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In the pursuit of socio-economic rights fulfilment

The case of a minimum core

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List of Abbreviations

Abbreviation	Explanation
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CIE	Committee of Independent Experts
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations Human Rights Commissioner
SER	Socio-Economic rights
UN	United Nations
UDHR	Universal Declaration of Human Rights

Abstract

It has been established that austerity measures pose significant challenges to the degree of socio-economic rights protection. Considering the fact that retrogressive measures and cuts in social services impact disproportionately the most vulnerable and marginalized groups of society, it has been argued that states must respect a net of minimum core obligations in order to comply with their human rights commitments. However, the task of defining the content of these minimum socio-economic obligations and determining an absolute threshold is entangled with multiple difficulties. Clarifying the normative assumptions in favor of the minimum core, assessing their theoretical consistency as well as their overall degree of feasibility are among the main tasks of this paper. While enumerating the different approaches that attempt to define a minimum content of socio-economic rights, this paper concludes that as a binding and universal concept, the minimum core lacks the necessary flexibility to adapt in divergent circumstances and needs. Eventually, the task of designating a minimum threshold proves to be detrimental to the aspiration of social justice and social inclusion. Alternatively, a commitment towards socio-economic rights fulfillment through democratic practices and ad hoc deliberation depending on the exigencies of particular circumstances is better placed in order to mitigate the negative impacts of austerity measures and lead to the empowerment of individuals.

Introduction

i. Research question

A deepening of the economic recession in the aftermath of the global financial crisis of 2008 and the wide-ranging cuts in government spending and social services that followed suit, raised a number of issues regarding socio-economic rights. To what extent retrogression on the protection of social welfare schemes can be considered legitimate in light of financial constraints? Is there any particular threshold of social security that states are expected to guarantee, notwithstanding financial and macroeconomic considerations? In a complementary sense, would constituting a scheme of minimum payment serve as an effective tool for social inclusion and eradication of extreme poverty?

While the European Commission Proposal on the European Pillar of Social Rights[1] is expected any time through 2017 and in the midst of a heated deliberation among EU authorities, member states, institutions, scholars and civil society movements on the potential function of the Pillar in bringing forth social justice in the European Union, questions regarding the extent to which law can assist in the fulfilment of socio-economic rights, regain significance.

The accumulation of national debt and the existence of recurrent macroeconomic constraints, has forced states to adopt contractionary measures which in turn led to a neglect of substantial aspects of social security to the expense of the most vulnerable and marginalized members of the society.[2] In response to this situation, scholars[3] as well as United Nations officials through their reports on socio-economic rights have argued in favor of a minimum core.[4] The minimum core could be perceived as a threshold of minimum pay or social services, that would concretize socio-economic obligations into strict standards in order to fulfill the vital interests of all members in a society. In theory, through a precise enumeration of the most essential aspects of each social right, it is hoped that administrative authorities and courts would possess clear-cut references on what constitutes an impermissible retrogression in the scheme of social protection while the cruelest effects of austerity in the lives of marginalized individuals would be mitigated.

However, although steps towards a more effective and inclusive approach in socio-economic rights protection such as the European Pillar of Social Rights merit a sincere interest, arguments in favor of a minimum core approach are accompanied with gross limitations. Namely, the degree of absolutism and rigidity that the minimum core is bestowed with, contradicts the manner in which courts normally approach socio-economic rights fulfilment. Moreover, the task of defining properly the content of the minimum core and elaborating a comprehensive definition in regards to its scope

1 European Commission, Establishing a European Pillar of Social Rights, 2017.

2 Office of the High Commissioner for Human Rights, Report of the United Nations High Commissioner on Austerity Measures and Economic and Social Rights, p. 7.

3 Van Bueren Geraldine, 2002, Coomans, 2002, David Bilchitz 2002.

4 Committee on Economic, Social and Cultural Rights, concluding observations on the fifth report of Spain, adopted by the Committee at its 48th session, Ariranga G. Pillay, Chairperson. Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16 May 2012. Committee on Economic, Social and Cultural Rights, concluding observations on the fourth report of Iceland, adopted by the Committee at its 49th session. Office of the High Commissioner for Human Rights, *Report on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it,* paras. 21 and 25.

of application is subject to a multitude of analytical difficulties. How could the content of the minimum core in relation to each right be ascertained? Namely, what could be deemed as sufficient to sustain human life or reversely what would be acceptable as a commensurate threshold for a life of human dignity and autonomy? Would this threshold be universal in nature or context-dependent upon financial and economic considerations? Could this concept contribute meaningfully in search of an equilibrium among competing rights of different degree and urgency? An attempt to shed light into the abovementioned questions and examine the normative assumptions that underpin this concept will be the main task of this paper while the practical significance and the extent to which a turn to law can contribute meaningfully in the realization of socio-economic rights will be the central theme of this paper.

ii. Defining Scope of Research

The Universal Declaration of Human Rights (UDHR hereinafter) adopted by the General Assembly in 1948 was the first official document to comprise in a comprehensive manner what we nowadays perceive as universal fundamental freedoms. The Declaration provided a coherent set of values and rights that were considered as mutually related and interdependent. Interdependence, indivisibility and interrelation in this context signifies that the adequacy of protection for a certain group of rights would foster the quality and scope of protection for a different set of rights. The most frequent distinction between human rights refers to a group of rights characterized as civil and political, which range from the right to political participation and representation to peaceful assembly and freedom of speech on the one side; to economic, social and cultural rights on the other, which in broad terms comprise all the essential elements and material preconditions in order to ensure that individuals are capable of leading an autonomous, meaningful and fulfilling lives. To name a few, economic, social and cultural rights may range from: the right to food, the right to adequate housing, the right to health, the right to property, the right to social security, the right to work and rights in work, the right to education, the right to human rights education, cultural rights including minorities and indigenous people languages, customs and tradition and the right to a safe and sustainable environment. [5]

In principle, these different dimensions of rights give substantive meaning to the notion of democracy and are encompassed within the over-arching principles of human dignity, equality and freedom. [6] In practice, each group of rights serves a particular purpose and altogether as a whole promote what is of inherent value to human societies. Social and economic rights seek to overcome the threats to material autonomy that arise from established property relations and the markets. Political rights, seek to encourage the notions of equal representation and self-determination. Lastly, civil rights aim to secure freedom of expression and conscience and ensure an undisturbed public deliberation about questions of common interest.

Although the interdependence and mutual reinforcement among different brackets of rights is hardly contested nowadays, this paper will nevertheless, narrow its focus towards socio-economic rights and the particular difficulties that they encompass. This decision is due to the strong interconnection between socio-economic rights enforcement and financial budgetary considerations.

5 Universal Declaration of Human Rights, Art. 22 – 30.

6 Ibid. Art. 1.

Although, it would be hard to deny that the protection of any human right does call at some point for an investment of resources, taken into proportion socio-economic rights cover a significantly superior portion of state's annual budgets. [7]

Moreover, although the relevant human rights treaties for socio-economic rights enumerate cultural rights as well, this paper will refrain from incorporating them into its analysis. It has been argued that disagreements evolving around questions of resource redistribution are essentially of a different nature when compared to struggles of cultural identity and self-determination.[8] Undoubtedly, cultural rights require an allocation and investment of resources as much as other rights do.[9] However, an all-inclusive analysis in regards to their potential normative core would risk digressing from the main focus of this paper.

iii. Research Outline

In regards to the structure of this paper, the first chapter will be focused towards providing some introductory remarks about the minimum core. Due emphasis will be attributed to its introduction by the Committee on 1990 and the ways in which the interpretation of this concept has evolved throughout the years on behalf of the Committee. The issues regarding the scope of application for the minimum core, its function as a non-retrogressive threshold and the definition of its content will be introduced for the first time. At a second level, the manner in which scholars have rationed the existence of a minimum core and attempted to define its content will be presented.

The second chapter is intended to provide some necessary context on the nature of socio-economic rights. Throughout this paper, it is supported that SER bear certain distinctive features that render their fulfilment unique. A first part will be devoted in examining to which extent socio-economic obligations demand concrete action on behalf of the states. Secondly, it is questioned whether bracketing SER into concrete obligations is a feasible and warranted approach. The third part presents a brief examination of the linguistic particularities that accompany the prospect of SER fulfilment. Furthermore, the complex relationship between SER fulfilment and the judiciary is scrutinized. Whether legislation is a potent means of bringing forth social change and the potential role of the judicial authority in SER fulfilment are discussed. Lastly, the importance of democratic deliberation when rights of an essentially abstract and open-ended nature are concerned, is underlined.

The third and central chapter of this paper delves into a close examination of the minimum core and its normative foundations. The first part deals with the case of basic rights and the right to subsistence. This approach introduces a minimum core that designates the absolute threshold to human survival. However, it will be demonstrated that disentangling the minimum core from any normative values and diminishing its function to an absolute minimum for survival, disempowers greatly the socio-economic rights objectives and seems inconsistent with the human rights edifice. The second part, focuses on the attempt of reducing the minimum core to the bare essentials in order to reach a practical consensus about urgent needs that merit immediate action and obligations that shall be classified as non-derivable. At this point, this paper argues that subjecting the minimum core to the practical constraints of consensus disrobes the concept of any guiding normative principles that could contribute meaningfully in enhancing social protection. The third part focuses on the intertwinement of the minimum core with values such as human dignity,

7 Aoife Nolan, Rory O'Connell, Colin Harvey, 2013, p. 2.

8 Katharine Young, 2008, p. 119.

9 See General Comment No. 17, Art. 15 by the Committee on Economic, Social and Cultural Rights (CESCR).

equality and autonomy. The grossest difficulties that arise with this approach emerge by the absolute and non-derogable purported feature of the minimum core. Effectively, perceiving social protection standards as non-derogable legal rules – such as the right to life and the prohibition of torture and degrading treatment – omits the financially constrained context in which most contemporary states operate in, while misinterpreting the manner in which judicial authorities deliberate. It is argued, that it is futile to approach socio-economic rights as concrete legal entitlements in view of multiple factors that must always be taken into consideration.

Lastly, the concluding chapter will summarize the main arguments in favor of the minimum core and support that although a struggle in order to reverse the grave consequences of extreme poverty is worryingly solicited, in practice the minimum core cannot fulfill this purpose. Alternatively, the minimum core could serve as a normative compass in order to emphasize the urgency of particular and recurrent needs while dismantling any rigid and absolute function that would seek to conclude rather than initiate democratic deliberation on the content of socio-economic rights.

Chapter 1
The minimum core in context

i. Introductory remarks

The minimum core concept made its first appearance in General Comment No. 3 of the Committee on the Nature of States Parties Obligations (1990). The essence of this approach was crystalized in the words of the Committee as: "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights… If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre." (General Comment No. 3, para.10.) In principle, socio-economic obligations are subject to the process of progressive realization allowing states a margin of appreciation as well as a necessary flexibility of maneuver in regards to their fulfilment. However, the fulfilment of socio-economic rights presupposes the adoption of "deliberate, concrete and targeted steps".[10] The minimum core was perceived to stem naturally from this need for precise steps while functioning as an effective remedy to the inherent indeterminacy that evolves around SER obligations. Put differently, it could assist in converting programmatic socio-economic rights aspirations into concrete individual entitlements vis a vis states. [11] Moreover, it could prove useful as a common legal standard or a common baseline of social protection among different political systems and divergent degrees of economic development and available resources. [12]

Since the introduction of the concept, the Committee has carefully elaborated a number of General Comments defining the minimum core for the right to housing, food, health, education and water.[13] However, one thing that remains unclear in regards to the content of the concept is whether it serves as an absolute standard that has a normative effect irrespective of resource availability or to the contrary, whether it remains dependent upon economic and social circumstances. For example, Craig Scott and Philip Alston suggested that the concept is two-fold and entails relative core minimums and absolute core minimums that would differ among varying degrees of economic development. Thus, when defining state obligations, a multitude of other considerations such as the wealth per capita enter into play. Although this approach further complicates things, it certainly has the advantage of adjusting to divergent economic and social realities and adopting a pragmatic approach in regards to the rights in question and the resources available.[14]

As will be elaborated in further detail within upcoming sections, it has been argued that the minimum core could stand only as a universal principle. Should the minimum core be resource

10 General Comment No. 3, 1990, para. 2.

11 Murray Wesson, 2004, p. 300

12 Katharine Young, 2008, p. 121

13 General Comment No. 4 (1991) on the Right to Adequate Housing (Article 11 (1) of the Covenant, General Comment No. 12 (1999) on the Right to Adequate Food (Article 11 of the Covenant), General Comment No. 13 (1999) on the Right to Education (Article 13 of the Covenant), General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health (Article 12) and lastly, General Comment No. 15 (2003) The Right to Water (Articles 11 and 12)

14 Craig Scott, Philip Alston, 2000, p. 248 – 251.

dependent, then an analysis wouldn't be restrained solely towards a single minimum core but rather to multiple minimum cores that would apply differently in each State and commit States to different degrees of obligation.[15] Furthermore, perceiving the minimum core as a shifting value undermines the normative and absolute essence of the concept and subjects it's content to a process of political bargaining and feasibility. Advocates of the minimum core have warned that sensitivity to context i.e. political and financial constraints, would undermine the effectiveness of the minimum core as a tool for social transformation and justice, rendering the concept dependent upon what is politically available and feasible.[16] On the contrary, the task of defining the content of the right must be identified within the right itself in a quasi-universal manner in order to ensure a rights-based approach.

