ASSESSING THE HUMAN RIGHTS REGIME OF THE COUNCIL OF EUROPE IN TERMS OF ECONOMIC AND SOCIAL RIGHTS

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Prof. Dr. Meliha ALTUNIŞIK
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Science.

Assoc. Prof. Dr. Galip YALMAN
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Science.

Assoc. Prof. Dr. Mehmet OKYAYUZ
Supervisor

Examining Committee Members

Assoc. Prof. Dr. Mehmet Okyayuz (METU, ADM) ____________________

Assoc. Prof. Dr. Faruk Yalvaç (METU, IR) ____________________

Assoc. Prof. Dr. Sevilay Kahraman (METU, IR) ____________________

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Name, Last name: Ece MİLLİ

Signature :

ABSTRACT

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Milli, Ece

M.S., Department of European Studies
Supervisor: Assoc. Prof. Dr. Mehmet Okyayuz

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This thesis seeks to answer the question whether economic and social rights have the same status with civil and political rights under the human rights regime of the Council of Europe. To this end, the thesis examines the assumptions with regard to the nature of economic and social rights, on the one hand, and civil and political rights, on the other. Second, it seeks to find out whether the nature of economic and social rights is different from that of civil and political rights. Third, it examines how the protection of and approach to the two sets of rights developed in the Council of Europe. Finally, it assesses the contemporary protection of economic and social rights in the Council of Europe in comparison to protection of civil and political rights.

Keywords: economic and social rights, civil and political rights, Council of Europe

ÖZ

AVRUPA KONSEYİ İNSAN HAKLARI REJİMİNİN EKONOMİK VE SOSYAL HAKLAR AÇISINDAN DEĞERLENDİRİLMESİ

Milli, Ece
Yüksek Lisans, Avrupa Çalışmaları Bölümü
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Çalışma, Avrupa Konseyi insan hakları rejiminde ekonomik ve sosyal hakların sivil ve siyasi haklarla aynı statüye sahip olup olmadığı sorusunun yanıtını aramaktadır. Bu amaçla, ilk olarak ekonomik ve sosyal haklar ile sivil ve siyasi hakların doğasına ilişkin varsayımları incelemektedir. İkinci olarak, ekonomik ve sosyal hakların doğasının sivil ve siyasi hakların doğasından gerçekte farklı olup olmadığını araştırır. Ardından, Avrupa Konseyi'nde her iki hak grubuna yaklaşımın ve bu hakların korunma düzeylerinin gelişimini incelemektedir. Son olarak, Avrupa Konseyi'nde ekonomik ve sosyal hakların günümüz korunma seviyesini sivil ve siyasi hakların korunma seviyesi ile karşılaştırmalı olarak değerlendirmektedir.

Anahtar Kelimeler: ekonomik ve sosyal haklar, sivil ve siyasi haklar, Avrupa Konseyi

To my father and grandmother

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CHAPTER I

INTRODUCTION

Although all human rights have been regarded as interdependent, indivisible and interrelated, civil and political rights were prioritized over economic and social rights by the international community, particularly by the West, during the Cold War era. Soon after the Universal Declaration of Human Rights (1948) was adopted, due to the ideological tension between the two blocs, Western states prioritized civil and political rights whereas the communist countries and the Third World have tended to prioritize economic and social rights (Toebes 1999:661). It was argued by the West that economic and social rights were different in their nature and, therefore, they were often considered "as aspirations or goals rather than properly of rights" (Beetham 1995:41). As a result, there had been a division between the two sets of rights. This resulted in devotion of more energy and resources at the international level for the promotion of civil and political rights. Therefore, economic and social rights led "a kind of shadow life" during this period (Hamm 2001:1006).

Economic and social rights were subject to a similar treatment at the regional level during the Cold War era. A major example to the underestimation of these rights at the regional level was the Council of Europe's human rights regime. In fact, for a long time, Europe was the only region where protection of economic and social rights was promoted. The European Social Charter (1961) was the major instrument protecting these rights. Even the International Covenant on Economic, Social and Cultural Rights entered into force fifteen years after the adoption of the Charter. As in the words of Alston

(2005:3), the Charter was "the flagship of international instruments" promoting protection of these rights. Nevertheless, when compared to the extent civil and political rights were protected within the system, particularly by the European Convention on Human Rights; the secondary status of economic and social rights was noticeable.

With the end of the Cold War, there has been greater embracement of and increasing support for economic and social rights at the international level. In the early 1990s, the international community achieved consensus, more vividly than ever, that the two sets of human rights are interdependent, indivisible and interrelated. This consensus was reaffirmed in 1993 by the Vienna Declaration and Program of Action as the Declaration states as the states agreed that "[a]ll human rights are universal, indivisible and interdependent and interrelated" and that they should treat "human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" (para. 5). Since the Vienna Declaration, there have also been efforts at the international level to bring economic and social rights on an equal footing with civil and political rights. Similarly, there have been renovations with regard to the protection of economic and social rights at the regional level, including Europe. A major example is the adoption of the Revised European Social Charter in 1996.

While there has been increasing support for economic and social rights at the international and regional levels, it has been common, especially in the Western liberal democracies, to think of human rights in terms of civil and political rights, i.e. the rights to fair trial and to freedom of expression. On the other hand, scholars and human rights experts increasingly are of the view that economic and social rights, i.e. the rights to food and to health, are as important as civil and political rights, and should be treated accordingly (Mapulanga-Hulston 2010:29). The focus of these debates is the natures of the two sets of rights, particularly the nature of economic and social rights.

According to some, due to their different nature, economic and social rights are aspirations rather than rights, and they should not be treated the way civil and political rights are treated. Thus, the relationship between civil and political rights, and economic and social rights, i.e. whether they should be on the same footing or whether there is hierarchy between them, is still central to the mainstream human rights debates (Ibid.).

Having taken the argument that economic and social rights shall be treated on an equal footing with civil and political rights as its basis, this thesis aims at assessing the status of economic and social rights within the human rights regime of the Council of Europe. In a world where there is widespread poverty and where people have problems in accessing their basic needs, it is essential to protect and promote the economic and social rights of people which, if done so, secure "basic quality of life in terms of food, water, shelter, education, health care and housing" (Erasmus 2005 cited in Brennan 2009:65). However, for decades while civil and political rights have been promoted, economic and social rights have been neglected both at international and regional levels. Only with a comprehensive approach to the promotion and protection of all human rights, including social and economic rights, that people can be treated as "full persons", persons enjoying all rights simultaneously (OHCHR 2005). Therefore, economic and social rights must be brought on an equal footing with civil and political rights. This thesis serves to this process by demonstrating that economic and social rights can actually be brought on an equal footing. It also critically analyzes the human rights regime of the Council of Europe with the aim of providing the reader with an actual picture with regard to the status of economic and social rights under the most developed regional human rights regime.

The overall problem that this thesis concerns with is whether economic and social rights are given the same value with civil and political rights. In the light of this problem, the main question that this thesis aims at answering is

whether economic and social rights are treated equally with civil and political rights in Europe, particularly under the human rights regime of the Council of Europe. The reason why the Council of Europe's human rights regime is chosen as the level of analysis is that it remains as the most developed regional human rights system (Smith 2003:92). By examining their status in Europe, the author aims at giving an insight into how these rights are treated in the world today. The following questions are the questions that the thesis seeks to answer in order to provide a detailed analysis of its research question: What are the assumptions with regard to the nature of ESRs and CPRs? Is the nature of ESRs different from that of CPRs? How did the protection of and approach to ESRs and CPRs develop in the Council of Europe? How is the contemporary protection of and approach to ESRs in the Council of Europe in comparison to CPRs?

Although they are grouped together with economic and social rights, cultural rights do not constitute a part of the subject of this paper. The reason is because they still remain as the least developed human rights category in terms of scope, content and enforceability when compared to civil, political, economic and social rights. Although they are listed together with economic and social rights in international and regional laws, they are often neglected and underestimated both in doctrine and state practice (Symonides 2002:559). Therefore, according to the author, cultural rights need to be the topic of a separate study as they remain behind economic and social rights in terms of status.

With regard to the methodology of the thesis, according to various scholars, the evidence of the extent to which a norm is internalized can be found within political discourses, institutions, laws and policies (Kang 2009:1009). In order to understand whether economic and social rights are internalized, in other words, whether they are given the value that they deserve, the thesis examines first the discourses such as those of statesmen and Council representatives. It

also analyses institutions such as the Committee on Economic, Social and Cultural Rights, the Human Rights Committee and the European Court of Human Rights. Finally, it examines the laws both at the international and European levels such as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the general comments issued by the Human Rights Committee, European Convention on Human Rights and European Social Charter. In addition to these analyses, comparative analysis is conducted in answering the research question as the status of economic and social rights is assesses in comparison to the status of civil and political rights.

To the aforementioned end, the second chapter will start with an analysis of economic and social rights as international human rights. Here, the content of economic and social rights and the historical development of the protection of these rights at the international level will be presented. In addition, the status of economic and social rights in comparison to civil and political rights will be presented here. The chapter also aims at bringing economic and social rights on an equal footing with civil and political rights by critically analyzing the assumptions with regard to the nature of economic and social rights. In the third chapter, the author will assess the status of economic and social rights within the Council of Europe's human rights system. To this end, historical overview of the Council of Europe's regime and the place of economic and social rights within this regime will be presented. Next, the latest developments with regard to these rights will be examined. Finally, considering these developments, whether or not economic and social rights are treated the way civil and political rights are treated will be analyzed. Based on these studies, the thesis will make an overall analysis in the conclusion chapter.

CHAPTER II

ECONOMIC AND SOCIAL RIGHTS AS INTERNATIONAL HUMAN RIGHTS

2.1. Overview of the International Human Rights Regime and the Origins of Internationally Recognized Human Rights

Human rights are the rights that every human being has because of being human. Human rights are equal, that is, every human being has the same rights as every other human being. They are inalienable, that is, one cannot lose her human rights just like she can never cease being a human. Finally, human rights are universal as they are held by everyone, everywhere (Donnelly 2005:1). This approach to human rights is the basis of the contemporary human rights understanding of the international community, as reflected through the international human rights regime.[1] The Universal Declaration of Human Rights, adopted at the United Nations in 1948, is the first instrument which has rendered this understanding globally recognized (Freeman 2002:32).

