PROHIBITION OF RETROGRESSION:
EFFECTIVENESS OF SOCIAL RIGHTS IN THE FINNISH SYSTEM OF CONSTITUTIONAL REVIEW

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This thesis seeks to define the normative nature and content of the prohibition of retrogression under the rules of international law, as applicable in Finland. Further, this thesis seeks to examine the effectiveness of the implementation and protection of social rights in Finland; in particular, the operation of the prohibition of retrogression in the Finnish system of constitutional review and human rights impact assessment.

Under article 2(1) of the International Covenant on Economic, Social and Cultural Rights and article 12(3) of the European Social Charter, state parties are under an obligation to progressively realise a higher level of social rights. The mirror principle of this requirement is the prohibition of retrogression, according to which a state cannot take any unnecessarily retrogressive steps in the realisation of social rights. Since the start of the European economic crisis in 2009, several European states have resorted to measures that have had a negative impact on the level of social rights in those states. Consequently, various supranational and national judicial organs have been required to examine the justifiability of those measures, thus clarifying the content of the prohibition of retrogression. From these decisions and statements it is possible to derive certain criteria for assessing compliance with the prohibition of retrogression: the regressive measure has to be temporary, it has to be necessary and proportionate, it cannot discriminate, and the minimum core content of each respective rights has to be protected.

The effectiveness of social rights can be seen as a tool for promoting equality, justice and democracy in society, as the effective enjoyment of social rights increases the participation of vulnerable groups within it. Therefore, compliance with the prohibition of retrogression is particularly crucial at times of economic recession in order to protect the rights of these most vulnerable groups. The effectiveness of social rights can be argued to consist of an effective monitoring system within a particular state, effective remedies for an individual, and the commitment of all public authorities to conduct a systematic human rights impact assessment on different levels of decision-making. It is argued that through these mechanisms, compliance with the prohibition of retrogression could be sufficiently guaranteed.

In Finland, the monitoring of the realisation of social rights is based on the competence of the Parliamentary Ombudsman, the Chancellor of Justice of the Government and various administrative authorities. Additionally, the supranational supervisory mechanisms, in particular the collective complaint procedure under the Additional Protocol to the European Social Charter, complement the domestic system of monitoring. Reviewing the constitutionality of new legislation has, however, traditionally fallen under the competence of the Constitutional Law Committee of the Parliament. The prohibition of retrogression is mainly of relevance in the ex ante constitutional review by the Constitutional Law Committee of the Parliament. In certain individual cases the prohibition can also be of relevance within the courts. This kind of ex post review by courts could, however, take place mainly through a human rights friendly interpretation or through the enforcement of subjective social rights. Due to the nature of the prohibition of retrogression, the norm should primarily be taken into account by the legislature before any decisions on potentially regressive measures have been made.

The operation of the prohibition of retrogression in the Finnish system of constitutional review and human rights impact assessment can be seen as partly ineffective due to the fact that the budgetary decision-making is not subject to systematic human rights impact assessment. This means that while resource allocations in budget decisions may have a regressive impact on social rights, the requirements of the prohibition of retrogression are not being reviewed in this context. This cannot be seen as justifiable, considering that the prohibition of retrogression requires a state to conduct a sufficient analysis on the potential impacts on social rights and to explore alternative options in order to avoid negative impacts on the rights of the most vulnerable groups in the society.

Avainsanat – Nyckelord – Keywords

Constitutional law, social rights, prohibition of retrogression, principle of progressive realisation, constitutional review

Säilytyspaikka – Förvaringställe – Where deposited

Faculty of law at the University of Helsinki

Muita tietoja – Övriga uppgifter – Additional information
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<td>1961 Charter</td>
<td>European Social Charter of 1961</td>
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<tr>
<td>CECR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>ECHR</td>
<td>European Convention of Human Rights</td>
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<tr>
<td>ECSR</td>
<td>European Committee of Social Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ESC</td>
<td>Revised European Social Charter of 1996</td>
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<td>ETS</td>
<td>European Treaty Series</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<td>FRA</td>
<td>European Union Agency for Fundamental Rights</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1. INTRODUCTION

1.1 EUROPEAN ECONOMIC RECESSION AND CHALLENGES TO WELFARE STATES

The modern welfare state. What does it consist of? One could list such things as social services, the right to education and protection of the most vulnerable groups. Moreover, democracy and the promotion of equality must also be mentioned since they, after all, are the very essence of the welfare state as a concept.\(^1\) It follows that in order to reach the goals of a modern welfare state, a state needs to guarantee the effective enjoyment of certain rights to all. These rights entail civil and political and economic, social and cultural human rights. With that said, economic, social and cultural rights in particular have become relevant in tandem with the emergence of the modern welfare state. Yet they have not gained as much attention as civil and political human rights.\(^2\) In particular, the question of which conditions limit social human rights has remained relatively open.\(^3\) Whilst not all\(^4\) human rights are absolute rights and can therefore be limited in certain situations, the principles concerning the limitation of social human rights have not been clearly defined. This can be seen as problematic since the lack of strict rules governing the grounds for limitation might lead to arbitral decisions by states, in particular in circumstances of economic recession. This, of course, reduces the effectiveness of the enjoyment of social rights.

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2 Ssenyonjo, Manusili: Economic, Social and Cultural Rights in International Law (Hart Publishing 2009), 4-5.
3 See about the discussion -or the lack of it- in the Finnish constitutional law context: Rautiainen Pauli: ‘Perusoikeuden heikennyskielto’ (2013) 261 Oikeus 42, 262-3.
4 International law recognises certain peremptory norms (jus cogens) from which no derogation is permitted. See eg Shelton, Dinah: ‘International Law and ‘Relative Normativity’’ in Evans, Malcolm (ed): International Law (Oxford University Press 2010), 146-57. Also certain fundamental rights have been protected as absolute rights in the Constitution of Finland. See eg Viljanen, Veli-Pekka: ‘Perusoikeuksien rajoittaminen’ in Hallberg, Pekka, Karapuu, Heikki, Ojanen, Tuomas, Scheinin, Martti, Tuori, Kaarlo and Viljanen, Veli-Pekka (eds): Perusoikeudet (WSOYpro 2011), 140.
Since 2009, Europe has been undergoing a period of outstanding difficulty in terms of financial stability. The European economic crisis emerged after the so-called Great Recession and resulted from a situation where European governments were not able to repay or refinance their government debts. Starting in 2009 and continuing until today, several states have been forced to take various austerity measures in order to counter the debt crisis. The implementation of these measures has invoked criticism and discussion about the legitimacy of the actions: non-state actors and academics have started to look for effective realisation of economic, social and cultural rights and, in particular, for more clearly defined guidelines to mitigate the limitation of these rights.

Admittedly, article 2(1) of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) can be argued to contain certain guidelines for the limitation of social rights under the ICESCR. Article 2(1) of the ICESCR requires each State Party to:

“take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

One logical consequence of this principle of progressive realisation is the mirror principle of non-regression; where state parties are generally obliged not to take regressive measures, since taking those measures would mean diverging from the obligation to take steps towards the full realisation of economic, social and cultural rights. The principle of non-regression can also be called as the prohibition of retrogression. The specific content of the norm has nevertheless been defined neither in the treaty text nor in the travaux preparatoires of the

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7 Rautiainen 2013, 261-2.
9 Ssenyonjo 2009, 59.
ICESCR, leading to a situation where the nebulous scope of the obligation makes economic, social and cultural rights litigation challenging. At the same time the economic downturn has forced many European states to take austerity measures, i.e. to deviate from the general prohibition to take regressive measures, raising questions about the de facto effectiveness of economic, social and cultural rights. The question about the legal definition of the principle of non-regression has, therefore, become more relevant than ever.

While the impact of the current economic crisis in Finland has not so far been as significant as in some other European countries, the effective realisation of social rights has similarly emerged as a topical issue in Finnish debate. The Government’s plans concerning structural reforms have raised questions as to whether the human rights impact assessment vis-à-vis these measures has been sufficient. Whilst the prohibition of retrogression has not been significantly addressed in Finnish fundamental and human rights discourse, it is, indeed, an important question to ask also in the domestic context; whether the Finnish monitoring system makes it possible to take the full realisation of social rights into account.

1.2 Research Question and Structure

The objective of this thesis is twofold. The research questions to be examined are the following:

1) What is the nature and content of the prohibition of retrogression?

2) How effective is the implementation and protection of social rights in Finland? In particular, how does the prohibition of retrogression operate in the Finnish system of constitutional review and human rights impact assessment?

The thesis is divided into two parts. Its emphasis is on the evaluation of the effectiveness of social rights in the Finnish constitutional law system, in particular on the relevance of the

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12 Rautiainen 2013, 263.
principle of non-regression. However, because the system for protection of human rights is a pluralist system, one cannot look merely at the domestic legislation.\footnote{On the pluralist nature of human rights obligations see eg Fabbrini, Federico, ‘The European Multilevel System for the Protection of Fundamental Rights: A ‘neo-federalist’ perspective’ (2010) 5 Jean Monnet Working Paper, 1-60.} It must be noted here already that Finland’s constitution creates an obligation for the public authorities to guarantee the protection of human rights and to comply with applicable rules of international human rights law.\footnote{Constitution of Finland section 22. See also Heinonen, Tuuli and Lavapuro, Juha: ‘Suomen oikeuden eurooppalaistuminen ja valtiosääntöystäminen 1990–2012’ in Heinonen, Tuuli and Lavapuro, Juha (eds): Oikeuskulttuurin eurooppalaistuminen (Suomalainen Lakimiesyhdistys 2012), 10.} The aim of part one is to examine and systematise the legal debate concerning the content of rules governing the limitation of social rights, in particular the principle of non-regression, under international law. For this purpose I will examine the reasoning of the Committee on Economic, Social and Cultural Rights (‘CESCR’), which is the supervisory body of the ICESCR; of the European Committee of Social Rights (‘ECSR’), which is the supervisory organ of the European Social Charter (‘ESC’); and of various European constitutional courts. In part two, the focus will shift from defining the principle under international law to evaluating its relevance and the effectiveness of social rights in the Finnish constitutional law context. In order to do this, I will look into the constitutional review system in Finland and into any remedies that are available for an individual after an alleged breach of social rights.

Finally, to discuss the effectiveness and the underlying ratio of the principle of non-regression, it must be asked whether there is a real justification for the divorce between the different types of human rights. The effective protection of human rights requires after all the effective implementation of both civil and political and economic, social and cultural human rights; economic crisis and austerity measures do not only have impact on the realisation of economic, social and cultural rights but also on various civil and political

\footnote{European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) CETS 163.}

rights. Nolan, for instance, has noted that cuts to legal aid and increases in legal fees have also had an effect on equal access to justice. Likewise, the realisation of economic, social and cultural rights cannot be said to be effective if there is no real access to justice in cases of violations of these rights. The effective realisation of economic, social and cultural rights has been argued as crucial in promoting equality and democracy in the society. This thesis seeks to point out interconnections between the effectiveness of social rights and equality.

Part I and Part II both contain two chapters. The thesis has separate chapters for the introduction and conclusions. Chapter Two contains a more general introduction to the history and nature of the economic, social and cultural rights and the principle of progressive realisation. In Chapter Three, the focus will be on the legal nature and substantive conditions of the principle of non-regression. I will derive the content of the principle from the practice of the CESCR, the ECSR and various judicial organs, particularly the domestic constitutional courts.

In Chapter Four I will introduce the history and current state of the Finnish system of constitutional review. Chapter Four includes also an evaluation of the operation of the principle of non-regression in the Finnish system for constitutional review. In Chapter Five I will first point out what impact the effectiveness of social rights has on equality and democracy. After this I will evaluate the effectiveness of the Finnish system of monitoring, in particular, whether an individual has effective remedies available when she feels that her social rights have not been fully realised. In the course of doing this, I seek to demonstrate how compliance with the principle of non-regression is an inherent part of the effective realisation of social rights. In Chapter Six I will conclude by outlining the research results.

1.3 **Method and Sources**

As for the method and sources that will be used, it must first be noted that in practice courts and other judicial organs have been faced with certain methodological difficulties when trying to apply the principle of non-regression. This is because defining the causal link

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between a new legislative action and alleged regressive consequences can be challenging.\textsuperscript{19} For the purposes of this thesis the empirical aspect of retrogression will not as such be examined, i.e. it will not be necessary to consider whether a particular legislative action has de facto had regressive impacts. Rather, the focus in part one of the thesis will be upon outlining the general conditions and limits of the principle of non-regression. In part two, the focus will be in particular on examining the operation of the principle of non-regression in the Finnish system for constitutional review and the interrelationship of the principle and the effectiveness of social rights. Therefore, the traditional legal dogmatic method will serve as a starting point.\textsuperscript{20}

Secondly, as for the sources that will be used, the limits of the principle of non-regression are to be derived from international law. Therefore, in part one, I will refer to the sources of international law, namely those listed in article 38 of the Statute of the International Court of Justice, in order to define the content of the principle of non-regression. Those sources are:

1) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2) international custom, as evidence of a general practice accepted as law;
3) the general principles of law recognised by civilised nations; and
4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\textsuperscript{21}

For the purposes of this thesis, provisions under the ICESCR and the ESC are of particular relevance, as Finland is a state party to both of these conventions. Provisions of human rights conventions are often given a more precise content by their supervisory bodies in their legal practice.\textsuperscript{22} As such, also statements and decisions by the CESCR and the ECSR shall be used as sources. Case law of European domestic courts will be referred to in order to demonstrate

\textsuperscript{19} Nolan, Lusiani and Courtis 2014, 121-145 and 127.
\textsuperscript{21} Statute of the International Court of Justice (adopted 24 October 1945), art 38.
\textsuperscript{22} Ojanen, Tuomas: ‘From Constitutional Periphery toward the Center –Transformations of Judicial Review in Finland’ (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 194, 200.
that certain conditions for the limitation of social rights have been generally accepted. I have chosen to refer solely to those European cases that have occurred during the current economic crisis. Once the focus shifts to the operation of the principle in the domestic constitutional system, it is not only logical but also necessary to apply the sources of the Finnish legal system, in particular the statements of the Finnish Constitutional Law Committee and case law of the domestic courts.

1.4 TERMINOLOGY AND LIMITATIONS

The scope of this thesis is concerned with the evaluation of the effectiveness of social rights. Therefore, I will refer to economic and cultural rights merely if reference to those substantive rights is relevant in order to examine the content of the principle of non-regression. Moreover, the system for the protection of human rights is, admittedly, a pluralist system and rules other than the principle of non-regression may also create obligations for states when they seek to limit social rights. With that being said, the emphasis of this thesis is on defining the principle of non-regression. Other rules governing the limitation of social rights will be discussed only if they are relevant for this purpose.

