

THE INDIVISIBILITY OF CIVIL AND POLITICAL RIGHTS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN CRPD

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Abstract

The separation of civil and political rights and economic, social and cultural rights has impeded the fulfilment of human rights. Thus, the concept of the indivisibility of both types of rights appears to assist the fulfillment of human rights. Later, CRPD came out and embodied civil and political rights alongside with economic, social and cultural rights. Hence, this research aims to find out how far the indivisibility of civil and political rights and economic, social and cultural rights applied in CRPD. There are two questions this research proposed to address. First: how the indivisibility of CPR and ESCR stipulated in international human rights instruments. Second: how the indivisibility of CPR and ESCR applied in CRPD. This research used qualitative research method which analyse regulations, literatures and documents related to the research. This research found out that the indivisibility of CPR and ESCR indicates that the fulfilment of CPR is unlikely to happen without the fulfilment of ESCR and vice versa. The indivisibility of CPR and ESCR have been mentioned in UDHR and Vienna Declaration but the CRPD is one of the international instruments which embodied this successfully. CRPD integrated CPR and ESCR into its provisions and provide mechanism and expansive way for states to fulfil the right of persons with disabilities. However, states still find difficulty to implement the obligations given by the CRPD.

Keywords: *Indivisibility; Civil and Political Rights; Economic, Social and Cultural Rights.*

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Introduction

The emerging of Universal Declaration of Human Rights (UDHR) on 1948 had triggered the creation of International Covenant on Civil and Political Rights (ICCPR) came into force 1976 as first generation of rights and later followed by International Convention of economic, social and Cultural Rights (ICESCR) as second generation of rights came into force on 1976. ICCPR and ICESCR is different in the content of the rights and the obligation. ICCPR address the traditional freedom and prerogative of people that encompass in the twenty provisions of the UDHR such as freedom of speech, the right to vote, right to fair trial and freedom of religion.¹ Meanwhile, the ICESCR address for instance the right to food, clothing and shelter, the right to education, right to health and right to work² which can be found in the provision 22-7 of UDHR and provision 55 (a) and (b) United Nations Charter.³ The separation of two categories of rights created a gap in the implementation of the rights itself. States more intend to fulfill the civil and political rights (CPR) rather than economic social and cultural rights (ESCR). The reason because ICCPR content the rights that more important for the continuity of human

¹ Joy Gordon, 'The Concept of Human Rights: The History and Meaning of its Politicization' (1997-1998) 23 Brook Journal of International Law, 692

² *ibid.*

³ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2edn, Cambridge University Press, 2016) 400



life and establish the dignity of human.⁴ Furthermore, ICCPR stipulates cost-free obligation for states⁵, which is contradictive with ICESCR that need a resource from states to fulfill the rights of people⁶. As a result, state parties to ICCPR which is 169 states,⁷ higher than ICESCR with only 165 states parties.⁸

Since individual both subject to ICCPR and ICESCR, the fulfillment of only one aspect of rights is not enough to embody the human rights of people, as noted in Teheran Proclamation '*human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible*'.⁹ Thus, the fulfillment of CPR of individual also means there should be the fulfillment of ESCR and vice versa because both of rights supported each other in order to fulfil the rights of individual. It can be seen how the indivisibility of CPR and ESCR run very well in the Convention on the Rights of Person with Disabilities (CRPD). CRPD is one of the international convention besides Convention on the Right of Children that successfully combine CPR and ESCR.¹⁰

Thus, this research aims to find out how far the indivisibility of civil and political rights and economic, social and cultural rights applied in CRPD. There are two questions this research proposed to address. First: how the indivisibility of CPR and ESCR stipulated in international human rights instruments. Second: how the indivisibility of CPR and ESCR applied in CRPD. In order to find out the answers, the author used qualitative research method with normative approach which analyse literatures, regulations and comments. In this research author analyse convention, declaration, resolution, concluding observation and shadow report from NGO.

