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Empowering Persons with Disabilities: Socio-Economic Rights as a Pathway to Personal Autonomy and Independence

Francesco Seatzu
University of Cagliari, Italy

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EMPOWERING PERSONS WITH DISABILITIES: SOCIO-ECONOMIC RIGHTS AS A PATHWAY TO PERSONAL AUTONOMY AND INDEPENDENCE

Francesco Seatzu^{*}

ABSTRACT—Recent years have witnessed a growing awareness of the importance of the status of persons with disabilities as right-holders, and increasing linkages being made between human rights and persons with disabilities’ vulnerabilities in the development context. Stimulated by mounting concerns about the impact of the financial crisis of 2007–2008 on persons with disabilities, these changes have unsurprisingly catalyzed attention on those rights of persons with disabilities that are most closely connected to ensuring persons with disabilities’ development needs—namely their social and economic rights. Focusing on the content of, and duties imposed by, persons with disabilities’ socio-economic rights, this article starts by describing the notions of “disability” and “disabled persons.” It then discusses the emergence of persons with disabilities as socio-economic rights holders, focusing on the question of whether persons with disabilities are or should be considered a “special case” vis-à-vis such rights when compared with other vulnerable groups. The article concludes with a discussion of the role domestic courts can and should play in the enforcement of the socio-economic rights contained in the UN Convention on the Rights of the Persons with Disabilities.

^{1*} JD (Cagliari); PhD (Nottingham); Full Professor of International and European Law, University of Cagliari, Italy.

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I. INTRODUCTION

This work looks at persons with disabilities and their social and economic rights. It also discusses when and how competent national judicial authorities may be called upon to implement such rights. With regard to this latter issue, the focus will be on competent national judicial authorities of developing countries. The focus on developing countries is for the simple reason that the majority of the world’s disabled people—about 80 percent—currently live in developing countries, as shown by some recent figures from University College London.² These issues are addressed in three stages.

First, the work describes the notions of social rights and disability employed throughout it. In so doing, it pays special attention to the core issues that arise in the conceptualization of persons with disabilities as socio-economic rights holders. This demands a consideration of the implications of different systems of disabilityhood and persons with disabilities from societal, political, and normative perspectives. Moreover, it examines the treatment of persons with disabilities under the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD)³ and its related Optional Protocol.⁴ The CRPD, adopted in 2006 and signed or ratified

² See Sophie Mitra et al., *Disability and Poverty in Developing Countries: A Snapshot from the World Health Survey*, SOCIAL PROTECTION & LABOR THE WORLD BANK, Discussion Paper No. 1109, 1109 (Apr. 2011), <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1566&context=gladnetcollect>.

³ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

⁴ Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2518 U.N.T.S. 283.

by 163 countries from all over the world,⁵ declares universal rights of every person with a disability, including some social and economic rights for disabled persons, such as the right to education, health, habilitation and rehabilitation, work and employment, adequate living and protection.⁶

Secondly, the work discusses the special place occupied by persons with disabilities with respect to socio-economic rights breaches and considers whether persons with disabilities are or should be considered a “special case” vis-à-vis such rights when compared with other vulnerable groups. This is in parallel to a discussion of the alleged features and the definition of socio-economic rights as “real” human rights with an aim to reject objections against judicial implementation of such rights. It also emphasizes and legitimizes the role of international human rights and public international law.

Lastly, the work focuses on the role of domestic courts in the enforcement of the socio-economic rights contained in the CRPD by outlining the situations in which these courts could intervene and what action they could adopt.

II. THE DEFINITIONS OF “PERSONS WITH DISABILITIES” AND “DISABILITY”

The first step is to define the subjects of this work: that is, “persons with disabilities.” Notwithstanding the efforts of the World Health Organization (WHO),⁷ the specialized branch of the UN concerned with public health, the meaning of “disability” and consequently that of “person with disability” still varies significantly. In my view, this depends on the different ways of “seeing” disability according to the social model of disability and according to the medical model of disability. In a nutshell, “disability,” according to the social model, is defined as a situation that derives from social constraints and structures. This is in sharp contrast to how disability has been defined by the supporters of the “medical model of disability”: namely, as a condition

⁵ For a chart of signatures and ratifications of the Convention on the Rights of Persons with Disabilities, see *CRPD List of Countries by Signature : Confirmation : Accession : Ratification*, DISABLED WORLD (Sept. 22, 2014), <https://www.disabled-world.com/disability/discrimination/crpd-milestone.php>.

⁶ See Francesco Seatzu, *Social rights as persons with disabilities’ rights*, RES. HANDBOOK INT’L L. AND SOC. RTS., 224 (2020).

⁷ INTERNATIONAL CLASSIFICATION OF FUNCTIONING, DISABILITY AND HEALTH, WORLD HEALTH ORGANIZATION [WHO] (2001), <https://apps.who.int/iris/bitstream/handle/10665/42407/9241545429.pdf;jsessionid=E775B4BADC286D56EF10FFA94F6A1084?sequence=1>. See also G. Stucki et al., *Application of the International Classification of Functioning, Disability and Health (ICF) in clinical practice*, 24 DISABILITY AND REHAB. 281, 281–82 (2009).

deriving from personal “deficiencies” to be solved by means of policies directed at normalizing those who “suffer” them.⁸

While there are similarities between the definitions of disability in some areas of social policy, legal disability definitions in each country—and often in each legal instrument—differ with respect to non-discrimination and employment measures, income maintenance, and social assistance with daily life activities.⁹ Emblematic of this is the evolution of the Individuals with Disabilities Education Act (IDEA),¹⁰ the “primary statutory vehicle for the educational rights of persons with disabilities in the United States” according to the U.S. National Council on Disability.¹¹ Until October 2010, the term “mental retardation”¹² was preferred to that of “intellectual disability.”¹³ Perhaps even more emblematic is the evolution in the interpretation of the Rehabilitation Act of 1973 (Rehabilitation Act), which forbids discrimination in federally funded activities and programs.¹⁴ As Paul Longmore indicates, though the original aim of the Rehabilitation Act did not intend to cover all forms of discrimination, the broad language of Section 504 of the 1973 Rehabilitation Act was eventually interpreted by the implementing agency to ban all forms of discrimination in the public sector.¹⁵

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) also do not supply a workable definition

⁸ See Agustina Palacios, *The Social Model in the International Convention on the Rights of Persons with Disabilities*, 4 AGE HUM. RTS. J. 91, 91 (2015) (citing CRISTINA CHURRUCA MUGURUZA ET AL., VULNERABILITY AND PROTECTION OF HUMAN RIGHTS (M. Carmen Barranco Avilés & Cristina Churrucá Muguruza eds., 2014)).

⁹ See Helen Bolderson & Deborah Mabbett, *Non-Discriminating Social Policy? Policy scenarios for meeting needs without categorisation*, in WHAT FUTURE FOR SOCIAL SECURITY? DEBATES AND REFORMS IN NATIONAL AND CROSS-NATIONAL PERSPECTIVE 53, 54 (Jochen Clasen ed., 2001).

