Reasonable or Risky?

Norwegian Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Contents

1. **Introduction** 3
2. **Overview of the Protocol** 4
   2.1 Historical Background 4
   2.2 Description of the New Mechanism 8
3. **Concerns with the Justiciability** 10
   3.1 Vagueness and Positive Obligations 10
   3.2 Ambitiousness 21
   3.3 Resource Allocation 23
   3.4 Democratic Legitimacy and the Margin of Appreciation 30
   3.5 Predictability and Dynamic Interpretation 37
   3.6 Institutional Competence of the Committee 40
4. **National Benefits and Foreign Policy Goals** 41
   4.1 Promotion of Human Rights Abroad 42
   4.2 Development of International Jurisprudence for National Courts 43
   4.3 Remedial Relief for Individuals and Groups 44
   4.4 Improvement of Policy 46
   4.5 Inquiry Procedure 48
5. **Conclusion** 48

1. Introduction

The Norwegian Government is faced with the question of whether to ratify the new Optional Protocol[1] to the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] Adopted by the UN General Assembly on 10 December 2008, the protocol permits individual victims to make complaints to the UN Committee on Economic, Social and Cultural Rights if a member State had failed to observe its obligations under the Covenant. The procedure is relatively circumscribed. The decisions of the Committee are not legally binding, domestic remedies must be exhausted and the remainder of the admissibility criteria are comparatively strict.

Despite the limited legal reach of the procedure and the incorporation of the Covenant into Norwegian law,[3] the protocol has provoked strong debate within legal circles.[4] The Regjeringsadvokat (the General Attorney) has consistently expressed the most opposition. In a series of letters to the Ministry of Foreign Affairs,[5] they outlined various doubts over the protocol, such as the justiciability of the rights and the potential threat to Norwegian parliamentary democracy. Inge Lorange Backer, amongst others, has advanced similar arguments.[6] These interventions have been highly influential within inter-ministerial discussions and the Norwegian Government's negotiating position shifted considerably in April 2008. The Government has since taken a cautious approach to considering ratification

[1] GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008). For official records of the plenary session, see *Official Records,* 66th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008, 4.30pm.

[2] G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

[3] Lov 21.05.1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett.

[4] See for example, Gudleiv Forr, *De Skjulte Strateger: Menneskerettighetene Splitter den Norske Juriststanden, Dagbladet*, 11 October 2010; Dag Michalsen, `Hva er galt med menneskerettighter?´, *Nytt Norsk Tidsskrift,* Vol. 28, No. 1 (2011), pp. 3-5.

[5] See Letter from Regjeringensadvokat to Utenriksdepartment, 26 October 2009 and Letter from Regjeringensadvokaten to the Utenriksdepartment, 6 January 2006.

[6] Inge Lorange Backer, Ìdeals and Implementation – Ratifying Another Complaints Procedure`, *Nordic Journal of Human Rights*, Vol. 28 No. 1 (2009), pp. 92-97. Eivind Smith is less concerned by the justiciability of the rights and more by the potential for international procedures to overshadow Norwegian *constitutional* democracy: Eivind Smith, `Vil de some er imot, rekke opp hånden?´, *Nytt Norsk Tidsskrift,* Vol. 28, No. 1 (2011), pp. 49-60.

and a lawyer, Henning Harbour, has now been contracted to consider the “legal implications” of ratification for Norway.[7]

This article asks whether Norway should ratify the optional protocol. It takes a point of departure in the principal concerns expressed in the recent debate, by the Regjeringsadvokat and others, and which find expression in the mandate. These issues are primarily analysed from a legal perspective given the current orientation of the debate. However, where protagonists raise questions that require other methods – such as political theory or the social sciences – these will be drawn upon as relevant.

The article begins in Section 2 with a history and description of the protocol before moving onto three different themes. Section 3 analyses the six of the most persistent concerns in the Norwegian debate: whether economic, social and cultural (ESC) rights are too vague or ambitious, adjudicators will be involved in allocation of budgetary resources, national democratic processes will be threatened, legal and political certainty will be lost by dynamic modes of interpretation or the Committee has the institutional competence to consider individual complaints. While the bulk of the article is concerned with addressing these legal apprehensions, Section 4 analyses arguments over whether the procedure will have positive effects (or not) in practice, such as providing remedies for victims, facilitating a culture of accountability for social policy and contributing to Norwegian foreign policy goals on human rights. In the end the calculus of any decision over ratification must rest on a weighing of the costs and benefits of such a procedure.

2. Overview of the Protocol

2.1 Historical Background

The ICESCR was adopted in 1966 and recognises a range of ESC rights, which are described and circumscribed in differing ways in Part III of the Covenant. In Part II, States are tasked with “taking steps” to the “maximum” of their “available resources” with the aim of

[7] This includes examining the protocol´s legal framework, the degree of discretion for authorities, the likely legal and factual meaning a decision will have for Norwegian authorities´, which rights in the Convention could Norway face a complaint over and the likely implications of such a case. The extent of the controversy on this question can be seen by the recent boycott of cooperation with the Foreign Ministry in relation to this process: see Amnesty International, *Norske Organisoner Boikotter UD*, Press Release, 8 June 2011, available at http://www.amnesty.no/aktuelt/flere-nyheter/norske-organisasjoner-boikotter-ud

"progressively achieving" the rights (Article 2.1) and guaranteeing them "without discrimination" (Article 2.2). More specific duties for some of the rights can be found in Parts III and IV.

However, unlike its' sister treaty, the International Covenant on Civil and Political Rights (ICCPR),[8] no protocol was included for a complaints mechanism. The reason for this divergent outcome is complex[9] but can be understood in simple terms by looking at the prevailing political maths. At the time, Eastern or Communist States opposed any form of international adjudication for human rights. This meant that any complaints mechanism required the support from the West, Latin America and some newly decolonising states. This group was relatively united on civil and political rights but there was division amongst Western States over whether ESC rights were justiciable. The inevitable result was that a majority could not be found for a ESC rights protocol. Even a proposal for an independent expert committee to review periodic State reports did not garner sufficient consensus - this task was left to a politically constituted body under the UN Economic and Social Council (ECOSOC).

Since that date, and contrary to the claims of the Regjeringsadvokat,[10] the international consensus on the justiciability on economic, social and cultural rights has slowly but inexorably shifted. Already in 1968, States at the International Conference on Human Rights called upon "all Governments to focus their attention" on "developing and perfecting legal procedures for prevention of violations and defence of economic, social and cultural rights".[11] In a follow-up study, the UN Secretary-General noted that the right to an effective remedy by the competent national tribunals applied "of course, also to economic, social and cultural rights".[12] The political monitoring procedure for the ICESCR also attracted increasing

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[8] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 and G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

[9] Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995), pp. 9-20.

[10] The Regjeringsadvokaten disputed the statement by the Norwegian Foreign Ministry that "today, it is generally recognised that all human rights are equal in worth and indivisible": Regjeringensadvokat, 2006 (n. 5 above), p. 2.

[11] *Final Act of the International Conference on Human Rights* (United Nations publication, Sales No. E.68.SIV.2), resolution XXI, para. 6.

[12] Ibid. para. 157.

criticism, particularly from Western States, for its lack of independence and efficiency.[13] In 1987, ECOSOC eventually agreed to establish an independent committee of experts, the UN Committee on Economic, Social and Cultural Rights ('Committee').[14]

This period also witnessed a major shift in constitutional rights. By the mid-1990s, a raft of new constitutions – particularly in Latin America and Eastern Europe but also in Western Europe, Africa and Asia - included justiciable ESC rights. If we take a statistical overview, we can see a relatively high recognition of constitutional ESC rights amongst 184 countries: right to health care (49% of constitutions), right to join trade unions (72%), right to fair remuneration (48%), right to a healthy environment (72%), right to social security (46%) and right to free education (62.5 %).[15] Moreover, many countries have directly incorporated the ICESCR. In a sample of 147 countries where information is currently available,[16] 38% had directly incorporated the Convention, 49% had not domestically recognised the rights in this manner while 13 per cent had not ratified the Covenant.

The same trend could be seen at the regional level. The European Social Charter was revitalized in the 1990s with additional rights and the creation of a collective complaints mechanism.[17] The mandates for the newly established African Commission on Human and Peoples Rights and Inter-American Court on Human Rights included social rights, although to differing degrees.[18] Complaint mechanisms were created for international treaties on women's rights and persons with disabilities, which both include economic and social rights.[19]

[13] See Economic and Social Council Resolution, 1980/24, para.2 and Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), pp.40-41 for a catalogue of defects.

[14] See generally, Philip Alston: "The Committee on Economic, Social and Cultural Rights", in Philip Alston (ed.): *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Oxford University Press, 1992), 473.

[15] Calculations were made from the new Dataset, Toronto Initiative for Economic and Social Rights: www.tiesr.org

[16] It currently excludes the Pacific States and half the Western European countries. The data will be soon finalized and new calculations can be made: see www.tiesr.org

[17] See Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', *European Journal of International Law*, Vol. 15, No. 3 (2004), pp. 417-456.

[18] For an analysis of the social rights jurisprudence from these mechanisms, see Langford, *Social Rights Jurisprudence* (n. 20 below), pp. 323-408.

[19] Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), *entered into force* Dec. 22, 2000; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex II, U.N. GAOR, 61st Sess., Supp. No. 49, at 80, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008.

This shift in legal protection combined with judicial reforms and growing civil society engagement has given rise to a new 'social rights jurisprudence' in comparative and international law.[20] Cases have been decided on the various dimension of social rights, such as the obligations to respect, protect, fulfil and non-discrimination as well as horizontal obligations between private actors. Such decisions can be found in every region of the world, and in every type of legal system and tradition. Even the International Court of Justice has adjudicated upon the ICESCR, holding for instance that Israel had violated the Covenant through the construction of the 'security' fence and its associated regime.[21]Although, the jurisprudence tends be most sustained and concentrated in Latin America and South Asia, possibly because of the large inequalities in income and development as well as the direct access procedures.

This emerging but fragile consensus on ESC rights gave new life to civil society efforts to create an optional protocol for the ICESCR. In 1992, all States at the Vienna Conference strongly affirmed the indivisibility of all human rights. They also encouraged States and the Committee to "continue the examination of optional protocols" to the ICESCR. In 1996, the Committee presented a report and draft protocol to the former UN Commission of Human Rights[22] and by 2002, a working group had been mandated to consider the matter.[23] In 2008, the working group completed a draft[24] that, after some adjustments, was formally adopted by the General Assembly, on 10 December that year, the sixtieth anniversary of the Universal Declaration.

[20] See Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008). See also F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia and Maastrict Centre for Human Rights, 2006) and R. Gargarella, P. Domingo and T. Roux (eds.) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006).

[21] *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* (2004) ICJ Reports 136.

[22] UN Doc. E/C.12/1996/CRP.2/Add.1. The report was distributed widely by the Commission for comments which are consolidated in UN Doc E/CN.4/1998/84.

[23] Commission on Human Rights, Resolution 2002/24, para. 9(F). It was granted a mandate to start drafting in 2006: Human Rights Council, Resolution 1/3 (2006).

[24] For a history of this process, see Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review* Vol. 8 (2008), pp. 617-646.

2.2 Description of the New Mechanism

The Optional Protocol does not provide any substantive rights or obligations. These are set out in the ICESCR. The protocol is procedural in orientation and mirrors the complaints mechanisms for other international human rights treaties. But it is slightly more restrictive.