This paper is divided into two parts. The first part discusses the nature of ICCPR and ICESCR, how they are indivisible, the meaning of indivisibility and indivisibility in international human rights instruments. The second part discusses the indivisibility of ESCR and CPR in CRPD and how it implemented in reality.

1. Indivisibility of civil and political and economic, social and cultural rights

A. ICCPR and ICESCR

ICCPR and ICESCR has been separated due to the political ideology of the world. The cold war between United States of America and 'Western' states versus 'Socialists' countries (Union of Soviet Socialist Republics/USSR) had contributed to the division of rights¹¹, where USA and its allies demanded for CPR that reflect part of regulation of democratic government and expectations of their people¹², meanwhile USSR demanded ESCR since for them an exhaustive and free social prosperity order cover ESCR was essential enlargement of its political system and organization of the country.¹³ Thus, USA and Western states disagree with combining ESCR with CPR in the same treaty due to the different in implementation, as the result ESCR rights were created in different covenant with CPR.¹⁴

⁴ Theo van Boven, 'Categories of Rights', in Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D., *International Human Rights Law* (Oxford: Oxford University Press, 2010)

⁵ Masa Marochini, 'Civil and Political and Economic and Social Rights – Indivisible or Separable?' (2014) 64 (2) *Zbornik PFZ*, 320

⁶ Stephen P. Marks, 'The Past and Future of the Separation of Human Rights into Categories' (2009) 24 *Maryland Journal of International Law*, 227

⁷ United Nations Human Rights Office of The High Commissioner, Status of Ratification Interactive Dashboard <<http://indicators.ohchr.org>> accessed on 15 May 2017

⁸ *ibid.*

⁹ Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).

¹⁰ Michael Ashley Stein & Janet E. Lord, 'Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities', in Oddny Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 24

¹¹ Bantekas and Oette (n 3) 19

¹² Marks (n 6) 218

¹³ Bantekas and Oette (n 3) 401

¹⁴ *ibid.*



In the terms of implementation, ICCPR need to be implemented immediately, meanwhile ICESCR are to be fulfilled progressively.¹⁵ Notwithstanding the clauses of CESCR mention in General Comment express particular rights to be of immediate impact and in connection to other rights particular actions to the fulfilment of the rights shall be carried out in a plausible time of a countries come into party of ICESCR.¹⁶ Furthermore, in General Comments No 3 and 9¹⁷ ICESCR, it declared that lot of clauses in the ICESCR area able to have immediate establishment, this statement confirmed in the Limburg Principle on the Implementation of the International Covenant on the Economic, Social and Cultural Rights, thus the rights stipulated in ICESCR are not progressive in generic but have immediate impact.¹⁸

In terms of obligation, ICCPR oblige states to refrain themselves for committing wrong action that might violate the rights of their citizen (negative obligation), meanwhile for ICESCR obliges states to make an action to the realization of ESCR (positive obligation).¹⁹ Thus, in order to fulfill ESCR, states have to make positive action together by using their maximum resources²⁰ or considerable expenditure meanwhile for ICCPR is cost-free obligation.²¹ Actually, the ICCPR not only require the abstain of states, for instance in the prohibition of torture, inhuman and degrading treatment states are required to create training agenda for the police and prison officers and also give place for imprisonment that meet international criterion, it proves that ICCPR in the establishment of detention place and training agenda are not cost-free.²²

The dichotomous of positive and negative obligation of both set of rights has been criticized, then the emerging of tripartite typology has assisted to move away from the wrong and misguide positive and negative obligation.²³ The tripartite typology consist of obligation to respect, protect and fulfil.²⁴ To respect meaning that states have to refrain from action that breach the integrity of freedom of their people, to protect means that states needs to take action to avoid others people or group from breaching the rights of individual and to fulfil means that states need to take action that may not be obtained by individual attempt, to guarantee their citizen to get enjoyment of those needs that acknowledged in the instrument of human rights.²⁵ As a result tripartite typology has bridged the ESCR and CPR and assert the long-established principle that all human rights are interrelated, independent and indivisible.²⁶