Regarding the Committee's approach, it could be deduced from many instances that the Committee views the minimum core as a universal principle egg. on paragraph 17 the adopted Statement on *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights*: "When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect." However, an inconsistency seems to exist among the recognition on General Comment No. 3 that in spite of "every effort" put forward, states may nevertheless be incapable of fulfilling even the most essential elements of the minimum core (Para. 11,12.) and General Comment No. 14 which perceives core obligations as absolute non-derogable obligations: "It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above which are non-derogable." (Para. 47.)[17] In any case, what could actually qualify as a universal and inherent set of values that is binding upon states regardless of resource considerations is still in search. The Committee's elaboration of the concept in the General Comments provided general guidelines which might be of relevance for national policy makers as assessment and future implementation tools. However, the absence of concrete principles which could guide the assessment of urgency for particular needs and facilitate prioritization of resources for particular purposes, is manifest.

Certainly, this absence could be explained by taking into account the institutional nature of the Committee and the fact that there was no individual complaint mechanism that would allow for the articulation of specific standards relevant to specific circumstances.[18] However, the need for specificity remains, since the whole rationale behind a minimum core concept implies a scarcity of available resources and a conflict between equally pressing and urgent needs. Reasonably, difficulties relating to the fulfillment of socio-economic rights emerge when needs outweigh the

15 Karin Lehmann, 2006, p. 184.

16 Coomans, 2002, p. 180.

17 Equally, "because core obligations are non-derogable they continue to exist in situations of conflict, emergency and absolute disaster." At: Economic and Social Council, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: *Poverty and the International Covenant on Economic, Social and Cultural Rights,* May 2001, para. 18.

18 Danie Brand, 2002, p. 100 – 102.

available resources. [19] Undoubtedly, the lack of precision is an essential feature of legal norms and perhaps the setting of flexible benchmarks is the best way to assist courts and governments in the tasks of assessment and fulfillment of socio-economic rights. However, this is not the purported function of the minimum core. In order to serve effectively as a rigid, universal and absolute threshold, a certain degree of specificity is required and has yet to be developed by the Committee and scholars that advocate in favor of the concept. However, deliberating on the content of rights on abstract grounds without reference on individual circumstances will most likely lead to imprecise and unsatisfactory definitions that would set the minimum core, short of its aspirations. In other words, the real issue of defining the minimum content is inseparably related with the particular dynamics, conflicting needs and current circumstances that exist in the societal context. Articulating specific individual entitlements and specific duties will be an open process, relevant only in the context of particular circumstances and binding for particular individuals. [20]

ii. The theoretical foundations of the minimum core

As a concept, the minimum core is believed to serve a broad range of functions among which, lies the ability to solidify vague and imprecise legal norms into concrete and immediate obligations. Given the particularly abstract language in which socio-economic rights are articulated as well as the introduction of unique concepts such as "progressive realization" and "maximum available resources", there was a need to define in clear terms what was expected of states. The minimum core would foster human rights by defining in clear terms the precise scope of application, for the treaties that states have voluntarily endorsed. [21]

Equally, the minimum core could serve as a tool for standard-setting. By identifying the content along with the degree and extent of its applicability, domestic and international courts, the Committee and states could have a clear idea of what constitutes a prima facie violation. Traditionally, in the context of globalization, complex international relationships and financial interdependence among states, the task of attributing legal responsibility or even defining what constitutes a violation in the domain of socio-economic rights would seem counter-intuitive. Through the minimum core and the consequent introduction of universal and objective standards such a task would no longer serve as a hindrance. To the contrary, a clear idea on what constitutes an impermissible violation would seem to strengthen and encourage socio-economic rights protection. Thus, the task of monitoring state performance at the intergovernmental and non-governmental level would be significantly facilitated. State actions and omissions could be scrutinized in reference to the minimum core while advocacy for proper redress encouraged.[22]

Certainly, such standards could equally assist courts in the historically contested task of adjudicating socio-economic rights. The recurrent argument against judicial review on socio-economic rights in order to ensure the proper distribution of powers among the judiciary on the one side and the legislative and administrative functions on the other, could be dismantled. Clear-cut standards on what constitutes an impermissible retrogression on the protection of individual socio-

19 Karin Lehmann, 2006, p. 185.
20 Danie Brand, 2006, p. 105,106.
21 Fons Coomans, 2002, p. 179.
22 Ibid p. 179.

economic rights would simplify to a desirable extent the authority of courts while dismissing judges of the accusation of judicial activism and its negative connotations. [23] Moreover, it could create a space, a rigid threshold, upon which any considerations of utility cease. This incommensurability element is present in the discourse of most advocates of the minimum core. Essentially, as soon as the minimum core content of a right is defined, it is automatically excluded from the act of balancing and cost-benefit analysis since the most fundamental and essential aspects of an individual's existence are at stake. When fundamental rights reach their normative core, they function as incommensurable values that render any cost and benefits analysis meaningless.[24]

At a theoretical level, the perception of socio-economic rights in that way commences from divergent analytical and philosophical backgrounds. The minimum core could be perceived as a concept that encompasses all the necessary conditions for the very existence of a human being. It stands valid as a self-evident principle merely as a mean of sustaining life per se and merely as an instrument for ensuring other fundamental rights. [25] Bracketing the minimum core in such a manner underpins the non-derogable, incommensurable and immediate character of the concept. Alternatively, in a manner which is more relevant to the human rights discourse, the normative core of socio-economic rights is perceived as a set of essential values not because of their instrumental or self-evident character but due to the fact that its content promotes and protects some constant and universal interests of human life. Yet again, others emphasize that a minimum core would be useful because agreement on such reasonable (and minimum) standards would be relatively easy among people of vastly different religious, political and cultural backgrounds. Lastly, it has been argued that the minimum core approach is plausible due to the fact that judicial and political authorities are already willing to accept some minimum standards of protection and thus a positivization of what has already been endorsed in practice would be possible.

Notwithstanding the premises of these approaches, it seems that the concluding justifications are inadequate. The principal dissent is based on the fact that dealing with socio-economic rights presupposes a degree of flexibility, openness and deliberation. However, such a preoccupation seems to be absent from the minimum core approach. From a practical point of view, an attempt to armour socio-economic rights with such a degree of absolutism, although potentially well-intended, neglects to a considerable extent the practical constraints and conflicts that exist in contemporary societies. Although socio-economic individual rights have to be secured and fulfilled, it is doubtful to what extent a minimum core bestowed with this degree of absolutism may serve this function effectively.

From a human rights perspective, it is understandable that many human rights scholars attempted to overlook the practical and economic constraints that contemporary societies face and focus rather on a normative and legalistic attempt of fostering socio-economic rights. However, it should be clear that socio-economic rights encompass a great degree of complexity, and from an intellectual standpoint it would serve better to shift our attention towards the criteria and principles that guide states and democratically elected governments to manage their macroeconomic policies and allocate available resources. An overemphasized focus solely on normative and legal arguments while disregarding the highly politicized nature of socio-economic rights is bound to prove inadequate in

23 Audrey Chapman et al, 2002, p. 8.

24 Martti Koskeniemmi, 2010, p. 47 – 49.

25 Chris Armstrong, 2012, p. 119.

the pursuit of socio-economic rights realisation and social justice. Moreover, it is evident that socio-economic rights can hardly be defined through self-reference. Defining the content of a right occurs in relation to specific needs and attached to particular circumstances.[26]

26 Martti Koskenniemi, 2010, p. 51

Chapter 2
On the nature of Socio-economic rights

i. The intricacies of socio-economic obligations

Under international law, states are the primary duty – holders. This implies that states have the capacity to impose obligations to any individual residing in their jurisdiction in order to ensure that the current human rights legal framework is effective. This would include penal laws as well as policies of progressive taxation in order to pursue redistributive policies. [27] In exchange, states have the duty to ensure accessibility on a non-discriminatory basis in basic social services for all individuals. When examining the role of states in socio-economic rights realization, accessibility is a key notion since in principle, human rights law aims at the emancipation and empowerment of individuals. Ideally, states are committed in dismantling social barriers that obstruct the equal participation of everyone in the society and promoting macroeconomic policies that would mitigate the inequalities that market competition generates.[28] At the same time, individuals assume responsibility for their well-being through cooperative action and by taking advantage of the available resources in their environment.[29] In principle, every human being is entitled to the same set of rights. However, since the case of equal starting points is hardly a reality in most societies, positive steps on behalf of states and international cooperation among them is presupposed. Thus, SER obligations entail the provision of allocating resources for particular purposes as in cases of manifest inability from state institutions, social welfare protection systems and the market, in order to prevent the social exclusion and marginalization of certain groups or individuals.[30] Such cases justify the need for a certain theory or methodology of allocating resources to the most vulnerable. Whether the minimum core concept in its divergent manifestations could serve as an effective tool for this purpose will not concern this chapter. However, it is important to be reminiscent that SER fulfilment entails aspects of direct provision only at a tertiary level.

Importantly, the significance of steps taken at a macro level in the pursuit of SER fulfilment is an aspect often overlooked. For example, the Committee routinely focuses its attention to aspects of direct provision in SER fulfilment while neglecting the importance of coherent and long-term macroeconomic policies in stimulating economic growth and development. Not coincidentally, the absence of recommendations at a macroeconomic level could be explained due to a manifest lack of technical competence and expertise among the members of the Committee.[31] However, it should be obvious that the extent of SER fulfilment is firmly correlated with continuous economic growth, modest restructuring of sovereign debt and budget deficits, and a taxation system based on reasonable and efficient principles.

Perceiving socio-economic obligations as legal entitlements of immediate application while neglecting the underlying determinants of economic growth and development as well as the

27 ICESCR Art.2

28 Office of the United Nations High Commissioner on Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights,* p. 21.

29 Wiktor Osiatynski, 2007, p. 60.

30 Eide Asbjorn, Catarina Krause, Allan Rosas, 2001, p. 24.

31 Mary Dowell-Jones, 2004, p.40.

practical constraints that contemporary finances pose to state budgets, is unavoidably one-sided. Furthermore, it is dubious whether focusing on state obligations solely from a legal perspective, can actually assist in incorporating human rights considerations and human rights-based approach in the mainstream debate of contemporary economics.[32] In short, socio-economic obligations encompass a high degree of complexity that renders a multi-faceted and multi-levelled approach necessary. As an example, even if societies as a whole committed themselves towards the establishment of egalitarian institutions and the eradication of poverty, a broad range of long-term macroeconomic policies including development strategies, unemployment policies and the reduction of deficits would be required. Evidently, such objectives take time and require persistent collective efforts at a macro level. In effect, any discussion regarding SER fulfilment, including a concept of minimum core obligations should be reminiscent of these implications.

ii. Framing socio-economic rights

The main distinctive element of SER fulfilment from other human rights categories, is the fact that they are part of a much broader debate regarding the proper way to organize the function of society. Economic and social rights presuppose a priori, a comprehensive redistributive system and effective institutions for the re-allocation of resources. Therefore, SER are in the midst of political controversies and divergent political visions. In that sense, the task of assessing socio-economic rights violations or an advocacy for a more comprehensive social protection may actually resonate more within the spheres of economic efficiency and growth development rather than being an issue of legal nature that can be resolved through the framework of human rights law and judicial review. (Viljam Engström, 2015, p. 8.)

The highly contested ideological nature of socio-economic rights can be annihilated in many instances. For example, proponents of a more liberal approach routinely underline that governments should not be encouraged to interfere with free markets notwithstanding the pursuit of legitimate causes since the risk of provoking economic turbulences is recurrent.[33] Letting aside the ideological controversies, it is true that any positive and honest approach towards the fulfillment of socio-economic rights demands a commitment to achieving social inclusion and a willingness to overcome cases of extreme poverty and social marginalization. Such principles shall be accompanied by an overarching principle of solidarity and a sense of common belonging. By now, it is clear that although socio-economic rights aim at the attainment of the highest and more comprehensive realization possible, there are limits to what is realistically expected by states in a given time. Such limitations are due to the often conflicting and competing needs that emerge among individuals in societies. On the other hand, the financial constraints that are imposed by international agreements and private investors to states as well as the time-consuming process of macroeconomic adjustments may delay the proper realization of socio-economic rights.