The Protocol recognises the competence of the Committee to hear complaints from "individuals or groups of individuals" who are under the State's "jurisdiction" and who claim to be "victims of a violation" of any of the ESC rights in the Covenant.[25] Earlier drafts of the protocol included a collective communications procedure, which permitted authorised non-governmental organisations to submit communications, but this was dropped during the negotiations.[26]

The admissibility criteria for the protocol largely resemble those contained in other international human rights complaints procedures.[27] However, three drafting choices deserve comment. First, the Working Group removed an increasingly common exception to the exhaustion of domestic remedies rule, namely remedies that "are unlikely to bring effective relief".[28] Instead the older test, as encapsulated in the ICCPR, is maintained. Complainants must have exhausted all available remedies unless they are unreasonably prolonged.[29] Second, the Protocol is seminal in its inclusion of a time limit: complaints must be submitted upon exhaustion of domestic remedies within one year. The author must otherwise demonstrate that

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[25] Articles 1 and 2.

[26] One lingering question is whether indigenous peoples could bring complaints under Article 1 of the Covenant in relation to socio-economic elements of the right to self-determination. The possibility is quite remote. The UN Human Rights Committee has found that the rights of peoples could not be adjudicated under a procedure restricted to "individuals" or "groups of individuals. See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

[27] These are set out in Article 3 of the protocol. Complaints will be inadmissible if all available domestic remedies have not been exhausted unless they are unreasonably prolonged; the complaint is not submitted within one year after the exhaustion of domestic remedies unless the author can demonstrate that it had not been possible to submit the communication within that time limit; the facts of the case occurred prior to the entry into force of the protocol for the State Party and did not continue after that date; the same matter has already been examined or has been or is being examined under another procedure of international investigation or settlement; it is incompatible with the provisions of the Covenant; it is manifestly ill-founded, not sufficiently substantiated or exclusively based on mass media reports; it is anonymous or not in writing.

[28] Optional Protocol to the Convention on the Elimination of Discrimination against Women (n. 17 above); First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (n. 17 above); Convention Against Torture (CAT),G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

[29] In *Patiño v. Panama*, the Human Rights Committee held that "an applicant must make use of all judicial or administrative avenues that offer him a *reasonable prospect of redress*": Communication No. 437/1990, U.N. Doc. CCPR/C/52/D/437/1990 (1994) (emphasis added). It should be noted that it is unlikely that complainants will be required to exhaust explicitly political remedies.

it had not been possible to submit by that deadline. While this deadline is more generous than the six-month cut-off for the European Court of Human Rights, some claims could be excluded on this basis.[30] Thirdly, Article 4 complements the mandatory admissibility criteria with a negatively-oriented discretion: the Committee can decline to consider a communication "where it does not reveal that the author has suffered a clear disadvantage" unless the Committee "considers that the communication raises a serious issue of general importance." This 'pressure valve' was championed by a small group of States and NGOs as a way for the Committee to control for the possibility of a flood of frivolous or undeserving cases.

A procedure for the adoption of interim measures is set out in Article 5. It applies only where the alleged victim/s might suffer "irreparable damage" before the complaint process is concluded. Such a remedy was developed by the Human Rights Committee and has been elevated into the texts of more recent procedures. During the final phase of the negotiations on the Optional Protocol to ICESCR, Norway requested that the phrase "bearing in mind the voluntary nature of such requests" be included. This was to emphasise that the remedy was not legally binding. This amendment was opposed by many states, although on differing grounds. Quite a number feared it would imply that the final views of the Committee would be fully legally binding. The eventual compromise was a UK proposal that interim measures are to be only ordered in "exceptional circumstances".

Article 8 sets out how the Committee is required to assess complaints. Communications, as they are formally called, are to be examined in closed meetings in the light of "all documentation submitted". This is principally from the parties but the Committee can consult third parties, such UN agencies, to obtain further documentation and the wording was crafted in such a way to allow the Committee to accept *amicus curaie* submissions if it wished. A great part of the debate on this article was focused on if, and how, the Committee should be explicitly guided in the way it would assess complaints. This is examined further below in Section 4 and the eventual compromise, which was supported by Norway, was to include the

[30] This will particularly be the case in those jurisdictions where no domestic remedies are available and a victim or their lawyers are not aware that an international procedure is available. See for example, *Moldovan and others v. Romania (no. 2);* application no. 41138/98 and 64320/01, judgment dated 12 July 2005. It is likely that the UN CESCR, like the European Court, would allow cases of "continuing violations" to fall outside such a rule and this rule is explicitly incorporated in article 3(2) of the Optional Protocol.

reasonableness test and explicitly note State discretion in policy choices:[31] Article 8(4) therefore requires that "the Committee shall consider the reasonableness of the steps taken by the State Party" and "shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights."

With regard to remedies, Article 9 simply empowers the Committee to make "recommendations" to States in connections with its views. It has no court-like powers. The State Party has six months to respond in writing including providing "information on any action taken in the light of the views and recommendations". Any further requests from the Committee are to be incorporated in the State reporting procedure. The Committee can also transmit its views or recommendations to various UN institutions, where there is a clear need for technical advice or assistance, particularly for developing countries. Accordingly, a UN trust fund is to be established "with a view to providing expert and technical assistance to States Parties" although this is "without prejudice to the obligations of each State Party to fulfil its obligations under the Covenant."

In addition to the complaints procedure, the Optional Protocol contains two other mechanisms: an Inter-State complaints procedure (Article 10) and an inquiry procedure though which the CESCR may investigate a situation in a State Party if it receives "reliable information indicating grave or systematic violations" (Article 11). Both procedures are only available if the State expressly selects them upon ratification.

3. Concerns with the Justiciability

3.1 Vagueness and Positive Obligations

The traditional concern with the adjudication of ESC rights has been their apparent lack of justiciability on the grounds that they are vague and imprecise or require the enforcement of positive or progressive obligations.[32] The result is that any adjudicative interpretation will inevitably be of a political rather than a legal nature. The Regjeringsadvokat has identified

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[31] *Report of the Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, U.N. Doc. A/HRC/8/7, 6 May 2008, para. 170.

[32] See for example, E.W. Vierdag, 'The legal nature of the rights granted by the international Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, Vol. IX (1978), pp. 69-105 at 103.

vagueness as its primary concern with the Optional Protocol.[33] ESC rights are said to be fundamentally dissimilar to civil and political (CP) rights, which are "different formulated" and "much more concrete".[34] Similarly, Backer argues that the rights are "drafted as goals" and "take a vague form" in comparison to CP rights.[35]

In its 2009 letter, the Regjeringsadvokat does make brief reference to the Committee's existing jurisprudence, such as its General Comments and periodic concluding observations. However, this guidance is quickly dismissed on the grounds that it does not involve individual cases.[36] Equally, the Committee's assertion in General Comment No. 9 that the rights are justiciable is seen as mere assertion, an unproven fact. The Regjeringsadvokat repeatedly insists that any interpretation must therefore be of political nature.

In its 2006 letter, the Regjeringsadvokat acknowledged (very briefly through a quotation) that some ESC rights case law exists. However, they claim that such jurisprudence is irrelevant since national courts (they do not mention regional) are likely to have better knowledge of the appropriate content of the rights as they are more integrated in the national political process. They add that, in any case, that there are few cases in Norway where the ICESCR has been relevant for judicial interpretation.

At a mere textual level, these differential claims of vagueness are difficult to sustain. Compare for example the wording of the right to freedom of expression in the two different covenants:

> <u>Article 19. Right to Freedom of Expression (ICCPR)</u>
>
> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (Article 19(2) ICCPR).

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[33] "Grunnene for vårt syn var først og fremst ... at enkeltindividers klager over påståtte brudd på ØSK oftest ikke vil kunne avgjøres gjennom fortolkning av artiklene ved bruk av alminnelige rettskildeprinsipper. Reglene utgjør brede og uklare prinsippbestemmelser." Regjeringensadvokat, 2009 (n. 5 above), p. 2.

[34] Ibid. p. 6.

[35] Backer (n. 6 above), p. 96.

[36] Regjeringensadvokat, 2009 (n. 5 above), p. 2. "Det er videre meget begrenset hva man kan få ut av komitéens uttalelser i landrapporteringssaker, bl.a. fordi disse ikke gjelder enkeltsaker. Heller ikke komitéens generelle uttalelser (General Comments, jf. nedenfor) gir noen nevneverdig hjelp til å forutsi hva klageorganet vil legge i ØSKs forskjellige bestemmelser. Hva utfallet i de enkelte sakene måtte bli dersom klageorganet ble gitt myndighet til å behandle dem, og Norge ratifiserte, kunne etter vårt syn ikke forutses."

and

> Article 13. Right to Education (ICESCR)
>
> The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
>
> (a) Primary education shall be compulsory and available free to all;
>
> (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
>
> (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

The articulation of these two rights is remarkably similar in terms of generality and specificity. It is true that some civil rights are set out in more detail – in particular the right to a fair trial and liberty. Generally though, there is no significant difference in textual precision for each Covenant.

What is differentiated is the wording of the general obligations. Article 2 of the ICCPR provides that States parties shall 'respect' and 'ensure' the respective rights, while the equivalent provision of the ICESCR is more graduated. Each State party commits itself to:

> *[T]ake steps*, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (Emphasis added).

However, one should be cautious in assuming there is no legal substance in these more conduct-oriented obligations. The growing comparative and international jurisprudence has demonstrated how the terms of Article 2(1) can be adjudicated. Indeed, it is worth remembering that the justiciable content of civil and political rights has been heavily influenced by legal method and jurisprudence as well as political debate and history. Law by its nature is open-ended – it is the nature of text. By attempting to apply consistent legal methods, often shaped by concrete cases, a reasonable degree of precision can be achieved. It is often the hard cases that provide the particular challenge in all areas of law.[37]

[37] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

It is this requirement of systemic legal reasoning that makes the legal profession internally and externally accountable for its interpretation. It is therefore no great surprise that the jurisprudence on ESC rights has drawn heavily from principles of interpretation developed in civil rights as well as constitutional and administrative law. Indeed, the four doctrinal areas that have emerged in ESC rights jurisprudence all have this pedigree. It is therefore worth considering to what extent they overcome the charge of imprecision.

(i) Immediate obligations to respect and protect

Borrowing directly from civil rights, the Committee has indicated that progressive realisation of ESC rights implies an immediate obligation by the State to respect and protect the capacity of individuals to realise their ESC rights.[38] This means that the State must avoid unreasonable interference with rights and ensure that private actors do the same. For many rights, the Committee has given examples of the ways in which a right could be interfered with.[39] In the case of forced evictions, water disconnections and personal autonomy in heath care, they have set out specific criteria to be taken into account.[40] These principles have been applied at times in the Committee's concluding observations on State periodic reports. For example, the Committee criticised the procedures for planned mass forced evictions in the Dominican Republic or the presidential decree criminalising homelessness in the Philippines.[41]

Obligations to respect and protect have been the subject of cased-based adjudication. In *Dunmore v Ontario*, the Supreme Court of Canada found that the repeal of legislation, which provided guarantees for freedom of association, violated the rights of agricultural workers.[42] In *Goldberg v Kelly*, the US Supreme Court found that the summary or immediate denial of a welfare benefit to an individual violated their right to due process.[43] At the regional level, the

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[38] *General Comment No. 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999).

[39] See Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); *General Comment 19, The right to social security* (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008).

[40] *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997); and *General Comment 15, The right to water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003); *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000).

[41] *Concluding Observations on the Dominican Republic*, E/C.12/1990/8 (1990); *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Philippines* U.N. Doc. E/C.12/1995/7 (1995).

[42] [2001] 3 SCR 1016.

[43] 397 U.S. 254, 264 (1970).