B. The concept of indivisibility in International Human Rights Instrument

The indivisibility of CPR and ESCR has been supported by United Nations as a principle and first appearance of this principle is in UDHR on 1948²⁷, UDHR has promoted axiological endorse and unification of ESCR and CPR with an address on the interdependence, universality and indivisibility of human rights.²⁸ Generally, UDHR is understood as showing the exhaustive type of human rights which

¹⁵Marochini (n 5) 321

¹⁶ ibid 311

¹⁷UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24 ; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of State Parties' Obligations*, 14 December 1990, E/1991/23

¹⁸Marochini (n 5) 321

¹⁹ Paul Hunt, 'Reclaiming Economic, Social and Cultural Rights' (1993) 1 *Waikato Law Review*, 151

²⁰Chauhan, Prashant, and Gagandeep Kaur. "Gender Bias and Artificial Intelligence: A Challenge within the Periphery of Human Rights." *Hasanuddin Law Review* 8, no. 1 (2022): 46-59.

²¹ Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Human Rights Law Review*, 84

²² Hunt (n 19) 151

²³ Koch (n 21) 85

²⁴Marochini (n 5) 326

²⁵ Koch (n 21) 85

²⁶ ibid 82

²⁷ Stephanie Soiffer & Dane Rowlands, 'Examining the indivisibility of human rights: A statistical analysis' (2016) *Journal of Human Rights*, 2

²⁸ Flavia Piovesan, 'Social, Economic and Cultural Rights and Civil and Political Rights' (2004) 1 *International Journal on Human Rights*, 24

the application of given rights can be said success depend on the successful application of all the others rights.²⁹

In the paragraph 13 of Teheran Proclamation on 1968 stated that³⁰:
*'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.'*³¹

This proclamation only use word of indivisible in the powerful way that it is unlikely to enjoy CPR if ignores the fulfilment of CESR and in the second sentence address that social and economic development are requirement for the implementation of human rights which advocate the prerogative of ESCR over CPR.³²

The United Nations General Assembly Resolution 32/130 on 1977 in the paragraph 1 (A)³³ address the eagerness of better unity of human rights and supporting connection between rights which not solely ESCR and CPR but also all human rights groups.³⁴ On the other hand, in The Declaration on the Right to Development on 1986³⁵ in the preamble paragraph 4 and 3 obviously declare the concept of integrated idea of human rights remembering ICCPR, UDHR and ICESCR and the completed application of the same.³⁶

In Vienna Declaration and Programme of Action 1993³⁷ broadens and improve the agreement regarding indivisibility and universality of human rights and also simultaneously assert the interdependence among the meaning of development, human rights and democracy.³⁸ Five years after Vienna Declaration, Maastricht Guidelines on 1997 had been created, which in the paragraph 4 enunciates the indivisibility and equal necessity for human dignity³⁹. The guidelines describe the world trend in the way enhancing ESCR advocacy together with the increasing world protest to ESCR discrepancy has assisted put indivisibility dispute to the question.⁴⁰ Consequently, countries are liable for breaching ESCR as well as countries beaching CPR.⁴¹

The principle of indivisibility of ESCR and CPR reject the perception regarding the hierarchy of human rights which international community more focus on CPR rather than ESCR.⁴² Thus, it advocates that there is mutually strengthen dynamic among ESCR and CPR in the terms of successful implementation of one aspect of rights is able to assist the successful implementation of another aspect of rights.⁴³ According to Nickel, indivisibility is powerful indispensable or interdependence of

²⁹Soiffer & Rowlands (n 27) 4

³⁰ Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers, 2011) 50

³¹Proclamation of Teheran (n 9)

³² Daniel J. Whelan, *Indivisible Human Rights A History* (University of Pennsylvania press 2010) <<http://www.upenn.edu/pennpress/book/toc/14758.html>> accessed 18 May 2017