While reminiscent of the limitations that SER fulfilment entail, it is equally important to underline that framing the content of socio-economic rights in abstract terms could easily prove a meaningless exercise. Rights are relevant within the context of particular individual situations and in light of different individual needs. For example, the right to adequate housing brings forth the question of what could amount as "adequate" given the specific needs and circumstances that a certain community faces. Equally, advocating for a rights-based approach by administrative bodies could

32 Mary Dowell-Jones, 2015, p. 212.

33 Cass Sunstein, 1993, p. 36.

very easily prove to be devoid of meaning. Whose rights ought to be taken into account and to what extent? As routinely stated, rights are interdependent and of equal normative weight. However, such an assumption inevitably, although most times implicitly, endorses that rights are also conflictual. Therefore, striking a balance among divergent needs and human rights claims, lies at the core of human rights consideration. If, however, such a balance is achieved through reference to the relative power of particular rights in particular circumstances, the task of framing the scope of application for socio-economic rights in a self-referential manner is bound to come short of its aspirations.[34] In the end, human rights balancing demands a thorough consideration of the particular reasons that render the fulfilment each right essential in given circumstances.[35]

All in all, it seems that addressing and enforcing socio-economic rights is a complex process that cannot be restricted to a fixed and predetermined methodology. Understandably, an attempt to convert socio-economic rights into concrete legal obligations was a response to mainstream economics which seemed to take into account only deficits and public debts in the expense of human rights considerations. However, distinguishing SER fulfilment from the financial and societal context resembles to an unhelpful, though pleasant, rhetoric. No doubt, approaching SER in this manner has been the main cause that human rights lawyers and advocates of socio-economic rights have been excluded from the mainstream debate about the feasible ways of overcoming the current financial crisis.[36]

iii. The concepts guiding socio-economic rights fulfilment

Article 2 of the ICESCR introduced a wide range of concepts that were meant to define the nature of socio-economic obligations and provide guidelines in regards to their implementation. The language adopted in this article gave rise to a wide range of skepticism in regards to the actual legal status of the Covenant. As Rapporteur Philip Alston commented, it was common, even from people placed in positions of public authority, to consider socio-economic obligations as "unclear and imprecise", "too vague" to amount as actual obligations, and "too complex" to dictate an actual social policy.[37] Other critics of the language adopted by the Covenant, commented that states may use the notions of "taking steps" and "to the maximum of available resources" as a justification for inaction and a masking for their unwillingness to take deliberate decisions that would reframe social inequalities.[38]

From a linguistic standpoint, it is true that the adoption of concepts such as "progressive realization", "by all appropriate means" and "to the maximum of its available resources"[39] was a deliberate decision intended to overcome the legal difficulties that economic and social realities pose.[40] In that sense, the Covenant was sensitive to the fact that drafting and executing structural financial policies is a complicated process that requires flexibility and a wide margin of appreciation for member States. Evidently, the need for flexibility becomes more apparent since no established consensus exists in regards to the best and more effective way to pursue economic

34 Martti Koskenniemi, 2010, p. 51.
35 Karin Lehmann, 2006, p. 189.
36 Mary Dowell-Jones, 2015, p. 212.
37 Philip Alston, 1997, p. 189.
38 David Beetham, 1995, p. 43.
39 ICESCR Art.2
40 Mary Dowell-Jones, 2004, p.40.

growth and development. (Viljam Engström, 2015, p.6.) Thus, the concepts introduced at article 2 of the Covenant and the recurrent reproduction of its terminology in the socio-economic rights discourse ever since, pinpoint the unique character of socio-economic obligations and the complexities that accompany their fulfilment.

On the other hand, attributing the shortcomings of socio-economic rights fulfilment to the vague and imprecise manner that the Covenant obligations are enumerated, undoubtedly overlooks the manner in which legal rules function. First and foremost, legal norms whether constitutional or statutory are always articulated in an abstract manner in order to apply to an indeterminate number of persons and cases.[41] The way in which they ought to be interpreted each time is an analytic process that takes into account the specific situation and the given facts, the content of the legal norm at stake and the general principles of justice that lie in the core of the constitution.[42].) Equally in the sphere of socio-economic rights, proper clarification of the legal content will be gained by interpreting the general principles enumerated in the Covenant through the light of specific circumstances.[43] In the end, it seems that the shortcomings in the domain of socio-economic rights fulfilment are weakly related with the vague manner in which socio-economic obligations are expressed. If anything, the domain of SER fulfilment is weakened by a deliberate reluctance of economic and political elites to engage in meaningful redistributive policies and an unwillingness to combat systemic incidents of corruption and tax evasion.

v. Socio-economic rights and the judiciary

a. The relevance of legislation

In regards to the utilization of all appropriate means, the Committee emphasizes the adoption of legislative measures and considers that legislation is "highly desirable" and often "indispensable". (General Comment no. 3, para.3.) However, the General Comment no.9 of the Committee does not recognize a formal requirement of actually adopting legislative measures. As Sepulveda claimed, this position appears to be the byproduct of a compromise between opposing views inside the Committee.[44] Both members of the Committee, Mr. Texier and Mr. Grissa supported opposing views in regards to the significance of enacting legislation for the protection of socio-economic rights. On the one hand, Mr. Texier held the opinion that member States ratifying the Covenant are under an obligation to give legislative effect to the Covenant articles in the domestic legal system. On the other hand, Mr. Grissa noted the uniqueness of socio-economic rights and argued that "it was both inappropriate and undeniable for the Committee to encourage States to legislate in areas in which they would be powerless to act. The Committee's condemnation of a country for failing to legislate would be far less damaging to the country than the enactment of certain legislation."[45] As far as this paper is concerned, legislative measures although well-intended might prove ineffective. As demonstrated, economic and social rights demand a complex macroeconomic approach that legislation alone would simply prove insufficient to secure. In a relevant sense the Constitutional Court of South Africa noted:

> The state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the

41 Aoife Nolan, 2013, p. 49.
42 Ronald Dworkin, 1986, p. 15-20.
43 Craig Scott, Philip Alston, 2000, p. 256.
44 Magdalena Sepulveda, 2003, p. 340.
45 Ibid. p. 340.

intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.[46]

As an example, the effectiveness of legislative action in support of the right to health would rightly be doubted, when taking into account the manifest absence of qualified doctors and resources in particular regions [47] A mere act of legislation in favor of SER protection will undoubtedly prove insufficient to give "socio-economic rights teeth" in instances of manifest lack of available resources.[48] Certainly, a limit to what judicial authorities may accomplish exists. The introduction of strict and stringent standards will prove unhelpful towards ensuring SER fulfilment in the long-term. Indicatively, Mr Grissa as member of the Committee noted:

State legislation on the right to housing would mean, from the people's point of view, the right to be offered housing by the State. That was a situation which was patently untenable from a Government's point of view, particularly in developing countries, such as Algeria, whose population increased by some two and a half per cent per annum. It was therefore … inappropriate … for the Committee to encourage States to legislate on areas in which they would be powerless to act … The same was true in the developing countries with regard to other rights, for example, the right to health: in countries like Zaire, which had only one doctor per 50.000 people in many regions, and neither hospitals nor drugs, the right to health was meaningless.[49]

Ideally, the framework in which socio-economic rights ought to be realized and brought into effect lies within the domain of macroeconomic and social policies. Perceiving socio-economic rights as legal obligations that give rise to individual entitlements overlooks the fact that socio-economic rights are enforced at an aggregate rather than at an individual level.[50] In that sense, although it might be possible to identify a violation, e.g. an unemployed worker being denied the right to work, such an assessment cannot offer any actual solutions. Whereas identifying violations using human rights language and expressing them as human rights concerns may be feasible, such a classification would not necessarily be conducive to the resolution of the violation. Normally, sustainable and long-term solutions could be provided only through reasonable and well-defined policies at a macroeconomic level.[51]

b. Socio-economic rights adjudication

The relevance of legislative action is firmly related with the recurrent question about the justiciability of socio-economic rights. While being cautious of the deep and complex balance courts must strike in order to contribute to SER fulfillment, it is worth noting certain crucial points. From an official standpoint, the Office of the United Nations High Commissioner on Human Rights supports that: "domestic courts must have the competence to fill in the gaps of Law in relation to human rights obligations just as in any other legal field. Thus, they must have the competence to define what constitutes adequate housing, hunger and reasonable retrogression vis a vis social services and social security."[52] In this view, the question of judicial enforcement is an issue that must be addressed in relation to each human right alone. Any potential implications that a legal decision may bear at the current human rights framework shall be assessed independently and by taking into account its own merits and drawbacks. Otherwise, legal assistance and protection would

46 *Grootboom and Other*s, para. 42.
47 Mary Dowell-Jones, 2004, p. 42.
48 David Blitchz, 2002.
49 Magdalena Sepulveda, 2003, p. 340.
50 Mary Dowell-Jones, 2004, p. 18.
51 Ibid. p. 18.
52 Office of the United Nations, *Frequently Asked Questions on Economic, Social and Cultural Rights*, p. 30.

be denied to a whole group of indispensable human rights provisions "because they do not fit the model of judicial enforcement of certain civil and political rights."[53]

On the other hand, the principal concern against judicial review over economic and social rights policies emphasises that judges should refrain from policymaking. Granting the competence of judicial review to courts over domestic macroeconomic policies would bestow disproportionate authority to the judicial branch in a core of highly politicized areas. As mentioned already, identifying in general terms the deprivation or denial of a certain right could be possible. However, although courts are able to define clearly what is manifestly in violation of a certain right, it is dubious on what grounds the whole range of macroeconomic policies that a government has employed could be assessed. In a same sense, a court lacks the technical competence to assess properly whether a state's limited budget ought to have been allocated in a different and more reasonable manner. For example, in the case of *Grootboom v Minister of Health*, the Constitutional Court of South Africa had to deal with a patient who suffered from chronic renal failure and was in need of extended and regular renal dialysis. Taking into account the fact that the number of renal dialysis machines is insufficient and that the hospitals prioritize by definition incidents of acute renal failure than chronic and untreatable cases the Court argued:

> The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[54]

Unavoidably, dealing with socio-economic rights violations presupposes taking into account beforehand the implications that a decision may bear in a state's scheduled distribution of finite and scare resources. In particular, considering that resources within a state's budget are finite presupposes a potential trade-off among the enforcement of different individual rights. As a major example, Mary Dowell-Jones pointed out to the *Coughlin and Grogan Judgments* which forced the UK government to introduce the National Framework for NHS Continuing Healthcare. This judgement rendered obligatory the adoption of national criteria for decisions concerning the funding of long-term health care rather than assessment on a regional basis by the competent authority. However, this framework provisioned the retrospective review of previously denied cases as well. Although such a judgement would seem as a positive step towards socio-economic rights protection, it is clear that in the context of the acute budget crisis and the already financially restrained national health care system, this decision could have deleterious effects to the viability of the NHS budget. In particular, such a decision would raise dramatically the annual budget of NHS to a degree that was impossible to foresee beforehand. In turn, this would signify either the reallocation of resources from the health care budget, setting other crucial domains of health care desperately sub-funded, or alternatively the reallocation of resources that belonged to other spheres of social protection to the health care budget.[55]

A similar example can be drawn from the South African experience when the Supreme Court of Appeal had to take into account the consequences that an interdiction of toll-fee collection on certain highway roads, would incur upon the government's finances and namely its ability to provision for other crucial social services, in order to rule out its decision. Effectively:

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53 Abdullahi A. An-Na'im, 2004, p. 7.

54 *Soobramooney v Minister of Health*, para. 29.

55 Mary Dowell-Jones, 2015, p. 222.

> As to the effect of a setting aside of the declarations on the Treasury, we know that the South African government, acting through Treasury, has guaranteed the R20 billion loan. The government had done so, we are told, on the hypothesis that the roads were validly declared toll roads and that SANRAL would thus be able to meet its obligations under the loan agreements through the collection of tolls. Had the declarations been challenged at the time, so Treasury says, government would not have put up the guarantee. If government is called upon to meet the guarantee – which is bound to happen if there will be no tolling – it will have a deleterious effect on funding so desperately needed by health care, educators, pensioners, those dependent on social grants, and so forth. Precisely what that effect will be, we do not know. What we do know, however, is that the reordering of public resources inevitably has a polycentric effect. 'Polycentric' in a sense described with reference to the image of a spider's web, where the pull on one strand distributes tensions after a complicated pattern throughout the web as a whole. It is 'polycentric' because it is 'many centred' – each crossing of the strand is a distinct centre for distributing tensions.[56]

Evidently, the broader consequences that a decision may incur upon a state's budget and resources must be taken into account by judicial authorities. As much as a rights-based approach would stress the priority of the legal principles in the expense of pragmatic considerations, it is important to note that incorporating a pragmatic approach alongside SER considerations is better equipped to promote socio-economic rights in a holistic manner. Such an approach is warranted since the prioritization of particular needs and the way resources are allocated is a human rights issue in itself. An unwillingness to endorse that a balance among different rights always reflects a vulnerable equilibrium will inevitably be short-sighted and could be conducive to an unwarranted weakening of other spheres of social protection.