European Committee on Social Rights found that the forced eviction of Roma communities in Greece, Bulgaria and Italy violated their rights to family life and housing.[44]

The field of forced evictions law has been witness to a growing converge on the criteria set established by the Committee. The Committee's General Comment No. 7 on Forced Evictions[45] has been explicitly endorsed by a range of political and judicial actors. This includes the Committee of Ministers of the Council of Europe,[46] regional human rights mechanisms[47] and a range of national courts.[48] Its` principles have also been applied by the Human Rights Committee and the European Court of Human Rights when adjudicating the civil right to respect for the home and family life.[49]

Article 4 of the Covenant also sets out a customary 'limitations' provision. It is quite similar in wording and form to those contained the ICCPR and the European Convention on Human Rights and is particularly relevant to these obligations to respect and protect. Article 4 provides that the rights in the ICESCR can only be limited by law, when compatible with the nature of the right and for the sole purpose of promoting the general welfare in a democratic society. The intention behind Article 4 was to permit, as specified, the limitation of Covenant

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[44] Complaint No. 15/2003, *European Roma Rights Center* v. *Greece,* Decision on the Merits, 8 December 2004; Complaint No. 31/2005, *European Roma Rights Center* v. *Bulgaria,* Decision on the Merits, 18 October 2006; *European Roma Rights Center* v. *Italy,* Decision on the Merits, 7 December 2005.

[45] N. 35 above. The criteria can be roughly summarised as follows:

- Any interference with a person's home requires both substantive justification, regardless of the legality of the occupation.
- Due process, which it described as including consultation on alternatives to eviction, adequate notice, information and access to legal remedies (including legal aid)
- Ensure that at a minimum no one is rendered homeless, adequate compensation is paid for losses and that adequate and alternative accommodation is provided within maximum available resources of the State.

There must be no discrimination on prohibited grounds in the substantive and procedural aspects.

[46] See *Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe*, Adopted by the Committee of Ministers on 1 December 2004, at the 907th meeting of the Ministers' Deputies, and *Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in* Europe, Adopted by the Committee of Ministers on 23 February 2005 at the 916th meeting of the Ministers' Deputies.

[47] *SERAC v Nigeria*, the African Commission on Human and Peoples' Rights, Communication 155/96 at para. 63.

[48] For example, the South African Constitutional Court in *Port Elizabeth Muncipality v Various Occupiers* 2004 (12) BCLR 1268.

[49] *Connors v United Kingdom*, (European Court of Human Rights, Application no. 66746/01, 27 May 2004) at para. 95; *Georgopoulos and Others v. Greece,* Human Rights Committee, Communication No. 1799/2008, Decision on the Merits, 14 September 2010 *Concluding Observations of the Human Rights Committee: Kenya*, 28 March 2005, CCPR/CO/83/KEN.

rights for reasons unrelated to resource constraints.[50] This was the approach of the International Court of Justice when it addressed alleged violations of the ICESCR in its advisory opinion on the legality of the wall constructed in the Occupied Palestinian Territories.[51] The Court found that Israel simply failed to promote the general welfare in a democratic society in Article 4 of ICESCR in the building of the wall, given the multiple and deep interferences with a range of economic and social rights of Palestinians.[52]

(ii) Non-Discrimination and Equal Treatment

Second, there is an explicit duty in the ICESCR to ensure that ESC rights are realised without discrimination. Obviously formal or *de jure* distinctions on prohibited grounds are reasonably easy to identify.[53] Here, the adjudicative question usually hangs on whether there is any reasonable or objective justification for the distinction.[54] The more difficult question can be the determination of whether there is indirect discrimination or a failure by the State to take steps to ensure greater equality in opportunities or outcomes. Nonetheless, adjudicators have increasingly set out criteria for assessing indirect discrimination, including in ESC rights cases. For example, in *D.H. v. Czech Republic*, which concerned claims of indirect racial discrimination against the right to education of children, the European Court of Human Rights set out when it will allow the burden of proof to be shifted in such cases.[55] In *Rupert Althammer et al v Austria*, the Human Rights Committee found that a violation of the right to equal treatment can 'result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate'. But it declined in that case to find that the

[50] See examination of the *travaux préparatoire* in P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9 (1987), pp. 156-229, pp. 194, 197, 205-206.

[51] *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* , (2004) ICJ Reports 136, at p.193.

[52] Ibid. 'The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be 'solely for the purpose of promoting the general welfare in a democratic society'.

[53] See the classic judgment of the US Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) concerning the right to equal treatment in education.

[54] At the international level, this is usually the case. In some national jurisdictions the threshold for the defence is quite high in relation to some prohibited grounds such as race and sex.

[55] Application no. 57325/00, Judgment 7 February 2006.

removal of a household benefits in favour of better benefits for children with employees was indirect discrimination.[56]

In relation to substantive equality, the Human Rights Committee has indicated that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant".[57] This was the approach of the Committee on Elimination of Discrimination Against Women in its first decision under its new optional protocol. In *A.T. v Hungary*, the CEDAW Committee found that Hungary had failed to take sufficient steps to address economic and social rights violations that occurred against women in the private realm (domestic violence in the home).[58] In particular, there were no available safe refugees for the victim and her children.

In Canada, the right to equality has been interpreted in a similar manner although not all cases have been successful. In *Eldridge*, the Supreme Court rejected the British Columbian provincial government's arguments that the right to equality did not require governments to allocate resources in healthcare in order to address pre-existing disadvantage of particular groups such as the deaf and hard of hearing.[59] One of the applicants, Linda Warren, had delivered twins prematurely by emergency caesarean section without any hospital staff being able to communicate with her about the procedure or her new-borns' survival or state of health. The Court rejected the 'thin and impoverished vision of equality' of the provincial government, and held that the government's failure to fund or provide sign language services in the provision of healthcare to the deaf was discriminatory, while noting that the overall budgetary impact was minimal.

These two types of obligations – respect/protect and non-discrimination – are relatively familiar to those working with civil and political rights. We now turn to two more positive-oriented obligations to see how those have been developed, although we see again similarities with civil rights jurisprudence.

[56] Communication No. 998/2001, Views of 8 August 2003.
[57] Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989), para. 10.
[58] See Chapter 26, Section 2.5.
[59] *Eldridge (n. 42 above)*, para. 87.

(iii) The 'Minimum Core' Obligation

The third interpretive principle or doctrine has been the identification of some limited but immediate positive obligations. This has often been usually through the idea or vehicle of a 'minimum core', in some cases derived from civil rights, in other cases from social rights. In post-War Germany, the idea of the *Existenzminimum* was legalised by the Federal Constitutional Court: the right to human dignity and the constitutional 'directive principle' of the *Sozialstaat*[60] were interpreted to require authorities to ensure each resident enjoyed at least a minimum existence. The doctrine took cognisance of the physical dimension of survival and, to a more restricted extent, the broader social context in which a person finds himself or herself. The State must ensure "every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life."[61] However, the Court abstains from setting such a minimum itself. Rather, it simply reviews whether the State's legislation and benefits system etc meet these requirements. The jurisprudence has been relatively limited. It has for example required the State to review taxation laws that threatened the sustenance minimum of poor families with children.[62]

The doctrine has been subsequently adopted in Switzerland,[63] Hungary,[64] and Colombia[65] and implicitly by the Inter-American Court of Human Rights[66] and to a certain extent in United Kingdom.[67] In Finland and the State of New York,[68] the right to a minimum level of social

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[60] See S-I. Koutnatzis, 'Social Rights as a Constitutional Compromise: Lessons from Comparative Experience', *Colombia Journal of International Law*, Vol. 44 (2005), 74-133 at 113.
[61] 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09.
[62] BVerfGE 99, 246 (259).
[63] *V v Einwohrnergemeine X und Regierunsgrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995)
[64] See Decision 772/B/1990/AB: ABH 1991, 519 at 520.
[65] See R. Arango and J. Lemaitre (eds.), *Jurisprudencia constitucional sobre el derecho al mínimo* vital (Bogotá: Ediciones Uniandes, 2002), p. 7.
[66] T. Melish, 'Rethinking the 'Less as More' Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas', *New York University Journal of International Law and Politics*, Vol. 39 (2006) p. 1. The doctrine is also evident in the right to food jurisprudence of India and Nepal*: People's Union for Civil Liberties v. Union of India* (2001) 5 SCALE 303; *Prakashmani Sharma and Others v GON, Prime Minister and Council of Ministers and Others*, Supreme Court of Nepal, Writ Petition No 065-W0-149 of 2008.
[67] In *Ex p Joint Council for the Welfare of Immigrants*, [1997] 1 WLR 275 (CA). the House of Lords found that leaving a class of asylum seekers in an utter state of destitution – on the grounds that had not applied for aylum immediately and were thus denied any social benefits – violated basic rights. Lord Justice Simon Brown described such rights as 'so basic are the rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights to take note of their violation' (p. 292). He referred to English authority from 1803, that "the law of humanity, which is anterior to all positive laws, obliges us to afford (foreigners) relief, to save them from starving": *Reg. v. Inhabitants of Eastbourne* (1803) 4 East 103, p. 107. See discussion in Jeff A.

security is enshrined as a justiciable right in the constitution. In the latter, a court has found that there is "a positive duty upon the state" to provide welfare payments to anyone considered indigent under the state's constitutional "need standard".[69] The doctrine also emerged in the jurisprudence of the Committee on Economic, Social and Cultural Rights. In 1991, it stated that:

> [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.... In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[70]

(iv) Progressive Achievement

A fourth approach is to give legal content to the Covenant's requirement of "progressive achievement". While this concept has sometimes been viewed in programmatic terms, it has taken legal shape in the Committee´s jurisprudence and concrete cases.

As early as 1991, the Committee recognised that the duty to take steps to progressive achieve the rights was a legal obligation and that the Covenant provided a measure of accountability. The Committee emphasised that States had a wide discretion in the measures to be adopted, notably refusing to endorse or reject any type of economic system. However, they expected the measures be "concrete, deliberate and targeted" and that "deliberately retrogressive measures" were not permissible unless they could be justified.[71] By 1999, the Committee indicated some particular elements for this test. In particular, States should ensure that there was a plan for progressive realization, that measures were appropriate and sufficiently focused

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King, ´United Kingdom: Asserting Social Rights in a Multi-Layered System´, in *Social Rights Jurisprudence* (n. 20 above).

[68] Article 19(1) of the Finnish Constitution provides that, " (1) Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care."

[69] *Tucker v Toia,* 43 N.Y.2d 1, 7 (1977).

[70] *General Comment No. 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para. 10.

[71] Ibid. paras. 2, 9.

on addressing the most disadvantaged, devoted sufficient resources (within constraints) and there was a framework for monitoring progress.

In essence, the Committee adopted a test that combines in a single breath a margin of appreciation or discretion together with the proportionality test, which is used by many international and regional adjudicators. It has become increasingly known as a "reasonableness test".[72] In other words, States have considerable discretion in choosing instruments of policy but must ensure that they are proportionally directed towards the aim of realising the rights.

One could say that it reflects the principal approach of the European Court on Human Rights to positive obligations to ensure respect for the rights. The focus is on whether there have been effective measures to ensure that the Convention rights are actually realized, e.g. access to legal aid or criminal investigations into human rights violations.[73] In other words, there has to be some reasonable or meaningful connection between the measures undertaken and the rights to be achieved.

This approach is evident in comparative jurisprudence. In Finland, the constitution provides that a range of justiciable ESC rights are to be immediately realised. However, the right to work and housing is framed in progressive terms – the State is only obliged to promote realisation of the right. In one case, Finnish local authorities were faulted for failing to take *sufficient steps* to secure employment for a job seeker.[74] At the regional level, the European Committee on Social Rights has formulated a similar test to the Committee, as follows:

> [W]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States parties must be particularly mindful of the impact their choices will have for groups with heightened

[72] See discussion in Section 4.
[73] See A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).
[74] See respectively KKO 1997: 141 (Employment Act Case) Yearbook of the Supreme Court 1997 No. 141 (Supreme Court of Finland), Case No. S 98/225 (Child-Care Services Case) Helsinki Court of Appeals 28 October 199; Case. No. 3118 (Medical Aids Case) Supreme Administrative Court, 27 November 2000, No. 3118. For English summaries of a wide range of cases see <www.nordichumanrights.net/tema/tema3/caselaw/> . The different approaches in Finland are partly related to the State obligations, particularly the more graduated obligation in the case of the right to work.

> vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.[75]

(v) Summing-Up on Vagueness

These jurisprudential developments complicate arguments that the rights are notoriously vague. Adjudicators appear capable of developing legally sensible techniques that provide criteria that aspire to be consistent and non-political. In other words, the doctrines set *boundaries* for policy-making rather than constituting an *act of policy determination*. And there is a certain degree of convergence of doctrine between the national, regional and international levels.

In addition, courts (amongst others) have increasingly poured cold water on the idea that one can easily divide positive and negative obligations. As Lord Brown in the British House of Lords put it:

> I repeat, it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 [Right not to be subjected to inhumane or degrading treatment] as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim.[76]

There is of course no significant tradition of the Norwegian Supreme Court referring to the ICESCR. This is partly because the protection of the rights in Norway is considerably strong (see below) and also the Covenant and its jurisprudence is not widely known in the legal community. In a recent case, the inheritor of a farm claimed that the decision by Sogn and Fjordane County to deny him the right to an extension for non-residence violated a range of rights, including the ICESCR. The Norwegian Supreme Court declined to comment on the extent of the justiciability of rights, noting that it was unclear,[77] but found that there was no violation of the rights to work, just and favourable working conditions and an adequate standard of living, particularly when he had the option of residing on the farm.[78] This decision seems very much consistent with the Committee´s jurisprudence. In particular, in assessing such an obligation to respect, the Committee places great weight on whether there was an

[75] Complaint No. 13/2002, *Autism-Europe v. France*, Decision on the Merits, para. 53.
[76] *R v Secretary of State for the Home Department, ex p Limbuela,* [2005] UKHL 66 para.92.
[77] Case No. HR-2011-476-A, para. 47.
[78] Ibid.

alternative means for an individual to secure their rights, which in this case there most clearly was.

However, it seems that in the few cases in which applicants have attempted to invoke the Covenant in Norwegian courts, the Committee´s jurisprudence has not been referred to.[79] This may be due to a lack of knowledge amongst lawyers or a strategic choice by applicants, as they were aware that the Committee´s comments provided them with little support. However, the Supreme Court has drawn on the case law of the European Social Charter and the ILO Committee on the Freedom of Association in deciding cases concerning freedom of association.[80]

3.2 Ambitiousness

It has been claimed by the Regjeringsadvokat, amongst others,[81] that some rights are over-ambitious in their phraseology.[82] They particularly name Article 12: it provides that, "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the *highest attainable standard* of physical and mental health" (emphasis added.)

The wording of this article can appear expansive on first reading. However, from a legal perspective,[83] it has to be read in the context of the obligations in the Covenant and the Committee's general approach to the normative content of the rights. Article 2(1) provides that the State must "take steps" towards this end within their maximum available resources. Moreover, in defining the content of the right, the Committee follows its approach for other rights. It sets out the elements that should be present when there is adequate realisation of the rights, subject to the availability of resources. For the right to health, these factors are quoted

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[79] See for example LB-2007-159206-2.

[80] See *Elin Tåsås et al. v Norsk Sjømannsforbund*, November 2008 (HR-2008-2036-A) (dissent 3-2) (n.y.p.); and Rt. 2001 p. 418 and Rt. 2001 p. 1413. See discussion in Stein Evju, Should Norway Ratify the Optional Protocol to the ICESCR? That is the Question, *Nordic Journal of Human Rights*, Vol. 28 No. 1 (2009), pp. 83-91.

[81] See also, M. Dennis and D. 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?', *American Journal of International Law*, Vol. 98, 2004, pp. 462-515.

[82] Regjeringensadvokat, 2009 (n. 5 above), p. 2.

[83] Human rights obviously constitute a political asset in broader debates, "political resources of unknown value in the hands of those who want alter the course of public policy" as Stuart Scheingold puts it: *The Politics of Rights: Lawyers, Public Policy and Social Change* (Ann Arbor: Yale University Press, 1974). However, human rights in positive law are embodied in legal systems which are bounded explicitly (in the terms of the incorporation of a right) and implicitly (by the broader and systemic principles of an enclosed legal system). Litigation can certainly be viewed as an act within the political realm but the act of adjudication is arguably heavily bounded.

in full in the footnote in order to give a more precise sense of the Committee´s potential demands.[84] The Committee focuses on the availability and cultural acceptability of health care facilities and the importance of affordable and non-discriminatory access. While a certain degree of flexibility is maintained in this definition, it is quite clear that the Committee´s emphasis is on ensuring that a health system provides primary and secondary care rather than some forms of expensive tertiary health care.

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[84] 12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) *Availability.* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

(b) *Accessibility.* Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) *Quality.* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

This approach is evident in middle-income and high-income countries where ESC rights have been adjudicated.[85] Take the case of right to education. A number of US state courts have found that states were failing to provide "adequate" or "efficient" education as required under the local constitutions. As part of its 1989 judgment in *Rose v Council for Better Education*, the Supreme Court of Kentucky[86] found that an "efficient system of education must have as its goal to provide each and every child with at least" seven essential capacities.[87] The Court left it to the Government however to decide how to reform and fund the poorly performing school system. After a series of reforms, it is worth noting that in 2001 it was the first time that students from Kentucky matched or exceeded the national average on a basic skills assessment.[88]

3.3 Resource Allocation

It is sometimes feared that the recognition and adjudication of ESC rights will place unrealistic demands on a country's available resources. Alternatively, adjudicators may become deeply involved in allocative trade-off of those resources. In 1978, Vierdag stated that implementation of the ICESCR "is a political matter, not a matter of law" since a Court would otherwise engage in prioritisation of resources by "putting a person either in or out of a job, a house or school."[89] Eivind Smith expresses a similar concern that these rights will "undermine

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[85] See *respectively KKO 1997: 141 (Employment Act Case)* Yearbook of the Supreme Court 1997 No. 141 (Supreme Court of Finland), *Case No. S 98/225 (Child-Care Services Case)* Helsinki Court of Appeals 28 October 199; *Case. No. 3118 (Medical Aids Case)* Supreme Administrative Court, 27 November 2000, No. 3118. For English summaries of a wide range of cases see <www.nordichumanrights.net/tema/tema3/caselaw/> . The different approaches in Finland are partly related to the State obligations, particularly the more graduated obligation in the case of the right to work.

[86] 790 S.W.2d 186 (Ky. 1989) (finding that Kentucky's entire system of common schools is unconstitutional).

[87] Those include:

(1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(2) sufficient knowledge of economic, social and political systems to enable the student to make informed choices;

(3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state and nation;

(4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) sufficient training or preparation for advancing training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

sufficient levels of academic or vocational skills to enable public school students to compete favourably with their counterparts in surrounding states, in academics and the job market.Ibid. 212-13.

[88] See Cathy Albisa and Jessica Schultz…

[89] E.W. Vierdag, 'The legal nature of the rights granted by the international Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, Vol. IX (1978), pp. 69-105 at 103.

fiscal budgeting as a political instrument" which could be expensive in the "long run".[90] He likewise presumes that the right to work could only be made subjectively justiciable in a planned economy.[91]

The Regjeringsadvokat has expressed concerns on both counts. It has noted that a resource-rich state such as Norway could face very high demands from the Committee as Article 2(1) of the Covenant requires that a State use its "maximum available resources".[92] Individual cases could also lead the Committee to determine "how society's resources should be divided amongst many and different legitimate objectives".[93] They claim that "resource allocation within and between different sectors and administrative arrangements will easily become a theme" under the Optional Protocol but that adjudicators, especially at the international level, lack the capacity and knowledge to consider such issues.

This concern is justified by reference to a paragraph in General Comment No.14 of the Committee that discusses potential violations of the Covenant, in which the Regjeringsadvokat highlights particular phrases.

> 52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized;…[94]

According to the Regjeringsadvokat, this implies that the Committee will consider the general allocation of all resources, including issues outside the ICESCR. For instance, they would determine whether "expenditure on health or employment is too low in relation to high (or ineffective) expenditure on diplomacy or defence".[95]

[90] Smith, V´il de som er imot´ (n. 7 above). p. 57.
[91] Ibid. See discussion on this point in Section 3.1(iv) above in relation to the Finnish jurisprudence.
[92] Regjeringensadvokat, 2009 (n. 5 above), p. 6.
[93] Ibid.
[94] Emphasis is added in original citation by Regjeringsadvokat.
[95] Ibid.

(i) Unreasonable Demands on Norwegian Resources?

Turning to the first concern, will Norway face unreasonable demands on its resources? The answer is that this is most unlikely. The provision in Article 2(1) of ICESCR can be primarily understood as a limit rather than an obligation. A straightforward reading of Article 2(1) shows that the phrase "maximum available resources" applies to the steps to be taken rather than the level of rights to be achieved. States are not legally required to use all of their resources on furthering the rights, once they have been achieved in accordance with the Covenant. That is clearly a matter for politics. The recognition that maximum available resources represents a defence for States has also been recognised by other international bodies, even when not expressly included in legal instruments that recognise ESC rights.[96]

This understanding of the use of ´maximum available resources´ is largely consistent with Norway's existing international experience with monitoring mechanisms for ESC rights. In its concluding observations in 2005, the Committee described twelve areas of concern, such as racial discrimination in the housing and work markets through to the trafficking of women for sexual exploitation. The only area of concern in which budget allocation was implicated was homelessness and housing waiting lists.[97] This is not surprising. The housing sector in Norway has been described as the "wobbly pillar" of the Norwegian welfare state (see below).[98]

A review of concluding observations on other countries reveals that Norway appears to have comfortably met and exceeded the adequacy level in areas such as social security. For example, to Canada, the Committee recommended that the State "establish social assistance at levels which ensure the realization of an adequate standard of living for all" and interrogated closely its existing social security schemes.[99] While the country is wealthy and income inequality is low, the levels of social assistance are comparatively low, and the conditions for

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[96] For instance, the European Social Charter and the Africa Charter on Human and People's Rights provide no express resources defence to States for failure to realises ESC rights. However, their oversight bodies have implied such a defence, using the language of the ICESCR, on the grounds of reasonableness and harmonisation of international law: see Complaint No. 13/2002, *Autism-Europe v. France*, Decision on the Merits, European Committee on Social Rights; *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Comm. No. 241/2001 (2003).

[97] Paras. 18 and 19.

[98] Ulf Torgersen, 'Housing: the Wobbly Pillar under the Welfare State', in B. Turner, J. Kemeny og L. Lundqvist (eds.) *Between State and Market: Housing in the Post-Industrial Era* (Stockholm: Almqvist & Wiksell International, 1987), pp. 116-126.

[99] See further Section 4.1 below.

benefits increasingly harsh, prompting even a coroner to call for an examination of the system after the death of a welfare recipient.[100] For countries in transition, such as Russia, the Committee required 'the raising of minimum pension levels' and it criticised Georgia for failing to meet the minimum.[101] In a low-income country like Senegal it only urged the country 'to allocate more funds for its 20/20 Initiative, designed as a basic social safety net for the disadvantaged and marginalized groups of society',[102] though it is arguable that it could have required much more of Senegal given ILO research.[103]

Would Norway be vulnerable to a *successful* international complaint in this field? The answer would be ´most unlikely´. Eivind Smith notes that many of the rights in the ICESCR, such as health, education and social security, are already and very strongly protected in Norwegian law.[104] After briefly examining the Committee´s jurisprudence, Inge Lorange Backer, as the Director for the Department of Justice, equally affirmed the Government´s view that Norway had largely fulfilled its Covenant obligations, especially in the health and socials security area. This meant that, "incorporation of the Convention will not create new rights in these areas".[105] The few complaints under Norwegian law are perhaps testament to this view. Moreover, for the last ten years, a collective complaint could have been taken against Norway to the European Committee on Social Rights. But no organisation has yet organised such a complaint. The only two states that have ratified the complaints procedure and not been subject to a complaint are Norway and Cyprus.