Prior to the adoption of the Universal Declaration, there had been attempts at the international level to abolish slave trade and slavery, to develop

[1]"International regimes are defined as principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area" (Krasner 1978 cited in Donnelly 1986:600). The international human rights regime, as used in this paper, refers to the regime established within the framework of the United Nations. For a detailed analysis of international regimes in general and the characteristics of the international human rights regime, see Donnelly 1986.

humanitarian laws of war, to provide protection for minorities and to set minimum standards for working conditions and related matters (Craven 1995; Eide 2001). These attempts, however, were limited in scope and "largely political rather than idealistic in motivation" (Craven 1995:6). It is with the end of the Second World War that the international community decided that commitment to protection of human rights should be the basis of the new international order in order to avoid reiteration of the atrocities of the War. To this end, when the United Nations Charter was formulated in 1945, the member states agreed that one of the aims of the organization was "to reaffirm faith in fundamental human rights" (preamble) and that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all" (Article 55). The Universal Declaration was adopted with the aim of establishing a common understanding of human rights and fundamental freedoms to which the international community made commitment via the Charter (preamble).[2]

The Declaration brings together almost all the human rights and fundamental freedoms which have been recognized globally (Eide and Rosas 2001:3). It reflects the historical processes which gave substance and form to human rights. Throughout history, and due to social struggles, different categories of human rights have been conceded and recognized (Mapulanga-Hulston 2002:32). Although the Declaration does not make a distinction as such, the rights it covers are thus grouped as civil and political rights, on the one hand, and economic, social, and cultural rights, on the other. The origins of civil and

[2] At the time of the adoption, most of the UN members were from Europe and Americas, with a few states from Africa and Asia. In the 1960s, UN membership has more than trebled as new members from Africa and Asia joined the organization. This has raised the question of applicability of the declaration to the new comers (Freeman 2002:35). Nevertheless, the Declaration is seen as a source of authority by most of the international legal instruments adopted at the UN, including the two human rights treaties which are recognized widely by the member states. Moreover, "[a]ll the basic instruments on human rights adopted by the regional organizations refer to the Universal Declaration in preambular paragraphs. The Vienna Declaration and Programme of Action also asserts the central position of the Universal Declaration for the international community" (Smith 2003:40-41).

political rights (hereafter CPRs) are usually traced back to the intellectual discussions and developments in the West in the 17th and 18th centuries (Donnelly 2005; Eide 2001; Freeman 2002). The American and French revolutions, which led to the adoption of the American Declaration of Independence (1776) and the French Declaration on the Rights of Man and the Citizen (1779) respectively, are regarded as the milestones in the development of these rights (Hunt 1996:4). The main motivation behind CPRs was to "uphold the sanctity of the individual before the law and guarantee his or her ability to participate freely in the political system" (Landman 2002:3). The absolute and arbitrary power of the modern state determined the content of these rights (Beetham 1995:47). As for economic and social rights (hereafter ESRs), the establishment of the International Labor Organization (ILO) in 1919 is particularly important for their development. The organization was established in order to respond to the demands of the workers of the time for right with regards to work-place (Mapulanga-Hulston 2002:34). The ILO adopted various conventions dealing with issues such as freedom of association, the right to organize trade unions, freedom from forced labor and freedom from discrimination in employment (Freeman 2002:39). Yet, the origins of ESRs can be traced back to the nineteenth century, before the establishment of ILO. The work of the ILO's nineteenth century antecedents and the beginnings of Western welfare states such as Chancellor Bismarck's social insurance schemes of the 1880s can be included in their origins (Hunt 1996:4).[3] Development of ESRs started later than that of CPRs. Those that were protected before the adoption of the Universal Declaration were mostly labor rights. With the Declaration, what we understand today as ESRs have been recognized as human rights. These rights, in general, are claims for the promotion of individual flourishing, and socio-economic development (Landman 2002:4). They "aim to secure … a basic quality of life in terms of food, water, shelter, education, health care

[3] For a more detailed analysis of the origins of economic and social rights, see Eide 2001:9-36.

and housing" (Erasmus 2005 cited in Brennan 2009:65). The insecurity generated by the free market economy as well as widespread urbanization and industrialization has determined much of the content of ESRs (Beetham 1995:47). The Universal Declaration embraced civil, political, economic, social and cultural rights as human rights, and thus extended the human rights platform (Eide 2001:17).

The Universal Declaration has been a "standard of reference" in the development of international human rights norms (Craven 1995:7). Two major human rights covenants, the International Covenant on Civil and Political Rights (hereafter ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (hereafter ICESCR), were adopted on the basis of the Universal Declaration. These three instruments, named as the International Bill of Rights, constitute the basis of the international human rights regime (Steiner and Alston 1996:256). The rights they contain "form a wide-ranging, but interrelated, normative system" (Eide 2001:10). The covenants establish legal obligations to which states may bind themselves. As of July 2012, the ICCPR has 167 parties and the ICESCR has 160 parties (United Nations, no date). This implies that most of the states recognize these rights as legitimate rights (Freeman 2002:53).

The covenants do not define CPRs or ESRs. They rather provide a list of rights falling under these two sets of rights. Several CPRs listed by the ICCPR are as follows:

(a) the right to life (Art. 6)
(b) the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (Art. 7)
(c) the right to freedom from slavery (Art. 8)
(d) the right to liberty and security (Art. 9)
(e) the right to liberty of movement (Art. 12)

(f) the right to equality before the law and the right to fair trial (Art. 14)
(g) the right to recognition everywhere as a person before the law (Art. 16)
(h) the right to freedom of thought, conscience and religion (Art. 18)
(i) the right to freedom of expression (Art. 19)
(j) prohibition of war and advocacy of national, racial or religious hatred (Art. 20)
(k) the right to peaceful assembly (Art. 21)
(l) the right to freedom of association, including the right to form and join trade unions (Art. 22)
(m) the right to participation in political life (Art. 25)

The ICESCR lists ESRs as follows:

(a) the right to work (Art. 6)
(b) the right to the enjoyment of just and favorable conditions of work (Art. 7)
(c) the right to form and join trade unions and the right to strike (Art. 8)
(d) the right to social security (Art. 9)
(e) the rights of families, mothers, and children (Art. 10)
(f) the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Art. 11)
(g) the right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12)
(h) the right to education (Art. 13)

"The International Bill of Human Rights has since been extensively elaborated through the adoption of numerous conventions and declarations, both at the universal level … and at the regional level" (Eide 2001:10). At the universal level, the human rights regime comprises seven other human rights treaties in addition to the ICCPR and the ICESCR. Five of these embody civil, political, economic and social rights of certain groups in accordance

with the International Bill. These are the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Convention on the Rights of Persons with Disabilities. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance are the two conventions which lay out protections of specific civil rights in accordance with the Declaration and the ICCPR.

Within the context of the international human rights regime, regional human rights regimes have also evolved in Europe, Africa, and Latin America (Landman 2002:5). European Convention for the Protection of Human Rights and Fundamental Freedoms, African Charter on Human and Peoples' Rights, and American Convention on Human Rights are the major treaties which govern regional human rights regimes.

2.2. The Status of Economic and Social Rights at the International Level in Comparison to the Status of Civil and Political Rights

Since the adoption of the Universal Declaration, as asserted through numerous resolutions, official position of the UN has been that all human rights are indivisible, interdependent and interrelated (Steiner and Alston 1996:256).[4] In practice, however, ESRs were neglected by the international

[4] See, for example, GA Resolution 32/130 (16 Dec 1977), para 8; GA Resolution 41/128, art. 6(2) (4 Dec 1986).

community until the early 1990s (Amnesty International 2005; Coomans 1995; Craven 1995; Hamm 2001; Hunt 1996; Robinson 2004).

The Universal Declaration does not make a distinction between the rights it covers. It has rendered different rights interrelated and mutually reinforcing. Following the Second World War, both CPR claims and ESR claims were brought to the agenda of the international society and regarded as interdependent.[5] Accordingly, the intention of the UN member states was to adopt a single human rights convention which would elaborate all the rights listed under the Universal Declaration. Following the adoption of the Declaration, however, the international community drifted into an ideological conflict which affected the development of ESRs negatively. As Alston (1994 cited in Hunt 1996:8) notes, with the beginning of the Cold War, "the rational and balanced debate between 1944 and 1947 (culminating in the adoption of the Universal Declaration)" turned into "a struggle that encouraged the taking of extreme positions and prevented objective consideration of the key issues raised by the concept of economic and social rights".

Generally speaking, the Western bloc championed CPRs over ESRs while the Eastern bloc prioritized the latter (Coomans 1995:4-5; Craven 1995:9; Toebes 1999:661). During the drafting process, Western states argued that the two sets of rights had different natures and, therefore, needed different formulations (Eide 2001:10-11; Hausermann 1991:50-51).[6] Thus, they pressed for the adoption of two separate international covenants (Eide and Rosas 2001:3).

[5] Roosevelt stated in his 1941 State of the Union address that the world states "have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence" (cited in Mapulanga-Hulston 2002:34). This speech is an example to how both sets of rights were on the agenda.

[6] For a detailed analysis of the different stances of UN member states, see Scott 1989.

In 1951, the General Assembly agreed that two separate covenants should be prepared. In 1966, the international community adopted the ICCPR and the ICESCR.[7] These two treaties had equal status and their preambles underlined the unity and interdependence of the two sets of rights. The preamble of the ICCPR, for instance, states that:

> …the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, *as well as* his economic, social and cultural rights [emphases added].

However, reflecting the view that the two sets of rights had different natures, these two treaties led to the division of human rights into two different categories with distinct levels of justiciability and requirement for realization (Merali and Oosterveld 2001:1). This division happened to the detriment of ESRs. While CPRs were regarded as negative rights that could be protected immediately, ESRs were formulated as positive rights necessitating programmes of action over time until they could be completely realized. This was followed by devotion of more energy and resources for the promotion of CPRs. By 1983, the majority of the UN human rights resolutions dealt with CPRs rather than ESRs. While the treaty body monitoring the implementation of the ICCPR, that is the Human Rights Committee, was established in 1976, it took nineteen years for the establishment of the Committee on Economic, Social, and Cultural Rights, the treaty body of the ICESCR.[8] Hence, until

[7] For a detailed analysis of the drafting process of the covenants, see Craven 1995:16-22.

