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Do human rights exist without social rights?

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Summary

This thesis is to introduce the international fora of social human rights, focusing on the social security system of Finland, in particular. The context of this paper starts by examining the international law around social security and general position of human rights. The birth of social rights is examined with civil and political rights and the acceptance of the the two Covenants that were introduced to be ratified at the end.

The formation of social rights includes several aspects in regard to their acceptance. In this paper, I have touched in my analyses solidarity, nature of norms and social dialogue. This approach is to show the complexity of the matter, from the legal and non-legal perspective. A note worthy aspect is that social rights and social security are formed in a country bases, enabling many different variations in implementations and prioritization.

For this reason, the legislation, and particularly the European Social Charter is looked at in detail and compared to other Conventions and legislations. By focusing on the Charter I have tried to point out the difficulties of the Charter in application in general. This is analyzed by thoughts of experts, and later to be combined to my conclusions. Regardless of the efforts of the International Labour Organization to stabilize social security matters by different Conventions and Covenants, at the national levels, social security is partly left to live its existence by constantly changing national legislations and to the mercies of the economical changes.

This paper is also to analyze the nature of the justiciability of the social rights, i.e. social security. The aspects included are introduced as state obligations. In more details, the obligation to respect, protect and fulfil are introduced with the Limburg principles and guidelines regarding the violations of human rights. The resources of states to comply the progressive raise of a social security system are expressed that it is the state's obligation and duty to demonstrate that all the necessary steps have been taken to improve the social security system. The outcome of the 'steps' naturally depends on the particular state, but the legal obligation is the same regardless.

The legal obligation that states have is fairly obvious but the enforcement mechanism has not reached the same level in all counts. Two main reasons have been identified to have an impact on this lack of will to regard the social rights as justiciable and enforceable; a loose wording of some of the provisions and in some instanses a weak monitoring mechanisms. However, the ILO again, has raised the requirements and compliances higher on this matter also. Nevertheless, this approach and model of thinking should be applied by the states to have a concrete effect on social security systems. Therefore, a reminder of the applicability of fair trial, is also in order.

As some of the provisions have a nature of not been so specific, the actual use of power can also be seen as mixed. Therefore, the national division of separation of powers and state sovereignty is considered to be a factor on influencing the justiciability of social rights. The actual use of power has been considered between the judiciary and governmental branches. The margin of choice and appreciation are introduced to be remembered along with fair trial aspects, in the social right decision makings. Criticism has been expressed beyond enforcement, to be taken into account for the legislative measures in the future. Here the focus is more on the international level though.

To proceed with the justiciability of social rights, the legislative purposes have been introduced in a context that emphasize the binding nature and state obligations. As the criticism above introduced some flaw, here the attempt is to correct them by introducing precise guidance. To introduce some examples, to have more detailed contents, allocating exact responsibilities, to have clear prohibiting and protecting measures and a functioning system of remedies, etc.

Statements of the Committee on Economic, Social and Cultural Rights have been put forth to enforce the importance of the rights. The Committee has identified some guidance for the national institutions in the field of economic and social rights to follow and sophisticate. These instructions are not tied to any specific institutions but are fairly flexible in their nature to be applied in different governmental divisions and other national non-governmental institutions. The guidelines invite more actors to be involved with economic and social rights, like in promotion and research. Although, the Committee recognises its own responsibility in the international level along with other international actors referring that as long as there is no compliance in the international level, it will be harder on the national level. Nevertheless, the national compliance does not depend on the international compliance.

The focus of this thesis, social security, is introduced through the original meaning of it, and continuing to explain the provisions protecting it today. The focus is the European Social Charter and Article 12, and particularly its requirement to improve the social security system progressively in a national level (12(3)). Although the main flaw have been identified being that there are no provisions on minimum social security requirements and the existence of the informal economy, the focus is shifted elsewhere.

As earlier mentioned, the focus in social security is to examine Finland, and particularly the social security system and its effects in young unemployed people. The group is identified as youth, ages between 18 and 24. Firstly, the national legislation is introduced.

The Finnish social law is fairly young and very complex on its nature, and vulnerable to the economical changes. The particular features of the Finnish social law and its jurisprudence are examined. As the main actors in the

field of social security are national institutions like the Social Insurance Institution of Finland (KELA), oppose to the courts of law as first instances.

The basics of the national social security are defined in the national Constitution, section 19. Guaranteeing the basic requirements of the international law on social human rights and therefore is the foundation of the national social security also. Nevertheless, the Finnish social security system relies on the fact, that everyone has the duty to take care of themselves as capable. If tampering his/her individual duty and obligation, the right to social benefits will be questioned.

As for the special features of the social security jurisprudence, the administrative law and duties of the authorities are explained in more details. These are legal norms that create obligations to the authorities investigating the applications and appeals.

A national feature of the self-governmental municipals is introduced and examined by an example municipal of Porvoo, to demonstrate the power that the municipals pose. This thesis also concentrates as an example to demonstrate the youth unemployment in Porvoo. Although, the national legislation on labour policies and labour market actions are applicable to all municipals, partly the self-governance creates unequal opportunities among the clients of the Employment and Economic Development Offices'.

The General Survey on Social Security by ILO is mainly to demonstrate the importance of the social empowerment of people and society. And at the end, exploring this as a solution to the concluding thoughts.

At the end, the more detailed country based analyzes is made. The object of this to have more concrete examples on how the activation measures are related to the improvement of social security and on the other hand what are the national threts related to unemployment and the system itself.

In my conclusions I try to bring forward an approach to target the group of youth earlier than 18 years old as is now done with the focus group. By this I introduce an idea to raise the level of social security by shifting and extending the education aspect to earlier ages of youth as a part of the compulsory education system.

Preface

I would like to thank my family and friends for the support and space that they have given me during this thesis process.

Also I would like thank my supervisor for his work and helpful thoughts on this thesis.

Abbreviations

UDHR	the Universal Declaration of Human Rights 1948
ICESCR	the International Covenant on Economic, Social and Cultural Rights
ESC	the European Social Charter (1961)
Revised ESC	the Revised European Social Charter (1996)
ILO	the International Labour Organization
ICCPR	the International Covenant on Political and Civil Rights
UN	the United Nations
CRC	the Convention on the Rights of the Child
Code	the European Code of Social Security in 1964
ECHR	the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
CoE	the Council of Europe
NGO	non-governmental organization
Committee	the Committee on Economic, Social and Cultural Rights
Convention No. 102	the Social Security (Minimum Standards) Convention of 1952 (No. 102)
ILC	the International Labour Conference
Revised Code	the Revised European Code of Social Security (1990)
esc	economic, social and cultural
GDP	Gross Domestic Product
KELA	the Social Insurance Institution of Finland (in Finnish Kansaneläkelaitos)
SATA Committee	Committee for reforming social protection

1. Introduction

Background

The ageing population in Finland has created speculation on the future aspects of funding the pensions as the population growth has declined. The general concern has been not only to increase the employment rate but also to prolong the careers and stabilize the labour market. In order to do this the Government of Finland has reframed and tightened the general policies and legislation regarding employment and unemployment. Also, the education sector has not escaped from these reforms as it has to respond to the demands of the labour market and economy in the number of places they offer on each field.

The European Social Charter requires in Article 12(3) to 'raise progressively' the system of social security to higher level. As the social security systems are country based, the development of the system can vary in many contexts and aspirations.

How can this progress then be measured and seen? Options could be analyzing the current legislation in the international level as well as in domestic level, by statistics to calculate several ratio numbers between employed and unemployed, study the future tendencies of population, etc.

Instead of having a "traditional" approach this paper is attempting to look an improvement of the social security system by focusing on a particular focus group, youth (ages between 18-24), who are targeted by the Government with activation measures in the labour markets. More closely, this paper is trying to address an option to have a decreasing effect on this group as becoming unemployed.

The international legislation and national legislation on social security system is very large with more and less specific provisions. The purpose of this thesis is to introduce the legislation around the social security although not to analyze the legislation itself, rather to see if Article 12(3) could be fulfilled by a different approach.

This approach, ultimately improving the situation of the youth on the labour market and therefore to have a positive impact on the pension funds in future. Not to mention the reduction of expenditures in other areas of social security.

Research question and delimitations

This thesis is concentrated on social law, particularly on social security law and human rights law. The research concerns the development of the social security system and the requirement of the European Social Charter, Article 12(3) to ‘raise progressively’ the system of social security to a higher level. How the requirement of the progressive raise of social security system could have an effect to the youth (ages between 18 and 24) unemployment rates in Finland?

The paper introduces the international aspect of social security human rights and touches upon the European aspect but focuses on a country analysis of Finland.

This thesis studies if the fairly complex Finnish law is to give rights to an individual or rather to give obligations to an individual. An object group of this finding is delimited to youth unemployed persons in age between 18 and 24. This thesis is not to analyze the social security human rights law or the domestic social security law in Finland nor the case law.

Despite the current complexity in the domestic law with legislation, decrees, legal norms, guidelines, etc., this paper will not go in depth in the actual protection and remedies of the social security law. This thesis will research how the justiciability of the social security can be seen as an individual right.

Nevertheless, the current threats and risks in social security on the domestic arena are cursorily touched upon in this thesis. Cursorily is also mentioned the implications and similarities that youth unemployment will have in other areas of the society, for example in criminality.

The agenda is to try to answer to the research question as a solution to the social security improvement via education before the age of 18, about the labour markets and labour issues among the youth, i.e., to introduce an approach to educate the youth before entering the labour markets.

Structure and methodology

I began my work with the social human rights law and the domestic social law in Finland to find out if the implementation of the non-legal aspects matches coherently in the administrative stream towards the practical effects, specifically in the group of youth unemployed people. As I became more familiar with the domestic municipal structures there were indications of inequality between the municipalities in the interpretations and

implementations of the guidelines. The focus group divided opinions in whether the special focus on youth were to be seen as an obligating trend towards the labour market rather than respecting the rights of the youth in that group.

In addition of the mere mentioning of legislation this paper focuses more on the guidelines and other non-legally binding instructions and the impact on bettering the general situation in the focus group.

This thesis has four main parts. The first Chapter being the introduction, the second Chapter focuses on the international law on social human rights. That Chapter analyzes in addition to the international social human rights law, the justiciability of social rights. The Chapter also considers the importance of the norms that are foundations of the social rights and the general factors attached to social and economical rights, solidarity. At the end of the Chapter, social security is introduced via the main provisions in human rights law.

The third Chapter focuses on the domestic law in Finland. It explains the complex nature and characteristics of the current legislation in social law by introducing the administrative nature of the social law and norms, and introducing the focus group of young unemployed persons.

The fourth Chapter explains the involvement of the International Labour Organization (ILO) in the development of social security and the current situation and appliance of the social security in the world through the ILO General Survey on Social Security 2011.