Whilst EU law is naturally of relevance in the Finnish legal system, for the purposes of this thesis I will refer to the union legislation and legal practice only if it is relevant in defining and examining the prohibition of retrogression. Moreover, this thesis does not seek to examine the questions concerning the potential international responsibility of a state that may arise from violations of social human rights obligations. The focus is on the remedies that are available for an individual, not on the international responsibility between sovereign states.

As for the terminology of the thesis, by the term positive rights I refer to economic, social and cultural rights, as they are usually conceptualised as creating positive obligations to a state, as shall be noted in the next chapter. This choice of terminology does not, however, imply that human rights other than economic, social and cultural rights cannot create positive obligations, or that strong distinctions between different types of human rights is even
advisable.\textsuperscript{23} Also, it must be noted that the terms \textit{principle of non-regression} and \textit{prohibition of retrogression} will be used throughout the thesis interchangeably.

Moreover, I have sought to pursue terminology that will recognise the interdependency of fundamental and human rights. The development of social rights in Finland has been influenced by both domestic and international trends. As such, it cannot be said that certain social rights in the Finnish constitution would only be relevant as \textit{fundamental rights}; the content of those rights must be derived from the international level, from the content of the respective \textit{human rights}.\textsuperscript{24} Consequently, for the purpose of this thesis, the term social rights shall be used to refer to the group of substantive social rights, regardless of their status as fundamental rights or human rights. It must nevertheless be noted that international human rights set only the minimum standard for the domestic implementation of human rights.\textsuperscript{25} Therefore, if and when the scope of the thesis requires distinction between these two levels of social rights, they will be referred to separately as fundamental rights and human rights.

\textsuperscript{23} See Fredman 2008, 9-10.
\textsuperscript{24} See eg Ojanen 2009, 194-207. Ojanen argues that domestic sources, EU membership and international human rights treaties have all had a major impact on the role of courts, judicial review and the interpretation of constitutional norms in Finland.
\textsuperscript{25} Heinonen and Lavapuro 2012, 8-11.
PART I: LIMITATION OF SOCIAL RIGHTS UNDER INTERNATIONAL LAW

2. NATURE OF SOCIAL RIGHTS

2.1 A SHORT HISTORY

To understand the questions concerning the effectiveness of social rights and the nature of the rules governing their limitation, one must first look at the history of human rights and, in particular, at the emergence of economic, social and cultural rights. Human rights have traditionally been categorised into two groups due to their historical origins. The reason for the distinction between these groups of rights and the creation of two separate human rights instruments, namely the International Covenant on Civil and Political Rights (‘ICCPR’) and the ICESCR, is the ideological conflict between the East and West at the time of drafting. The Soviet states, on the one hand, sought to embrace the cause of economic, social and cultural rights as they saw them closely linked with the socialist ideology. On the other hand, the Western states found it crucial to promote the recognition of civil and political rights, “the foundation of liberty and democracy in the free world”. As a result, two separate human rights treaties and two classes of human rights were created.

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26 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
27 See, however, O’Cinneide, Colm: ‘Austerity and the faded dream of a ‘social Europe’ ’ in Nolan, Aoife (ed): Economic and Social rights after the Global Financial Crisis (Cambridge University Press 2014), 170. O’Cinneide argues that positive rights in Europe are not merely a post WW II concept.
The so-called first generation of human rights seeks to protect in particular civil and political rights, which are to a great extent based on such core principles as human dignity and non-discrimination. The second generation of human rights is based on the idea that everyone should have equal opportunities and rights to participate in society.\(^\text{29}\) The first generation of human rights has traditionally been perceived as creating negative obligations for states: a state is under an obligation not to deprive an individual of her fundamental freedoms. These negative obligations have also been known as duties of restraint.\(^\text{30}\) The second generation of human rights, on the other hand, requires positive contribution from a state: the underlying idea is to create material equality rather than formal. This might - and often does – require an element of financial subsidiarity.\(^\text{31}\) With that said, as has been noted above, too strict a division between these two categories of rights has been argued to be artificial.\(^\text{32}\) Ultimately, civil and political rights can create positive obligations for a state and economic, social and cultural rights can operate also as duties of restraint.

Admittedly, positive rights fall to a great extent into the second generation of human rights, i.e. the fulfilment of these rights by a state requires sufficient funding and resources. This does not mean, however, that the fulfilment of first-generation rights would be without relevance when implementing second-generation rights. Quite the opposite in fact, as the fulfilment of civil and political rights is also necessary in order to effectively implement positive rights. This is evidenced inter alia by the fact that certain major human rights conventions require respect for equality, non-discrimination and democracy.\(^\text{33}\) The common ground of civil and political and economic, social and cultural rights is by definition the very same: promoting equality and democracy in the society. Therefore, these two generations of

\(^{29}\) Mikkola, Matti: Social Human Rights of Europe (2010 Karelactio), 6-7. Mikkola lists also the third generation of human rights. These rights aim at people’s right to promote their collective interests, such as right to clean environment, peace and self-determination. The examination of this category is nevertheless outside the scope of this thesis.

\(^{30}\) Fredman 2008, 1.

\(^{31}\) Mikkola 2010, 7.

\(^{32}\) Fredman 2008, 70.

human rights are interdependent and indivisible.\textsuperscript{34} This view has been widely accepted by the international community.\textsuperscript{35}

As illustrated above, the effective realisation of positive rights usually requires material input, i.e. human resources and funding, by a state. But how much exactly is a state required to invest in the effective realisation of social rights? Under which conditions can a state reduce the level of investment already established? In answering these questions, one must look at the legal principle concerning the effective implementation of positive rights. This principle is called the principle of progressive realisation and its operation will be further discussed in the following chapter.

\textbf{2.2 A STARTING POINT: ARTICLE 2(1) OF THE ICESCR}

One may argue that the single most important provision concerning the nature and limitation of social rights can be found in article 2(1) of the ICESCR. According to this article:

\begin{quote}
“[...]each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”
\end{quote}

Article 2(1) is not a substantive social right as such, but instead applies as a general rule when a state party implements substantive rights under the ICESCR.\textsuperscript{36} The content of article 2(1) has been discussed by the CESC in its general comments. The nature of states’ obligations under article 2(1) of the ICESCR has also been commented upon in the so-called Limburg Principles on the Implementation of the International Covenant on Economic,

\begin{footnotesize}
\textsuperscript{34} Craven 1995, 7-16.
\textsuperscript{35} See eg Proclamation of Teheran, UNGA Res 32/130 (16 December 1977) UN Doc A/Res/32/130, para 13.
\end{footnotesize}
Social and Cultural Rights of 1987 (‘Limburg Principles’). The Limburg Principles have been supplemented by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 (‘Maastricht Guidelines’). Also article 12(3) of the ESC creates an obligation upon state parties to “endeavour to raise progressively the system of social security to a higher level”, thereby imposing a somewhat similar prohibition of retrogression that must be respected by the state parties to the ESC, for instance by Finland. In this chapter I will examine the prohibition from the viewpoint of article 2(1) of the ICESCR, but the considerations presented below also apply, to a large extent, when one talks about the prohibition under the ESC.

The phrasing of article 2(1) of the ICESCR is relatively vague and leaves much room for interpretation. Specifically, two general observations must be made. First, article 2(1) creates an obligation to “achieve progressively the full realisation”, i.e. establishes the standard of progressive realisation. This concept, however, has not been further defined in the text of the ICESCR, leaving the definition obscure. Second, according to article 2(1) state parties are under an obligation to utilise maximum available resources. The ICESCR does not require a state to take steps that would require utilisation of resources beyond what is available. Here, also, the same interpretational problem arises: how does one define what resources of a state are available?

When we consider the interpretation of these terms, it must be noted that article 2(1) of the ICESCR is a treaty provision and, as such, is binding between the state parties. Therefore, its content must be defined through the general rule of treaty interpretation, which is a rule of customary international law. The rule has been codified in the Vienna Convention on the Law of Treaties (‘VCLT’) by the International Law Commission (‘ILC’) in 1969. According to the rule the treaty must be interpreted “in good faith and in accordance with

40 The International Court of Justice has confirmed the customary law nature of these articles, See Territorial Dispute (Libyan Arab Jamahirya v Chad) (1994) ICJ Rep 6, para 41; Kasikili/Sedudu Island (Botswana v Namibia) [1999] ICJ Rep 1045, para 18.
the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The interpretation may be supplemented by recourse to the preparatory work of the treaty.\(^\text{42}\) Therefore, in order to discover the more precise content of article 2(1), one must first look into the ordinary meaning of the terms \emph{progressive realisation} and \emph{maximum available resources}. We must also define the object and purpose of the ICESCR.

It has been generally established in academic discussion that the very object and purpose of the ICESCR - as well as of other human rights treaties - is the effective realisation of human rights.\(^\text{43}\) Therefore, the interpretation of the ICESCR should be as favourable to the individual as possible and any limitations on rights should be interpreted narrowly.\(^\text{44}\) Additionally, the European Court of Human Rights (‘ECtHR’) has frequently found that human rights provisions ought to be interpreted so as to make their implementation as effective as possible.\(^\text{45}\) Therefore, to interpret the terms \emph{progressive realisation} and \emph{all available resources} in the light of the object and purpose of the covenant, one must seek for the most human-rights-orientated interpretation available. Some guidelines can be found in the statements of the CESCR.

As for the \emph{maximum available resources} the CESCR has stated that the phrase refers to “both the resources existing within a State as well as those available from the international community through international cooperation and assistance”.\(^\text{46}\) It follows that the term does not refer merely to certain resources within one particular state, but rather to resources available within the society as a whole; ranging from the public and private sectors to the international community.\(^\text{47}\) This interpretation appears to be in accordance with the general rule of treaty interpretation in the sense that the ordinary meaning of the phrase refers to all

\(^{42}\) VCLT arts 31-2.  
\(^{43}\) Ssenyonjo 2009, 51.  
\(^{44}\) Craven 1995, 3.  
kinds of available resources.\textsuperscript{48} That being said, there is yet to be common ground as to whether this establishes an international obligation to assist: during the drafting of the ICESCR states did not clearly agree on the existence of any well-defined obligation to offer international assistance to a state struggling with its obligations under the Covenant.\textsuperscript{49} For the time being it is difficult to see a situation where a failure to comply with this kind of an obligation to assist would trigger international responsibility. For instance, the International Court of Justice (‘ICJ’) has held that a state has an obligation to guarantee rights under the ICESCR only within the territories it has sovereignty and within those over which that state exercises territorial jurisdiction.\textsuperscript{50} The general rule seems to be that each state party has an obligation to seek the assistance of other states when it is not able to meet its own treaty obligations, while the obligation of other states to offer financial assistance is considerably more vague. Of course, monitoring whether a state allocates the maximum of available resources for the realisation of social rights is extremely challenging.\textsuperscript{51} Whilst certain indicators, such as the percentage of the national budget allocated to the ICESCR rights and comparisons between states of the same level of development, have been developed by the CESCR in their concluding observations,\textsuperscript{52} the lack of sufficient national data\textsuperscript{53} and case law on the issue\textsuperscript{54} makes the use of these indicators challenging.

In interpreting article 2(1), perhaps even more central is the question of how to interpret the term \textit{progressive realisation}. The usage of terms \textit{full realization} and \textit{progressive achievements} implies that the drafting parties have acknowledged that the full realisation of

\textsuperscript{48} The ICJ has noted in its case law that ”[t]o warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required”. See \textit{Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)}, (Advisory Opinion) (1948) ICJ Rep 57, 63.


\textsuperscript{50} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (Advisory Opinion) (2004) ICJ Rep 136, para 112.

\textsuperscript{51} See Ssenyonjo 2009, 60-1.


\textsuperscript{53} Ssenyonjo 2009, 61.

\textsuperscript{54} Craven 1995, 4 and 10.
rights cannot be achieved in a short period of time. Whilst the ultimate result that has to be achieved is left somewhat open, article 2(1) creates an obligation not to stop the realisation of rights at any given level but rather to aim at the continuous improvement. The question is not, therefore, merely about the result that must be achieved but also about the desired conduct, i.e. the continuing measures that need to be taken.

In academic debate it has indeed been argued that two kinds of obligations can be derived from article 2(1): namely obligations of conduct and obligations of result. Legal experts have upheld this view during the drafting of Maastricht Guidelines in 1997. According to the ILC, an obligation of conduct is an obligation where the state is obliged to undertake a certain course of conduct, whether through an act or omission. Here the conduct itself would be the goal. An obligation of result, instead, requires a state to achieve a specific result whilst the form of conduct is left to state discretion. Article 2(1) of the ICESCR has been described as a mixture of these two types of obligations. This does seem accurate, as the obligation to progressively achieve the full realisation of the rights is indeed mostly an obligation of conduct, whereas the substantive articles of the ICESCR set various obligations of result when read together with article 2(1).

To summarise, two different obligations derive from article 2(1) the ICESCR: first, the principle of progressive realisation imposes an obligation to move as expeditiously and effectively as possible towards the full realisation of the rights provided for in the ICESCR, highlighting the importance of improvement and advancement when it comes to the realisation of social rights. In addition to this positive obligation, the article also entails a negative obligation, namely the prohibition of retrogression. The prohibition of retrogression means that when a state becomes a party to the ICESCR, it assumes an obligation to refrain from lowering the level of protection of the respective social rights. Any retrogressive

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57 See eg Ssenyonjo 2009, 22.
58 Maastricht Guidelines, paras 6 and 7.
60 Alston and Quinn 1987, 165. See also Craven 1995 107-9.
61 CESC General Comment 3, para 9.
measures can only be taken in accordance with the limitations set out under the ICESCR.\textsuperscript{62}

The interrelationship between these two principles shall be further explored in the next chapter.

\textbf{2.3 Three levels of implementation of social rights}

Realisation of positive rights can be said to consist of three different levels. First, the lowest level entails realisation of the minimum core content of each right. Each substantive social right has a so-called minimum core content. The CESCR has outlined that the ratio of the minimum core obligation is to “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.\textsuperscript{63} It follows that the lack of sufficient resources cannot be a justification for any state in not meeting this obligation.\textsuperscript{64} The minimum core obligation, however, is not a static threshold but rather an evolving one; it might be that a certain level of implementation, once above this baseline, is not sufficient after the economic situation in a particular state has improved in time.\textsuperscript{65} One of the practical difficulties, as noted in the academic discussion on the topic, is that defining the content of the minimum core obligation of each substantive right is challenging.\textsuperscript{66} It must be noted that the domestic threshold of the minimum core content of social rights may be higher than the threshold under international law; even if the state manages to meet the requirements deriving from the international human rights obligations, the level of realisation is not necessarily in compliance with the domestic standards for the realisation of social rights.