The one potential area of vulnerability to a resource-sensitive complaint is the right to housing. Levels of homelessness have been relatively consistent over time and Norway experiences relatively high levels of housing unaffordability, particularly for low-income and marginalised groups, together with a very low stock of public housing.[106] While the Government has attempted to meet this dilemma, particularly through subsidises for mortgage

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[100] See Malcolm Langford, *Litigating ESC Rights: Achievements, Challenges and Strategies* (Geneva: COHRE, 2003), p. 19.

[101] *Conclusions and recommendations of CESCR: Russian Federation,* U.N. Doc. E/C.12/1/Add.94 (2003); para. 50; *Conclusions and recommendations of CESCR: Georgia,* U.N. Doc E/C.12/1/Add.83 (2002), para. 17.

[102] *Conclusions and recommendations of CESCR: Senegal, U.N. Doc. E/C.12/1/Add.62 (2001).*

[103] *Cash benefits in low-income countries: Simulating the effects on poverty reduction for Senegal and Tanzania*, Issues in Social Protection, Discussion Paper 15, ILO, 2006.

[104] Eivind Smith, *Konstituionelt Demokrati* (Bergen: Fagbokforlaget, 2010). See discussion in Part III.

[105] *Menneskerettsloven – lov 21 mai 1999 nr 30 styrking av menneskerettighetenes stilling i norsk rett*, Department of Justice and Policing, 31 May 1999, section 2.

[106] Tor Morten Normann, Elisabeth Rønning og Elisabeth Nørgaard, *Utfordringer for den nordiske velferdsstaten - sammenlignbare indikatorer*, Nordisk Socialstatistisk Komité (NOSOSKO) 2009, pp. 154-155.

payments of all homeowners, it is not clearly the policies adopted over the last 30 years have been entirely successful. In 2008, the Riksrevisjon issued a report that strongly criticised municipalities, departments and the Housing Bank for their lack of effort in supporting the most marginalised groups in the housing market.[107]

However, it is not clear whether the insufficiency of effort rises to the threshold of violation. A recent study attempted to determine whether the lack of affordable housing for disadvantaged groups contravened the Revised European Social Charter and the ICESCR. The answer was equivocal – it was not clear.[108] This was partly because in 2007, the Government moved to address some of the underlying proble ms in the system – such as the overly strict conditions for housing support and subsidised loans together with the low supply of public and private housing which keeps prices high. Therefore it is difficult to see Norway facing cases that might have significant budgetary implications.

Of course, this is not to deny that the ICESCR could be used opportunistically by litigants to raise more ambitious or doubtful claims. This partly seems to be the case where the ICESCR has been raised in Norwegian courts in relation to land and housing. One could also imagine complaints about waiting lists for surgical operations or other procedure. However, it is difficult to see such claims succeeding unless there is an acute emergency. The level of health expenditure in Norway is particularly high and adjudicators customarily show high degrees of deference in such cases.[109]

One final worry might be that Norway´s pension fund, based on oil-related revenues, would be covered by the term `available resources´ in Article 2(1) of the Covenant. Would Norway therefore have to allocate these funds towards the realisation of rights under the Covenant? Could this subsequently result in the Government breaching the cross-parliamentary rule on not using more than 4 per cent of the funds at any time? The short answer is no. The pension fund would certainly constitute part of Norway´s resources but it is unlikely that they would be considered ´available´. A sudden and very large increase in government spending – particularly non-investment related - is likely to have significant economic consequences (higher inflation for example) that could actually imperil realisation of other rights and public

[107] *Riksrevisjonenes undersøkelse av tilbudet til de vanskeligstilte på boligmarkedet*. Dokument nr. 3:8 (2008).
[108] See overview in Malcolm Langford and Johannes Nilsen, 'Å leve er også å bo: Norske boutgifter – i overensstemmelse med retten til bolig?', *Kritisk Juss*, No. 2 (2011).
[109] See discussion of the *Soobramoney* at note 131.

priorities. Thus the decision to use a limited amount of the pension funds appears to reflect a relatively well-informed political calculation of what can feasibly used in Norway´s current situation. The use of oil revenues to achieve social rights may be more relevant in those natural resource-rich states which have done little in terms of social development. In any case, the question seems largely irrelevant as discussed above. And where Norway appears to struggle at times in realising some ESC rights, the issues do not appear to relate to resources – but rather policy design or implementation.

(ii) Adjudicative Prioritisation of Resources?

Despite the regularly articulated concern that adjudicators will be allocating resources between different sectors, it is impossible to find evidence of this in the current jurisprudence on ESC rights. Of the approximately 500,000 cases around the world concerning constitutional or international ESC rights, none of them appear to contain such reasoning or remedial relief. All cases revolve around whether a particular right has been realised. It could be argued that the Committee could undertake such politically-oriented analysis in its concluding observations and periodic dialogue with States. But even here, the Committee has been very careful in not looking at overall patterns of expenditure.

The Optional Protocol could of course have indirect effects on budgetary allocations. An increase in expenditure for a particular right means the reductions of spending elsewhere within a sectoral or national budget. ESC rights are not particularly unique in this regard.[110] Court judgments often have budgetary implications: from taxation and tort law through to civil rights concerning prison conditions or fair trial. The question should therefore rather not be whether there are budgetary effects, but whether they are significant or justified.

In a earlier study of jurisprudence on civil rights and ESC rights cases which had budgetary implications, I found a remarkable congruence between the judicial criteria. In essence, the degree to which an adjudicator would make an order with *any* budgetary impact was largely determined by four factors: the (1) *seriousness* of the effects of the violation; (2) *precision* of the government duty; (3) *contribution* of the government to the violation; and (4)

[110] See Jeff A. King, 'The Pervasiveness of Polycentricity', *Public Law* (2008).

manageability of the order for the government in terms of resources.[111] This approach is particularly evident in the Committee's and broader jurisprudence. Where the minimum core of a right is concerned, the Committee takes a less flexible approach to the claim of resources. The burden of proof is on the State to show that sufficient resources are not available.[112] In other words, if the deprivation is very serious, adjudicators will be less flexible. The inclusion of the word "appropriate" in Article 2 of the ICESCR and "reasonableness" in the Optional Protocol also mandate the Committee to look at the broader circumstances. As Norway seemingly meets all of these minimum core obligations and beyond, it is difficult to imagine such a scenario arising. [113]

Many courts have been careful in such circumstances in applying positive obligations. The German Federal Constitutional Court for example has refrained from articulating the precise level of the right. In a recent case concerning the dramatic reduction of unemployment benefits, the Court indicated that the benefit levels had fallen below the minimum, particularly in relation to the amount allocated for dependent children.[114] The Court did not set out how the benefit should be re-arranged or increased but left it to the Government to decide. After negotiations with different stakeholders, including trade unions, a partly revised benefit scheme was agreed upon.

This discussion reveals that the Committee is heavily constrained in making decisions that have significant or unwarranted budgetary effects, particularly for any claim that exceeds the minimum core.

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[111] Malcolm Langford, 'Judging Resource Availability', in John Squires, Malcolm Langford, and Bret Thiele (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: University of NSW Press, 2005), pp. 89-108.

[112] *General Comment 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991); *General Comment 19, The right to social security* (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008).

[113] A higher risk of negative consequences would be in those jurisdictions in which individuals can claim immediate access to the minimum on short notice (the 'tutela' procedure in Latin America). In these systems, judges are not required to look at the broader effects of their decisions or necessarily follow judgments of higher courts. Some of these countries have found ways to deal with these dilemmas. The Colombian Constitutional Court issued structural orders in which it requested the Ministry of Health to reform its rules and plan to avoid distortions in the system. Bruce Wilson, 'Rights Revolutions in Unlikely Places: Costa Rica and Colombia', *Journal of Politics in Latin America,* Vol. 1 No. 2 (2008), pp. 59-85. The Costa Rican constitution provides that the health budget must simply increase in such situations. However, Brazil possibly represents an example where policymakers have been constrained because judges have only been looking at individual cases. See Alicia Yamin and Siri Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health* (Cambridge, MA: Harvard University Press, 2011).

[114] 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, 9 February 2010.

The interpretation by the Regjeringsadvokat of General Comment No. 14 is also misplaced. Unfortunately, they have plucked the text out without clarifying that the Committee had already set out the relevant obligations above it. In particular, the duty to ensure a plan is in place to progressively and effectively realise the right and steps are being taken to implement it. In this context, insufficient expenditure or misallocation of resources (e.g. no or little resources being directed towards the rights of the poorest as has been found in some cases) could constitute an eventual funding of a violation. But one has to jump through the various legal hoops to get there. There is no abstract consideration by the Committee of whether resources have been allocated properly or not.

3.4 Democratic Legitimacy and the Margin of Appreciation

The potential threat to national democratic processes has emerged as a red thread in Norwegian debates over the legal and justiciable recognition of all human rights.[115] Taking his point of departure in St.meld. nr. 17 (2004-2005) *Makt og demokrati* (Parliamentary Paper on Power and Democracy), the Regjeringsadvokat express the worry that ratification of the ICESCR will mean "a delegation of authority to the Committee" and thus a restriction on the "ability of Norwegian actors to freely act in many important sectors".[116] They question whether such a delegation of power is reasonable or democratically legitimate, particularly when it may be practically difficult to reverse the ratification decision. The Regjeringsadvokat places particular weight on the inability of the Committee to understand the Norwegian context.[117] Norwegian officials and politicians have expressed concern that the doctrine of margin of appreciation was not included in the Optional Protocol, as they had requested at the final negotiating session in April 2008.[118]

These concerns can be analysed in different ways in relation to the Optional Protocol.

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[115] See Inge Lorange Backer, `The European Court of Human Rights´, *Nordic Journal for Human Rights*, Vol. 23, No. 4 (2005), pp. 425-33.

[116] Tolle Stabell, 2009 (n. 6 above), p. 2.

[117] " Det vil slik vi ser det ikke være et fremskritt dersom avgjørelser om fordelingen av samfunnets ressurser besluttes av organer utenfor landet, (a) som er organer uten videre kjennskap til det norske samfunn, (b) som ikke har forutsetninger for å se helhetsbildet på samme måte som nasjonal lovgiver, (c) som er annerledes stilt enn nasjonale domstoler som tross alt kjenner samfunnet vesentlig bedre enn et organ som har ansvaret for ca 140 stater, og (d) som følger en saksbehandling som nødvendigvis må bli atskillig mer begrenset enn den som vil være tilgjengelig nasjonalt, uten direkte bevisførsel." Ibid. p. 7.

[118] *Referat fra åpent møte om utkast til Norges 5. rapport til FNs komité for økonomiske, sosiale og kulturelle rettigheter (ØSK)* 21.04.2010. See also Raymond Johansen, _________ *Klassekampen*, 2008.

(i) Is there a Conflict with Democracy?

The premise that there is an automatic conflict between democracy and human rights adjudication should be carefully questioned, though not discounted. Does judicial or quasi-judicial protection of human rights necessarily weaken democracy? Even if we adopted a narrow or thin version of democracy – with the emphasis on electoral representation and strict parliamentarism – some human rights may need strong protection in order to achieve a functioning democracy. According to Miller, 'Protective and welfare rights provide a secure basis upon which the citizen can launch" into their "political role'.[119] Indeed, the Swiss Federal Court partly justified its derivation of a right to minimum subsistence from political rights:

> The guaranteeing of elementary human needs like food, clothing and shelter is the condition for human existence and development as such. It is at the same time an indispensable component of a constitutional, democratic polity.[120]

However, such a conception would only protect a number of ESC rights and largely at a very minimalist level, except for the right to education.[121]

A separate path to tread is to recognise the indivisibility and importance of all internationally recognised human rights but acknowledge that governments and majoritarian democracies do not always succeed in ensuring their protection. This 'democratic failure' may result from majoritarian democracies paying insufficient attention to minority groups. Even a fierce critic of judicial review such as Jeremy Waldron acknowledges that judicial review may be important in protecting 'discrete and insular minorities' who consistently lack political representation.[122] In some cases, the 'minority' might actually constitute the numerical majority – a political system may be dominated by a certain gender or political or social class. Indeed, one can discern greater judicial activity in those jurisdictions where the systematic failure by State to address social disadvantage is perhaps most extreme. This is not to claim that parliamentary majorities are incapable of recognising the claims of minorities.[123]

[119] D. Miller, *Market, State and Community* (Oxford: Clarendon Press, 1989), p. 249.
[120] *V. v Einwohnergemeinde X. und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367), para. 2(b).
[121] See Cecil Fabre, *Social Rights under the Constitution*, (Oxford: Oxford University Press, 2000).
[122] Jeremy Waldron, 'The Core of the Case Against Judicial Review', *The Yale Law Journal*, Vol. 115 (2006), pp. 1346-1406.
[123] Ibid.