³³ The United Nations General Assembly Resolution 32/130 on 1977

³⁴ Amsalu Darge Mayessa, 'Overview on the Notion of Integration of Human Rights: Giving Pragmatic Value to Socio-Economic Rights Rather than Rim Service' (2014) 83 *Nordic Journal of International Law*, 181

³⁵ The Declaration on the Right to Development on 1986

³⁶ Mayessa (n 34) 186

³⁷ The Vienna Declaration and Programme of Action 1993

³⁸ Piovesan (n 28) 26

³⁹ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights on 1997

⁴⁰ Lisa J. Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development' (2007) 10 *Yale Human Rights and Development Law Journal*, 152

⁴¹ *ibid*

⁴² Helen Quane, 'A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Development Concerning the Rights of Indigenous Peoples' (2012) 25 *Harvard Human Rights Journal*, 49

⁴³ *ibid*.

support.⁴⁴ Thus, indivisibility can be interpreted as bidirectional, powerful and simultaneous relationship among several or all human rights.⁴⁵

The concept of relationship between CPR and ESCR had assisted to recognize the causal correlation and epistemic of support, for instance right to political participation by public discuss assist individual to analyse ESCR regulation that are appropriate for their situation and also it makes the state officials responsible to enhance the possibility that the state officials will take care of the citizen's needs of socioeconomic.⁴⁶ The indivisibility of CPR and ESCR also can be seen by the example which Yamin gives regarding the relation of right to health (ESCR) and right to life (CPR). In that example, Yamin address that the failure of government to fulfill, protect and respect rights of health can be impact to the death⁴⁷. Thus, Yamin stated that right to health and right to life are inextricably intertwined.⁴⁸ Currently, the right to life is acknowledged to cover more than people not dying is the impact of measures taken by countries that to encompass circumstances that allow well-being and dignity, United Nations Human Rights Committee declared that in terms of right to health not only requires positive action from states but also states are required to decrease infant mortality, abolish malnutrition, improve the expectation of life and also abolish punishment that oblige abortion than implies the rise of maternal mortality meaning the right to life.⁴⁹

The impact of indivisibility allows not solely the agenda for the achievement of ESCR but also visualize again the traditional CPR and demand for more exhaustive examination of the nature and interplay between different rights in the value of implementation, acknowledgement and justification, reconsidering of the way we form a concept and implement all rights showing a better hope for the movement of human rights since it brings us more familiar to lived adventure of rights.⁵⁰

The principle of indivisibility has a powerful contribution for the promotion of human rights,⁵¹ for instance on how indivisibility of human rights integrated the CPR and ESCR for the implementation of the rights of person with disabilities in CRPD.

2. Indivisibility of Civil and Political Rights and Economic, Social and Cultural Rights in CRPD

A. Theory

CRPD is the only one that show improvement of disabled people which reflect continual and worldwide way reform of law in the area of disability.⁵² The preamble of CRPD address to affirm the indivisibility of human rights and freedoms that are needed to fulfill the rights of person with disability without discrimination.⁵³ CRPD stipulates clearly CPR and ESCR into the condition of person with disabilities, in CRPD the drafters not merely putting the suited provision into CRPD but they tailor the related values of human rights instrument to the situation of person with disability and by that give high generalities with life and pertinence in the particular disability context.⁵⁴ The need to put CPR and ESCR into CRPD because it has been a long time that person with disabilities were not regarded as human, being a victims of eugenism, massacre and discrimination, consequently their

⁴⁴ James W. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 (4) *Human Rights Quarterly*, 990

⁴⁵ Soiffer & Rowlands (n 27) 2

⁴⁶ Pablo Gilabert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel' (2010) 32 (2) *Human Rights Quarterly*, 429

⁴⁷ Alicia Ely Yamin., 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda' (2005) 27 (4) *Human Rights Quarterly*, 1214

⁴⁸ *ibid* 1219

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ Soiffer & Rowlands (n 27) 2

⁵² Gerard Quinn and Charles O'Mahony, 'Disability and Human Rights: A New Field in the United Nations' in K Krause and M Scheinin (eds), *International Protection of Human Rights: A Textbook* (Åbo Akademi University-Institute for Human Rights, 2009), 266

⁵³ Convention on The Rights of Persons with Disabilities come into force 3 May 2008.

