joined the academia in September 2006 as Graduate Assistant II (till June 2007), as Assistant Lecturer (till July 2009) and Lecturer (till October 2019) at the Jimma University. In addition to teaching activities, he had also served as the deputy director of the School of Law Legal Aid Centre, as the research and postgraduate studies coordinator, as a chairperson of research and ethical review board, as chairperson of academic staff disciplinary committee, as an editorial member of the Jimma University Journal of Law and as an associate editor of Jimma University Gadaa Journal. While conducting his PhD research at the University of Groningen, he also authored a book chapter on *Ensuring the Realization of the Right to Health through the African Union (AU) System* in the book edited by Toebes et al (2014) and *a book review* published on *The Netherland International Law Review* (Vol. 59, 2012). He had also made paper and poster presentations on Legal Research Network Conference (Groningen 2010) and ILA Annual Conference (Hague 2010) respectively. In addition, he had also attended summer courses on *Method and Methods in Legal Science* at Uppsala University (2010) and *Intensive Course on Justiciability of ESC Rights* at Abo Academy (2011). Between May 2007 and Aug 2008, he had also served as the Judge of the Jimma Zone High Court in Oromia Regional State combining with his teaching activity at Jimma University. He is now appointed as an Assistant Judge of the Federal Supreme Court of Ethiopia (since August 2019).

# Human Rights Research Series

*The Human Rights Research Series*' central research theme is the nature and meaning of international standards in the fi eld of human rights, their application and promotion in the national legal order, their interplay with national standards, and the international supervision of such application. Anyone directly involved in the defi nition, study, implementation, monitoring, or enforcement of human rights will fi nd this series an indispensable reference tool.
The Series is published together with the world famous Netherlands Network for Human Rights Research (formerly School of Human Rights Research), a joint eff ort by human rights researchers in the Netherlands.



*Published titles within the Series:*

80. Marie Elske Gispen, *Human Rights and Drug Control*
    ISBN 978-1-78068-454-3
81. Bart van der Sloot, *Privacy as Virtue: Moving Beyond the Individual in the Age of Big Data*
    ISBN 978-1-78068-505-2
82. Mohammad Hadi Zakerhossein, *Situation Selection Regime at the International Criminal Court*
    ISBN 978-1-78068-618-9
83. Yi Zhang, *Advancing the Right to Health Care in China. Towards Accountability*
    ISBN 978-1-78068-677-6
84. Diana Itza Odier-Contreras Garduño, *Collective Reparations.Tensions and Dilemmas Between Collective Reparations and the Individual Right to Receive Reparations*
    ISBN 978-1-78068-705-6
85. Daphina Misiedjan, *Towards a Sustainable Human Right to Water. Supporting vulnerable people and protecting water resources*
    ISBN 978-1-78068-612-7
86. Benedicta Deogratias, *Trapped in a Religious Marriage*
    ISBN 978-1-78068-842-8
87. Kasim Balarabe, *Realising the Right to Water and Sanitation in Nigeria*
    ISBN 978-1-78068-901-2
88. Leonie Huijbers, *Process-based Fundamental Rights Review*
    ISBN 978-1-78068-887-9
89. Vincent Willem Vleugel, *Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies. How the HRC, the CESCR and the CEDAWCee use human rights as a sword to protect and promote culture, and as a shield to protect against harmful culture*
    ISBN 978-1-83970-006-4
90. Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law*
    ISBN 978-1-83970-004-0