[8] The international human rights treaties are complemented by their treaty bodies. Treaty bodies "form the corpus of institutions that comprise the international human rights regime" as they monitor state compliance with the treaty in question, request reports from the states, and make recommendations (Landman 2002:5). They also publish general comments. General comments provide a general discussion and interpretation of specific subjects, such as treaty provisions. They are based on the experience of the Committee in discussing state reports. They aim at improving the implementation of the treaty provisions via identifying the problems in the realization of rights, providing a further explanation of particular topics in conventions and suggesting improvements to the legislation and state policies (Coomans 1995:17).

1985, the ICESCR was only "a textual reference point" (Craven 1995:1). In addition, when established, the latter's mandate was limited to examination of regular state reports while the Human Rights Committee could also examine individual complaints. Finally, none of the special procedures was dealing with ESRs during this period.[9] In short, violations of CPRs were more closely scrutinized as more enhanced mechanisms had been established at the international level while ESRs performance of states was "subject to only very superficial scrutiny" (Alston 1983:543).

Disparity between CPRs and ESRs was demonstrated by the UN Committee on Economic, Social, and Cultural Rights in the Vienna World Conference in 1993 as follows:

> …states and the international community as a whole *continue to tolerate* all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, *despite the rhetoric*, violations of civil and political rights *continue to be treated* as though they were far *more* serious, and *more* patently intolerable, than massive and direct denials of economic, social … rights (cited in Beetham 1995:41 [emphases added]).

There has been a renewed interest in ESRs since the end of Cold War. The cessation of ideological confrontation between the two blocs relaxed human rights discussions, and led to the re-inclusion of these rights into the mainstream human rights discussion (Amnesty International 2005; Craven 1995; Hamm 2001; Hunt 1996; Koch 2006; Robinson 2004). The

[9] The Human Rights Council establishes mechanisms in order to address either specific country situations or thematic issues in all parts of the world. These mechanisms are called special procedures in general. Special procedures can be an individual (called 'Special Rapporteur', 'Special Representative of the Secretary-General' or 'Independent Expert') or a working group with five members. Most of the special procedures receive information on specific allegations of human rights violations and send urgent appeals or letters of allegation to governments asking for clarification (Office of the High Commissioner for Human Rights, no date).

conceptualization of the right to development as a human right also contributed to "the reorientation of human rights discussion" (Hamm 2001:1006). The right to development, which was first articulated in the 1970s, was recognized as a human right in 1986 under the Declaration on the Right to Development. The Declaration states that:

> the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized (Art. 1(1)).

The Declaration thus unified civil, political, economic and social rights "into an indivisible and interdependent set of human rights and fundamental freedoms, to be enjoyed by all human beings without distinction … thus bringing to a close the split that had occurred earlier" (Sengupta 2002:840).

The reorientation of human rights discussion was reflected in the 1993 Vienna Declaration on Human Rights. With the Declaration, the international community asserted that:

> [a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and *equal manner, on the same footing, and with the same emphasis* ... it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect *all* human rights and fundamental freedoms (para. 5 [emphases added]).

Since then, there have been several positive developments at the international level concerning ESRs. For instance, in the late 1990s and the 2000s, independent experts were appointed as special rapporteurs on extreme poverty and on rights to education, food, adequate housing and health. Some of the human rights treaty bodies started "to look at rights in an integrated manner,

defining and expanding the content and scope of certain rights in order to deal with them in a logical context" (Merali and Oosterveld 2001:1). In 2008, an Optional Protocol to the ICESCR was adopted at the UN. This protocol, upon entering into force, will allow the establishment of an individual complaints mechanism similar to the one established by the First Optional Protocol to the ICCPR for the Human Rights Committee.[10] Moreover, ESRs have become part of human rights regimes, not only at the international but also at the regional level. They are contained in the European Social Charter, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights. In more recent international instruments, the two sets of rights have been covered in one common text. The Convention on the Rights of the Child, adopted in 1989, is one example of an instrument where both sets of rights are side by side. At the national level, more and more countries began to include ESRs in their constitutions along with CPRs.

Nevertheless, despite the rhetoric and positive developments regarding these rights, it is argues by some that there is still disparity between CPRs and ESRs. The latter, it is claimed, has not yet received equal treatment as compared to the former and, therefore, still enjoys secondary status (Alston 2009; Freeman 2002; Hamm 2001; Merali and Oosterveld 2001).[11]

Principal causes of the neglect of ESRs by the international community can be examined under two headings: ideological concerns and concerns regarding the allegedly different nature of these rights. As regards the

[10] As of December 2011, the Protocol has 39 signatories and 5 parties (United Nations, no date) It will enter into force when ratified by 10 parties (Art 18).

[11] At the extreme, there is the idea that economic and social rights are not human rights. The position of the US reflects this idea. But, since the fact that the CESCR has widely been ratified by the international community indicates that this position is not recognized by the majority of the world states. Therefore, whether or not economic and social rights are human rights is not the subject of this thesis. For a detailed analysis on this issue, see Beetham 1995.

ideological concerns, Eide points to the ideological and cultural resistance to ESRs within some societies in the West where "cultural traditions persist based on a strong faith in full economic liberalism and a severely constrained role for the state in matters of welfare" (Eide 2001:11). Similarly, Alston (1997:190) states that "those who are entirely committed to an undiluted free market ideology have profound difficulties with economic and social rights". Consequently, these rights are put after CPRs. Alston (1993:66) explains this commitment in more details as follows:

> …the proposition that minimum core economic and social rights ought to be accorded to every individual is still almost automatically made subject by decision-makers to an economic calculus which will often culminate in various economically compelling reasons as to why such rights can simply be *not* recognized. The same sort of process was once applied to certain civil and political rights when it was argued, for example, that giving the vote to women was too costly, … that allowing trade union rights at the expense of industrial harmony was economically ill-advised, that accused persons did not warrant the expense of a fair trial… Over the past fifty years, all such arguments have been gradually rendered irrelevant by the firm and uncompromising commitment to the relevant values that has been both implicit and explicit in the acceptance of the basic principles of civil and political rights.

ESRs are also criticized for being different than CPRs in terms of their nature. As a result, they are either regarded not as fundamental as CPRs or even not as human rights.

In the next section, criticisms which are raised against ESRs on the basis of their nature are critically evaluated. It is argued that the view that ESRs are different from CPRs in their nature is merely a misconception. The main aim here is to bring ESRs on an equal footing with CPRs through presenting current conceptualizations of and approaches to both sets of rights. It is demonstrated that ESRs and CPRs do not necessarily have different natures

but that ESRs are underdeveloped as a result of the misconception that they are different.

2.3. Bringing Economic and Social Rights on an Equal Footing with Civil and Political Rights

Disparity between CPRs and ESRs has partly emerged as a result of the misconception that the two sets of rights have different natures (Kunneman 1995:332). This misconception stems from several arguments that have been advanced against ESRs since the adoption of the UDHR. These arguments are raised in the context of comparisons between the two sets of rights, and are summarized in the table below as follows (Scott 1989:833):

Economic and Social Rights *are* …	**Civil and Political Rights *are*…**
Positive	Negative
Resource-Intensive	Cost-Free
Progressive	Immediate
Vague	Precise
Unmanageably Complex	Manageable
Ideologically Divisive/Political	Non-Ideological/Non-Political
Non-Justiciable	Justiciable
Aspirations or Goals	“Real” or “Legal” Rights

These arguments are interrelated. For instance, if ESRs are positive, then they are also resource-intensive and progressive. Their vagueness is a reason for their being unmanageably complex. Similarly, if they are vague, then they are non-justiciable. And if they are non-justiciable, they are not “real” or “legal” rights but rather aspirations or goals (ibid.). These attributions given to ESRs affected their development and realization negatively, and they have been considered less fundamental than CPRs (Beetham 1995; Landman 2002; Oladimeji 2002; Puta-Chekwe and Flood 2001). Concordantly, they have been enjoying an inferior status.

Existence of two separate covenants and distinctive formula of the ICESCR perpetuated the idea that ESRs are different from CPRs in terms of their nature and value. Nevertheless, adoption of two separate covenants and their different wording do not have conceptual explanations but historical and political ones. The ICESCR was not the product of the fundamental differences between the two sets of rights but of conflicting political ideologies and misconceptions about the nature of ESRs (Puta-Chekwe and Flood 2001:39).

In this section, the alleged differences in the natures of the two sets of rights are critically evaluated. Since the arguments that have been advanced against ESRs are interrelated, they are discussed under four headings: that they are vague; positive, resource-intensive and progressive; ideologically divisive/political and unmanageably complex; and non-justiciable.

2.3.1. Economic and Social Rights are Vague

It is a commonplace to argue that ESRs are vague norms implying unclear and imprecise obligations on states (Alston 1997; Coomans 1995; Toebes

2009); whereas CPRs are precise norms and impose clear obligations. Differences in the wording of the two covenants are mostly referred to when this argument is raised. Vagueness of the normative implications of the rights covered by the ICESCR is one of the prominent characteristics of the Covenant. Nonetheless, some of the formulations in the Covenant are not vaguer than some of those in the ICCPR. There is rather a difference in the extent of the elaboration of the two sets of rights. This difference emerged as a result of the negligence of ESRs for decades and the slow proceeding of their conceptual development (Kunneman 1995:332). As Liebenberg (1995 cited in Nolan et al. 2007:12) has indicated:

> [i]t is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity... The fact that the content of many social and economic rights is less well-defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature.

In the international arena, while the international community has failed to develop the content of ESRs for decades, CPRs have been subject to detailed analysis and enhanced interpretation (Alston 1987:352). The right to life, for instance, as it is worded in the ICCPR, is not more precise than the right to work or the right to the enjoyment of the highest attainable standard of health. Similarly, the right to enjoy just and favorable conditions of work is not a more general provision than the right to freedom of expression (Algan 2006:204). The difference rests on the fact that normative content of CPRs has been clarified mostly by the Human Rights Committee via general comments. The Committee on Economic, Social and Cultural Rights, on the other hand, started to issue general comments much later. In addition, the latter does not have the mandate to receive individual communications which also prevented further clarification of the rights.

Another reason behind the underdeveloped content of ESRs is the fact that evolution of CPRs began much earlier compared to the evolution of ESRs. As Robertson (1994:693) indicates that:

> [c]ivil and political rights have grown through centuries of struggle and legal evolution, with international law eventually reflecting the evolved national laws protecting these rights. The process with economic, social … rights has been the reverse. Many of these rights were first established in international law.