⁵⁴ Anna Lawson, 'The United Nations Convention on The Rights of Persons With Disabilities: New Era or False Dawn?' (2007) 34 (2) *Syracuse Journal of International Law and Commerce*, 584



fundamental rights have been refused⁵⁵ both ESCR and CPR. CRPD then assert that all existing human rights both ESCR and CPR are appropriate to disabled people.⁵⁶

Cases regarding disability incline to give an evidence about the concept of indivisibility and interdependence of CPR and ESCR, it can be seen by the method on how to remove barriers for person with disabilities, the principle of non-discrimination is not adequate so it required positive measures of social solidarity to support freedom.⁵⁷ Thus, in the area of disability it clearly describes how ESCR support and do not harm freedom.⁵⁸

Article 29 and Article 10 to Article 23 of CRPD reflects CPR but in several cases, there are novel applications or expansion of those rights, for instance Article 13 notably expands the conventional right of equality before the law into positive action to guarantee the access to justice and Article 11 expands the right to survival to circumstances of emergencies and right to life which oblige states to guarantee the safety and protection of disabled person in the emergency circumstances such as natural disaster and armed conflict.⁵⁹ Thus, the provisions in CRPD accommodate several novelty and implementation of CPR to person with disabilities.⁶⁰

Meanwhile, Article 30 and Article 24 until Article 28 reflects ECSR which address the importance of participation and inclusion of person with disability, for instance in the commonlabour market, endorsed by the positive obligation and accommodation that needed to implement the right to work for person with disabilities.⁶¹ Right to work on Article 27 assisted by Article 26 which expands the conventional right to work to habilitation and rehabilitation that guarantee person with disabilities to possess an access to agenda that will make them able to improve their skill.⁶² Besides that, Article 27 also obliges states to guarantee and protect on the same basis with others that person with disabilities are not objected of slavery and forced labour⁶³, it implies that in this provision that reflect ESCR also related to the fundamental freedom of CPR.

In the Article 25 also contains both ESCR and CPR. Regarding right to health, it is not merely about provide person with disabilities equal access, good quality and free or inexpensive health care that also refer to sexual and reproductive health⁶⁴. Sexual and reproductive health is really significant for women disabilities due to there are several violations occurs to them such as forced sterilization and contraception and denial of their legal capacity and decision making⁶⁵ that often led them become object of torture. Article 25 address that health-care practicing shall assert the free and informed consent⁶⁶ which referring to the legal capacity of person with disability (Article 12 CRPD) and also protection of mental and physical integrity in ICCPR Article 7⁶⁷. The recognition of legal capacity and consent of person with disabilities is really important since without consent, it will let psychiatric intervention to use for example direct electroshock and drugs neuroleptic to cure which is form of

⁵⁵ Frederic Megret, 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 12 (2) *The International Journal of Human Rights*, 501

⁵⁶ *ibid.*

⁵⁷ Quinn and O'Mahony (n 52) 269

⁵⁸ *ibid.*

⁵⁹ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 (1) *Human Rights Law Review*, 28

⁶⁰ *ibid* 29

⁶¹ *ibid* 30

⁶² *ibid* 31

⁶³ Convention on The Rights of Persons with Disabilities (n 53) Article 27 (2)