Secondly, the principle of non-regression operates between the minimum core obligation and the current level of rights. The minimum core obligation is the lowest threshold below which a state can in no circumstances fall, whereas the principle of non-regression prevents a state from taking any unnecessary regressive steps even \textit{after} the threshold of the minimum

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} Nolan and others 2014, 123.
\item \textsuperscript{63} CESCR, General Comment 3, para 10.
\item \textsuperscript{66} Rautiainen 2013, 269.
\end{itemize}
\end{footnotesize}
core obligation has been reached.\footnote{Bilchitz 2003, 12. See also Coomans, Fons: ‘In Search of the Core Content of the Right to Education’, in Chapman, Audrey and Russell, Sage (eds): Core Obligations: Building a Framework for Economic, Social and Cultural Rights (Intersentia 2002), 228.} The second level is thus the current level of rights, although a state is under an obligation to seek to progressively raise the level of rights above that threshold. The third level is the imaginary “perfect” level of rights, towards which the state should constantly aim in the implementation of social rights. Therefore, the principle of progressive realisation can be seen to operate between the second and the third level of rights.

Acknowledging the existence of these thresholds is necessary in order to understand the context in which the principle of non-regression operates. Of further interest is the specific content of the obligation not to take any unnecessary regressive steps. Due to the reticent approach of the CESCR and the ECSR to the definition and limits of the principle of non-regression, it is necessary to have recourse to the decisions and statements of international, regional and domestic judicial organs in order to define the limits of the principle in a satisfactory manner. In other words, we can ensure the accurate application of the principles of progressive realisation and non-regression and, consequently, the effective enjoyment of
social rights only by defining the practical content of the principle of non-regression. The scope of the minimum core obligation shall be further discussed in Chapter Three, as one of the cumulative conditions of the prohibition of retrogression can be argued to be the protection of the minimum core content of each substantive right.

The purpose of the next chapter is to find how judicial organs and experts have defined the content of the principle of non-regression. This serves the purposes of Part II of the thesis, as by defining the legal principle governing the limitation of social rights, one can evaluate whether the Finnish system of human rights review makes it possible to take the principle into account. As the CESCRI is the main authority monitoring the implementation of the ICESCR by the state parties, I will examine its statements on the issue. Moreover, the statements of the European regional judicial bodies, in particular the ECSR and the European Union Agency for Fundamental Rights (‘FRA’), are of great importance.

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68 Nolan and others 2014, 132. The authors point out that also the normative content of the principle remains to be unclear.
3. **PROHIBITION OF RETROGRESSION**

3.1 **CHALLENGES IN DEFINING AND APPLYING THE PROHIBITION OF RETROGRESSION**

The CESCR has stated that “any deliberately retrogressive measures […] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.\(^{69}\) In other words, progressive realisation does not mean that the social rights are to be deprived of any meaningful content. This is further evidenced by the general objective of the ICESCR, namely in establishing obligations for States Parties with regards to the full realisation of the social rights in question.\(^{70}\) It is evident that article 2(1) of the ICESCR and article 12(3) of the ESC impose certain requirements that states need to take into account when they are deciding on measures that might have a regressive impact on the realisation of positive rights. The precise content of those requirements has, nevertheless, remained somewhat unclear; leaving not only the theoretical concept but also the practical application of the doctrine open to interpretation.\(^{71}\)

Moreover, regardless of the specific requirements of the principle, the assessment of any alleged breach is in any event remarkably challenging. This is due to the fact that the prohibition of retrogression contains two dimensions: a normative and an empirical dimension. With regards to the normative dimension, we refer to any legal, *de jure* steps backwards; the empirical dimension concerns the *de facto* backsliding in the effective enjoyment of the rights. Assessing whether a state has failed to comply with the latter

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69 CESCR General Comment 3, para 9.
70 Nolan and others 2014, 122.
71 ibid, 121.
dimension would require a comprehensive analysis of the state conduct and a wide range of various quantitative indicators, which unfortunately are not always available, as states do not systematically collect such data. In Part II of the thesis, it will be submitted that the so-called proactive models for monitoring the realisation of social rights would be the most effective in monitoring the empirical dimension of the prohibition of retrogression. Proactive models require constant participation of all public authorities in the implementation and monitoring process. Consequently, the prohibition of retrogression would be taken into account as one element of constant human rights impact assessment by public authorities.

Another factor that makes assessing the existence of a breach demanding is the fact that different states value and ascribe to different schools of economic thought. This is to say that competing economic ideologies have different views for instance on the role of the public sector and fiscal policies. Therefore, while a neo-classical school of thought would adopt lower wages to increase the competitiveness of national firms on the global market and thus the domestic employment rate, neo-Keynesian schools of thought would guarantee the existing labour conditions and wages to ensure a high enough demand for goods and services from consumers, driving economic growth and job creation. These economic questions are ultimately irresolvable disputes and one cannot name the best option with sufficient empirical certainty. As one cannot decisively find that following another school of thought would have led to a more acceptable result, international judicial bodies have been reticent to enter into these discussions. This, of course, has not in any way clarified the content of the prohibition of retrogression, particularly in its empirical dimension at times of an economic crisis.

With that said, it must be noted that it is not necessary, or even advisable, to have too stringent a set of conditions to make the application of the prohibition of retrogression efficient. In fact, it might be that too strict and narrow a definition of the principle could lead to a situation where a particular state would not base its decisions on the special features of

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74 See eg Nolan and others 2014, 128-9
75 ibid. On measures taken to tackle unemployment in various EU member states, see FRA 2010, 11-13.
the case at hand nor adjust its decision-making in an advisable manner. In that sense a definition of the prohibition incorporating a sufficient degree of flexibility may also be necessary in order to avoid a negative impact upon the realisation of social rights.\footnote{Nolan and others 2014, 130-1.}

I argue that while article 2(1) of the ICESCR or article 12(3) of the ESC do not contain any strict guidelines for the limitation of the recognised rights, they nevertheless entail certain similar criteria that must be considered and respected by a state when it seeks to limit social rights.\footnote{See Craven 1995, 26-7. Craven argues that the drafters of the ICESCR considered article 2(1) to be flexible enough to allow the lack of any specific derogation clause.} This can be seen, first of all, from the statements and observations given by the CESCR and decisions of the ECSR during the current economic crisis.

Until recently, the CESCR has been reluctant to clarify the content of the principle of retrogression. As noted above, this can be explained by the fact that evaluating whether a particular legislative measure \emph{de facto} is a retrogressive measure is particularly challenging.\footnote{Nolan and others 2014, 126-7.} However, in the statement concerning the obligation to take steps to the maximum of available resources in May 2007 the CESCR listed a set of parameters for evaluating whether the limitation of social rights has been justified and in accordance with the object and purpose of the ICESCR, namely the effective protection of human rights.\footnote{Ssenyonjo 2009, 51.} These criteria seek to take into account the country’s level of development; the severity of the alleged breach and its effect on the minimum core content of the respective right; the current economic situation of the country and any impacts of economic recession; limited resources of the country, resulting, for example, from a recent natural disaster or an armed conflict; whether the state has explored the possibility to resort to low-cost options; and whether the state has asked for cooperation and assistance or rejected offers of resources from the international community without sufficient reason.\footnote{CESCR: ‘An evaluation of the obligation to take steps to the “Maximum of available resources” under an optional protocol to the Covenant’ (1 May 2007) UN Doc E/C.12/2007/1, para 8.} These so-called objective criteria operate as guidelines when assessing the legitimacy of any regressive measures.

In addition to that, in their Letter to States Parties dated 16 May 2012 the CESCR, for the first time, gave a series of requirements that should be met when limiting rights recognised in the ICESCR. One can of course contest the binding nature of that letter, particularly as
the words *retrogressive measures* have not been expressly mentioned in the wording of this instrument. Whilst the legal status of this letter remains unclear and potentially non-binding, even as a soft law instrument, recent statements by the CESCR and various cases in domestic courts continue to suggest that the international community has been willing to recognise the binding nature of these conditions.\(^{81}\)

Further, article 12(3) of the ESC entails the obligation to raise progressively the system of social security to a higher level, and, consequently, not to take any unnecessary regressive steps. The ECSR has pointed out that not all reductions automatically constitute a violation of article 12(3) of the ESC. Rather, it has concluded that “the pursuit of economic goals is not incompatible with article 12”. According to the ECSR, certain regressive measures may be needed to safeguard the social security system at the time of economic recession.\(^{82}\) The ECSR has in its recent decisions sought to clarify, at least to some extent, when a regressive measure could be justified.

The CESCR and the ECSR are the supervisory bodies of the two main instruments for the international protection of social rights, namely the ICESCR and the ESC. As noted, these instruments are also binding in Finland. By looking into the statements and decisions by these two bodies, one can derive certain requirements that have been frequently mentioned when discussing the legitimacy of any limitations upon social rights. In the subsequent chapters, it will be demonstrated that the requirements mentioned by the CESCR in the letter of May 2012 have also been applied by domestic courts, by the ECSR and by the CESCR itself in its concluding observations and other statements. This means that the requirements have been accepted by domestic and international levels as applicable guidelines for the limitation of social rights and, as such, form the conditions of the principle of non-regression. The conditions which will be examined next are as follows:

1) the limitation should be temporary;
2) the limitation should be necessary and proportionate;
3) the limitation should not be discriminatory; and


\(^{82}\) Pensioners’ Union of the Agricultural Bank of Greece (ATE) v Greece (7 December 2012) ECSR 80/2012 (hereinafter “ECSR 80/2012”), para 66.
4) the state must at all times identify and protect the minimum core obligation of the right in question.83

3.2 THE REQUIREMENT OF IMPERMANENCE

Judging from the statements by international judicial organs and case law of domestic constitutional courts, the conditions of the principle of non-regression are cumulative.84 This means that each and every one of them must be fulfilled in order to lawfully limit social rights. The first of these criteria is the requirement that the limitation of a right be temporary.

At the international level, both the CESCR and the ECSR have listed the temporary character of limitations as one of the conditions of the principle of non-regression. Indeed, the CESCR itself has started to apply the conditions outlined in the 2012 Letter to State Parties. It has stated in several concluding observations on states’ periodic reports that austerity measures should in all cases be temporary.85 This evidences that the CESCR does not consider the principle of non-regression merely as a soft-law instrument. Moreover, the ECSR has held in its decision concerning the level of social security in Greece that reduction in the level of pensioners’ social security was incompatible with article 12(3) of the ESC. One reason for the finding of the ECSR was the fact that the regressive legislation did not entail any provisions on the provisional application of the act; in other words that the regressive measure was not meant to be temporary.86

The requirement has also been mentioned and applied in various domestic cases concerning the principle of non-regression. For the purposes of this thesis, two cases are of particular relevance; the so-called Latvian Pensions Case87 and the case concerning the legality of

83 CESCR, ‘Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis’ (16 May 2012) UN Doc CESCR/48th/SP/MAB/SW.
86 ECSR 80/2012, paras 56 and 73.
Portuguese State Budget Law\textsuperscript{88}. Both of these cases were heard by the respective constitutional courts. The Latvian Constitutional Court found that the temporary nature of the limitation is indeed necessary for a limitation to be justified. In that particular case the reduction of pensions was planned to be temporary, but the constitutional court found that the Latvian legislator had failed to meet other cumulative conditions.\textsuperscript{89}

In the Portuguese Budget Law Case, the Constitutional Court of Portugal had to consider the legality of several budget-related austerity measures, including reductions in public salaries and pensions. Whilst the court found that in many respects the requirements of justified limitation had not been met, it held that since the reduction in sickness and unemployment benefits were imposed only for one year at a time, the limitation was in accordance with the requirement of impermanence.\textsuperscript{90} What is essential for the purposes of this thesis is the fact that, in this particular case, the temporary nature of the limitation was considered as one of the cumulative conditions when limiting social rights.

In Finland, the condition of impermanence is a cumulative condition that must be met when limiting fundamental rights at a time of emergency.\textsuperscript{91} The Finnish Constitutional Law Committee has also noted that a temporary freezing of index increments of child allowance was not unconstitutional.\textsuperscript{92} The reasoning of the Committee has, however, been criticised as not sufficiently examining the effects on the most vulnerable groups, i.e. families with young children.\textsuperscript{93}

### 3.3 The Requirement of Necessity and Proportionality

The second condition under the prohibition of non-regression might be argued to be that a limitation must be necessary and proportionate. Even in situations of resource scarcity, fiscal discipline or savings, the state must be able to demonstrate the necessity of the measures taken. Looking at the statements given by the CESC, this requirement means that

\begin{itemize}
\item \textsuperscript{89} Latvian Pensions Case, para 32.
\item \textsuperscript{90} Portuguese Budget Law Case, English summary, chapter 3.
\item \textsuperscript{91} See Constitutional Law Committee of Finland, PeVL 309/1993 vp, chapter 3.5.
\item \textsuperscript{92} Constitutional Law Committee of Finland, PeVL 25/2012 vp.
\item \textsuperscript{93} Rautiainen 2013, 273.
\end{itemize}
the measures must have been necessary for the protection of the totality of the rights provided for in the ICESCR.⁹⁴ The burden of proof to demonstrate that the measures have been necessary and proportionate lies upon the state in question: The CESCR has on several occasions noted that *the state* must prove the strict necessity of the measure.⁹⁵ During the drafting of Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, a group of legal experts found that the burden of proof is upon the state to show that it is making measurable progress toward the full realisation of the rights in question or that it is unable to carry out its obligation for reasons beyond its control.⁹⁶ The condition of proportionality means that “the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights”.⁹⁷ In other words, the test is whether there would have been any less restrictive but yet effective measures available for the state at that point. Needless to say, assessing whether this condition has been met is extremely challenging due to the empirical difficulties in monitoring, as demonstrated above in Chapter Two.

Furthermore, the ECSR has highlighted that any regressive measures must have a legitimate aim. A regressive measure is compatible with the principle of non-regression, as established in article 12(3) of the ESC, when it is necessary to ensure the stability of the system of social security. According to the ECSR, a regressive measure cannot prevent individuals from enjoying the effective protection against social and economic risks.⁹⁸

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⁹⁴ CESCR, General Comment 3, para 9; see also Nolan and others 2014, 134.
⁹⁶ Maastricht Guidelines, paras 8 and 13.
⁹⁸ ECSR 80/2012, para 66.
After the outburst of the economic crisis in 2008, several European constitutional courts have been forced to assess the fulfilment of this prerequisite. Both in the Latvian Pensions Case and in the Portuguese Budget Law Case, the constitutional court found that the measures taken did not pass the test of necessity and proportionality. In order to elaborate upon the content of this condition, these considerations shall be further discussed below.