Similarly to the previous case, the judgement of the Constitutional Court of South Africa in the case of *Soobramooney* was concerned by the precedent that a given decision could establish in regards to the principle of equal treatment and the consequences that could be provoked financially-wise. Thus, providing dialysis treatment to a patient who suffers from chronic renal failure three times a week would demand an equal provision to all others persons that find themselves in a similar situation. Should this principle, be extended to any person in need of expensive medical treatment due to a life-threatening condition, the health budget would be increased to an unstainable degree.[57] All in all, it is clear that the issue of SER adjudication is particularly complex. At first, identifying a violation and ordering a proper remedy is an already challenging task. However, the principle of equality demands that any individual situated in a similar position is entitled to the same treatment. Such a provision could lead to unforeseen implications in a state's overall budget and policies. In the end, assessing individual claims to socio-economic rights through a doctrine of proportionality might prove beneficial individually for an applicant but could end up being counterproductive to the overall collective scheme of socio-economic protection.[58]

Furthermore, courts are not in the best place to deliver judgments about the optimal manner of resource distribution. Difficult and agonising decisions are made constantly in the context of limited budgets and by definition courts lack the technical expertise to enter this discussion. A fact that was acknowledged by the Constitutional Court of South Africa in *Soobramooney* as well, by reasoning that the medical professionals of the hospital were simply in a better position to ensure the utilization of medical facilities to the advantage of the maximum number of patients.[59] However, it is not solely a lack of expertise in macroeconomic issues that renders the adjudication of SER problematic. The judicial branch lacks the necessary political and constitutional authority to participate into such a discussion as well. Courts enjoy a circumscribed authority in order to ensure the protection of fundamental rights. Judgments that would interfere with the democratic process of resource allocation by an elected assembly could amount to a breach of power divisions within a

56 *Opposition to Urban Tolling v The South African National Roads Agency*, para. 33.

57 *Soobramooney*, para. 28.

58 Dennis M. Davis, 2015, p. 207.

59 *Soobramooney,* para. 29.

state.[60] Relevantly, in regards to the constitutionality of granting toll fee-collection authority to a private company for highway roads construction, the South African Court noted:

When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. …..What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.[61]

c. The limits of judicial review

However, the question of judicial review cannot be restricted to its negative aspects and strong reasons exist in favour of socio-economic rights adjudication as well. In particular, the competence of judicial review might be essential when considering the persistence of extreme poverty, social exclusion and marginalization in contemporary societies. Certainly, respect for the separation of powers does not immunize public action from judicial review and constitutional control, while principles such as non-discrimination and additional concern for the most vulnerable and disadvantaged need to be present in every political decision of resource allocation. In addition, courts deal constantly with cases where social policies and the allocation of resources is at stake.[62] Classifying human rights between rights under judicial protection on the one side and on the other among rights left to the discretion of the administrative authorities of each state would be downright ineffective and contradictory to the notion of interdependence and indivisibility. In this regard, the Committee considers that although separation of powers should be respected, courts are still engaged in a wide range of cases that concern the allocation of resources or at least have resource implications. Therefore, a rigid distinction among justiciable and non-justiciable rights would seem arbitrary while at the same time curtailing the potential for meaningful protection of vulnerable and disadvantaged groups. [63]

Moreover, democratic deliberation requires both a formal and a substantive aspect of legitimacy.[64] In that sense, the judiciary through its own procedures and functions is expected not only to interpret and apply current legislation but also to exercise constitutional control over government decisions and ensure compliance with international obligations of the state. Effectively, reviewing national policies vis a vis international human rights obligations and standards remains within the constitutionally framed function of the judiciary.[65] In the same spirit, article 5 of the Vienna World Human Rights Conference of 1993 underlines:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[66]

60 Lord Lester of Herne Hill QC and Colm O'Cinneide, 2004, p. 19.

61 *National Treasury v Opposition to Urban Tolling*, para. 64.

62 Stephen Holmes and Cass Sustein, 1999, p. 35 – 39.

63 *The Domestic Application of the Covenant,* 1998, para. 10.

64 Rosenfeld Michel and Andrew Arato, 1998, p. 117 – 120.

65 Office of the United Nations, *Frequently Asked Questions on Economic, Social and Cultural Rights*, No. 33, p. 31

66 Article 5, Vienna World Human Rights Conference, 1993.

Therefore, any genuine attempt to render human rights truly inclusive and universal shall preclude the possibility of judicial supervision over government and state policies.[67] Arguments regarding the difficult questions that economic and social rights would bring into surface are equally relevant to the protection of classic civil and political rights. Reasonably, the proper way to establish a coherent case law and methodology is through the constant reinterpretation and engagement with each case and set of rights at once, placing each litigation in a unique context.[68] In lieu of conclusion, a strong case in favor of allowing judicial review over SER violations exists. Indeed, in absence of a competent regulatory mechanism capable of assessing national policies performance and administrative measures, it is unlikely that the rights guaranteed under the Covenant would ever become effective. Especially in times of economic austerity and financial constraints the need for social protection for the most vulnerable becomes explicit. However, it should be manifest that the key responsibility as well as the capacity for the realization of socio-economic rights lies within the executive and administrative branches of the state.[69] Moreover, it is worth keeping in mind that identifying a violation in terms of retrogression would in many instances demand the court to make judgments on national policies and the optimal way of distributing and allocating a state's available resources. Apart from obvious limitations in the expertise of courts, such a permission hinders the core political and administrative functions of a democratically elected government. Therefore, in the context of SER fulfilment a cautious and comprehensive approach is warranted.

iv. The value of deliberation

Evidently, in the context of persisting economic crises and fiscal austerity, fundamental rights are constantly threatened and marginalized, often times considered as "costly luxuries". Certainly, the need for a collective answer on how to best fulfil and promote social rights remains. However, the common ground that can provide this answer is blurred. It has been pointed out, that "a turn to law", namely the task of deepening the scope of legal protection to social rights may prove ineffective and inadequate to grasp the complexities and issues of social justice that economic redistribution entails.[70] Similarly, a "turn to content" as a task of identifying in rights themselves an inviolable core that states and courts must protect notwithstanding any other circumstances, is equally helpless. This rejection, holds both for governments and national policy-makers when facing situations concerning the optimal allocation of resources, as well as for courts when assessing whether a retrogressive measure was apart from necessary, in conformity with principles of equal distribution of burdens and non-discrimination. However, courts and governments still have to make tough decisions and the question of protecting the most vulnerable and marginalized groups of society in face of severe material inequalities remains. As far as this paper is concerned, the answer in questions of economic redistribution and social justice can be reached through unobstructed political participation and constant deliberation about the values that ought to govern a particular society. It is neither a matter of abstract legal reasoning, nor a matter of administrative function. In that sense, it is important to note that judicialization is inherently at odds with a deliberative approach.[71] By definition, delineating the content of a right in a legal sense aims to exclude the deliberative and political element of this task. Notably:

67 Abdullahi A. An-Na'im, 2004, p. 15.
68 Ibid. p. 15.
69 Aoife Nolan, 2008, p. xvi.
70 Viljam Engström, 2015, p.2
71 Viljam Engström, 2009, p. 248.

as the performance of the adjudicative function in itself builds on avoiding political deliberation, the actual (political) heart of the problem hereby runs the risk of escaping attention. As a result, as soon as the legal argument in a disagreement on the contents of human rights is made the decisive argument, the inherent political dimension of the question is not addressed at all."[72]

Therefore, dealing with SER in particular demands an incessant investment of meaning and reinterpretation at a collective level based on the principles of human dignity, equality and liberty, in order to allow societies to grow and develop a thorough definition of fundamental rights. Unavoidably, this openness entails the danger of gradual retrogression rather than "progressive realization". However, only on such an inclusionary basis could the aspiration of social justice become an effective reality. In the context of socio-economic rights such a perspective would not necessarily restrict courts in cases of resource allocation or neglect the justiciability of socio-economic rights. To the contrary, it could be commonly recognized that rights and competing interests conflict in societies as a matter of principle, thus rendering the adoption of solid and fair criteria indispensable. However, it should be endorsed that the extent of necessity, appropriateness and proportionality is always assessed in reference to particular and specific circumstances. The supremacy of a given fundamental right, at a given time does not diminish the normative value of other rights. Nor it establishes a concrete hierarchy between different rights. The assessment of "the limits of limits" is always bound to be an ad-hoc process that takes into account all the particular circumstances, the relevant rights at stake and unavoidably, the practical implications and constraints of such a decision.[73]

As a conclusion, this chapter focused in providing a comprehensive analysis of issues that are recurrent in the domain of SER fulfilment. One of the main interests, was centred towards the particular intricacies that SER entail and the complex relationship between rights adjudication and SER fulfilment. In this context, it was questioned whether an actual legalistic approach, or a "turn to law" [74]can actually prove effective. At this point, it was argued that socio-economic rights encompass further layers of complexity. Firstly, it is evident, that socio-economic rights and needs conflict. By definition, in the context of a finite environment with limited resources, conflicts among individuals for influence and control over these resources exist. In such an instance, the role of Law is directed in regulating this unavoidable competition on equal and fair principles of justice. In the human rights context, such an endorsement signifies that every person's needs and rights must be taken into equal consideration. However, equal consideration brings forth disputes and disagreements about whose needs should be prioritized. Manifestly, governments and courts have to engage constantly in an act of balancing with the common interest, assessing the particular circumstances and attributing special weight to certain needs when required. [75] In a different sense, as far as human rights are interrelated, same counts for the resources that are reserved for their fulfilment. Naturally, a deliberate decision to prioritize a certain group of rights could implicitly prove detrimental to the status of protection of other rights. Manifest examples were present in

72 Ibid, 2009, p. 250.

73 Contiades Xenophon, Alkmene Fotiadou, 2012.

74 Viljam Engström, 2015, p.2

75 Carozza Paolo, 2003, p. 73.

cases of judicial review which failed to consider adequately the implications of a certain decision to the whole structure of social security. Undoubtedly, it is hard to foresee, and sometimes even harder to accept these limitations. However, collective rights ought to be examined and understood in a collective manner as well. At this point, by no means a dichotomy between individual and collective rights is proposed. It is rather suggested, that the fulfilment of collective rights calls for a differentiated approach. An inclusionary approach that will be committed towards fostering democratic participation and deliberation.

Chapter 3
Justifying the content of the minimum core

i. Basic rights and subsistence

In regards to the normative justification of the minimum core, the case of basic rights occupies a prominent position. In essence, basic rights introduce a distinction between rights that ought to be urgently addressed and are perceived as basic, "core" rights and rights that evolve around the periphery and can be addressed in a progressive manner. This notion of basic rights is justified instrumentally by prioritizing certain rights that are inherently essential and function as prerequisites to the attainment of any other important rights. In an attempt of balancing, it seems that non-basic or periphery rights must be restricted when needed in order to ensure the protection of basic rights, while the opposite assumption, namely restricting a basic right in order to ensure less fundamental rights would prove problematic, if not impossible.[76]

The normative value of basic rights is assessed in terms of necessity. When a right is important enough to render the enjoyment of other rights dependent upon its existence, it could be considered as basic. Thus, in a simplified sense, freedom of speech cannot meaningfully exist without respect for freedom of conscience while the right to political participation cannot be capitalized when individuals lack the necessary means for their own subsistence and independence. Basic rights therefore, supersede as a matter of priority the enjoyment of other rights and form a minimum and essential core.

Moreover, basic rights are immune to ethical considerations. Whether a right has an intrinsic value that renders it important, is a question that lies beneath the scope of basic rights. What is of interest in the basic rights concept is whether a right is instrumentally essential in the first place. [77]Such an instrumental justification of basic rights manifestly lacks a normative structure that could guide further action. It neither provides moral reasons to prioritize certain rights over others nor engages itself in a discussion about the relative higher normative value of some rights over others. The approach is rather simplistic and remains focused as to which conditions are essential for human survival per se. At the same time, the proposition of basic rights allows its proponents to refrain from value judgements and further ethical considerations and rather focus on the self-evident character of basic rights.

In regards to the socio-economic rights sphere, the need for individuals to possess at least the necessary means to sustain survival underpin a right to "minimal economic security". In essence, such a right is placed in order to avoid cases of severe material deprivation and the deleterious impacts that such cases would bring upon the enjoyment of other fundamental rights. Although it is hard to deny that basic rights as portrayed above are indeed essential and cannot under any circumstances be overlooked, it is hardly convincing that interpreting the minimum core concept in a such a minimal and instrumental way is actually compatible with the moral and ethical imperatives that underpin positive human rights law. As outlined, the theory deliberately refrains from articulating value judgements in order to maintain an uncontestable degree of impartiality and

76 Henry Shue, 1980, p. 19.
77 Henry Shue, 1980, p.20.

objectivity. Although this might be perceived as an advantage, the right to subsistence ends up disempowered both from a normative and practical standpoint.