The fifth Chapter explores the research question in practice via personal interviews of Professor of Law Matti Mikkola, Professor of Law Pentti Arajärvi, Mr Niclas Tåg, the area director of the Employment and Economic Office in Porvoo, and via emails of Mrs Maija Faurie and Mr Ilpo Airio who are in an employment of the Social Insurance Institution of Finland but not representing the view of the Institution.

This Chapter introduces local governmental level actions by having an example municipal, Porvoo. It also sets forth the critics of the activation measures designed to youth.

2. International Social Human Rights Law

2.1. Introduction

Economic and social rights are an essential part of the normative international code of human rights. They are placed in the Universal Declaration of Human Rights 1948 (UDHR) (especially, in Articles 22-25 of the UDHR), at the universal and regional level, they are found in conventions on human rights (The International Covenant on Economic, Social and Cultural Rights; the European Social Charter and the Revised European Social Charter; Chapter III of, and Additional Protocol to, the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Articles 15-18 of the African Charter on Human and Peoples' Rights) and in human rights treaties' networks, aimed at to abolish discrimination and to protect certain vulnerable groups. (5(e) of the Convention on the Elimination of All Forms of Racial Discrimination, Articles 11 to 14 of the International Convention on the Elimination of Discrimination against Women, Articles 24 to 27 and 32 of the Convention on the Rights of the Child and Articles 15, 17 to 19, 21 and 24 of the Convention relating to the Status of Refugees.) Specifically, many of the International Labour Organization (ILO) conventions are also designed to protect economic and social rights. These treaties are legally binding, creating legal obligations to States Parties involved. In order to have a legal validity in the domestic plane, the treaties require the ratification and implementation on the domestic level.¹

Social human rights are rights of an organized society to secure respect and protection of human worth and protect and safeguard dignity and equality of everyone, while similarly endorsing access to society's cumulative wellbeing. Mikkola has described social human rights being based on moral norms and, in principle, their existence does not require the state's recognition, but, with a view to their effective exercise and enforceability, he continues that such recognition is needed. As legal norms, he characterizes the social human rights either rules or principles, since their basic function is to protect the fundamental rights of all persons efficiently and without any exception. The indisputable minimum standards of the social human rights cover every human and states are obliged to guarantee their instant fulfillment in all circumstances. So he concludes that in this sense these rules possess an absolute nature.²

After completing the work on the Universal Declaration of Human Rights (UDHR 10th December 1948) the United Nations (UN) Commission on

¹Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.29.

² Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, p.2.

Human Rights started the work to draft conventions that could be legally binding on the states to ratify, on which conclusion the Commission split on the question if there should be one or two covenants. This pondering resulted that this question was turned over to the General Assembly, which, in a resolution adopted in 1950, put emphasis on the interdependence of all categories of human rights and called upon the Commission to adopt a single convention. The following year, however, the Western states were able to reverse the decision, requesting the Commission to separate the rights contained in the UDHR into two single international covenants, one on civil and political rights (ICCPR) and the other on economic, social and cultural rights (ICESCR).

Although deciding to adopt two covenants, the General Assembly also decided to pass a resolution emphasizing that the different sets of human rights were interrelated and indivisible. Continuously and ever since, this has been repeated in United Nations fora, including at the World Conference on Human Rights in 1993, in which 171 states participated and which, in its Vienna Declaration and Programme of Action, states that 'all human rights are universal, indivisible and interdependent and interrelated'. According to Eide, Krause and Rosas, the interrelation between the different sets of rights can also be documented in practice, but much more is needed to give substance to the affirmation of their indivisibility and interdependence so often repeated by the UN.³

During the course of the evolutionary history of human rights, three aspects of human existence have sought to be safeguarded: human integrity, freedom and equality. Obvious to these three parts is the respect for the dignity of every human being. The primary principles reflected the necessity to coerce the power of authoritarian sovereigns. Progressively the notion of realization that the people should not be subordinated to anyone except themselves, the sovereignty of the people developed to a framework for the elaboration of human rights. From that realization, ideas about the protective function of the state were developed, along the ideas of a states' role in promoting the common welfare of the people.⁴

To emphasize even more the role of the States, the sincerity of the implementation obligations undertaken also by the international community, under international human rights instruments shall be implemented in good faith, as provided in the Article 26 of the Vienna Convention on the Law of Treaties of 1969. This is a standard that applies to all parts of the contemporary human rights system. However, many obstacles must be overcome in fulfilling this standard, including that of the relative neglect of economic, social and cultural rights. Another problem has been the slow course in clarifying the content of these rights and their corresponding obligations and requirements.⁵

³ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook* Second Revised Edition, 2nd ed., Hague, Kluwer Law International, pp. p.3-4.

⁴ *ibid*, pp.12-13.

⁵ *ibid*, p.9.

2.2 Comparison of the two covenants

Regardless of the distinction that was made to emphasize the equality of the rights in both of the Covenants, the separation starting point is still in its parts existing.

2.1.1 Background of division of the two sets of Covenants

The earlier the civil and political rights were considered to be ‘absolute’ and ‘immediate’, whereas economic, social and cultural rights were held to be programmatic and also, to be realized gradually and therefore not thought as rights. The view is partial and takes its roots back to the creations of the two Covenants. An allied hypothesis was that civil and political rights were ‘justiciable’ in the sense that they could easily be applied by courts and other judicial bodies, whereas economic, social and cultural rights were assumed to be more political in their nature. It was further believed that civil and political rights were ‘free’ in the sense that they did not cost much; the contents were assumed to be obligations of states not to interfere with the integrity and the freedom of the individual. The implementation of economic, social and cultural rights, in contrast, was held to be costly understood to obligate the state to provide welfare to the individual. The arguments were focused on the different state obligations on the two sets of rights. For this reason, it was expected that states who did not want to undertake the obligations arising from economic, social and cultural rights would prefer to ratify an instrument containing only civil and political rights. Nevertheless, many of the assumptions have been overstated or mistaken, based on the considerable similarities in state obligations with regard to both sets of rights.⁶

2.3 Solidarity and norms

The characteristics of solidarity and norms have formed basic cornerstones for human rights and still continue to do that. However, concept of solidarity changes with time, the norms do too.

2.3.1 Solidarity

⁶ *ibid*, p.10.

The social dialogue has progressed with the Revised European Social Charter (1996) in client and patient democracy. The 1996 Charter obligates the states to develop legislation in process and administrative actions in regard to the participation of workers, citizens and their interest groups, for example to advance and secure their collective interests.⁷ Therefore, the 1996 Charter is to express an advanced concept of external solidarity of all human beings. It is to emphasize the social inclusion of everyone while also to promote equal opportunities for everyone.⁸ Although, Mikkola is in an opinion that Europe has much to do to strengthen this type of immediate and open democracy thinking.⁹

2.3.2 Nature of norms

To define the fulfillment of rights, Mikkola has analyzed that the effectiveness of law, is dependent on following matters: 1) the effects of the national political system on law, 2) the enforceability of the rights, 3) the position of the national social policies and its material and immaterial contributions, and 4) cultural aspects of the system's functionality. However, Mikkola considers that the above mentioned matters do not alone create the core and functioning nature of law, but to be characterized as a normative guideline in a particular society, the law also has to be applied or otherwise followed. As he continues, that judges of courts and public authorities are not educated only to "follow the letter of the law", but to "interpret texts and apply them according to what is justifiable in a changing society". To have an atmosphere for modifications creates a legal order that can evolve and yet, have a dynamic nature. On the other hand, the legislation could be minimized to offer greater options for a local decision makings in court and other authorities, but that would instead present requisite on the education of the population whereas that would not help problems regarding casuistry. On the contrary, the greater judge based approach on guiding the public and society, could have an enhancing effect on detailed norms and casuistry.¹⁰

⁷ Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, p.19.

⁸ *ibid*, p.15.

⁹ *ibid*, p.19.

¹⁰ In this Mikkola analyzes the two faces of the law being understood as a linguistic expression or statutes in books. He notes that the dynamic nature of law becomes evident only when law starts functioning as a normative guideline in a particular society, i.e. when it is applied or otherwise followed. He then continues that in a democracy, norm sentences are abstract and public powers separated and the application to depend on the differences in the particular society. In his view, separation of powers enables critical assessment of decisions, which reduces the possibility of misrule and increases the predictability and certainty of decision-making, and the supervisory eye of others being helpful in making decisions that are more sustainable as regards applications and argumentation. pp.20-21.

2.2.3 Social dialogue

Generally social dialogue is action of states in varying levels with varying transparency. States are in a position to give blessings to collective agreements in negotiation and to the following effects of it, providing enforceable legislation that incorporates the interests of the parties. Several countries include in the national legislation the rules of social dialogue. As a rule of thumb, the state will have a better bargaining position as a third party in the collective agreements the more social dialogue is included in social and economic policies.¹¹

The ILO's definition for social dialogue includes all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy¹², whereas the European Commission has defined social dialogue as a "Progress of continuous interaction between the social partners with the aim of reaching agreements on the control of certain economic and social variables, at both macro and micro levels."¹³ The European Commission's definition takes into consideration the varying forms of bilateral dialogue between employers' and workers' representatives, both at company and industry level, as well as in the framework of tripartite concertation.¹⁴

2.4 Basis of social rights at the European level

According to Mikkola, the critical contemporary issues for social dialogue in Europe are currently; how to pass on from short-term objectives back into more long-term and more sustainable production more balanced and equal labour relations as well as improved employment? By this he refers to the conflicts between labour, interests of the management and capital, and that strong hierarchical directive power relations are still typical in many companies of East Europe.¹⁵ Although, this power struggle is also a current interest in Finland, with the Finnish pension companies as one example (option schemes of the top managers).¹⁶

¹¹ Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, pp.231-232.

¹² [online] Available from:

<http://www.ilo.org/public/english/dialogue/ifpdial/areas/social.htm> [3.5.2011].

¹³ Mikkola, p.232. (Report on Industrial Relations in Europe, 2000)

¹⁴ Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, p.232.

¹⁵ *ibid*, p.125.

¹⁶ Matti Mikkola. 2011. Interview on social human rights in the national level in Helsinki, Finland by Laura Suntio. Helsinki, Finland 2.5.2011.

2.5 An adequate standard of living

A core social right is the right to an adequate standard of living, like in the UDHR, Article 25; ICESCR, Article 11; CRC, Article 27. To enjoy this right, the minimum requires that everyone shall enjoy the necessary subsistence rights, i.e. adequate food and nutrition rights, clothing, housing and the necessary conditions of care. In order to be able to fully enjoy these social rights, a need to enjoy certain economic rights is also required. These economic rights are the following: 1) the right to property in the UDHR, in Article 17, 2) the right to work in the UDHR, in Article 23; in the ICESCR, in Articles 6, and 3) the right to social security in the UDHR, in Articles 22 and 25; in the ICESCR, in Article 9; in the CRC, in Article 26. The right to social security is indispensable, especially when a person does not have the necessary property available, or is unable to secure an adequate standard of living through work, unemployment, old age or disability as provided in the UDHR, in Articles 22 and 25.¹⁷

2.6 ILO

In 1919, the idea behind the creation of the International Labour Organisation (ILO) was based upon an inspiration to establish universal and lasting peace based upon social justice.