In the Latvian Pensions Case the court held, inter alia, that the state had not considered other less restrictive options. The court first highlighted that the economic situation of a state cannot serve as an overarching justification to lower the already existing level of social rights, but rather, the state needs to have other legitimate ends for its restrictive actions. Secondly, it held that the reduction of pensions did have a legitimate end; that being the secured sustainability of the social insurance budget which supports societal welfare. The court did not, however, find that the measure chosen by the Latvian legislator would have been proportionate. In its reasoning the court listed three criteria to examine whether the measures taken had been proportionate: it noted that the means used by the legislator should be appropriate for achieving the legitimate end; the action could not have been achieved by other, less restrictive means; and the benefit for society should be more significant than the detriment to the rights of the individual. Whilst it could be argued that the reduction of pensions had a legitimate end, the court found that the legislator had not considered with sufficient care the alternatives to the impugned provisions and had not envisaged a more lenient solution. Consequently, the court was unable to find that the criterion of proportionality had been met.

It must be noted that in the case at hand the court derived the content of the rule partly from its earlier case law and the Latvian Constitution. This does not mean, however, that international law was without relevance. The court expressly referred to the ICESCR and noted that the international human rights regulations and practice serve as interpretative means for determining the nature and scope of the principles of judicial state and fundamental rights. Also, the Latvian Constitution states that the state shall recognise and

99 Latvian Pensions Case, para 31.
100 ibid, para 27.2.
101 ibid, para 28.
102 ibid, para 30.2.
103 ibid, para 20.
protect fundamental human rights in accordance with the Constitution, laws and *international agreements* binding upon Latvia.\(^{104}\)

In the Portuguese Budget Law Case, the Constitutional Court of Portugal held that the norm which provided for a contribution payable on unemployment and sickness benefits was unconstitutional because it violated the principle of proportionality. The court found that the principle of proportionality had been violated because the legislation made it possible for the amount of sickness and unemployment benefits to fall below the minimum level of benefits already established in the legislation. The court linked the disproportionality with the fact that these kinds of situations would affect the rights of the most vulnerable groups.\(^{105}\)

Two notions can be derived from the reasoning of the constitutional courts. First, one essential question to be answered when assessing the proportionality of restrictive measures seems to be whether the legislator has carried out sufficient consideration of alternative measures prior to taking action. This, of course, is an imperative part of good governance and, as such, logically one of the elements when assessing whether the actions of the legislator have been reasonable in this context. The fact that a state has not considered alternative measures usually indicates that other, less restrictive options could have been available for the legislator. Secondly, if the limitation of social rights is discriminatory or fails to protect the most vulnerable groups, it also usually fails to pass the test of necessity and proportionality.

### 3.4 The Requirement of Non-Discrimination

Third condition of the prohibition of retrogression can be argued to be that the regressive measure cannot be discriminatory. This is to say that it should be neither directly nor indirectly discriminatory and it should, in particular, take into account the rights of disadvantaged and marginalised individuals and groups and ensure that they are not disproportionately affected by the regressive measure.\(^{106}\) It is a responsibility of a democratic constitutional state to ensure that the effects of austerity measures do not impair the effective enjoyment of the rights of the most vulnerable groups.\(^{107}\)

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\(^{104}\) ibid, para 20. See Latvian Constitution, section 89.

\(^{105}\) Portuguese Budget Law case, English summary, chapter 3.

\(^{106}\) Nolan and others 2014, 140.

\(^{107}\) Rautiainen 2013, 272.
condition appears to go hand in hand with the general objective of economic, social and cultural rights; namely the promotion of equality in society.

The importance of this particular condition has been widely recognised by the international community. The FRA has in several occasions highlighted that austerity measures during the current economic crisis should seek to secure the rights of the most vulnerable groups.108 The main reason for this is to avoid the increase of socio-economic inequalities in society, as the vulnerability of the most disadvantaged groups rises in times of crisis.109 Notably, recession causes long-term unemployment, which is in turn closely linked to social exclusion.110

This condition has been recently discussed by the ECSR in its decisions concerning the legality of the austerity measures in Greece. The FRA noted already in 2010 that the Stability and Growth Pact, through which the EU sets certain restrictions on the use of fiscal policy by each Member State, might have an adverse impact on vulnerable groups.111 Due to the situation of excessive deficit in Greece, the European Commission, the European Central Bank and the International Monetary Fund - the so-called Troika - agreed in 2010 on a financial support mechanism with the Greek government. According to this agreement, Greece was obligated to take measures “towards the correction of the excessive deficit”. These measures included, inter alia, several modifications to pensioners’ social protection.112 The implementation of those measures in Greece led to a series of collective complaints to the ECSR by Greek pensioners’ unions. These five complaints concerned the same facts and in each of the cases the ECSR found a violation of article 12(3) of the 1961 European Social Charter (‘1961 Charter’).113 As article 12(3) of the 1969 Charter concerns state party

109 FRA 2013, 12.
111 FRA 2010, 37-40.
113 European Social Charter of 1961 (adopted 18 October 1961, entered into force 26 February 1965) CETS 035; Federation of employed pensioners of Greece (IKA-ETAM) v Greece (7 December 2012) ECSR 76/2012, para 78; Panhellenic Federation of Public Service Pensioners (POPS) v Greece (7 December 2012) ECSR 77/2012, para 78; Pensioners’ Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece (7 December 2012) ECSR 78/2012, para 78; Panhellenic Federation of
obligations “to endeavour to raise progressively the system of social security to a higher level”, the ECSR was required to discuss the justified limitations of social rights under the 1961 Charter.\textsuperscript{114}

According to article 31(1) of the 1969 Charter the rights guaranteed under the charter “shall not be subject to any restrictions or limitations not specified in [the charter], except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”. The ECSR based its considerations concerning the legality of the regressive measures on the interpretation of article 31. For the purposes of this thesis these decisions of the ECSR are of relevance, as the Revised ESC is binding and applicable in the Finnish constitutional context and its article G is identical to article 31 of the 1961 Charter.\textsuperscript{115}

Also, the considerations of the ECSR can be argued to more generally cast light on the content of this criterion.

The ECSR found that the fact that Greece had made agreements on the implementation of certain austerity measures with the Troika was not a justification for their non-compliance with other international obligations, i.e. the obligations of Greece under the 1961 Charter.\textsuperscript{116}

Furthermore, it concluded that Greece had not made sufficient efforts to maintain a satisfactory level of protection for the benefit of the most vulnerable members of society. Here, also, one of the most important reasons for this finding was that the government had not conducted a minimum-level of research and analysis into the impacts of the measures on vulnerable groups. The CESR found that the government should have explored other options and so limited the restrictive effect of the measures.\textsuperscript{117}

\begin{notes}
\item[114] Article 12(3) of the Revised ESC is identical to its predecessor.
\item[115] See Tasavallan presidentin asetus uudistetun Euroopan sosiaalisen peruskirjan voimaansaattamisesta ja uudistetun Euroopan sosiaalisen peruskirjan lainsäädännön alaan kuuluvien määärysten voimaansaattamisesta annetun lain voimaantulosta sekä Euroopan sosiaalisen peruskirjan ja siihen liittyvän lisäpöytäkirjan eräiden määärysten hyväksymisestä annetun lain kumoamisesta annetun lain voimaantulosta (80/2002 26.7.2002).
\item[116] See eg ECSR 80/2012, para 46.
\item[117] ECSR 80/2012, paras 73-6. See also General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v Greece (23 May 2012) ECSR 65/2011, paras 14-9.
\end{notes}
The Council of Europe and its institutions have also on other occasions highlighted that the rights of the most vulnerable groups should always be protected when resorting to regressive measures. The Committee of Ministers has noted that any austerity measures should be evaluated in the light of the objective to prevent poverty.\(^\text{118}\) Furthermore, the Parliamentary Assembly of the Council of Europe in its resolution on austerity measures called on the member states of the Council of Europe to “closely assess current austerity programmes from the viewpoint of their short- and long-term impact on democratic decision-making processes and social rights standards, social security systems and social services [...] to the most vulnerable groups”.\(^\text{119}\)

As for the domestic case law during the current economic crisis, the constitutional courts of Latvia\(^\text{120}\), Portugal\(^\text{121}\) and Germany\(^\text{122}\) have all found that regressive legislative measures have not been justified as the legislator has failed to protect the most vulnerable groups and to target the measures in an equitable manner. The conditions of proportionality and non-discrimination are, indeed, closely linked with each other. It can hardly be argued that an austerity measure targeted at the most vulnerable groups in society could be the best option available even at the time of a fiscal crisis. This holds true also in cases where the measures taken have had an indirect negative impact on the most disadvantaged groups. Consequently, if the legislator fails to meet this condition when limiting social rights, it is also highly likely that the condition of necessity and proportionality has not been met.

In Finnish constitutional discourse it has been underlined that the justification of regressive measures should always be more difficult where they touch the rights of the most vulnerable.\(^\text{123}\) This is indeed true, especially when it would be possible to resort to other measures; the budgetary impact of which would be as beneficial whilst the human rights impact would be minimised. The actions of a welfare state should always reduce the

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\(^\text{118}\) ECSR 80/2012, para 29.
\(^\text{120}\) Latvian Pensions Case 2009, para 32.
\(^\text{122}\) Constitutional Court of Germany, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9 February 2010), paras 208-9.
inequality in the society, thus diminish economic and social differences between individuals and various groups.

Finally, while discriminatory measures or measures that increase inequality cannot be considered appropriate, regressive measures can be justified when they benefit the most vulnerable groups.124 In other words, austerity measures are urged to be targeted so that they would increase equality and improve the realisation of social rights of the most vulnerable groups.125 According to the FRA reports, European states have sought to target austerity measures so that the limited resources would be channelled at those most in need. Assessing whether this channelling has been successful and whether the minimum level of social protection is de facto being maintained is, however, challenging.126

3.5 THE REQUIREMENT TO PROTECT THE MINIMUM CORE OBLIGATION OF THE RIGHT IN QUESTION

As noted above in Chapter Two, protecting the minimum core obligation of the right in question can be listed as one of the prerequisites of the limitation of social rights. Protecting the minimum core obligation means that a regressive measure cannot defeat the most essential content; the ratio of the right in question. The minimum core content is the non-negotiable, fundamental part of the right. All individuals are always, in all circumstances, entitled to the minimum core content of the right.127

It must be noted also in this context that there is a difference between the international minimum core obligation and the Finnish, domestic minimum core obligation.128 While the international minimum core obligation operates as the ultimate threshold, below which the state can never go, the domestic minimum core obligation may be higher. Nothing prevents a state from adopting higher minimum standards in its constitution and domestic system, for as long as the international requirements are met. For the purposes of part one of the thesis, when one examines the prohibition of retrogression and its conditions under international

125 Limburg principles, paras 13-14 and Maastricht Guidelines, para 14(d).
127 CESCR, General Comment 3, para 10.
law, it is indeed the former threshold that is of relevance. In the Finnish context, however, the domestic minimum threshold needs to be respected. The international minimum core obligation of social rights has been determined generally by "having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question".\textsuperscript{129}

The CESCR has in its statements pointed out that the adoption of any retrogressive measures incompatible with the core obligations under the ICESCR would not be permissible.\textsuperscript{130} Defining the core elements and the minimum core obligation of each social right is not necessarily always an easy task. The CESCR has, however, noted that when it comes to the right to social security, the minimum essential level of benefits means that all individuals and families are able to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.\textsuperscript{131} In Europe, citizens generally enjoy access to these minimum essential level of social rights.\textsuperscript{132} With that being said, the minimum core obligation of a right is, as pointed out above in chapter two, an evolving threshold. Therefore it can be argued that the threshold of minimum core obligation in the European welfare states is higher than in some less developed countries, simply because of differences in the amount of available resources.

As for the legal practice of the ECSR, the Committee has recently examined whether Finland had violated article 12(3) of the ESC by failing to improve the social security system in an adequate manner. Whilst the ECSR did not eventually find a violation of article 12(3), in assessing the issue it held that changes to any social security system must ensure “the maintenance of a basic compulsory social security system which is sufficiently extensive”.\textsuperscript{133} Moreover, the former President of the ECSR noted in his separate concurring opinion on the decision that the inadequate level of social security in terms of article 12(1) of the ESC makes it difficult to demonstrate adequate progress in terms of article 12(3) of the ESC.\textsuperscript{134} I

\textsuperscript{129} Constitutional Court of South Africa, Government of South Africa v Grootboom (4 October 2000) CCT 11/00, para 31. See also Ssenyonjo 2009, 66.
\textsuperscript{130} General Comment 19, para 64; CESCR General Comment 14, para 48.
\textsuperscript{131} CESCR General Comment 19, para 59(a).
\textsuperscript{132} O’Cinneide 2014, 169.
\textsuperscript{133} Finnish Society of Social Rights v Finland (9 September 2014) ECSR 88/2012, para 85. The ECSR did find violations of articles 12(1) and 13(1) of the ESC.
\textsuperscript{134} Separate Concurring Opinion of Luis Jimena Quesada (9 September 2014) ECSR 88/2012, para 9.
will further discuss the relevance of the particular case in the Finnish context in Part II of the thesis.

Moreover, domestic constitutional courts have discussed the specific content of this condition. In the Latvian Pensions Case, the court held that even in a situation of rapid economic recession there is still a minimum body of rights that a state is not entitled to derogate from, i.e. the minimum core content of the social right in question. In this context the court also referred to the CESC’s statement, according to which a state should specify the groups that need special protection in situations where it is incapable of ensuring the minimum level of protection to all the risk groups. Furthermore, the Constitutional Court of Germany has found that for a measure to be reasonable, the minimum standard of rights that is in line with human dignity must be secured. Interestingly, the court held that the exact amount of state benefits should be calculated in a manner compatible with human dignity. This implies that in assessing whether a regressive measure has de facto affected the minimum level of rights, the principle of human dignity should operate as a guideline.

The underlying idea of this condition is that the minimum subsistence rights for all should always be ensured by states, regardless of the resources available and the level of economic development. The question remains, however, as to what a state is required to do in situations where its own resources are not sufficient for securing the minimum level of rights. While it is evident that international cooperation would be necessary in those cases, the specific content of the obligation to cooperate remains unclear, as noted in Chapter Two.

3.6 Legal nature of the prohibition of retrogression: A rule or a principle?

It has been presented above that the principle of non-regression consists of a series of cumulative criteria that must be met when limiting social rights. The question remains,

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135 Latvian Pensions case, para 31. See also ECSR 80/2012, paras 68-9, where the ECSR discussed the minimum level of pensions under the ESC.
136 CESC General Comment 19, para 59.
137 Constitutional Court of Germany, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9 February 2010), para 44. See also O’Cinneide 2014, 174-5. O’Cinneide notes that regressive measures which are incompatible with human dignity may be argued to clash with the ‘social state’ principle.
however, what is the nature of the principle as a legal norm? Does it operate more as a principle, as its name would suggest, or can it in certain situations have a status of a binding rule?