Similarly, Alston (1987:351) draws the attention to the fact that rights recognized under the ICESCR, with the exception of labor related rights, are in advance of most national legislation. Contrary to CPRs, these rights had not been subject of in-depth judicial and academic analysis before their inclusion in the Covenant. Consequently, their normative content is not as clear as that of CPRs. By way of illustration, the right to freedom of expression has been in several legal documents since 1789 whereas the right to the highest attainable standard of health was first recognized as a human right in 1948 with the Universal Declaration. Therefore, there has been more elaboration on the former. Yet, CPRs, as all other human rights, are not static rights that were defined permanently centuries ago. If one takes the example of the right to freedom of conscience again, she can see that, since 1789, this right has been subject to renewed and enhanced interpretation. This change does not render the right in question vague nor does it present an obstacle to its protection (Algan 2006:207). In fact, it is argued that open-textured framing of all human rights provides the ground for the courts so that they can "respond adequately to individual circumstances and historical developments in concretizing their meaning over time" (Nolan et al. 2007:11).

Since the mid 1980s, there have been efforts to provide insight into the normative content of various ESRs. Great effort came from the Committee on Economic, Social and Cultural Rights as its Chairman Philip Alston (1987)

developed the term “core content”. He suggested that core content for each human right should be identified by the Committee. The term refers to the set of guarantees that constitute a particular human right. This approach was adopted by the Committee and has been applied to various rights. General Comment No.12 on the right to adequate food defined the core content of the right in question as, inter alia, the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture, and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights (para.8). In fact, the concept of core content is not unique to ESRs. Concerning, for instance, the right to freedom from arbitrary detention, one can identify the core content of the right. One element is that state must obtain a warrant in case a person is arrested and present it to the arrested. Similarly, an individual who is detained cannot be held for an indefinite period of time (HRRC, no date).

In the light of the above, the argument that ESRs are vague norms implying unclear and imprecise obligations on states whereas CPRs are precise norms appears to be invalid. As Hausermann (1992:52) indicated, while “many of the legal provisions protecting economic and social rights may not have been drafted with the same precision as those protecting civil and political rights, there is nothing to prevent the further enunciation of the former and their corresponding obligations”.

2.3.2. Economic and Social Rights are Positive, Resource-intensive and Progressive Rights

That ESRs are positive rights whereas CPRs are negative rights is one of the most common distinctions that are drawn between the two. This distinction

implies, on the part of ESRs, that without government intervention they cannot be realized. By contrast, CPRs necessitate only that governments refrain from taking action towards these rights because any positive action would violate them (Alston 1987:160). This distinction also implies that whilst CPRs are cost-free, ESRs are resource intensive (Hunt 2002:54). In other words, the former can be realized without using government resources whereas the realization of the latter necessitates a major commitment of resources. Closely linked to these views is the one that, due to these differences, ESRs can only be realized gradually. CPRs, on the other hand, are to be realized fully and immediately. As a result, while states may be reasonably required to refrain from, for instance, torturing their citizens, they cannot be equally required to guarantee them all a livelihood, adequate accommodation and a healthy environment (Beetham 1995:42). In the light of these arguments, ESRs are considered to be aspirations or goals rather than real rights (Alston 1987:160). The wording of Article 2 of the ICESCR reflects and maintains the above mentioned conceptualization of ESRs. Different from that of the ICCPR, Article 2 of the ICESCR states that each state party should "*take steps* … to the maximum of its *available sources*, with a view to *achieving progressively* the full realization of the rights" [emphases added]. Nevertheless, the view that ESRs are positive, resource-intensive and progressive rights is based on a narrow understanding of these rights and of corresponding state obligations (Eide 2001:23).

How state obligations are conceptualized is crucial in the negative and positive rights distinction. Eide (1987 cited in Coomans 1995:10) identifies three levels of obligations which states shall undertake: obligations to respect, to protect and to fulfill. Obligation to respect means that states should refrain from intervening in the exercise of rights. It forbids states to take action because it would violate the right. Obligation to protect requires states to take steps, i.e. through legislation, in order to prevent the violation of a right by third parties. Finally, obligation to fulfill necessitates that states take further

positive measures so that the effective realization of a right is ensured in the long term. According to a narrow understanding of state obligations which divides rights into negative and positive rights, CPRs connote freedom from interference and, therefore, impose on states only an obligation to respect. Conversely, ESRs connote a right to something and are perceived to impose obligations to protect and fulfill (Puta-Chekwe and Flood 2001:42). However, a broader understanding acknowledges that there are ESRs which require nonintervention and there are CPRs which require positive action. In order for the full realization of the right to fair trial, for instance, it is not enough to pass the necessary law and refrain from its exercise by the governments. To that end, states need to take further steps such as building courts and paying salaries for judges and prosecutors as well as providing free legal assistance in some circumstances. Similarly, the prohibition against torture, inhuman and degrading treatment requires the provision of humane places of detention and establishment of training programmes for prison and police officers (Hunt 2002:57). In addition, for an individual to participate in political life, it is compulsory for the state to provide that elections are held periodically. This can be assured via positive action from the state (Nolan et al. 2007:9). On the part of ESRs, the right to form and join trade unions, for instance, requires states to refrain from its exercise. Likewise, the right to education implies that persons have a right to choose education institutions themselves and for their children without the interference of the government. Similarly, the right to housing may, in some cases, requires respect by abstaining from eviction (Koch 2003:9). Moreover, whether a right necessitates positive action may vary depending on time and space. Human rights situation in a given state at a specific time determines the extent of positive actions needed in order to ensure that a given right is fully realized. In a country where torture is exercised systematically, the state may need to take more action to avoid torture than a state where torture is sporadic (Algan 2006:189-190). These examples demonstrate that a clear cut distinction between human rights on the basis of whether they are positive or negative is not possible. In fact, for the

enjoyment of every human right there is an obligation to respect, protect and fulfill on the part of the states (Algan 2006; Leckie 1998).

The work of the Human Rights Committee also supports the view that CPRs do not only impose the obligation to respect but also to take steps for their realization. General Comment on Article 2 states that:

> …the obligation under the Covenant is *not confined to the respect of* human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for *specific activities* by the States parties to enable individuals to enjoy their rights (General Comment 3 para. 1 [emphases added]).[12]

General Comment 6 of the Committee states, as regards to the right to life, that:

> [t]he right to life has been too often *narrowly* interpreted, the expression 'inherent right to life' cannot properly be understood in a restrictive manner and the protection of this right *requires* that states adopt *positive* measures (para. 5 [emphases added]).

Similarly, according to the Committee on Economic, Social, and Cultural Rights, ESRs impose an obligation to respect as well. General Comment 14 on Article 12 of the ICESCR, for instance, points to three aspects of state obligations corresponding to the right to the enjoyment of the highest attainable standard of physical and mental health. Obligation to respect requires states to refrain from denying or limiting equal access for all persons and to abstain from enforcing discriminatory practices (para. 34). Obligation to protect includes, inter alia, the duties of states to take measures in order to

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[12] Similar statements are made under General Comments 6 (para. 5), 20 (para. 10), 21 (paras. 3 and 11), 17 (para. 3), 12 (para. 6), 18 (para. 10), 4 (para. 2) and 23 (para. 6.1) (Hunt 2002: 62-64).

ensure equal access to health care services provided by third parties and that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services (para. 35). Finally, obligation to fulfill requires states, inter alia, to adopt a national health policy with a detailed plan for realizing the right to health and to ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing (para. 36). The three-levels-of-obligation approach has been applied to several other ESRs, i.e. the right to education and the right to food, via general comments.[13]

The argument that ESRs are resource-intensive whereas CPRs are cost-free is closely related to the negative and positive rights distinction. The former is resource-intensive because it requires positive action on the part of the states and the latter is cost-free because its full realization can be achieved by noninterference. That some rights are resource-intensive is a valid argument only in situations where the corresponding state obligation is mainly on the third level that is the obligation to fulfill. It has been shown above that whether a state has an obligation to respect, protect and/or fulfill with regard to a given right does not depend on its being an economic, social, civil or political right. There are ESRs which can be protected in many cases via noninterference by the state and there are CPRs which necessitate state obligations at all levels (Eide 2001:32). Accordingly, each right has aspects which require allocation of resources by the governments. Similarly, as the particular conditions of a given country play a major role in determining the extent of the obligations for the realization of a given right, they also determine the extent of the resources needed. As Tomasevski (1989 cited in Hill 1992:3) indicates, in developing countries "[n]ot only the universal primary education, but also an effective and independent judiciary

[13] For details, see General Comment 12 on the right to food (E/C.12/1999/5), and General Comment 13 on the right to education (E/C.12/1999/10).

necessitates resources”. In short, it is not possible to make a distinction between ESRs and CPRs on the ground of economic resources for the reason that all human rights necessitate resources so that they can be fully realized (Oladimeji 2008:13).

Conceptualization of ESRs as positive and resource-intensive rights has led to the belief that their fulfillment can only be gradual. By contrast, CPRs are conceptualized as negative, free rights whose fulfillment should be absolute and immediate (Puta-Chekwe and Flood 2001:42). The wording of Article 2 of the ICESCR is mostly referred to in supporting the view that states do not have an immediate obligation for the realization of ESRs. Despite the differences in the wording of the two covenants and because a clear cut distinction of negative and positive rights cannot be made, “[i]t would be difficult to dispute that the full realization of all human rights will invariably be a progressive undertaking” (Leckie 1998:93). Accordingly, it is not always possible, for instance, to fully realize freedom from torture, inhuman and degrading treatment through passing the necessary legislation at once. There is a process within which states take the necessary measures. Furthermore, there are provisions in the ICESCR which clearly impose precise obligations on governments. Article 2(2), for instance, prohibits discrimination in the exercise of the rights recognized. States could and should take steps immediately in order to prohibit such discrimination (Hausermann 1992:52). Moreover, the wording of the ICESCR does not imply that states do not have immediate obligations corresponding to each right covered by the Covenant. In fact, they are required to ensure immediately that minimum essentials of each ESR are satisfied. As the UN Special Rapporteur on Economic, Social and Cultural Rights Danilo Turk (1991 cited in Leckie 1998:100) stressed, "[s]tates are obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all”. General Comment No. 3 of the Committee supports the existence of “minimum core obligations” arising from the ICESCR. It asserts 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" (para.10). The term "minimum core" refers to a baseline level that must be guaranteed for all individuals in all contexts, even under critical conditions. Therefore, regardless of the level of its economic development a state has an obligation, for instance, to ensure freedom from hunger and to ensure for everyone within its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe (General Comment 12, para. 14). The Committee has issued other general comments that identify the minimum core content of the right to education, the right to the highest attainable standard of health, the right to work and the right to social security.[14] General Comment No. 3 also asserts that states have an obligation to develop targeted, legally consistent and progressive policies with a view of securing those rights within a reasonably short time. Therefore, while every state has an obligation to meet the minimum core of ESRs, for the remaining essentials of a right they are required to show tangible progress toward their enjoyment by every individual (Leckie 1998:93).

