The Right to Social Security and Implications for Law, Policy and Practice

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1. Introduction: Added value?

Literature emanating from the 'social security sector' reveals an increasing tendency to deploy the right to social security not only as a rhetorical flourish, as was common with social rights before the 1990s, but as a legal entitlement grounded in international law. For example Wouter van Ginnekin of the ILO concludes:

> This situation of low coverage reflects a failure by governments by countries and the international community to meet their obligations under Article 9 of the International Covenant on Economic, Social and Cultural Rights [ICESCR] which 'recognizes the right of everyone to social security, including social insurance.'[1]

Others have gone further. At the general discussion on social security at the International Labour Conference in 2001, worker's representatives highlighted the individualised nature of the right to social security, which meant that pension systems that linked women's entitlements to discriminatory labour markets or a spouse's entitlement should be re-examined to ensure conformity with the principle of non-discrimination, inherent in the right to social security.[2] An NGO participant asserted that individual savings accounts for social security should not be used since 'the great majority of low-paid workers in precarious employment' would be excluded, a result inconsistent with the right to social security in ICESCR and ILO conventions which the speaker said should be 'universal, comprehensive and based on the principle of solidarity'.

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1 Wouter van Ginneken, *Extending social security coverage: Policies for Developing Countries*, (ESS-Paper No.13, 2003), at 2.

2 International Labour Office, *Social Security: A New Consensus* (International Labour Office, 2001) at 19.

But questions remain as to whether the right to social security offers more than a principled and legal justification for supporting the current, and very comprehensive, ILO framework on social security. If the right to social security has a more sophisticated content, representing what we might call a quiver of arrows, then what are the consequences for law, policy and practice?

What is immediately noticeable is that the potential content of the right, as contained in the ICESCR and the conventions on race, women and children, speaks directly to the difficult issues faced by the ILO in applying the current framework:[3] These challenges include:

- The need for protection of those persons excluded from coverage of social security systems, particularly in the informal sector and rural areas.
- The greater calls for market-based solutions and reductions of non-employee contributions. Both ideas have spurred greater marketisation of social security systems, particularly in Latin America and Eastern Europe, as well as the reduction of government and employer expenditures on social security. Proponents have argued that such policies will increase economic efficiency, spur economic growth through the release of public finances and increase incentives.
- Ensuring non-discriminatory outcomes for women, migrants and people with disabilities. The employment-based nature of the ILO framework is perhaps partly the problem, but the causes of unequal outcomes run much deeper.
- The need to address the rise of voluntarism and self-regulation in the labour and social sectors. Some authors have recently argued that this is partly attributable to the soft law 1998 ILO Declaration on Fundamental Principles and Rights at Work.[4]
- The general lack of effective national and international systems of accountability for both individual and collective violations of international social security rights.

Whether the right to social security can provide comprehensive or non-controversial answers to these issues though is another matter. Nevertheless, we can point briefly to some potential benefits of a 'right to social security approach'.

The first is the *universal nature* of the right to social security, which potentially avoids the bias towards formal employment in the ILO framework, particularly as manifested in the earlier standards. Such an approach is likely to benefit those working in the informal sector, long-term unemployed, as well as women, children, migrants and asylum seekers, persistently excluded minorities and those suf-

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[3] See, for example, International Labour Office, Social Security: A New Consensus, *ibid*. and Emmanuel Reynaud, *The extension of social security coverage: The approach of the International Labour Office*, (ESS-Paper No. 3, 2002).

[4] See: Philip Alston and James Heenan, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work', 36 (2004) *New York University Journal of International Law and Politics,* 221-264.

fering from permanent disabilities. This extension of the definition also enables NGOs and other associations working with these groups to more easily join the trade union movement - suffering a declining base in the face of globalisation and expanding services sector - in defending social security rights. Amartya Sen, while strongly endorsing this aspect of a human rights based approach to work, notes however the danger of neglecting 'the hard-earned gains of people in organized industry, through an attempt – often recommended (if only implicitly) – to level them down to the predicament of unorganized and unprotected workers'.[5]

The second benefit is the greater *ratification* of human rights instruments addressing social security in comparison to ILO Conventions. For example, as at 8 May 2006, 153 States had ratified the International Covenant on Economic, Social and Cultural Rights and 192 had ratified the Convention on the Rights of the Child, both of which provide explicit provisions on social security. At the same time, the principal ILO Convention on social security – No. 102 – has received 42 ratifications despite it being adopted in 1952. The figures for other ILO social security conventions are lower with the exception being the more specialised Workmen's Compensation (Agriculture) Convention, 1921 (No. 12) Equality of Treatment (Accident Compensation) Convention with 75 and 120 ratifications respectively. Although it must be said that many countries have followed the ILO approach even though they have not ratified the standard.

The pervasiveness of ratification of human rights treaties also means that there can be a more comprehensive response to the negative impacts of globalisation on social security: States are able, or should be compelled, to refer to their international obligations when faced with unreasonable demands for structural adjustment, cuts in social security spending etc. Furthermore, many countries have incorporated the right to social security or the above human rights treaties in their national constitutions, which means the potential for national application of the right. A greater emphasis on the content on the right would help guide court decisions and policymaking. However, while national courts and other adjudicatory and political bodies will have the opportunity to monitor the right, it is difficult to conclude that the international enforcement mechanisms for the human rights treaties can rival the ILO system, both in terms of focus upon the respective contributions and the high-level participation of employee and employer groups, which increases the likelihood of implementation.

A third benefit is the focus upon *participation* and *accountability* that are inherent in the right to social security. The practice of the Committee on Economic, Social and Cultural Rights makes clear that participation rights and the provision of remedies – both individual and collective - are a key and indispensable part of the mechanisms for the realisation of economic, social and cultural rights.[6] Indeed,

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5 Amartya Sen, 'Work and Rights' 139 (2000) 2 *International Labour Review* 119-128 at 120.