At first, it is worth noting that arguments about human rights and values in general, unavoidably entail difficult questions about moral principles and subjective judgements. Limiting a concept to its absolute minimum in order to avoid entering the realm of "subjectivity" leaves a concept vulnerable as to why certain rights deserve our respect and commitment. Instead of adopting a comprehensive approach as to why some rights count more than others, the theory gets lost in search of an "absolute" minimum and the conditions necessary for human survival. As pointed out, this approach brackets human rights to the inner limits of survival in order to gain objectivity and potentially feasibility. This bracketing, however, comes at a great cost since the normativity of concepts such as equality, dignity and autonomy are dismissed. [78] Certainly, an attempt to disentangle human rights from their normative values in order to gain objectivity is paradoxical. In principle, human rights are based on values which means that their validity is not based on the contingent factors of how many people are willing to accept them but rather on the fact that they protect and promote some constant and highly valued features of human life per se.[79]

Moreover, the task of defining an absolute minimum of subsistence to human survival is meaningless. Firstly, disregarding any contextual factors and focusing rather to the articulation of concrete and universal minimum standards ends up in examining the absolute limits to which human life can be sustained in a very abstract, unhelpful and more importantly, unwarranted sense. Taking into account the variations in physical demands, climate divergences and daily activities renders the task of drawing a line in regards to minimum subsistence requirements nearly impossible and inevitably arbitrary.[80] Furthermore, it has been rightly observed that it is not life per se guaranteed under the human rights treaties but rather the right to lead a dignified and autonomous life in communion with other people.[81] Evidently, a narrow definition of the right to subsistence lacks the necessary flexibility to provide a more comprehensive protection that needs of different individuals necessitate. This view was similarly proposed by the Constitutional Court of South Africa in Grootboom by supporting that divergences among different needs exist not only in terms of degree but also in relation to the kind of protection required.[82] Undoubtedly, assessing core obligations in reference to needs that are essential to human survival disregards the fact that human rights are committed to the values of democracy, human dignity, equality and autonomy. A prioritization of certain rights will be warranted notwithstanding their urgency as instruments to human survival. For example, sustaining the function of childcare facilities may be crucial to the empowerment of women and the promotion of equal employment opportunities while a minimum-survival approach could dismiss it as non-essential.[83]

Certainly, justifying the minimum core in such an instrumental way while refraining from the expression of ethical and normative assumptions undermines greatly the basic rights concept. Unavoidably, rights conflict with each other and public deliberation on subjective and normative grounds is required. Attempting to transform abstract principles into concrete decisions when rights of equal normative value conflict, require adequate criteria of defining what is practically

78 Katharine Young, 2011, p. 132.

79 Beetham David, 1999, p. 138.

80 Amartya Sen, 1981, p.12.

81 *S v T MAKWAN,* para. 326,327.

82 *The Government of the Republic of South Africa v Grootboom, para. 33.*

83 Sandra Liebenberg, 2010, p.170,171.

significant in a particular situation.[84] Moreover, disrobing rights of their normative content overlooks the fact that legal decisions necessarily express subjective values and preferences.[85] Disorienting rights from a normative direction, concedes the moral priority that certain rights enjoy over others and leaves them helpless to arbitrariness in face of conflictual situations. In the end, ranking the notion of human survival as the essence of the minimum core will prove incapable to contribute meaningfully in difficult questions of prioritization and ad hoc balancing.

ii. Attaining consensus

The impetus for articulating a minimum core originated from the exigencies of defining in a universal way immediate and absolute human rights obligations. It has been supported that the minimum core is meaningful only as an absolute concept that would not be dependent to the amount of available resources within a state's budget. Arguably, if the minimum content of a right is dependent on budget considerations, the ratio of the minimum concept as a threshold would be severely undermined.[86]. Thus, as a minimum requirement all states must respect the minimum threshold determined by the minimum core notwithstanding the availability of resources and the economic disparities that exist among states. The margin of appreciation in regards to human rights fulfilment and the principle of progressive realization are reintroduced after the minimum requirements are met. Then, the minimum core covers the bare essentials of a certain right and its content is identical whether in Canada or Benin while the remaining provisions for the protection of each right remain in each state's capacity and policies. [87]

In search of universality, the concept seems dependent upon achieving a certain degree of consensus. This was evident in the basic rights approach but remains present in value-based approaches as well. The consensus theory has been an influential concept in the realm of political and moral philosophy since the 1970's. It was first introduced by John Rawls in his book "A theory of Justice." In essence, the theory supports adopting a neutral and objective stance when articulating principles of justice by taking into account what could individuals reasonably agree for themselves when all factors of secular interest, social class, sex and race are foreshadowed. Letting aside whether such a discharge of individual interest is apart from possible, warranted, such an exercise presupposes a very thin definition of what belongs to the political sphere.[88] At the same time, the essence of a good life and the values that are worth pursuing, remain in the realm of individual and private sphere. In short, Rawls pinpointed this distinction as the priority of right over the perception of good. Presumably, uncontested principles that could be endorsed deliberately by every individual shall prevail when delineating the basic political institutions of a society. To a second level, individuals are free to adhere to any religious or moral dogmas of personal belief and conduct as long as these credos remain restrained to the private sphere.[89]

Relevantly to the discussion of the minimum core, the consensus theory introduces the idea of primary goods or as stated by Rawls: "the minimum essential capacities required to be a normal cooperating member of the society." [90]Primary goods may consolidate divergent provisions and aspire in pledging certain constant material interests that are present in any society. In the context of the consensus theory, the main focus is oriented towards what reasonable individuals could agree

84 Marti Koskeniemmi, 2010, p. 55.
85Viljam Engström, 2009, p. 32.
86 Kahrin Lehmann, 2006, p. 184.
87 Geraldine Van Bueren, 2002, p. 184,185.
88 Michael Sandel, 1998.
89 John Rawls, 1986, 173 – 176.
90 John Rawls, 1986, p. 183.

upon regardless of moral, religious and social class considerations. Although appealing, such a notion of reasonableness and consensus lacks certain substantial elements. Firstly, a distinction shall be drawn between what could be perceived as reasonable in theory on the one hand and where would an actual deliberation about the minimum core eventually lead to.

It is plausible that even wider ethical agreements about "what is manifestly unjust"[91] may fail to take into account in a consistent manner the social and economic restraints that are present in every society.[92] It has been argued, that although agreement upon what is morally and constitutionally "right" might be reached, reasonable people may still disagree about the actual significance of these principles in practice or about the necessary means to be employed in order to pursue these objectives.[93] Two considerations are worth elaborating at this point. Firstly, perhaps it is possible to identify a common perception about what manifest injustices encompass. Once, however, beyond that point the task of designating the content of rights will be subject to disagreement.[94] Inevitably, the question of SER fulfilment intertwines with a multitude of political, social and cultural considerations and reasonable individuals will share different opinions and perspectives on these matters. At best, seeking a consensus that will cease the discussion on SER and establish stringent standards will most likely yield the most minimal and unhelpful results. The second point refers to the socio-economic restraints that contemporary states face. A minimum core approach could interfere with the efficacy of macroeconomic policies by focusing disproportionately to short term relief policies in order to meet the minimum requirements, while neglecting an investment of resources into more sustainable and longer term solutions.[95] Normally, a multitude of limitations can be identified within the domain of SER fulfilment. The recognition of such limitations even in the form of widespread consensus does not ipso facto translate in the possibility of addressing these issues consistently. Contemporary states operate within a time and resource-limited context while social reforms and macroeconomic adjustments demand prioritizing certain objectives over others, and sacrificing certain short-term considerations over long-term sustainability.

Moreover, a stringent focus on consensus and what could be reasonably agreed among individuals lacks the guidance of normative principles. Considering consensus as a value in itself instead of a procedural instrument, renders the outcome of the deliberation dependent on multiple contingent factors.[96] In regards to this point, it should be noted that consensus is a root principle of democracy. The value of this principle, however, consists in the fact of attributing equal consideration to the opinion of each individual and fostering inclusion in the democratic discourse. Certainly, the mere value of consensus is not sufficient to guarantee the legitimacy of *any* outcome. This is part of the reason that the outcomes of consensus in particular and democratic deliberation in general are subject to general principles of justice. Thus, consensus on its own in the context of human rights fulfilment has little to offer in regards to the legitimacy of the agreed standards. In order to specify a bit further, it is not intended to undermine the importance of procedural requirements. Certainly, equal participation and the attainment of consensus are prerequisites in the pursuit of efficient and democratic institutions. What is argued against, is a shift of interest from the fulfilment of certain substantial human rights objectives to an adherence towards formal requirements that do not serve human rights aspirations.[97]

91 Michael Ignatieff, 2001, p. 56.
92 Katharine Young, 2011, p. 141.
93 Rosalind Dixon, 2007, p. 417.
94 Viljam Engström, 2009, p. 252.
95 Murray Wesson, 2004, p. 304.
96 Katharine Young, 2011, p. 141.
97 Viljam Engström, 2009, p. 175.

Effectively, in absence of strong justice and fairness considerations, consensus seems incompatible with the minimum core concept both from a practical as well as a normative perspective. From a normative point of view, consensus as a value on its own is inadequate to guarantee an outcome that would be in accordance with human rights aspirations. In regards to human rights, the objective always remains to render them inclusive and effective. Subjecting these aspirations to the attainment of a universal consensus will by definition have little to offer.[98] Furthermore, taking into consideration the ways in which consensus is normally reached in practice is equally discouraging.[99] Instead of an unhindered deliberation among equals, consensus resembles more to an expression of secular interests and the attainment of a vulnerable equilibrium. The value of consensus under such circumstances is dubious to say the least, and incongruous with the central human rights principles that a minimum core wants to promote.

iii. Consensus in practice

Apart from examining consensus at a theoretical level and its adequacy as a standard-setting theory for the minimum core, certain approaches define consensus in reference to the status already attained and endorsed by states, international institutions and courts. Such an approach incorporates a comparative analysis of the constitutional values, the extent of legislative protection and previous case-law regarding socio-economic rights adjudication and then proceeds in defining the normative content of a given right. Then, the minimum core is identified through state practice rather than deduced theoretically.[100] This kind of practical consensus differs significantly from the former, in a sense of adopting a rather positivist approach. Effectively, instead of engaging in an abstract exercise that will yield a minimum core threshold, the attention is shifted to the principles that have actually been endorsed in practice by the legislative, administrative and judicial authorities. Focusing on the existing protection scheme rather than articulating new standards in a theoretical manner gains both in specificity as well as in feasibility. In regards to specificity, concrete standards are present in constitutional and statutory law, and courts possess an abundance of case-law concerning social security protection. On the other hand, the spotlight is pinpointed towards standards that states have deliberately assumed on their own accord. Thus, constructing a minimum core in reference to standards already endorsed in state practice will equally be feasible.

The Committee seems to endorse such an approach by the statement in General Comment No. 3 paragraph 10, that a minimum core obligation approach was derived "on the basis of the extensive experience gained by the Committee… over a period of more than a decade of examining State's parties reports". As Philip Alston mentioned, the clarification of the normative content recognized in the Covenant was a top priority for the Committee and the prevailing view was that this should emerge from the examination of State Parties' reports. However, he admits that State's reports failed to assist in a substantial way in this task, namely because of the lack of effort investment on behalf of the States.[101] In regards to defining the minimum core, focusing on the standards that are commonly accepted already in practice certainly possess some merits. Namely, through a pragmatic approach towards the minimum core and a concrete reference to the existing status quo of social protection the task of articulating minimum standards is facilitated. However, it is doubtful whether this approach can contribute substantially to SER fulfilment.