¹⁰ 20 U.S.C. § 1400 (1990).

¹¹ See NAT’L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) 90 (2008).

¹² See, e.g., THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIOURAL DISORDERS: CLINICAL DESCRIPTIONS AND DIAGNOSTIC GUIDELINES 15 (1992) (recalling that the term “mental retardation” was used in the American Psychiatric Association’s DSM-IV (1994) and in the World Health Organization’s ICD-10 (codes F70–F79)).

¹³ See Kevin Walker, *Comparing American Disability Laws to the Convention on the Rights of Persons with Disabilities with Respect to Postsecondary Education for Persons with Intellectual Disabilities*, 12 NW. J INT’L HUM. RTS. 115, 117 n.16 (2014). See also Luis Salvador-Carulla, Marco Bertelli, “Mental Retardation” or “Intellectual Disability”: Time for a Conceptual Change 41 PSYCHOPATHOLOGY 10 (2008) (recalling that the term “mental retardation” was gradually changed after 2010 because of its negative and insulting connotation and offensiveness).

¹⁴ 29 U.S.C. § 701 (1973) (amended 1998). For a commentary, see, e.g., Anne B. Thomas, *Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act*, 22 N.M. L. REV. 243 (1992).

¹⁵ See PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 104 (2003).

of disability. Nevertheless, this has not hindered either of the two courts from moving in the direction of developing their own case-law on disability issues. To elucidate this point, the ECtHR has given a number of important decisions that have had an impact on disability laws, policies and procedures, notably in Bulgaria,¹⁶ France,¹⁷ Poland,¹⁸ the United Kingdom,¹⁹ the Netherlands,²⁰ and Italy.²¹ Similarly, one can also recall that the Inter-American Commission on Human Rights (IACcHR) and the Inter-American Court of Human Rights (IACtHR) have also developed a rich case-law and practice on the protection of the fundamental rights of persons with disabilities,²² recently culminating in the IACcHR's ruling on an emergency "precautionary measures petition" filed by Disability Rights International (DRI) on behalf of more than 300 children and adults at Federico Mora Hospital in Guatemala.²³ That being said, both courts have followed the ECtHR's lead in failing to clarify the operative meaning of the term "disability."²⁴

But this is not all. One can also recall the *MDAC v. Belgium* case,²⁵ where the European Committee of Social Rights (ECSR) found Belgium in breach of the European Social Charter (ESC) for failing to provide education and training for children with intellectual disabilities who are denied access to mainstream education and to the forms of support necessary to ensure such

¹⁶ See generally *Nencheva & Others v. Bulgaria*, App. No. 48609/06, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-120956>.

¹⁷ See generally *Vincent v. France*, App. No. 6253/03, Eur. Ct. H.R. (2006), <http://hudoc.echr.coe.int/eng?i=001-77641>.

¹⁸ See generally *Zarzycki v. Poland*, App. No. 15351/03, Eur. Ct. H.R. (2007), <http://hudoc.echr.coe.int/eng?i=001-117210>.

¹⁹ See generally *Aswat v. the United Kingdom*, App. No. 17299/12, Eur. Ct. H.R. (2013), <http://hudoc.echr.coe.int/eng?i=001-118583>.

²⁰ See generally *X & Y v. the Netherlands*, App. No. 8978/80, Eur. Ct. H.R. (1985), <http://hudoc.echr.coe.int/eng?i=001-57603>.

²¹ See Francesco Seatzu, *Does the European Convention on Human Rights Protect the Disabled?*, 8 ANNUAIRE INTERNATIONAL DES DROITS DE L'HOMME 397, 397–420 (2014).

²² See D. Guarnizo-Peralta, *Disability rights in the Inter-American System of Human Rights*, 36 NETH. Q. OF HUM. RTS. 43 (2018).

²³ See *Inter-American Commission on Human Rights orders Guatemala to protect children and adults from abuses in psychiatric facility*, DISABILITY RTS. INT'L (Nov. 28, 2012), <https://www.driadvocacy.org/inter-american-commission-on-human-rights-orders-guatemala-to-protect-children-and-adults-from-abuses-in-psychiatric-facility/>.

²⁴ See Analía Banfi & Sofia Galvan, *Los Derechos de las Personas con Discapacidad y la Comisión Interamericana de Derechos Humanos*, REVISTA LATINOAMERICANA DE DERECHO INTERNACIONAL (Nov. 10, 2014), http://repositoriocdpd.net:8080/bitstream/handle/123456789/1303/Art_GalvanPuentes_DerechosComisionInteramericana_2014.pdf?sequence=1.

²⁵ See *Mental Disability Advocacy Center (MDAC) v. Belgium*, Complaint No. 109/2014, Decision, EUR. COMM'N OF SOC. RTS. (Oct. 16, 2017), <http://hudoc.esc.coe.int/eng?i=cc-109-2014-dadmissandmerits-en>.

inclusion.²⁶ But still, the issue of the definition of the term “disability” has not been addressed as such by the ECSR. This is in spite of this Committee monitoring an international legal instrument that, at Article 15, explicitly refers to the right of persons with disabilities to independence, social integration, and participation in the life of the community.²⁷ Nevertheless, given that supervisory body’s extensive reliance on the case-law of the ECtHR in areas of overlap between the ECHR and ESC,²⁸ should a question of the definition of “disability” or of “persons with disabilities” arise before it, the ECSR Committee would most likely enact a corresponding approach to the expansive and inclusive one that has been implicitly adopted by the ECtHR in its disability line of cases.²⁹

In light of the preponderant approach of international and regional human rights law, as well as the wide diversity of approaches at national level, this work aligns itself with the broad notion of “disability” that is implicitly encompassed in the CRPD through reference to the social model understanding of disability—that is the belief that disability is a socially constructed entity rather than a medicalized pathology.³⁰ This is not to ignore the fact that in some domestic legal systems the constitutional framework leads to a much less inclusive definition.³¹ In particular, this occurs in those legal systems that adopt, either explicitly or implicitly, the traditional

²⁶ See Giuseppe Palmisano, *Protecting the Rights of Persons with Autism: the Role of the European Committee of Social Rights*, in *INTERNATIONAL LAW AND THE PROTECTION OF HUMANITY: ESSAYS IN HONOR OF FLAVIA LATTANZI* 90, 90–104 (Pia Acconci et al. eds., 2017).

²⁷ European Social Charter (revised) art. 15, May 3 1996, 163 E.T.S. (“With a view to ensuring . . . the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake . . . (1) to take necessary measures to provide persons with disabilities with guidance, education and vocational training . . . (2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities . . .”).

²⁸ See Dovilė Gailiūtė, *Right to Housing in the Jurisprudence of the European Committee of Social Rights*, 4 *SOCIETAL STUD.* 1605 (2012). See also Francesco Seatzu, *Enhancing a Principled Justificatory Model of Adjudication for the Protection of Human Rights in the Socio-Economic Sphere—The Impact of the European Social Charter on the Case Law of the European Court of Human Rights*, 15 *GLOBAL COMMUNITY Y.B. INT’L. L. AND JURISPRUDENCE* 247 (2015).