6 In the case of remedies for violations, the Committee has indicated to States it will require them to justify their absence in the domestic legal system. See: Committee on Economic, Social and Cultural Rights, *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998).

the emphasis on participation and accountability goes to the heart of the human rights approach. Decision-makers must not only listen to the views of the beneficiaries of human rights, but they must account for the reasonableness of their decisions in a public and transparent manner, which can be achieved through some form of independent review. As Amartya Sen notes, 'unscrutinized feelings' and 'very rudimentary reasoning' are not the foundations for the crafting of social security policy.[7]

2. Content of the Right

It is certainly possible to tease out a detailed interpretation of the right to social security in light of the previous General Comments of the UN Committee on Economic, Social and Cultural Rights ('Committee') and the emerging human rights jurisprudence on social security from national and regional courts around the world. There is of course a genuine question as to whether such an interpretation should be the only legitimate version. Whose 'voices' does the Committee capture in its interpretive process, particularly since General Comments are developed without reference to a particular case or violation, as is normal in the common law world. In response, it can be said that the Committee has express authority from States to develop General Comments in order to give them guidance on their substantive obligations under the ICESCR[8] - the former UN Human Rights Commission also annually adopted a resolution encouraging the Committee to draft further general comments[9] - , and the Committee does draw to a certain extent on its extensive experience in monitoring the performance of States parties to the ICESCR. Another more potent critique is the length and occasionally ambitious and repetitious nature of some recent General Comments, a result of the template adopted by the Committee in the late 1990s' and the adoption of new but overlapping catego-

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7 Amartya Sen, *supra* note 5, at 121.

8 The United Nations Economic and Social Council encouraged the Committee to 'continue using that mechanism to develop a fuller appreciation of the obligations of State Parties under the Covenant.' Economic and Social Council Resolution 1990/45, para. 10.

9 See: Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights and study of special problems which the developing countries face in their efforts to achieve these human rights, Commission on Human Rights, resolution 2003/18, para. 11(a)(ii). Alston and Heenan also make a pertinent point about the value of expert development of human rights standards at the international level: 'creating 'Habermasian' dialogues that lead to 'shared convictions' and common standards is not always possible at the international level, nor perhaps even desirable if the result is an unwieldy heterogeneity or the emasculation of the content of human rights through the over-representation of non-democratic polities.' See: Philip Alston and James Heenan, *supra* note 4, at 251.

ries, particularly the extension of the idea of the minimum core obligations.[10] But even this approach can be partially defended.[11]

With this jurisprudence in mind, we might posit a number of key elements of the right that should apply to everyone. These aspects are often 'existential' in nature, representing the key concerns of individuals. A number of authors have attempted to define these key elements for the right to social security.[12] The 'claim' or 'normative' aspects of the rights are usually then covered under the 'State obligations' due to bifurcation of rights and obligations in the ICESCR. While the binary approach enables the more precise identification of State responsibility, Amartya Sen correctly points out that the sometimes over-obsessing by lawyers with such dualistic approaches can detract attention from the general force of the idea of human rights: 'The recognition of such claims as rights may not only be an ethically important statement, it can also help to focus attention on these matters, making their fulfilment that much more likely – or quicker.'[13] A marriage of the two approaches would certainly be possible by conceptualising obligations as equivalent to rights, combined with a defence for state incapacity.[14] But for present purposes the Committee's current approach will be followed.

The key element of the right would invariably include at a minimum:

1. *Adequate* benefits that ensure the rights to family protection, an adequate standard of living and right to health, as respectively contained in Articles 10, 11 and 12 of the ICESCR. A key question is the extent to which the level of benefits should be informed by the respective ILO Conventions. On one hand, the relativist approach of the ILO bodes well for the ICESCR since the minimum is often defined in relation to average wage levels in the national economy. For example, in ILO Convention 102, unemployment and sickness benefits must be 45 per cent (or 50 per cent in a later convention) of the wage of a

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10 See: Malcolm Langford, 'Ambition that overleaps itself? A Response to Stephen Tully's 'Critique' of the General Comment on the Right to Water', 26 (2006) 3 *Netherlands Quarterly of Human Rights,* and Matthew Craven, 'Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights', in John Squires, Malcolm Langford and Bret Thiele (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre, Distributed by UNSW Press, 2005), 27 – 42.

11 See: Malcolm Langford, Ambition that overleaps itself?, *ibid.*

12 See: Lucie Lamarche, 'The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights', in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002), 87-114 and Malcolm Langford, Aoife Nolan and Bret Thiele, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier (Revised)* (Centre on Housing Rights and Evictions, 2006). See also discussion of the South African context by Sandra Liebenberg, 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' 17 (2002) 2 *South African Journal on Human Rights*, 232.

13 Amartya Sen, *supra* note 5, at 124.

14 See: Malcolm Langford and Bret Thiele, 'Introduction' in Road to a Remedy, *supra* note 10.

skilled manual male employee plus any family benefits available to such workers. It is debatable though whether the percentages applied by the ILO Convention represent the 'minimum essential level' or a higher level of adequacy. Chantal Euzéby argues, for example, that flat-rate pensions in Europe should correspond to 50 to 60 per cent of the median income or poverty line. This corresponds to the ILO Recommendation 131 of 1967 which provides for 55 per cent of the reference wage and coverage of a minimum standard of living.[15] But the earlier ILO Conventions Nos. 102 and 128 respectively provide for 40 and 45 per cent. It should be noted that this incremental approach of the ILO suggests that ILO Convention 102 of 1952 is closer to the minimum than any level of adequacy necessary for a dignified life, the cornerstone of economic and social rights.

2. *Coverage* of all *risks and contingencies,* particularly those articulated in ILO Convention 102. As is well known, the ILO conventions provide benefits for nine risks: medical care, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits and survivors' benefits. The Committee on Economic, Social and Cultural Rights has dealt explicitly with a number of these categories. In General Comment on people with disabilities it emphasised the importance of social security and income-maintenance schemes and noted that such schemes should 'reflect the special needs for assistance and other expenses often associated with disability' and, as far as possible, such support should also cover carers of people with disabilities.[16] In General Comment No. 6 on Older Persons, the Committee required States parties to guarantee the provision of survivors' and orphans' benefits on the death of the breadwinner who was covered by social security or receiving a pension, and noted further that Article 9 of ICESCR implicitly recognises the right to old-age benefits and that States parties should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who are not entitled to an old-age pension or social security benefit or assistance under a contributory scheme and have no other source of income.[17] However, other risks associated with inability to realise economic, social and cultural rights must also need to be included,[18] for example risks from natural disasters and emergencies.
3. *Affordable* contributions, if a social insurance scheme is used. Contributors should be informed in advance of the extent of their liabilities. Affordability

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15 Chantal Euzéby, 'Rethinking social security in the European Union' 57 (2004) 1 *International Social Security Review*, 85-103.

16 Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with disabilities*, (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), para. 28.

17 Committee on Economic, Social and Cultural Rights, *General comment No. 6, The economic, social and cultural rights of older persons*, (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996).