It is apparent, that contemporary societies are in need of a comprehensive and more effective scheme of social protection. Such a statement presupposes that the current regime of social

98 Eyal Benvenisti, 1999, p. 853.

99 Katharine Young, 2011, p. 149.

100 Katharine Young, 2011, p. 142.

101 Philip Alston, 1992, p. 490 – 493.

protection often times acts on an exclusionary basis and neglects the fundamental needs of the most marginalized and disadvantaged members of the society. In essence, focusing on the degree of social protection already acknowledged in practice, resembles more to a task of systematizing existing legal norms and deepening the issue of social exclusion rather than articulating a new concept that will positively affect the daily lives of people in manifest need. Furthermore, it seems unavoidable that such a narrow approach will place a disproportionate focus to "the lowest common denominator" instead of serving as an effective tool of promoting social justice.[102] The problem of the lowest common denominator drag is particularly relevant in the human rights sphere where state parties of divergent cultural, legal and political traditions must necessarily agree upon common standards that command the broadest level of acceptance.[103] In the contested field of SER fulfilment, it becomes apparent that the content of a minimum core which originates solely from the existing status of social protection, is condemned to reach very conservative conclusions that will fall short of its promises to guarantee to all people the necessary means to leave a dignified and fulfilling life.

v. Minimum core and the value-based approach

The subtlest attempt to define the content of the minimum core is liaised in reference with principles that haul a robust normative force. Undoubtedly, associating the minimum core with the principles of human dignity, equality and autonomy can contribute in a meaningful sense to the pursuit of social justice and the eradication of extreme poverty. Furthermore, elaborating in a comprehensive manner what constitutes a dignified life and defining universal standards that every individual in virtue of her/his humanity is entitled to enjoy is a great step towards achieving the aspirations set forth in the Universal Declaration for "freedom from fear and want". If anything, underlining the interdependence of human dignity and socio-economic protection lies at the heart of human rights discourse and examining the minimum core under this light, calls for a cautioned analysis. In its most common manifestations, the value-based approach encompasses minimal interests that provision the essential features that guarantee the existence of a right in a strict sense. At a second level, the value-based approach incorporates extensive interests that consolidate all fundamental elements in order for individuals to be able to flourish and achieve their goals.[104] Furthermore, the criteria that determine whether a feature should be classified as minimal or extensive are not dependent on pragmatic considerations or the availability of resources but rather on classifying different degrees of urgency within a right itself.

Hence, the process of defining the adequacy of a right is three-fold. At first, an individual shall be able to fulfil her basic survival interests. Secondly, it is assumed that certain recurrent conditions are necessary in any society regardless of cultural and historical considerations. Thus, any individual must have a guaranteed access to these conditions. Lastly, societies accommodate certain distinctive and unique features and defining the threshold of what constitutes a dignified life must equally ensure the inclusion of all members of the society in these domains.[105] Such a comprehensive definition differs substantially from previous attempts to define the minimum core through incorporating a concern for distinct needs that are socially determined and dependent upon multiple contingent social, cultural, historical and economic factors. Nevertheless, besides their contingency these needs shall be accommodated when considering the essence of a dignified life for a given society in a given time. In principle, the essence of a dignified life is multifaceted and intertwined

102 Katharine Young, 2011, p. 148.

103 Andrew Byrnes, 1994, p. 202.

104 David Bilchitz, 2007, p. 185 – 210.

105 Ibid, p. 192.

with multiple considerations such as the social norms that are prevalent in each society, and the need of examining a right in relation to relevant factors for its purpose.[106]

As far as the minimum core concept is concerned, defining the normative content in such a manner, leaves plenty of room for the consideration of the societal context and divergent individual needs. However, the cost of designating the minimum threshold in reference to the abovementioned three-scaled approach comes at a great price. Firstly, it departs from the idea of a universal and absolute minimum core inherent in socio-economic rights as developed by the Committee. Should the content of the minimum core be perceived as a shifting target in order to accommodate divergent needs, a degree of variability must be expected among different regions but also among seemingly equal individual circumstances. Put differently, as long as the definition of a minimum core is dependent upon the synergy of multiple factors, including distinctive individual circumstances, the content will vary greatly from person to person. (*The Government of the Republic of South Africa v Grootboom and Other*s para. 32) In the Grootboom case, the Constitutional Court of South Africa argued that an attempt to define the minimum core of the right to adequate housing would raise many difficult questions, namely because the needs accommodating this right are extremely diverse. Naturally, the inherent diversity of needs in reference to socio-economic rights fulfilment further complicates the question of a minimum core. In its decision, the Court argued:

> The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.[107]

Apparently, an essential feature of the minimum core, its universality, has to be jettisoned and replaced by a minimum core concept dependent upon the distinctive features of each society. Certainly, such a move delineates a pragmatic shift, it is, however, indicative of the limitations that the concept of universality is destined to face in absence of context considerations. While adding another layer of complexity by dismissing the universal feature of the minimum core, the value-based approach encompasses the limitations and problematic aspects of previous approaches in their totality. Thus, for example the first part of this approach incorporates elements absolutely essential for sustaining human survival. As argued in the first section of this chapter, the issue of defining where an absolute threshold to human survival stands is far from obvious. Physiological human needs differ to a substantial degree according to environmental, societal and individual variables. Unless a doctrine of proportionality is incorporated in order to measure divergent needs, the whole idea of a threshold that would guarantee the absolute essentials to every individual is manifestly misguided. Then, the value-based approach proceeds in identifying certain "universal" interests that are distinct from the notion of human survival while at the same time being valid in any society and at any point throughout history. Enlisting certain rights as universal in a sense of protecting constant vital interests of individuals can certainly be a legitimate task. However, certain limitations must be borne in mind. Firstly, commanding broad acceptance on certain rights and framing them as universal is possible. The real question lies on how this acceptance can be capitalized in practice. Not unlikely, broad acceptance could be due to abstraction and disagreement may emerge as soon as the practical significance and application of a certain right is discussed.[108] From the moment focus is narrowed down further in order to examine the possibility of a minimum threshold in regards to SER the issue appears even more complicated. Namely, it is not clear which group of rights will

106 Sandra Liebenberg, 2010, p. 170,171, David Bilchitz, 2007, p. 92.

107 *The Government of the Republic of South Africa v Grootboom,* para. 33

108 Viljam Engström, 2009, p. 266.

belong in the subsequent layer of the threshold following the group of rights essential to human survival. Defining the content of rights that do not cover the basics of human survival but nevertheless are present in any society throughout history is certainly a vague task. However, in regards to the minimum core the task is even more complicated since an absolute threshold of these rights must be designated while leaving plenty of space for its subsequent fulfilment at a later point.

iv. The case of moral relativism

The final bracket of the value-based approach entailed consideration for needs that are divergent in their nature and dependent upon the societal context. Although this may be considered as one of the strengths, or essential shifts, of this approach it disembarks from the established notion of the minimum core. However, since the value-based approach is associated with certain high-esteemed and commonly accepted principles a deeper obstacle in regards to the abstract nature of human rights and their potentially divergent perceptions has to be considered. The concept of human dignity is a recurrent value in a multitude of legal constitutional orders while remaining the cornerstone of the human rights discourse. However, although widely-endorsed, moral principles, presuppose the articulation of highly subjective judgments. Naturally, an inherent right to freedom should be respected for any individual in spite of social class, religion, sex, origin and other considerations. However, although unconditional freedom is a non-negotiable principle for every human being, reasonable people may well enter into disagreement as soon as the discussion extents to the necessary legislative measures that are required in order to guarantee this right in a meaningful sense. Abstract principles encounter recurrently the problem of indeterminacy, therefore disagreement. Security and welfare protect certain fundamental rights. However, for a certain group of people security will signify the protection of established property titles and the stability of a country's tax collection system while for others security will imply the reproduction of basic social welfare services.[109] In a same sense, equality is the basis of any legal system. However, whether equality is sufficiently respected when its formal preconditions are met or whether affirmative action by the legislative branch is required and to what extent, are issues that reasonable individuals will routinely disagree upon. Aristotle noted a long time ago about justice:

> for all men agree that what is just in in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supports of aristocracy with excellence.[110]

Another aspect worth considering is not only divergences of perception about the actual content but also on the justification that different groups of people may provide for their course of action.[111] For example, the justificatory reasons in support of the ICESCR do not necessarily coincide between all states. As a matter of fact, the obtained approval could be due to diametrically different perceptions on the function and role of the state towards the fulfilment of SER. Certainly, in the example of ICESCR the purpose of the Covenant is symmetrical, however, the underlying perceptions and the ways in which these purposes must be fulfilled could be entirely divergent. Such differences in perception matter as long as they demonstrate that disagreement will always emerge whenever the true content of a right is on the spotlight.

The disagreement that evolves around abstract principles does not render the dialogue futile. To the contrary, an open deliberation and constant redefinition about commonly accepted and established principles, is the essence of democracy and political participation. The same rationale applies in an

109 Marti Koskeniemmi, 2010, p. 53.

110 Aristotle, para. 3.

111 Viljam Engström, 2009, p. 268.

equal sense, with the minimum core approach. As stated earlier, a continuous and all-encompassing discourse about socio-economic rights and the best ways to attain their fulfilment is warranted. However, the pursuit of this objective, shall be disentangled from any attempts of closure, determinacy and rigidity.[112] Put differently, given the abstract nature of rights and the different manner in which they are perceived by reasonable individuals across the globe, any meaningful concretization of their content is bound to be controversial.[113] Such a limitation shall be borne in mind in reference to the minimum core. Namely, a legalisation of SER in an absolute manner runs the risk of impeding political discourse and democratic deliberation instead of acting as a commence to this discussion.[114] The minimum core, despite of its intertwinement with widely-endorsed moral principles, has little to offer as a universal and absolute threshold. Although human dignity and autonomy are appealing from a deontological perspective, they can be utilized as principles of an essentially open nature. The abstract character that accompanies them, renders them incompatible with the fixed and rigid essence of a minimum core. Such a distinction on the nature of human dignity and autonomy, does not diminish their essence and normativity. It does, however, pinpoint that the common ground of these principles is blurred. Thus, a constant redefinition through democratic practices on the content of these principles, is warranted.

It should follow naturally that as long as the substantial content of equality and human dignity form part of a constant democratic deliberation, same would count for the content of a minimum core. The rigid and fixed essence of the minimum core lacks the sensitivity to assimilate and respond to changing perceptions and circumstances. In the end, the attempt to transmute the normative core of socio-economic rights into rigid legal norms is the main drawback of this approach. Understandably, these attempts stem from a need to concretize socio-economic obligations, or put differently to "give socio-economic rights teeth".[115] However, as underlined recurrently in this paper, it is doubtful whether a solidification of socio-economic rights can form an adequate response to phenomena of social exclusion and poverty. Unwarrantedly, the bracketing of socio-economic obligations to concrete legal standards may actually lead to the curtailment of social protection to a considerable extent due to the need of commanding broad acceptance. On the other hand, predefined legal standards are incapable of prioritizing properly the urgency and relevance of conflicting needs and provide reasonable ad hoc assessments on the basis of individual circumstances. Lastly, the danger of a minimum core impeding political deliberation on the true content of SER due to legalisation of social standards is present. The extent and manner of SER

112 Katharine Young, 2011, p. 116.

113 Viljam Engström, 2009, p. 264.

114 Compare with the essentially open nature of the European Pillar in regards to its implementation: *Establishing a European Pillar of Social Rights*, 2017, p. 17. It is suggested among others: i) the establishment of social investment targets for the Member States, ii) Benchmarks, including stronger policy guidance and monitoring, iii) a more targeted use of EU funding instruments to support reforms at a national level, v) an inclusive dialogue process, and a specific role for the EU/national social partners, iv) systematic assessment of social impacts and other evidence-based methods (ex-ante and ex-post) for better social and employment "proofing" of actions, iiv) Policy coordination (eg. Open Method of Coordination), iiiv) Mutual learning and exchange of good practices. Evidently, the mechanisms of implementation for the Pillar provide a great margin of flexibility to Member States in order to achieve convergence in social standards and protection.

115 David Bilchitz, 2002.

fulfilment belongs in the interest of public sphere rather being an issue of judicial competence.

Conclusions

i. The limitations of the minimum core

The impetus for this paper was stimulated by the prominent position that the debate of socio-economic rights fulfilment occupies in the current global and regional context. The European Pillar of Social Rights is currently under constant formulation and millions of people confide their hopes on a more social and inclusionary European Union. However, while the debate about the potential role of the European Pillar endures, it is of interest to examine a theoretical perception that originated from the Committee on Economic, Social and Cultural Rights. Identical to the purposes of the European Pillar, the minimum core concept is an attempt to combat cases of extreme poverty and ensure a fixed degree of social security. In order to achieve these purposes, the minimum core was bestowed with an absolute and rigid character that states must adhere to notwithstanding any contextual considerations. However, a critical analysis of the minimum core from an academic perspective demonstrates that it is vulnerable to a plethora of limitations that deserve to be enumerated. Therefore, a close scrutiny on the function of the minimum core along with the identification of its theoretical and practical limitations, was the focal concern of this paper. At the same time, identifying the shortcomings of past attempts can shed light towards the desired direction that SER fulfilment must adopt.

Keeping the abovementioned considerations in mind, the main research questions of this paper were oriented towards the function of the minimum core. How proponents of the minimum core define its content? Is it feasible to designate in a concrete sense the absolute essentials of each right and if so, on what standards? Could, lastly, such a delineation of the minimum core contribute meaningfully to the fulfilment of socio-economic rights in practice? In light of these questions, this paper identified a multitude of theoretical approaches that seek to propose substantial criteria and define the minimum core content adequately.