Overall, the argument that ESRs are positive, resource-intensive and progressive rights remains as a misconception. There is not a clear distinction as such between human rights, be it a civil, political, social or economic right. Therefore, the argument that ESRs are not real rights because they have these characteristics is also invalid.

[14] For details, see General Comment 12 on the right to education (E/C.12/1999/10); General Comment 14 on the right to health (E/C.12/2000/4); General Comment 18 on the right to work (E/C.12/GC/18) and General Comment 19 on the right to social security (E/C.12/GC/19). The concepts of core content and minimum core content are different from each other. The core content of the rights may be limited to some extent in special circumstances, but with the minimum core content a basic minimum for the action of all governments is established. Therefore, they cannot be limited in any case (HRRC, no date).

2.3.3. Economic and Social Rights are Ideologically Divisive/Political and Unmanageably Complex

Another criticism that has been raised against ESRs is that they are political and ideologically divisive/political. According to this view, CPRs are non-political and non-ideological in nature. They are "proper rights" to which all humans are entitled. Their realization is independent from socio-economic choices and compatible with most systems of government. By contrast, ESRs are seen as political and ideological in nature for the reason that their realization requires an unacceptable degree of government intervention (Algan 2006; Alston 1987). As a result, it is argued, while the protection of CPRs can be ensured with law, ESRs cannot be protected through law but through socio-economic governmental policies.[15] At the heart of this view, according to Algan (2006:209), lies the positive and negative rights distinction. Different from CPRs, ESRs are political and ideological because they necessitate positive government action, in other words, intervention of the government via policy-making. Nevertheless, it has been demonstrated that positive-negative rights distinction is based on a narrow understanding of human rights and state obligations. All human rights may necessitate government intervention at the level of obligations to promote and fulfill. Moreover, when the ICESCR is examined, it can be seen that the wording of Article 2 presents a free space for governments in choosing which policies to implement and how to implement them in order to realize ESRs. In General Comment 3, the Committee on Economic, Social, and Cultural Rights interprets Article 2 as follows:

[15] For this view, see Vierdag, 1978:103. Vierdag argues that the implementation of ESRs is a political issue and, therefore, is not a matter of law or human rights.

> [t]he Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected (para. 8).

The Committee, therefore, is of the position that ESRs can be realized within the context of various economic and political systems. Moreover, the fact that a wide majority of the states with different economic and political systems has ratified the ICESCR indicates that this criticism is not valid.

That ESRs are unmanageably complex is another criticism that has been advanced against these rights. This criticism is also closely linked to the other criticisms, namely their being vague, positive, resource-intensive and progressive. As these alleged characteristics of the ESRs have been critically evaluated above, it can be argued that ESRs cannot be regarded as unmanageably complex based on these attributions.

2.3.4. Economic and Social rights are Non-justiciable

ESRs, contrary to CPRs, are often regarded as non-justiciable in the sense that "they are not capable of being invoked in courts of law and applied by judges" (Scheinin 2001:41-42). This argument is followed by the one that these rights are not "real" rights but rather aspirations or goals (Algan 2006:216). Non-justiciability of ESRs is mostly based on their so-called different nature. To put more clearly, the allegedly different characteristics of these rights – their being vague, positive, resource-intensive and progressive, render them non-justiciable as well (Scott 1989:833). Therefore, in order to demonstrate that ESRs are justiciable, one needs to first examine whether or

not these rights have these alleged characteristics. Above, it has been demonstrated that ESRs are not necessarily different than CPRs in terms of their nature. Non-justiciability of ESRs is critically discussed below in relation to these so-called characteristics.

Concerning the vagueness of ESRs, it is generally argued that because these rights lack precision, they are also non-justiciable. The reason is that a court needs a clear description of their content in order to render a decision. Nevertheless, CPRs, which can equally be vague, have not been regarded and treated as non-justiciable. Therefore, simply because a right is imprecise or vague does not mean that it cannot be adjudicated before a court of law (Brennan 2009:67). Moreover, it is possible to define the content of ESRs as has been done by the Committee on Economic, Social, and Cultural Rights in recent years. The core content of various ESRs has already been clarified via general comments.

It is also argued that because ESRs are positive, resource intensive and progressive it is not possible for a court to render a decision about them. Those who claim that these rights have different characteristics argue that rights to, for instance, housing, health care, education and so on are moral statements and should not be regarded as enforceable rights. Since they are positive, their adjudication necessitates policy making and significant government resources which can be assessed and balanced by the legislature. They can be carried out by the political branches of government, not by the courts as the courts do not have the competence and legitimacy to decide on ESRs (Christiansen 2007:322). Therefore, ESRs should be considered as directives to the legislature rather than individual rights and be monitored via general reporting obligations (Koch 2003:6). According to Baderin and McCorquodale (2007 cited in Oladimeji 2008:12), this position is groundless since:

> [a]djudicating economic, social … rights claims does not require courts to take over policy making from the governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases, courts and other bodies adjudicating economic, social … rights review governmental decision-making, to ensure consistency with fundamental human rights.

Furthermore, all human rights necessitate negative and positive state conduct. Whether or not a right is cost-free depends on the obligation of the state as regards to a particular right. Therefore, those who argue that ESRs are not justiciable because they are positive fail to consider the very nature of all human rights (Brennan 2009:72). Similarly, as Koch puts it, since the obligations to respect, provide and fulfill apply to all human rights, all human rights are subject to progressive realization. As a result, "the question regarding justiciability no longer concerns a particular type of right but a certain layer in the obligations of any human right" (Koch 2003:21). As regards progressiveness, although some aspects of ESRs may be progressive, each right has a minimum core content that requires immediate action on the part of the state.

In addition to the above mentioned problems, the Committee of Economic, Social, and Cultural Rights states that:

> [t]he adoption of a rigid classification of economic, social … rights which puts them, by definition, beyond the reach of the courts would … be arbitrary and *incompatible* with the principle that the two sets of human rights are indivisible and interdependent (General Comment 9, para. 10 [emphasis added]).

Therefore, rejecting the justiciability of ESRs is to reject the legitimacy of the principle of indivisibility and interdependency of all human rights as it establishes a hierarchy between CPRs and ESRs.

Although ESRs are justiciable in theory, both international and national means to avoid and remedy their violations are underdeveloped. This is because these rights have been neglected for decades (Tigerstrom 2001:139). The way ESRs are supervised in the ICESCR has contributed to the underdevelopment of their justiciability. The Human Rights Committee, the treaty body monitoring the implementation of the ICCPR, has been given the mandate to examine individual complaints in addition to receiving state reports. With the complaints procedure, the Human Rights Committee has gained a quasi-judicial role. It can interpret the provisions of the ICCPR and make recommendations on how to approach situations in the future (Puta-Chekwe and Flood 2001:44). The Committee on Economic, Social, and Cultural Rights, on the other hand, can only receive periodic state reports. Since there has not been a strong enforcement mechanism in the ICESCR, ESRs have been marginalized and their full realization have been stymied (Brennan 2009:65). Similarly, the lack of national case law directly related to ESRs has strengthened the idea that they are not justiciable (Puta-Chekwe and Flood 2001:44).

Recent international developments indicate that there is a tendency to acknowledge and improve the justiciability of ESRs. A major development regarding their justiciability at the international level is the adoption of the Optional Protocol to the ICESCR in December 2008. The optional protocol establishes the individual complaints mechanism for ESRs and provides the Committee with a quasi-judicial function. This implies that states who are parties to the protocol may need to answer to an international institution in case they violate the ICESCR. The Optional Protocol, provided that it is in force, "will mark a high point of the gradual trend towards greater recognition of the indivisibility and interrelatedness of all human rights" (Arbour 2008). In addition, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the

Convention on the Elimination of All Forms of Discrimination against Women not only bring together CPRs and ESRs but also provide a petition system that can be utilized by individuals, for all of the rights protected including ESRs.

At the national level, more and more countries, i.e. South Africa, Nigeria and India, embrace ESRs in their constitutions with different levels of enforcement in recent years (Oladimeji 2008:15-16). Similarly, various cases, i.e. Grootboom, Soobramoney and Olga Tellis v. Bombay Municipal Corporation indicate how South Africa and India, countries with limited resources, abjudicate the right to shelter and health care (in Khemani 2009:7).[16]

An important approach to human rights in general has also been effective in changing the attitude towards ESRs. It is widely recognized that the principle of interdependence and indivisibility of all human rights leads to the recognition that most rights claims are multidimensional. There are CPRs which have ESRs dimensions and there are ESRs which have CPRs dimensions. Therefore, judicial protection for various CPRs also provides protection for ESRs in relation and vice versa (Nolan et al. 2007:7). According to the Human Rights Committee, for instance, reducing infant mortality and increasing life expectancy, especially in adopting measures to eliminate malnutrition and epidemics are among the measures state parties should undertake in order to protect the right to life (General Comment 6, para. 5). Here, not only the distinction between CPRs and ESRs fade away (Koch 2006:407) but also it becomes possible to adjudicate some components of the rights to food and health. The right to a fair hearing (Art. 14(1)) and the

[16] For the details of the cases, see Grootboom and Others v Government of the Republic of South Africa and Others, Constitutional Court Order (CCT38/00) [2000] (21 September 2000); Soobramoney v Minister of Health (KwazuluNatal), Constitutional Court Order (CCT 32/97) [1997] (27 November 1997); Olga Tellis & Ors v Bombay Municipal Council, [1985] 2 Supp SCR 51.

right to freedom of association (Art. 22(1)) also have ESRs dimensions (Leckie 1998:104). Consequently, it is possible to adjudicate ESRs by integrated means at the international level. This is called the integrated approach and this approach “refers to a methodology of enforcing economic, social ... rights through the instrumentality of civil and political rights” (Oladimeji 2008:15). The Human Rights Committee has used the integrated approach. It has decided cases, for instance, where the right to equal protection under law and the prohibition of discrimination were applied to ESRs as well. There is case law of the Human Rights Committee which proves that it is possible to refer to ESRs such as the right to health, the right to housing and the right to social security under the ICCPR (Koch 2006:407).