In legal theory, legal norms have been divided into rules and principles, depending on the impact of the norm. More precisely, one should talk about the impact the norm has in an individual situation of application: the same norm can in some cases operate as a rule, whereas in some other cases it would operate as a principle. Alexy has distinguished between legal rules and principles by noting that with rules one usually has to make a choice either to apply or not to apply the rule, whereas legal principles operate more as “optimization requirements” that need to be balanced with other applicable principles in situations of a collision. By balancing the principles one can then see, which one should have the strongest effect in that particular case. Principles are, regardless of their application or non-application to particular cases, always in force and an integral part of the legal system.

What kind of an impact can the principle of non-regression then have in individual situations of application? Prima facie it would seem that the principle of non-regression operates, indeed, merely as a principle. The principle of non-regression has not been expressly incorporated into any provision, and the specific content of it remains relatively vague. Moreover, it is challenging to picture a case where a court should decide whether to apply the principle of non-regression or not, as it usually is the legislator who should make these decisions. In this sense the principle of non-regression seems to operate as a principle, the relevance of which actualises mainly in the work of the legislature. With that said, there are some arguments worth mentioning that suggest that the principle of non-regression could, in certain situations, operate also as a rule. For the sake of clarity I will refer solely to the term prohibition of retrogression in the following presentation.

As noted, the prohibition of retrogression is, due to its nature, mainly of relevance in the work of the legislature. In this context, a human rights norm operates as a rule if it prevents

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the legislature from passing certain kinds of legislation.\textsuperscript{142} If we look at the prohibition of retrogression, this is exactly how the principle should operate. For instance, if the legislature were to choose between two bills, in order to comply with the prohibition of retrogression it should choose to pass the one that has less impact on vulnerable groups. In particular, in situations where the minimum core content of rights would otherwise be violated, the prohibition of retrogression operates as an absolute rule.\textsuperscript{143} Moreover, the prohibition of retrogression could operate as a rule in situations where the Constitutional Law Committee would find that a bill could not be passed in the ordinary order of enactment because it was not in accordance with the prohibition of retrogression and was therefore unconstitutional.\textsuperscript{144} In this sense it can be argued that the prohibition of retrogression can, in individual situations of application, operate as a \textit{rule} rather than as a principle.

Normally, however, the prohibition of retrogression seems to operate as a principle. This means that the prohibition should be balanced against other relevant principles. Again, it is the legislature who has to weight the prohibition against principles that may support adopting regressive legislation. As demonstrated above, regressive measures can also have a justifiable aim and they can be supported by other legal principles, for instance, maintaining the stability of the social welfare system. The prohibition of retrogression derives, however, from states’ human rights obligations. Human rights and fundamental rights obligations are choices of priority as made by the legislature and, consequently, the prohibition of retrogression should be regarded as having a relatively strong position in the balancing process.\textsuperscript{145}

In the second part of this thesis, I will examine the operation of the prohibition of retrogression in the Finnish system for constitutional review and human rights impact assessment.

\textsuperscript{142} See Constitutional Law Committee of Finland, PeVL 12/1982 vp and Scheinin 1991, 37.
\textsuperscript{143} Rautiainen 2013, 267-70.
\textsuperscript{144} See Scheinin 1991, 38.
PART II: PROHIBITION OF RETROGRESSION AND EFFECTIVENESS OF SOCIAL RIGHTS IN FINLAND

4. THE CONSTITUTIONAL REVIEW AND THE PROHIBITION OF RETROGRESSION

4.1 STATUS OF FUNDAMENTAL AND HUMAN RIGHTS IN FINLAND

In this part of the thesis I will examine the effectiveness of social rights in the Finnish constitutional legal context, in particular the operation of the principle of non-regression in the Finnish system. In order to find out the relevance of the principle in the Finnish legislative process and legal practice, one must first look into the Finnish constitutional law culture, in particular to the forms of constitutional review. To understand the current model of constitutional review in Finland, the traditional doctrine of constitutional review and recent developments of Finnish constitutional law must first be discussed. I will do this in four parts: First, I will describe how fundamental and human rights started to take root in Finland, enhancing the role of the courts within the realm of constitutional law. Secondly, I will introduce the domestic mechanisms for the limitation of fundamental rights. Thirdly, I will discuss the Finnish model of constitutional review and, finally, consider whether the principle of non-regression could and should be of relevance when the constitutionality of legislation is being reviewed.

The development and rise of human rights in 1990s was relatively rapid; Finland became a member of the European Council in 1989 and ratified the European Convention on Human
Rights\textsuperscript{146} (‘ECHR’) in 1990. The comprehensive reform of constitutional rights in the Finnish system entered into force on 1 August 1995 (Act No 969/1995) and was largely influenced by international human rights treaties. The revised constitution entailed a list of fundamental rights, including not only civil and political but also economic, social and cultural rights.\textsuperscript{147} In addition to the material content of constitutional rights, also the process governing the protection and monitoring of the constitutional rights has been affected by international human rights treaties: the new constitution of Finland entered into force on 1 March 2000 and contained clauses concerning the protection and effective implementation of constitutional rights. Section 22 of the 2000 Constitution provides for the duty of public authorities to guarantee the observance of constitutional and human rights. Section 74 establishes the competence of the Constitutional Law Committee to issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.\textsuperscript{148} The importance of international human rights treaties has been recognised also in sections 108 and 109, which regulate the duties of the Chancellor of Justice of the Government and the Parliamentary Ombudsman. Their duties entail, inter alia, monitoring the implementation of fundamental rights and human rights.

One major factor in the Finnish history of human rights is Finland’s accession to the European Union in 1995. As a result, the Finnish courts were granted the competence to review all national law with regards to its compliance with the EU. Moreover, in addition to its direct and indirect effect, EU law ought to have primacy over any conflicting domestic legislation.\textsuperscript{149} Since 1995, the number of cases where a Finnish court would have refused to apply domestic law due to the primacy of EU law has been relatively low. The explanations offered in the academic discussion consider Finnish legislation’s predisposition to harmony with EU law from the outset, the vast number of precedents by the European Court of Justice and the tendency of Finnish courts to interpret domestic law in conformity with EU law to

\textsuperscript{146} Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (entered into force 3 September 1953) ETS 5.
\textsuperscript{147} Heinonen and Lavapuro 2012, 11.
\textsuperscript{148} As will be discussed in chapter 4.3, the Constitutional Law Committee had the competence to review constitutionality of bills already before the constitutional reform of 1999.
avoid conflicts.\textsuperscript{150} Because of these reasons the Finnish courts have been reluctant to directly address the question concerning the possible conflict between EU law and the domestic system for the protection of fundamental and human rights.\textsuperscript{151} The Constitutional Law Committee has, however, highlighted that the domestic level of protection of constitutional rights cannot be lowered because of the implementation of EU law.\textsuperscript{152} The core idea of the Finnish system for the protection of fundamental rights and human rights, social rights included, is to establish a level of protection as high as possible. To achieve this goal it is necessary to derive the applicable legal norm from various sources, ranging from domestic system to EU law and to the international level. These different levels, after all, form one consistent system for the protection of these rights.\textsuperscript{153} In addition, international human rights treaties establish only the minimum standard in the domestic implementation of the respective rights. According to a generally accepted opinion Finnish authorities should aim to offer more extensive protection of those rights.\textsuperscript{154}

Starting from the early 1990s, Finnish courts have become increasingly aware of the relevance of human rights norms and treaties and have started to refer to them in their case law.\textsuperscript{155} The Constitutional Law Committee issued an opinion in which it noted that all domestic law should be applied in accordance with the human-rights-orientated interpretation to avoid conflicts between domestic legislation and international human rights treaties.\textsuperscript{156} The ever-growing number of references to international human rights treaties and case law of the monitoring bodies evidences that the role of human rights norms in Finland has become more and more important. In tandem with the emergence of fundamental and human rights, the traditional forms of constitutional review have also been, to some extent, challenged. The forms of constitutional review in Finland shall be further discussed in Chapter 4.3.

\textsuperscript{150} Ojanen 2009, 201-3.  
\textsuperscript{151} Ojanen 2009, 201.  
\textsuperscript{152} Constitutional Law Committee of Finland, PeVL 25/2001 vp.  
\textsuperscript{153} This question about legal pluralism in the Finnish constitutional law and human rights culture has been further discussed eg in Ojanen, Tuomas: ‘Perusoikeuspluralismin kotimaisessa tuomioistuimessa’ (2011) 4 Defensor Legis 442.  
\textsuperscript{154} Ojanen 2009, 199.  
\textsuperscript{155} Ojanen 2009, 197-8.  
\textsuperscript{156} Constitutional Law Committee of Finland, PeVL 2/1990 vp.
4.2 LIMITATION OF FUNDAMENTAL RIGHTS IN FINLAND

Before proceeding with the forms of constitutional review in the Finnish system, it is necessary to give regard to the domestic mechanisms that enable limiting of fundamental rights. These mechanisms can be divided into four categories.

First, the limitation of fundamental rights can be based on a provision of the Constitution itself, if it provides for a possibility to limit a certain right by an ordinary act. A good example of this kind of a provision is section 12(1) of the Constitution, according to which everyone has the freedom of expression. Provisions on restrictions relating to pictorial programs that are necessary for the protection of children may be laid down by an act.

Secondly, in addition to these kind of provisions, a limitation can be based on section 23 of the Constitution, which provides for exceptions to basic rights and liberties in situations of emergency. According to section 23, such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary, may be provided by an act or by a government decree. The government decree must be issued on the basis of authorisation given in an act for a special reason and it is subject to a precisely circumscribed scope of application. The grounds for provisional exceptions shall, however, be laid down by an act. An exception can be deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency that pose a serious threat to the nation. The Constitutional Law Committee has in its statement noted that the conditions of this section would be in accordance with the derogations clauses in article 2(1) of the ICESCR and in article 30 of the 1961 ESC (article F of the Revised Charter). 157 It is, however, somewhat unclear whether times of economic recession fall within the definition of a public emergency. 158

Thirdly, and perhaps most importantly, limitation of fundamental rights can be based on the so-called general conditions for the limitation of basic rights and liberties. In Finland the Constitutional Law Committee has listed a series of cumulative conditions which must be met when limiting fundamental rights by an ordinary act. These conditions are the following:

157 See Constitutional Law Committee of Finland, PeVL 309/1993 vp, chapter 3.5.
158 Tuori 2011, 719.
1) The limitation has to be based on a law;
2) The limitation has to be necessary and proportionate;
3) The limitation cannot affect the minimum core content of the right in question;
4) There has to be a legitimate end for the limitation;
5) The scope of the limitation must be sufficiently well defined;
6) The limitation must be in accordance with Finland’s obligations under international law; and
7) Individuals’ access to justice cannot be endangered.\textsuperscript{159}

While these conditions cannot be found in Finnish legislation and have been formulated in the constitutional law practice and legal literature, they have widely been considered as binding guidelines when limiting fundamental rights.\textsuperscript{160}

These conditions are, admittedly, somewhat similar to those of the prohibition of retrogression. However, the conditions of the prohibition of retrogression are a separate series of conditions and operate separately from the conditions listed above. Both sets of conditions are of natural relevance, in particular since the approach in those cases should advisably aim at the most effective enjoyment of social rights possible.\textsuperscript{161} Also, the prohibition of retrogression entails certain features inherent to the aim of effective protection of social rights and equality. If the legislator looks solely at the general conditions of limitation of fundamental rights when implementing potentially regressive measures, the measures might have undesirable discriminatory impacts on the most vulnerable groups.\textsuperscript{162}

Finally, the Finnish system also entails the possibility to limit fundamental rights without necessarily complying with any of the mechanisms described above. In those rare cases the limitation must be made in the constitutional order of enactment, in accordance with section 73 of the Constitution.\textsuperscript{163}

\textsuperscript{159} Constitutional Law Committee of Finland, PeVM 25/1994 vp, 4-5.
\textsuperscript{160} Viljanen, ‘Perusoikeuksien rajoittaminen’ 2011, 144-7.
\textsuperscript{161} Tuori 2011, 719.
\textsuperscript{162} Rautiainen 2013, 272-3.
\textsuperscript{163} See Viljanen, ‘Perusoikeuksien rajoittaminen’ 2011, 142.
4.3 FORMS OF CONSTITUTIONAL REVIEW

The Finnish constitutional system has traditionally been based on the classic idea of legislative supremacy. The model of constitutional review in Finland has been ex ante review by the Constitutional Law Committee, meaning that the Committee has examined the compatibility of a bill with the Constitution when doubts about the constitutionality of the bill have arisen. The statements by the Constitutional Law Committee have de facto had the same normative relevance as that which the decisions by constitutional courts have had in some other countries. Whilst the Committee is a political organ and consists of members of Parliament, its statements can be seen as legally persuasive since they are based on textual interpretation and travaux préparatoires of the Constitution, Committee’s own precedents and opinions of experts of constitutional law.\(^\text{164}\)

The reason for the supremacy of ex ante review can be traced back to the Constitution Act of 1919. While the old Constitution did not contain a prohibition of judicial review per se, section 92(2) was interpreted so as to preventing courts from examining constitutionality of acts of Parliament. Under section 92(2) of the old Constitution, courts and authorities were under an obligation not to apply government decrees that conflicted with the Constitution or an act of Parliament. The Chancellor of Justice, the Speaker of the Parliament and the President of the Republic had certain mandates for constitutional review, but they did not have such a significant role as that of the Constitutional Law Committee. Thus, the emphasis of the Finnish model of constitutional review was clearly on ex ante review by the Committee.\(^\text{165}\)

After decades of following the constitutional doctrine that practically prohibited courts from reviewing the constitutionality of ordinary legislation and, consequently, led to a situation where courts did not refer to provisions of the Constitution at all,\(^\text{166}\) this prohibition of judicial review was formally removed through the adoption of section 106 of the new

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\(^{165}\) Lavapuro and others 2011, 510-12.

\(^{166}\) ibid.
Constitution in 1999. Section 106 provides for the primacy of the Constitution and, consequently, for a possibility of ex post constitutional review by courts:

“If in a matter being tried by a court, the application of an Act of Parliament would be in manifest conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.”

The wording of the provision implies that the drafters of the Constitution still wanted to maintain the primacy of the ex ante constitutional review by the Constitutional Law Committee. The threshold for applying section 106 of the Constitution is relatively high. In order to apply section 106, the court must find a manifest conflict between an act and the Constitution. Moreover, finding a manifest conflict allows a court to give primacy to the provision of the Constitution only in that particular case. The court does not have the competence to repeal the act as unconstitutional. There are a number of cases where section 106 has been discussed but not applied and a group of cases where the section has been applied. To shed light on the juridical problems attached to the manifest-conflict criteria and to evaluate whether the prohibition of retrogression could be subject to this form of ex post constitutional review, I will shortly discuss some of the cases.