18 See: Martin Scheinin, 'The Right to Social Security', in Asbjørn Eide, Catarina Krause, Allan Rosas (eds.) *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, 2001) 211-221, at 215.

should be defined, as in previous jurisprudence of the Committee, with respect to an individual's or family's budget for covering economic, social and cultural rights. Bettie goes further, and argues that many define affordability in relation to the future benefits they expect to derive from the scheme and concludes, perhaps provocatively, that contribution-based schemes may be viewed as more affordable than tax-based schemes.[19]

4. *Non-discrimination* in the guaranteeing of the rights. This requires that the social security system should not only provide objectively unjustifiable differential arrangements directly or indirectly based on prohibited grounds – such as race, sex, marital status, disability, age – but that there is a positive obligation to eradicate such differences over time.

Lucie Lamarche, however, adds two more elements, which will later take us to the heart of the discussion in this paper. The first is that *all persons* are covered and while this is intrinsic in the right and all the elements expressed above, the real question is the extent to which the Government covers all persons immediately and progressively. Secondly, and more importantly, she argues that social security must be defined as a collective arrangement in accordance with the ILO definitions.[20] While this accords with sectoral understandings, the tripartite approach of the Committee to State obligations means that the right may have a wider definition, encompassing self-help forms of social protection. This will be taken up in section 3.1 below. It also potentially clashes with the Committee's previous non-committal approach to the involvement of the market although they do require the states to engage in a variety of ways with the market: see section 3.3 below. But Lamarche includes private arrangements within the ambit of collective arrangements, so long as certain minimum requirements are met, notably those articulated in ILO Convention 102.[21]

The second leg of the Committee's approach is State obligations. In addition to the duty to guarantee the right without discrimination,[22] States parties to the Covenant must take steps, including through international assistance and cooperation, to progressively achieve the realisation of the rights with the maximum available

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19 Roger Beattie, 'Social Protection for all: But how?' 139 (2000) 2 *International Labour Review,* 129 at 137.

20 She states: '[S]ocial security, as a human right and not a commodity, relies on collective funding. This can be of different types: public, professional community, private (if risks are assessed on the basis of a determined group and benefits paid to this group) or even mixed. In all cases, it is a basic and minimal requirement of the right that it be supervised by an independent, participatory and regulated body.' Lamarche, *supra* note 12, at 103.

21 Articles 71 and 72. In particular, contributions must be affordable, the public authority must regulate the system, beneficiaries must be able to participate in the system and have the right to appeal decisions negatively affecting them. See: Lamarche, *ibid*, at 94.

22 Article 2(2) of ICESCR states: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

resources.[23] This duty has been broken down below, somewhat awkwardly at times, into a set of duties. It has been done in summarised format since many of the issues will be picked up in the analysis of implications.[24]

Domestic Obligations

1. *Respect* existing arrangements for right to social security – private and public - and permit individuals to self-organise, or provide adequate alternatives as a result of any interference.
2. *Protect* from interference by private actors the existing arrangements for social security and permit individuals to self-organise, or ensure provision of adequate alternatives as a result of any interference.
3. *Fulfil* the right which means:
   a) Reviewing legislation and policy to ensure consistency with right to social security.
   b) Adopting and implementing appropriate measures, including legislation, to ensure provision of social security with effective participation of potential and current beneficiaries.
   c) Ensuring progressive realisation of the right to social security over time as resources permit.
   d) Ensuring a minimum essential level of social security immediately.
   e) Avoiding unjustifiable deliberate retrogressive measures that cannot be justified.
   f) Monitor the realisation of the right and provide remedies for violations.

With respect to the first two, and possibly three, aspects of the obligation to fulfil, the Committee would obviously be influenced by the 'menu' system for the different pillars of social security (e.g. unemployment benefits, old age benefits etc) and incremental coverage under the ILO system. But the ILO approach may represent more of a guide rather than an exclusive definition of appropriate measures, particularly in light of uneven ratification and selection by states of different risk pillars.

International obligations

The international obligations of States relate to persons outside their jurisdiction:

1. *Respect* existing the right to social security of such persons.

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[23] Article 2(1) states: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[24] Note that I have ignored the so-called 'minimum core obligations' category since it largely repeats the immediate obligations.

2. *Protect* the right to social security of such persons from interference by private actors based in the State or international organisations of which the State is a member. For example, ensuring that policies of international financial institutions do not negatively impact on the right to social security.
3. *Fulfil* the right to social security of such person's through international aid and cooperation.

3. Potential Implications

The paper now turns to analyse the implications of the right to social security for a number of crucially important issues. These include the coverage of the excluded, the elimination of discrimination and the challenge of 'market' approaches.

3.1 Covering the Excluded

> Generally, the extension of social protection to uncovered populations raises a fundamental question: should one try to extend the existing coverage – which benefits only a minority – to all the population, or create specific mechanisms that provide a lower level of protection for the uncovered population?[25]

One of the key challenges for the achievement of the right to social security is the slow, stagnant or even declining coverage of both persons and risks in developing countries, and even some transition countries.[26] While the European experience clearly indicates that the development of fully-functioning and comprehensive systems of social insurance and assistance can take a significant period,[27] the situation in many regions is alarming: 5-10 per cent are covered in sub-Saharan Africa and South Asia (in most cases only pension schemes), 10 to 80 per cent are covered in Latin America, in South East Asia and East Asia coverage is between 10 and 100 per cent, while in European transition countries the figures are 50 to 80 per cent.[28]

The ILO has evaluated whether the current system of incrementally extending formal coverage through financially sound and well-organised schemes – as required by ILO Convention 102 and others – should be the sole method for reaching the excluded, particularly those working and living in the informal sector and rural areas. Emmanual Reynaud of the ILO concedes that in poor, as opposed to

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25 Emmanuel Reynaud, *supra* note 3.

26 Wouter van Ginneken, *supra* note 1.

27 See: Peter Koehler, Hans Zacher in collaboration with Martin Partington, The Evolution of Social Insurance 1881-1981: Studies of Germany, France, Great Britain, Austria and Switzerland (Frances Pinter, 1982).

28 See: Emmanuel Reynaud, *supra* note 3, at 1. See also: An Maes, 'Informal economic and social security in sub-Saharan Africa' 56 (2003) 3-4 *International Social Security Review,* 39-58.

transition, countries, alternative approaches will be critical since the State's capacity is limited.[29] But the ILO emphasis is upon drawing the informal sector into the formal sector, and it perhaps has in mind the 19th Century German experience where fragmented public, private and informal arrangements gradually evolved into a system characterised by almost comprehensive coverage of all risks and persons, the collective sharing of risks and a strong role for the State.[30] Otherwise, dual systems of protection may result. Other major international actors, such as the World Bank, are however, more accepting of differentiated results and systems – particularly if the private sector has a significant role - although they also express concern at the current levels of coverage.