However, in the event that the fundamental interests of these minorities are not taken up by parliaments, then a `second-look´ by adjudicators provides an important safety valve. As Føllesdal puts it from a theoretical perspective:

> Liberal Contractualism grants that democratic, majority rule among elected and accountable representatives may be one important mechanism to ensure the protection and furtherance of the best interests of citizens. But other arrangements may also be required, such as super-majoritarian features, constraints and checks on parliament and government of various kinds. There is no prima facie normative preference for unrestrained parliaments.[124]

It may also be arguable that judicial processes, *to the extent they are accessible*, are characterised by a high degree of 'participation', at least at the individual or group level. Claimants are entitled to officially plead their case, information must be supplied by all parties and a systematic evaluation of the issues and evidence is undertaken. Some commentators have suggested that litigation provides an opportunity for constructive dialogue between the branches of government over effective policy-making (See further below in Section 5).[125]

(ii) Managing Potential Conflicts

Depending on the case, or one´s definition of democracy, the potential for conflicts between democracy and ESC rights could loom large. However, the likelihood of such conflicts being significant is mostly marginal. This is because the principle of subsidiarity is built into the Optional Protocol process in four ways. First, there are multiple admissibility criteria to be passed through. Second, the domestic exhaustion of remedies allows the national perspective from the country´s judiciary to be heard by the Committee – something which does not occur in international investment arbitration for example.

Third, and substantively, the Covenant and the Committee provides a margin of appreciation or discretion to States in choices made by their parliaments and beyond in the broader policy and implementative spheres. In the drafting of the Optional Protocol, considerable time was devoted to addressing the concern that the Committee might dictate certain policy choices as well as making unrealistic demands on States' limited resources. A range of proposals were

[124] Andreas Føllesdal, "Why international human rights judicial review might be democratically legitimate." 52 *Scandinavian Studies in Law* (2007) 103-122

[125] See further, Craig Scott, 'Social Rights: Towards a Principled, Pragmatic Judicial Role', *SER Review,* Vol. 1, No. 4 (1999).

made which included directing the Committee to give States a "broad margin of appreciation" in deciding upon policy choices, declaring violations only in cases where a State acted "unreasonably" or require it to use criteria such as "reasonableness" or repeating the "appropriateness" test from the Covenant. Some other suggestions included making reference to a States' available resources or that only gross violations are adjudicated. Other States wanted no explicit test to be included. They referred to the Committee's existing jurisprudence on the matter, which included a margin of discretion.

The Committee had actually already developed a test in its general comments. By 1995, Matthew Craven has noted that in determining whether measures are "appropriate" under Article 2(1), the Committee employs a "margin of discretion" doctrine although it retains a residual power to "assess whether or not the measures taken were the most appropriate in the circumstances".[126] This is analogous to the idea of constitutional subsidiary at the national level where courts begin with the statutory interpretation of rights before applying their own assessment. This is also more State-friendly than the Human Rights Committee has to a certain extent rejected the doctrine.[127] During the negotiations, some States asked for more legal certainty in this regard. In a slightly unusual move, the Committee agreed to draft a statement providing guidance on its future interpretations. It repeats its earlier standards (particularly on minimum core and retrogressive measures) as well as mentioning that States need to adopt "reasonable" measures,[128] which included a "margin of appreciation".

The eventual drafting compromise proposed by the Chair of the Working Group was to include a test of reasonableness and to note State discretion in policy choices. The "reasonableness" concept galvanised diverse support with the final Working Group report listing Australia, Bangladesh, Belgium, Greece, Japan, Norway, the UK and USA as supporting the compromise.[129] There was some nervousness about adopting the margin of appreciation explicitly as it was a test solely developed in the European context. These negotiations and the eventual test adopted showed that there was a considerable understanding that the principle of subsidiarity was built into both the Covenant and the Optional Protocol.

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[126] Craven (note 10 above) 116.
[127] *Länsman v Finland (No. 2)* (Communication No. 671/1995), Views of 30 October 1996, para. 10.5
[128] *An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol*, Statement, UN Doc. E/C.12/2007/1 (2007).
[129] *Report of the Open-Ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, U.N. Doc. A/HRC/8/7, 6 May 2008, para. 170.

This language of the "reasonableness" test in the Optional Protocol was taken directly from the jurisprudence of the South African Constitutional Court. In the case of *Grootboom,* and in language not dissimilar to the Committee's General Comment No. 3, the Court expressed the principle in the following terms:

> The measures [by government] must establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The program must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable.[130]

These include whether the programme is 'comprehensive, coherent, coordinate, with appropriate allocation of 'financial and human resources', 'balanced and flexible' with provision for 'short, medium and long-term needs', 'reasonably conceived and implemented', 'transparent' and made 'known effectively to the public'.[131] While the Court acknowledged that the Government had developed and partly implemented a raft of housing programmes, it found that the authorities had failed to develop any housing programme that was directed towards providing emergency relief for those without access to basic shelter. The applicants in this case had been evicted and were living on the edge of a sportsfield in precarious circumstances. The Court did not order any specific relief and three years later the Government established a new Emergency Housing Programme. The Ministry of Finance also agreed to devote 0.8 per cent of the housing budget to this programme. In the majority of cases dealing with positive obligations though, the South African Constitutional Court has decided that no violation has occurred and that the Government's actions were reasonable.[132]

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[130] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2000 (11) BCLR 1169 (CC), para. 41.

[131] S. Liebenberg, ´South Africa: Adjudicating Rights under a Transformative Constitution´, in *Social Rights Jurisprudence* (n. 20 above), p. 85.

[132] Some of these decisions were clearly justified but the Court has been arguably conservative in the Case of *Mazibuko*. In the former category one would include *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1977(12) BCCR 1969 (CC). The applicant, an unemployed man in the final stages of chronic renal failure, sought a positive order from the courts directing a provincial hospital to provide him with ongoing dialysis treatment. Without this treatment the applicant would die, as he could not afford to obtain the treatment from a private clinic. Despite relying on the constitutional rights to life and emergency medical treatment, the application was dismissed. The guidelines set by the hospital authorities for admission to the dialysis programme were found not to be unreasonable nor was it suggested that they were not applied 'fairly and rationally' in the applicant's case. The Court particularly noted that such claims had to be evaluated within the broader context of the demands upon the health sector and their capacity. If the State was required to provide other patients with

This approach to policy discretion is also represented in the *Autism-Europe v France* decision of the European Committee of Social Rights in 2003. Here, France had made extremely slow progress in advancing the provision of education for children with the autism, despite having passed a statute providing for such education. Up to that moment, the Committee had generally applied a common standard for all States parties, regardless of their relative economic wealth[133] - there is no defence of "maximum available resources" in the Charter unlike the ICESCR. However, in this case, the Committee accepted that some rights may be expensive and complicated and require progressive implementation meaning. Thus, it stated it would focus on whether reasonable effort has been made with sufficient emphasis on the most vulnerable. They adopted the language of 'margin of appreciation' stating that, at least in respect of certain Charter provisions, parties to the Charter do 'indeed enjoy a certain margin of appreciation'.[134] The Committee also took a point of departure in the content of rights as defined in the French legislation. However, it found that the definition of which children had autism was excessively narrow and much narrower than the WHO definition. Moreover, 20 years had passed since the legislation was adopted and little had been achieved. The final conclusion was that France had not complied with the Charter.

It is worth noting that the margin of appreciation developed by the European Court of Human Rights also includes the notion of State consensus. This allows the Court to take note of actual national practice by determining whether there is a sufficient trend or consensus to justify finding a violation of a right. The principle thus incorporates another aspect of subsidiary, although it can lead to violations being more easily found in those few countries that find themselves outside such a consensus. In Morowa´s analysis, the concept serves to balance the margin of appreciation with that of the principle of dynamic interpretation.[135] In practice, it tends to be more used for particular rights in the European Convention (such as privacy and freedom of expression) and only when the Convention and existing case law do not provide clarity.[136]

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such tertiary and expensive medical interventions, "the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet."

[133] Harris and Darcy, *The European Social Charter* (n. 12 above), pp. 26-27.

[134] Complaint No. 8/2000, *Quaker Council for European Affairs v. Greece*, Decision on the Merits, para. 24.

[135] See A. Morowa, ´The "Common European Approach", "International Trends", and the Evolution of Human Rights Law: A Comment on *Goodwin and I* v. *The United Kingdom', German Law Journal*, Vol. 8 (2002), http://www.germanlawjournal.com/index.php?pageID=11&artID=172.

[136] Kanstantsin Dzehtsiarou, ´Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights´, *Public Law* (forthcoming June 2011).

It is not clear though that the consensus principle would be appropriate at the international level. The Human Rights Committee has mostly refrained from adopting it although the Committee made partial use of it in a recent case concerning conscription without alternative civil service in Korea.[137] In the case of the ICESCR, the obligations in Article 2(1) are premised on state difference – i.e. different levels of resources and different policy options. The adoption of a ´consensus´ approach may distract from an appropriate contextual application of the Covenant although if almost all states in the world have adopted a particular policy, it may provide a strong argument for its reasonableness. The Committee has also in its General Comments, and in accordance with the Vienna Convention of Law of Treaties, observed multilateral pronouncements that indicate consensus on issues. As will be discussed below, this led it to derive a right to water from Article 11 of the Covenant but reject claims for a right to sanitation.

Fourthly, and lastly, concern with democratic competence is addressed by many national, regional and regional adjudicators at the remedial stage. A violation might be found but the remedy provides space for the Government to use different options to ensure implementation (noting that in the case of the Optional Protocol, the Committee can only provide recommendations not traditional legal remedies). For example, in *Eldridge v British Columbia*, which concerned the provision of interpretive services to deaf patients in hospitals, the Canadian Supreme Court stated that:

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.[138]

(iii) A Quasi-Judicial Procedure

It should be lastly emphasised that the protocol is a quasi-judicial procedure. The nature of the views of the Committee is fundamentally different from the European Court on Human Rights or the EFTA tribunal. Moreover, there is no formal or strong legal or political process for following up implementation of the decisions. As Beth Simmons puts it, the "idea that the optional protocol represents over-legalization run amok is a contorted caricature of the

[137] *Yeo-Bum Yoon and Myung-Jin* v. *Republic of Korea*, Communication No. 1321-1322/2004, Decision on the Merits 23 January 2007, U.N. Doc CCPR/C/88/D/1321-1322/2004, para. 8.4.
[138] [1997] 3 S.C.R. 624.

protocol" since the "protocol does not substitute the decision of an international court for local legislative decision making." [139]

In the drafting of the protocol, States were clear on this quasi-judicial nature of the procedure. However, their reasons slightly differed conceptually although the extent of the difference is not immediately clear. Some stated that the views of such committees are not legally binding while others stated that they were legally binding but not enforceable. The latter reflects perhaps the Human Rights Committee position on its views.[140]

The position of the Norwegian Supreme Court largely reflects this dialectical nature of the optional protocols. It has stated that the decisions of the Committee are of "significant weight" but not legally binding.[141] As Ulfstein has stated:

> As opposed to the binding nature of the decisions of the European Court of Human Rights, the Norwegian Supreme Court has sufficient leeway in coming to a different conclusion than international human rights treaty bodies, if the Court finds a ground in international law for that. The subsidiarity principle means that there is significant interpretive room that favours Norwegian judges.[142]

The Supreme Court also takes a graduated approach to international views, which appears partly dependent on the nature and quality of an international decision[143].