In the Supreme Court case KKO 2004:26 a manifest conflict between an ordinary act and the Constitution was found to take place and section 106 was applied for the first time. In that particular case, environmental authorities had issued a preservation order, prohibiting the company from altering the interior of premises of the ground floor of an apartment building that it owned. This prevented the company from freely letting out these business premises, as it was not possible to carry out the necessary alteration works. The temporary

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169 In addition to the cases mentioned below, see eg Supreme Court of Finland, KKO:2004:62, Insurance Court of Finland, 6254:2005, Supreme Administrative Court of Finland, KHO:2008:25 and Supreme Court of Finland, KKO:2015:14.
preservation order was based on the Act on the Protection of Buildings (Act No. 60 of 1985). The company asked the court to order compensation due to the loss of income. The court held, by a majority of seven votes to four, that although the act did not provide for compensation for damage caused by a temporary preservation order, the company was entitled to compensation due to the primacy of the fundamental right to property. Five judges found that the application of the act would be in manifest conflict with the property clause of the Constitution. Two judges denied this interpretation and four others based their varying positions on a constitutional rights-friendly interpretation rather than on examination of the manifest-conflict criterion. Whilst section 106 was applied, the court based its reasoning on the views of the Constitutional Law Committee on the constitutionality of the legislation in the early 1980s, thus failing to consider the more recent constitutional development, in particular the constitutional reforms of 1995 and 2000.\textsuperscript{170}

In the Supreme Administrative Court case KHO 2007:77,\textsuperscript{171} the decision of the Helsinki Administrative Court\textsuperscript{172} was overruled. The Helsinki Administrative Court had found that the provision of the Car Tax Act was in a manifest conflict with section 81 of the Constitution, which requires that the state tax must be governed by an act, which shall contain provisions on the grounds for tax liability and the amount of the tax. However, the Supreme Administrative Court held that while the formulation of the impugned provision was somewhat vague, its application would not be manifestly unconstitutional. The court based its reasoning on the travaux préparatoires of sections 81 and 106 of the Constitution.

Finally, in the most recent case on 4\textsuperscript{th} August 2015, the Helsinki Administrative Court found a manifest conflict between the Act on Registered Partnerships (950/2001) and the non-discrimination clause in section 6(2) of the Constitution.\textsuperscript{173} Section 10(1) of the Act on Registered Partnerships requires that both parties have been habitually resident in Finland for two years immediately before the registration. The Marriage Act, however, does not entail this kind of a provision. The court noted that neither the government proposal for the Act on Registered Partnerships nor the Constitutional Law Committee’s statement regarding

\textsuperscript{170} Supreme Court of Finland, KKO:2004:26, para 18.
\textsuperscript{171} Supreme Administrative Court of Finland, KHO:2007:77.
\textsuperscript{172} Helsinki Administrative Court (9 October 2006) HAO 06/1410/1.
\textsuperscript{173} Helsinki Administrative Court (4 August 2015) HAO 15/0615/2.
the constitutionality of the act contained any considerations concerning the issue. The court found that there was no acceptable reason for treating the parties to the case differently on the ground of their sexual orientation and held that section 10(1) of the Act on Registered Partnerships was in manifest conflict with section 6(2) of the Constitution. It must be noted that a bill legalizing same-sex marriage in Finland has been passed by the parliament in December 2014 but will not enter into force until March 2017. The bill is the first legislation to become an act as the result of a citizen’s initiative. There has been vivid public debate concerning this issue in Finland. Considering Finnish courts’ previously reticent approach to finding a manifest conflict and giving primacy to the Constitution, the case at hand can be seen as a certain kind of statement by the judiciary, both on the right to same-sex marriage and on the interpretation of the manifest-conflict criterion.

From these cases one can draw a conclusion that the courts have indeed required the conflict between an ordinary act and the Constitution to be nearly self-evident. They have based their reasoning on *travaux preparatoires* of the Constitution and on the views of the Constitutional Law Committee vis-à-vis the constitutionality of particular bills at the time of their passing. This can be seen as problematic, as it is not possible for the Committee to consider all possible individual situations that might emerge in the future and where an act could be in conflict with the Constitution. Lavapuro, Ojanen and Scheinin have noted that the manifest-conflict criterion creates a problematic grey area between the judicial competence under section 106 and the constitutional and human rights orientated interpretation. There might appear cases where the conflict between an act and the Constitution is less evident but cannot be resolved via the fundamental rights-friendly interpretation.174

Moreover, application of section 106 has not been perfectly consistent in the Finnish legal practice, as one can see from the so-called paternity cases.175 These cases have dealt with the question of whether the provision on the Implementation of the Paternity Act is in manifest conflict with the equality clause of the Constitution. The provision requires children

174 Lavapuro and others 2011, 527-30. See also Lavapuro, Juha: Uusi perustuslakikontrolli (Suomalainen Lakimiesyhdistys 2010), 213-16.
who have been born before the entry into force of the Paternity Act to file a paternity suit within five years from the entry into force of the act. In four out of these six cases the Supreme Court has found the provision to be discriminatory. In two of the cases it has expressly refused to apply section 106 of the Constitution. In academic discussion it has been argued that these cases demonstrate the problem central to the manifest-conflict criterion as the court seemed to put aside the possibility of constitutional rights-friendly interpretation. It seemed to think that the only two options available were either the literal application of section 7(2) of the Act on the Implementation of the Paternity Act or finding a manifest conflict.\textsuperscript{176} This, of course, cannot be seen as a desirable situation from the viewpoint of the effective implementation of human rights.

Regardless of the somewhat reluctant attitude of Finnish courts towards judicial review of ordinary legislation, it can be argued that the Finnish model of constitutional review has been undergoing certain significant transformations during the past couple of decades. Whilst ex ante review by the Constitutional Law Committee is still the supreme form of constitutional review in Finland, adoption of section 106 of the Constitution has brought the Finnish system closer to the so-called weak-form models of constitutional review.\textsuperscript{177} I will next examine the concrete ways through which the principle of non-regression could be taken into account in the Finnish system of constitutional review.

\textbf{4.4 How does the prohibition of retrogression operate in the Finnish system?}

As Finnish public authorities are, according to section 22 of the Constitution, under an obligation to ensure compliance with international human rights obligations, they are also under an obligation to guarantee compliance with the principle of non-regression. As a main rule, the principle of non-regression should be taken into account by the legislator. Because of its nature, the principle of non-regression should be considered before adopting any possibly regressive measures and legislation. Moreover, unjustified regressive measures often take place through the repeal of an act that guarantees a certain level of social rights.


\textsuperscript{177} On the concept of the weak-form review, see Lavapuro 2010, 243-67. See also Lavapuro and others 2011, 505-10.
In these situations it is not even possible for a court to refer to legislation that is no more in force, not to mention to examine the legality of the revocation. The prohibition of retrogression could fall within the scope of ex post judicial review only in exceptional situations. These situations will be addressed at the end of this chapter.

When we talk about the ex ante review and the principle of non-regression, it is important to note that the principle of non-regression must be taken into account by the legislator in two kinds of situations. First, the legislator must ensure compliance with the principle when passing new ordinary legislation. Secondly, and perhaps even more importantly, the principle should be respected in the context of budgetary decision-making. In Finland, the drafting process of ordinary legislation normally entails systematic ex ante constitutional review by the Constitutional Law Committee and any limitations must be in compliance with the general conditions of limitation of fundamental rights. Interestingly enough, the budgetary decision-making by the parliament has not de facto been subject to any systematic review mechanisms. Budget decisions are made in one hearing of the Parliament and the decision needs to be supported by merely a simple majority. It follows that while budgetary decision-making de facto affects the realisation of social rights in Finland, the decision-making process itself is not subject to systematic human rights impact assessment and constitutional review. This is viewed as problematic from the viewpoint of constitutional law. Without effective human rights impact assessment vis-à-vis the budget decisions, the principle of non-regression can also be disregarded. This, of course, can have a negative impact upon the rights of the most vulnerable and, thus, upon equality generally.

178 Rautiainen 2013, 275-6.
180 See chapter 4.2.
181 The Constitutional Law Committee has stated that budgetary decisions should be subject to fundamental rights impact assessment. See eg Constitutional Law Committee of Finland, PeVM 25/1994 vp.
The Constitutional Law Committee has touched upon the relevance of the prohibition of retrogression in some of its statements. It has noted that during an economic recession it should be possible, at least to some extent, to take regressive measures and lower the level of social rights. According to the Committee, it is logical to take into consideration the state of public economy when deciding on the level of services financed by the public sector.\(^\text{184}\)

Instead of elaborating on the content of the principle of non-regression, the Committee has, however, focused mainly upon the obligation to protect the minimum core content of the right in question. It has, for instance, stated that organising education as subject to a charge could not amount to a decrease in the student places which were free of charge\(^\text{185}\) and that extending the waiting period of unemployment security by two days was not a regressive measure of constitutional significance.\(^\text{186}\)

More recently, the Constitutional Law Committee has been required to examine the constitutionality of the government proposal on social welfare and health care reform.\(^\text{187}\)

While the prohibition of retrogression has not been directly addressed, certain related observations can be made. First of all, the Committee emphasised that the reform is indeed necessary in order to ensure the effective realisation of social rights, in particular of the right to basic subsistence under section 19 of the Constitution. It can be argued that through this statement the Committee acknowledged the government’s obligation to realise progressively social rights. Secondly, the Committee’s reasoning when it rejected the Government’s proposal was linked with the principle of non-regression. The Committee rejected the proposal because it found that the proposed arrangements would cause unequal economic burden to some municipalities. In that sense the evaluation by the Committee was closely linked to the principle of equality and, from the viewpoint of the principle of non-regression, to the condition of non-discrimination. Here, of course, the measures in question would not necessarily have been regressive. Committee’s statements demonstrate, however, that principles of equality and non-discrimination are an inherent part of the implementation of positive rights.

\(^{184}\) Constitutional Law Committee of Finland, PeVM 25/1994 vp.

\(^{185}\) Constitutional Law Committee of Finland, PeVL 14/2007 vp.

\(^{186}\) Constitutional Law Committee of Finland, PeVL 16/1996 vp.

As for the ex post review, it can be argued that the principle of non-regression could be of relevance in two types of situations. First, the principle can be taken into account through a human rights orientated interpretation. For instance, in relation to the reform of the Act on Social Assistance (1412/1997) the Constitutional Law Committee noted that impacts on the most vulnerable groups and the creation of new marginalised groups can be avoided through a fundamental rights friendly interpretation of the new legislation by courts.\(^\text{188}\) In practice this can lead to situations where a court departs rather significantly from the wording of the Social Assistance Act in order to avoid generating new marginalised groups in society and to promote equality.\(^\text{189}\) One can, of course, ask whether it would be more advisable for the legislator to seek to already ensure the accomplishment of this goal in the course of the drafting process. This criticism is particularly topical in light of the recent decisions of the ECSR at a social security level in Finland. In its decision 88/2012, the ECSR found that Finland’s level of social security was in violation of article 12(1) of the ESC as it fell below 50% of median income.\(^\text{190}\) The Finnish Government sought to justify the level of basic social assistance by stating that in addition to the basic amount of the social allowance, a person who is entitled to social assistance may receive other forms of assistance.\(^\text{191}\) The right to these other forms of assistance is not, however, a subjective right, but rather subject to certain specific criteria. Therefore the ECSR concluded that the level of social security in Finland was not sufficient. The ECSR seemed to require the state to guarantee adequate social assistance in its legislation for all, so that reaching an adequate level would not be dependent upon the fulfilment of certain special prerequisites.\(^\text{192}\) In that sense one can conclude that seeking to secure the fulfilment of social rights through the method of human rights friendly interpretation may not be sufficient in light of the Committee’s decision.\(^\text{193}\)

Secondly, a court may have to consider the application of the principle of non-regression in cases where an individual has based her claim on subjective social rights, which are directly

\(^{188}\) Constitutional Law Committee of Finland, PeVL 35/2012 vp.
\(^{189}\) See Rautiainen 2013, 276-7, in particular footnote 74.
\(^{190}\) ECSR 88/2012, paras 110-25.
\(^{191}\) ECSR 88/2012, paras 101-9.
\(^{192}\) ECSR 88/2012, para 120.
enforceable through the courts.\textsuperscript{194} Finland’s Constitution provides for two subjective rights: the right to minimum level of subsistence under section 19(2) and the right to free basic education under section 16(1). If an individual feels that her subjective constitutional right has not been realised, she can raise a claim in front of a court of justice and base her claim directly on the constitutional provision, even if ordinary legislation would not grant her that right. In these cases the question is, however, more about the Government’s responsibility to implement fundamental rights and the direct effect of these rights rather than the applicability of the principle of non-regression.\textsuperscript{195}

Even so, one might contemplate that the principle of non-regression could be of relevance in application of section 106 of the Constitution. As noted, public authorities have an obligation to ensure compliance with international human rights norms under section 22 of the Constitution. Based on the considerations in the first part of the thesis, it can be argued that the prohibition of retrogression forms a part of these international human rights obligations. Therefore, hypothetically, there could be a situation where an individual’s fundamental subjective right, for instance the right to basic subsistence, has not been fully realised because of regressive legislative measures. Could a court in this situation find the new legislation to be in conflict with the Constitution, in particular with section 22? Judging from the previous case law on the interpretation of section 106 of the Constitution, the answer to this question appears to be negative. It seems highly unlikely that a court would solve this kind of a case through application of section 106. This is, most of all, because the threshold for finding a manifest conflict between an ordinary act and the Constitution is relatively high. The principle of non-regression is, after all, not a clearly defined legal principle and it is not expressly mentioned in any of the applicable human rights instruments, not to mention in the Finnish Constitution. Moreover, this kind of a case would probably be solved through a fundamental rights-friendly interpretation or through a direct reference to the respective subjective social right under the Constitution. If section 106 were to be applied, then the manifest conflict would quite likely take place between an ordinary act and the subjective constitutional right, without any reference to the principle of non-regression.

\textsuperscript{194} On the definition of subjective rights, see Tuori, Kaarlo and Kotkas, Tuomas: Sosiaalioikeus (WSOYpro 2008), 242-3.

\textsuperscript{195} Rautiainen 2013, 276.
As demonstrated above, it is certainly not an established rule that claims concerning social rights or the constitutionality of ordinary legislation vis-à-vis social rights could be brought before courts, as not nearly all of the social rights have been guaranteed as subjective rights. This raises the question of whether social rights are de facto effective. In the next chapter I will address the issue of effectiveness of social rights. In particular, the focus will be on the monitoring system of social rights and on remedies that are available. The first two parts of the chapter contain a more theoretical approach to the question of effectiveness of social rights and the principle of non-regression. I will try to demonstrate that the effective realisation of social rights is important in a democratic society, as there is good reason to believe that effective social rights promote equality and democracy. Subsequently, I will examine what remedies are available in Finland for an individual when they feel that their social rights have not been fully realised and, finally, I will evaluate the effectiveness of the Finnish system for the protection of positive rights.
5. Effectiveness of Social Rights in Finland

5.1 Criteria for Assessing Effectiveness

It can be argued that the starting point for the effective realisation of social rights is the positive attitude in society towards the implementation of social rights. Promoting social rights must be seen as one of the fundamental values in the democratic society, and the state must be willing to commit itself to the full realisation of social rights. However, this is only a starting point. In addition to good faith, a state must de facto have the capacity to make the realisation of social rights effective. One must ask, therefore, what does this mean in practice?