The first approach introduces the notion of basic rights. Essentially, basic rights function as preconditions for the enjoyment of anything else in life. They form the “sine qua non” of rights, provisions that in their absence the utility of other rights diminishes. The significance of basic rights is plain and a right to every person to the absolute essentials in order to sustain life manifest. Thus, the content of the minimum core in light of the basic rights approach is designated by taking into account the absolute minimum requirements in order for an individual to sustain life. From a normative standpoint, a basic rights approach is worryingly disentangled from any ethical considerations. It is important to be reminiscent that human rights treaties do not solely aspire in ensuring the reproduction of human life. To the contrary, a life of human dignity and self-empowerment is the central theme of human rights aspirations. Therefore, the minimum core in light of the basic rights approach is incompatible with the human rights enterprise. At a practical level, a consideration worth recalling is the vague delineation of a borderline between what constitutes the bare essentials of human survival and what shall be considered as complementary. Human physiology is dependent upon multiple factors and needs are essentially divergent. In effect,

an attempt to define the absolute essentials without reference to societal factors seems manifestly misguided. Moreover, due to its sole reference to survival-based criteria, the basic rights approach will prove incapable of articulating a right's assessment methodology when divergent needs conflict in practice. Put differently, rights of equal normative value often conflict and a survival-based approach due to the absence of normative references cannot assist in any meaningful sense to an ad hoc classification.

Alternatively, the minimum core could be perceived as the product of an overlapping consensus. The focal point of the consensus approach reflects a hypothetical deliberation among equal individuals in order to deduce the content of the minimum core. Although the consensus approach emphasizes the substantial precondition of democratic deliberation in order to conclude on the content of the minimum core, it is subject to its own limitations. At first, it is important to stress that the utility of consensus is procedural rather than substantial. Deliberation among individuals is a necessary parameter in any democratic function. The value of consensus, however, lies in its ability to act inclusively and engage all members of the society in the public debate. Consensus on its own lacks the substantial criteria to guarantee a fair and warranted outcome. Put differently, consensus cannot justify an outcome on the sole basis of widespread agreement. Human rights considerations must precede the instrumental use of consensus. Furthermore, delineating human rights aspirations within the sphere of the politically and pragmatically feasible will undoubtedly disempower the normative content of human rights. Especially in the human rights framework, it is worth recalling that a multitude of states from divergent political, cultural and historical backgrounds collide. Consensus among such a plethora of states will likely be restrained in order to articulate a very thin definition of the minimum core content that could command broad acceptance. It is doubtful whether such a narrowly defined minimum core is a warranted mean of socio-economic rights fulfilment. Furthermore, from a practical standpoint it is important to note that ideally consensus presupposes an unhindered democratic deliberation among politically equal individuals. In the current context of vast material and social inequalities the value of consensus as root principle lacks in legitimacy. Lastly, although widespread agreement could be attained upon certain concrete standards, states may still find themselves incapable of meeting these obligations. Naturally, although a parliamentary decision of minimum protection can lead towards the warranted direction, it is important to be reminiscent of the socio-economic restraints that contemporary states operate within. Put differently, SER fulfilment at a macro level requires the investment of resources and time on long-term projects. Equally it demands a prioritization among different objectives. Such limitations render the idea of inflexible standards implausible. Attaining a sufficient degree of social protection is an open-ended process that cannot fit on pre-determined standards. The issue at stake is the absolute and non-retrogressive function that the minimum core is expected to accomplish. Consensus within a society can set certain benchmarks and objectives. However, consensus on its own cannot accomplish these objectives. Well-targeted administrative measures on a consistent basis will lead towards this direction.

A third approach that is worth mentioning in short, is an attempt to define the content of the

minimum core through a comparison of standards that are present in the current practice of states and international institutions. In this case, the minimum core is rather deduced through an empirical inquiry on the international regime of social protection. However, rendering the content of the minimum core dependent on the existing status of social protection will in principle reach conservative conclusions. Intuitively, the minimum core is articulated as a response to the shortcomings of the current social security regime. A concept originating from the roots of the current scheme of protection will inevitably reproduce its limitations and will prove incapable of contributing in a meaningful manner to the pursuit of justice.

The last approach that this paper focused on, utilizes principles that are deeply embodied within the human rights discourse and treaties in order to propose a minimum core that would serve as their embodiment. The deontological importance of a minimum core that intents to ensure respect for these principles in a universal manner is evident. However, the issue at stake is whether human dignity is a commensurate principle that could be defined in a universal manner or whether equality invokes the same positive connotations in different contexts. In principle, a notion such as human dignity has a relative value. Put differently, the threshold between qualities that dignify an existence and conditions that diminish it, is as vague as divergent. The essence of a dignified life will be dependent upon multiple historical, social and cultural considerations rendering the aspiration of defining the content of the minimum core in a universal manner a noble chimera. Furthermore, the abstract nature of principles such as equality demands a certain plasticity and openness in regards to their true content. In substance, the content of normative principles is the subject of a constant deliberation among democratic institutions. A minimum core that aspires to conclude instead of initiating a dialogue about socio-economic rights fulfilment is in that sense misguided. Ideally, framing minimum standards must remain open to developments in civil society and the public sphere while taking into account any contextual limitations that affect the redistribution of resources within a society.

ii. In search of alternatives

By now, it should be apparent that although the minimum core was introduced as a tool for social justice, its manifestations in reference to this purpose are inadequate. Unwarrantedly, bracketing socio-economic obligations into minimum standards may lower significantly the extent of social protection. Furthermore, the rigid essence of the minimum core is devoid of any utility in the context of conflicting needs and opposing views about the proper allocation of resources. However, a shift of perception regarding the minimum core might have better chances of success. Understandably, although a minimum approach is unwarranted towards more complex situations, it can highlight at a primary level the urgency and priority certain pressing needs demand. Instead of its absolute essence, the minimum core could stress the weighted priority that certain needs deserve. It is manifest that administrative bodies and courts are in need of normative guidelines in front of tough decisions about the optimal allocation of resources. Apparently, human rights law does not encompass a methodology of defining the most vulnerable neither establishes a scaled priority in the allocation of resources since rights are indivisible and interdependent. However, taking into

account the current economic and political challenges, it is evident that difficult choices have to be made in regards to rights fulfilment. Thus, elaborating criteria that can inform legislative, administrative and judicial practice can prove substantial.[116] Although it is doubtful whether the minimum core can function effectively as a framework of ethical and normative guidelines due to its insistence on minimum standards, a revision of its function as a flexible and open-ended principle which encompasses normative principles and settles priorities is not entirely misplaced. The minimum core certainly has the potential of underlining the elevated priority that certain urgent needs of vulnerable and disadvantaged groups deserve. The limitations that evolve around it may caution for a reconsideration rather than a complete abandonment of the concept.[117] In the end, framing the minimum core as a complementary principle in order to articulate consistent arguments concerning the prioritization of certain vital needs must be the best future for this concept. At the same time, the position of this concept should be clear. An argument amongst many others in the political discourse concerning the realization of SER. Is it legitimate? Is it warranted? Should it be extended? Should it be jettisoned? Democratic practice and deliberation will show.

116 Mary Dowell – Jones, 2015, p. 199.

117 Sandra Liebenberg, 2010, p. 172,173.

Bibliography

Abdullahi A. An-Na'im, *To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights,* at Ghai Yash, Jill Cottrell, *Economic, Social and Cultural Rights in Practice: The role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, London 2004.

Alston Philip, *Making Economic and Social Rights Count: A strategy for the Future*, Political Quarterly, 1997, vol. 68.

Alston Philip, *The Committee on Economic, Social and Cultural Rights, The United Nations and Human Rights: A critical Appraisal*, Clarendon Press, Oxford 1992.

Aristotle, Nicomachean Ethics Book V.

Armstrong Chris, *Global Distributive Justice*, Cambridge University Press, New York 2012.

Baderin Mashood A., Robert McCorquodale, *Economic, Social and Cultural Rights in Action*, Oxford University Press, New York 2007.

Beetham David, *What Future for Economic and Social Rights?,* Political Studies, 1995, vol. XLIII.

Beetham David, *Democracy and Human Rights*, Polity Press, 1999.

Benvenisti Eyal, Margin of Appreciation, Consensus and Universal Standards, International Law and Politics Vol. 31 1999,

Bilchitz David, *Poverty and Fundamental Rights: The justification and Enforcement of Socio-Economic Rights*, Oxford University Press, New York 2007.

Bilchitz David, *Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence*, South African Journal on Human Rights, Volume 19, 2003.

Bilchitz David, Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance, The South African Law Journal, vol. 119, 2002.

Brand Danie and Sage Russell, Exploring the core of content of socio-economic rights: South African and international perspectives, Protea Book House, Pretoria 2002.

Buck Trevor, *Judicial Review and Social Welfare*, Pinter, London 1998.

Byrnes Andrew, *Toward More Effective Enforcement of Women's Human Rights through the Use of International Human Rights Law and Procedures*, at Human Rights of Women National and International Perspectives, ed. Rebecca J. Cook, University of Pensylvania Press, Philadelphia 1994.

Carozza Paolo, *Subsidiarity as a Structural Principle of International Human Rights Law*, American Journal of International Law, Vol. 97, 2003.

Chapman Audrey and Sage Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp 2002.

Constitutional Court of South Africa, Case CCT 11/00, *The Government of the Republic of South Africa v Grootboom and Other*s.

Constitutional Court of South Africa, Case CCT 32/97, *Soobramooney v Minister of Health.*

Contiades Xenophon, Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, International Journal of Constitutional Law, Volume 10 Issue 3 July 2012.

Coomans Fons, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Intersentia, Antwerp-Oxford 2006.

Craig Scott, Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A comment on Soobramoney's Legacy and Grootboom's Promise*, South African Journal of Human Rights, 2000.

De Feyter Koen, Stepthan Parmentier, Christiane Timmerman, George Ulrich, *The Local Relevance of Human Rights*, Cambridge University Press, New York 2011.

Dowell-Jones Mary, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit*, Martinus Nijhoff Publishers, Leiden 2004.

Dixon Rosalind, *Creating dialogue about socio-economic rights: strong-form versus weak-form judicial review revisited*, International Journal of Constitutional Law Volume 5 Issue 3, 2007.

Dowell–Jones Mary, *The Economic of the Austerity Crisis: Unpicking some Human Rights Arguments, Human Rights Law Review*, 2015, Vol. 15.

Dworkin Ronald, Law's Empire, The Belknap Press of Harvard University Press, Cambridge, Massachusetts 1986.

Eide Asbjorn, Catarina Krause, Allan Rosas, *Economic, Social and Cultural Rights*, A textbook Second Revised Edition, Ed. Kluwer Law International 2001.

Engström Viljam, *Understanding Powers of International Organizations: A study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism- with a Special Focus on the Human Rights Committee*, Abo Akademi University Press, Abo 2009.

Engström Viljam, *The Political Economy of Austerity and Human Rights Law*, Institute for Human Rights Working Paper No. 1/2016, November 19 2015.

Fuller Lon, Kenneth Winston, *The Forms and Limits of Adjudication*, Harvard Law Review, Vol. 92, 1978.

Ghai Yash, Jill Cottrell, *Economic, Social and Cultural Rights in Practice: The role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, London 2004.

Gibney Mark, Sigrun Skogly, *Universal Human Rights Obligations and Extraterritorial obligations*, University of Pensylvania Press, Philadelphia 2010.

Herter Shareen, Lanse Minkler, *Economic Rights: Conceptual, Measurement and Policy Issues*, Cambridge University Press, New York 2007.

Hill Herne QC and Colm O'Cinneide, *The Effective protection of Socio – Economic Rights,* at Ghai Yash, Jill Cottrell, *Economic, Social and Cultural Rights in Practice: The role of Judges in Implementing Economic, Social and Cultural Rights*, Interights, London 2004.

Holmes Stephen and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, W.W. Norton, New York 1999.

Ignatieff Michael, *Human Rights as Politics and Idolatry*, Princeton University Press, 2001.

Iles Kevin, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, South African Journal on Human Rights, Vol. 20, 2004.

Koskeniemmi Marti, *Human Rights Mainstreaming as a strategy for Institutional Power*, Humanity: An International Journal of Human Rights, Humanitarianism and Development, Volume 1, Fall 2010.

Leckie Scott and Anne Gallagher, *Economic, Social and Cultural Rights, A Legal Resource Guide*, University of Pensylvania Press, Philadelphia 2006.

Lehmann Karin, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, American University International Law Review 22, no. 1, 2006.

Liebenberg Sandra, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, Juta 2010.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Article 6, Annex 4 at Economic, Social and Cultural Rights, A Textbook

Mittas Stergios, *Η αλληλεγγύη ως θεμελιώδης αρχή δικαίου*, εκδ. Ιδρύματος Σάκη Καράγιωργα, Αθήνα, 2016.

Pieterse Marius, *Eating Socio-Economic Rights: The usefulness of Socio-Economic Rights in Alleviating Social Hardship Revisited*, Human Rights Quarterly, Vol. 29, 2007.