Before considering such alternatives, it is important to analyse the legal requirements of the right to social security. On one hand, it is clear that ICESCR calls for the progressive realisation of the right to social security and therefore the incremental expansion of a formal 'system' – the nature of such a system will be considered below – at a pace consistent with a country's capabilities. On the other hand, the Committee's jurisprudence indicates that certain measures will be needed in at least the short to medium term.

Protection of assets etc

First, the *obligation to respect* represents the more classically liberal notions of human rights since it calls for State abstention from injurious acts that may impinge upon an individual's self-organised access to social security.[31] Similarly, the obligation to protect requires measures to prevent other actors interfering with self-organised protection. Such measures ordinarily include regulation and a system of accountability, including remedies. These protections extend both to the financial resource itself as well as the systems and associations connected with its realisation.

The ILO acknowledges that there have been calls to widen the definition of social security to include the wider sense of social protection, for example protection of assets, resources and livelihoods intrinsically connected with social security. The traditional definition reads as follows:

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29 Emmanuel Reynaud, *supra* note 3, at 3.

30 Reynaud, *ibid*, states at 4: 'The extension of social protection calls for a dynamic approach. The process involved is long, and the ultimate aim is to build a generalized national social security system in order to guarantee to all a secure income and access to health care at a level corresponding to the economic capacity and political will of the country. Moreover, it is essential from the outset to provide for linkages and bridges between the arrangements designed for uncovered categories and other social protection mechanisms.' For the German experience see: Detlev Zoellner, 'Germany', in Peter Koehler, Hans Zacher and Martin Partington, *supra* note 27, 1-92.

31 It is to be noted that the obligation to respect could also apply to retrogressive measures that reduce publicly funded or organised social security. However, this aspect of the 'respect obligation' is still unclear in the literature on economic, social and cultural rights and will be dealt with under the obligation of 'non retrogression' in section 3.3 below.

> [T]he protection which society provides for its members through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, invalidity and death; the provision of medical care; and the provision of subsidies for families with children.[32]

Of course, it can be argued that such resources would be protected under many other economic and social rights and that the right to social security should remain confined to systemic or 'public' measures. Nevertheless, assets, resources and livelihoods of the poor are commonly destroyed in forced evictions, particularly in informal settlements in rural areas and peasants and fisher-folk that live with precarious security of tenure. Likewise, it is important for semi-formal networks and associations – for example savings and insurance schemes – to be protected from malevolent State interference. This is certainly not a new phenomenon. Before Bismarck's reforms in the late 1880s, one of the only two demands the German Socialist Labour Party made with respect to social security in 1875 was 'complete self-administration for all worker relief and benevolent funds'.[33]

The argument carries strong resonance in developing countries but is not without its contradictions and there is a need to ensure that the *method* of protecting the rights does not compromise the rights of other vulnerable and marginalised groups. For example, slum-upgrading schemes are increasingly, and appropriately targeting tenants but elderly 'slum landlords', particularly women, should be taken into consideration since rental income effectively constitutes their 'pension'.[34] Similarly, in rural areas women and poorer families are often discriminated against in traditional systems. While many commentators have increasingly focused on the positive effects of traditional systems,[35] the discriminatory aspects of family and community based systems are sometimes overlooked, for example 'fewer and weaker' general resource rights for women and exclusion of women and children from inheritance laws.[36] In conjunction with the focus on micro-insurance, in which women often predominate and therefore undertake the greatest

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32 ILO, *Introduction to Social Security*, (ILO, 1984, 3rd edition), at 2-3.

33 Quote from the Gotha Programme in Detlev Zoellner, *supra* note 30, at 12. However, it is difficult draw generalisations from the German experience. Bismarck's social security reforms can be largely understood as a way to justify restrictions on the labour movement and remove worker support for the political arms of the labour movement.

34 See: COHRE, *Listening to the Poor: Housing Rights in Nairobi, Kenya* (COHRE, 2005) at chapter 5. Available at www.cohre.org/kenya.

35 For a review see: Johannes Jutting, 'Social security systems in low-income countries: Concepts, Constraints and the need for cooperation' 53 (2000) 4 *International Social Security Review*, 3-24.

36 See: Deborah Kasente, 'Gender and social security reform in Africa' 53 (2000) 3 *International Social Security Review,* 27-41 and COHRE, *Women's Inheritance Rights in Africa* (COHRE, 2004).

risks, some authors have called for positive measures to restrain male behaviour and norms that adversely affect access to social security.[37]

Minimum essential level

The second relevant aspect of the Committee's jurisprudence is the obligation to provide the minimum essential level of each rights:

> [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[38]

However, even these obligations are tempered by the availability of resources but the State party to ICESCR must demonstrate that there is sufficient evidence that this is indeed the case.[39]

As can be seen in the list of minimums enumerated, only 'existential' entitlements are included but it is relatively straightforward to recognise some form of minimum entitlement to basic protection against risks, particularly those which may impinge upon other economic, social and cultural rights. While the minimum under the European Social Charter has been defined as those obligations existing under the relevant ILO Conventions or, more lately, the European Code of Social

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[37] A critique on the South African Governments White Paper on Social Welfare stated: 'Compared to the relative space that is devoted to women and other special groups it is in fact rather astonishing how little is said about men as a social group…. Despite mentioning family violence against women and children, a problem that is highly prevalent in South Africa, the report does not discuss how this might be caused by specific conceptions of male behaviour. There is no thorough discussion of male negligence and neglect (refusal to pay child support for example) and the abandonment of wives and children.' See: Selma Sevenhuijsen, Vivienne Bozalek, Amanda Gouws and Marie Minaar-McDonald, 'South African social Welfare Policy: An analysis through the Ethic of Care', Paper, University of Utrecht, The Netherlands, 2003 at 16 quoted in Rune Ervik, *Global Normative Standards and National Solutions for Pension Provision: The World Bank, ILO, Norway and South Africa in Comparative Perspective,* Working Paper 8-2003, Stein Rokkan Centre for Social Studies, April 2003.

[38] Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para. 10.

[39] The Committee states: 'By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.' General Comment No. 3, *ibid*, para. 10.

Security, it is likely that the ICESCR requires that States go beyond their incremental obligations under ILO conventions and address the excluded with some alternative measures in the short-term. The Committee frequently encourages States to consider low-cost and small-scale alternatives as a way to extending the reach of economic and social rights.[40]

But what can a State be expected to do for those who are not yet covered for all or any risks? For example, workers who have access to a pension scheme, but not unemployment, health or maternal assistance or insurance, or those in the informal sector with no coverage. The difficulty of identifying clearly a minimum was one of the key reasons the South African Constitutional Court did not endorse the concept as part of its interpretation of constitutional socio-economic rights. But in the absence of any safety net, there is a likelihood that all economic, social and cultural rights will be at risk in the event of unemployment, injury or the birth of a child. Should the Committee accept the principle of 'all for some' but not 'some for all' as a recognition of the State's limited capacities, or is there a minimum obligation to provide some form of assistance for all?