⁶⁴ Quinn and O'Mahony (n 52) 29

⁶⁵ Carolyn Frohmader and Stephanie Ortoleva, 'The Sexual and Reproductive Rights of Women and Girls with Disabilities' *Disabilities (Issues Paper commissioned by the ICPD International Conference on Human Rights)*, The Hague, 4 <http://www.womenenabled.org/pdfs/issues_paper_srr_women_and_girls_with_disabilities_final.pdf> accessed 19 May 2017

⁶⁶ Michael Ashley Stein, Penelope J S Stein, Dorothy Weiss and Raymond Lang, 'Health Care and the UN Disability Rights Convention' (2009) Paper 34 *Popular Media*, 1796

⁶⁷ Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions' (2007) 34 *Syracuse Journal of International Law and Commerce* 407

torture that create psychological trauma to the person with disabilities.⁶⁸ As the result, it violates the right of liberty, self-determination and integrity of individual. Thus, it requires states to take action to prevent person of disabilities from being a subjected to that treatment.⁶⁹

All of the rights in CRPD emphasize on the societal dimension of the experience of rights which move away from the conventional human rights correlation between states and individual.⁷⁰ This convention brings its personal identity that never been mention in other human rights treaties which is CRPD provides significant extra detailed to particular rights through define the method they established for person with disabilities.⁷¹ For instance, in the ICCPR only stated the recognition of person before the law and equality before the law, but in CRPD it interpreted that states obliges to provide access to ensure they can enjoy their legal capacity.⁷²

The integration of CPR and ESCR in CRPD into more exhaustive provision in the Convention has risen an issue that CRPD creates new rights, CRPD just stipulates the existing human rights into the way that it emphasizes the circumstances and needs for person with disabilities since the existing human rights treaties cannot protect the rights of person with disabilities in the context of the needs that will safeguard their rights in the future.⁷³ For instance, CRPD has offered the idea of Living Independently and being included in the community on Article 19, this idea never mention in international human rights instrument but CRPD, it might seem CRPD creates new rights but actually Article 14 is the result of the integration and indivisibility of CPR and ESCR which restate self-determination or autonomy and in the enjoyment of their autonomy, as the result a lot of choices are made and that including education, employment, health and etc.⁷⁴

The mechanism of states to implement the rights of person with disabilities can be by create or modify the policies, promote public awareness about disability, mainstream attention for person with disabilities, construct particular infrastructure, give training for both person with disabilities and government officials or other authority person, employ person with disabilities, offer assistance or particulars type of services, consult with disability organization.⁷⁵ On the Article 33, CRPD obliges states to implement 'one or more focal points' in the government and must provide deliberation to the implementation or designation of a coordination mechanism.⁷⁶ It is clearly aim to the requirement for joined-up government in the terms of disability, but unfortunately the guidance regarding form and purpose of focal point is still less.⁷⁷ Seeing the vague term of focal point in CRPD, Office of the United Nations High Commissioner (OHCHR) produced a guidance for states to the supervision and establishment of CRPD.⁷⁸ This guidance suggests the implementation of two-pronged approach and designate focal points in the every stage of governmental departments and also build one for general focal point.⁷⁹ The focal point in the government has to have enough endorses from resources and technical personnel, the aims of focal point shall focus on improving and conform the domestic regulation with CRPD.⁸⁰

⁶⁸ibid 412

⁶⁹ibid 414

⁷⁰Megret (n 55) 507

⁷¹ ibid 503

⁷² ibid

⁷³Kayess and French (n 59) 20

⁷⁴ Tabitha Collingbourne, 'The UN Convention on the Rights of Persons with Disabilities and the Right to Independent Living' (2009) 4,5 http://www.enil.eu/wp-content/uploads/2012/11/ENIL_UNCRPD-and-the-Right-to-Independent-Living_2009.pdf accessed 18 May 2017

⁷⁵Megret (n 55) 506

⁷⁶Quinn and O'Mahony (n 52) 297

⁷⁷ibid

⁷⁸Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities 2009

⁷⁹Quinn and O'Mahony (n 52) 298

⁸⁰ ibid.