Rawls John, *Political Liberalism*, Columbia University Press, New York 1996.

Rosenfeld Michel and Andrew Arato, *Habermas on Law and Democracy: Critical Exchanges*, University of California Press 1998.

Sandel Michael, *Liberalism and the Limits of Justice*, Cambridge University Press 1998.

Nolan Aoife, Rory O'Connell, Colin Harvey, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Hart Publishing, Oxford and Portland, Oregon 2013.

Wiktor Osiatynski, Needs-Based Approach to Social and Economic Rights, at Herter Shareen, Lanse Minkler, *Economic Rights: Conceptual, Measurement and Policy Issues*, Cambridge University Press, New York 2007.

Sepulveda Magdalena, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights,* Intersentia, Antwepren 2003.

Sen Amartya, *Poverty and Famines: An essay on Entitlement and Deprivation*, Clarendon Press, Oxford 1981.

Shue Henry, *Basic Rights: Subsistence, Affluence and U.S Foreign Policy,* Princeton University Press, New Jersey 1980.

Sunstein Cass, *against positive rights: why social and economic rights don't belong in the new constitutions of Post-Communist Europe,* East European Constitutional Review 35, 1993.

Tara J. Melish, *Rethinking the "Less as More Thesis": Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, New York University Journal of International Law and Politics, Vol. 39, 2006.

Van Bueren Geraldine, *Of Floors and Ceilings: Minimum Core Obligations and Children*, at Exploring the Core content of socio-economic rights: South African and international perspectives, Ed. Danie Brand and Sage Russell, Protea Book House, Pretoria 2002.

Van Bueren Geraldine, *Alleviating Poverty through the Constitutional Court, South African Journal on Human Rights*, vol. 15, 1999.

Young Katharine, *The Minimum Core of Economic and Social Rights: A concept in Search of Content*, Yale International Law Journal, Vol. 33, 2008.

Wesson Murray, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights Vol. 20, 2004.

Legal Sources

Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

"Convention for the Protection of Human Rights and Fundamental Freedoms", ETS No. 005, Rome, 04/11/1950.

African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003.

"Convention on the Elimination of All Forms of Discrimination Against Women" adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 and entered into force 3 September 1981.

"*Convention on the Rights of the Child"* adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990.

Council of Europe, *European Social Charter* (Revised), 3 May 1996, ETS 163.

"*International Covenant on Economic, Social and Cultural Rights"* adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976.

"International Convention on the Elimination of All Forms of Racial Discrimination" adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1969.

"International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" adopted by General Assembly resolution 45/158 of 18 December 1990 and entered into force 1 January 2003.

Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* ("Protocol of San Salvador"), 16 November 1999, A-52.

Organization of African Unity, *African Charter on Human and People's Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982).

Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

United Nations Opinions

Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, Letter to States Parties, 16 May 2012.

Committee on Economic, Social and Cultural Rights, concluding observations on the fifth report of Spain, adopted by the Committee at its 48th session (E/C.12/ESP/CO/5).

Committee on Economic, Social and Cultural Rights, concluding observations on the fourth report of Iceland, adopted by the Committee at its 49th session (E/C.12/ISL/CO/4).

Department of Economic and Social Affairs, Division for Social Policy and Development, *Social Justice in an Open World: The role of the United Nations*, New York 2006.

Economic and Social Council, Distr. General E/C. 12/2001/10, 10 May 2001, Statement adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001, *Substantive Issues Arising in the Implementation of the International Covenant on economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights.*

Office of the High Commissioner for Human Rights, *Report on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it*, (A/HRC/13/38).

Office of the United Nations High Commissioner on Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33.

Office of the United Nations High Commissioner on Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, New York, Geneva 2012.

Office of the United Nations High Commissioner on Human Rights, *Who Will be Accountable: Human Rights and the Post-2015 Development Agenda*, New York, Geneva 2013.

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17.

UN Chronicle, *International Human Rights Law: A Short History*, Vol. XLVI No. 1, 2, January 2009.

UN Development Group, *A Million Voices: The World We Want, A Sustainable Future with Dignity for All*, 2013.

UN General Assembly, Open Working Group on Sustainable Goals, Compendium of Technical Support Team Issues Briefs, October 2014.

UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant),* 14 December 1990, E/1991/21.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: On the Right to Adequate Housing (Article 11(1) of the Covenant)",* 13 December 1991, E/1992/23.

The Domestic Application of the Covenant, UN Committee on Economic, Social and Cultural Rights General Comment 9, UN Doc. E/C.12/1988/24, 3 December 1998.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23.

UN Committee on Economic, Social and Cultural Rights, (CESCR), *General Comment No.12: The right to Adequate Food (Art. 11 of the Covenant),* 12 May 1999, E/C.12/1999/5.

UN Committee on Economic, Social and Cultural Rights, (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant*), 8 December 1999, E/C. 12/1999/10.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant),* 11 August 2000, E/C. 12/2000/4.

UN General Assembly, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Distr.: General, 27 December 2016, A/HRC/34/57.

UNICEF, Social and Economic Policy Working Paper, *Right in Principle and in Practice: A Review of the Social and Economic Returns to Investing in Children*, Nicholas Rees, Jingqing Chai, David Anthony, June 2012.

Regional Documents

African Commission on Human and People's Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*.

European Commission, Commission Staff Working Document, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Establishing a European Pillar of Social Rights*, COM 2017 250 Final, Brussels, 26.4.2017.

Organization of American States, Inter-American Commission on Human Rights, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights,* OEA/Ser.L/V/II.132, Doc. 14, 19 July 2008.

Organization of American States, Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007.

Annexes

ANNEX I

Commission Staff Working Document, Report of the Public Consultation,
Establishing a European Pillar of Social Rights,
Brussels, 26.4.2017
SWD(2017) 206 final

Introduction

In his 2015 State of the Union address, President Juncker announced the determination to develop a European Pillar of Social Rights which takes account of the changing realities of the world of work and can serve as a compass for the renewed convergence within the euro area. On 8 March 2016, the European Commission adopted a Communication putting forward a first, preliminary outline of what should become the European Pillar of Social Rights. The Communication set out the rationale behind the initiative and its role, scope and nature.
On this basis, the Commission launched from March until 31 December 2016 a broad public consultation to gather feedback on the proposed outline to feed into its final proposal. The consultation aimed at discussing existing social rights, the changing realities of the world of work and societies, and the role of the Pillar as part of the social dimension of the Economic and Monetary Union (EMU). A European conference took place on 23 January 2017 to wrap up this consultation process.
During the consultation the Commission sought feedback on the following ten questions:
On the social situation and EU social "acquis":

1. What do you see as most pressing employment and social priorities?
2. How can we account for different employment and social situations across Europe?
3. Is the EU "acquis" up to date and do you see scope for further EU action?

On the future of work and welfare systems:

4. What trends would you see as most transformative?
5. What would be the main risks and opportunities linked to such trends?
6. Are there policies, institutions or firm practices – existing or emerging – which you would recommend as references?

On the design of the European Pillar of Social Rights:

7. Do you agree with the approach outlined here for the establishment of a European Pillar of Social Rights?
8. Do you agree with the scope of the Pillar, domains and principles proposed here? Are there aspects that are not adequately expressed or covered so far?
9. What domains and principles would be most important as part of a renewed convergence for the euro area?
10. How should these be expressed and made operational? In particular, do you see the scope and added value of minimum standards or reference benchmarks in certain areas and if so, which ones?

This report presents the consultation process and summarises its main findings.

3. The legal nature

The debate on the binding versus non-binding nature of the Pillar

The choice of the legal instrument for establishing the Pillar was left open in the Commission Communication launching the public consultation on 8 March 2016. This point was much debated

during the consultation, with many questions arising on the final form that the Pillar will take, and contrasting positions on whether it should have a legally binding nature.
Stakeholders generally shared the view that discussions on the choice of instruments for the Pillar itself should follow from an agreement on the substance of the initiative. This is because the preliminary draft Pillar consisted of a broad range of principles, with each of them reflecting a different nature and degree of EU competence. As a result, the final form of the Pillar will have to reflect such diversification, in full respect for the division of competences between the EU and Member States, and subsidiarity.
Support for a binding Pillar was strongest among trade unions and NGOs. On the other hand, national government representatives in a majority of Member States and employer organisations expressed their disagreement over the potentially prescriptive nature of the principles and favoured the use of soft policy.
A number of parameters were identified for consideration in the choice of the instrument, including political visibility, the involvement of the different Union institutions and social partners, possibilities for application to the euro area only, the degree to which it can encompass both a legislative and non-legislative agenda, and the links to the European Semester.

The difference between rights and principles
Stakeholders raised questions about the distinction between rights and principles in the initial Commission's draft, and how they relate to values and rights that feature in the EU acquis. A common view was that this relationship could be further clarified, and that alignment of individual principles with the relevant provisions of the Charter of Fundamental Rights of the European Union could improve legal certainty.
The importance of ensuring consistency with international law instruments such as the Council of Europe Social Charter and ILO Conventions and Recommendations was also underlined. Concretely, EU-level social partners asked for clarification around sources of law and areas of EU/Member State competence for each of the 20 principles proposed, to identify possible options for policy action.
It was also noted that the draft text of the Pillar combined rights directed at individuals with principles targeting employment and social systems. Therefore, many considered that the final Pillar should draw a clearer distinction between individual rights and systemic principles.
The personal scope of application should also be clarified, with some arguing that the rights should apply to everyone in the EU, while others being in favour of a distinction between EU citizens and third-country legal residents.
Certain stakeholders put forward that more clarity on access to and enforceability of rights would be important to make the Pillar more visible and operational for citizens and all players involved in implementation.
The importance of broad political commitment regardless of the final legal framework chosen
The European Parliament in its Resolution on the Pillar "considers that the Pillar should be adopted in 2017 as an agreement between Parliament, the Commission and the European Council, involving the social partners and civil society at the highest level. European Anti-Poverty Network: "The EU needs a new vision and a new plan […] This should demonstrate that the EU is committed to developing an economy that can deliver shared prosperity and sustainable development, underpinned by social rights and social and environmental standards."
Regardless of the legal form finally chosen to establish the Pillar itself, the consultation emphasised that this initiative should first of all mark a strong political commitment to a renewed agenda for inclusive growth that benefits individuals, the economy and society at large.
In order to respect subsidiarity, the Pillar will need to ensure ownership at all levels of governance and mobilise broad support for its implementation through joint efforts by all players involved,

from EU institutions to Member States and authorities at regional and local levels, social partners and civil society.

4. The implementation

A mix of tools, respecting subsidiarity and involving different players

The consultation confirmed the need for the Pillar to be accompanied by concrete deliverables and that its success will ultimately depend on how it will be made operational.

The Committee of the Regions "highlights the need for closer cooperation between the different levels of government, sectors and stakeholders, including a stronger role for social partners and the introduction of an efficient instrument for civil dialogue, which would strengthen the democratic legitimacy of the Union."

European Parliament: The Pillar should "not be limited to a declaration of principles or good intentions"

There was agreement that the Pillar should be implemented by a mix of appropriate and effective deliverable tools, deployed at the appropriate level, involving all relevant dimensions of governance, and avoiding duplications.

Social Platform:"Now is the time to empower civil society and to give us an active role. It will be difficult to deliver on Europe's ambitious social agenda without us."

A strong point coming from the consultation was the need to respect the distribution of competences at EU, national and sub-national levels, subsidiarity, and the autonomy of social partners. The instruments deployed should reflect the primary responsibility of national governments and social partners in making social rights and principles operational on the ground. There were also concerns about a "one size fits all" approach, arguing that national social policy specificities should be taken into account in the Pillar's implementation.

Another point was the central function of stakeholder dialogue in the implementation of the Pillar and of multi-stakeholder cooperation to improve the relevance of social policies. The EESC and NGOs called for a stronger role for civil society and civil dialogue to ensure that everyone, including young people and those in vulnerable situations or facing discrimination, can participate in policy-making.

When it comes to the preferences for concrete instruments, national government representatives in a majority of the Member States and employer organisations favoured the use of policy tools, such as benchmarking based mainly on policy learning to achieve upward convergence in employment and social outcomes. On the other hand, support for binding instruments was strongest among trade unions and NGOs. Certain stakeholders put forward that the coherent application of social rights across all policy areas, especially in the economic and monetary fields, but also in external action and trade agreements, was needed for the Pillar to have a real impact. The logic used in the context of the proposed European Accessibility Act was highlighted as a possible good model for mainstreaming to facilitate the advancement of social rights through internal market instruments. Other stakeholders argued that the modernisation of social protection and welfare systems would help to increase the resilience of labour markets to economic shocks, while increased efficiency of policies aimed at facilitating business creation and upscaling would help to improve the efficiency of resource allocation, fostering employment growth.