Within this approach, however, ESRs are considered justiciable to the extent that they are related to CPRs. For instance, violation of a person’s right to the enjoyment of the highest attainable standard of health can be considered as violation of the right to freedom from torture or cruel, inhuman or degrading treatment provided that it exceeds a certain threshold of violence. This approach has been criticized for instrumentalizing ESRs (Ertan 2008:19-20). Yet, considering that the justiciability of ESRs is still limited, it provides an opportunity to that end.

To sum up, until the 1990s, ESRs were neglected at the international level whereas CPRs remained at the centre of the attention of the international community. In other words, they were not valued as much as CPRs. Since the 1990s, ESRs have been re-included into the mainstream human rights discussions and new conceptualizations of human rights in general are being adopted both in the literature and in international law. ESRs are no longer regarded as being vague, positive, resource-intensive, progressive, ideologically divisive/political, unmanageably complex and non-justiciable. As a result, there have been institutional renovations and progressive interpretations with regards to ESRs. In the next chapter, the status of ESRs

within the Council of Europe human rights regime will be examined in comparison to CPRs. Whether ESRs are given the same value with the CPRs is the main question of the chapter.

CHAPTER III

ASSESSING THE HUMAN RIGHTS REGIME OF THE COUNCIL OF EUROPE

Europe is the region where the first regional human rights developments took place. Under the framework of the Council of Europe, a legally binding instrument of human rights was adopted almost two years after the adoption of the Universal Declaration of Human Rights and more than fifteen years before the adoption of international human rights covenants. Today, the Council of Europe "has the most developed system of protection for human rights at the regional level" (Smith 2003:92).

The aim of this chapter is to assess the human rights regime of the Council of Europe in terms of ESRs by examining the novelties brought into the ESRs' protection in recent years and comparing it with the CPRs' protection. To this end, it first presents an overview of the development of the human rights regime of the Council and the status of ESRs until the 1990s. Second, it examines the positive developments concerning the protection of ESRs since the 1990s. In doing so, it focuses both on the developments within both the European Social Charter and the European Convention on Human Rights systems. Finally, it seeks to understand the current status of ESRs in comparison to the status of CPRs.

3.1. Historical Overview of the Human Rights Regime of the Council of Europe

The Council of Europe (hereafter CoE or the Council) is a regional intergovernmental organization which aims at promoting democracy and human rights throughout Europe. Like the United Nations, it was founded after the cessation of the atrocities of the Second World War.[17] This brought human rights onto the agenda of the organization. The founding states adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights, in 1953 as the basis of the organization. Since then, various treaties have been adopted by the CoE. Along with the European Convention, the European Social Charter is one of the basic treaties of the organization (Alston 2005:4). While the former covers CPRs, the latter guarantees ESRs. Accordingly, the European Social Charter is often regarded as the counterpart of the European Convention on Human Rights and equivalent of the ICESCR at the regional level.

Various rights that the European Convention on Human Rights covers are as follows:

(a) the right to life (Art. 2)
(b) prohibition of torture (Art. 3)
(c) prohibition of slavery and forced labor (Art. 4)
(d) the right to liberty and security (Art. 5)
(e) the right to a fair trial (Art. 6)

[17] It was founded on 5 May 1949 by 10 countries: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. As of 2012, it has 47 member states. In order for a state to be a member of the CoE, it has to promote the enjoyment of human rights and fundamental freedoms actively within its territory (Smith 2003:93).

(f) no punishment without law (Art. 7)

(g) the right to respect for private and family life (Art. 8)

(h) freedom of thought, conscience and religion (Art. 9)

(i) freedom of expression (Art. 10)

(j) freedom of assembly and association (Art. 11)

(k) the right to marry (Art. 12)

(l) the right to an effective remedy (Art. 13)

(m) prohibition of discrimination (Art. 14)[18]

Some of the ESRs listed by the European Social Charter (as revised in 1996) are as follows:

(a) the right to work (Art. 1)

(b) the right to just conditions of work (Art. 2)

(c) the right to safe and healthy working conditions (Art. 3)

(d) the right to a fair remuneration (Art. 4)

(e) the right to organize (Art. 5)

(f) the right to bargain collectively (Art. 6)

(g) the right of children and young persons to protection (Art. 7)

(h) the right of employed women to protection of maternity (Art. 8)

(i) the right to vocational guidance (Art. 9)

(j) the right to vocational training (Art. 10)

(k) the right to protection of health (Art. 11)

(l) the right to social security (Art. 12)

(m) the right to social and medical assistance (Art. 13)

(n) the right to benefit from social welfare services (Art. 14)

[18] The content of the Convention was enhanced with the adoption of various additional protocols. With Protocol No.4 (1963), for instance, included the right to freedom of movement and of residence; the right to leave any country, including one's own (Art. 2), and the right not to be expelled from the country of which one is a national and the right not to be refused entry into the State of which one is a national (Art. 3). Protocol No. 7 (1984) added the right not to be tried again for the same offence within the jurisdiction of the same State (Art. 4).

(o) the right of persons with disabilities to independence, social integration and participation in the life of the community (Art. 15)

(p) the right of the family to social, legal and economic protection (Art. 16)

(q) the right of children and young persons to social, legal and economic protection (Art. 17)

(r) the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Art. 20)

(s) the right to take part in the determination and improvement of the working conditions and working environment in the undertaking (Art. 22)

(t) the right to protection against poverty and social exclusion (Art. 30)

(u) the right to housing (Art. 31)[19]

Similar to the UN human rights framework, ESRs were long neglected within the CoE's human rights system. Therefore, they enjoyed a secondary status in Europe as well. When it was founded, the CoE promptly adopted the European Convention on Human Rights. The Convention was based on the Universal Declaration of Human Rights. During the drafting, member states acknowledged the necessity of protecting both CPRs and ESRs. Eventually, however, they agreed on providing a mechanism for enforcement of not all but "certain of the Rights" covered in the Declaration (European Convention on Human Rights, preamble). They adopted a single instrument which would cover only CPRs as they were the rights which were considered to be essential for democracy. ESRs, on the other hand, were considered, as in the words of the British representative to the Council, "too controversial and

[19] Different from the international human rights system, the rights to education and assembly have been considered as civil rights within the Council of Europe's human rights system. The right to education is added as part of the civil and political rights protection via the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 20th March 1952. See Article 2 of the Protocol. Right to education is also incorporated into the Social Charter through various articles, primarily the right of children and young persons to protection (Art. 7). European Social Charter was the first international treaty expressly recognizing the right to strike.

difficult" to be enforced "in the changing state of social and international development of Europe" (cited in Kang 2009:1023). Similarly, the Rapporteur of the Legal Committee of the Consultative Assembly of the CoE that prepared the draft of the Convention stated in 1997 that:

> [the Committee] considered that, for the moment, it is preferable to limit the collective guarantee to those [civil and political] rights and essential freedoms which are practised [sic], after long usage and experience, in all the democratic countries. While they are the first triumph of democratic regimes, they are also the necessary condition under which they operate. Certainly, professional freedoms and social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to coordinate our economies, before undertaking the generalisation [sic] of social democracy (Teitgen cited in Koch 2009:2).

Hence, as in the case of the UN human rights regime, human rights were divided into two different categories within the Council's human rights regime. In fact, the Convention was the first legal codification of human rights as it was drafted two years before the International Covenants. Therefore, the Convention was a model for the United Nations in dividing human rights. As to the reasons for this division, the CoE was a Cold War institution, and the adoption of the Convention reflected the international environment of the time. As the French statesman Robert Schuman stated during the drafting process, the Convention would provide "foundations on which to base the defense of human personality against all tyrannies and against all forms of totalitarianism" (Kang 2009:1023). ESRs were associated with Eastern European Communism and this association had an impact in the codification processes not only in the United Nations but also at the CoE. As Koch notes (2009:6), it was not surprising for the Council, which was consisted of Western European States, to choose to prioritize CPRs. These were the rights which symbolized respect for liberty and free market project

for these states. The outcome was the marginalization of the Charter and ESRs. As Peter Leuprecht, former Deputy Secretary General of the Council, stated at a May 1997 meeting on the Charter "[f]or a long time, for too long it would have been fair to describe the European Social Charter as a 'Sleeping Beauty'" (cited in Briggs 2000:24).

Following the drafting of the Convention, member states demonstrated willingness to draft an instrument for protecting ESRs so that minimum standards of living were achieved in all member states. The work began in 1951 with the establishment of a subcommittee. However, it took ten years for the committee to draft a document. In 1961, representatives of the member states of the CoE signed the final text of the European Social Charter. The purpose of the Charter was to provide a framework for the protection of ESRs and entail the obligations that the member states would undertake. However, member states could not agree on a legalized document. There were conflicting opinions on whether to include ESRs in a covenant that was as strong as the European Convention. The Social Charter emerged out of a process reflecting the disagreements on the CoE's enforcement mandate over these rights (Briggs 2000:24). Therefore, there was a great difference between the European Social Charter and the European Convention in terms of both monitoring and enforcement. For instance, while the European Convention established a court to decide over individual applications, the Social Charter's supervisory organ, that is the European Committee of Social Rights, was given only the mandate of receiving annual reports from the state parties. Similarly, the Charter was not governed by the Council's Directorate of Human Rights, the institution which was responsible for the development and implementation of the human rights standards of the CoE. It was responsible only for the European Convention on Human Rights.

Since the 1990s, there have been developments which indicate that the situation of ESRs is changing. The Charter was transferred to the Directorate

of Human Rights in 1989. With this transfer, steps began to be taken in order to improve the Charter. In 1990, ministers representing the member states underlined the necessity of giving the Charter "a fresh impetus" and called for taking the necessary measures in order to revise it. Following this decision, an amending protocol was adopted in 1991. The protocol changed the system of supervision of the Charter (Harris 1992:660). Since then, four other instruments were adopted in order to change the Charter system. The final document revising the system relating to the ESRs was the 1996 Revised Social Charter. The Revised Charter aims at modernizing the Charter and providing additional enforcement mechanisms so that it reflects the social concerns of the twenty-first century (Briggs 2000:24).