B. Practice

The implementation of CRPD is vary among the states especially among developing and developed countries. For right to health, according to World Health Survey in Southern Africa the barriers to accessing health care for person with disabilities are the cost, lack of transport and distance.⁸¹ It suggest that Southern African need to modify the regulation regarding health care system, emphasize the barriers to affordability and financing, and addressing the barriers of human resources.⁸² The great examples of reforming the policy of legislation comes from Canada, Australia and United Kingdom that have adopted domestic agenda that particularly address the health issues of person with intellectual disabilities.⁸³ Regarding the consent to the health treatment, The CRPD Committee found Tunisia still lack of clarity in its legislation to protect person with disabilities subjected to the treatment without their consent, thus The Committee recommend Tunisia to combine the law of abolition of surgery and treatment without consent of the patient.⁸⁴ While, in the Spain, The Committee found that disabled people that their legal capacity are not recognized can be subjected to sterilization without consent, thus Committee recommend to abolish the law regarding sterilization without informed consent.⁸⁵ From this report, it can be seen that in several states still find problem in implementation of right to health for person with disabilities. States need to address particularly in their policies both regarding the access for health care system and at the same time shall modify their policies about consent to health treatment.

Regarding the right to participation in political and public life Article 29, according to the Disability Council Independent Review to Gabon⁸⁶, Gabon already have the Constitution that ensure all citizen to enjoy right to participate in political and public life equally but unfortunately the Constitution did not explain much on how Gabon can ensure the access of person with disabilities to vote.⁸⁷ Thus, Disability Council recommend to Gabon to modify their Constitution to conform with CRPD and stipulate the accessibility needs for person with disabilities to vote.⁸⁸ Meanwhile in Sweden, Disability Council found that the legislation in Sweden have already stipulated reasonable accommodation facilitating vote for person with disabilities and also provide the action to facilitate person with disabilities who work as elected representative.⁸⁹ But unfortunately, the legislation in Sweden still lack of information whether there is an obligation to provide information in accessible format regarding the political information.⁹⁰ Thus, Disability Council praise for the legislation that ensure the accessible circumstance for person with disabilities to enjoy their rights to vote but Disability Council still recommend to Sweden to offer more information concerning person with mental disabilities in electoral participation.⁹¹ The report of Sweden and Uganda practice in implementing rights of political participation for person with disabilities show how the right to political participation which is CPR have strong relationship with ESCR which is in this case Sweden in its legislation has already included the information of the mechanism to ensure political rights of person with disabilities through providing reasonable accommodation.

Regarding the right access to justice on the Article 13 in CRPD, the according to Concluding Observation from CRPD Committee and Disability Council, Mongolia still lack of explicit clauses

⁸¹World Health Orgaization, 'World Report on Disability' (2011) 65 <https://www.unicef.org/protection/World_report_on_disability_eng.pdf> accessed 18 May 2017

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ Concluding Observation of the Committee on the Rights of Persons with Disabilities Tunisia 2011 (CRPD/C/TUN/CO/1)

⁸⁵ Concluding Observation of the Committee on the Rights of Persons with Disabilities Spain 2011 (CRPD/C/ESP/CO/1)

⁸⁶ Disability Council International Independent Review to Gabon 2015, 10 <<http://disabilitycouncilinternational.org>> accessed 18 May 2017

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ Disability Council International Independent Review to Sweden 2014, 27 <<http://disabilitycouncilinternational.org>> accessed 18 May 2017

⁹⁰ *ibid.*

⁹¹ Disability Council International Independent Review to Sweden (n 89) 28



guarantee the procedural accommodation in condition necessary for ensuring access to justice for person with disabilities⁹² and lack of training of justice and prison staff.⁹³ The report from Mongolia states that in the Court of Mongolia in order to provide equal opportunity for person with disabilities in court proceedings by providing special interpreter for person with hearing disabilities.⁹⁴ Thus, the Council recommend that Mongolia shall remove all the barriers that hinder access to justice for person with disabilities and implement training for official staff.⁹⁵ On the other hand, in Australia, The Disability Council found that nothing in the legislation of Australia mention about measures to be taken in order to guarantee access to justice for person with disabilities on the basis of equal with others⁹⁶ and also the access to sign language interpreters or the utilization of Augmentative and Alternative Modes of Communication is not promoted in all states and territories in Australia⁹⁷. On the other hand, several states and territories in Australia has successfully implement training for staff of prison system and the national justice system⁹⁸ for instance in New South Wales, they provide legal practitioner to help person with mental disabilities and also provide training for judicial and Sheriff's officers.⁹⁹ Thus, the CRPD Committee recommends that Australia needs to combine the standard and mandatory modules on working with person with disabilities into training agenda for all justice system personnel.¹⁰⁰ Seeing the implementation of Australia and Mongolia to ensure the right to access to justice for person with disabilities, it can be concluded that both of states still facing problem to implement this right in their legislation that conform with Article 13 especially regarding the access and training even if Australia is one step ahead compared to Mongolia. Furthermore, from the report, we can see how indivisibility of CPR (equality before the law) can only be achieved successfully if the access to equality before the law also achieved (ESCR). In this case, the access can be by providing interpreter and justice staff who knows how to treat person with disability (that is why training is really important).

Regarding article 33 about national implementation and monitoring, in the practice, the guidance of OHCHR about focal point has been interpreted widely, for instance in Canada, New Zealand and United Kingdom they build disability rights offices in the ministry level, meanwhile in Denmark and Australia they build in the Ministry of Social Affairs.¹⁰¹

Conclusion

The indivisibility of CPR and ESCR means that there is a strong relationship between those two aspect of rights which implies that the fulfilment of the rights of CPR without ESCR and vice versa is unlikely to happen. The principle of the indivisibility of CPR and ESCR itself has been stipulated in several international human rights instruments such as UDHR and Vienna Declaration. Moreover, the major international instrument that success implement the indivisibility of CPR and ESCR is in the CRPD. CRPD effectively blended or integrated CPR and ESCR into the convention, even if it leads to the debate that makes CRPD seems to create new rights but theoretically CRPD only tailoring or restate the CPR and ESCR into more detailed (which create provide mechanism on how states shall react to ensure the right of person with disabilities) and expansive way (which means one right related to other rights in provision) to satisfy the needs of person with disabilities.

⁹² Concluding Observation of the Committee on the Rights of Persons with Disabilities on the initial report of Mongolia 2015 (CRPD/C/MNG/CO/1)

⁹³ Disability Council International Independent Review to Mongolia 2014, 28 <<http://disabilitycouncilinternational.org>>accessed 18 May 2017

⁹⁴ *ibid*

⁹⁵ *ibid.*

⁹⁶ Disability Council International Independent Review to Australia 2013, 18 <<http://disabilitycouncilinternational.org>>accessed 18 May 2017

⁹⁷ Concluding Observation of the Committee on the Rights of Persons with Disabilities on the initial report of Australia 2013 (CRPD/C/AUS/CO/1)

⁹⁸ Disability Council International Independent Review to Australia (n 96) 18

⁹⁹ *ibid.*

¹⁰⁰ Concluding Observation of the Committee on the Rights of Persons with Disabilities on the initial report of Australia (n 97)

¹⁰¹ Quinn and O'Mahony (n 52) 299

In practice, according to CRPD Committee and NGO report, several countries such as Australia, Sweden, Mongolia, Gabon, Tunisia have attempted to create legislation that conform with CRPD but mostly the states have not included the way to achieve the rights in their legislation and encounter difficulty especially for developing countries to establish the meet-international standard for example health care system due to financial problem. Thus, theoretically indivisibility of CPR and ESCR in CRPD proves a strong concept but in reality, it still struggling.

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