First, there must be an effective supervisory system for the realisation of social rights within the state. In particular, the supervisory authorities ought to be capable of assessing compliance with the empirical dimension of the prohibition of retrogression, i.e. evaluating whether the measures taken have de facto had a regressive impact on the level of social rights. This would include both the domestic and the international monitoring mechanisms. In chapter 5.3 I will examine the supervisory mechanisms that are relevant in Finland.

Secondly, an individual must have access to effective remedies when she feels that her social rights have not been fully realised. With effective remedies for an individual, one can refer to the justiciability of social rights; the respective right as directly enforceable within the courts. These remedies can, however, entail also so-called administrative remedies. While

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197 CESCR, General Comment 3, paras 5-7.
an individual cannot enforce any substantive rights through an administrative complaints procedure per se, the procedure offers means for an individual to express her dissatisfaction with the level of realisation of rights. This makes it possible for an administrative authority to detect and intervene in illegal or reprehensible conduct of a social service provider.\textsuperscript{198} Administrative complaints procedures are, therefore, closely linked to the idea of effective supervisory system.

Finally, the effectiveness of social rights requires comprehensive and continuous human rights impact assessment by the legislature, courts and other public authorities. It can be argued that through effective human rights impact assessment the principle of non-regression would also be sufficiently taken into account.\textsuperscript{199} Whether this kind of an assessment is being carried out is, however, also a question of policy and the predominant attitude within the particular state. In the following chapters I will examine whether the Finnish system for protection of social rights can be regarded as effective. In doing this I will utilise the concept of the \textit{proactive model}, which is an alternative model for promoting effectiveness of social rights as opposed to those based solely on judicial intervention. The idea of the proactive model is that the responsibility for addressing ineffectiveness in the realisation of social rights, and inequality in the society, lies on those who are best equipped to do so. This means that actively promoting the effective realisation of social rights is not solely a task of courts and the judicial process, but rather a task of all public authorities.\textsuperscript{200} In Finland, these authorities entail, in addition to courts, in particular the legislature and administrative supervisory authorities and, to some extent, non-governmental organisations in the field of social law.

\textbf{5.2 Effectiveness of Social Rights as a Tool for Promoting Equality, Justice and Democracy}

Before proceeding to examine the effectiveness of the Finnish legal system, one must shortly discuss the question of why should social rights be implemented as effectively as possible. From the Finnish constitutional law perspective, promoting participation, democracy and

\begin{itemize}
  \item \textsuperscript{198} Puimalainen, Mikko: 'Mitä Euroopan unionin perusoikeudet merkitsevät laillisuusvalvonnalle?' in Heinonen, Tuuli and Lavapuro, Juha (eds): Oikeuskulttuurin eurooppalaistuminen (Suomalainen Lakimiesyhdistys 2012), 267-8.
  \item \textsuperscript{199} Rautiainen 2013, 280.
  \item \textsuperscript{200} See Fredman 2008, 189.
\end{itemize}
justice in society are fundamental principles expressly mentioned in the Constitution of Finland. According to section 1(2), the Constitution shall guarantee the inviolability of human dignity, the freedom and rights of the individual, and promote justice in society. Further, according to section 2(2) of the Constitution, democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions. According to section 6(1) of the Constitution, everyone is equal before the law. The Constitutional Law Committee of Finland has noted that promoting justice in society is closely linked with the effective realisation of economic, social and cultural rights. The obligation of public authorities to guarantee the observance of fundamental and human rights in the society can also be seen as crystallising the fundamental values expressed in sections 1 and 2 of the Constitution.

It has, indeed, been argued that the effective realisation of social rights promotes equality and democracy in society. This is because effective social rights promote the transparency of and participation in the decision-making process. This, subsequently, increases the level of participation of the most vulnerable groups in the decision-making process and, therefore, increases equality in the society. Wide participation of the vulnerable groups of society then, in turn, strengthens the status of social rights in the society. The FRA, for instance, has noted that countries that promote participation and transparency of decision-making tackle the challenges of economic crisis much better.

If one looks at the question from the viewpoint of the principle of non-regression, it can be noted that the principle, indeed, aims at tackling the inequality in society. One of the cumulative conditions of the principle of non-regression is, as noted above in chapter three, that the regressive step cannot be discriminatory or targeted at the most vulnerable groups. The importance of the principle of non-regression in protecting equality in society becomes

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203 On the role of participation in promoting equality, see Fredman 2008, 105-13 and 199-202.
204 FRA 2010, 14-5.
emphasised in times of economic crisis, as austerity measures create a risk of rising inequality.\textsuperscript{205}

As can be seen, effective social rights increase the level of participation in the decision-making process. Consequently, effective realisation of social rights contributes to the effective realisation of civil and political rights, such as the freedom of expression, electoral and participatory rights and the freedom of assembly. Also in this sense, therefore, the effectiveness of social rights is of importance. Further, this implies that too strict a distinction between so-called negative and positive rights may be artificial and harmful for the effective implementation of human rights as a whole.\textsuperscript{206}

5.3 Remedies Available in Finland

As noted above, most of the positive rights are not directly enforceable in courts. This is not to say that Finnish courts would not treat subjective social rights and their dimensions as justiciable. The Supreme Administrative Court deals annually with several cases concerning the right to basic subsistence.\textsuperscript{207} Also the right to basic education is directly enforceable and has been applied by courts also ex officio.\textsuperscript{208} There are, however, several other positive rights that are not subjective rights and as such not directly enforceable. The purpose of this chapter is to find out whether there are effective remedies for individuals in Finland vis-à-vis realisation of these social rights. I will first cast light upon the domestic administrative remedies available for individuals. As the ICESCR and ESC provide for certain monitoring and complaints procedures available for people living in Finland, these supranational mechanisms will also be addressed.

For a start, it must be noted that with administrative remedies, for the purposes of this thesis, one refers to domestic supervising mechanisms. The purpose of these mechanisms is to

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\textsuperscript{206} See eg Tuori 2011, 712.

\textsuperscript{207} On the cases dealt with in 2014, see eg Supreme Administrative Court of Finland, KHO:2014:136, Supreme Administrative Court of Finland, KHO:2014:178 and Supreme Administrative Court of Finland, KHO:2014:196.

\textsuperscript{208} See eg Supreme Administrative Court of Finland, KHO:2009:33.
ensure that customers of social welfare and health care services receive appropriate treatment and their rights as customers are being respected. The importance of these mechanisms lies in particular in supervising the realisation of those positive rights that derive from the field of constitutional law but do not have a status of subjective rights. One cannot, however, enforce the substantive content of any positive rights through these mechanisms, not even of subjective rights. Only courts have the competence to handle appeals.

In Finland it is the responsibility of a municipality to organise necessary social welfare and health care services within its region, as stipulated in Act on Social Welfare, section 14 (1301/2014). Municipalities have, of course, the responsibility to supervise its service providers and a customer can file a complaint directly to the municipality in question. As public authorities, municipalities are equally obligated to ensure compliance with fundamental rights and human rights in accordance with section 22 of the Constitution. In addition to this, the Government carries out nationwide supervising. Tuori separates between different administrative monitoring systems based on the differences in instituting the proceedings. In his view, there are three relevant categories of proceedings:

1) Supervising service providers in the course of the licensing process;
2) Ex officio supervising by the supervisory authority; and
3) Supervisory process triggered by an administrative complaint of an individual.

For the purposes of this thesis the third category is of further interest. An individual can file her administrative complaint, depending on the particular situation, either to the Parliamentary Ombudsman, the Chancellor of Justice, National Supervisory Authority for Welfare and Health (Valvira), or to one of the six Regional State Administrative Agencies (Aluehallintovirastot). Filing an administrative complaint means informing the supervisory authority about possible illegalities or other reprehensible conduct related to implementation of social welfare and health services. Competence of the Chancellor of Justice and the Parliamentary Ombudsman derive from the Constitution of Finland. According to its section

209 See also Tuori and Kotkas 2008, 30.
211 Tuori and Kotkas 2008, 628.
108(1), the Chancellor of Justice shall ensure that the courts of law, the other authorities and the civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. In the performance of his or her duties, the Chancellor of Justice monitors the implementation of basic rights and liberties and human rights. Further, in section 109(1) of the Constitution it has been provided for the similar mandate of the Parliamentary Ombudsman. The Parliamentary Ombudsman has noted in his annual reports that since 2000 nearly all supervisory tasks of the Ombudsman have entailed issues related to constitutional rights and human rights.\footnote{Eduskunnan oikeusasiamiehen toimintakertomus vuodelta 2014 (Juvenes Print 2015), 58.} It has been noted that currently Ombudsman’s supervisory proceedings seems to be one of the most important mechanisms for ensuring the effective protection of constitutional and human rights in Finland.\footnote{Eduskunnan oikeusasiamiehen toimintakertomus vuodelta 2014 (Juvenes Print 2015), 58.}

Yet another supervisory authority should be mentioned in this context. Starting from June 2015, the National Discrimination and Equality Tribunal of Finland has been appointed by the Government to supervise compliance with the Non-Discrimination Act and the Act on Equality between Women and Men both in private activities and in public administrative and commercial activities. The tribunal is an impartial and independent judicial body and it has the mandate to prohibit continued or repeated discrimination and impose a conditional fine to enforce compliance with its injunctions and order payment of such a fine. The tribunal does not, however, have competence to order compensation to be paid. A decision of the tribunal may be appealed to the competent Administrative Court.\footnote{National Discrimination and Equality Tribunal of Finland at http://yvtltk.fi/en/index.html (accessed 4 August 2015).}

As for monitoring systems organised by international organs, one should mention the state reporting system under the ESC, the collective complaint system under the additional protocol to the ESC, the state reporting procedure under the ICESCR and the individual complaints procedure and inter-state communications under the optional protocol to the ICESCR.\footnote{Optional Protocol to the International Covenant on Economic, Social and Cultural rights (adopted 10 December 2008, entered into force 5 May 2013).} All of these mechanisms are available remedies also in Finland, as Finland is a state party to both of these human rights instruments and has ratified both of the protocols.
The monitoring system under the ESC is divided into the so-called reporting procedure and the collective complaints procedure. The reporting procedure means that each state delivers a periodic report on the implementation of the rights under the ESC to the ECSR, and after examination of the report the ECSR issues its conclusion on compliance with the respective rights within that state. Under the additional protocol to the ESC, complaints of violations of the ESC may be lodged with the ECSR by organisations.\(^{216}\) As can be seen, the ESC does not establish a system for an individual complaint procedure. On the European regional level, this kind of a mechanism is available under the ECHR, but as noted above, the ECHR concerns solely civil and political rights. Social rights could have some relevance in proceedings of the ECtHR mainly through application of the non-discrimination clause in the ECHR.

Unlike the supervisory mechanism of the ESC, the ICESCR and its Optional Protocol do not provide for a collective complaint procedure. A state party to the ICESCR is, likewise, required to submit periodic reports on compliance with the ICESCR to the CESCR. Moreover, as Finland has ratified the Optional Protocol to the ICESCR and it has entered into force on 30 April 2014 (Finnish Government Decree 17/2014), it is now possible for an individual or a group of individuals to submit a communication to the CESCR, claiming to be a victim of a violation of any of the economic, social and cultural rights set forth in the ICESCR. These rights entail, inter alia, article 2(1) and the principle of progressive realisation. According to article 3 of the Optional Protocol a communication is admissible if all available domestic remedies have been exhausted. Moreover, the communication has to be filed within a year from the exhaustion of local remedies and the communication has to be compatible racione loci, racione temporis and racione materiae with the ICESCR. A communication must be in writing and the same matter cannot be examined by another international organ. Exhaustion of local remedies is, admittedly, a common condition of admissibility in international human rights law.\(^{217}\) Remedies that are available after violations of social rights do, however, somewhat differ from those that are available after a


violation of civil and political rights. In Finland, as demonstrated above, domestic system of remedies comprises various administrative complaint procedures. During the drafting process of the protocol states had differing opinions on as to whether also administrative remedies should be exhausted before submitting a communication to the CESCR in accordance with the Optional Protocol. The situation has been left somewhat unclear, and will possibly require a clarifying statement from the CESCR in the future.\textsuperscript{218}

From the viewpoint of the principles of progressive realisation and non-regression, article 8(4) of the Optional Protocol is of particular interest. According to article 8(4) of the Protocol, the CESCR shall consider the reasonableness of the steps taken by the state party. In doing so, the CESCR shall bear in mind that the state party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant. By including this provision in the protocol, parties sought to ensure that the CESCR would not have too wide a mandate to evaluate governments’ economic and budgetary choices.\textsuperscript{219} It is nevertheless interesting that this mechanism now, at least technically, allows an individual to file a complaint concerning state’s failure to comply with the principle of non-regression.

To conclude, there are several domestic and supranational supervisory mechanisms for supervising the effective implementation of social rights. These mechanisms do not, however, entail the same judicial mandate as what the domestic courts have when they examine the realisation of subjective social rights enforceable in courts. One may ask, therefore, whether the Finnish system of monitoring and remedies sufficiently promotes the effectiveness of social rights and, subsequently, increases equality and democracy in the society.\textsuperscript{220} In the next chapter I will try to answer to this question.

\textsuperscript{218} See eg Hyttinen, Sanna: ‘Kauan odotettu valitusmahdollisuus taloudellisia, sosiaalisia ja sivistyksellisiä oikeuksia koskevaan yleissopimukseen’ (2009) 2 Oikeus 207, 211.

\textsuperscript{219} Hyttinen 2009, 212-14.

\textsuperscript{220} On the interrelationship between effectiveness of positive rights and democracy, see eg Fredman 2008, 38-40.
5.4 Evaluating the effectiveness of the Finnish system for the protection of social rights

First, it must be noted that as a state party to the ICESCR and the ESC, Finland is under an obligation to provide individuals with effective remedies and to monitor the implementation of social rights. Moreover, as demonstrated above, Finland has committed itself to the effective realisation of social rights and to compliance with the prohibition of retrogression inter alia through sections 1, 2 and 22 of the Constitution.