Of course in national political discourse, quasi-judicial decisions of a UN body may have significant weight through its symbolic power. However, this is likely to be highly dependent on the Committee´s reasoning (as it is for the Supreme Court) and the facts or issues in the case at hand.

3.5 Predictability and Dynamic Interpretation

Throughout the analysis of the Optional Protocol, the Regjeringsadvokat expresses a concern that the principle of dynamic interpretation at the international level will aggravate the factors

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[139] Beth Simmons, 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR', *Nordic Journal of Human Rights*, Vol. 27, No.1 (2009), pp. 64-81, p. 71.

[140] *General Comment No. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc CCPR/C/GC/33 (2008), 5 November 2008.

[141] See Rt-2009-1261, para.44, Rt-2001-1413 (260-2001), side 1429, Rt-2008-1601, para.53

[142] Geir Ulfstein, `Internasjonale domstoler I konstitutionelt perspektiv´, *Nytt Norsk Tidsskrift,* Vol. 28, No. 1 (2011), pp. 38-48, p. 46.

[143] See Rt 2008 s. 513; Rt 2008 s. 1764 and Rt 2010 s. 858.

discussed above. Ratification will therefore carry unpredictable consequences. Norwegian commentators have expressed this anxiety about all international and regional human rights treaties; it is not particularly unique to ESC rights.[144] As to the Optional Protocol to ICESCR, the Regjeringsadvokat states that what the Committee will "decide in individual cases is very unpredictable" particularly as the application of the margin of appreciation "cannot be predicted in light of the principle of dynamic interpretation applied by human rights organs".[145] However, in assessing this risk they particularly emphasise the lack of clarity and vagueness of the rights, which as argued above, does not reflect the development of the jurisprudential field.

Nonetheless, unforeseen decisions are part of the reality of all fields of law, including international law and human rights law. Thus in delegating authority one should be prepared for this within a course a reasonable assessment that this might occur – noting the discussion above. However, the manner in which the Regjeringsadvokaten paints the principle of dynamic interpretation seems uncharitable. The principle refers to the importance of applying the treaty in light of today´s realities. The Vienna Convention on Law of Treaties places emphasis on the ordinary meeting of the text together with the purpose of the treaty and subsequent state practice. The original intention of the drafters is relegated to a residual source. But the Vienna Convention and dynamic interpretation have not necessarily led to runaway international activism. One of the curiosities of the Norwegian debate on international human rights adjudication is the almost exclusive focus on cases where the ECHR appears to be activist (e.g. the first chamber on the crucifix case) or decisions in which Norway loses. The debate seems to lose sight of the fact that very few of the Court´s ten thousand decisions have touched Norway or that there is a robust debate elsewhere on the conservatism of the Court on many rights. One only has to look at the Court´s decision on abortion, post-conflict restitution of property rights and racial discrimination in schooling to find a court that at times is much more conservative than the US Supreme Court. This is not to deny that some decisions may have pushed the boundary too far in one direction but a balanced and holistic approach is needed to evaluating judicial output.[146]

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[144] See Inge Lorange Backer, `The European Court of Human Rights´, *Nordic Journal for Human Rights*, Vol. 23, No. 4 (2005), pp. 425-33; Regjeringensadvokat (n. 6 above), p. 6.
[145] Regjeringensadvokat (ibid), p. 3.
[146] See discussion of this in Sadurski, Wojciech (2002), 'Judicial Review and the Protection of Constitutional Rights', *Oxford Journal of Legal Studies,* 22 (2), 275-99.

Moving beyond the legal principles, sociologically there may be a risk that international mechanisms attain an over-inflated sense of importance or power. Perhaps the Committee will feel free to issue strong decisions lacking nuance. This is a possibility but one needs to factor in the sociological restraints on adjudicators, particularly the accountability that comes through the legal profession, the UN system and the responses of States. Indeed, the secrecy of the investment arbitration system has been cited as one reason why more dynamic decisions tend to be found in that field while the World Trade Organisation´s Tribunal appears to have corrected course more quickly given the deeper involvement of states in trade matters.[147] Martin Scheinin and I have suggested the opposite can also occur in international and national adjudication.[148] As a body attains more power, it tends to be more cautious in its articulation and findings. It operates with an enhanced awareness that the decision will have greater influence and weight. Its' powers make it more aware of its responsibility. Therefore, should Norway ratify the protocol it should focus on ensuring good mechanisms for feedback from States to decisions.

Has the Committee been excessively activist in its interpretation so far? It is hard to say but a short answer is 'no' if one gauges it by the reaction of states to its General Comments and concluding observations. Perhaps the most notable moment was the negative reaction of some States (particularly the United States, United Kingdom, Canada and Egypt) to General Comment No. 15 on the Right to Water in 2003. Here, the Committee stated that the right to water could be implied from Article 11 of the Covenant, which provides for the "right to adequate of living, including food, clothing and housing". How radical was such a step? Well, all States had recognised the right to water in the Mar del Plata Declaration of 1977 and, in 2001, the Committee of Ministers to Member States on the European Charter on Water Resources had stated that the right to water could be derived from Article 11 of the ICESCR.[149] Moreover, the Committee declined to derive the right to sanitation, despite requests during the public consultation process from NGOs. This was on the grounds that there has been insufficient state practice. In the end, all States chose to affirm the Committee´s interpretation on right to water in resolutions in 2010 in the UN General

[147] See discussion by Andrew Lang, 'Liberalization and Regulatory Autonomy: The Right to Water and International Economic Law', in M. Langford and a. Russell, *The Human Right to Water: Theory, Practice and Prospects* (Cambridge University Press, forthcoming 2012),

[148] 'Revolution or Evolution? The Optional Protocol's Possible Trajectory in Light of the Experience of the Human Rights Committee', *Nordic Journal of Human Rights*, Vol. 27, No.1 (2009), pp. 125-140.

[149] Recommendation 14 (2001), para 5.

Assembly and UN Human Rights Council.[150] But, in these resolutions, States went much further than the Committee and also recognised a right to sanitation.

3.6 Institutional Competence of the Committee

The institutional competence of the Committee to decide complaints under the protocol has not been publicly discussed in Norway. But it is sometimes raised informally in discussions. The participation of non-lawyers on the various treaty body committees (besides the Human Rights Committee) and occasionally serving diplomats has raised eyebrows. Three things should be said about this. The first is that the bulk of the work in these committees is done by the most capacitated members along with professional legal staff at the UN Office of the High Commissioner for Human Rights. For instance, in the first decade of the Committee (1987-1988), all of the General Comments were drafted by the Chairperson (Philip Alston) and a second member, Bruno Simma. They were subsequently appointed to the positions of UN Special Rapporteur on Extra-Judicial Killings and the International Court of Justice respectively, which indicates a certain level of State satisfaction with their legal expertise. In the second decade, the general comments were predominantly drafted by Paul Hunt (Professor of Law, University of Essex, UK), Eibe Riedel (Professor of Law, University of Mannheim, Germany) and Justice Philippe Texier (French Supreme Court of Judicature).

Second, many of the Committee's General Comments have been used by national courts, such as the Constitutional Court of South Africa, the Constitutional Court of Colombia, the Supreme Court of Argentina, Supreme Court of Canada, Constitutional Court of Latvia, the Supreme Court of Nepal, the Inter-American Court of Human Rights and so forth. The UN Commission on Human and Human Rights Council have continually encouraged the Committee in this manner.[151] This is not to say that all General Comments are of the same quality or that they could not be improved in various respects. But it is notable to what extent they have become part of legal practice.

[150] In July 2010, the UN General Assembly declared that "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights": *The human right to water and sanitation*, U.N. Doc A/64/L.63/Rev.1, para. 1. In September 2010, the UN Human Rights Council "affirm[ed] that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity". The human right to water and sanitation": *Human rights and access to safe drinking water and sanitation*, U.N. Doc. A/HRC/15/L.14.

[151] See for example, Commission on Human Rights resolution 2003/18, para. 11(a)(ii).

Third, it is arguable that some of the non-lawyers have made valuable contributions to the different committees. In the Committee Against Torture sits a Norwegian psychologist, Nora Sveaas, who is an expert on the psychological dimensions of torture. In the Committee on Economic, Social and Cultural Rights, we find Maria Virginia Bras-Gomes from Portugal who is an expert on social security and services, and was particularly active in the drafting of the General Comment No. 19 on the Right to Social Security.

However, this is not to deny that the quality of the committees can, and should be, improved. The problem though is not the committees, but the States Parties, including Norway. Membership of the Committee is sometimes based more on geography than competence as countries seek to trade off votes in order to get their nationals on different bodies from treaty bodies committees, to WTO panels to gaining positions on the Security Council etc. The Norwegian Ministry of Foreign Affairs has been challenged to take a more expertise-driven approach to appointments to the committees but has declined, suggesting that it prefers to leave open this space for political negotiation.

However, Norway has been active in ensuring that a qualified Norwegian expert has a seat on the Committee on the Rights of the Child and it could work to ensure a more independent process is adopted for appointments. The best model is the one now used by the UN Human Rights Council for appointment of Special Rapporteurs. Despite the seemingly politicised nature of the current UN Human Rights Council, it has appointed more qualified and independent rapporteurs than its predecessor as there is an open and competitive process and all potential rapporteurs must be registered on a public roster.

4. National Benefits and Foreign Policy Goals

In a single sentence, the Regjeringsadvokat acknowledges that an "individual complaints mechanism in some cases, in some places in the world, could contribute to the protection of the disadvantaged groups".[152] However, it quickly dismisses this argument on the basis that such groups are "better served with concrete rules developed by lawmakers rather than imprecise and general principles which are concretised through lengthy and costly litigious processes". It is of course, easy to agree with this statement in the abstract. And States such as Norway have demonstrated the power of parliamentary democracy to sustainably achieve

[152] Regjeringensadvokat, 2006 (n. 6 above), p. 8.

ESC rights. However, what happens when this doesn't function? If laws exclude such groups or are not properly implemented?

This section therefore considers a number of arguments for why Norway should consider ratifying the Optional Protocol on instrumental grounds. Ratification is an act of public policy and should involve a full consequential analysis. The various costs need to be weighed against the benefits. Thus, even if we accept there might be some legal risks what would be the potential benefits to Norway in ratifying? Indeed, the Norwegian parliament in setting out its strong policy on international human rights in 2000, explicitly acknowledged that there may be some costs in ratification:

> Svaret er enkelt: Menneskerettigheter gjelder alle individer, uavhengig av om de er bosatt i Norge eller andre deler av verden. Dette universalitetsprinsippet gir et moralsk og rettslig imperativ for alle til å bidra til en global menneskerettighetsbeskyttelse. Derfor er tiltak som fremmer menneskerettigheter, et viktig virkemiddel i norsk utenrikspolitikk. Bare gjennom en samlet innsats for alle sivile, politiske, økonomiske, sosiale og kulturelle menneskerettigheter kan vi føre en utenrikspolitikk som fremmer Norges interesser og sikkerhet, bidrar til internasjonal fred og rettferdighet og verner om menneskerettighetene. På grunnlag av et slikt helhetlig perspektiv ønsker Regjeringen å føre en offensiv menneskerettighetspolitikk. Dette gjelder så vel i internasjonale fora som i direkte samarbeid med andre land enkeltvis.[153]

4.1 Promotion of Human Rights Abroad

Norway has historically promoted itself as a leader in the field of international human rights, including in its´ adoption of new instruments. Indeed, the government´s discomfort in taking a more sceptical position towards ratification of new instruments in recent years is evident through its constant highlighting of its strong historical record on ratification and domestic incorporation.[154] The country certainly has a strong record of ratification. However, other states have ratified more human rights treaties – Finland and France being examples. Norway´s self-understanding of its uniqueness on incorporation has, however, always been flawed. Numerous states automatically incorporate international law or human rights treaties

[153] St.meld nr. 21 (1999-2000), p. 3.
[154] *Referat fra åpent møte om utkast til Norges 5. rapport til FNs komité for økonomiske, sosiale og kulturelle rettigheter (ØSK)* 21 April 2010.

in their legal systems or have included a much broader catalogue of rights in their constitutions.[155]

While failure to ratify to ratify the Optional Protocol to the ICESR would further complicate this, partly flawed, narrative, the deeper contribution of Norwegian ratification in foreign policy is possibly more focussed. First, ratification is paradoxically positive for the promotion of civil and political rights. In international debates, the historical divide on CP and ESC rights is commonly re-deployed by more authoritarian states. If Western countries are able to demonstrate that they are willing to be bound by ESC rights, then greater pressure can be placed on those regimes and fragile democracies to do likewise.

Secondly, the Optional Protocol can provide a useful tool in promoting a culture of human rights accountability in all states, which accords with the objectives of Norway´s development and foreign policy. China, for example, has ratified the ICESCR but not the ICCPR. If it were encouraged to ratify the Optional Protocol to the ICESCR, such a measure could not only assist in core economic and social rights but foster real benefits in those areas where there is a strong overlap between social and civil rights, such as protection of labour rights, basic livelihoods and protection of the home, women´s rights, right to life and general participation in the design of social policy. The same could be applied in many other States.

Third, recent research indicates that the majority (72%) of the world´s poor live in middle-income countries.[156] Thus, provision of traditional development aid will have less effect as these countries have significant resources at hand. Human rights mechanism can thus play one, although minor, role in helping improve the politics in those countries, pushing them to pay more attention to poverty and inequality.

However, in all of these scenarios, if Norway is not prepared to ratify such a treaty, its´ ability to convince these countries to this protocol and other international treaties is diminished.

4.2 Development of International Jurisprudence for National Courts

While cases decided under the optional protocol have the potential to provide remedial relief and spark policy debate (see below), one of the main contributions will be the development of

[155] See discussion in Section 2.1 above.
[156] Andy Sumner, 'The New Bottom Billion: What If Most of the World's Poor Live in Middle-Income Countries?', *Centre for Global Development (CGD) Policy Brief* , Washington, DC: CGD (2011).

case-based jurisprudence. Indeed, the Human Rights Committee has arguably played a valuable role in this area and this has influenced the practice of domestic courts.[157] Indeed the Regjeringsadvokat acknowledged this role of the individual complaints mechanism in 1999 when commenting on the incorporation of the CRC and ICESCR into Norwegian law. In its letters to the Foreign Ministry on the OP to ICESCR, the Regjeringsadvokat now advances a different and curious argument. It says that the ICESCR is vague because there have been no cases but resists ratification which would provide such case law.

As discussed in Section 3 above, the Committee has developed a good degree of jurisprudence in its general comments of sufficient preciseness. These already been used by many courts around the world in interpreting ESC rights. Comparative and regional law also provides a rich jurisprudence from which national courts and governments can draw. However, decisions from a UN body adjudicating individual cases may have greater influence in some or many jurisdictions. Its decisions would be translated into multiple languages or it may be more authoritative for courts that lack a tradition of citing comparative jurisprudence.

4.3 Remedial Relief for Individuals and Groups

The Optional Protocol obviously provides a forum for relief for individuals who believe their ESC rights have been violated. This right also exists under Norwegian law. Whether courts or international complaint mechanisms will provide remedial relief is an empirical rather than a theoretical or legal question. Growing social science research indicates that ESC rights litigation can have an impact in certain circumstances. This may be material impacts for victims, indirect effects on policy or positive changes in power relations and symbolic perceptions and attitudes of unpopular groups.[158] In a study of five developing and middle-income countries funded by the World Bank, Gauri and Brinks found that judgments concerning the right to health and education "might well have averted thousands of deaths"

[157] See for example, *Mabo v Queensland* (1992) HCA 23; (1992) 175 CLR1.

[158] Cesar Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America', *Texas Law Review*, vol. 89(7) *(*2011)

and have ”enriched the lives of millions of others”. [159] Studies of regional human rights bodies reveal compliance with some decisions while others are more challenging.[160]

There is sometimes a perception that only wealthy countries or Northern European democracies are likely to implement quasi-judicial or judicial decisions. That is not necessarily correct. The degree of democracy or existing levels of equality is only one factor in influencing the degree of implementation. Indeed, Beth Simmons finds that ratification of the ICCPR and its Optional Protocol has had the greatest impact on rights improvement in transitional democracies, helping bridging the gap between state promises and actual performance, rather than wealthy democracies.[161]

There is sometimes a fear that adjudicators will be too conservative,[162] although this is largely not worried about in official circles in Norway. There is the occasional concern that more advantaged groups will dominate the process. The Regjeringsadvokat states that less advantaged individuals won´t have legal resources to take such cases. This critique is only partly borne out by the emerging studies of litigant profiles and distributive impact. When it comes to successful judgments, least advantaged groups commonly form the majority. In some jurisdictions, they have also used initial gains by middle class individuals to gain improved access to health or education rights.[163]

However, effective access to justice is an important issue. But it is not clear that denying access to an Optional Protocol complaints mechanism is the answer to that problem. The better response is to improve accessibility. There is a slow global trend, for example, towards establishing rights to legal aid for violations of some ESC rights or aspects of them.[164] Perhaps ratification of the Optional Protocol could prompt the Norwegian Government to review whether disadvantaged Norwegians have sufficient access to legal services in non-

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[159] Gauri, Varun and Daniel Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008).

[160] See for example Frans Viljoen, “State compliance with the recommendations of the African Commission on Human and Peoples’ Rights” in M Baderin & M Ssenyonjo M (eds) *International human rights law: Six decades after the UDHR* Aldershot:Ashgate (2010).

[161] Simmons, ´Should States Ratify?´ (n. 139 above).

[162] See, for example, Karl Klarel (1998), 'Legal Culture and Transformative Constitutionalism', *South African Journal of Human Rights,* 14, 146-88; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

[163] Gauri and Brinks, *Courting Social Justice* (n. 156 above).

[164] See Andrea Durbach, ‘The Right to Legal Aid in Social Rights Litigation, in *Social Rights Jurisprudence* (n. 20 above), pp. 59-71.

criminal cases. To what extent do services such as Juss-Buss and JURK carry too much the burden of civil legal aid in Norway? The proposed Optional Protocol to the CRC has raised discussion, for instance, on whether children in Norway receive sufficient legal representation for example.

4.4 Improvement of Policy

Social rights adjudication can support better democratic governance and policy-making by highlighting problems in the design and implementation of policies. As has been pointed out, many of the arguments for human rights adjudication are pro-majoritarian.[165] In particular a complaint-based system can act as a "fire alarm", allowing individuals to raise issues with a policy that may not receive any or adequate attention in other participatory forums such as the media or parliament. As Gauri and Brinks put it, "courts serve as an information-gathering function that facilitates the accountability of various parts of the state (or even private providers) to each other, using formal rights and judicial gloss as their yardsticks".[166] Moreover, adjudication can play a role in highlighting unfilled commitments by the state in in its law, and sometimes policy, bringing "lower-level or state bureaucracies in line with stated national policy".[167]

A good international example of this potential is the first collective complaint filed under the European Social Charter, which was against Portugal. It was alleged that they had taken insufficient steps to eliminate exploitative child labour with official statistics showing 200000 children under the age of 15 were working. The Committee agreed and found that the law was too permissive and the number of labour inspectors insufficient. The response of Portugal was to amend its constitution, reform its legislation and triple the number of labour inspectors. Five years later, Portugal reported a radical reduction in the level of child labour. This experience help prompt Portugal to be one of the leading states in pushing for the Optional Protocol to ICESCR and their diplomats in the UN Human Rights Council discussed the benefits of the decision for Portugal.[168]

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[165] Anine Kierulf, `Rettliggjøringsdebatten etter Barnesykdommene´, *Nytt Norsk Tidsskrift*, No. 2 (2011), pp. 209-12.
[166] Ibid., p. 346.
[167] Ibid. p. 346-7.
[168] Statement to the UN Commission on Human Rights Working Group, 2005.

In evaluating arguments for and against ratification, Simmons highlights this positive dialogical role that the Committee can play:

> The focus on litigiousness has obscured an important aspect of individual complaints to the international community: these complaints can complement and support broader domestic social movements to prod governments to change public policies and priorities. The most important consequences of significant cases will not so much be the formal findings, but the inspiration the case provides to groups, coalitions, and social movements to press an issue forward on multiple fronts. Indeed, far from being an alternative to "legitimate political processes", the publicity surrounding individual complaints can be used to bolster them. A finding that the government has not lived up to its obligations would add at least a bit of weight to people's demands that their government take economic and social deprivation and discrimination seriously. It could certainly be useful for framing demands to governments and legislatures. These cases should provide inputs into domestic political processes, not replace those processes.[169]

However, rights strategies also have the potential to divide and polarise. The use of legal strategies could decrease the chance for political compromise. Eivind Smith worries about this by-product of litigation and Williams and Scheingold note the increasing backlash to the use of progressive rights-claiming strategies by conservative groups in the United States.[170] Such consequences need to be brought into the overall equation of considering the impacts of ratification. However, it is doubtful whether such effects would be significant in Norway and many other places. Recourse to the courts tends to come when there has been no success in resolving conflicts in the bureaucratic and political sphere. Moreover, the optional procedure is a quasi-judicial procedure and it is hard to say that even the decisions against Norway in the European Court of Human Rights have had such a polarising effect. One should also be cautious about denying potential victims the right to assert their claims on the basis that it may disrupt `social harmony´. However, the potential polarisation highlights the importance of litigants and not their representatives making the key decisions in litigation strategies since it is the former who will most likely bear any political fallout from the case.

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[169] Simmons, ´Should States Ratify?´ (n. 139 above).

[170] S. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change (*Ann Arbor: the University of Michigan Press, 1974), pp. xxxii-xxxvii; and L. Williams, 'Issues and Challenges in Addressing Poverty and Legal Rights': A Comparative United States/South African Analysis', *South African Journal of Human Rights*, Vol. 21 (2005), pp. 436-472.

4.5 Inquiry Procedure

In addition to the complaints procedure, the Optional Protocol also contains an inquiry procedure under which the Committee may investigate a situation in a State Party if it receives "reliable information indicating grave or systematic violations". However, a visit to the territory of the State is premised upon consent. Such an inquiry procedure is much needed. Given the number of intractable and systemic violations that have been uncovered during the State reporting procedure, it should allow the CESCR to make better and focused recommendations. Norway should consider whether to encourage other States to accept this procedure on ratification.

5. Conclusion

The article set out to delve more deeply into the premises for the Norwegian debates on the drafting and ratification of the Optional Protocol to the ICESCR. Despite the legalistic orientation of these discussions, it is not clear that the arguments against the Protocol stand up to legal analysis. There is arguably a sufficient jurisprudence that reveals a justiciable content that can be interpreted in such a way as to support democratic processes, or at least establish general contours for policy rather than make it. Moreover, there are a significant number of legal and political arguments in Norwegian domestic and foreign policy for ratification that needed to be considered and weighed. It is unlikely that any or many cases will be filed against Norway or that applicants will be successful. But in some areas Norway may be slightly vulnerable. However, it is not clear that any loss before the Committee would be problematic rather than helpful for social policy given the form and weight of adjudication.