In addition to the work of the Directorate, there were other reasons behind the renewal of interest in the protection of ESRs. One was the emergence of independent Eastern European states and, therefore, of new member states and candidates for the membership. This brought the protection of ESRs onto the agenda of the Council as these rights were considered important for the operation of free market economies that these new states aimed at establishing. The Charter could provide the standards to that end provided that it was working efficiently (Harris 1992:661). Developing solutions to the resurgence of racism and intolerance in some countries was also at the heart of the discussions on the necessity to revise the Charter. The economic situation in the West was another consideration. These concerns were summarized at the Summit of Heads of State and Government held in Vienna in 1993 as follows:

> [a] special emphasis should be placed on social and economic rights at a time when much of what had been achieved in this field is questioned and even threatened, in the East by the reforms and in the West by the economic crisis. With regard to this, the Social Charter should be regarded as a basic instrument in the European project (cited in Vandamme 1994:642)

The renewal of interest in ESRs at the international level also affected the agenda of the CoE. These factors led to the emergence of the political will on the part of the member states to prioritize the improvement of ESRs.[20] Hence, the CoE entered into a stage in which steps were taken in order to revise the Charter system.

3.2. Improvements with regard to the Protection of Economic and Social Rights

That civil, political, economic, and social rights are indivisible, interrelated and interdependent is stressed more often in the CoE since the 1990s (Koch 2009:2). In 1997, former deputy secretary general Leuprecht, for instance, stated that "[t]he reality of the world we live in shows us that it is only if all fundamental rights in it are guaranteed, civil and political rights as well as economic, social and cultural rights, that man can have a dignified existence" (cited in Briggs 2000:26). The Parliamentary Assembly of the Council also stated in relation to the 1999 Additional Protocol to the European Convention on Human Rights that "there can be no genuine democracy without recognition of all human rights, including social rights" (Recommendation 1415, para.1). This political willingness was complemented via the revision of the Charter system in the 1990s.

[20] Member states adopted the Declaration on Human Rights on 27th April 1978 under which they demonstrated their decision "to give priority to the work undertaken in the Council of Europe of exploring the possibility of extending the lists of rights of the individual, notably rights in the social, economic and cultural field" (Explanatory Report to the 1988 Additional Protocol, para.1). Nevertheless, there was not a strong political willingness on the part of the member states to improve the protection of ESRs until the mentioned developments took place in early 1990s (Cetin 2008:38).

Since the adoption of the European Social Charter, the CoE has adopted four other instruments revising the Charter system. In 1988, the Additional Protocol of 1988 extending the social and economic rights of the 1961 Charter was adopted.[21] In 1991 and 1995, Amending Protocol of 1991 reforming the supervisory mechanism[22], and Additional Protocol of 1995 providing a system of collective complaints were adopted respectively. The 1996 Revised European Social Charter, entering into force in 1999, was the main instrument which revised the Charter system. It is gradually replacing the original 1961 Charter as thirty two member states have become parties to the former.[23]

The Revised European Social Charter updated and extended the 1961 Charter in various ways. Firstly, it expanded the number of core obligations of states with regard to various ESRs recognized by the Charter. Among the rights whose core content were extended by the Revised Charter are the rights to just conditions of work and to safe and healthy working conditions. It also recognized eight new ESRs, i.e. the rights to protection against poverty and social exclusion, and to housing.[24] Secondly, the Revised Charter increased the minimum number of articles and paragraph that the state parties should adhere to. The 1961 Charter was designed as a flexible instrument. States can be a party to the Charter without accepting all the articles and all the provisions provided that they accept a minimum number of articles or

[21] The additional rights that were recognized by the 1988 Protocol were as follows: the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Art. 1), the right to information and consultation (Art. 2), the right to take part in the determination and improvement of the working conditions and working environment (Art. 3) and the right of elderly persons to social protection (Art.4).

[22] The 1991 Protocol improved the reporting and enforcement procedures of the Charter by specifying in detail the procedures for submission of reports and their review by various committees (Briggs 2000:24).

[23] All member states of the Council of Europe are parties to either the 1961 European Social Charter or the 1996 Revised European Social Charter. Both treaties are in force.

[24] The 1988 Addition Protocol to the Charter expanded the number of rights covered by the 1961 to 23. With the Revised Charter this number has increased to 31.

paragraphs as binding. Those which are not ratified, however, constitute social objectives that the state parties strive to achieve (Vandamme 1991:637). Article 20 of the 1961 Charter requires state parties to be bound by at least five core articles and another ten articles or forty-five paragraphs. The Revised Charter requires state parties to be bound by at least six core articles and another sixteen articles or sixty three paragraphs.[25] Finally, with the Revised Charter the collective complaints mechanism was incorporated into the new Charter system. The collective complaints mechanism was established with the 1995 Additional Protocol. Originally, the system of state reporting was the only machinery that the Charter provided in order to ensure that the state parties follow their obligations. Under this system, the state parties were required to submit periodic reports regarding their obligations in relation to the articles they ratified. These reports were examined by the European Committee on Social Rights. Based on these reports, the Committee drew conclusions as recommendations. Therefore, the Committee did not enjoy the status of a court adopting binding decisions, but only evaluated compliance with the Social Charter. The perception that ESRs are different from CPRs has probably avoided the reporting system to be judicial. This system raised questions about the efficacy and appropriateness of the Charter's monitoring mechanism (Mantouvalou and Voyatzis 2008:8). The 1995 Protocol was a response to these questions. It provided an additional compliance mechanism in the form of a system of collective complaints mechanism. Through this mechanism, the European Committee on Social Rights was given the competence to hear complaints brought by social partner organizations and non-governmental organizations recognized by the CoE (Cullen 2009:61-62). This mechanism has enabled the Committee to make new interpretations of the Charter articles. Nevertheless, adhering to the complaints system was optional since the Additional Protocol did not apply automatically to the state parties to the1961 Charter. With the incorporation

[25] Of these 31 provisions, Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20 are considered core articles (in Khemani 2009:11).

of the system into the Revised Charter, the state parties to the Revised Charter do not have an option to choose between the compliance mechanisms. Moreover, both the adoption of the 1995 Additional Protocol and the Revised Charter indicates that ESRs are regarded as justiciable rights. This move indicates a departure from the traditional view that while CPRs are justiciable rights, ESRs are non-justiciable.

Another important point as regards the protection of ESRs is that the European Court of Human Rights has gone beyond the wording of the European Convention by acknowledging social elements in CPRs provisions of the Convention. In other words, the Court has been willing to apply integrated approach in protecting CPRs (Koch 2009:10). In Airey case (1979), for instance, the Court clearly reflects its understanding with regard to the relationship between the two sets of rights:

> [w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers … that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention (cited in Koch 2009:44).

In several cases, it has also stated that the European Convention should be interpreted as a living instrument not in line with the intentions of the founding fathers in 1950 but in line with current developments (Koch 2003:21). Having applied the integrated approach, the Court has been able to protect five different ESRs under the Convention. These rights are the right to health, the right to housing, the right to education, the right to social cash benefits and various work-related rights (Koch 2009:10). As regards the right to health, for instance, the Court found it as an element on the right to family

and private life and on torture or inhuman or degrading treatment or punishment on several occasions (Koch 2006:408).

In addition, it is now widely accepted within the Council's human rights regime that both ESRs and CPRs impose positive and negative obligations on the part of governments. In other words, the distinction between ESRs as positive rights and CPRs as negative rights has been eroded over time. The wording of the Convention and the case law of the European Court of Human Rights, indirectly or directly, indicate that CPRs impose positive obligations (Cullen 2009:82). The right to fair trial, as spelt out in Article 6 of the Convention, for instance, indicates indirectly a positive – and resource demanding – character as it presupposes the existence of an "independent and impartial tribunal established by law" (Koch 2009:21). In Pibernik v. Croatia (2004), on the failure of the Croatian authorities to carry out an eviction order and preventing the applicant from living in her home for several years, the Court stated that "there may be positive obligations inherent in an effective respect for the applicant's rights protected under Article 8" (cited in Koch 2009:23). Similarly, various decisions of the Court had budgetary consequences for the state parties. Among them are the decisions on matters such as the adequacy of police protection or police investigation in relation to the right to home and family life and the right to freedom of expression (Koch 2003:14). The position of the Committee on Social Rights has been more on the side that the Charter imposes positive obligations on states (Cullen 2009:82). Nevertheless, the practice of the Committee also indicates that ESRs impose obligations to respect, protect and fulfill on states. The right to social security, for instance, requires states to adopt legislation in order to ensure protection of the right, i.e. to avoid discrimination, as an obligation to respect (Kont-Kontson 2005:116).

3.3. Current Status of the Economic and Social Rights in comparison to the Status of Civil and Political Rights

As mentioned earlier, the European Social Charter is seen to be equivalent of the European Convention on Human Rights. However, despite the modifications since the early 1990s, the European Social Charter system differs to a great extent from that of the European Convention on Human Rights. The differences between the two render the former weaker than the latter. In fact, while the Convention has been "the jewel in the Council of Europe crown", the Social Charter has been an instrument with a "twilight existence" (Mantouvalou and Voyatzis 2008:7).

To start with, for a state to be a member of the Council, it has to adhere to the European Convention on Human Rights whereas adherence to the Social Charter is not a condition for membership. This clearly indicates the secondary status of ESRs within the Council. In addition, the co-existence of the 1961 Charter and the additional protocols on the one hand, and the Revised Charter, on the other, renders the Charter system complicated. The compliance mechanisms of the Charter are particularly complicated due to this reason. The European Convention on Human Rights system, however, is a unified system (Algan 2006:346).

Furthermore, both the 1961 Social Charter and the Revised Charter establish a flexible treaty system as the state parties enjoy a degree of flexibility in the obligations they undertake via the Charter. They have discretion as to the rights by which they will be bound as they can decide on the articles and paragraphs they want to adhere to with the minimum numbers for each is fixed. This flexible system of the Charter is intended to be transitory as the state parties are required to review their commitments regularly and consider

undertaking additional obligations where possible (Khemani 2009:11). Nevertheless, under the Convention on Human Rights there is no such flexibility. Article 1 of the Convention states that each state party undertakes the obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in … the Convention". The reason behind this difference is that while CPRs are regarded as immediate rights, ESRs are regarded as progressive rights. This view reflects the Cold War conceptualization of the two sets of rights. If ESRs were regarded to be equal with CPRs, the CoE could have adopted the same gradualist approach in relation to CPRs. Just like ESRs were differentiated in the United Nations, they were differentiated within the Council (Kang 2009:1025).