Under the ICESCR, the state has a right to implement social rights through non-legislative measures also. This does not mean that taking non-legislative measures could justify a situation where effective remedies do not exists. Quite the opposite; the state should ensure that the remedies may be sought either from judicial or administrative authorities.\footnote{CESCR, General Comment 3, paras 5-7. See also Maastricht Guidelines, paras 16 and 22-3.} The ECSR has stated that especially in times of economic crisis “governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most”.\footnote{European Committee of Social Rights, ‘General introduction to Conclusions XIX-2 (2009)’, 12-3.}

Secondly, as demonstrated in Chapter Three, the prohibition of retrogression requires a state to conduct sufficient research and analysis into the impact of any regressive measures on vulnerable groups in order to ascertain the measure that has the most minimal impact on the rights of the most vulnerable groups. Therefore, it can be argued that conducting a social rights impact assessment is an inherent part of the obligation not to take any unnecessary regressive steps. The FRA has considered human rights impact assessment as crucial in revealing how the overall burden of regressive measures is being shared between different groups of society.\footnote{FRA 2010, 20.} Conducting sufficient impact assessment prevents the state from violating the principle of non-regression and promotes the effectiveness of social rights. Next, I will evaluate whether the Finnish system of monitoring makes it possible to carry out this kind of analysis.
The idea of so-called proactive models of monitoring is to acknowledge that equality between citizens requires a state not only to refrain from violating the right to equality but also to actively promote it.\textsuperscript{224} This can happen, for instance, through effective realisation of social rights. Proactive models are not based merely on the competence of courts to review whether rights have been violated, but on the idea that all public authorities should participate in addressing structural and institutional inequalities in the society.\textsuperscript{225}

In Finland, monitoring compliance with human rights and fundamental rights is, as noted above, one of the most important tasks of the Parliamentary Ombudsman and the Chancellor of Justice. Both authorities provide an annual report on their supervisory activities, and the Constitutional Law Committee has found that the report should entail a section on the realisation of fundamental rights and human rights.\textsuperscript{226} The Finnish model for monitoring compliance with social rights is strongly based on the mandate of administrative authorities to receive administrative complaints and to conduct supervision. Whilst administrative authorities do not have the authority to decide on the implementation of regressive legislation and, consequently, effectively supervise compliance with the principle of non-regression, they can spot areas where social rights are not being fully realised. This, in turn, can indicate to the legislature how they might promote the realisation of social rights; i.e. what the next progressive step of the state should be. Citizens’ administrative complaints can also be useful in evaluating compliance with the empirical dimension of the principle of non-regression, i.e. whether new legislation has de facto had a negative impact on the level of social rights in Finland. In this sense the supervisory work of the administrative authorities complements the monitoring system, and the Finnish system can be argued to have certain characteristics of a proactive model.\textsuperscript{227}

In the effective realisation of social rights in Finland - in addition to the work of administrative authorities - the role of non-governmental organisations is also, to some extent, relevant. As the additional protocol to the ESC now provides for a system of collective complaints and has been ratified by Finland, non-governmental organisations can

\textsuperscript{224} Fredman 2008, 189.
\textsuperscript{225} Ibid.
\textsuperscript{226} Constitutional Law Committee of Finland, PeVM 25/1994 vp.
\textsuperscript{227} As a principle, the prohibition of retrogression by definition affects the work of all public authorities. See Scheinin 1991, 37.
submit complaints on “unsatisfactory application” of the ESC. According to the preamble of the additional protocol, the purpose of the collective complaints procedure is to “improve the effective enforcement of the social rights guaranteed by the Charter”. The Finnish Society of Social Rights (“Suomen Sosiaalioikeudellinen Seura r.y.”) filed a complaint in December 2012 on the inadequate level of social security in Finland. As elaborated in the previous chapters, this led the ECSR to find that Finland was not complying with articles 12(1) and 13(1) of the ESC.

As for the effectiveness of social rights in Finnish courts, it has been noted in the academic discussion that courts do not tend to refer to social rights in their legal practice. In fact, it has proven to be relatively difficult to get access to any data on the number of cases where social rights would have been referred to.\(^{228}\) When the courts have invoked social rights, they have referred to them merely as fundamental rights but have not simultaneously referred to respective human rights. This can be seen as problematic from the viewpoint of effectiveness for two reasons: first, the catalogue of social fundamental rights in the Constitution of Finland does not codify all the social rights provided for in the ICESCR. Those social rights are, however, binding in Finland as international human rights norms and must be protected, as stipulated in section 22 of the Constitution. Second, even though the level of domestic protection of fundamental rights has traditionally been thought to be higher than that of international human rights,\(^{229}\) it is possible that the international minimum standards evolve through the practice of the international supervisory bodies, such as the ECSR and the CESCR.\(^{230}\) In that sense the domestic courts should be aware of the recent practice of these organs in order to effectively protect social rights in Finland.

As for the effectiveness of the prohibition of retrogression in the Finnish courts, one particular case can be mentioned. In the Supreme Court case KKO:2008:83 a group of pensioners sought compensation from the state because of reductions in their pensions. They argued, inter alia, that the regressive legislation was in manifest conflict with the property clause of the Constitution. The Supreme Court did not, however, address any substantive


\(^{229}\) See, for instance, Rautiainen 2013, 267-8.

issues in the judgement, as it found that the question of compensation should be addressed by the Insurance Court and only after individuals had received concrete decisions on the amount of their pension. The case at hand demonstrates well the problem attached to the ex post review of compliance with the prohibition of retrogression. First, the reduction in the level of rights of an individual cannot be seen as a violation of the principle of non-regression per se. A more comprehensive analysis on the regressive impact of measures would be required. Second, the claims raised in courts often concern violations of subjective social rights or, as in the case at hand, the right to property. The prohibition of retrogression can, however, be disregarded also by decreasing the level of other social rights, i.e. those not directly enforceable through courts. From the viewpoint of effectiveness of social rights this distinction between different social rights might appear problematic; when the Government has an absolute obligation to guarantee the effective enjoyment of certain subjective social rights, the realisation of other social rights might not be sufficiently considered during the budgetary decision-making process.

Finally, it must be asked whether the realisation of social rights can be effective if the budgetary decision-making is not subject to systematic human rights impact assessment. Budgetary decisions have, after all, an important role in allocating state resources. The fact that this allocation of resources is not subject to systematic constitutional and human rights review has been seen as problematic. Social rights often pose positive obligations for a state, and therefore state compliance with the principles of progressive realisation and non-regression are closely linked with the amount of available resources. The Government’s budgetary decisions are not, however, subject to ex ante constitutional review by the Constitutional Law Committee, at least not to the same extent as new legislative proposals.

In Finland, the municipalities have the right to self-government and they are responsible for the realisation of rights that derive from the social rights guaranteed in the Constitution. They are not, however, under an obligation to make sure that they allocate sufficient resources for this purpose in their budgets. This has been seen as one of the major problems

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231 Supreme Court of Finland KKO:2008:83, paras 6-8.
232 Rautiainen 2013, 275.
of the effective realisation of social rights in Finland.\textsuperscript{235} It must be noted that the Government cannot escape its responsibility to guarantee compliance with the prohibition of retrogression and the effective implementation of social rights by delegating the realisation of social rights to municipalities. If the municipalities cannot provide adequate services due to shortage of resources, it is the Government who is responsible for any violations of social rights.\textsuperscript{236} Therefore, the Government should ensure that its budgetary decision-making and resource allocations are in compliance with the state’s human rights obligations, in particular with the prohibition of retrogression.

Budgetary decision-making has not been subject to systematic human rights impact assessment and constitutional review partly because it has been traditionally seen as a political, rather than a legal, process.\textsuperscript{237} However, in light of section 22 of the Constitution, this should not be the case. As all public authorities are under an obligation to guarantee the observance of human rights, the budgetary decisions should also be subject to human rights impact assessment, particularly since it is arguably the most effective way to ensure compliance with the principle of non-regression.

\textsuperscript{235} Rautiainen 2013, 277.
\textsuperscript{236} Viljanen, ‘Perusoikeuksien soveltamisala’ 2011, 118.
\textsuperscript{237} Rautiainen 2013, 279.
6. CONCLUSIONS

The prohibition of retrogression places an obligation upon the state to avoid taking any unnecessary regressive steps when progressively realising social rights. The underlying idea of this prohibition is to ensure that states would not arbitrarily depart from the objective of effective realisation of social rights. The effective realisation of social rights can be seen as a crucial factor in promoting equality and democracy in society, as it promotes the participation of the most vulnerable groups in the decision-making process. In that sense, the traditional distinction of economic, social and cultural rights and civil and political rights into so-called positive duties and duties of restraint can be seen as somewhat artificial. Effective realisation of social rights requires the effective realisation of civil and political rights, and vice versa. Moreover, both groups of rights entail dimensions of both positive and negative obligations.

The first aim of this thesis was to find what is the normative nature of the prohibition of retrogression and which conditions does the prohibition consist of. The prohibition of retrogression has its origins in article 2(1) of the ICESCR and can also be derived from article 12(3) of the ESC. It operates together with the principle of progressive realisation, which requires a state to achieve progressively the full realisation of social rights and aim towards the imaginary, “perfect” level of rights. This does not, however, mean that states would in all situations be prohibited from taking any regressive steps.

In the course of the current economic crisis, several European countries have been almost forced to resort to certain austerity measures due to the lack of resources. Consequently,
several supranational human rights bodies and domestic constitutional courts have given decisions and statements on the justifiability of these measures. From these statements one can ascertain certain requirements which are consistently imposed by the prohibition of retrogression: the regressive measure has to be temporary; it has to be necessary and proportionate; it cannot be discriminatory, and; the legislature has to protect the minimum core content of the right in question.

If one compares these requirements to the general conditions of the limitation of fundamental rights in Finland, certain parallels can be drawn. With that said, the conditions also do somewhat differ from each other. First, the general conditions of limitation in Finland do not entail the requirement of impermanence. Instead, it is one of the conditions of provisional expectations to fundamental rights in situations of an emergency under section 23 of the Constitution of Finland. Secondly, even though the protection of the minimum core content is a part of both of these series of conditions, the domestic threshold of the minimum level of rights may be higher than the one under international human rights law. Lastly, the requirement of non-discrimination is inherent to the principle of non-regression only. It reflects the overall idea behind the effective realisation of social rights; legislature and all public authorities of a democratic society should always seek to promote equality and ensure that regressive measures do not have a negative impact on the rights of the most vulnerable groups.

Compliance with the prohibition of retrogression should, to a great extent, be secured by the legislator when implementing possibly regressive legislation or deciding on the state’s budget. The prohibition may, however, have relevance in courts through a human-rights friendly interpretation or application of certain subjective social rights that can be directly enforced through courts. The prohibition of retrogression operates mostly as a principle and can be tackled by a weightier principle in individual situations of application. The prohibition can sometimes, however, operate as an absolute rule; for instance, when there is a risk that a regressive measure might fail to protect the minimum core content of the social right in question.

The second aim of this thesis was to find out whether the realisation of social rights in Finland passes the test of effectiveness and, in particular, how the principle of non-regression
operates in the Finnish system of constitutional review and human rights impact assessment. The realisation of social rights can be regarded as effective if there are sufficient monitoring systems for noticing de facto regression of the level of social rights and, consequently, for addressing inequalities in the society. Moreover, one factor of effectiveness can be argued as the need for effective remedies to be made available to an individual. Both of these factors contribute to conducting a systematic human-rights impact assessment of potentially regressive measures. Compliance with the prohibition of retrogression would be taken into account in the course of this assessment.

In the Finnish system, compliance with the prohibition of retrogression is being reviewed by the Constitutional Law Committee of the Parliament in the course of its ex ante constitutional review process. The prohibition may, technically speaking, be subject to ex post review by the courts, but this has yet to take place and can be seen as a highly hypothetical situation for two reasons. First, the Finnish system of constitutional review has its emphasis strongly on the ex ante review by the Constitutional Law Committee. Secondly, the prohibition of retrogression should, by definition, be taken into account by the legislature before deciding on any potentially regressive measures. This requires conducting a sufficient analysis on the potential impacts on social rights and exploring alternative options before resorting to any measures. If the prohibition were to be considered by courts, this would happen through a human rights friendly interpretation or the application of subjective social rights rather than the direct application of the prohibition itself.

The Finnish system of monitoring can be argued to have some characteristics of so-called proactive models, which are based on the idea that addressing inequalities in society and promoting effectiveness of fundamental rights and human rights is the responsibility of all public authorities. Whilst models that are based on the judicial process often only review whether social rights of an individual have been violated, proactive models seek to recognise the positive dimension of social rights, i.e. to actively promote the effective realisation of those rights. Section 22 of the Constitution of Finland provides for the responsibility of all public authorities to guarantee observance of fundamental and human rights. The monitoring system in Finland for the protection of social rights is, to a great extent, based on the supervisory work of the Parliamentary Ombudsman, the Chancellor of Justice and other administrative supervisory authorities. The supervisory mechanisms of the ICESCR and the
ESC are also of relevance in Finland, particularly as non-governmental organisations can submit collective complaints on alleged violations of the ESC to the ECSR. In that sense, it could be argued that several quarters are actively participating in the process of effective realisation of social rights in Finland.

From the viewpoint of the prohibition of retrogression, the single largest gap in the Finnish system of human rights review can be argued to be the fact that budgetary decision-making process is not subject to systematic ex ante constitutional review and human rights impact assessment. Budgetary decisions, whilst not being new legislation per se, de facto determine the allocation of available resources within the state. As such, compliance with the prohibition of retrogression, in particular evaluating whether the decisions have a negative impact on the most vulnerable groups, should be assessed in the course of the budgetary decision-making process.

Insufficient human rights impact assessment vis-à-vis budgetary decision-making can be seen as a core problem attached to the effective operation of the prohibition of retrogression. Whilst it is understandable - and realistic - that the level of resources available for a state often decreases during an economic turmoil, economic recession does not justify the lack of sufficient human rights impact assessment when reacting to the economic situation by taking austerity measures. Quite the contrary, a democratic welfare state has the responsibility to promote the effective realisation of social rights and to protect vulnerable groups particularly at times of an economic crisis, as there is a real risk of rising inequality in the society. Therefore, as a de lege ferenda suggestion, it is submitted that budgetary decision-making process should be subject to more systematic human rights impact assessment; in particular from the perspective of the prohibition of retrogression. This would more efficiently guarantee that the resource allocations have been made, from the beginning, in the most equal and equitable manner available.

Finally, a few words can be said on the future academic research to come. As noted in the beginning of the thesis, the recent economic recession has had a European-wide impact. A comprehensive study on the negative impact on the level of social rights in European states during the crisis would require access to statistics on the de facto situation and level of rights. Evaluating whether states have managed to comply with the empirical dimension of the
prohibition of retrogression is challenging, but would be useful in addressing inequalities and areas that need more protection. Some studies have, of course, been carried out, but the focus has not been on assessing compliance with the prohibition of retrogression. On the Finnish level, further research on the budgetary decision-making process within municipalities and its impact on the level of social rights could be carried out. Of particular interest, from the constitutional legal perspective, is the question of whether differences in resource allocations between municipalities create inequalities between them and how this might be avoided.