There are of course some examples in developing countries, for example the grain ration system in India[41] although the challenges of administering such a scheme are demonstrated by the recent hunger-related suicides of two women in rural areas.[42] At the same time, advocates have secured a series of Supreme Court judgments for the improved implementation of the scheme.[43] In slightly wealthier countries, for example South Africa, cash payments have been made to all older persons, which has had a significant impact on rural economies and poverty. Others advocate for the adoption of a basic income[44] in developing countries, although the administrative costs in some countries may make such a scheme unfeasible.

An alternative approach is to focus on the risks identified by the population itself. While pensions have traditionally been the first scheme developed, a number of countries have responded to the demand of workers for more immediate and culturally relevant needs, in particularly health expenses but also funeral expenses. In Namibia, a scheme for sickness, maternity and death expenses was introduced in 1995 and now covers 80 per cent of the formal sector.[45]

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40 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003).

41 See interview with Colin Gonsalves in Malcolm Langford, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (COHRE, 2003), chapter 3.

42 Letter from Asian Human Rights Commission to UNICEF, dated 15 March 2005 (on file with author).

43 *People's Union for Civil Liberties v Union of India*, No. 196 of 2001, Interim Order of 2 May 2003.

44 See, for example, Rick van der Ploeg, *Pros and Cons of Basic Income*, presented at 'Basic income versus subsidized employment' of the 6th B.I.E.N. International Congress 1996, United Nations Office at Vienna, 12-14 September 1996.

45 Emmanuel Reynaud, *supra* note 3, at 5.

Secondly, what steps can be undertaken to reach the informal sector, who are unlikely to benefit from collective schemes for a significant period? One approach that has growing support – although it is certainly not new in historical terms - is micro-insurance[46] or what Jutting refers to as member-organisation-based organisations. Jutting defines such organisations as follows:

> We are thinking here of civic organisations in the form of various sorts of self-help groups organized to improve social security at the community level. Major activities could encompass the provision of health insurance, access to credit and saving, or giving people a voice to formulate their needs and interests. [47]

In the case of health micro-insurance, Reynaud argues that State should assist such schemes through design kits for schemes, control and regulatory mechanisms, decentralising public health services to enable engagement with such schemes, training and co-financing. The State should then seek to replicate the schemes nationwide. But one obstacle to well-functioning schemes is communal wide risks, which such schemes cannot cope with. For example, risks include crop failure, natural disaster or large-scale evictions or home/business demolitions, all common in developing countries. In some cases, the State is directly responsible for the destruction of the scheme: i.e., cases of forced eviction of small businesses, homes and community facilities.

But there are other voices of scepticism. Workers' Representatives at the ILO stated that 'while micro-insurance schemes might contribute to extending coverage in a limited way, they were unlikely to provide a solution for large numbers of people' and supported further research on the question to the extent that 'it showed potential for expansion and that such schemes could be integrated with national security schemes'.[48] Jutting also notes the tendency for schemes to be captured by the wealthier poor.[49]

3.2 Equal Treatment and Non-Discrimination

The equality implications of the right to social security are significant, and perhaps remain only partially explored. The 'negative' aspects of the right to non-discrimination have received much attention with respect to gender and race,[50] but the common exclusion or unequal treatment of other groups, for example migrants and asylum seekers, may raise significant issues. On the other hand, the 'positive' obligations arising from the right to social security may have important implications for women and people with disabilities since they address unequal outcomes. This is sometimes ignored in the literature. Luckhaus' analysis of the right to so-

46 See: Johannes Jutting, *supra* note 35 and Reynaud, *supra* note 3.
47 Johannes Jutting, *supra* note 35, at 7.
48 ILO, *supra* note 2, at 13.
49 Jutting, *supra* note 35.
50 See: Linda Luckhaus, 'Equal Treatment, social protection and income security for women' 139 (2000) 2 *International Labour Review,* 149.

cial security in the EU for example, situates the relevant international legal framework wholly within the 'negative obligations' approach of the European Court of Justice to the EU equality regulations and relegates other important and potentially further-reaching international standards to a footnote.[51]

As will be seen, it is clear from the ICESCR that the right to social security requires both abstention from discrimination as well as a duty to take positive steps. Article 2(2) states:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Direct and indirect discrimination has been criticised by UN human rights treaty committees. The Human Rights Committee declared that unemployment benefit legislation that excluded married women – on the assumption that their husbands would provide for their needs – discriminated on the basis of marital status and sex. [52] In its concluding observations on Canada, the Committee on Economic, Social and Cultural Rights noted that cuts to social security most adversely affected women who constitute the majority of the poor: 'The Committee notes with grave concern that with the repeal of CAP and cuts in social assistance rates, social services and programmes have had a particularly harsh impact on women, in particular single mothers, who are the majority of the poor, the majority of adults receiving social assistance and the majority among the users of social programmes.'[53]

However, while the European Court of Justice have adopted a more formal approach to non-discrimination, allowed for 'equalising down' or 'levelling down' in its application of equality directives,[54] the UN system,[55] including the more con-

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51 *Ibid.,* at 153.

52 '[A]lthough article 26 [right to equality and non-discrimination] requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.' See the following decisions of the UN Human Rights Committee: *Zwaan-de Vries v the Netherlands*, Communication No. 182/1984, (9 April 1987) at para. 12.4.

53 Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada, 10/12/98, E/C.12/1/Add.31, para. 23.

54 For example, in *Taylor v United Kingdom* Case-382/98, 16 December 1999, the European Court of Justice ruled that the lower-age threshold for a winter fuel benefit discriminated against elderly men.

55 In its General Comment No. 15 on Right to Water, the Committee on Economic, Social and Cultural Rights states: The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability,

servative Human Rights Committee,[56] have hued more tightly to the expansive definition of discrimination set out in the Convention on the Elimination of All Forms of Racial Discrimination, which calls for the elimination of discrimination in practice.[57] This approach has been accepted by quite a number of national courts in applying similar provisions. For example, the Canadian Supreme Court declared that 'The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.'[58] In the *Eldridge* case, the Committee found that the protection from discrimination entailed a positive right of the deaf to interpretive services in hospitals, despite the additional costs.[59]

Further, in its first substantive General Comment concerning a group vulnerable to discrimination, the Committee on Economic, Social and Cultural Rights has underlined the influence of the explicitly affirmative character of the Covenant:

> The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably

health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes. See: General Comment No. 15, *supra* note 40, para. 13.