Another difference is the wording of the treaties. The wording of both the 1961 Charter and the Revised Social Charter rights is weak and the provisions appear more like aspirations rather than justiciable rights. For instance, Article 11 states that "[w]ith a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake … to take appropriate measures … to remove as far as possible the causes of ill-health". Similarly, under Part I of the Charter, the treaty provisions set out the rights and principles as "the aim for the policy of the Parties". These examples indicate that the Charter rights are seen as programmatic rights. This wording contrasts with the wording of the Convention on Human Rights (Mantouvalou and Voyatzis 2008:10). For instance, Article 2 of the Convention states that "everyone's right to life shall be protected by law". Similarly, Article 11 states that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests".

Moreover, the personal scope of the Social Charter is narrow whereas the European Convention on Human Rights guarantees CPRs to everyone within a state's jurisdiction (Art. 1). In the 1961 Charter and the Revised Charter,

ESRs of non-nationals are minimally protected. The Appendix to the Social Charter under the title Scope of the Social Charter in Terms of Persons Protected states that:

> …persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19 (cited in Mantouvalou and Voyatzis 2008:10).[26]

A similar provision can be found in the additional protocols and the Revised Charter. As a result, most of the safeguards of the Charter remain irrelevant to the residents and lawfully employed persons who are citizens of non-European States (Mantouvalou and Voyatzis 2008)

A positive improvement in the Charter system was the adoption of the 1995 Additional Protocol to the European Social Charter providing for a system of collective complaints and its incorporation into the Revised Charter system. The collective complaints system does not only provide an opportunity for enhancing the normative character of ESRs through its case law but also implies a move towards justiciability (Khemani 2009; Koch 2006). Moreover, it has brought the European Convention system and the Charter system closer in terms of implementing procedures (Cullen 2009:75). Nevertheless, there are several points where the effectiveness of the system of collective complaints is questioned. Initially, as its name indicates, the complaints system that was provided by the Additional Protocol and recognized by the Revised Charter does not contain a right to individual petition. This implies that complaints cannot be issued by individuals but only by organizations. These organizations are also limited in number as those that are eligible to

[26]Article 18 provides for the right to engage in gainful occupation in other Contracting States, and article 19 guarantees the right of migrant workers and their families to protection and assistance.

issue a complaint have been determined by the Council itself (Churchill and Khaliq 2004:426).[27] Under the European Convention on Human Rights, on the other hand, individuals have a right to submit an application – alleging a violation of the Convention – to the European Court of Human Rights, the institution monitoring compliance with the Convention provisions. Moreover, the European Convention on Human Rights also recognizes the inter-state complaints procedure as one of its enforcement mechanisms. According to its Article 33, a state can bring a case against another one if it believes that the latter is violating the Convention. This mechanism is mandatory for all member states as the other mechanisms. A second point that is regarded as a question towards the effectiveness of the Charter system is that the recommendations of the European Committee on Social Rights are scrutinized by the Committee of Ministers of the Council of Europe. The role of the Committee of Ministers demonstrates that the governments are extremely sensitive as regards economic and social rights (Mantouvalou and Voyatzis 2008:10). The Committee had a similar role within the European Convention system until 1998. The member states decided to abolish this role in Protocol 11 to the Convention. Concerning the fact that the collective complaints mechanism was adopted one year after Protocol 11, it is clear that the same states were of the view that it was appropriate for the Committee to have a determinative role in the collective complaints system (Churchill and Khaliq 2004:455). This implies that, while the Committee of Ministers cannot undermine the decisions of the European Court of Human Rights, it may decide to refrain from adopting a recommendation to implement a decision in

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[27] There are several types of organizations that are eligible to make complaints under the system. One type, for instance, is the international organizations of employers and trade unions that are observers at meetings of the Governmental Committee under the reporting system. Another type is the international non-governmental organizations that have consultative status with the Council of Europe and have been placed on a list drawn up by the Governmental Committee for the purpose of making complaints. For a international non-governmental organization to be put on this list, it must prove that "it has 'access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions etc. in order to draw up complaint files that meet the basic requirements of reliability'". The list is renewed every four years (Churchill and Khaliq 2004:426).

the case of the European Committee of Social Rights. Moreover, the Committee's decisions are not binding upon the state parties. They are rather non-binding recommendations (Kang 2009:1024). When compared to the Convention system, it can be seen that the Council of Europe is less than enthusiastic in its approach to the enforcement of ESRs.[28] Although there have been reforms in order to strengthen its monitoring system, the Social Charter still lacks strong enforcement provisions. The European Court of Human Rights, in contrast, remains as one of "the most powerful, most strongly legalized, and most petitioned human rights institutions in the world" (Ibid. 1025).

[28] The Council is composed of several institutions among which there is the Committee of Ministers, the Parliamentary Assembly and the Secretary General. Being an intergovernmental organization, the Council of Ministers is the Council's decision making body. The choice to establish the European Social Charter system in such way was the decision of the Council of Ministers, therefore of the member states. Their choice points to the hesitation of the member states in establishing a system as strong as the European Convention of Human Rights system.

CHAPTER IV

CONCLUSION

The main aim of this thesis was to assess the status of ESRs within the human rights regime of the Council of Europe. The research question was whether these rights were treated equally with CPRs in Europe, particularly under the human rights regime of the Council of Europe. In answering this question, the thesis searched for the assumptions with regard to the nature of ESRs and CPRs and it sought answers to whether the nature of ESRs was different from that of CPRs; how the protection of and approach to ESRs and CPRs developed in the Council of Europe; and how the contemporary protection of and approach to ESRs was in the Council of Europe in comparison to CPRs. In order to answer these questions, the first chapter made an analysis of ESRs as international human rights in order to present their status at the international level. Having presented an overview of historical development of internationally recognized human rights, particularly civil, political, economic and social rights, the second chapter demonstrated that, despite the official position that all human rights were indivisible, interdependent and interrelated, ESRs had been neglected by the international community since the adoption of the Universal Declaration of Human Rights. The main reason was the ideological conflict during the Cold War which led to the conceptualization of ESRs as having different nature than civil and political rights. While the former was regarded as positive rights, the latter was seen as negative rights. This decision had political explanations. The outcome was the adoption of two different international treaties with different wordings and

different levels of justiciability and requirements of realization. This was followed by devotion of more energy and resources for the promotion of CPRs. Since the 1990s, however, there has been a renewed interest in ESRs. These rights were re-included into mainstream human rights discussions. Nevertheless, ideological concerns and concerns regarding the allegedly different nature of ESRs remained as obstacles to the eradication of the disparity between CPRs and ESRs. The thesis aimed at bringing ESRs on an equal footing with CPRs by critically analyzing the assumptions with regard to the nature of the former. It was demonstrated that ESRs were not necessarily vague, positive, resource intensive, progressive, ideologically-divisive/political, unmanageably complex and non-justiciable.

In the third chapter, the Council of Europe's human rights regime was assessed in terms of its ESRs protection. To this end, historical overview of the Council of Europe's regime and the place of ESRs within this regime were presented. It was argued that these rights enjoyed a secondary status within the Council although it was the first organization in the world which adopted a treaty protecting them. In the second sub-section, the improvements with regard to ESRs protection within the Council were analyzed. The number of core obligations of states with regard to various ESRs was increased. Eight new ESRs, i.e. the rights to protection against poverty and social exclusion and to housing were recognized as human rights. Moreover, the collective complaints mechanism was incorporated into the new Charter system. Through this mechanism, the European Committee on Social Rights was given the competence to hear complaints brought by social partner organizations and non-governmental organizations recognized by the CoE (Cullen 2009:61-62). This mechanism has enabled the Committee to make new interpretations of the Charter articles. This move indicates a departure from the traditional view that while CPRs are justiciable rights, ESRs are non-justiciable. Another major development was that the European Court of Human Rights has gone beyond the wording of the European Convention and

has been able to protect five different ESRs under the Convention. In addition, it is now widely accepted within the Council's human rights regime that both ESRs and CPRs impose positive and negative obligations on the part of governments.

The improvements with regard to ESRs protection indicate that there is a willingness to accord more importance to these rights. Nevertheless, these rights remain as the "poor step-sister of civil and political rights" (Alston 2005:4-5). States do not have to ratify the European Social Charter in order to be Council member. The wording of the Social Charter rights is weak and the provisions appear more like aspirations rather than justiciable rights. The personal scope of the Social Charter is narrow. Finally, the mandates of the European Committee on Social Rights and the European Court of Human Rights are different. The former's mandate is limited whereas the European Court operates as a fully judicial institution.

To sum up with, the thesis had the following as its findings. The European Social Charter system differs to a great extent from that of the European Convention on Human Rights. The laws on ESRs are not as strong and broad as the laws on CPRs. The institutions monitoring the protection of ESRs are not as strong as those monitoring CPRs. ESRs are regarded as progressive rights where as CPRs are regarded as immediate rights, and member states are not enthusiastic in rendering the European Social Charter system as strong as the European Convention on Human Rights system. Therefore, the thesis has concluded that, despite the discourse and the positive developments in institutional terms and in laws, the Council of Europe still treats ESRs as secondary rights. This thesis demonstrated that, economic and social rights can be brought on an equal footing with civil and political rights. It also indicated, however, that under the Council of Europe's human rights regime they are not protected equally. It provided the reader with the overall

problematic picture of the status of economic and social rights under the most developed regional human rights regime.

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APPENDIX A

THESIS PHOTOCOPY PERMISSION FORM/
TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü ☐

Sosyal Bilimler Enstitüsü X

Uygulamalı Matematik Enstitüsü ☐

Enformatik Enstitüsü ☐

Deniz Bilimleri Enstitüsü ☐

YAZARIN

Soyadı : Milli
Adı : Ece
Bölümü: Avrupa Çalışmaları

TEZİN ADI (İngilizce): Assessing the human rights regime of the Council of Europe in terms of economic and social rights

TEZİN TÜRÜ : Yüksek Lisans X Doktora ☐

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. X
2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. ☐
3. Tezimden bir bir (1) yıl süreyle fotokopi alınamaz. ☐

TEZİN KÜTÜPHANEYE TESLİM TARİHİ: