VERTAISARVIOITU
KOLLEGIALT GRANSKAD
PEER-REVIEWED
www.tsv.fi/tunnus

OIKEUSTIEDE

JURISPRUDENTIA

XLIX 2016

SUOMALAISEN LAKIMIESYHDISTYKSEN JULKAISUJA

Suomalainen Lakimiesyhdistys
Kasarmikatu 23 A 17
00130 Helsinki
www.lakimiesyhdistys.fi

ISSN-L 0355-8215
ISSN 0355-8215
ISBN 978-951-855-360-4
Oy Nord Print Ab, Helsinki 2016

Laura Kirvesniemi

THE PROHIBITION OF RETROGRESSION IN THE FINNISH SYSTEM OF CONSTITUTIONAL REVIEW

Table of Contents

1 EUROPEAN ECONOMIC RECESSION AND CHALLENGES TO WELFARE STATES 9
2 NATURE OF SOCIAL RIGHTS 13
3 PROHIBITION OF RETROGRESSION 18
3.1 General notions on defining and applying the prohibition of retrogression 18
3.2 Requirements deriving from the prohibition 20
3.3 Legal nature of the prohibition of retrogression: a rule or a principle? 26
4 THE CONSTITUTIONAL REVIEW AND THE PROHIBITION OF RETROGRESSION 28
4.1 Status of fundamental and human rights in Finland 28
4.2 Limitation of fundamental rights in Finland 30
4.3 Forms of constitutional review 32
4.4 How does the prohibition of retrogression operate in the Finnish system? 34
5 EFFECTIVENESS OF SOCIAL RIGHTS IN FINLAND 38
5.1 Criteria for assessing effectiveness 38
5.2 Effectiveness of social rights as a tool for promoting equality, justice and democracy 40
5.3 Evaluating the effectiveness of the Finnish system for the protection of social rights 41
6 CONCLUSIONS 46

SOURCES 49
LIST OF ABBREVIATIONS 53
TABLE OF CASES 54
HEIKENNYSKIELTO SUOMALAISESSA PERUSTUSLAKIKONTROLLISSA 56

The Prohibition of Retrogression in the Finnish System of Constitutional Review

1 EUROPEAN ECONOMIC RECESSION AND CHALLENGES TO WELFARE STATES

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

---

* *Laura Kirvesniemi*, OTM, ylitarkastaja, Etelä-Suomen aluehallintovirasto

1 See eg *Fredman* 2008, p. 32–40.

2 *Ssenyonjo* 2009, p. 4–5.

3 See about the discussion – or the lack of it – in the Finnish constitutional law context: *Rautiainen* 2013, p. 262–263.

4 International law recognises certain peremptory norms (*jus cogens*) from which no derogation is permitted. See eg *Shelton* 2010, p. 146–157. Also certain fundamental rights have been protected as absolute rights in the Constitution of Finland. See eg *Viljanen* 2011, p. 140.

Since 2009, Europe has been undergoing a period of outstanding difficulty in terms of financial stability. The European economic crisis emerged after the so-called Great Recession and resulted from a situation where European governments were unable to repay or refinance their government debts.[5] Continuing until today, several states have been forced to take various austerity measures in order to counter the debt crisis. The implementation of these measures has invoked criticism and discussion of the legitimacy of these actions: non-state actors and academics have started to look for effective realisation of economic, social and cultural rights and, in particular, for more clearly defined guidelines to mitigate the limitation of these rights.[6]

As will be presented in this article, the International Covenant on Economic, Social and Cultural Rights[7] (ICESCR) and the European Social Charter both require state parties to take steps to promote the full realisation of the rights recognised within the human rights instrument. One logical consequence of this principle of progressive realisation is the mirror *principle of non-regression*: state parties are generally obliged to not take regressive measures, since taking such measures would mean diverging from the obligation to take steps towards the full realisation of economic, social and cultural rights.[8] The principle of non-regression can also be called the *prohibition of retrogression*. The specific content of the norm has nevertheless been defined neither in the text of the treaty nor in the *travaux preparatoires* of the ICESCR, leading to a situation where the nebulous scope of the obligation makes economic, social and cultural rights litigation challenging.[9] At the same time, the economic downturn has forced many European states to take austerity measures, deviating from the general prohibition to take regressive measures, raising questions about the *de facto* effectiveness of economic, social and cultural rights. The question about the legal definition of the prohibition of retrogression has, therefore, become more relevant than ever.

While the impact of the current economic crisis in Finland has not so far been as significant as in some other European countries, the effective realisation of social rights has similarly emerged as a topical issue in Finnish debate. The Government's plans concerning structural reforms have raised

5 See eg *FRA* 2010, p. 6–9.
6 *Rautiainen* 2013, p. 261–262.
7 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
8 *Ssenyonjo* 2009, p. 59.
9 *Nolan – Lusiani – Courtis* 2014, p. 9.

questions as to whether the human rights impact assessment vis-à-vis these measures has been sufficient.[10] Whilst the prohibition of retrogression has not been significantly addressed in Finnish fundamental and human rights discourse,[11] it is, indeed, an important question also in the domestic context – whether the Finnish monitoring system makes it possible to take the full realisation of social rights into account.

The purpose of this article is to examine, first, what is the nature and content of the prohibition of retrogression. The second question is how the prohibition of retrogression operates within the Finnish system of constitutional review and human rights impact assessment.

It must be noted here already that Finland's constitution creates an obligation for public authorities to guarantee the protection of human rights and to comply with applicable rules of international human rights law.[12] Therefore, as protection of human rights is a pluralist system,[13] the sources used for this research entail not only domestic sources, such as opinions of the Constitutional Law Committee of Finland and domestic court decisions, but also the reasoning of the Committee on Economic, Social and Cultural Rights (CESCR) – the supervisory body of the ICESCR – the European Committee of Social Rights (ECSR) – the supervisory organ of the European Social Charter (ESC)[14] – and of various European constitutional courts. The purpose of the first two chapters is to examine and systematise the legal debate concerning the content of rules governing the limitation of social rights, in particular the prohibition of retrogression, under international law. In chapter four the focus will shift from defining the principle under international law to evaluating its relevance in the Finnish constitutional law context, in particular in the constitutional review system of Finland.

Certain limitations should be mentioned at the outset. First, I will refer to economic and cultural rights merely if reference to those substantive rights is relevant in order to examine the content of the prohibition of retrogression. Second, whilst the system for protection of human rights is, admittedly, a pluralist system, and rules other than the prohibition of retrogression may also create obligations for states when they seek to limit so-

[10] Helsingin Sanomat: Oikeustieteilijät: Hallitus sivuuttaa menoleikkauksista ihmisoikeudet (16.6.2015).

[11] *Rautiainen* 2013, p. 263.

[12] Constitution of Finland section 22. See also *Heinonen – Lavapuro* 2012, p. 10.

[13] On the pluralist nature of human rights obligations see eg *Fabbrini* 2010, p. 1–60.

[14] European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) CETS 163.

cial rights, the emphasis of this article is on defining the prohibition of retrogression. Other rules governing the limitation of social rights will be discussed only if they are relevant for this purpose. Third, whilst EU law is naturally of relevance in the Finnish legal system, for the purposes of this article I will refer to EU legislation and legal practice only if it is relevant in defining and examining the prohibition of retrogression. Finally, this article does not seek to examine questions concerning the potential international responsibility of a state that may arise from the violation of social human rights obligations.[15]

As for terminology, by the term *positive rights* I refer to *economic, social and cultural rights*, as they are usually conceptualised as creating positive obligations upon a state, as shall be noted in the next chapter. This choice of terminology does not, however, imply that human rights other than economic, social and cultural rights cannot create positive obligations, or that strong distinction between different types of human rights is even advisable.[16]

Moreover, I have sought to use terminology that will recognise the interdependency of domestic fundamental rights and international human rights. The development of social rights in Finland has been influenced by both domestic and international trends. As such, it cannot be said that certain social rights in the Finnish constitution are only relevant as *fundamental rights*; the content of those rights must be derived from the international level, from the content of the respective *human rights*.[17] Consequently, for the purpose of this article the term social rights shall be used to refer to the group of substantive social rights regardless of their status as fundamental rights or human rights. It must nevertheless be noted that international human rights set only the minimum standard for the domestic implementation of human rights.[18] Therefore, if and when the scope of the article requires distinction between these two levels of social rights, they will be referred to separately as fundamental rights and human rights.

Finally, it must be noted that in this article the term *effectiveness of social rights* does not refer merely to the justiciability of social rights. Whilst, admittedly, certain social rights in Finland are directly enforceable through

---

15 On international responsibility regarding violations of social human rights obligations, se eg *de Schutter – Salomon* 2015.

16 See *Fredman* 2008, p. 9–10.

17 See eg *Ojanen* 2009, p. 194–207. Ojanen argues that domestic sources, EU membership and international human rights treaties have all had a major impact on the role of courts, judicial review and the interpretation of constitutional norms in Finland.

18 *Heinonen – Lavapuro* 2012, p. 8–11.

courts, it is submitted that *de facto* effectiveness of social rights also consists of other factors, for instance the amount of resources allocated for the enforcement of social rights.

2 NATURE OF SOCIAL RIGHTS

To understand the questions concerning the effectiveness of social rights and the nature of the rules governing their limitation, one must first look at the history of human rights and, in particular, at the emergence of economic, social and cultural rights. Human rights have traditionally been categorised into two groups due to their historical origins. The reason for the distinction between these groups of rights and the creation of two separate human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR)[19] and the ICESCR, is the ideological conflict between the East and West at the time of drafting. The Soviet states, on the one hand, sought to embrace the cause of economic, social and cultural rights, as they saw them closely linked to socialist ideology. On the other hand, the Western states found it crucial to promote the recognition of civil and political rights, "the foundation of liberty and democracy in the free world".[20] As a result, two separate human rights treaties and two classes of human rights were created.

The so-called first generation of human rights seeks to protect in particular civil and political rights, which are to a great extent based on such core principles as human dignity and non-discrimination. The second generation of human rights is based on the idea that everyone should have equal opportunities and rights to participate in society.[21] The first generation of human rights has traditionally been perceived as creating negative obligations for states: a state is under an obligation not to deprive an individual of her fundamental freedoms. These negative obligations have also been known as duties of restraint.[22] The second generation of human rights, on the other hand, requires positive contribution from a state: the underlying idea is to create material rather than formal equality. This might – and often

[19] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

[20] *Craven* 1995, p. 8–9. See, however, *O'Cinneide* 2014, p. 170. O'Cinneide argues that positive rights in Europe are not merely a post WW II concept.

[21] *Mikkola* 2010, p. 6–7. Mikkola lists also the third generation of human rights. These rights aim at people's right to promote their collective interests, such as right to clean environment, peace and self-determination.

[22] *Fredman* 2008, p. 1.

does – require an element of financial subsidiarity.[23] But how much exactly is a state required to invest in the effective realisation of social rights? And under which conditions can a state reduce the level of investment already established?

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

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

Article 2(1) is not a substantive social right as such, but instead applies as a general rule when a state party implements substantive rights under the ICESCR.[24] The content of article 2(1) has been discussed by the CESCR in its general comments. The nature of states' obligations under article 2(1) of the ICESCR has also been commented upon in the so-called Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1987 (Limburg Principles).[25] The Limburg Principles have been supplemented by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 (Maastricht Guidelines)[26] and by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).[27] Article 12(3) of the ESC also creates an obligation upon state parties to "endeavour to raise progressively the system of social security to a higher level", thereby imposing a somewhat similar prohibition of retro-

---

23 *Mikkola* 2010, p. 7. With that said, it must be noted that too strict a division between these two categories of rights can be seen as artificial. Civil and political rights can create positive obligations for a state and positive rights can operate as duties of restraint. See *Fredman* 2008, p. 70. See also *Mikkola* 2000, p. 259–272. Mikkola notes that the rights recognised European Social Charter complements the European Convention on Human Rights.

24 See eg *Riedel*.

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

26 International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (adopted 26 January 1997).

27 International Commission of Jurists, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, (adopted 28 September 2011).

gression that must be respected by the state parties to the ESC, including Finland. In this chapter I will examine the prohibition from the viewpoint of article 2(1) of the ICESCR, but the general considerations presented below also apply to a large extent when one talks about the nature of the prohibition under the ESC.

The phrasing of article 2(1) of the ICESCR is relatively vague and leaves much room for interpretation. Specifically, two general observations must be made. First, article 2(1) creates an obligation to "achieve progressively the full realisation"– the standard of progressive realisation. This concept has not, however, been further defined in the text of the ICESCR, leaving the definition obscure. Second, according to article 2(1) state parties are under an obligation to utilise maximum *available* resources. The ICESCR does not require a state to take steps that would need utilisation of resources beyond what is available.[28] Here, also, the same interpretational problem arises: how does one define what state resources are *available*?

When we consider the interpretation of these terms, it must be noted that article 2(1) of the ICESCR is a treaty provision and, as such, is binding between the state parties. Therefore, its content must be defined through the general rule of treaty interpretation, which is a rule of customary international law. The rule has been codified in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) by the International Law Commission (ILC) in 1969.[29] According to the rule the treaty must be interpreted "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Interpretation may be supplemented by recourse to the preparatory work of the treaty. Therefore, in order to discover the more precise content of article 2(1), one must first look into the ordinary meaning of the terms *progressive realisation* and *maximum available resources*. We must also define the object and purpose of the ICESCR.

It has been generally established in academic discussion that the very object and purpose of the ICESCR – as well as of other human rights treaties – is the effective realisation of human rights.[30] The interpretation of the ICESCR should therefore be as favourable to the individual as possible,

28 *Ssenyonjo* 2009, p. 62.

29 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Whilst not all articles of the Vienna Convention are codified rules of customary international law, the International Court of Justice has confirmed the customary law nature of articles 31–32. See *Territorial Dispute (Libyan Arab Jamahirya v Chad)* (1994) ICJ Rep 6, para 41; *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045, para 18.

30 *Ssenyonjo* 2009, p. 51.

and any limitations on rights should be interpreted narrowly.[31] Additionally, the European Court of Human Rights (ECtHR) has frequently found that human rights provisions ought to be interpreted so as to make their implementation as effective as possible.[32] Thus, to interpret the terms *progressive realisation* and *all available resources* in the light of the object and purpose of the Covenant, one must seek the most human-rights-orientated interpretation available.

Some guidelines can be found in the statements of the CESCR. As for the *maximum available resources* the CESCR has stated that the phrase refers to "both the resources existing within a State as well as those available from the international community through international cooperation and assistance".[33] It follows that the term does not refer merely to certain resources within one particular state, but rather to resources available within the society as a whole, ranging from the public and private sectors to the international community.[34] This interpretation appears to be in accordance with the general rule of treaty interpretation in the sense that the ordinary meaning of the phrase refers to all kinds of available resources.[35] That being said, there is yet to be common ground as to whether this establishes an international obligation to assist: during the drafting of the ICESCR states did not clearly agree on the existence of any well-defined obligation to offer international assistance to a state struggling with its obligations under the Covenant.[36] For the time being it is difficult to see a situation where a failure to comply with this kind of an obligation to assist would trigger international responsibility. For instance, the International Court of Justice ('ICJ') has held that a state has an obligation to guarantee rights under the ICESCR only within the territories it has sovereignty over and those over which that state exercises territorial jurisdiction.[37] The general rule seems

---

31 *Craven* 1995, p. 3.

32 See eg *Soering v UK* (1989) 11 EHRR 439, para 87; *Artico v Italy* (1981) 3 EHRR 1, para 33 and *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, para 72.

33 CESCR, Statement: An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant, (10 May 2007) UN Doc E/C.12/2007/1, para 5.

34 Chapman – Russell 2002, p. 11.

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

36 *Alston – Quinn* 1987, p. 186–92. See, however, eg *Coomans – Kamminga* 2004, p. 2 and *Skogly* 2006, p. 83–98. The authors argue that the ICESCR creates extraterritorial obligations.

37 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, para 112.

to be that each state party has an obligation to seek the assistance of other states when it is not able to meet its own treaty obligations, while the obligation on other states to offer financial assistance is considerably more vague. That being said, in the Maastricht Principles on Extraterritorial Obligations of States the Commission of Jurists gave this extraterritorial obligation a notably stricter interpretation. According to principle 33 states are under an obligation to provide international assistance. Failure to meet this obligation could lead to international responsibility within the meaning of principle 11.[38] It is yet to be seen whether this interpretation becomes accepted in state practice and case law.

In interpreting article 2(1), perhaps even more central is the question of how to interpret the term *progressive realisation*. The usage of terms such as *full realization* and *progressive achievements* implies that the drafting parties have acknowledged that the full realisation of such rights cannot be achieved in a short period of time.[39] Whilst the ultimate result to be achieved is left somewhat open, article 2(1) creates not an obligation to stop the realisation of rights at any given level but rather to aim for continuous improvement.[40] The question is not, therefore, merely about the result that must be achieved but also about the desired conduct, i.e. the continuing measures that need to be taken.

In academic debate it has indeed been argued that two kinds of obligations can be derived from article 2(1): obligations of conduct and obligations of result.[41] Legal experts have upheld this view in the Maastricht Guidelines in 1997[42] and the Maastricht Principles in 2011.[43] According to the ILC, an obligation of conduct is an obligation where the state is obliged to undertake a certain course of conduct, whether through an act or omission. Here the conduct itself would be the goal. An obligation of result, instead, requires a state to achieve a specific result, whilst the form of conduct is left to state discretion.[44] Article 2(1) of the ICESCR has been described as a mixture of these two types of obligations.[45] This seems accurate, as the obligation to progressively achieve the full realisation of the

38 Maastricht Principles 2011.

39 CESCR, General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 9.

40 See eg *Craven* 1995, p. 128–129.

41 See eg *Ssenyonjo* 2009, p. 22.

42 Maastricht Guidelines, paras 6 and 7.

43 Maastricht Principles, para 14.

44 ILC, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 123–133.

45 *Alston – Quinn* 1987, p. 165. See also *Craven* 1995, p. 107–109.

rights is indeed mostly an obligation of conduct, whereas the substantive articles of the ICESCR set various obligations of result when read together with article 2(1).

3 PROHIBITION OF RETROGRESSION

3.1 General notions on defining and applying the prohibition of retrogression

Realisation of positive rights can be said to consist of three different levels. The lowest level entails realisation of the minimum core content of each right. Each substantive social right has a so-called minimum core content. The CESCR has outlined that the ratio of the minimum core obligation is to "ensure the satisfaction of, at the very least, minimum essential levels of each of the rights".[46] It follows that a lack of sufficient resources cannot be justification for any state in not meeting this obligation.[47] The minimum core obligation, however, is not a static threshold but rather an evolving one; it might be that a certain level of implementation, previously above this baseline, is no longer sufficient once the economic situation in a particular state has improved over time.[48] One of the practical difficulties, as noted in the academic discussion on the topic, is that defining the content of the minimum core obligation of each substantive right is challenging.[49] It must be noted that the domestic threshold of the minimum core content of social rights may be higher than the threshold under international law: even if the state manages to meet the requirements deriving from the international human rights obligations, the level of realisation is not necessarily in compliance with domestic standards for the realisation of social rights.

The second level is the current level of rights protection. The prohibition of retrogression operates between the minimum core obligation and the current level of rights. The minimum core obligation is the lowest threshold below which a state can in no circumstances fall, whereas the prohibition of retrogression prevents a state from taking any unnecessary regres-

46 CESCR, General Comment 3, para 10.
47 D Turk, Second Progress Report of UN Special Rapporteur on ESCR, UN Doc E/CN.4/Sub.2/1991/17, para 10.
48 See *Bilchitz* 2003, p. 13–14.
49 *Rautiainen* 2013, p. 269.

sive steps even *after* the threshold of the minimum core obligation has been reached.[50]

Finally, a state is under an obligation to seek to progressively raise the level of rights. Consequently, the third level is the imaginary "perfect" level of rights, towards which the state should constantly aim in the implementation of social rights. Therefore, the principle of progressive realisation can be seen to operate between the second and the third level of rights.

Acknowledging the existence of these thresholds is necessary in order to understand the context in which the prohibition of retrogression operates. Of further interest is the specific content of the obligation not to take any unnecessary regressive steps. It is evident that article 2(1) of the ICESCR and article 12(3) of the ESC impose certain requirements that states need to take into account when they are deciding on measures that might have a regressive impact on the realisation of positive rights. Due to the reticent approach of the CESCR and the ECSR in defining and limiting the prohibition of retrogression, it is necessary to have recourse to the decisions and statements of international, regional and domestic judicial organs in order to define the limits of the prohibition in a satisfactory manner. In other words, we can ensure the accurate application of the principle of progressive realisation and the prohibition of retrogression and, consequently, the effective enjoyment of social rights only by defining the practical content of the prohibition of retrogression.[51]

With that said, it must be noted that the assessment of any alleged breach is remarkably challenging. This is due to the fact that the prohibition of retrogression contains two dimensions: a normative dimension and an empirical dimension. With regards to the normative dimension, we refer to any legal, *de jure* steps backwards; the empirical dimension concerns *de facto* backsliding in the effective enjoyment of the rights. Assessing whether a state has failed to comply with the latter dimension would require a comprehensive analysis of the state's conduct and a wide range of various quantitative indicators, which unfortunately are not always available as states do not systematically collect such data.[52] As will be submitted in the chapters below, so-called proactive models for monitoring the realisation of social rights would be most effective in monitoring the empirical dimension of the prohibition of retrogression. Proactive models require constant

[50] *Bilchitz* 2003, p. 12. See also *Coomans* 2002, p. 228.

[51] *Nolan – Lusiani – Courtis* 2014, p. 132. The authors point out that also the normative content of the principle remains to be unclear.

[52] *Nolan – Lusiani – Courtis* 2014, p. 123–127. See also *Center for Economic and Social Rights* 2012 and *Office of the United Nations High Commissioner for Human Rights* 2012.

participation of all public authorities in the implementation and monitoring process. Consequently, the prohibition of retrogression would be taken into account as one element of constant human rights impact assessment by public authorities.[53]

3.2 Requirements deriving from the prohibition

The CESCR and the ECSR have frequently mentioned in their recent statements and decisions certain parameters for evaluating whether the limitation of social rights has been justified.[54] Several domestic constitutional courts, as will be demonstrated below, have also applied similar criteria when assessing the legality of regressive steps taken by respective governments. These parameters can be argued to form requirements that derive from the prohibition of retrogression: the limitation should be temporary; the limitation should be necessary and proportionate; the limitation should not be discriminatory; and the state must at all times identify and protect the minimum core obligation of the right in question. Judging from the statements by international judicial organs and case law of domestic constitutional courts, the conditions of the prohibition of retrogression are cumulative.[55] This means that each and every one of them must be fulfilled in order to lawfully limit social rights.

The first of these criteria is the requirement that the limitation of the right has to be temporary. At the international level, both the CESCR and the ECSR have listed the temporary character of limitations as one of the conditions of the prohibition of retrogression. The CESCR has stated in several concluding observations on states' periodic reports that austerity measures should in all cases be temporary.[56] This evidences that the CESCR does not consider the prohibition of retrogression merely as a soft-law instrument. Moreover, the ECSR has held in its decision concerning the

53 See *Fredman* 2008, p. 189–192.

54 See eg CESCR, Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis (16 May 2012) UN Doc CESCR/48th/SP/MAB/SW; CESCR: An evaluation of the obligation to take steps to the 'Maximum of available resources' under an optional protocol to the Covenant (1 May 2007) UN Doc E/C.12/2007/1, para 8 and Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece (7 December 2012) ECSR 80/2012 (hereinafter ECSR 80/2012).

55 See eg Constitutional Court of Latvia, (21 December 2009) Case No 2009-43-01 (hereinafter Latvian Pensions Case), para 28.

56 See eg CESCR, Concluding Observations on Spain (6 June 2012) UN Doc E/C.12/ESP/CO/5, para 17 and CESCR, Concluding Observations on Iceland (11 December 2012) UN Doc E/C.12/ISL/CO/4, para 6

level of social security in Greece that reduction in the level of pensioners' social security was incompatible with article 12(3) of the ESC. One reason for this finding was the fact that the regressive legislation did not contain any provisions on the provisional application of the act; in other words the regressive measure was not meant to be temporary.[57] The requirement has also been mentioned and applied in various domestic cases concerning the prohibition of retrogression.[58]

In Finland, the Finnish Constitutional Law Committee has also noted that a temporary freezing of index increments of child allowance was not unconstitutional.[59] The reasoning of the Committee has, however, been criticised as not sufficiently examining the effects on the most vulnerable groups, i.e. families with young children.[60]

The second condition under the prohibition of retrogression is that a limitation must be necessary and proportionate. Even in situations of resource scarcity, fiscal discipline or savings, the state must be able to demonstrate the necessity of the measures taken. Looking at the statements given by the CESCR, this requirement means that the measures must have been necessary for the protection of the totality of the rights provided for in the ICESCR.[61] The burden of proof to demonstrate that the measures have been necessary and proportionate lies upon the state in question: the CESCR has on several occasions noted that *the state* must prove the strict necessity of the measure.[62] The condition of proportionality means that "the adoption of any other policy, or a failure to act, would be more detri-

---

57 ECSR 80/2012, paras 56 and 73.

58 See Constitutional Court of Latvia, (21 December 2009) Case No 2009-43-01, para 32 and Constitutional Court of Portugal, (5 April 2013) Judgment No 187/2013, English summary (hereinafter Portuguese Budget Law Case), chapter 3.

59 Constitutional Law Committee of Finland, PeVL 25/2012 vp.

60 *Rautiainen* 2013, p. 273.

61 CESCR, General Comment 3, para 9; see also *Nolan – Lusiani – Courtis* 2014, p. 134.

62 CESCR, General Comment No 13: The right to education (article 13 of the Covenant) (8 December 1999) UN Doc E/C.12/1999/10, para 45; CESCR, General Comment No 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (11 August 2000) UN Doc E/C.12/2000/4, para 32; CESCR, General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights) (6 February 2006) UN Doc E/C.12/GC/18, para 21; CESCR, General Comment No 19: The right to social security (art. 9) (4 February 2008) UN Doc E/C.12/GC/19, para 42; CESCR, General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21, para 65; CESCR, An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant (21 September 2007) UN Doc. E/C.12/2007/1, para 9. See also Maastricht Guidelines, paras 8 and 13.

mental to economic, social and cultural rights".[63] In other words, the test is whether there would have been any less restrictive but still effective measures available to the state at that point. Needless to say, assessing whether this condition has been met is extremely challenging due to the empirical difficulties in monitoring.

Furthermore, the ECSR has highlighted that any regressive measures must have a legitimate aim. A regressive measure is compatible with the prohibition of retrogression, as established in article 12(3) of the ESC, when it is necessary to ensure the stability of the system of social security. According to the ECSR, a regressive measure cannot prevent individuals from enjoying effective protection against social and economic risks.[64]

After the outburst of the economic crisis in 2008, several European constitutional courts have been forced to assess the fulfilment of this condition. Both in the Latvian Pensions Case and in the Portuguese Budget Law Case, the constitutional courts found that the measures taken did not pass the test of necessity and proportionality. Two notions can be derived from the reasoning of the constitutional courts. First, one essential question to be answered when assessing the proportionality of restrictive measures seems to be whether the legislator carried out sufficient consideration of alternative measures prior to taking action.[65] This, of course, is an imperative part of good governance and, as such, logically one of the elements when assessing whether the actions of the legislator have been reasonable in this context. The fact that a state has not considered alternative measures usually indicates that other, less restrictive options could have been available to the legislator. Second, if the limitation of social rights is discriminatory or fails to protect the most vulnerable groups, it also usually fails to pass the test of necessity and proportionality.[66]

Third condition of the prohibition of retrogression is that the regressive measure cannot be discriminatory. This is to say that it should be neither directly nor indirectly discriminatory and it should, in particular, take into account the rights of disadvantaged and marginalised individuals and groups and ensure that they are not disproportionately affected by the re-

---

63 CESCR, Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis, 2.

64 ECSR 80/2012, para 66.

65 Latvian Pensions Case, para 31 and ECSR 80/2012, paras 73–76. See also General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece (23 May 2012) ECSR 65/2011, paras 14–19.

66 Portuguese Budget Law case, English summary, chapter 3.

gressive measure.[67] The importance of this particular condition has been widely recognised by the international community. The European Union Agency for Fundamental Rights (FRA)[68] has on several occasions highlighted that austerity measures during the current economic crisis should seek to continue to secure the rights of the most vulnerable groups.[69] The main reason for this is to avoid the increase of socio-economic inequalities in society, as the vulnerability of the most disadvantaged groups rises in times of crisis.[70] Notably, recession causes long-term unemployment, which in turn is closely linked to social exclusion.[71]

This condition has been recently discussed by the ECSR in its decisions concerning the legality of the austerity measures in Greece. These measures included, inter alia, several modifications to pensioners' social protection.[72] The implementation of those measures in Greece led to a series of collective complaints to the ECSR by Greek pensioners' unions. These five complaints concerned the same facts and in each of the cases the ECSR found a violation of article 12(3) of the 1961 European Social Charter (1961 Charter).[73] Article 12(3) of the 1961 Charter concerns state party obligations "to endeavour to raise progressively the system of social security to a higher level".[74] The ECSR concluded that Greece had not made sufficient efforts to maintain a satisfactory level of protection for the benefit of the most vulnerable members of society.

---

67 *Nolan – Lusiani – Courtis* 2014, p. 140. See also *Rautiainen* 2013, p. 272.

68 The European Union established the FRA to provide independent, evidence-based assistance and expertise on fundamental rights to EU institutions and Member States. FRA is an independent EU body, funded by the Union's budget. See http://fra.europa.eu/en (26.5.2016).

69 *FRA* 2010, p. 14 and *FRA* 2013, p. 14–17.

70 *FRA* 2013, p. 12.

71 *European Commission, Directorate-General for Employment, Social Affairs and Inclusion* 2013, p. 3.

72 Council Decision (EU) 2010/182/EU of 16 February 2010 giving notice for Greece to take measures for the deficit reduction judged to be necessary in order to remedy the situation of excessive deficit (2010) OJ L83/13.

73 European Social Charter of 1961 (adopted 18 October 1961, entered into force 26 February 1965) CETS 035; Federation of employed pensioners of Greece (IKA-ETAM) v Greece (7 December 2012) ECSR 76/2012, para 78; Panhellenic Federation of Public Service Pensioners (POPS) v Greece (7 December 2012) ECSR 77/2012, para 78; Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece (7 December 2012) ECSR 78/2012, para 78; Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece (7 December 2012) ECSR 79/2012, para 78 and ECSR 80/2012, paras 7 and 78.

74 Article 12(3) of the Revised ESC is identical to its predecessor.

As for the domestic case law during the current economic crisis, the constitutional courts of Latvia[75], Portugal[76] and Germany[77] have all found that regressive legislative measures have not been justified as the legislator had failed to protect the most vulnerable groups and to target the measures in an equitable manner. The conditions of proportionality and non-discrimination are, indeed, closely linked with each other. It can hardly be argued that an austerity measure targeted at the most vulnerable groups in society could be the best option available even at a time of a fiscal crisis. While measures that discriminate or increase inequality cannot be considered appropriate, regressive measures can be justified when they *benefit* the most vulnerable groups.[78] In other words, austerity measures are urged to be targeted so that they will increase equality and improve the realisation of the social rights of the most vulnerable groups.[79] According to the FRA reports, European states have sought to target austerity measures so that the limited resources would be channelled to those most in need. Assessing whether this channelling has been successful and whether the minimum level of social protection is *de facto* being maintained is, however, challenging.[80]

Fourth, protecting the minimum core obligation of the right in question can be listed as one of the prerequisites of the prohibition of retrogression. Protecting the minimum core obligation means that a regressive measure cannot defeat the most essential content: the ratio of the right in question. The underlying idea of this condition is that the minimum subsistence rights for all should always be ensured by states, regardless of the resources available and the level of economic development.[81] The minimum core content is the non-negotiable, fundamental part of the right. All individuals are always, in all circumstances, entitled to the minimum core content of the right.[82]

It must be also noted in this context that there is a difference between the international minimum core obligation and the Finnish, domestic mini-

---

75 Latvian Pensions Case 2009, para 32.

76 Constitutional Court of Portugal, (5 July 2012) Judgment No 353/2012, English summary.

77 Constitutional Court of Germany, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9 February 2010), paras 208–209.

78 See eg *Elson – Balakrishnan – Heintz* 2013, p. 23.

79 Limburg principles, paras 13–14 and Maastricht Guidelines, para 14(d).

80 On the measures taken in certain European countries in 2009, see *FRA* 2010, p. 25–29.

81 Realization of economic, social and cultural rights: Second progress report prepared by Mr. Danilo Türk, Special Rapporteur (18 July 1991) UN Doc E/CN.4/Sub.2/1991/17, para 10. See also CESCR, General Comment 3, para 10 and Limburg principles, para 25.

82 CESCR, General Comment 3, para 10.

mum core obligation.[83] While the international minimum core obligation operates as the ultimate threshold, below which the state can never go, the domestic minimum core obligation may be higher. Nothing prevents a state from adopting higher minimum standards in its constitution and domestic system, so long as international requirements are met. When one examines the prohibition of retrogression and its conditions under *international law*, it is indeed the former threshold that is of relevance. In the Finnish context, however, the domestic minimum threshold needs to be respected.

The CESCR has in its statements pointed out that the adoption of any retrogressive measures incompatible with the core obligations under the ICESCR would be impermissible.[84] Defining the core elements and the minimum core obligation of each social right is not necessarily always an easy task. The CESCR has, however, noted that when it comes to the right to social security, the minimum essential level of benefits means that all individuals and families are able to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education.[85] In Europe, citizens generally enjoy access to these benefits.[86] With that being said, the minimum core obligation of a right is, as pointed out above, an evolving threshold. It can therefore be argued that the threshold for minimum core obligation in the European welfare states is higher than in some less developed countries, simply because of differences in the amount of available resources. The CESCR has invited states to create domestic indicators to evaluate whether the level of social security is sufficient vis-à-vis the resources available in that particular country.[87] Moreover, all state parties to the ICESCR should have a social security system that provides for the coverage of nine principal branches of social security. These branches entail health care, family and child support, maternity benefits, social security benefits for older people and disabled people and social benefits in the case of sickness, unemployment or employment injury.[88] It can be argued that removal of any of these branches would automatically amount, if not to a violation of the minimum core content of the right to social security, at least to a violation of the prohibition of retrogression.

---

83 *Rautiainen* 2013, p. 267–268.
84 General Comment 19, para 64; CESCR, General Comment 14, para 48.
85 CESCR, General Comment 19, para 59(a).
86 *O'Cinneide* 2014, p. 169.
87 CESCR, General Comment 19, paras 74-6. See also *Saul – Kinley – Mowbray* 2014, p. 648–650.
88 CESCR, General Comment 19, paras 12–21.

As for the legal practice of the ECSR, the Committee has recently examined whether Finland had violated article 12(3) of the ESC by failing to improve its social security system in an adequate manner. Whilst the ECSR did not eventually find a violation of article 12(3), in assessing the issue it held that changes to any social security system must ensure "the maintenance of a basic compulsory social security system which is sufficiently extensive".[89] Moreover, the former President of the ECSR noted in his separate concurring opinion on the decision that the inadequate level of social security in terms of article 12(1) of the ESC makes it difficult to demonstrate adequate progress in terms of article 12(3) of the ESC.[90] The relevance of the particular case in the Finnish context will be further discussed below.

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

It has been presented above that the prohibition of retrogression consists of a series of cumulative criteria that must be met when limiting social rights. The question remains, however, as to the nature of the prohibition as a legal norm. Does it operate more as a principle, or can it in certain situations have the status of a binding rule?

In legal theory, legal norms have been divided into rules and principles, depending on the impact of the norm. More precisely, one should talk about the impact the norm has in an individual situation of application: the same norm can in some cases operate as a rule, whereas in others it would operate as a principle.[91] Alexy has distinguished between legal rules and principles by noting that with rules one usually has to make a choice either to apply or not to apply the rule, whereas legal principles operate more as "optimization requirements" that need to be balanced with other applicable principles in situations of conflict. By balancing the principles one can then see which should have the strongest effect in that particular case.[92] Princi-

[89] Finnish Society of Social Rights v Finland (9 September 2014) ECSR 88/2012, para 85. The ECSR did find violations of articles 12(1) and 13(1) of the ESC.
[90] Separate Concurring Opinion of Luis Jimena Quesada (9 September 2014) ECSR 88/2012, para 9.
[91] *Scheinin* 1991, p. 32–33.
[92] *Alexy* 2002, p. 75–77.

ples are – regardless of their application or non-application to particular cases – always in force, and an integral part of the legal system.[93]

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

As noted, the prohibition of retrogression is, due to its nature, mainly of relevance in the work of the legislature. In this context, a human rights norm operates as a rule if it prevents the legislature from passing certain kinds of legislation.[94] If we look at the prohibition of retrogression, this is exactly how the principle should operate. For instance, if the legislature were to choose between two bills, in order to comply with the prohibition of retrogression it should choose to pass the one that has less impact on vulnerable groups. In particular, in situations where the minimum core content of rights would otherwise be violated, the prohibition of retrogression operates as an absolute rule.[95] Moreover, the prohibition of retrogression could operate as a rule in situations where the Constitutional Law Committee would find that a bill could not be passed in the ordinary order of enactment because it is not in accordance with the prohibition of retrogression and thus unconstitutional.[96] In this sense it can be argued that the prohibition of retrogression can, in individual situations of application, operate as a *rule* rather than as a principle.

Normally, however, the prohibition of retrogression seems to operate as a principle. This means that the prohibition should be balanced against other relevant principles. Again, it is the legislature who has to weigh the prohibition against principles that may support adopting regressive legislation. As demonstrated above, regressive measures can also have a justifia-

93 *Scheinin* 1991, p. 30.
94 See Constitutional Law Committee of Finland, PeVL 12/1982 vp and *Scheinin* 1991, p. 37.
95 *Rautiainen* 2013, p. 267–270.
96 See *Scheinin* 1991, p. 38.

ble aim and can be supported by other legal principles, for instance, maintaining the stability of the social welfare system. The prohibition of retrogression derives, however, from states' human rights obligations. Human rights and fundamental rights obligations are choices of priority as made by the legislature and, consequently, the prohibition of retrogression should be regarded as having a relatively strong position in the balancing process.[97]

4 THE CONSTITUTIONAL REVIEW AND THE PROHIBITION OF RETROGRESSION

4.1 Status of fundamental and human rights in Finland

In order to find out the relevance of the prohibition in the Finnish legislative process and legal practice, one must first look into the history and culture of the Finnish constitutional law, in particular into the systems for limiting fundamental and human rights and to the forms of constitutional review. After this it will be considered whether the prohibition of retrogression could and should be of relevance when the constitutionality of legislation is being reviewed.

The development and rise of human rights in 1990s was relatively rapid; Finland became a member of the European Council in 1989 and ratified the European Convention on Human Rights[98] ('ECHR') in 1990. The comprehensive reform of constitutional rights in the Finnish system entered into force on 1 August 1995 (Act No 969/1995) and was largely influenced by international human rights treaties. The revised Constitution entailed a list of fundamental rights, including not only civil and political but also economic, social and cultural rights.[99] In addition to the material content of constitutional rights, the process governing the protection and monitoring of the constitutional rights has also been affected by international human rights treaties. The new Constitution of Finland entered into force on 1 March 2000 and contained clauses concerning the protection and effective implementation of constitutional rights. Section 22 of the 2000 Constitution provides for the duty of public authorities to guarantee the observance of constitutional and human rights. Section 74 establishes the competence

97 Tuori 2011, p. 720.

98 Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (entered into force 3 September 1953) ETS 5.

99 *Heinonen – Lavapuro* 2012, p. 11.

of the Constitutional Law Committee to issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.[100] The importance of international human rights treaties has been recognised also in sections 108 and 109 which regulate the duties of the Chancellor of Justice of the Government and the Parliamentary Ombudsman. Their duties entail, inter alia, monitoring the implementation of fundamental rights and human rights.

One major factor in the Finnish history of human rights is Finland's accession to the European Union in 1995. As a result, the Finnish courts were granted the competence to review all national law with regards to their compliance with the law of the EU. Moreover, in addition to its direct and indirect effect, EU law ought to have primacy over any conflicting domestic legislation.[101] Since 1995, the number of cases where a Finnish court has refused to apply domestic law due to the primacy of EU law has been relatively low. The explanations offered in the academic discussion consider Finnish legislation's predisposition to harmony with EU law from the outset, the vast number of precedents by the European Court of Justice and the tendency of Finnish courts to interpret domestic law in conformity with EU law to avoid conflicts.[102] The Constitutional Law Committee has, however, highlighted that the domestic level of protection of constitutional rights cannot be lowered because of the implementation of EU law.[103] The core idea of the Finnish system for the protection of fundamental rights and human rights, social rights included, is to establish as high a level of protection as possible. To achieve this goal it is necessary to derive the applicable legal norm from various sources, ranging from the domestic system to EU law and to the international level. These different levels, after all, form one consistent system for the protection of these rights.[104] In addition, international human rights treaties establish only the minimum standard in the domestic implementation of the respective rights. According to a generally accepted opinion Finnish authorities should aim to offer more extensive protection of those rights.[105]

---

100 As will be discussed in chapter 4.3, the Constitutional Law Committee had the competence to review constitutionality of bills already before the constitutional reform of 1999.

101 *Craig – de Búrca* 2011, p. 256–267.

102 *Ojanen* 2009, p. 201–203.

103 Constitutional Law Committee of Finland, PeVL 25/2001 vp.

104 This question about legal pluralism in the Finnish constitutional law and human rights culture has been further discussed eg in *Ojanen* 2011.

105 *Ojanen* 2009, p. 199.

Starting from the early 1990s, Finnish courts have become increasingly aware of the relevance of human rights norms and treaties and have started to refer to them in their case law.[106] Importantly, the Constitutional Law Committee issued an opinion in which it noted that all domestic law should be applied in accordance with the human-rights-orientated interpretation to avoid conflicts between domestic legislation and international human rights treaties.[107] The ever-growing number of references to international human rights treaties and the case law of monitoring bodies evidences that the role of human rights norms in Finland has become of significantly greater importance.

4.2 Limitation of fundamental rights in Finland

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

Second, in addition to these kinds of provisions, a limitation can be based on section 23 of the Constitution, which provides for exceptions to basic rights and liberties in situations of emergency. According to section 23, such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and deemed necessary may be provided for by an Act or government decree. The government degree must be issued on the basis of authorisation given in an Act for a special reason and is subject to a precisely circumscribed scope of application. The grounds for provisional exceptions shall, however, be laid down by an Act. An exception can be deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency that pose a serious threat to the nation. The Constitutional Law Committee has in its statement noted that the conditions of this section would be in accordance with the derogations clauses in article 2(1) of the ICESCR and

106 *Ojanen* 2009, p. 197–198.
107 Constitutional Law Committee of Finland, PeVL 2/1990 vp.

in article 30 of the 1961 ESC (article F of the Revised Charter).[108] It is, however, somewhat unclear whether times of economic recession fall within the definition of a public emergency.[109]

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

1. The limitation has to be based on a law;
2. The limitation has to be necessary and proportionate;
3. The limitation cannot affect the minimum core content of the right in question;
4. There has to be a legitimate end for the limitation;
5. The scope of the limitation must be sufficiently well defined;
6. The limitation must be in accordance with Finland's obligations under international law; and
7. Individuals' access to justice cannot be endangered.[110]

While these conditions cannot be found in Finnish legislation and have been formulated in the constitutional law practice and legal literature, they have widely been considered as binding guidelines when limiting fundamental rights.[111]

These conditions are, admittedly, somewhat similar to those of the prohibition of retrogression. However, the conditions of the prohibition of retrogression are a separate series of conditions and operate separately from the conditions listed above. Both sets of conditions are of natural relevance, in particular since the approach in those cases should advisably aim at the most effective enjoyment of social rights possible.[112] Also, the prohibition of retrogression entails certain features inherent to the aim of effective protection of social rights and equality. If the legislator looks solely at the general conditions of limitation of fundamental rights when implementing potentially regressive measures, the measures might have undesirable discriminatory impacts on the most vulnerable groups.[113]

---

108 See Constitutional Law Committee of Finland, PeVL 309/1993 vp, chapter 3.5.
109 *Tuori* 2011, p. 719.
110 Constitutional Law Committee of Finland, PeVM 25/1994 vp, 4–5.
111 *Viljanen* 2011, p. 144–147.
112 *Tuori* 2011, p. 719.
113 *Rautiainen* 2013, p. 272–273.

Finally, the Finnish system also entails the possibility to limit fundamental rights without necessarily complying with any of the mechanisms described above. In those rare cases the limitation must be made in the constitutional order of enactment, in accordance with section 73 of the Constitution.[114]

4.3 Forms of constitutional review

The Finnish constitutional system has traditionally been based on the classic idea of legislative supremacy.[115] The model of constitutional review in Finland has traditionally been ex ante review by the Constitutional Law Committee, meaning that the Committee has examined the compatibility of a Bill with the Constitution when doubts about constitutionality have arisen. The statements by the Constitutional Law Committee have *de facto* had the same normative relevance as that of decisions by constitutional courts in some other countries. Whilst the Committee is a political organ and consists of members of Parliament, its statements can be seen as legally persuasive since they are based on textual interpretation, the *travaux preparatoires* of the Constitution, the Committee's own precedents and the opinions of experts in constitutional law.[116]

For decades, Finnish courts followed the constitutional doctrine that practically prohibited them from reviewing the constitutionality of ordinary legislation and, consequently, led to a situation where courts did not refer to provisions of the Constitution at all.[117] This prohibition of judicial review was formally removed through the adoption of section 106 of the new Constitution in 1999. Section 106 provides for the primacy of the Constitution and, consequently, for a possibility of ex post constitutional review by courts:

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

---

114 See *Viljanen* 2011, p. 142.

115 The reason for the supremacy of ex ante review can be traced back to the Constitution Act of 1919. While the old Constitution did not contain a prohibition of judicial review per se, section 92(2) was interpreted so as to preventing courts from examining constitutionality of Acts of Parliament. See *Lavapuro – Ojanen – Scheinin* 2011, p. 510–512.

116 *Lavapuro – Ojanen – Scheinin* 2011, p. 510.

117 Ibid.

The wording of this provision implies that the drafters of the Constitution still wanted to maintain the primacy of ex ante constitutional review by the Constitutional Law Committee.[118] The threshold for applying section 106 of the Constitution is relatively high. In order to apply section 106, the court must find a manifest conflict between an Act and the Constitution. Moreover, finding a manifest conflict allows a court to give primacy to the provision of the Constitution only in that particular case. The court does not have the competence to repeal the Act as unconstitutional.

There are a number of cases where section 106 has been discussed but not applied[119] and a group of cases where the section has been applied.[120] From these cases one can draw certain conclusions. First, the courts have indeed required the conflict between an ordinary Act and the Constitution to be almost self-evident. Second, they have based their reasoning on *travaux preparatoires* of the Constitution and on the views of the Constitutional Law Committee vis-à-vis the constitutionality of particular bills at the time of their passing. This can be seen as problematic, as it is not possible for the Committee to consider all possible individual situations that might emerge in the future and where an Act could be in conflict with the Constitution. Third, it has been noted in academic literature that the manifest-conflict criterion creates a problematic grey area between the judicial competence under section 106 and the constitutional and human rights oriented interpretation: there may be cases where the conflict between an Act and the Constitution is less evident but cannot be resolved via fundamental rights-friendly interpretation.[121]

Regardless of the somewhat reluctant attitude of Finnish courts towards judicial review of ordinary legislation, it can be argued that the Finnish model of constitutional review has been undergoing certain significant transformations during the past couple of decades. Whilst ex ante review by the Constitutional Law Committee is still the supreme form of constitu-

---

118 See Government proposal for the 2000 Constitution, Finnish Government Proposal HE 1/1998 vp, *Hallituksen esitys Eduskunnalle uudeksi Suomen Hallitusmuodoksi*, 164 and the Report by the Constitutional Law Committee on the proposal, Constitutional Law Committee of Finland, PeVM 10/1998 vp, 31.

119 See eg Supreme Court of Finland KKO 2003:107, Supreme Administrative Court of Finland, KHO 2005:43, Supreme Court of Finland KKO 2006:71, Supreme Administrative Court of Finland, KHO 2007:77, Supreme Court of Finland KKO 2008:83 and Supreme Court of Finland KKO 2014:14.

120 See eg Supreme Court of Finland, KKO 2004:26, Supreme Court of Finland, KKO 2004:62, Insurance Court of Finland, 6254:2005, Supreme Administrative Court of Finland, KHO 2008:25, Supreme Court of Finland, KKO 2015:14 and Helsinki Administrative Court (4 August 2015) HAO 15/0615/2.

121 *Lavapuro – Ojanen – Scheinin* 2011, p. 527–530. See also Lavapuro 2010, p. 213–216.

tional review in Finland, adoption of section 106 of the Constitution has brought the Finnish system closer to so-called weak-form models of constitutional review.[122] For the purposes of this article, the next question to be examined is what are the concrete ways through which the prohibition of retrogression could be taken into account in the Finnish system of constitutional review.

4.4 How does the prohibition of retrogression operate in the Finnish system?

As Finnish public authorities are, according to section 22 of the Constitution, under an obligation to ensure compliance with international human rights obligations, they are also under an obligation to guarantee compliance with the prohibition of retrogression. As a main rule, the prohibition of retrogression should be taken into account by the legislator. Because of its nature, the prohibition of retrogression should be considered *before* adopting any possibly regressive measures and legislation. Moreover, unjustified regressive measures often take place through the repeal of an Act that guarantees a certain level of social rights. In these situations it is not even possible for a court to refer to legislation that is no more in force, not to mention examining the legality of the revocation. The prohibition of retrogression could fall within the scope of ex post judicial review only in exceptional situations.[123] These situations will be addressed at the end of this chapter.

When we talk about the ex ante review and the prohibition of retrogression, it is important to note that the prohibition must be taken into account by the legislator in two kinds of situations. First, the legislator must ensure compliance with the prohibition when passing new ordinary legislation. Second, and perhaps even more importantly, the prohibition should be respected in the context of budgetary decision-making.[124] In Finland, the drafting process of ordinary legislation normally entails systematic ex ante constitutional review by the Constitutional Law Committee and any limitations must be in compliance with the general conditions of fundamental rights limitation.[125] Interestingly enough, budgetary decision-making by

[122] On the concept of the weak-form review, see Lavapuro 2010, p. 243–267. See also *Lavapuro – Ojanen – Scheinin* 2011, p. 505–510.
[123] *Rautiainen* 2013, p. 275–276.
[124] See eg *Nolan – Dutschke* 2010.
[125] See chapter 4.2.

the Parliament has not *de facto* been subject to any systematic review mechanisms.[126] Budget decisions are made in one hearing of the Parliament and the decision needs to be supported by only a simple majority. It follows that while budgetary decision-making *de facto* affects the realisation of social rights in Finland, the decision-making process itself is not subject to systematic human rights impact assessment and constitutional review. This is viewed as problematic from the viewpoint of constitutional law.[127] Without effective human rights impact assessment vis-à-vis budget decisions, the prohibition of retrogression can also be disregarded. This, of course, can have a negative impact upon the rights of the most vulnerable and, thus, upon equality generally.[128]

The Constitutional Law Committee has touched upon the relevance of the prohibition of retrogression in some of its statements. It has noted that during an economic recession it should be possible, at least to some extent, to take regressive measures and lower the level of social rights. According to the Committee, it is logical to take into consideration the state of the public economy when deciding on the level of services financed by the public sector.[129] Instead of elaborating on the content of the prohibition of retrogression, the Committee has, however, focused mainly upon the obligation to protect the minimum core content of the right in question. It has, for instance, stated that organising education as subject to a charge could not amount to a decrease in the number of student places which were free of charge,[130] and that extending the waiting period of unemployment security by two days was not a regressive measure of constitutional significance.[131]

More recently, the Constitutional Law Committee has been required to examine the constitutionality of the government proposal on social welfare and health care reform.[132] While the prohibition of retrogression has not been directly addressed, certain related observations can be made. First of

---

126 The Constitutional Law Committee has stated that budgetary decisions should be subject to fundamental rights impact assessment. See eg Constitutional Law Committee of Finland, PeVM 25/1994 vp.

127 *Rautiainen* 2013, p. 277–279.

128 On criticism concerning the lack of human rights impact assessment in the 2015 government platform of Finland, see *Lavapuro – Ojanen* 2015.

129 Constitutional Law Committee of Finland, PeVM 25/1994 vp.

130 Constitutional Law Committee of Finland, PeVL 14/2007 vp.

131 Constitutional Law Committee of Finland, PeVL 16/1996 vp.

132 Constitutional Law Committee of Finland, PeVL 67/2014 vp; Constitutional Law Committee of Finland, PeVL 75/2014 vp and Finnish Government Proposal HE 324/2014 vp, *Hallituksen esitys eduskunnalle laiksi sosiaali- ja terveydenhuollon järjestämisestä ja eräiksi siihen liittyviksi laeiksi*.

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

As for the ex post review, it can be argued that the prohibition of retrogression could be of relevance in two types of situations. First, the prohibition can be taken into account through a human rights oriented interpretation. For instance, in relation to the reform of the Act on Social Assistance (1412/1997) the Constitutional Law Committee noted that impacts on the most vulnerable groups and the creation of new marginalised groups can be avoided through a fundamental rights-friendly interpretation by the courts of the new legislation.[133] In practice this can lead to situations where a court departs rather significantly from the wording of the Social Assistance Act in order to avoid generating new marginalised groups in society and to promote equality.[134] One can, of course, ask whether it would be more advisable for the legislator to seek to ensure the accomplishment of this goal already in the course of the drafting process. This criticism is particularly topical in light of the recent decisions of the ECSR on the level of social security in Finland. In its decision 88/2012, the ECSR found that Finland's level of social security was in violation of article 12(1) of the ESC as it fell below 50 % of median income.[135] The Finnish Government sought to justify the level of basic social assistance by stating that in addition to the basic amount of the social allowance, a person who is entitled to social assistance may receive other forms of assistance.[136] The right to these other forms of assistance is not, however, a subjective right, but rath-

133 Constitutional Law Committee of Finland, PeVL 35/2012 vp.
134 See *Rautiainen* 2013, p. 276–277, in particular footnote 74.
135 ECSR 88/2012, paras 110–125.
136 ECSR 88/2012, paras 101–109.

er subject to certain specific criteria. The ECSR therefore concluded that the level of social security in Finland was insufficient. The ECSR seemed to require the state to guarantee adequate social assistance in its legislation for all, so that reaching an adequate level would not be dependent upon the fulfilment of certain special prerequisites.[137] In that sense one can conclude that seeking to secure the fulfilment of social rights and compliance with the prohibition of retrogression through the method of human rights friendly interpretation may not be sufficient in light of the Committee's decision.[138]

Second, a court may have to consider the application of the prohibition of retrogression in cases where an individual has based her claim on subjective social rights, which are directly enforceable through the courts.[139] Finland's Constitution provides for two subjective rights: the right to minimum level of subsistence under section 19(1) and the right to free basic education under section 16(1). If an individual feels that her subjective constitutional right has not been realised, she can raise a claim in front of a court of justice and base her claim directly on the constitutional provision, even if ordinary legislation would not grant her that right. In these cases the question is, however, more about the Government's responsibility to implement fundamental rights and the direct effect of these rights rather than the applicability of the prohibition of retrogression.[140]

Even so, one might contemplate that the prohibition of retrogression could be of relevance in application of section 106 of the Constitution. As noted, public authorities have an obligation to ensure compliance with international human rights norms under section 22 of the Constitution. It can be argued that the prohibition of retrogression forms a part of these international human rights obligations. Therefore, hypothetically, there could be a situation where an individual's fundamental subjective right, for instance the right to minimum level of subsistence, has not been fully realised because of regressive legislative measures. Could a court in this situation find the new legislation to be in conflict with the Constitution, in particular with section 22? Judging from the previous case law on the interpretation of section 106 of the Constitution, the answer to this question appears to be negative. It seems highly unlikely that a court would solve this kind of a case through application of section 106. This is, most of all, because the threshold for finding a manifest conflict between an ordinary Act

137 ECSR 88/2012, para 120.
138 On criticism concerning Government's arguments, see *Rautiainen* 2015.
139 On the definition of subjective rights, see *Tuori – Kotkas* 2008, p. 242–243.
140 *Rautiainen* 2013, p. 276.

and the Constitution is relatively high. The prohibition of retrogression is, after all, not a clearly defined legal norm, and is not expressly mentioned in any of the applicable human rights instruments, not to mention in the Finnish Constitution. Moreover, this kind of a case would probably be solved instead through a fundamental rights-friendly interpretation or through direct reference to the respective subjective social right under the Constitution. If section 106 were to be applied, then the manifest conflict would quite likely take place between an ordinary Act and the subjective constitutional right, without any reference to the prohibition of retrogression.

As demonstrated above, it is certainly not an established rule that claims concerning the constitutionality of ordinary legislation vis-à-vis social rights can be brought before courts. This raises the question of whether social rights are *de facto* effective. In the next chapter I will evaluate the effectiveness of social rights from the perspective of the prohibition of retrogression. The purpose of the chapter is to demonstrate that the effective realisation of social rights is important in a democratic society as there is a good reason to believe that effective social rights promote equality and democracy. Moreover, it will be argued that effectiveness of social rights can be best secured not only through justiciability of certain subjective rights but also by actively evaluating compliance with the prohibition of retrogression before resorting to new legislative and budgetary measures.

5 EFFECTIVENESS OF SOCIAL RIGHTS IN FINLAND

5.1 Criteria for assessing effectiveness

Whilst subjective social rights in Finland are, as noted above, directly enforceable through courts, there are also other factors that should be in place for the protection of the level of social rights to be regarded as effective. It can be argued that the starting point for the effective realisation of social rights is the positive attitude in society towards the implementation of social rights. Promoting social rights must be seen as one of the fundamental values in the democratic society, and the state must be willing to commit itself to the full realisation of social rights.[141] However, this is only a starting point. In addition to good faith, a state must *de facto* have the capacity

[141] Se eg *Burchill* 2007, p. 361–362.

to make the level of social rights adequate and the realisation of social rights effective. One must ask, therefore, what this means in practice.

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

Second, an individual must have access to effective remedies when she feels that her social rights have not been fully realised. With effective remedies for an individual, one can refer to the justiciability of social rights; the respective right as directly enforceable within the courts. These remedies can, however, entail also so-called administrative remedies.[142] While an individual cannot enforce any substantive rights through an administrative complaints procedure per se, the procedure offers means for an individual to express her dissatisfaction with the level of realisation of the rights. This makes it possible for an administrative authority to detect and intervene in illegal or reprehensible conduct of a social service provider.[143] Administrative complaints procedures are, therefore, closely linked to the idea of effective supervisory system.

Finally, the effectiveness of social rights requires comprehensive and continuous human rights impact assessment by the legislature, courts and other public authorities. It can be argued that through effective human rights impact assessment the prohibition of retrogression would also be sufficiently taken into account.[144] Whether this kind of an assessment is being carried out is, however, also a question of policy and the predominant attitude within the particular state. In the following chapters I will examine whether the Finnish system for protection of social rights can be regarded as effective, in particular from the viewpoint of the prohibition of retrogression.

142 CESCR, General Comment 3, paras 5–7.
143 *Puumalainen* 2012, p. 267–268.
144 *Rautiainen* 2013, p. 280.

5.2 Effectiveness of social rights as a tool for promoting equality, justice and democracy

Before moving on to evaluating the effectiveness of the Finnish system for the protection of social rights, one must first ask *why* social rights should be implemented as effectively as possible? From a Finnish constitutional law perspective, promoting participation, democracy and justice in society are fundamental principles expressly mentioned in the Constitution. According to section 1(2), the Constitution shall guarantee the inviolability of human dignity, the freedom and rights of the individual, and promote justice in society. Further, according to section 2(2) of the Constitution, democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions. According to section 6(1) of the Constitution, everyone is equal before the law. The Constitutional Law Committee of Finland has noted that promoting justice in society is closely linked with the effective realisation of economic, social and cultural rights.[145] The obligation of public authorities to guarantee the observance of fundamental and human rights in the society can also be seen as crystallising the fundamental values expressed in sections 1 and 2 of the Constitution.[146]

It has, indeed, been argued that the effective realisation of social rights promotes equality and democracy in society. This is because effective social rights promote the transparency of and participation in the decision-making process. This, subsequently, increases the level of participation of the most vulnerable groups in the decision-making process and, therefore, increases equality in the society.[147] Wide participation of the vulnerable groups of society then, in turn, strengthens the status of social rights in society. The FRA, for instance, has noted that countries that promote participation and transparency of decision-making tackle the challenges of economic crisis much better.[148]

If one looks at the question from the viewpoint of the prohibition of retrogression, it can be noted that the prohibition, indeed, aims at tackling the inequality in society. One of the cumulative conditions of the prohibi-

---

145 Government proposal for the fundamental rights reform, Finnish Government Proposal HE 309/1993 vp, *Hallituksen esitys Eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta*, detailed justifications chapter 1(1).

146 See eg *Ojanen – Scheinin* 2011, p. 224–225.

147 On the role of participation in promoting equality, see *Fredman* 2008, p. 105–113 and p. 199–202.

148 *FRA* 2010, p. 14–15.

tion of retrogression is, as noted above, that the regressive step cannot be discriminatory or targeted at the most vulnerable groups. The importance of the prohibition of retrogression in protecting equality in society becomes emphasised in times of economic crisis, as austerity measures create a risk of rising inequality.[149]

As can be seen, effective social rights increase the level of participation in the decision-making process. Consequently, effective realisation of social rights contributes to the effective realisation of civil and political rights, such as the freedom of expression, electoral and participatory rights and the freedom of assembly. Also in this sense, therefore, the effectiveness of social rights is of importance. Further, this implies that too strict a distinction between so-called negative and positive rights may be artificial and harmful for the effective implementation of human rights as a whole.[150]

5.3 Evaluating the effectiveness of the Finnish system for the protection of social rights

First, it must be noted that as a state party to the ICESCR and the ESC, Finland is under an obligation to provide individuals with effective remedies and to monitor the implementation of social rights. Under the ICESCR, the state has a right to also implement social rights through non-legislative measures. This does not mean that taking non-legislative measures could justify a situation where effective remedies do not exist. Quite the opposite; the state should ensure that the remedies may be sought either from judicial or administrative authorities.[151] The ECSR has stated that especially in times of economic crisis "governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most".[152] Moreover, as demonstrated above, Finland has committed itself to the effective realisation of social rights and to compliance with the prohibition of retrogression, inter alia, through sections 1, 2 and 22 of the Constitution.

Second, as demonstrated above, the prohibition of retrogression requires a state to conduct sufficient research and analysis into the impact of any

149 *Committee on Social Affairs, Health and Sustainable Development* 2012.

150 See eg *Tuori* 2011, p. 712.

151 CESCR, General Comment 3, paras 5–7. See also Maastricht Guidelines, paras 16 and 22–23.

152 European Committee of Social Rights, General introduction to Conclusions XIX-2 (2009), 12–13.

regressive measures on vulnerable groups in order to ascertain the measure that has the most minimal impact on the rights of the most vulnerable groups. Therefore, it can be argued that conducting a social rights impact assessment is an inherent part of the obligation not to take any unnecessary regressive steps. The FRA has considered human rights impact assessment as crucial in revealing how the overall burden of regressive measures is being shared between different groups of society.[153] Conducting sufficient impact assessment prevents the state from violating the prohibition of retrogression. Next, it will be evaluated whether the Finnish system of monitoring makes it possible to carry out this kind of analysis. In doing this I will utilise the concept of the *proactive model,* which is an alternative model for promoting the effectiveness of social rights as opposed to those based solely on judicial intervention. The idea of so-called proactive models of monitoring is to acknowledge that equality between citizens requires a state not only to refrain from violating the right to equality but also to actively promote it.[154] Proactive models are based on the idea that the responsibility for addressing ineffectiveness in the realisation of social rights, and inequality in society, lies on those who are best equipped to do so. This means that actively promoting the effective realisation of social rights is not solely a task of courts and the judicial process, but rather a task of all public authorities.[155] In Finland, these authorities entail, in addition to courts, in particular the legislature and administrative supervisory authorities and, to some extent, non-governmental organisations in the field of social law.

In Finland, monitoring compliance with human rights and fundamental rights is one of the most important tasks of the Parliamentary Ombudsman and the Chancellor of Justice.[156] Both authorities provide an annual report on their supervisory activities, and the Constitutional Law Committee has held that the report should entail a section on the realisation of fundamental rights and human rights.[157] The Finnish model for monitoring compliance with social rights is strongly based on the mandate of administrative authorities to receive administrative complaints and to conduct supervision.[158]

---

153 *FRA* 2010, p. 20.

154 *Fredman* 2008, p. 189.

155 See *Fredman* 2008, p. 189.

156 The Parliamentary Ombudsman has noted in his annual reports that since 2000 nearly all supervisory tasks of the Ombudsman have entailed issues related to constitutional rights and human rights. See Eduskunnan oikeusasiamiehen toimintakertomus vuodelta 2014, p. 58.

157 Constitutional Law Committee of Finland, PeVM 25/1994 vp.

158 Currently Ombudsman's supervisory proceedings seems to be one of the most im-

Whilst administrative authorities do not have the authority to decide on the implementation of regressive legislation and, consequently, effectively supervise compliance with the prohibition of retrogression, they can spot areas where social rights are not being fully realised. This, in turn, can indicate to the legislature how they might promote the realisation of social rights, i.e. what the next progressive step of the state should be. Citizens' administrative complaints can also be useful in evaluating compliance with the empirical dimension of the prohibition of retrogression, i.e. whether new legislation has *de facto* had a negative impact on the level of social rights in Finland. In this sense the supervisory work of the administrative authorities complements the monitoring system, and the Finnish system can be argued to have certain characteristics of the proactive model.[159]

In the effective realisation of social rights in Finland – in addition to the work of administrative authorities – the role of non-governmental organisations is also, to some extent, relevant. As the additional protocol to the ESC now provides for a system of collective complaints and has been ratified by Finland, non-governmental organisations can submit complaints on "unsatisfactory application" of the ESC.[160] According to the preamble of the additional protocol, the purpose of the collective complaints procedure is to "improve the effective enforcement of the social rights guaranteed by the Charter". The Finnish Society of Social Rights (Suomen Sosiaalioikeudellinen Seura r.y.) filed a complaint in December 2012 on the inadequate level of social security in Finland. As elaborated in the previous chapters, this led the ECSR to find that Finland was not complying with articles 12(1) and 13(1) of the ESC.[161] Moreover, as Finland has ratified the Optional Protocol to the ICESCR which entered into force on 30 April 2014 (Finnish Government Decree 17/2014), it is now possible for an individual or a group of individuals to submit a communication to the CESCR, claiming to be a victim of a violation of any of the economic, social and cultural

portant mechanisms for ensuring the effective protection of constitutional and human rights in Finland. See *Lavapuro – Ojanen – Scheinin* 2011, p. 521. See also *Lavapuro* 2010, p. 42–43. Also other administrative authorities, namely the National Supervisory Authority for Welfare and Health (Valvira) and the six Regional State Administrative Agencies (Aluehallintovirastot), monitor compliance with social rights in Finland.

159 As a principle, the prohibition of retrogression by definition affects the work of all public authorities. See *Scheinin* 1991, p. 37.

160 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted 9 November 1995, entered into force 1 July 1998) CETS 158

161 The ECSR also found in its decision *STTK ry and Tehy ry v Finland* (17 October 2001) ECSR 71/2000 that Finland had violated article 4(2) of the ESC by removing the right to additional paid leave for hospital personnel who were exposed to radiation. The ECSR did not, however, refer to the prohibition of retrogression in its reasoning.

rights set forth in the ICESCR. These rights entail, inter alia, article 2(1) and the principle of progressive realisation.[162]

As for the effectiveness of social rights in Finnish courts, it must first be noted again that the right to a minimum level of subsistence and the right to free basic education are directly enforceable in the courts. However, apart from those cases, courts do not tend to refer to social rights in their legal practice. In fact, it has proven to be relatively difficult to get access to any data on the number of cases where social rights would have been referred to.[163] When the courts have invoked social rights, they have referred to them merely as fundamental rights but have not simultaneously referred to respective human rights. This can be seen as problematic from the viewpoint of effectiveness for two reasons. First, the catalogue of social fundamental rights in the Constitution of Finland does not codify all the social rights provided for in the ICESCR. Those social rights are, however, binding in Finland as international human rights norms and must be protected, as stipulated in section 22 of the Constitution. Second, even though the level of domestic protection of fundamental rights has traditionally been thought to be higher than that of international human rights law,[164] it is possible that international minimum standards evolve through the practice of the international supervisory bodies such as the ECSR and the CESCR.[165] In that sense the domestic courts should be aware of the recent practice of these organs in order to effectively protect social rights in Finland.

As for the effectiveness of the prohibition of retrogression in the Finnish courts, one particular case can be mentioned. In the Supreme Court case KKO 2008:83 a group of pensioners sought compensation from the state because of reductions in their pensions. They argued, inter alia, that the regressive legislation was in manifest conflict with the property clause of the Constitution. The Supreme Court did not, however, address any substantive issues in the judgement, as it found that the question of compensation should be addressed by the Insurance Court and only after individuals had received concrete decisions on the amount of their pensions.[166] The case at hand demonstrates well the problem attached to the ex post review of compliance with the prohibition of retrogression. First, the reduction in

[162] Optional Protocol to the International Covenant on Economic, Social and Cultural rights (adopted 10 December 2008, entered into force 5 May 2013).
[163] See *Hyttinen* 2012, p. 496–515.
[164] See, for instance, *Rautiainen* 2013, p. 267–268.
[165] *Hyttinen* 2012, p. 511–513.
[166] Supreme Court of Finland KKO 2008:83, paras 6–8.

the level of rights of an individual cannot be seen as a violation of the prohibition of retrogression per se;[167] a more comprehensive analysis on the regressive impact of measures would be required. Second, the claims raised in courts often concern violations of subjective social rights or, as in the case at hand, the right to property. The prohibition of retrogression can, however, be disregarded also by decreasing the level of other social rights, i.e. those not directly enforceable through courts. From the viewpoint of the effectiveness of social rights this distinction between different social rights might appear problematic: when the Government has an absolute obligation to guarantee the effective enjoyment of certain subjective social rights, the realisation of other social rights may not be sufficiently considered during the budgetary decision-making process.[168]

Finally, it must be asked whether the realisation of social rights can be effective if the budgetary decision-making is not subject to systematic human rights impact assessment. Budgetary decisions have, after all, an important role in allocating state resources. The fact that this allocation of resources is not subject to systematic constitutional and human rights review has been seen as problematic.[169] Social rights often pose positive obligations for a state, and therefore state compliance with the principle of progressive realisation and the prohibition of retrogression are closely linked with the amount of available resources. The Government's budgetary decisions are not, however, subject to ex ante constitutional review by the Constitutional Law Committee, at least not to the same extent as new legislative proposals.

In Finland, the municipalities have the right to self-government and are responsible for the realisation of rights that derive from the social rights guaranteed in the Constitution. They are not, however, under an obligation to make sure that they allocate sufficient resources for this purpose in their budgets. This has been seen as one of the major problems of the effective realisation of social rights in Finland.[170] The Government cannot escape its responsibility to guarantee compliance with the prohibition of retrogression and the effective implementation of social rights by delegating the realisation of social rights to municipalities. If the municipalities cannot provide adequate services due to shortage of resources, it is the Government who is responsible for any violations of social rights.[171] Therefore,

167 *Rautiainen* 2013, p. 275.
168 *Puumalainen* 2012, p. 273–274.
169 See eg *Puumalainen* 2012, p. 273–274 and *Rautiainen* 2013, p. 276–279.
170 *Rautiainen* 2013, p. 277.
171 *Viljanen* 2011, p. 118.

the Government should ensure that its budgetary decision-making and resource allocations are in compliance with the state's human rights obligations, in particular with the prohibition of retrogression.

Budgetary decision-making has not been subject to systematic human rights impact assessment and constitutional review partly because it has been traditionally seen as a political, rather than a legal, process.[172] However, in light of section 22 of the Constitution, this should not be the case. As all public authorities are under an obligation to guarantee the observance of human rights, budgetary decisions should also be subject to human rights impact assessment, particularly since it is arguably the most effective way to ensure compliance with the prohibition of retrogression.

6 CONCLUSIONS

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

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

In the course of the current economic crisis, several European countries have been almost forced to resort to certain austerity measures due to the

172 *Rautiainen* 2013, p. 279.

lack of resources. Consequently, several supranational human rights bodies and domestic constitutional courts have given decisions and statements on the justifiability of these measures. From these statements one can ascertain certain requirements which are consistently imposed by the prohibition of retrogression: the regressive measure has to be temporary; it has to be necessary and proportionate; it cannot be discriminatory; and the legislature has to protect the minimum core content of the right in question. The obligation to conduct sufficient social rights impact analysis before resorting to any regressive measures seems to be an inherent part of the prohibition of retrogression.

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

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

The Finnish system of monitoring can be argued to have some characteristics of so-called proactive models, which are based on the idea that addressing inequalities in society and promoting effectiveness of fundamental rights and human rights is the responsibility of all public authorities. Whilst models that are based on the judicial process often only review

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

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

Insufficient human rights impact assessment vis-à-vis budgetary decision-making can be seen as a core problem attached to the effective operation of the prohibition of retrogression. Whilst it is understandable – and realistic – that the level of resources available for a state often decreases during economic turmoil, economic recession does not justify the lack of sufficient human rights impact assessment when reacting to the economic situation by taking austerity measures. Quite the contrary, a democratic welfare state has the responsibility to promote the effective realisation of social rights and to protect vulnerable groups particularly in times of economic crisis, as there is a real risk of rising inequality in the society.

SOURCES

Bibliography

Alexy, Robert: A Theory of Constitutional Rights. Oxford University Press, Oxford 2002.

Alston, Philip – Quinn, Gerard: The Nature and Scope of States parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, (1987) 9 Human Rights Quarterly 156.

Bilchitz, David: Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for the Future Socio-economic Rights Jurisprudence, (2003) 19 South African Journal on Human Rights 1.

Burchill, Richard: Democracy and the Protection of Socio-Economic Rights, in Baderin, Mashood – McCorquodale, Robert (eds): Economic, Social and Cultural Rights in Action. Oxford University Press, Oxford 2007.

Center for Economic and Social Rights: OPERA: Assessing Compliance with the Obligation to Fulfill Economic, Social and Cultural Rights (2012).

Chapman, Audrey – Russell, Sage: Introduction, in Chapman, Audrey – Russell, Sage (eds): Core Obligations: Building a Framework for Economic, Social and Cultural Rights. Intersentia, Antwerp 2002.

Committee on Social Affairs, Health and Sustainable Development, Austerity measures – a danger for democracy and social rights (7 June 2012). – Http://www.andrej-hunko.de/start/aktuell/1105-austerity-measures-a-danger-for-democracy-and-social-rights (26.5.2016).

Coomans, Fons – Kamminga, Menno: Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties, in Coomans, Fons – Kamminga, Menno (eds): Extraterritorial Application of Human Rights Treaties. Intersentia, Antwerp 2004.

Coomans, Fons: In Search of the Core Content of the Right to Education, in Chapman, Audrey – Russell, Sage (eds): Core Obligations: Building a Framework for Economic, Social and Cultural Rights. Intersentia, Antwerp 2002.

Craig, Paul – de Búrca, Gráinne: EU Law: Text, Cases, and Materials. Oxford University Press, Oxford 2011.

Craven, Matthew: The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development. Oxford University Press, Oxford 1995.

Eduskunnan oikeusasiamiehen toimintakertomus vuodelta 2014. Juvenes Print, Tampere 2015.

Elson, Diane – Balakrishnan, Radhika – Heintz, James: Public Finance, Maximum Available Resources and Human Rights, in Nolan, Aoife – O'Connell, Rory – Harvey, Colin (eds): Human Rights and Public Finance. Hart Publishing, Oxford 2013.

European Commission, Directorate-General for Employment, Social Affairs and Inclusion: Employment and Social Developments in Europe 2012 (8 January 2013).

European Union Agency for Fundamental Rights (FRA): Protecting Fundamental rights during the economic crisis (2010).

European Union Agency for Fundamental Rights (FRA): The European Union as a Community of values: safeguarding fundamental rights in times of crisis (2013).

Fabbrini, Federeco: The European Multilevel System for the Protection of Fundamental Rights: A 'neo-federalist' perspective, (2010) 5 Jean Monnet Working Paper.

Fredman, Sandra: Human Rights Transformed: Positive Rights and Positive Duties. Oxford University Press, Oxford 2008.

Heinonen, Tuuli – Lavapuro, Juha: Suomen oikeuden eurooppalaistuminen ja valtiosääntöistyminen 1990–2012, in Heinonen, Tuuli – Lavapuro, Juha (eds): Oikeuskulttuurin eurooppalaistuminen. Suomalainen Lakimiesyhdistys, Helsinki 2012.

Helsingin Sanomat: Oikeustieteilijät: Hallitus sivuuttaa menoleikkauksista ihmisoikeudet (16.6.2015). – Http://www.hs.fi/politiikka/a1434245657218 (26.5.2016).

Hyttinen, Sanna: Sosiaaliset ihmisoikeudet ja suomalaiset tuomioistuimet – otetaanko sosiaaliset ihmisoikeudet vakavasti? (2012) 4 Oikeus 496.

Lavapuro Juha – Ojanen Tuomas – Scheinin Martin: Rights-based constitutionalism in Finland and the development of pluralist constitutional review, (2011) 9 International Journal of Constitutional Law 505.

Lavapuro, Juha – Ojanen, Tuomas: Hallitusohjelma ja perustuslaki -tippuiko perustuslaki pois prosessikaaviosta? (8.6.2015). – Https://perustuslakiblogi.wordpress.com/ (26.5.2016).

Lavapuro, Juha: Uusi perustuslakikontrolli. Suomalainen Lakimiesyhdistys, Helsinki 2010.

Mikkola, Matti: Social Rights as Human Rights in Europe, (2000) 2 European Journal of Social Security 259.

Mikkola, Matti: Social Human Rights of Europe. Karelactio, Helsinki 2010.

Mowbray, Alastair: The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights. Hart Publishing, Oxford 2004.

Nolan, Aiofe – Dutschke, Mira: Article 2(1) ICESCR and State Parties' Obligations: Whither the Budget? (2010) 3 European Human Rights Law Review 280.

Nolan, Aoife – Lusiani, Nicholas J. – Courtis Christian: Two steps forward, no steps back? Evolving criteria of the prohibition of retrogression in economic and social rights, in Nolan, Aoife (ed): Economic and Social rights after the Global Financial Crisis. Cambridge University Press, Cambridge 2014.

Nolan, Aoife: Introduction, in Nolan, Aoife (ed): Economic and Social rights after the Global Financial Crisis. Cambridge University Press, Cambridge 2014.

O'Cinneide, Colm: Austerity and the faded dream of a 'social Europe', in Nolan, Aoife (ed): Economic and Social rights after the Global Financial Crisis. Cambridge University Press, Cambridge 2014.

Ojanen, Tuomas – Scheinin, Martin: Suomen valtiosäännön perusperiaatteet (PL 1 §), in Hallberg, Pekka – Karapuu, Heikki – Ojanen, Tuomas – Scheinin, Martin – Tuori, Kaarlo – Viljanen, Veli-Pekka (eds): Perusoikeudet. WSOYpro, Helsinki 2011.

Ojanen, Tuomas: Perusoikeuspluralismi kotimaisessa tuomioistuimessa, (2011) 4 Defensor Legis 442.

Ojanen, Tuomas: From Constitutional Periphery toward the Center –Transformations of Judicial Review in Finland, (2009) 27 Nordisk Tidsskrift för Menneskerettigheter 194.

Puumalainen, Mikko: Mitä Euroopan unionin perusoikeudet merkitsevät laillisuusvalvonnalle? in Heinonen, Tuuli – Lavapuro, Juha (eds): Oikeuskulttuurin eurooppalaistuminen. Suomalainen Lakimiesyhdistys, Helsinki 2012.

Rautiainen Pauli: Perusoikeuden heikennyskielto, (2013) 261 Oikeus 42.

Rautiainen, Pauli: Oikeus sosiaaliturvaan ei toteudu Suomessa (11.2.2015). – Https://perustuslakiblogi.wordpress.com/ (26.5.2016).

Riedel, Eibe: International Covenant on Economic, Social and Cultural Rights (1966), in Rüdiger Wolfrum (ed): The Max Planck Encyclopedia of Public International Law. – Http://opil.ouplaw.com/home/EPIL (25.5.2016).

Saul, Ben – Kinley, David – Mowbray, Jacqueline: The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials. Oxford University Press, Oxford 2014

Scheinin, Martin: Ihmisoikeudet Suomen oikeudessa: valtiosääntöoikeudellinen tutkimus kansainvälisten ihmisoikeussopimusten valtionsisäisestä voimassaolosta sekä ihmisoikeus- ja perusoikeusnormien sovellettavuudesta Suomen oikeusjärjestyksessä. Suomalainen Lakimiesyhdistys, Helsinki 1991.

de Schutter, Olivier – Salomon, Margot E.: Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010–2015. Legal Brief Prepared for the Special Committee of the Hellenic Parliament on the audit of the Greek Debt (Debt Truth Committee), 12 June 2015.

Shelton, Dinah: International Law and 'Relative Normativity', in Evans, Malcolm (ed): International Law. Oxford University Press, Oxford 2010.

Skogly, Sigrun: Beyond National Borders: States' Human Rights Obligations in International Cooperation. Intersentia, Antwerp 2006.

Ssenyonjo, Manisuli: Economic, Social and Cultural Rights in International Law. Hart Publishing, Oxford 2009.

Steiner, Henry: International Protection of Human Rights, in Evans, Malcolm (ed): International Law. Oxford University Press, Oxford 2010.

Tuori, Kaarlo – Kotkas, Tuomas: Sosiaalioikeus. WSOYpro, Helsinki 2008.

Tuori, Kaarlo: Sosiaaliset oikeudet (PL 19 §), in Hallberg, Pekka – Karapuu, Heikki – Ojanen, Tuomas – Scheinin, Martin – Tuori, Kaarlo – Viljanen, Veli-Pekka (eds): Perusoikeudet. WSOYpro, Helsinki 2011.

Viljanen, Veli-Pekka: Perusoikeuksien rajoittaminen, in Hallberg, Pekka – Karapuu, Heikki – Ojanen, Tuomas – Scheinin, Martin – Tuori, Kaarlo – Viljanen, Veli-Pekka (eds): Perusoikeudet. WSOYpro, Helsinki 2011.

Official documents

Realization of economic, social and cultural rights: Second progress report prepared by Mr. Danilo Türk, Special Rapporteur (18 July 1991) UN Doc E/CN.4/Sub.2/1991/17.

CESCR, Concluding Observations on Iceland (11 December 2012) UN Doc E/C.12/ISL/CO/4.

CESCR, Concluding Observations on Spain (6 June 2012) UN Doc E/C.12/ESP/CO/5.
CESCR, General Comment No 13: The right to education (article 13 of the Covenant) (8 December 1999) UN Doc E/C.12/1999/10.
CESCR, General Comment No 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (11 August 2000) UN Doc E/C.12/2000/4.
CESCR, General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights) (6 February 2006) UN Doc E/C.12/GC/18.
CESCR, General Comment No 19: The right to social security (art. 9) (4 February 2008) UN Doc E/C.12/GC/19.
CESCR, General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (21 December 2009) UN Doc E/C.12/GC/21.
CESCR, General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990) UN Doc E/1991/23.
CESCR, Statement: An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant, (10 May 2007) UN Doc E/C.12/2007/1.
CESCR, Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis (16 May 2012) UN Doc CESCR/48th/SP/MAB/SW.
Constitutional Law Committee of Finland, PeVL 12/1982 vp.
Constitutional Law Committee of Finland, PeVL 14/2007 vp.
Constitutional Law Committee of Finland, PeVL 16/1996 vp.
Constitutional Law Committee of Finland, PeVL 2/1990 vp.
Constitutional Law Committee of Finland, PeVL 25/2001 vp.
Constitutional Law Committee of Finland, PeVL 25/2012 vp.
Constitutional Law Committee of Finland, PeVL 309/1993 vp.
Constitutional Law Committee of Finland, PeVL 35/2012 vp.
Constitutional Law Committee of Finland, PeVL 67/2014 vp.
Constitutional Law Committee of Finland, PeVL 75/2014 vp.
Constitutional Law Committee of Finland, PeVM 10/1998 vp.
Constitutional Law Committee of Finland, PeVM 25/1994 vp.
European Committee of Social Rights, General introduction to Conclusions XIX-2 (2009).
Finnish Government Proposal HE 1/1998 vp, Hallituksen esitys Eduskunnalle uudeksi Suomen Hallitusmuodoksi.
Finnish Government Proposal HE 309/1993 vp, Hallituksen esitys Eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta.
Finnish Government Proposal HE 324/2014 vp, Hallituksen esitys eduskunnalle laiksi sosiaali- ja terveydenhuollon järjestämisestä ja eräiksi siihen liittyviksi laeiksi.
ILC, Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10.

International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (adopted 26 January 1997).
International Commission of Jurists, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, (adopted 28 September 2011).
Office of the United Nations High Commissioner for Human Rights, Human Rights Indicators: A Guide to Measurement and Implementation (2012).
UN Doc A/Res/32/130.
The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN Doc E/CN.4/1987/17).

Table of treaties

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted 9 November 1995, entered into force 1 July 1998) CETS 158.
Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (entered into force 3 September 1953) ETS 5.
European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) CETS 163.
European Social Charter of 1961 (adopted 18 October 1961, entered into force 26 February 1965) CETS 035.
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
Optional Protocol to the International Covenant on Economic, Social and Cultural rights (adopted 10 December 2008, entered into force 5 May 2013).
Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

LIST OF ABBREVIATIONS

1961 Charter	European Social Charter of 1961
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention of Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	Revised European Social Charter of 1996
ETS	European Treaty Series
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
UN	United Nations
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

TABLE OF CASES

Artico v Italy (1981) 3 EHRR 1

Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), (Advisory Opinion) (1948) ICJ Rep 57

Constitutional Court of Germany, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (9 February 2010)

Constitutional Court of Latvia, (21 December 2009) Case No 2009-43-01

Constitutional Court of Portugal, (5 April 2013) Judgment No 187/2013, English summary. – Http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html (26.5.2016).

Constitutional Court of Portugal, (5 July 2012) Judgment No 353/2012, English summary. –Http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html (26.5.2016).

Council Decision (EU) 2010/182/EU of 16 February 2010 giving notice for Greece to take measures for the deficit reduction judged to be necessary in order to remedy the situation of excessive deficit (2010) OJ L83/13

Federation of employed pensioners of Greece (IKA-ETAM) v Greece (7 December 2012) ECSR 76/2012

Finnish Society of Social Rights v Finland (9 September 2014) ECSR 88/2012

General Federation of employees of the national electric power corporation

(GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece (23 May 2012) ECSR 65/2011

Helsinki Administrative Court (4 August 2015) HAO 15/0615/2

Helsinki Administrative Court (9 October 2006) HAO 06/1410/1

Insurance Court of Finland, 6254:2005

Kasikili/Sedudu Island (Botswana v Namibia) [1999] ICJ Rep 1045

Legal Consequences of the Construction of a Wall in the Occupied Palestinian *Territory* (Advisory Opinion) (2004) ICJ Rep 136

Loizidou v Turkey (Preliminary Objections) (1995) 20 EHRR 99

Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece (7 December 2012) ECSR 79/2012

Panhellenic Federation of Public Service Pensioners (POPS) v Greece (7 December 2012) ECSR 77/2012

Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece (7 December 2012) ECSR 80/2012

Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece (7 December 2012) ECSR 78/2012
Separate Concurring Opinion of Luis Jimena Quesada (9 September 2014) ECSR 88/2012
Soering v UK (1989) 11 EHRR 439
STTK ry and Tehy ry v Finland (17 October 2001) ECSR 71/2000
Supreme Administrative Court of Finland, KHO 2005:43
Supreme Administrative Court of Finland, KHO 2007:77
Supreme Administrative Court of Finland, KHO 2008:25
Supreme Court of Finland, KKO 2003:107
Supreme Court of Finland, KKO 2004:26
Supreme Court of Finland, KKO 2004:62
Supreme Court of Finland, KKO 2006:71
Supreme Court of Finland, KKO 2008:83
Supreme Court of Finland, KKO 2014:14
Supreme Court of Finland, KKO 2015:14
Territorial Dispute (Libyan Arab Jamahirya v Chad) (1994) ICJ Rep 6

Laura Kirvesniemi

HEIKENNYSKIELTO SUOMALAISESSA PERUSTUSLAKIKONTROLLISSA

Artikkeli käsittelee sosiaalisten oikeuksien heikennyskieltoa ja heikennyskiellon käyttäytymistä suomalaisessa perustuslakikontrollissa. Artikkelin tutkimuskysymys on kaksiosainen: Ensinnäkin tarkoituksena on määritellä heikennyskielto, sen alkuperä ja sen keskeiset elementit. Tähän tarkoitukseen artikkelissa hyödynnetään paitsi YK:n taloudellisia, sosiaalisia ja sivistyksellisiä oikeuksia koskevan kansainvälisen yleissopimuksen 2(1) artiklan ja Euroopan sosiaalisen peruskirjan 12(3) artiklan sanamuotoja, myös kansainvälisten valvontaelinten kyseisille artikloille antamia tulkintoja. Lisäksi heikennyskiellon määrittelyssä hyödynnetään aiempaa aihetta käsittelevää oikeuskirjallisuutta sekä eurooppalaisten valtiosääntötuomioistuinten ratkaisuja nykyisen talouskriisin ajalta.

Artikkelissa arvioidaan myös heikennyskiellon normiluonnetta periaatteisiin ja sääntöihin perustuvan jaottelun valossa. Toisena tutkimuskysymyksenä artikkelissa arvioidaan, miten heikennyskielto voidaan huomioida ja miten se tulisi huomioida suomalaisessa perustuslakikontrollissa, erityisesti perus- ja ihmisoikeusvaikutusarvioinnissa.

Vaikka heikennyskielto ei olekaan absoluuttinen kielto olla heikentämättä valtiossa saavutettua sosiaalisten oikeuksien tasoa, edellyttää se tiettyjen ehtojen täyttymistä ennen mahdollisia heikentäviä lakimuutoksia tai muita toimenpiteitä. Nämä heikennyskiellon valtioille asettamat ehdot ovat vaatimus heikennyksen määräaikaisuudesta, vaatimus heikennyksen välttämättömyydestä ja oikeasuhtaisuudesta, vaatimus heikennyksen kohteena olevan oikeuden ydinalueen säilyttämisestä sekä velvollisuus turvata jo valmiiksi haavoittuvassa asemassa olevien ryhmien oikeudet. Velvollisuus arvioida mahdollisesti heikentävän toimenpiteen vaikutuksia etukäteen sekä selvittää mahdollisia oikeuksien tasoa vähemmän heikentäviä vaihtoehtoja on kansainvälisen tulkintakäytännön perusteella heikennyskieltoon automaattisesti sisältyvä vaatimus.

Lisäksi koska perustuslainmukaisuuden arviointi Suomessa perustuu vahvasti ennakkovalvonnalle lain säätämisvaiheessa, kuuluu vastuu heikennyskiellon asianmukaisesta huomioimisesta eduskunnalle ja erityisesti sen perustuslakivaliokunnalle. Tuomioistuimilla on tietyissä, varsin rajallisissa tilanteissa mahdollisuus huomioida heikennyskielto päätöksenteossaan. Tällä hetkellä valtiosääntöoikeudellisesti ongelmallisimmalta vaikuttaa heikennyskiellosta johtuvien velvoitteiden valossa se, ettei talousarviopäätöksenteon yhteydessä systemaattisesti huomioida perus- ja ihmisoikeusvaikutuksia, erityisesti heikennyskieltoa, vaikka mahdollisuudet vakut-

taa sosiaalisten oikeuksien tasoon Suomessa ovat tosiasiallisesti talousarviota laadittaessa varsin suuret.