56 The Human Rights Committee has commented: [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.' Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989), para. 10.

57 Article 1(1) states: 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

58 *Eldridge v British Columbia* (Attorney General) [1997] 3 S.C.R., para. 78.

59 *Ibid*.

> means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[60]

While two of the Committee's General Comments have focused on people with disabilities and older persons, the remainder of this section will explore the position of women and migrants. Unequal outcomes for women in the field of social security are overwhelming in their number and scope. First, the rights of women to maternity protections, including maternity leave benefits for a minimum period, are protected in ILO Convention 102 and strengthened in the Maternity Protection Convention 2000 (No. 183), but ratification remains low and maternity protections are very weak in many countries. Even where some protection is provided, Arun and Arun note that women in India fear claiming their benefits since they may lose their jobs.[61] Therefore, States will not only need to ensure that a system of protection develops for maternity benefits – even it means allowing women in developing countries to claim other forms of social assistance (e.g. pensions for a short-term) – but will need to eradicate the other obstacles that women face in accessing the benefits such as actual or perceived employer discrimination.

Secondly, discrimination in the workplace is responsible for perhaps the most intractable element of discrimination in social security, the replication of unequal work outcomes in insurance-based systems, particularly where insurance benefits such as pensions and unemployment benefits are based on a percentage of previous earnings or qualifying periods and hours do not take account of women's intermittent labour market participation, often due to child rearing and domestic duties, and part-time work.[62] Since the gender wage gap is unlikely to disappear in the foreseeable future, even in developed countries,[63] and women will continue to dominate part-time work, reliance on corrections to the labour market are unlikely to solve the problem. Increased child-care is obviously one clear remedy but redressing the structural wage inequalities whereby occupations dominated by women receive lower wages is extremely difficult with the decline of centralised wage fixation and the neo-liberal emphasis on competitiveness in the setting of wages.[64] Therefore, States will need to attempt to redress some of the problems in their social security system, and this will invariably require additional resources. But there are some positive examples. For example, various European countries have taken some steps to address the problem by crediting unpaid caring work (e.g. Finland) or by omitting periods of unpaid work from calculation of benefits (e.g. Switzerland).[65] Italy on the other hand has established a new fund for 'home-

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60 General Comment No. 5, *supra* note 16, para. 9.

61 Shoba Arun and T.G. Arun, 'Gender issues in social security policy of developing countries: Lessons from the Kerala experience' 54 (2000) 4 *International Social Security Review,* 93-110, at 98.

62 See generally: Linda Luckhaus, *supra* note 50.

63 See: Malcolm Langford, 'The Gender Wage Gap in the 1990's' (1995) 34 *Australian Economic Papers,* 62-85.

64 *Ibid*.

65 See: Linda Luckhaus, *supra* note 50, at 168-169.

makers'.[66] In Canada, the earnings and hours thresholds were abolished for unemployment benefits.[67] However, such schemes will require either State budgetary support or increased contributions from employer and employee.

In the area of survivor's pensions, the position of women is actually under significant pressure. Luckhaus notes the increasing trend to dismantle the protections granted to widow's under social insurance and occupational schemes, which linked benefits to the earnings of their deceased spouses.[68] Schemes across Europe have introduced various reforms that decrease the levels of payments of female survivors or make them subject to a means test. While financial viability of the schemes must obviously be taken into account, and perhaps result in less regressive redistribution of incomes, the system increases the income gaps between men and women, potentially contravening Article 3 of ICECR.

A fourth, and perhaps most critical issue is the over-representation of women in all the disadvantaged groups as they relate to social security, for example those relying on minimum or flat pensions, unemployment benefits, survivor's pensions, or who are working in the informal economy of developing countries.[69] Ensuring coverage for the excluded is therefore synonymous with protection of women's rights, and the discussion in the section above becomes immediately relevant. However, there are some fundamental contradictions in policy responses. Pragmatic strategies to increase the level of protection for women mean ensuring that women benefits are more closely linked to their partner's benefits, for example through the practice of pension or pension splitting. However, others decry this approach on principled grounds and argue that the right to social security should reduce dependency, not increase it.[70]

Turning to the issue of migrants and social security, perhaps one the most explosive political issues in developed countries and in even in wealthier countries in less developed regions such as South Africa and Malaysia. Despite this, exclusion of migrants from social insurance and assistance schemes has been a relatively regular topic for international and European supervisory bodies and national courts. (Note that I will concentrate migrants in general and not on specific categories such as asylum seekers. Helen Bolderson covers the social security rights of this latter group in a chapter in this volume).

What is striking is that courts and quasi-judicial bodies principally concerned with civil and political rights – and who have greater enforcement powers, have issued far-reaching decisions, particularly on rights to social assistance, which are the most controversial due to the limited nature of a migrant's contribution to taxation. This is particularly the case for the European Court of Human Rights. In *Gaygusuz v Austria*, the Court characterised social assistance benefits as *property* and therefore a protected right for residents. However, the fact that the worker from Turkey had made contributions to an unemployment benefit scheme seemed

66 *Ibid*. at 169.
67 *Ibid.* at 165.
68 *Ibid*. at 158.
69 For an overview, see: Shoba Arun and T.G. Arun, *supra* note 61.
70 See: Linda Luckhaus, *supra* note 50, at 164.

to be decisive factor in the case.[71] Similarly the ruling by the UN Human Rights Committee that Senegalese ex-soldiers who served with the French army had equal rights to the same level of pension benefits[72] is certainly 'far-reaching' as Scheinin and Krause conclude, but it is not clear whether it applies to all pensions as they suggest.[73] The case is slightly different from normal claims since the soldiers were now living in Senegal but instead claimed French pension rights on the basis of their service. Therefore, the link with *a contribution* is made, which made it easier for the Committee to find that the distinction based on nationality was not based on reasonable and objective criteria. However, a number of national courts have struck down exclusion of migrants from social assistance schemes, for example in Spain.[74] Courts in the United Kingdom have consistently battled with the executive over the denial of social security rights to asylum seekers, even elevating the exclusions to the category and 'cruel and degrading treatment'.[75]

However, economic and social rights most likely provide a higher level of protection, since those excluded can rely directly on the right as opposed to claiming the more complex and stretched application of civil and political rights. The recent *Khosa* decision in South Africa is emblematic of this. The Constitutional Court of South African read the equality and social assistance provisions together and ruled that permanent residents had the right to social security, a significant decision given the large numbers of non-nationals from Africa working in South Africa (see further discussion by Liebenberg in this book).[76] Similarly Swiss courts relied on an implied constitutional right to assistance and extended access to illegal migrants.[77]

The European Committee on Social Rights in applying the European Social Charter has consistently found national practices on exclusion of non-nationals – particularly through residency and qualifying period requirements – to violate the

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71 See: Martin Scheinin and Catarina Krause, 'The meaning of article 1 of the First Protocol for social security rights in the light of the *Gaygusuz* judgement', in Stefaan Van den Bogaert (ed.), *Social Security, Non-discrimination and Property* (Antwerpen-Apeldoorn, 1997), 59-73 and Martin Scheinin and Catarina Krause, 'The Right not to be Discriminated Against: The Case of Social Security', in Theodore S. Orlin et al. (eds.), *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Turku: Åbo Akademi University Institute for Human Rights, 2000), 253-286, at 265.

72 *Gueye et al v France*, Human Rights Committee, Communication No. 196/1983 (3 April 1989).

73 Martin Scheinin and Catarina Krause, *supra* note 71, at 262.

74 Decision of the Constitutional Court of Spain, Case No. 130/1995, (1995) 3 Bulletin on Constitutional Case Law 366, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002).

75 *R ex parte Adam and others v Secretary of State for the Home Department* [2004] EWCA Civ. 540.

76 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC).

77 *V v Einwohnergemeinde X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995).

rights to social security and social assistance.[78] However, there are some key restrictions in the Charter. A party to the Charter is only obliged to ensure the protection of the rights in the Charter to non-nationals of other Contracting Parties who are lawful resident or working regularly in their territory, unless refugee and stateless person conventions cover them.[79] This exception in a multilateral treaty in essence attempts to reflect the reciprocal approach that many States adopt to the social security rights of non-nationals.[80] While restrictiveness is tempered by provisions urging State to apply such regulations for non-nationals in a 'spirit of liberality' and simplify visa requirements, it is clear that the rights of non-nationals from outside Western Europe are quite circumscribed. However, a recent decision by the Committee on the right to health care for illegal immigrants in France indicates that the Charter could be read more expansively.[81]

Yet, the ICESCR contains none of these limitations and there is a key question as to the extent to which States parties to the ICESCR can limit access to social security assistance and insurance schemes to non-nationals, particularly those from countries they have not signed bilateral agreements with or who are working or living illegally in the country. The Committee in its General Comment No. 14 on the Right to Health, to the consternation of some States, has found that illegal migrants are entitled to health care:

> States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.[82]

Therefore, the Committee certainly appears to take a relatively principled stand on the importance of access to social and economic rights for non-nationals, but the key question may be the extent of access to benefits. Health care is often closely linked to right to life and there is a question as to whether assistance for non-nationals will or should be set at the maximal or minimal levels in accordance with the ICESCR.[83]

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78 For a review see: Martin Scheinin and Catarina Krause, *supra* note 71, at 269-277.

79 See appendix to original and revised European Social Charters.

80 See: Simon Roberts, 'Migration and social security: Parochialism in the global village', presented at *The Year 2000 International Research Conference on Social Security*, Helsinki, 25-27 September 2000 at 8.

81 See: *FIDH v France,* Complaint No. 14, European Committee on Social Rights. For a comment on the implications of this decision, see: Malcolm Langford, 'Gathering Steam? A Review of Recent Cases from the European Committee on Social Rights', 2 (2005) 2 *Housing & ESC Rights Law Quarterly*, 4-6.

82 Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 34.

83 See: Malcolm Langford, *supra* note 82.

3.3 Markets and Social Security

The confluence of the beliefs that market provision is more efficient, that smaller governments promote economic growth, that generous social security provisions provide perverse work incentives and that current levels of social security, particularly benefits, cannot be financed in the future have generated significant debate and substantial reforms in social security provision. These beliefs have been strengthened by attitudes in many countries which some have characterised as 'post-emotionalism' and 'downwards envy' whereby solidarity with the poorer segments of society has been replaced with more harsher Victorian notions of deserving and undeserving poor. The reduction in universal entitlements has also helped undermine middle-class, and even working class, support for social security. Two of the key issues are the privatisation of social security through increasing the role of market-based insurance and secondly the pressure to reduce benefit and financing levels.

Privatisation of social security

While the scope and definition of privatisation differs according to the context (and various models are possible), the content of the debate over the push for privatisation is relatively uniform across the relevant sectors.[84] Proponents for an increased role for the private sector point to the failings of the public sector, the inability of the public sector to provide sufficient capital and finance, and, when faced with the development and human rights discourses, argue that the private sector is more able to reach the excluded. Opponents of privatisation point to increased administrative costs of schemes, the vulnerability of beneficiaries to shocks to the economy and exchange rates and the financial disincentives for the market to reach the excluded, which are unlikely to be corrected through regulation due to weak governments, particularly in developing countries. They also claim that the various institutions who denounce the public sector failings are partly responsible for that failure, for example through structural adjustment programs and the refusal to provide public support. One critic called it a policy of 'defund and defame'. While the World Bank has recently stated in various publications that it will look at mixed approaches, its emphasis on resolving the issue at the national level means that it retains significant leverage over the debate since this is where its power is greatest *vis-a-vis* other international organisations such as the ILO, which are more supportive of collective and public-based systems. Further, supporters of social security privatisation point to the politicisation of social security funds while detractors are nervous about the social security capital being placed in the hands of managers over whom they may have little control.

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[84] For an overview of the debate on pension reform see sources listed in: Monika Queisser, 'Pension reform and international organizations: From conflict to convergence' 53 (2000) 2 *International Social Security Review* 2, in particular debates between McGillivray and Beattie with Estelle James and Robert Holzmann.

The Committee on Economic, Social and Cultural Rights has generally refrained from declaring that private sector participation is contrary to ICESCR. From its beginning it has interpreted the Covenant to mean that States have flexibility in choosing their economic system – see particular General Comment No. 3. As former Committee member, Paul Hunt has stated:

> [I]nternational human rights law is interested in the *destination* - the full realisation of all human rights - and is less interested in the *road* by which that destination is reached.[85]

But the Committee is clear on three things. First, the involvement of the private sector must be consistent with *democratic principles*, particularly the right to participation. A constant critique of privatisation processes in social security is the lack of transparency, particularly when international financial institutions are involved. Indeed, Mueller's analysis of social security privatisation in Latin America and Eastern Europe demonstrates that higher levels of civil society and parliamentary participation ordinarily result in more modest reforms.[86] Further, many social insurance schemes were previously characterised by high levels of employee participation, something that the market model does not provide for.

The second requirement is *regulation*. In its General Comment on the Right to Water, the Committee has been clear that the private sector must be independently monitored and penalties are to be imposed for non-compliance. During their process of periodically reviewing the performance of countries, they have often been critical of governmental failure to properly regulate private actors operating in the area of social and economic rights.[87] At the national level, some Courts have been

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[85] Paul Hunt, *The international human rights treaty obligations of State parties in the context of service provision*, Submission to UN Committee on the Rights of the Child, Day of Discussion on The Private Sector as Service Provider and Its Role in Implementing Child Rights, Office of the High Commissioner for Human Rights, Palais Wilson, Geneva, 20 September 2002 at 2. Available at www.crin.org/docs/resources/treaties/ crc.31/Paul_Hunt-Legal-Obligations.pdf.

[86] See: Katharina Müller, *Privatising Old-Age Security: Latin America and Eastern Europe Compared* (Edward Elgar, 2003).

[87] In the case of social security, the Committee pertinently stated in its concluding observations on Chile: 'The Committee is deeply concerned that the private pension system, based on individual contributions, does not guarantee adequate social security for a large segment of the population who do not work in the formal economy or are unable to contribute sufficiently to the system, such as the large group of seasonal and temporary workers. The Committee notes that women are particularly affected in this regard: "housewives" and about 40 per cent of working women do not contribute to the social security scheme and are consequently not entitled to old age benefits. Moreover, the Committee is concerned at the fact that working women are left with a much lower average pensions than men as their retirement age is five year earlier than that of men. The Committee recommends that the State party take effective measures to ensure that all workers are entitled to adequate social security benefits, including special measures to assist those groups who are currently not able to pay into the private social security system, paying special attention to the disadvantaged position of women and the large number of temporary and seasonal workers and workers in the informal economy.' See:

willing to apply the right to social security to this issue: A Latvian law that established an ineffective mechanism for ensuring that employers paid their contributions was struck down by the Constitutional Court of Latvia for its failure to ensure the right to social security of the relevant employees.[88] Many commentators in social security have noted the very poor enforcement mechanisms for regulating social security, particularly in developing countries. This is particularly the case where a defined contributions scheme is used and private social security managers build up large capital assets. The incentives for corruption are no less than in the public sector.

The third stipulation is that the government must ensure that private actors, at the end of the day, take the *necessary steps* to assist in the realisation of the right to social security or accept the responsibility itself to correct market failures. The debate over whether private managers are better or worse at improving access to social security is heated. But three observations can be made. First, the use of defined contribution, and not defined benefit, schemes is almost problematic by definition. While the multi-pillar approach of the World Bank provides for a first tier basic pension, a defined contributions scheme for the second tier potentially undermines the obligation of progressive realisation. First, it is likely to increase unequal outcomes since it will mean greater links between labour markets and social security payments. While many countries have contribution-based insurance schemes, a long-term effort has been made to ensure greater equity. But perhaps more striking is the reliance on pre-funding and no defined benefits, which leaves savings or insurance contributions more vulnerable to inflation and the prospect that benefits will not be paid or will be lower. Of course the obverse is true and benefits may be higher if real interest rates and wages are high but it is difficult to conclude that the system provides *security*. While a pre-funded defined contributions scheme is not automatically inconsistent with the right to social security, it raises significant issues that will need to be dealt with in the design and implementation of the scheme, for example as was done in Sweden. The second major issue is whether private managers will engage in cherry-picking and creaming by excluding poorer workers – where administrative costs may be comparatively too high – or avoiding minimum benefits mandated for such schemes.

Benefits: Reductions and restrictions

Many social security reforms as McGillivray points out in his paper, seek to reduce benefit levels and introduce greater restrictions on eligibility. Since social security is often a major budget item, the pressure to institute retrogressive reforms is significant. While retrogression is not prohibited under the Covenant, it is

Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Chile, U.N. Doc. E/C.12/1/Add.105 (2004), paras. 20 and 43 respectively.

88 See: Case No. 2000-08-0109, Constitutional Court of Latvia, 2001. The right to social security and the International Covenant on Economic, Social and Cultural Rights are respectively enshrined and incorporated in the constitution.

deemed immediately suspicious since it contradicts the duty of progressive achievement. The Committee has therefore stated:

> [A]ny deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[89]

Further, Article 4 of the Covenant states that 'the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.' The European Committee on Social Rights has captured this necessity for objective and rational review of retrogressive measures as follows: 'It recalls that this provision of the Charter leaves the Contracting Party concerned a certain latitude in the choice of occupations to be classed as dangerous or unhealthy. This choice is however still subject to review by the Committee.[90] In the periodic review of one country, the Committee actually sanctioned the reduction of social security benefits after reviewing the justifications.

The importance of providing such a review is undeniable. Amartya Sen has stated that 'The need for trade-offs is often exaggerated and is typically based on very rudimentary reasoning. Further, even when trade-offs have to be faced, they can be more reasonably – and more justly – addressed by taking an inclusive approach, which balances competing concerns, than by simply giving full priority to just one group over another.'[91] But what form should the review take? A number of principles of non-retrogression can be advanced, in circumstances where the reforms are carried out in a democratic society and in promotion of the general welfare:

1. Alternatives to the problem at hand should be comprehensively examined, including budgetary reviews to determine whether the objectives can be reached without affecting the right to social security.
2. There should be genuine participation of affected groups in examining proposed measures and alternatives that threaten their existing human right to social security protections.
3. The burdens, where necessary, should be shared as far as possible in order not to exacerbate poverty.
4. The reform should not be directly or indirectly discriminatory.
5. The reform must as far as possible avoid beneficiaries losing the achievement of the right to an adequate standard of living, particularly if the reduction is to be sustained.

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89 General Comment No. 3, *supra* note 38, para. 9.
90 *STTK ry and Tehy ry v Finland*, Complaint No. 10, para. 20.
91 Sen, *supra* note 5, at 120-121.

6. The reform must not further deprive an individual of access to the minimum essential level of housing, health care, education etc unless all maximum available resources have been used, including domestic and international.
7. Review procedures should be instituted at the national levels, for example Senate review Committees in Finland.

4. Conclusion

In a field congested by standards and existing actors, it appears at first glance that the right to social security may simply provide a supporting and affirming role. However, the above analysis indicates that the right to social security may have a much more substantial role to play since it not only greatly extends the reach of the international legal framework and mandates a system of accountability, but may require new approaches in the field of social security.