²⁹ See Emily Hazlett, *Disability Rights in a Post-Convention Era: Protecting Legal Capacity at the European Court and Beyond*, 2 *INT’L. HUM. RTS. INTERNSHIP WORKING PAPER SERIES* 11 (2014).

³⁰ On the social model understanding of disability, see, e.g., Mike Oliver, *The Social Model in Action: if I had a hammer*, in *IMPLEMENTING THE SOCIAL MODEL OF DISABILITY: THEORY AND RESEARCH LEEDS* 18 (Colin Barnes & Geoff Mercer eds., 2004); Rannveig Traustadóttir, *Disability Studies, the Social Model and Legal Developments*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 3 (Oddný Arnadóttir & Gerard Quinn eds., 2009). For some recent criticisms of this model, see Janine Owens, *Exploring the critiques of the social model of disability: the transformative possibility of Arendt’s notion of power*, 37 *SOC. OF HEALTH & ILLNESS* 385 (2015).

³¹ See *HEALTH CARE FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES ACROSS THE LIFESPAN* 418 (I. Leslie Rubin et al. eds., 2016).

medical model understanding of disability, the central tenets of which are that a person's "impairment" can be diagnosed, cured, or at least rehabilitated by medicine and/or medical technology and that such interventions will be provided by all-knowing professionals.³²

III. THE EMERGENCE OF PERSONS WITH DISABILITIES AS SOCIO-ECONOMIC RIGHTS HOLDERS

Having indicated *who* we are considering here, it is appropriate to clarify *why* it is indispensable to take these people into consideration. It is important that more observation be given to persons with disabilities as socio-economic rights holders, autonomous from the community to which they belong. Persons with disabilities are currently acknowledged as a minority rights group.³³ Indirectly, this is confirmed by the existence of an *ad hoc* human rights treaty (the CRPD), and also by the shared experience of discrimination, oppression and suffering that persons with disabilities share with other minority groups in society like, and in particular with, elderly people³⁴ and children.³⁵ Throughout the world, especially in developing countries, disabled persons cannot exercise significant legal or strategic economic influence and are generally, ultimately excluded from the large majority of societal organizations, whether labor or political in nature.³⁶ Conventionally, in regarding persons with disabilities—particularly persons with intellectual disabilities—as a discrete category of individuals, Western societies usually set them aside as incompetent individuals who are “inferior” to non-disabled individuals and whose enjoyment of fundamental freedoms and rights is conditioned upon the views of the state or legal guardians, or both.³⁷

³² See Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 221 (2000).

³³ See Corey Leshandon Moore, *The Minority Group Model and Persons With Disabilities: Toward a More Progressive Disability Public Policy in the United States of America*, 4 AUSTL. J. REHAB. COUNS. 36 (1998).

³⁴ See, e.g., Mutamad Amin et al., *EquiFrame: A framework for analysis of the inclusion of human rights and vulnerable groups in health policies*, 13 HEALTH AND HUM. RTS. J. 82 (2011).

³⁵ On the classification of children as belonging to a minority group, see Daniel Thomas Cook, *Minority Group, Children as*, in THE SAGE ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD STUDIES 1111 (Daniel Thomas Cook ed., 2020) (recalling that “children can be understood as a minority group in different ways, including as the last minority—a social group that has not yet achieved equal rights.”).

³⁶ See Joanne Neille & Claire Penn, *Beyond Physical Access: a qualitative analysis into the barriers to policy implementation and service provision experienced by persons with disabilities living in a rural context*, 15 RURAL AND REMOTE HEALTH (2015); Gobinda C. Pal, *Disability, Intersectionality and Deprivation: An Excluded Agenda*, 23 PSYCHOL. & DEVELOPING SOC’Y 159 (2011).

³⁷ See, e.g., Hélène Ouellette-Kuntz et al., *Public Attitudes Towards Individuals with Intellectual Disabilities as Measured by the Concept of Social Distance*, 23 J. APPLIED RES. INTELL. DISABILITIES 134 (2010).

Clearly, the considerations made above and below in this work about persons with disabilities may be rejected as wide-ranging conjectures that characterize persons with disabilities as an alike group whose views and interests are similar and who are confronted with the same challenges. But, of course, they are not. Similar to other social groups, persons with disabilities differ from each other in terms of race, socioeconomic status, and gender. Nevertheless, I would maintain that persons with disabilities are similar enough in terms of common features—such as needs, lifestyle, and legal and political status—for it to be admissible to refer to “persons with disabilities” in building my line of reasoning.

The main reason there has been little consideration of persons with disabilities as holders of social and economic rights is that, until recently, disabled people were regarded as recipients of charitable acts and goodwill, rather than as fundamental freedoms and rights-bearers themselves.³⁸ Traditionally, persons with disabilities were not deemed to be independent actors enhancing social processes. As a result, they did not achieve consideration as a distinct group, justified by the perception that they are the responsibility of their legal guardians. In fact, giving persons with disabilities lifelong “dependent” status was functional to placing them outside the socially active community.

The perception of persons with disabilities as rooted in a relationship with a legal guardian that is able to meet their needs fails to take into account the fact that the relationship between legal guardians and disabled persons does not establish an identity of disabled persons interests. As several authors have pointed out, a failure to consider the persons with disabilities’ claim to resources as autonomous of the disabled-legal guardian relationship results in a failure to recognize the position of persons with disabilities as separate members of the social community with separate interests.³⁹

Persons with disabilities’ social conditions are strongly connected with those of the people who take care of them. Nevertheless, although resources are often given to persons with (intellectual) disabilities by close relatives,⁴⁰ this is not invariably the case. The idea that family relationships are unavoidably supported by general principles of social justice misses the fact

³⁸ See ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 30 (2015),

³⁹ Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 *STAN. L. REV.* 625, 630 (1979); Nina A. Kohn et al., *Supported Decision Making: A Viable Alternative to Guardianship*, 177 *PENN. ST. L. REV.* 1111, 1117 (2013).

⁴⁰ See Brian Grossman & Sandy Magaña, *Introduction to the special issue: Family Support of Persons with Disabilities Across the Life Course*, 19 *JOURNAL OF FAMILY SOCIAL WORK* 237, 239–41 (2007).

that the family is not affected by the attitudes of society. Indeed, like any other social entity, the family mirrors public assumptions that are still disablist in nature. Moreover, the idea that persons with disabilities' socio-economic rights-related needs will be taken care of by their caregivers or close relatives—compounded by the fact that the traditional predilection of the state is to provide for persons with disabilities' social entitlements through the family unit—may disadvantage those persons with disabilities who do not have family caregivers that are able to help. There has also been a failure to adequately consider persons with disabilities' needs when examining the needs of “households” that leads to an undervaluation of the needs of the disabled-members and to an excessive consideration of those without disabilities, i.e. other members of the household.⁴¹

Essentially, the recurrent transfer of social rights-connected resources from relatives to persons with disabilities neither abolishes nor invalidates the duty of the state to persons with disabilities. In addition to its default task of supplying social freedoms and rights where family caregivers have difficulty to or are unable to do so, there are specific socio-economic rights—such as the right to ensure maternity leave for working mothers, the right to a healthy environment, and the right to social security—that only the state can deliver. It is essential that persons with disabilities' entitlements to resources be considered as autonomous of the family caregiver-person.

There have been advancements in terms of attitudes and approaches to persons with disabilities. Disabled persons, especially intellectually disabled persons, are less frequently viewed as an extension of their relatives and legal guardians, at least for States Parties to the CRPD, but as individuals with their own fundamental freedoms and rights. Nevertheless, persons with disabilities are still severely disadvantaged in society as compared to non-disabled persons. And this is so despite the entry into force of the CRPD that has marked a “paradigm shift” in the rights of people with disabilities.⁴² This point has been well captured by writers who claim that “disablism”—that is the discriminatory, oppressive or abusive behavior of non-disabled toward persons with disabilities—has the same negative impact on the lives of

⁴¹ See Alissa C. Stevens et al., *Adults with One or More Functional Disabilities—United States, 2011–2014*, CENTER FOR DISEASE CONTROL AND PREVENTION 1021, 1021 (Sept. 30, 2016), <https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm6538.pdf> (also stressing that acknowledging the characteristics of persons living with multiple disability types would be of strategic importance for understanding the overall functional status of these individuals).

⁴² Ida E. Koch, *From Invisibility to Indivisibility: The International Convention on the Rights of Persons with Disabilities*, in *THE UN CONVENTIONS ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 67, 67–77 (2009); Paul Harpur, *Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons With Disabilities*, 27 *DISABILITY & SOCIETY* 1, 3–5 (2012); Teodor Mladenov, *The UN Convention on the Rights of Persons with Disabilities and its Interpretation*, 7 *ALTE-EURO. J. DISABILITY* 69, 72 (2013).

persons with disabilities as the disability *per se*.⁴³ Moreover, other authors, in similar terms, maintain that disabilityhood as a social condition is still defined within the social order as inferior to non-disabilityhood.⁴⁴

Persons with disabilities have a different position in society from that of other socially disadvantaged individuals. Ramon Puig and Stephen von Tetzchner express this clearly by stressing the existence of a paradox throughout history, according to which “the problem for people with disabilities, unlike the problem for older persons and children (two other groups of vulnerable subjects), has not been a lack of integration, but, rather, an unfulfilled form of ‘integration,’ with limited possibilities for education, work and social life.”⁴⁵ On such a view of persons with disabilities, disabled dependence must be approached and resolved through political or social development. Puig and von Tetzchner’s claims deserve to be taken seriously. Puig and von Tetzchner explain that the “dependence” of disabled persons is to a large extent the result of cultural, social, and historical approaches towards, and treatment of, persons with disabilities, rather than constituting an unavoidable outcome of disabilityhood itself.⁴⁶ Flawed perceptions of disabled persons as non-autonomous and dependent have led to a vicious cycle. Erroneous views on persons with disabilities are strengthened by the restricted chances for persons with disabilities to prove their competence. Strictly connected to this is the deleterious influence of the eugenic, an ideology that was prevalent both in Western Europe and the United States in the early twentieth century.⁴⁷

Judicial consciousness of the weak and disadvantaged position of persons with disabilities in the enjoyment of human rights, including socio-economic rights, is clearly shown in ECtHR case-law. In *Guberina v. Croatia*, the ECtHR observed that:

the alleged discriminatory treatment of the applicant on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of

⁴³ For further references on this point, see e.g., MICHAEL W.J. SCHILLMEIER, RETHINKING DISABILITY: BODIES, SENSES AND THINGS 5 (2010); Shelly Tremain, *On the Subject of Impairment*, in DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY 32 (Corker & Shakespeare eds., 2002).

⁴⁴ See, e.g., Tom Shakespeare, *Back to the future? New genetics and disabled people*, 1 CRITICAL SOC. POL’Y 20 (1995); Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABILITY, HANDICAP & SOC’Y 5 (1987).

⁴⁵ See Ramon Puig & Stephen von Tetzchner, *The Disabled Person in Society: an Historical Perspective in Issues*, in TELECOMMUNICATION AND DISABILITY 623 (Tetzchner ed., 1991).

⁴⁶ *Id.*

⁴⁷ David Pfeiffer, *Eugenics and Disability Discrimination*, 9 DISABILITY & SOC’Y 481 (1994).

disability-based discrimination covered by Article 14 of the Convention.⁴⁸

This statement reflects a perception of disability dependence as something that shall not in any case be used to prevent the effective exercise of fundamental rights including socio-economic rights, like the right to housing. A similar line of reasoning is found in *Enver Şahin v. Turkey*.⁴⁹ Here, the ECHR maintained that neither economic nor time constraints can justify the refusal or delay of the State in introducing the necessary changes to the environment that would permit any persons (including persons with disabilities) to exercise their right to education.⁵⁰

IV. SOCIO-ECONOMIC RIGHTS AS “REAL” HUMAN RIGHTS

Before moving to discuss the legitimacy and efficacy of the domestic courts’ enforcement of persons with disabilities’ socio-economic rights, it is necessary to consider some of the objections that have been traditionally posed to the competent national judicial authorities becoming involved in the adjudication of socio-economic rights. Here, the focus will be on objections related to the characteristics or nature of socio-economic rights that the large majority of legal authors have for decades identified as incompatible with their judicial implementation and constitutionalization. In enumerating these objections, I will follow the structure for the judicial enforcement of socio-economic rights provided by Natasha G. Menell,⁵¹ as well as the discussion contained in Jeff King’s book titled *Judging Social Rights*.⁵²

First, according to the “democratic objection,” judicial implementation of socio-economic rights restricts the scope of the democratic decision-making process.⁵³ Supporting this conclusion is the idea that a single judicial decision may oblige the political branches of government to treat an individual beneficiary or class of beneficiaries differently, or eventually to adjust democratically developed policies.⁵⁴ For the supporters of this view, the judicial implementation of socio-economic rights poses two structural

⁴⁸ *Guberina v. Croatia*, App. No. 23682/13, Eur. Ct. H.R. 1, 28 (2016), <http://hudoc.echr.coe.int/eng?i=001-161530>.

⁴⁹ *Sahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. 115 (2005), <http://hudoc.echr.coe.int/eng?i=001-70956>.

⁵⁰ *Id.* at 36–37.

⁵¹ See Natasha G. Menell, *Judicial Enforcement of Socioeconomic Rights: A Comparison between Transformative Projects in India and South Africa*, 49 CORNELL INT’L L.J. 723 (2016).

⁵² See JEFF KING, *JUDGING SOCIAL RIGHTS* (2012).

⁵³ See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 21, 21–24, 35–38 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

⁵⁴ See Natasha G. Menell, *supra* note 51, at 727.

concerns.⁵⁵ The first concern is that of the separation of powers between the democratic branches and the judicial branch, because it gives courts the possibility to “invalidate choices as to the allocation of financial resources that are fundamentally political.”⁵⁶ Second, implementation of socio-economic rights raises questions related to judicial capacity. And this is for the very reason that judges are neither in theory nor in practice the best-placed state entities to evaluate potential policy options and select between priorities.⁵⁷

Unlike executive officers and legislators, competent domestic judicial authorities arguably lack democratic accountability.⁵⁸ Nevertheless, as Michelman has rightly pointed out, this objection fails to consider that socio-economic rights may also be formulated in a narrower form.⁵⁹ States can draft socio-economic rights as duties for the state to pursue progressive and gradual realization, rather than as absolute individual rights, providing greater policy flexibility.⁶⁰

The second objection is generally known as the “contractarian objection.”⁶¹ At the heart of this objection is the idea that enforcement of socio-economic rights is not easy to measure, which allows the circumventing of citizens’ abilities to evaluate adherence to the state’s constitutional duties.⁶² The vagueness of the level of achievement of socio-economic rights makes it hard for citizens to establish whether political policy choices effectively breach or respect their rights.⁶³ This might lead to a perceived failure of democratic legitimacy because citizens are not correctly informed on the performance of their political leaders.⁶⁴ Michelman suggests this objection, too, can be dismissed.⁶⁵ Notwithstanding that reasonable citizens can differ in their evaluations of the realization of a socio-economic right, they can agree on a wide spectrum of acceptable procedures and policy choices for assigning priorities.⁶⁶ If reasonable citizens perceive constitutional social rights as establishing bounds on the acceptable policy

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Natasha G. Menell, *supra* note 51, at 727.

⁵⁹ See Michelman, *supra* note 53, at 32–33.

⁶⁰ *Id.* at 32.

⁶¹ See MENELL, *supra* note 51, at 728.

⁶² *Id.* at 728.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See MICHELMAN, *supra* note 53, at 32.

⁶⁶ *Id.* at 32–33.

space, then they can relatively easily determine the extent to which national legislators have kept within those boundaries.⁶⁷

Another frequently made objection to courts adjudicating socio-economic rights is that socio-economic rights radically differ from civil and political rights given the former involves the expenditure of resources, while the latter are without costs.⁶⁸ But even this claim is far from being true for various reasons. For instance, indicating which rights are social and which ones are not, even assuming that such language can be used, is never as simple as could be presumed.⁶⁹ This is certainly true when analyzing socio-economic rights and rights that are instrumental to promoting development. There is a great deal of interdependence and overlap between civil and socio-economic rights, on the one hand, and between socio-economic rights amongst themselves on the other.⁷⁰ For example, the right of all peoples to self-determination that is encompassed both in the International Covenant on Economic, Social and Cultural Rights⁷¹ and the International Covenant on Civil and Political Rights,⁷² as well as the right of minorities to enjoy their own culture in community with other members offer two vivid confirmations of this interdependence and possible overlaps.⁷³

V. THE SPECIAL CASE OF PERSONS WITH DISABILITIES

While civil and political rights were, for a long time, marginal in the discussion of disability rights, socio-economic rights were greatly debated and perceived as being of critical importance by disability activists and disability studies scholars, and this was so even during the early times of the

⁶⁷ See Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*, 39 BROOK. J. INT'L L. 1 (2014).

⁶⁸ See Cecile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263 (1998); Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1 (2006); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE INT'L L. J. 113 (2008).

⁶⁹ See Virginia Mantouvalou, *The Case for Social Rights*, 6 GEO. L. FAC. PUBL'N & OTHER WORKS 10–18 (2010).

⁷⁰ See Neil Hibbert, *Human Rights and Social Justice*, 6 LAWS (2017).

⁷¹ International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3. (providing for the right of all peoples to self-determination).

⁷² International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (providing for the right of all peoples to self-determination).

⁷³ See Martin Scheinin, *The Justiciability of Social Rights: From Theory to Practice*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 549 (Malcolm Langford ed., 2008) (“Article 27 on minority rights represents an explicit extension by the ICCPR into the field of economic, social and cultural rights.”).

various disability movements.⁷⁴ The reason behind this focus on social rights is the traditional conceptualization of disability rights in terms of social and welfare rights, which was, incidentally, the only coherent element of the initial paternalistic approach to disability.⁷⁵ Having said that, there is no question that social rights, such as those relating to adequate social protection, work, education and livelihood, are of strategic importance for articulating demands by and for disabled persons. The expansive language of Article 24 of the CRPD⁷⁶ which provides not only that children with disabilities should not be discriminated against but also that they should be able to participate in the general education system⁷⁷ indirectly confirms this conclusion in relation to the right to education.⁷⁸

Although the nature of the socio-economic rights breaches experienced by persons with disabilities and other socio-economically disadvantaged groups can be analogous, it is of key relevance to stress that persons with disabilities face different challenges in terms of the assertion of their socio-economic rights than do several other vulnerable groups. It is not that persons with disabilities are more fragile than all other social groups but only that they are differently fragile.⁷⁹ Persons with disabilities share several of the problems faced by children, including traditional subjection to charity and paternalistic measures. Unlike disadvantaged children and like women and older persons however, they represent a cross-class minority of the population. Persons with disabilities are not uniformly discriminated against. Again, on paper at least, they may obtain more sympathy than other socially vulnerable groups, like prisoners and irregular migrants who are often rejected by more privileged segments of the society. If persons with disabilities are more sympathetic figures than irregular migrants and

⁷⁴ See Janet E. Lord & Michael A. Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 450, 460 (2008).

⁷⁵ See Arlene Kanter, *The Promise and Challenge of the United Nations Convention on the Right of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 11 (2007).

⁷⁶ Convention on the Rights of Persons with Disabilities art. 24, Dec. 13, 2006, 2515 U.N.T.S. 3.

⁷⁷ See Gauthier de Beco, *The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions*, 32 NETH. Q. HUM. RTS. 264 (2014).

⁷⁸ See Dimitris Anastasiou et al., *Article 24: Education*, in THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 670 (Ilias Bantekas et al. eds., 2018) (stressing that “paragraph 1 of Article 28 is appropriately (and even inspiringly) expansive in its vision of educational attainment for PWD . . .”).

⁷⁹ See, Johan Lievens & Marie Spinoy, *Dupin v. France: the ECtHR going old school in its appraisal of inclusive education?*, STRASBOURG OBSERVERS (Feb. 11, 2019), <https://strasbourgoobservers.com/2019/02/11/dupin-v-france-the-ecthr-going-old-school-in-its-appraisal-of-inclusive-education/#more-4304> (stressing that “education for children with a disability concerns a complex service to organize in a world of finite resources.”).

prisoners, then there is arguably more likely to be a lobby group ready to ask for measures aimed at vindicating their rights than would exist for prisoners or irregular migrants. Moreover, while discrimination on the grounds of imprisonment or on the basis of illegal immigration status is still generally allowed, discrimination on the grounds of disability is always considered unacceptable as indirectly confirmed by the adoption and enactment of the CRPD,⁸⁰ and of the Optional Protocol (OP) that allows for an individual citizen of a ratifying country to make a direct complaint to the UN CRPD Committee about his or her treatment/discrimination,⁸¹ and also by the ECtHR's case-law relating to persons with disabilities.⁸² In relation to the latter, reference is made to the ECtHR's judgment in *Guberina*,⁸³ where the Court clarified for the first time in its jurisprudence that Article 14 of the ECHR covered discrimination by association, and that consequently, the applicant could claim victim status based on the disability of his child, "with whom he had close personal links and for whom he provided care."⁸⁴

There are also a number of other ways in which persons with disabilities are in a significantly different position from non-disabled persons with regard to their enjoyment of socio-economic rights. First, persons with disabilities, especially persons with intellectual disabilities and psychosocial disabilities, are often affected in a different way from non-disabled persons by violations of a similar nature.⁸⁵ The psychological and physical effects that persons with intellectual disabilities experience as a result of breaches of their socio-economic rights and freedoms will usually be greater than those suffered by non-intellectually disabled persons due to their different level of mental development.⁸⁶ This is certainly true with regard to the direct impact that breaches of the right to an adequate standard of living can have on an intellectually disabled person's psychological state.

⁸⁰ See R. Lang, *The United Nations Convention on the right and dignities for persons with disability: A panacea for ending disability discrimination?*, 3 ALTER 265 (2009).

⁸¹ See, e.g., Tina Stavrinaki, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, in THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 670 (Ilias Bantekas et al. eds., 2018)

⁸² See, e.g., Francesco Seatzu, *supra* note 21.

⁸³ *Guberina v. Croatia*, App. No. 23682/13, Eur. Ct. H.R. 1, 28 (2016), <http://hudoc.echr.coe.int/eng?i=001-161530>.

⁸⁴ Constantin Cojocariu, *Guberina and Gherghina: the two sides of the Court's disability jurisprudence*, STRASBOURG OBSERVERS (May 17, 2016), <https://strasbourgobservers.com/2016/05/17/guberina-and-gherghina-the-two-sides-of-the-courts-disability-jurisprudence/>.

⁸⁵ See Monika Domańska, *People with Disabilities as a Vulnerable Group. The Concept of Protection of the Rights of Vulnerable Groups*, 23 BIAŁOSTOCKIE STUDIA PRAWNICZE 28, 29 (2018).

⁸⁶ See *How discrimination impacts on the health of people with disability*, CRE-DH CTR. RES. EXCELLENCE DISABILITY & HEALTH, <https://credh.org.au/publications/fact-sheets/how-discrimination-impacts-on-the-health-of-people-with-disability/> (last visited May 18, 2020).

Consider the right to work and employment. Persons with disabilities are more acutely affected than non-disabled persons by breaches of their right to work and employment.⁸⁷ While there can be little uncertainty that the breach of a non-disabled person's right to work can impact negatively on their lives in terms of, for instance, their capability to gain a living, it is probable that the violation of a disabled person's right to work and employment will have more serious consequences. This disparity is in consideration of the fact that the employment opportunities for persons with disabilities are generally lower than those of non-disabled persons, as indirectly confirmed by the available statistics that show that the labor force inactivity rate of workers with disabilities tends to be much higher than that of other workers.⁸⁸ This is also indirectly evidenced by the fact (highlighted by the current UN Special Rapporteur on the Rights of Persons with Disabilities) that persons with disabilities are disproportionately fragile to the negative consequences of insecure living and working conditions.⁸⁹

Moreover, persons with disabilities who belong to other vulnerable groups are more exposed to breaches of their socio-economic rights and freedoms than persons with disabilities who do not belong to such groups.⁹⁰ All of this depends on their suffering from both the disadvantages and fragilities of their condition as persons with disabilities and those deriving from detention, non-citizenship, status as an indigenous person, gender, etc. For example, it is more likely that women with disabilities will experience socio-economic rights breaches more often than those living without—a fact that derives from the particular exclusion experienced by such women.⁹¹ It can be argued that persons with disabilities who suffer such multiple disadvantages are the victims of various discriminations at once.

Finally, persons with disabilities are often potential victims of national legislation and policies that are based on the assumption that persons with

⁸⁷ Marco Fasciglione, *Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism*, in *PROTECTING THE RIGHTS OF PEOPLE WITH AUTISM IN THE FIELDS OF EDUCATION AND EMPLOYMENT* 145 (Valentina D. Fina & Rachele Cera eds., 2015).

⁸⁸ See ARTHUR O'REILLY, *THE RIGHT TO DECENT WORK OF PERSONS WITH DISABILITIES* (2007), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_091349.pdf.

⁸⁹ Catalina Devandas-Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), *Rep. of the Special Rapporteur on the Rights of Persons with Disabilities*, U.N. Doc. A/70/297, para. 52 (August 7, 2015).

⁹⁰ See Neta Ziv, *The Social Rights of People with Disabilities: Reconciling Care and Justice*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 369 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

⁹¹ See Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights*, 18 PAC. RIM. L. & POL'Y J. 293 (2009).

disabilities are unable to exercise the same rights as non-disabled persons, and, therefore, focus on rehabilitation and social security instead of fully allocating rights.⁹² Breaches of the socio-economic rights of persons with disabilities are generally the result of systemic discriminations and structural inequalities.⁹³ Far from being surprising, this is in reality quite natural, considering that the effects of discrimination are most clearly felt in the sphere of socio-economic rights, in the fields of, for instance, employment, housing, transport, cultural life and access to public services.⁹⁴

VI. THE ROLE OF DOMESTIC COURTS IN THE IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS

This paragraph makes two considerations, the first one being that of the acknowledged general “lack of effective national disability policies that are needed to provide a foundation for CRPD implementation.”⁹⁵ The second is “the lack of political will among policymakers for full implementation of the CRPD.”⁹⁶ Against this backdrop, this section then proceeds to argue that domestic courts may and should play a strategic role in the domestic protection of the socio-economic rights of persons with disabilities. A large part of the argument used here implicitly assumes (similar to the drafters of the CRPD) that social rights are fully justiciable and immediately claimable entitlements. Also, that the “direct protection of social rights as justiciable entitlements offers the best opportunity to develop a jurisprudence that engages seriously with the content of these rights and the nature and scope of the obligations they impose.”⁹⁷ In so arguing, I consider the circumstances in which the domestic courts can be called upon to give effect to the socio-economic rights of disabled persons. Nevertheless, before so proceeding, two general assumptions underlying this consideration shall be pointed out.

⁹² See *Disabled Persons*, ICELAND HUMAN RIGHTS CENTRE, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups/disabled-persons> (last visited Apr. 26, 2020).

⁹³ See Steven J. Hoffman et al., *Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada*, BMC INT. HEALTH HUM. RTS. 1 (2016).

⁹⁴ See ICELAND HUMAN RIGHTS CENTRE, *supra* note 92.

⁹⁵ See Raymond Lang et al., *Implementing the United Nations Convention on the rights of persons with disabilities: principles, implications, practice and limitations*, 5 EUR. J. DISABILITY RES. 207, 208 (2011).

⁹⁶ *Id.* at 210.

⁹⁷ See NTANDOKAYISE NDHLOVU, PROTECTION OF SOCIO-ECONOMIC RIGHTS IN ZIMBABWE, 33 (2016).

The first assumption is that acknowledging socio-economic rights as fully justiciable human rights⁹⁸ means that no difference exists between these rights and other fully justiciable human rights.⁹⁹ There are indeed some differences among these categories of human rights, concerning in particular their historical origins¹⁰⁰ and the role domestic courts play in the enforcement and implementation phase. Admittedly, this role is harder to play in the enforcement of socio-economic rights. This is given that, unlike civil and political rights, social and economic rights are “policy structuring devices intended to inform the way a government goes about its business.”¹⁰¹ In fact, from this it follows that the government may defend a particular policy measure on the grounds of an approach that is different to that taken by the competent court in the case. Therefore, owing both to this and the fact that socio-economic rights are highly costly to enforce, it is safe to conclude that social rights are fully—but differently—justiciable.

Secondly, it is assumed that, because the fulfillment of socio-economic rights normally leads to an increase in the expense of public resources that are scarce by definition, the protection of these rights by a domestic court could produce a macroeconomic disequilibrium, in the sense that it can detract public resources that were bound to satisfy other social or economic rights, in which case the court might paradoxically become a factor leading to the breach of fundamental socio-economic rights.¹⁰² That being said, this

⁹⁸ There are a number of sources that recognize approaches in favor of the justiciability of social rights. *See, e.g.*, ECONOMIC SOCIAL AND CULTURAL RIGHTS: ECONOMIC AND SOCIAL RIGHTS AS HUMAN RIGHTS, 113 (Asbjørn Eide et al. eds., 2001); ROBERT ALEXY, *TEORÍA DE LOS DERECHOS FUNDAMENTALES* (1997); VÍCTOR ABRAMOVICH & CHRISTIAN COURTIS, *LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES* (2nd ed. 2004). On the other hand, there are various critical and more skeptical views on the subject as well. *See, e.g.*, GERALD ROSENBERG, *THE HOLLOW HOPE* (2nd ed. 1991); Mark Tushnet, *An Essay on Rights* 4 TEX. L. REV. 1363 (1984); F. A. Hayek, *Law, Legislation and Liberty* 57 PHIL. 274 (1973); Rodolfo Arango, *Los derechos sociales fundamentales como derechos subjetivos* 8 PENSAMIENTO JURÍDICO 138 (1998). Finally, for a source against, *see* S. Kalmanovitz, *Las consecuencias económicas de los fallos de la Corte Constitucional*, 3 ECONOMÍA COLOMBIANA 276 (1999).

⁹⁹ For example, there is a résumé of the differences between the enforcement of social rights and the enforcement of civil and political rights. *See, e.g.*, David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT. L. J. 190 (2012).

¹⁰⁰ *See* Asbjørn Eide, *Economic and Social Rights as Human Rights*, in ECONOMIC SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 113 (Asbjørn Eide et al. eds., 2001) (stressing that: “the formulation of economic and social rights in the Universal Declaration is significantly influenced by the experience of industrialization in Western countries.”).

¹⁰¹ Danie Brand, *The Proceduralisation of South-African Socio-Economic Rights Jurisprudence, or “What are Socio-Economic Rights For?”*, in RIGHTS AND DEMOCRACY: IN A TRANSFORMATIVE CONSTITUTION 54 (Henk Botha et al. eds., 2003); *See also* RORY O’CONNELL ET AL., *APPLYING AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK TO STATE BUDGET ALLOCATIONS* 9 (2014).

¹⁰² *See Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, INT’L COMM’N JURISTS 1, 6, 9, 25–26, 99 (2008), <https://www.refworld.org/pdfid/4a7840562.pdf>.

is certainly not to suggest that national courts' decisions on socio-economic rights generally have such a negative impact on the protection of other fundamental rights. On the contrary, it is simply to say that a negative impact could be a possible outcome. The Indian Supreme Court's practice on the implementation of socio-economic rights contains an indirect awareness of this possibility.¹⁰³ And in fact, although the Indian Constitution sets out socio-economic rights in a section of the Constitution called "Directive Principles of State Policy" that deals with rights not enforceable in courts, the Indian Supreme Court has given indirect effect to the Directive Principles by interpreting civil and political rights, such as the right to life, to mean the right to an adequate quality of life, including adequate nutrition, clothing and shelter.¹⁰⁴

But, let me now move back to the possibilities for the domestic courts to intervene on issues concerning alleged violations or non-implementation of socio-economic rights. For the sake of the exposition, I will examine the circumstances in which domestic courts are requested to secure disabled persons' socio-economic rights. First, is the Executive's failure to respect disabled persons' socio-economic rights.¹⁰⁵ Second, there is the Executive's failure to prevent hindrances of third parties in the enjoyment of disabled persons' socio-economic rights.¹⁰⁶ Thirdly and lastly, there is the Executive's failure to adopt positive actions and steps to enhance disabled persons' social rights. These three events result in the courts' operating in different manners to secure disabled persons' social rights. With all that said, it is important to acknowledge that socio-economic rights breaches are often complex, not least because of the difficulties associated with qualifying austerity measures as infringements of these rights.¹⁰⁷ This should be kept in mind when examining the approaches of the courts considered in this work.

¹⁰³ See Surya Deva, *Access to justice for socio-economic rights: lessons from the Indian Experience*, VÖLKERRECHTSBLOG (Sept. 15, 2017), <https://voelkerrechtsblog.org/access-to-justice-for-socio-economic-rights-lessons-from-the-indian-experience/>.

¹⁰⁴ For further references on this issue, see Ontario Ministry of the Attorney General, Constitutional Law and Policy Division, *The Protection of Social and Economic Rights: A Comparative Study*, STAFF PAPER 11 (1991).

¹⁰⁵ See Comm. on Econ., Soc. & Cultural Rts., General Comment No. 9: The Domestic Application of the Covenant, ¶ 5, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998) (stressing that the means used to give effect in national law to socio-economic rights should be appropriate in the sense of producing results which are consistent with the full discharge of the State party's duties). See also Janet E. Lord & Michael A. Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 460 (2008).

¹⁰⁶ *Id.*

¹⁰⁷ See Caroline Mortimer, *Government Refuses to Accept Austerity Measures are Human Right*, INDEPENDENT (Feb. 8, 2017), <https://www.independent.co.uk/news/uk/politics/government-accused-of-kicking-un-concerns-about-its-austerity-policy-into-the-long-grass-a7569761.html>.

The role the court is requested to exercise when the Executive does not respect disabled persons' socio-economic rights is substantially undisputed, given the fact that it mainly leads to a revision of the state's conduct. In such a circumstance, the court will be demanded to order a stop to the intrusion in question: it will not usually be demanded to impose positive measures to be adopted by the state in order to guarantee the discharge of the rights in question. The second situation, namely the Executive's failure to prevent third party hindrances to the enjoyment of disabled persons' socio-economic rights, may require the courts to adopt positive steps to put an end to the intrusion by third parties.¹⁰⁸ It seems, however, that this may be difficult in the case of the adjudication of persons with disabilities socioeconomic rights, given the prominence attributed to civil and political rights and the minor attention given to socio-economic rights in the framework of the Americans with Disabilities Act of 1990,¹⁰⁹ where the anti-discrimination approach formed the fulcrum around which disability rights protection has revolved.¹¹⁰ However, it would not be difficult in the normative framework of the CRPD, since the CRPD devotes several clauses to the protection of socio-economic rights such as Article 24 (right to Education),¹¹¹ Article 25 (the right to health)¹¹² and Article 27 (the right to work and employment).¹¹³ Nevertheless, these steps are purported to prevent intrusions in the enjoyment of a fundamental right. Therefore, as with the first situation, the courts' actions may be considered as purported to restore the *status quo ante*.

A court adjudicating a state's failure to respect and protect is likely to prove less controversial than adjudicating the Executive's failure to adopt positive steps to enhance disabled persons' socio-economic rights, which is aimed at changing the *status quo ante*. And yet this is less controversial, at least if one believes (as the majority of constitutional lawyers do) that courts have a role to play in the enforcement of constitutional obligations.¹¹⁴

¹⁰⁸ See Amita Dhanda, *The right to treatment of persons with psychosocial disabilities and the role of the courts*, 28 INT'L J. L. & PSYCHIATRY 155, 155–56 (2005).

¹⁰⁹ 42 U.S.C. § 12101.

¹¹⁰ See Justice Srem-Sai, *The hugger-mugger of enforcing socio-economic rights in Ghana: A threat to the rights of persons with disabilities*, 3 AFR. DISABILITY RTS. Y.B. 135, 140 (2015) (stressing that: “[t]his disregard for socio-economic rights emanates from the ideological arguments that socio-economic rights are mere political statements which are not amenable to judicial enforcement; and that they could only be guaranteed by national policy (rather than law) and achieved progressively when resources are available.”).

¹¹¹ Convention on the Rights of Persons with Disabilities art. 24, Dec. 13, 2006, 2515 U.N.T.S. 3.

¹¹² *Id.* art. 25.

¹¹³ *Id.* art. 27.

¹¹⁴ *But see* for some critical dissent, Adam. S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293 (2018).

Nevertheless, it is also clear that the strict linkage between the three situations mentioned above implies that courts can have a certain degree of flexibility in terms of how they decide to classify fundamental rights breaches and state conduct that comes before them. A particularly instructive example is offered by the approach of the Supreme Court of India in *Ranjit Rajak*.¹¹⁵ This decision centered on the right of access to work and employment of a man who was denied the right to apply for a probationary post at the State Bank of India because of a renal transplant in 2004.¹¹⁶ The right of access to work of persons with medical disabilities was initially considered not to be covered under the prevailing disability law, the Rights of Persons with Disabilities Act (PWD Act).¹¹⁷ Later, however, the Supreme Court found that the right to earn a livelihood of disabled persons had to be considered as part of the PWD Act because India had ratified the CRPD.¹¹⁸ The applicant brought an action seeking, essentially, to be allowed to apply for a probationary post at the Bank on the basis that such denial would deprive him of his right to life and work guaranteed by the national constitution.¹¹⁹ This action was based on a threatened breach by a state organ, namely the State Bank of India, of its duty to respect (that is, not to interfere with) the medically disabled person's enjoyment of his right to access to public employment and posts.¹²⁰ However, the Supreme Court's judgment focused extensively on the wider and more encompassing duty of the state to take steps to enhance the medically disabled person's right to work by eradicating discriminatory practices.¹²¹ This decision shows courts' ability to approach breaches of disabled persons' socio-economic rights from a variety of angles where they are demanded to do so.

VII. FINAL REMARKS

This work has demonstrated the emergence of persons with disabilities as socio-economic rights holders as a result of the adoption, entry into force, and the high number of ratifications of the CRPD. As the analysis above

¹¹⁵ *Ranjit Kumar Rajak v. State Bank of India*, 5 Bom. C.R., 227 (2009) [hereinafter *Ranjit Kumar Rajak*].

¹¹⁶ *Id.* at 227.

¹¹⁷ *The Rights of Persons with Disabilities Act, 2016*, GAZETTE OF INDIA (Dec. 28, 2016), <http://www.tezu.ernet.in/PwD/RPWD-ACT-2016.pdf>.

¹¹⁸ *Ranjit Kumar Rajak*, *supra* note 115, at 228.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Lisa Waddington & Anna Lawson, *Interpreting the Convention on the Rights of Persons with Disabilities in Domestic Courts*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS* 470 (Lisa Waddington & Anna Lawson eds., 2018).

illustrates, the CRPD's use of the social model of disability instead of the medical model combined with its innovative use of non-discrimination, equality and social participation provisions and mechanisms have introduced new tools that move socio-economic rights closer to civil and political rights.¹²²

Yet, although the innovations within the implementation and monitoring provisions are relevant to the fostering, realization, and "justiciability" of the socio-economic rights of persons with disabilities, they are not sufficient *per se* to achieve that end, (e.g. to transform the CRPD's text into an actual lever of change in the socio-economic rights field in conformity with the intention of its drafters).¹²³ According to this work, in order to do this it is indispensable to develop a broad understanding among persons with disabilities of the practical importance for them of the socio-economic rights and freedoms guaranteed in the CRPD, such as the right to work and the right to health care, as well as a large understanding of the fact that achieving these rights shall become a prioritized goal of the disability rights movements and care agencies.¹²⁴ Moreover, it is also necessary to develop and promote a more precise role for the domestic courts in relation to the enforcement of disabled persons' socio-economic rights. And this could be done, for instance, by following the above-mentioned example of the Supreme Court of India in the *Ranjit Rajak* case concerning the right to work and employment of a person suffering a physical disability.¹²⁵

¹²² See Maša ANIŠIĆ, *Innovative aspects of the UN convention on the rights of persons with disabilities*, EUR. U. INST. (2013).

¹²³ *Id.*

¹²⁴ See Jerry. A. Winter, *The Development of the Disability Rights Movement as a Social Problem Solver*, 23 DISABILITY STUD. Q. 33 (2003).

¹²⁵ See above Section VI.