ILO's most important conventions were made at a time when other binding social human rights instruments had not yet been adopted and ILO in effect became the "mother" of social human rights showing the way for the European Social Charter (1961), especially Articles 1-10 and, later, for the creation of the European Code of Social Security in 1964, and (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.¹⁸

Social security has always been a mission of ILO, and the Constitution in 1919, expressed its concern on the social rights of workers. This was later reaffirmed by the International Labour Conference in the Declaration of Philadelphia, in 1944, being the first international instrument addressing social security as a human right. The Declaration endorses a very broad view of social security in calling, among other measures, for the provision of "a basic income to all in need of such protection". The Conference has always ensured that social security standards respond to social, economic and industrial changes in the world.¹⁹

¹⁷ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.17-18.

¹⁸ Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, p.48.

¹⁹ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087692.pdf [8.5.2011].

These ideas of peace, democracy and human rights were strengthened in June 1945 in San Francisco, where the United Nations (UN) was established by the representatives of 50 states. The representatives provided the United Nations to have global supervisory role in the human rights matters by signing the United Nations Charter.²⁰

As recently stated in the ILO General Survey on Social Security 2011 (ILO Survey), the continues agenda of ILO is to promote globally common goals and standards in the field of social and labour rights, and ILO Conventions bring a common understanding of the content of social rights in the multilateral system which in turn also serves as a basis for international development assistance.²¹

2.7 European Treaties

The main European treaties on human rights are; the European Social Charter (1961 (ESC) and Revised 1996) outlining the key of the social human rights of Europe with the standards and benchmarks, and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)²² (ECHR), having the main significance.²³ After the progress already achieved at the European level which recently furthered into the European Union (UN) Charter on Fundamental Rights, as the EU became the first European body to include all basic rights in one and the same legal document. This document reached an agreement in a form of a declaration, in Nice 2000 and further on in 2007 in Lisbon, a form of a legally binding instrument. Finally, the treaty came into force 1 December 2009.²⁴

The ECHR protects the rights of dignity, fundamental freedoms, non-discrimination and justice (rule of law), whereas the ESC includes provisions of dignity, equal opportunities, solidarity and participation, emphasizing the indivisible and interrelated nature of the social human rights.²⁵ Currently, all 47 member states of the Council of Europe are bound by the ECHR Convention, and therefore, it presents a status of cornerstone in protecting human value and dignity, fundamental freedoms, non-discrimination and rule of law in Europe. Although, unlike the Convention, the Social Charter has for many years been “the Great Unknown”, and even though 43 countries are bound by it and most of them to its revised version, Mikkola is in the opinion that, its name is not widely recognized and its content is even less well known.²⁶

²⁰ Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, p.50.

²¹ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 156

²² (newly formed in 1953, creating the European Court of Human Rights)

²³ Mikkola, M. (2010) *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, p.3.

²⁴ *ibid*, p.56. (The Revised Social Charter being the key source of social rights of the Draft EU Charter. p.57.)

²⁵ *ibid*, p.52.

²⁶ *ibid*, p.3.

2.7.1 The European Social Charter's character

Like Mikkola, Petman²⁷ shares the same opinion that the European Social Charter is less known. She explains that the Charter was supposed to be Europe's version of the Covenants but it never even rose to the same level with them. She is in the opinion that since only four out of 43 contracting states has accepted the Charter in whole to be bound by it, indicates that that without the option to choose from there would not be as many states involved. Since the Charter allows options to choose from the states tend to choose narrowly and therefore to destabilize the credibility of the Charter. The reasons why the Charter is a low profile and almost invisible by its system must be because of the disputed characters of the social rights in different states, though it can also be said that the unidentified character is due to the Charter's structure. The process of communication where the message of the European Committee of Social Rights is forwarded to the contracting parties via the Committee of Ministers is slow and difficult and excluding the meaningful communication between the contracting states and the European Committee of Social Rights. Also because of the a la carte regulations there are superimposed regulations that leave gaps on the rights to be protected. This can be analyzed to have an effect that carves the credibility and reliability of the Charter.

To have the Charter as a living instrument fully, it is required to have active and reciprocal communication with other European social rights actors, European Human Rights treaties and European Union mechanisms. Further on this demands that individual citizens, states, non-governmental organizations (NGO), labour market parties, administrative authorities, courts of law and international organizations are familiar with the Charter and apply the regulations. In this regard the recovery measures of the Charter are just beginning.

2.8 State obligations under international law

2.8.1 Introduction

Under international law, obligations to respect human rights are primarily held by states. When states seek to implement these obligations in national

²⁷ Petman, J. 2010. *Euroopan sosiaalinen peruskirja ja sen valvonta* [The European Social Charter and its supervision] [online] Available at: [http://www.kela.fi/in/internet/liite.nsf/NET/171110152827HJ/\\$File/Petman_051010.pdf?openElement](http://www.kela.fi/in/internet/liite.nsf/NET/171110152827HJ/$File/Petman_051010.pdf?openElement) [26.4.2011]. pp.1-6.

law, duties are imposed on persons subject to their jurisdiction. The duties imposed on the state to respect the rights of other persons, and duties to contribute to the common welfare, make it possible for the state to assist and to provide which then allow everyone to enjoy their economic, social and cultural rights. At least a moral obligation, if not more, is imposed in the UDHR, the states to seek realizing social and economic rights. The legally binding obligations upon the contracting Parties, is to take steps to the maximum of available resources to ‘achieve progressively the full realization’ of the economic and social rights as set in the Article 2 of the ICESCR. The words ‘achieve progressively’ have often been misinterpreted but in its General Comment No. 3 (1990) on the nature of state obligations under Article 2(1), the United Nations Committee on Economic, Social and Cultural Rights (UN Committee on ESCR) indicates that while the concept of progressive realization establishes an acknowledgment of the fact that full realization of all economic, social and cultural rights will usually not be able to be achieved in a short period of time, the expression must be seen in light of the overall objective, which is to establish clear obligations for States Parties to move as expeditiously as possible toward the realization of these rights.²⁸

In addition to the clarification of the General Comment, the ILO Survey has interpreted that in Art. 2(1), the “progressive realization” is emphasized, and to include the use of the international resources in assistance and cooperation alongside the domestic resources. It further continues to analyze that although the concept of “progressive realization” affords the State some latitude in achieving the full realization of the right the United Nations Committee on Economic, Social and Cultural Rights in practice requests States parties to demonstrate that they are moving as expeditiously and effectively as possible toward that goal. The concept also implies that the States should generally avoid “any deliberate retrogressive measures” which reduce the coverage or level of benefits provided under the social security system.²⁹

In other words the concept of Article 2(1) has got a wider and more specific clarification for the current times. This clarification emphasizes not only the meaning of the Article but also the whole notion and approach toward social and economic rights.

2.8.2 State obligation to respect, protect and fulfil

²⁸ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.22.

²⁹ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 157.

Human rights are said to impose three different types or levels of obligations on States Parties. As Mikkola points out, Asbjörn Eide³⁰ has already a quarter century ago criticized the division of rights into negative and positive rights being overly dichotomous and strict. He pointed out that the protection of negative rights also requires positive resources from the states for the judiciary, and for the enforcement of its decisions. He typified human rights on the basis of a trichotomy: respect, protect and fulfil. The obligation to respect requires the state to abstain from all type of interferences that violate the dignity and fundamental freedom of people. The obligation to protect requires the public bodies to safeguard the rights of the people with judicial power and other necessary resources. The obligation to fulfil goes even further with the requirements of positive inputs by the state.³¹

Like Eide, Krause and Rosas open up these three levels more; the obligation to fulfil also incorporates both an obligation to facilitate and an obligation to provide. States must, at the primary level, respect the resources owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her own needs. Significant components of the obligation to protect are spelled out in existing law. Such legislation becomes manageable for judicial review, and therefore belies the argument that economic and social rights are inherently non-justiciable. Legislation of this kind must, of course, be contextual – that is, it must be based on the specific requirements in the country concerned. At the tertiary level, the state has the obligation to fulfil the rights of everyone under economic, social and cultural rights, by way of facilitation or direct provision. The obligation to fulfil by facilitation takes several forms, described in the relevant instruments. The provisions can consist what is required to satisfy basic needs, such as food or resources which can be used for food (direct food aid, or social security) when no other possibility exists, such as, for example: (1) when unemployment sets in (such as under recession); (2) for the disadvantaged, and the elderly; (3) during sudden situations of crisis or disaster; and (4) for those who are marginalized (for example, due to structural transformations in the economy and production).³²

To specify these particularly on social security, the ILO Survey, has identified the state party obligations with regard to that. The obligation to respect was specified for the states to abstain from interfering directly or indirectly with the enjoyment of the right to social security. The duty to protect was to oblige States to prevent third parties to interfere the right, and the obligation to fulfil meant that the states were to adopt all the necessary measures for the full realization of the right to social security.

In difference to the previous subdivision of the obligation to fulfil, divided in two, the ILO Survey divides the obligation to fulfil into three obligations

³⁰ Eide, A. (1989), *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 *Human Rights Law Journal*, p.35.

³¹ Mikkola, M. (2010), *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, pp.23-24.

³² Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.23-24.

to: 1) facilitate, by taking positive measures to assist individuals and communities to enjoy the right to social security; 2) promote access to and enjoyment of social security; and 3) provide the right to social security for those who are unable to realize this right themselves for reasons beyond their control. By these actions the realization of social security is defined to be a work in progress by ILO.³³

Contrary to the Eide, Krause and Rosas, the ILO Survey has elevated the obligation to promote as a separate obligation in the addition to others. Maybe the general obligations to promote, respect and protect human rights in general, the promotion has not been enough in itself and has not received the deserved attention.

2.8.3 Limburg principles and guidelines on state obligations

Contrary to the general principles, the specific nature and scope of the State Parties' obligations for economic and social rights were formed by a group of experts, convened by the International Commission of Jurists, in Maastricht in June 1986. The outcome of some rights can be made justiciable immediately while other rights can become justiciable over time (section 8.). In 1997, experts on economic, social and cultural rights met again in Maastricht to elaborate the "Limburg principles" (the outcome of the above, in 1986) in regard to violations of the economic, social and cultural rights, by agreeing on guidelines (The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights). These guidelines also been taken into account in the treaty monitoring bodies.³⁴

2.8.4 State responsibilities in using resources

In determining which actions or omissions amount to a violation, it is important to distinguish the incapability from the reluctance of a State Party to comply. Further on this requires the state to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. Article 2(1) of the ICESCR obligates Parties to take necessary steps to maximum of the available resources. A state that claims that it is powerless to carry out its obligation for reasons beyond its control has the burden to prove that this is

³³ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 159.

³⁴ Committee on Economic, Social and Cultural Rights, 24th Session 2000. [online] Available from: [http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf) [2.5.2011].

the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility.³⁵

As the states are under negative duties in imposing the social and economic rights the actions of the states therefore require positive actions to a complete realization of the rights to ensure universal access to its socio-economic resources and services. The importance of the realization should constitute in the national constitution as protecting both civil and political rights and social and economic rights as presenting equally important fundamental values.³⁶

Primarily, the human rights instruments establishing effective individual rights, the rights must be guaranteed by the state, whereas, the ILO instruments directly focus on the obligation of the State to secure social security benefits to those who have the right to them, guaranteed by a social institution with a legal framework. It appears that, while the UN Committee on Economic, Social and Cultural Rights (UN Committee on ESCR) is moving towards the ILO system in the state social responsibility approach, the ILO is moving towards the human rights approach to social security pursued by the UN Committee on ESCR. The complement of these approaches is, in certain cases, explicitly recognized by international instruments envisaging social security both as a human right and a duty of the State. For example, the European Social Charter addressing social security twice: in Part I of the Charter establishing the right of all workers and their dependants to social security, and in Part II providing the obligation of the State to establish and maintain a system of social security. Both approaches are needed and their complementarity is evident and well established. The ILO Survey explains that the challenge that needs to be addressed is to develop this complementarity into an effective instrument of governance for the State, and into a decent level of social protection for the individual. Therefore, the link between universal social security and the concepts of human rights, democracy and the rule of law might best be understood by reference to the notions of human dignity and social cohesion as the human rights address the individual's personal dignity and value to be recognize by the state and therefore to evolve from moral obligations to legislative obligations.³⁷

2.9 Are economic and social rights justiciable?

³⁵ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.26-27.

³⁶ *ibid*, p.58.

³⁷ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. parts 160-161 and 164.

This is a dilemma that roots back to the births of the Covenants and has divided opinions on their justiciability. The rights exist in theory, but how are they fulfilled in practice?

2.9.1 The nature of the rights

The problem that social and economic rights possess in their legal nature is not related to their validity but rather to the probability of applying them. Like Eide, Krause and Rosas have analyzed the many opinions of other authors on economic and social rights, for the reason of their very nature, as not being 'justiciable' in the sense that they are not capable of being invoked in courts of law and applied by judges. They have concluded that some authors base this position on the predominantly 'political' character of treaty obligations under existing treaties on economic and social rights, whereas others make a distinction between obligations of result and obligations of conduct and classify economic and social rights under the latter category. However, two main reasons are to be concluded for the underdeveloped justiciability of international treaties on economic and social rights, amplifying each other, are to be identified in: (a) the wording of these provisions, and (b) the relatively weak international monitoring mechanism under the treaties in question.^{38 39}

However, ILO has an impressive record of establishing detailed standards' interpretations in which, at least partly as a consequence, also the provision of the ICESCR are more precise, and that actual rulings also exist with references to the ICESCR by the domestic courts alongside with other ILO standards.⁴⁰

2.9.2 Direct and indirect enforcement of the economic and social rights

"The most important source of added value in the human rights approach is the emphasis it places on the accountability of policy-makers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability." (As quoted in the ILO Survey)

³⁸ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.29-30.

³⁹ *ibid.* Like the detailed and precise language used in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families evidences that it is possible to formulate treaty provisions on economic and social rights in a way that meets all the requirements of 'justiciability'. (The Convention generally uses the language of individual rights and not of state obligations.) However, it illustrates the difficulties in using this method as a primary one for strengthening the legal protection of economic and social rights. p.31 This is due to the wording of the Convention and therefore the lack of ratifications.

⁴⁰ *ibid.*, p.31.

Therefore, the existence of effective accountability mechanisms marks the shift between charities and claims.⁴¹

However, when importance is attached to various forms of social insurance and social assistance as ‘individual, economic rights’, the protection of Article 6 of the UDHR relates to both procedural details in the decision making on allocating the benefits in question, and the social and economic rights as genuine individual rights, which enjoy additional elements in legislation of international, constitutional, statutory and contractual provisions.

However, in situations where social and economic rights may receive indirect protection through the execution and supervision of treaties on civil and political rights is a case where an interference in, or a limitation to, a right otherwise protected, is legitimate due to considerations relating to social and economic rights. Nevertheless, the additional elements in legislation, execution and supervision also require challenging measures from private parties, instead of only taken by authorities and legislatures that the social and economic rights start playing a role. The fairly weak role of the direct horizontal effect in the legal implications is one reason to explain the implications of the existing treaty provisions on social and economic rights.⁴²

This has also been recognized in the ILO Survey, that the effectiveness of the access to social rights is ultimately related to an explicit, clearly interpretable and inclusive framing of social rights, as well as to the justiciability of these rights. The aim of the enforceability is to guarantee that each individual effectively obtains the benefits of his/her rights. In this respect, the Survey also identifies that one particular feature of social rights is their undeniable collective scope alongside their obvious individual scope. Therefore, collective action by beneficiaries might help in obtaining effective implementation, if the enforceability of social rights is to be increased.⁴³

With an active supervisory enforcement mechanism by an international organization, the application at the domestic level could also have more positive results. ILO has a unique supervisory system that helps countries to implement the ratified Conventions when help is needed. ILO examines countries and collects data of the grievances and through social dialogue and technical assistance works through the trouble areas. The variety of the mechanisms is flexible and wide to be suitable for varying purposes.⁴⁴

⁴¹ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 168.

⁴² Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.38-40.

⁴³ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 168.

⁴⁴ [online] Available from: <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> [8.5.2011]

Therefore, the ILO Survey makes a notion that the Committee of Experts has recognized on several occasions the important role of constitutional and supreme courts in defining and making effective the right to social security. Therefore, the case law reported defines the right to social security through these seven main concepts, as follows: 1) the right to social security is a fundamental right; 2) the right to social security has the dual purpose to protect individuals and improve their quality of life; 3) the right to social security permits the recognition of social security as an institutional guarantee; 4) the concept of social security refers to all means of institutional protection against the risks that threaten the ability and opportunity of people and their families to generate sufficient income to have a decent human existence; 5) social security has as its own responsibility the integral coverage of the negative consequences produced by social contingencies; 6) national social security institutions have the duty to calculate benefits correctly and to grant benefits in full, respecting the principle of legitimate expectations of a beneficiary; and 7) on the basis of the urgency of the case and social solidarity, individuals who are not covered by the social security system may be entitled to social security benefits.⁴⁵

2.9.2.1 Separation of powers and sovereignty

The separation of powers and sovereignty is considered in the context of justiciability of the economic and social rights. Some criticism by legal academics has been introduced that it is inappropriate to include social and economic rights as justiciable rights in a domestic constitution. The main reasoning for the reason of inappropriateness that has been introduced is that the courts would be in a position to require the states to undertake extensive positive conduct and resource commitments. This power in the hands of the judiciary would breach the separation of powers doctrine. This interpretation of the doctrine explains that social policy and budgetary allocations are the exclusive domain of the legislature which is directly accountable to the electorate. However, as analyzed by Eide, Krause and Rosas, this represents a rigid, formalistic concept of the doctrine of separation of powers, who have also used a notion by the UN Committee on Economic, Social and Cultural Rights to support this view: ‘The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society’.⁴⁶

⁴⁵ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011], parts 273 and 281.

⁴⁶ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.58-59.

However, other scholars have underlined the need to improve a more flexible, ‘cooperative model’ of the relations between the different branches of government. This model would involve constant interaction between the branches of government in defining and redefining their individual roles and powers in different contexts. The principal purpose of the doctrine of separation of powers is to avoid concentrate power in any single branch of government. This model therefore would be representing the judiciary’s role to play in the enforcement of social and economic rights. For example, the courts may push the legislature into action to comprehend the rights while at the same time valuing the legislature’s choice of means as to the most appropriate methods to advance the rights.⁴⁷

Nevertheless, all rights have social policy implications. Where a positive mandate may have extensive consequences, it is certainly suitable for the judiciary to consent a margin of choice to the executive and legislature. Furthermore, the fact that the normative content of economic and social rights is less well-developed than civil and political rights is more of a reflection of their historical segregation from adjudication procedures than their characteristic nature. The on-going judicial interpretations form the content of rights via interpretation of their meaning in the context of existing cases. There is no purpose why the content of economic and social rights cannot mature in a similar way if they are subject to regular judicial enforcement. According to the UN Committee on ESCR, ‘there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions’.⁴⁸

2.9.3 In ILO

The International Labour Organisation has an outstanding record to promote and protect social and economic rights. In the ILO system, collective complaints by trade unions and employers’ organizations to the Committee of Experts or the Committee on Freedom of Association play a substantial role. As demonstrated above, the supervisory and complaint procedures have supported the development of a case law on legal interpretations of numerous treaty provisions in the relevant ILO conventions on social and economic rights. Nevertheless, the ILO mandate also includes the importance of other methods of protecting social and economic rights than only complaint procedures. The importance is based on the tripartite participation of governments, workers and employers, with the equal importance placed on the role of national legislation by the ILO system, belonging to these important experiences.⁴⁹

⁴⁷ *ibid*, pp.59-60.

⁴⁸ *ibid*, pp.60-61.

⁴⁹ *ibid*, p.46.

2.9.4 At the European level

In Europe, the trend is focused toward effective enforcement mechanisms, like in under the European Social Charter, thereby strengthening the legal nature of the treaty obligations. A system for petitions was proposed by the Parliamentary Assembly in 1978. The role of the European Committee of Social Rights was strengthened with the 1991 Amending Protocol to the ESC. In 1995, Additional Protocol was adopted (entering into force in 1998) opening the possibility for collective complaints by employers, trade unions and other relevant non-governmental organizations. To understand the nature of the European Social Charter as having a legal effect and implications, although the European Committee of Social Rights has not decided on many cases, the Additional Protocol clearly indicates that the procedure for collective complaints is important for the understanding of the legal nature of the provisions of the European Social Charter, and therefore, creating more generic interpretations.⁵⁰

2.9.5 Criticism generally, beyond enforcement

As earlier mentioned some of the criticisms in relation to the European Social Charter as á la carte Charter, Mikkola has also demonstrated criticism to the hardcore provisions that can be selected by the states to obey. The targets of criticism are: 1) the excessive abstraction of the provisions, 2) the improperly balanced hardcore provisions, 3) the inadequately resourced secretariat, 4) the function of the supervisory body on a part-time basis only, 5) case law emphasizing some national or regional model and 6) a political body (Committee of Ministers) acting as the final decision-making body also on rights of fundamental nature.⁵¹

This emphasizing that the basic standards for protection of dignity and against all type of abuse of people must be understood similarly, irrespective of the provision. By saying that the “interpretations of the Charter must take into account the hierarchy of human rights provisions, in particular in relation to the Convention”, Mikkola is referring to the difference between the Charter and the Covenant to include only nationals or everyone under them. He poses the question if the Appendix rules out the equal treatment provision from the third world citizens. Mikkola is in the opinion that it does not do so. This is where he makes a valid point that the Charter must take into account the hierarchy of all the human rights provisions.⁵²

⁵⁰ *ibid*, pp.46-47.

⁵¹ Mikkola, M. (2010), *Social Human Rights of Europe*, Porvoo, Bookwell Ltd, pp.66-67.

⁵² *ibid*, p.72.

2.9 How are the social rights then justiciable?

To which degree these rights become justiciable varies and with the definition of justiciable defined by different actors but at least some social rights are rather often capable of being invoked in courts of law at least in some jurisdictions on the basis on constitution, and/or through other supporting legislation.⁵³

According to Asbjorn Eide, in Eide, Krause and Rosas, ‘the theoretical legalistic debate’ on whether economic and social rights are or can be justiciable is ‘largely off the mark’ because what is the significant issue is the effective protection of the rights in question, be it through courts or through other mechanisms. The conclusion being that here is no need to contest this statement. An effective protection of economic, social and cultural rights requires international and domestic methods of protection other than complaint procedures or justiciability in general to be effective. This is part of the progress of realizing social and economic rights, where the prime role is of legislative, budgetary and other positive state obligations. Another important aspect of an effective protection of social and economic rights are that these rights, or at least many of them, are understood as legally binding individual or collective rights. Although, the development towards justiciable social rights on an international, regional or national level is a contribution toward actual protection of economic, social and cultural rights in general. To acknowledge their ‘justiciability’, the general understanding of their legally binding nature and the following realization of the positive state obligations must be enforced.⁵⁴

The ILO is known for its supervisory system that enhances the effective protection of social rights via its international labour standard mechanisms. According to the ILO Constitution, the member states are required to report on requests on non-ratified and ratified ILO Recommendations and Conventions (Articles 19 and 22).⁵⁵

Nevertheless, a solid legislative foundation is crucial for the effective implementation and enforcement of economic and social rights within national jurisdictions. Legislation should be serving these following purposes in the context of economic and social rights:

- a) Providing a more precise, detailed definition of the scope and content of the rights encountered in international instruments and national constitutions.
- b) Stipulating the financing arrangements for the delivery of the rights;

⁵³ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.29.

⁵⁴ *ibid*, p.54.

⁵⁵ ILO Article 19 and 22 reporting forms. [online] Available from: <http://www.ilo.org/ilolex/english/reportforms/reportformsE.htm> [8.5.2011].

- c) Prescribing the exact responsibilities and functions of the different spheres of government at the national, provincial and local level in giving effect to the rights;
- d) Creating a coherent and coordinated institutional framework for the delivery of the rights;
- e) Preventing and prohibiting violations of the rights by both public officials and private parties;
- f) Providing concrete remedies to redress violations of the rights.⁵⁶

2.10 Protection and remedies in the domestic legal system

The national protection for the social and economical rights should have a solid enforceable base with remedies. Diversity and the regulatory elements should be included in the domestic legislation and jurisprudence, with appliance to the institutions and individuals who also are in contact with the economic and social rights. On the national level the attention must be focused on actions that have positive and permanent effects with possible threatening effects. The justiciability of the economic and social rights depends not only on the legislative factors but also on the political decisions and policy actions.

2.11 National legislation

Commonly there are great potentials at the domestic level to develop the normative content of the economic and social rights. The national legislation usually guarantees several individual options whereas constitutional rights emphasize more the rights in general level. Generally the acceptance as a constitutional right will require a specific legislative procedure and therefore is also more permanent than a non-constitutional right to the changes of the Government and the society.⁵⁷

Even though the legislation would be fine as it is more actions and activities are required by the economic and social rights activists and scholars to concentrate that how these rights could be more effectively advanced and enforced in the domestic mechanisms.⁵⁸ Even though the courts tend to be more receptive to the enforcement of concrete legislative rights and duties than broadly framed constitutional or international law norms, the risk of failing to guarantee the economic and social rights as subjective rights exists.

⁵⁶ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.79.

⁵⁷ *ibid*, p.84.

⁵⁸ *ibid*, p.55.

The implications of a national legislation on social rights should also be seen as implications in the society in whole. Therefore, effective access to social rights is also a part of the vision of what “development” means in economic, social and developmental terms. The neglect of social rights produces a productive loss to the economy, a loss in social and human capital, which is borne by entire societies at every level. In other words, effective access to social rights is an investment in social justice, with a high rate of return, in social and economic terms, and also constitutes an indispensable and solid foundation for sustainable and peaceful development for all.⁵⁹

Even though human rights and development issues were at first seen as separate domains, the focus was progressively positioned on the principle of indivisibility of human rights recognized by the 1993 World Conference on Human Rights held in Vienna and on the collective obligation of all States to create a just and equitable international environment for the realization of the right to development. An internationally united approach provides a stronger basis for citizens to make claims to their States, since the State is the principal duty bearer with respect to the rights of the people living within its jurisdiction. A development in progress is to empower people to seek guarantees to their rights.⁶⁰

2.12 The general view of the Committee on Economic, Social and Cultural Rights (the Committee on ESCR)

The UN Committee on ESCR has commented that the primary consideration in the domestic application of the Covenant is the effectiveness that the administrative remedies are adequate, particularly domestically. Nevertheless, they should be ‘accessible, affordable, timely and effective’, and an ‘ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate’. Some of the legislation provides administrative remedies as cheaper, speedier and more accessible than formal court proceedings.⁶¹ The UN Committee on ESCR has also emphasized the importance of judicial remedies for the protection of the rights recognized in the ICESCR. It has considered that in many cases, the other ‘means’ used in the context of Article 2(1) of the Covenant for realizing these rights ‘could be rendered ineffective if they are not reinforced or complemented by judicial remedies’.⁶²

⁵⁹ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 165.

⁶⁰ *ibid*, part 166.

⁶¹ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.80.

⁶² *ibid*, p.57.

2.12.1 Specific activities determined by the Committee on ESCR to enhance economic and social rights

In addition to the legislative approaches and purposes, other public institutions can also play an important role in the effective implementation of economic and social rights at the national level. These institutions being human rights commissions, ombudsman offices, public interest groups or human rights 'advocates', for example. Special offices may be created in the field of particular economic and social rights such as social security adjudicators or commissions. The UN Committee on ESCR has emphasized that these institutions 'have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights'. The Committee on ESCR has identified activities for national institutions in the field of economic and social rights such as:

- a) Promoting educational and information programmes;
- b) Scrutinizing existing laws, administrative acts, draft bills and other proposals to ensure that they are consistent with the ICESCR;
- c) Providing technical advice or undertaking surveys;
- d) Identifying national level benchmarks against which the realization of Covenant obligations can be measured;
- e) Conducting research and inquiries designed to ascertain the extent to which the rights are being realized;
- f) Monitoring compliance with specific rights recognized under the ICESCR and providing reports thereon to the public authorities and civil society; and
- g) Examining complaints alleging infringements of economic and social rights.⁶³

The reality of the relationship between the international complaint system in institutionalizing interpretations and domestic view of justiciability, has been explained very accurately by the UN Committee on Economic, Social and Cultural Rights: 'As long as the majority of the provisions of the Covenant ... are not the subject of any detailed jurisprudential scrutiny at the international level, it is most unlikely that they will be subject to such examination at the national level either'.⁶⁴

Therefore, the domestic system has to have a solid legal ground with working solutions and mechanisms protecting economic and social rights in domestic legal systems require a range of mechanisms. Some have been listed as: a) the entrenchment of these rights as fundamental norms in the legal system, preferably in the country's supreme law; b) comprehensive policies and legislation that give concrete effect to the rights; c) accessible and effective judicial and administrative remedies for redressing violations

⁶³ *ibid*, p.82.

⁶⁴ *ibid*, p.49.

of the rights; and d) appropriate national institutions vested with the mandate and powers to monitor and investigate economic and social rights.⁶⁵

2.13 The right to social security

The right to social security is a part of economic and social rights and protected in several international treaties. To focus on how the rights to social security can be enforced, the previous chapters have introduced the international legislation, obligations, protection and remedies on the matter. To understand the wide meaning of the social security it is in place to start from its formation in the society.

2.13.1 The right to social security

In 1883-84, Germany, Otto von Bismarck as Chancellor, established a social security system that since then has been a type of model for social insurance: workers and employers were to pay contributions to finance sickness insurance and workers' compensation. Some years later, the schemes were accompanied with an old-age insurance programme, partly financed through taxes. The justification of social security schemes has varied from time to time and from state to state. The need for social security legislation can be argued on the basis of social justice or social equality, as well as in terms of securing social and political stability.

A difference is often made between social security and social welfare. Through classification the effort is to separate between the 'earned' social security benefits of workers and their families, and any individual or group receiving need-based assistance from public funds, raised through tax and in kind revenues. Although very often the term social security is used in a common meaning, covering both social insurance and social assistance.⁶⁶

However, the international labour standards on social security were already operating as a base to the Universal Declaration of Human Rights to secure the right to social security, aiming to provide protection in terms of personal coverage, risk coverage and an adequate level of compensation. To strengthen people's security through a greater social solidarity has been evaluated in the ILO Survey to mean that "basing social security systems on such organizational principles as risk pooling and collective financing by the members of the community, and guaranteeing a minimum level of protection sufficient to maintain the family of the beneficiary in health and decency." To accomplish this, the government, the representatives of different groups of interest groups needs to present and "the State must accept general responsibility for the due provision of benefits and for the

⁶⁵ *ibid*, p.84.

⁶⁶ *ibid*, p.211.

proper administration of the institutions and services concerned”. Having said that the “international social security Conventions offer perhaps the largest set of options and flexibility clauses allowing for the goal of universal coverage to be attained gradually and in step with economic development”.⁶⁷

Yet, the share of responsibility of the State is taken by private insurers for people to insure themselves for the future, is not the agenda of ILO standards. The state can not release the primary duty bearer’s role in social security.⁶⁸ The future global social security floor is to avoid the risk-based direction to move toward mixed forms of social protection.⁶⁹

2.13.2 Classification of social security

Within the extensive notion of social security, numerous classifications can be made. One notion can be drawn by distinction between general and situation-based social security. Most of the specific forms of international treaties, if not all, are understood to cover the specific forms of social security.

The juridical basis for social security benefits varies from private law contracts and collective agreements that bind private companies or other parties to the contract in question. Legislated and regulated by the statutory and constitutional provisions enacted by the state. Some social benefits may be optional in the sense that administrative authorities have public funds at their disposal but there is no actual ‘right’ of the beneficiaries to obtain those funds. The legal origins for the benefits might be used as a foundation to classify them under, or outside of, the concept of social security. Such a criterion is also often used to categorize need-based social assistance outside social security, but the improvement of international protection of social and economic rights, primarily through the acceptance of the European Social Charter (ESC), has modified the situation. Important difference in social assistance for persons without adequate resources, paid from general tax revenues and not on the basis of an insurance-type scheme with individual contributions, must also be provided as a right and not on the basis of complimentary discretion by the authorities.

The European Committee of Social Rights has expressed its concern about the possibility that increased flexibility and individual choice could lead to the marginalization of the more vulnerable members of society. It has concluded that ‘it is of paramount importance that social security systems are adequate to protect the population’, particularly as regards certain vulnerable groups. This position indicates a shift towards directing more

⁶⁷ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. parts 34-35.

⁶⁸ *ibid*, parts 36-37.

⁶⁹ *ibid*, part 53.

attention to the implications of a social security system aiming to secure basic subsistence to all members of society.⁷⁰

In the ILO General Survey on Social Security 2011⁷¹, the Committee of Experts observed that it was a new era to adopt new approaches regarding the future social security. The Committee of Experts evaluated that the new approaches are to see to promote continuity, coherence and sustainability, and further to develop social security based on the unwavering principles of social justice, solidarity and fairness.⁷² Although social security is a combination of social and economical aspects it is also a legal right. Therefore the ILO Survey states that “from the individual’s point of view, social security is rights based: consisting prescribed entitlements, qualifying conditions and procedural guarantees, and details of which are defined in national laws and regulations. The Survey also explores ways to extend, strengthen and preserve social security under the challenging economic conditions faced by many countries”.⁷³

To classify social security in a rights-based approach the social security empowers individuals to protect themselves against social risks. The diffusion of “rights consciousness” within communities can encourage citizen’s mobilization against various forms of discrimination and division and help generate a kind of “social consensus” on the object of social security for all. Improving the capacities of beneficiaries is one of the basic principles of good practice in promoting access to social rights, like enabling toward entrepreneurship when threatened by unemployment or strengthening social capital by enabling networks to emerge. Individual and collective empowerment, that is human and social capital, is mutually supportive and bringing various actors together creates links between micro-level initiatives and macro-level commitments in order to ensure sustainability. In order to secure sustainability over time, it is important that empowerment measures involve a wide variety of actors and be continuously financed. In addition, enabling people to become less vulnerable by providing adequate training, education and health care also has the consequence of reducing the needs for expenditures on social and other assistance in the future.⁷⁴

The ILO, as a body of standards, has produced the foundation of the instruments in social security and brought it under the rule of law also with several Conventions and Recommendations that are even today globally valid and legal. Therefore, the Survey also stresses the combination of the

⁷⁰ *ibid*, pp.211-213.

⁷¹ A global survey was conducted by the International Labour Organization (ILO), concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, in 2011. It was a Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution).

ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011].

⁷² *ibid*, part 2.

⁷³ *ibid*, part 7.

⁷⁴ *ibid*, part 164.

economic and social development resulting democracy and cohesion in the long-term. In 1999, ILO was faced with a challenge by the Report of the Director-General entitled 'Decent work' to tackle social security from its roots to the changing situations of economics, industrialization and globalization up to date. During early 2000, the International Labour Conference (2001) came to its conclusion that "social security was recognized as a basic human right and in fundamental means creating social cohesion and strengthening social peace and social inclusion. If properly managed, it enhanced productivity by providing income security and social services. In order to be effective, initiatives to establish or extend social security required social dialogue and good governance." In year 2003, ILO launched the 'Global Campaign on Social Security and Coverage for All', "implementing in practice the global consensus of governments, employers' and workers' organizations to broaden social security coverage, particularly in the informal economy, and raise awareness of its constructive role in economic and social development."⁷⁵

However, the ILO mandate of social security has largely outgrown its standards and needed to be reformed. The available means were no more sufficient to meet the new ends. Therefore, the actions were also to focus beyond the formal sector in economic and employment to have all the citizens to be included in the sphere of social security.⁷⁶

2.14 The main human rights provisions on the right to social security

2.14.1 The Universal Declaration of Human Rights, Article 25

The 1948 Universal Declaration of Human Rights (UDHR), in Article 25 states that everyone 'as a member of society' has the right to social security. In addition, several forms of social security are covered by Article 25(1). However, the UDHR framers did not define a minimum core of social and economic rights indispensable for the dignity and personal development of the individual.⁷⁷

⁷⁵ *ibid*, part 16.

⁷⁶ *ibid*, part 30.

⁷⁷ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.213-214.

2.14.2 The International Covenant on Economic, Social and Cultural Rights, Article 9

The International Covenant on Economic, Social and Cultural Rights (ICESCR) has a general clause on the right to 'social security, including social insurance' (Article 9). Although the text of the Covenant is rather general on social security issues, it can be explained by the existence of advanced ILO standards in this field, and the intention to continue with ILO standard-setting and implementation.⁷⁸

2.14.3 The Social Security (Minimum Standards) Convention of 1952 (No. 102)

The principal ILO instrument in the field of social security is the Social Security (Minimum Standards) Convention of 1952 (No. 102). This menu-type convention is structured around nine definite branches of social security but relevant to this thesis two; unemployment benefit (Part IV) and old-age benefit (Part V).

This list for different forms of social security exists in the reporting guidelines under Article 9 of the ICESCR, reflecting the significance of ILO standard-setting for the understanding of the obligations under the ICESCR. This intense relationship also means that the ICESCR mainly focuses on social security in the narrow sense: income-based and situation-based cash benefits for workers and their families. Even though Article 11(1) of the ICESCR is related on the right to an adequate standard of living, it also relates to social assistance and other need-based forms of social benefits in cash or in kind to anyone without sufficient resources.⁷⁹

The Convention No. 102 was the first to establish ground provisions on social security and its appliance. The provisions in the Convention left room for the states to choose from and create their own designer social security system, as the Convention also promoted that one system of social security is not necessarily a good social security system for all. Instead, the Convention established the minimum threshold to the member states involved. As part of the minimum requirement the States would take care of the social security funds to be invested only to sustain the social security system. (Articles 71(3), 72(2))

Further long in time, the States Members of the Council of Europe incorporated the minimum standards of social security Convention No. 102 into the European Code of Social Security (Code) signed in Strasbourg on 16 April 1964.⁸⁰

⁷⁸ *ibid*, p.214.

⁷⁹ *ibid*, pp.214-215.

⁸⁰ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from:

2.14.4 The European Code of Social Security 1964 (Code)

The Preamble of the European Code of Social Security 1964 recognizes the collaboration of the ILO in the preparation of this instrument, which was aimed “to encourage all Members to develop further their system of social security”. Their experience, monitored by the ILO’s supervisory system, convinced the authors of the Code, as it is stated in the Preamble, “that it is desirable to establish European Code of Social Security at a higher level than the minimum standards embodied in international labour Convention No. 102 concerning minimum standards of social security”. Such higher standards were also prepared by the Council of Europe, again, with the active collaboration of the ILO and embodied in the Protocol to the Code.⁸¹

The sphere of the protection of persons, however, varies between the provisions of the European Code of Social Security 1964 (Code) and the commitments of a given State Party, but the weight is clearly on the protection of employees and other economically active persons. Many of the provisions, however, comprise, at least as an optional undertaking, all residents or certain specific ‘inactive’ groups.

Not only human rights treaties distinctively on economic and social rights, but also treaties primarily aimed at the protection of other categories of rights are important to social security issues (informal sector issues).⁸²

2.14.5 Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)

The Convention No. 168 is up to date Convention that looks the social security system beyond the general scope. With regard to the means of protection against unemployment, Convention No. 168 broadens the range of benefits and employment and social services for the unemployed persons, including special programmes to promote additional job opportunities and employment assistance for identified categories of disadvantaged persons, such as women, young workers, disabled persons, older workers, the long-term unemployed, migrant workers and workers affected by structural change (Article 8). The adoption of special measures to meet the specific needs of such disadvantaged groups and other categories of persons who have particular problems in the labour market, shall not be considered as

http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. parts 69-70.

⁸¹ *ibid*, part 70.

⁸² Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.218-219.

unequal treatment or discrimination (Article 6(2)). Further means by which social security can contribute to protection against unemployment and its prevention through active employment policy measures are mentioned in Recommendation No. 176 (Safety and Health in Mines Convention), which, is the only ILO instrument expressly foreseeing such measures to be taken in the situation of economic crisis.⁸³

The Convention supports to active measures with unemployed to seek work and be employed. Regardless of the poor ratification record, Finland has ratified the Convention coming into force 17 October 1991. Maybe this is due to the higher standards of it than in the Code.

Unemployment security is important for the economy of the country concerned and to the unemployed self, as the income benefit “smoothes consumption and facilitates the adjustment of the labour market”.⁸⁴

2.14.6 The European Social Charter 1961 and the Revised European Social Charter 1996

Both of the Charters, ESC (1961 and 1996) with several their provisions are aiming to protect the right to social security in a broad sense. Specifically, Article 12, using the same meaning for securing social security as the ILO does to ensure the right to social security, and especially in Article 12(2), has a reference to the ILO Convention No. 102 to be used as a minimum standard under the ESC. A reference of a higher social security standard of the ILO Convention No. 102 is made in the Revised ESC, as reference to the European Code of Social Security. Article 12(2) is complemented by Article 12(3) complements Article 12(2) by establishing an obligation to the contracting parties to maintain ‘to raise progressively’ the system of social security to a higher level.⁸⁵

2.14.6.1 Article 12

However, a definition for a proper level for social security is not defined in the ESC as such. Nevertheless, some indication can be drawn from the different provisions, interpretations and implementations that legal obligations of the State Parties can be seen as a joint effect of them.

According to Article 12(1) the State Parties have an obligation to ‘establish and maintain a system of social security’. However, a conclusion is drawn that if there are substantial gaps in social security systems or the benefit levels are low, the European Committee of Social Rights is in the opinion

⁸³ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 102.

⁸⁴ *ibid*, part 105.

⁸⁵ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, pp.215-216.

that it implies, that a State Party is not complying with its obligations under the provisions. To consider the minimum standard of social security benefits, the references in Article 12(2) of the ESC to ILO Convention No. 102 and in the European Code of Social Security in the same article of the Revised ESC, establishes the material minimum standards. It should be noted that the ratification of the European Code of Social Security obligates a higher standard of social security than in the ratification of ILO Convention No. 102. As earlier mentioned, Article 12(3) sets that the States Parties are to 'raise progressively' the system of social security to higher level which, by definition, means that the standard shall be higher than the ILO minimum standard. Interestingly though, the European Code of Social Security and its Protocol have set standards, that have been interpreted as a kind of 'ceiling' for the efforts that can be understood as a legal obligation under Article 12 of the ESC. Similarly this has been mentioned in the explanatory report that the Revised ESC states that the Revised European Code of Social Security (1990) could be taken into account in relation to Article 12(3) of the Revised ESC. However, this mention of the 'ceiling' does not mean that a prohibition to 'go back', i.e., to reduce the general level of social security could not be drawn from Article 12.

In addition to the fact that the Revised ESC demands a higher level of protection for social security rights, it also introduces certain new rights. The system of supervision has been significantly improved by the entry into force in July 1998 of the Additional Protocol providing for a procedure for collective complaints, to also to guarantee the level of protection in relation to social security.

The Council of Europe (CoE), has produced the 1964 European Code of Social Security (Code), in addition to the ESC. In 1990, the Code, like the Charter, was revised, substantively, but the new version has not yet entered into force. As in Eide, Krause and Rosas it has been analyzed that there is a normative connection between the (revised) Code and the ESC, since Article 2 of the Code establishes somewhat different obligations for states that are also parties to the ESC and have undertaken to regard themselves to be bound by its Article 12(1)-(3). A notion is also made that similarly to ILO Convention No. 102 and the ESC, the Code is also a menu-type treaty, leaving it for the States Parties to select those treaty provisions they undertake to be bound by.⁸⁶

2.14.6 The Charter of Fundamental Rights of the European Union 2000

In the Article 34 of the EU Charter on Fundamental Rights, adopted by the European Council in Nice in December 2000, covers social security and social assistance. According to this formally non-binding instrument 'the Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as ... old age, and the case

⁸⁶ *ibid*, pp.217-218.

of loss of employment'. The traditional form of listing the branches of social security is very obvious again.⁸⁷

2.14.7 Year 2000 and onwards

In the beginning of year 2000 social security reforms were in need to have more unified and coherent directions. It was clear that the social security reforms were a topic of economic and social policies to come. In the meanwhile, the social security system had a turn toward a self-acting securing. Private insurers came on the markets and individuals were able to increase their sense of social security for old age or an emergency in life. It was not enough that the employers were imposed compulsory taxes and fiscal payments toward the employee's pension fund. As the Committee noted, clearly such a redistribution of responsibilities yields positive results both in terms of financial and human discipline, in particular, minimizing "welfare dependency" and the disincentive effects of passive income maintenance. However, in pursuing these positive results, governments should not lose sight of the possible side effects for which society might later have to pay an unacceptable "social price".⁸⁸

To mark the anniversary of the Code in 2004, the Committee of Experts observed that, together with the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Code:

- (1) formed the hard core of the European Social Model;
- (2) filled the basic human right to social security proclaimed in the European Social Charter with concrete substance and guarantees;
- (3) provided the benchmark to judge the effective exercise of the right to social security in the European countries;
- (4) establishing minimum standards of social security in itself and higher standards in its Protocol, the Code traced a straightforward vector for progressive development of social security systems in Europe;
- (5) during the last decade of the twentieth century, the Code/Convention No. 102 remained a stronghold against the excesses of certain neo-liberal economic policies, putting in danger social cohesion and solidarity in the European nations;
- (6) gave the necessary guidance to Central and Eastern European countries transforming their social security systems to provide protection in the emerging market economy;
- (7) at the beginning of the twenty-first century, the Code/Convention No. 102 continued to be an important reference point in the accelerating process of reforms in social security extending throughout the continent;

⁸⁷ *ibid*, p.219.

⁸⁸ ILO General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. [online] Available from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011]. part 138.

(8) safeguarding the acquired standards of social protection, orient the Code/Convention No. 102 the reform process towards guaranteeing better social security in Europe with a higher level of protection of the population and prevents this level from sliding backwards.⁸⁹

2.15 Complaint mechanism

The main supervision for economic and social rights is state reporting, although the right to social security is, internationally monitored and protected through the implementation mechanisms of the relevant treaties. Nevertheless, in the ILO, functioning complaint procedures already exists.⁹⁰

2.16 Informal economy

As the informal economy has an impact on the labour conditions and social security, I will briefly state here some facts that relate to earlier mentioned⁹¹ sphere of protection of employees and other economically active persons. According to ILO estimation in the developing countries the effect of the informal economy is between 35 and 90 per cent of the total employment. In the informal economy, the employees all over the world suffer from low or non-existing social security, lower incomes, generally poor working conditions, etc. In addition to have poor working conditions, and illegal aspects, informal economy generally is also seen to increase poverty. The ILO's approach to the informal economy is thus an integrated one. Its programme is organized around three principles: 1) a more systematic approach by all ILO programmes to deepen their understanding and work with respect to the challenges of informal economy; 2) an integrated and coherent perspective to analyse and support the transition to formality across the four decent work objectives; and 3) responsiveness to the diversity of local demands. Though, all the ILO approaches are also easy to follow in a national level in fighting against informal economy and its consequences.

The Global Jobs Pact adopted by the ILC in 2009 recognizes informal economy workers amongst those particularly vulnerable to the crisis and proposes policy measures to mitigate its impact and speed up recovery. These include the implementation of employment guarantee schemes,

⁸⁹ *ibid*, part 75.

⁹⁰ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.220.

⁹¹ Section 9.3.4 on page 17.

targeted employment programmes, public works, support to micro- and small enterprises and the promotion of a social protection floor.⁹² Here as an example and demonstration is one of the many diagrams about a division between different groups of workers and their sex who belong to the particularly vulnerable groups.

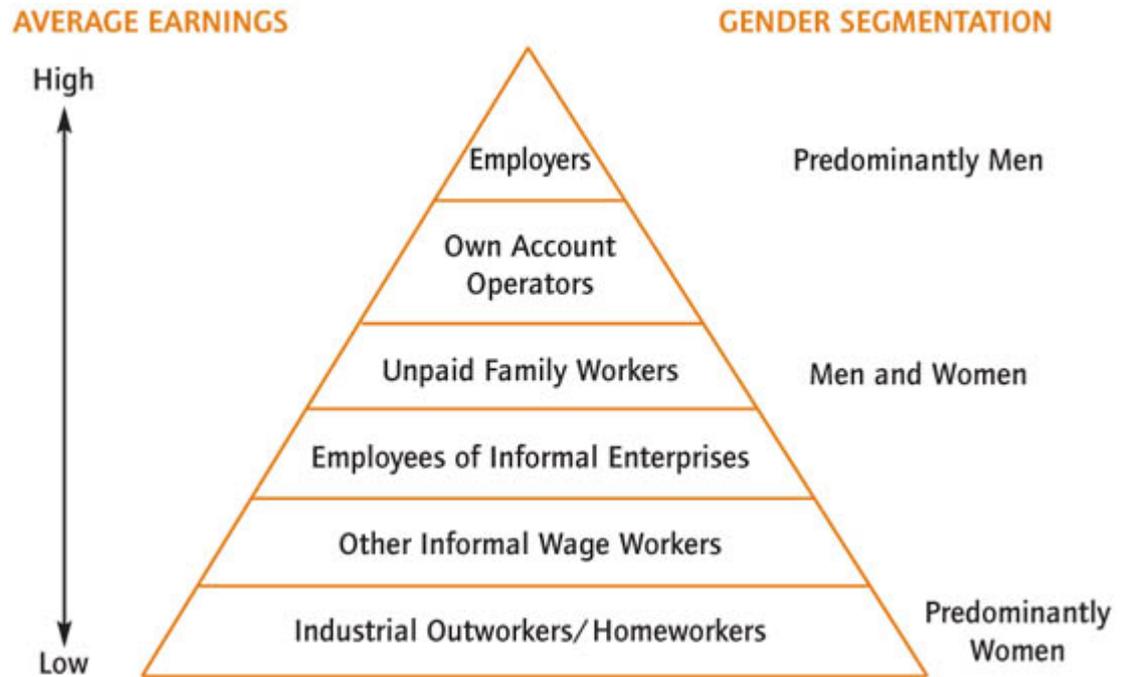


Figure: The Gender Segmentation of the Informal Economy⁹³

⁹² International Labour Office. Employment for Social Justice and a Fair Globalization Overview of ILO programmes. [online] Available from: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_140951.pdf [8.5.2011]. pp.1-2.

⁹³ [online] Available from: http://www.idrc.ca/en/ev-83646-201-1-DO_TOPIC.html [8.5.2011].

3 National Social Law in Finland

3.1 Introduction

In the late 1980s and the 1990s many Western European countries were faced with increasing costs of social security. The management of resources and the introduction of more flexible arrangements left room for improvement and private initiative. The actual reductions to certain social security schemes were rearranged in an effort to accommodate the growing costs. The high demands to cut social security costs remain still today; the proportion of the elderly is constantly increasing and together with the prevailing ideological choices that advocate reduced public spending. According to the Statistics Finland, at the moment, the payments of the social security are the biggest bulk is toward pensions by 34,3 per cent, and after sickness and health, disfunction, family and children, the rate of the unemployment is 7,9 per cent. Altogether the portion of the social security expenditures of the GNP is rising, and in 2009 it was 30,6 per cent of the GNP in Finland.⁹⁴

As the payments in cash are the primary form of social security benefits, there is a difficulty to separate and maintain between cash payments and social services or other benefits.⁹⁵

In 1990, to secure the status of social security, the Revised European Code of Social Security was drafted with the participation of the ILO and supporting strong structural similarities to the ILO Convention No. 102 (1952). The sphere of protected persons varies between the provisions of the Code and the commitments of a given State Party, but the emphasis is clearly on the protection of employees and other economically active persons. Several of the provisions, however, comprise at least as an optional undertaking, all residents or certain specific 'inactive' groups. Not only human rights treaties specifically on economic and social rights, but also treaties primarily aimed at the protection of other categories of rights and relevant to social security issues.⁹⁶

For the national legal status of the social rights, the UN Committee on Economic, Social and Cultural Rights has stated a clear indication that a number of provisions in the CESCR are to be considered 'capable of immediate application by judicial and other organs in many national legal systems'. The negative duties imposed by economic and social rights (the duty 'to respect') are not generally dependant on legislative measures of implementation. Prohibitions such as the duty not to discriminate or

⁹⁴ [online] Available from: http://www.stat.fi/tup/suoluk/suoluk_sosiaaliturva.html [21.6.2011].

⁹⁵ Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, pp.212-213.

⁹⁶ *ibid*, pp.218-219.

interfere without justification in people's enjoyment of their economic and social rights are capable to have a direct enforcement by courts and administrative bodies without legislative intervention. Thus, legislation can play an important role in ensuring that both public and private sectors respect these prohibitions and by providing effective and accessible remedies.⁹⁷

In countries where international treaties on economic and social rights are incorporated into domestic law; either due to 'monism' or as a consequence of a treaty specific incorporating statute, in which treaties might also become applicable in courts. When the Parliament of Finland gave its consent to the ratification of the ESC and passed an incorporating Act, the Social Affairs Committee explicitly stated that the provision of the ESC would become applicable in domestic courts and for administrative authorities. Above examples demonstrate the possibilities for treaty provisions on social and economic rights to become 'justiciable' on the domestic level are highly dependent on the constitutional framework into which the treaty provisions are incorporated. Yet, treaty provisions may develop into 'self-executing' or directly applicable, even if this was against the actual intent of their framers.⁹⁸ This illustrates that there are situations in which a treaty provision, a national constitutional clause or a statutory affirmation of an economic or social right is understood as a creation of a 'subjective right'⁹⁹, capable of being invoked by an individual in a court case as a basis of a lawsuit or an appeal. For instance, in the Nordic countries one can note a gradual trend toward securing various benefits and services, for example, social security and health and education as individual rights. Also, some rights have been defined as subjective rights in Acts of Parliament in Finland. The Constitutional Rights Reform in 1995 formulated some provisions on economic, social and cultural rights as subjective rights at the constitutional level. The same provisions were included in the new Constitution, entering into force 1 March 2000.¹⁰⁰ The protection that a constitutional provision or an international treaty provides to a certain right is based on an internationalized practice of interpreting, defining and putting into effect the original provision on the right in question.¹⁰¹

⁹⁷ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.77-78.

⁹⁸ *ibid*, p.49-50.

⁹⁹ Subjective right is a power given by the legal system to the citizen to secure or obtain a certain goods. It also means a person's legal status toward another person who has an obligation that is corresponding the other person's right. The legal system protects the power provided to the individual against claims from others and grants a subjective right against authorities in executing the particular right. (Tuori, p.189)

¹⁰⁰ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.51.

¹⁰¹ *ibid*, p.42.

3.2 Background of the Finnish social security system

The Second World War was a turning point in the development of the welfare state of Finland in social policy and social law, although it developed to its institutional face during the 1960's and 1970's. The English Beveridge doctrine from 1942, the "fight against the five evils" (i.e. shortage, sickness, ignorance, poverty and unemployment) was also well received in Finland.¹⁰²

In the beginning of 1990's Finland entered the biggest recession so far. The national product decreased and unemployment rate increased to almost 20 per cent. The banking system nearly collapsed and to revitalize it, tens of billions of Finnish Marks (prior to Euro) were invested in recovery. The economy was in crises and the state debt was in its highest. As a consequence, social expenditures multiplied, when the gross domestic product (GDP) share decreased and the wide unemployment rate caused the social security benefits to increase (37.5 per cent of the GDP in 1993). Instead of creating new benefit systems, the national legislation focused on improving the existing laws. Besides changing the benefits and the requirements for the system, the development focused on to regulate the proceeding and appealing possibilities within the Social Insurance Institution of Finland (KELA).¹⁰³

3.3 Characteristics of the Finnish Social Law

The social law has recently started to become more stabilized as in an independent area of law in Finland and forming its own general doctrine with basic and legal principles.¹⁰⁴

According to Francois Ewald, it is characteristic for social law to draw from the legal regulations and decision makings in the society but also to ease the division of the traditional existence and legal norms. In addition, legislation is based on compromises between interest groups by applying the balance and fairness between them.¹⁰⁵

Tuori, on the other hand, considers that defining social policies the starting point is its goals. The social policies determine the governmental aims and measures 1) to guarantee a decent livelihood to different interest groups, families and individuals, 2) to secure them in social risks, and 3) to secure

¹⁰² Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, p.90.

¹⁰³ *ibid*, pp.105-106.

¹⁰⁴ *ibid*, p.2.

¹⁰⁵ *ibid*, p.3.

the availability of the services. As fourth, trade equality and the principle of justice might also be attached to his list in characterizing social policies. The problem of a developed social security policy though is that it emphasizes the social risk being as solely to secure livelihood.¹⁰⁶ Even though, the chosen perspective of social law has an effect on the interpretation, systematization and application.¹⁰⁷

The norms regulating the Finnish social law benefits are very technical and difficult not only for the applicants and receivers but for lawyers too. The nature of the social security decisions are mass phenomenon in rulings and in no other area of law are there so many meaningful decisions made, than in social law, in a yearly base.¹⁰⁸¹⁰⁹ In the first decision making instances and factual procedures the cases are handled mostly by other professionals than lawyers.¹¹⁰

3.4 Finnish social security system

“Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.” (section 19 subsection 2, the Finnish Constitution) Although, this does not alone establish a subjective right to have a basic income benefits, it obliges that these rights will be guaranteed as subjective rights by regular law.¹¹¹ The Constitutional requirement in section 19.2 is provided in other legislation, providing a subjective right to the benefits in social insurance.

¹⁰⁶ *ibid*, p.8-9.

¹⁰⁷ *ibid*, p.11.

¹⁰⁸ *ibid*, p.6.

¹⁰⁹ KELA (Kansaneläkelaitos) is “Supervised by the Finnish Parliament, Kela is an independent social security institution with its own administration and finances. The parliamentary supervision is exercised by a group of Trustees appointed by Parliament.” [online] Available from: <http://www.kela.fi/in/internet/english.nsf/NET/260302104637EH?OpenDocument> [4.5.2011].

The benefits provided by Kela are generally available on application only. If one thinks that the decision s/he received from Kela on her/his application is wrong, s/he can appeal to have Kela amend it. The appeal can be written in one’s own words, and taken to Kela office. The decision will be re-examined by Kela and, if found to be wrong, amended. The amended decision will be mailed to the applicant. If Kela declines to amend the decision, it will forward the appeal to the Social Security Appeal Board, and the highest court of appeal being the Insurance Court. Both will issue the applicant with a written decision on hers/his appeal.

[online] Available from:

<http://www.kela.fi/in/internet/english.nsf/NET/110908120300HS?OpenDocument&navtdid=220210095001PM> [4.5.2011] Note the difference here for the general court proceedings in Finland.

¹¹⁰ Tuori, p.162.

¹¹¹ *ibid*, p.203.

These are in the unemployment law (602/84), Labour Market Support Act (1542/93) and in Pensions Act (347/56).¹¹²

Since the section 19.2 rights have a subjective cover they also enjoy a stronger protection than rights in section 19 subsection 3¹¹³ and section 19 subsection 4^{114, 115}.

The Finnish social security system is divided on social insurance, social assistance and social service. The basis for the division is based on both the means and principles of social policy and also on administrative organizations. Social insurance and social assistance almost solely offer cash payments whereas social service offers both, cash payments and services.

The social insurance is an obligatory insurance by the government, legally arranged, for social risks. The benefits of the social insurance relate to situations where employment has been hindered. Primarily social insurance is trying to cover the livelihood of individuals and families in risks of old age, sickness, disability, unemployment and occupational accidents. The benefits of the social insurance are financed by the insurance payments but also by state and municipal taxes.¹¹⁶

The connection that the Finnish welfare state has to the paid labour society has in some parts been analyzed to exist at least in the following situations. Firstly, the paid labour guarantees the finances of the welfare state. During times, the welfare state has been financed by taxing the labour incomes and the consumer goods. Secondly, the main focus has been in paid labour, securing the public health care, health insurance and temporary unemployment benefits, in order for the welfare state to return as many able-bodied citizens as possible to a rewarding paid labour and to produce new able-bodied citizens with the help of the family concentrated social benefits. The third connection between the welfare state and paid labour is the earnings bond of the benefits. Fourthly, the claims for the benefits, such as the regulations of the deductible and waiting period and the stipulation of interest to work, has been qualifications for taking care of the obedience of the norms of paid labour. Ultimately, the welfare state has itself created jobs in social and health care services which have made an important impact on increasing the paid work of women. This will help in the matters that otherwise a continuing unemployment will induce financial crises in a welfare state. In addition to that, a permanent unemployment creates new

¹¹² *ibid*, p.219.

¹¹³ 19.3: "The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children." [online] Available from: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf> [4.5.2011]

¹¹⁴ 19.4: "The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing." [online] Available from: <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf> [4.5.2011]

¹¹⁵ Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, p.220.

¹¹⁶ *ibid*, pp.15 and 19.

expectations on livelihood. Also, increasing short term and part-time jobs are elements to destabilize the paid labour society.¹¹⁷

The Finnish social law system is extremely complex and its characteristics are defined by combination of several reforms and, instead of creating new benefit systems, the legislation has focused on the fine adjustments of the existing systems.¹¹⁸

In regard to the basic need, the legal scholars have interpreted that in the section 19 of the Finnish Constitution, the basic income security requires case-based means test; however, in the section 19 subsection 2, it is guaranteed to everyone in the situations of life mentioned in the section 19, without any means test, and it is more than the basic income support. However, the Constitution does not define what amount is necessary or reasonable for the basic need.¹¹⁹

Therefore, even the question of which benefits are included to basic security benefits and to minimum basic security is not clear. It has been interpreted that pensions and labour market support benefits are frequently considered to be included to the minimum basic security benefits also. To clarify, it is simpler to say that the minimum is formed by the benefits outside the labour markets and work related incomes.¹²⁰

3.4.1 Personal accountability in the social security system

Everyone has the duty to take care of themselves to the extent of their capabilities. A person seeking work, within the working age and working condition, has to register to the Employment and Economic Development Office and to accept the offered job and if there is not one, the person needs to apply for the unemployment support benefit which is the primary social benefit in relation to the basic income benefit. Should the person fail to register to the Employment and Economic Development Office and to deny accepting the offered work or in any other ways by his/her own conduct sabotages the possibilities to be offered work or a labour political actions, his/her basic income support will be deducted by maximum of 20 per cent

¹¹⁷ *ibid*, p.109.

¹¹⁸ *ibid*, p.107.

¹¹⁹ Pelkonen, L. Committee for reforming social protection (SATA Committee) (2009), *Toimeentuloturvan nykytilanne pääpiirteissään* [The status of the basic income today], Helsinki, Helsinki University Press, Appendix 4, p.22. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7508.pdf [4.5.2011].

¹²⁰ Moisio, P. Committee for reforming social protection (SATA Committee) (2009), *Vähimmäisturva ja köyhyysraja Suomessa* [Minimum income and poverty level in Finland], Helsinki, Helsinki University Press, Appendix 5, p.9. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7508.pdf [4.5.2011].

and if so needed, another 20 per cent, adding all together by 40 per cent. The deductions are short-term and they require a written plan to the client.¹²¹

The Constitutional Law Committee noted that if a person has been offered a factual opportunity to earn his/her income by working or taking part to a labour political action, it can be considered that the person meets the security denoted in the Constitution.¹²²

3.5 Administrative work in the Finnish social security system

According to the Constitution of Finland, section 2, subsection 3 “The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.” After the Constitutional reform, in 2000, the meaning of the basic rights has increased in the social law decision making. In the arguments are nowadays included the economic, social and cultural rights, and might therefore have an effect in the individual decision making process on benefit payments.¹²³

Nevertheless, the public authorities are under the section 22 of the Constitution “The public authorities shall guarantee the observance of basic rights and liberties and human rights.” In the opinion of the Government, the public authorities can fulfill obligations by legislating laws that secure and protect the basic rights and by allocating economic resources.¹²⁴

Economic and social rights are constitutionally protected as objective legal norms in the form of directive principles or legislative commands. These objective norms do not give rise to subjective rights which can be directly enforced in the courts. They depend on legislation for their concrete realization. Nevertheless they may provide indirect protection to economic and social rights as interpretative guidelines for the judiciary and executive authorities. The principle of proportionality is a key factor in determining the degree to which it is permissible to limit civil and political rights to achieve social justice objectives.¹²⁵

¹²¹ Pelkonen, L. Committee for reforming social protection (SATA Committee) (2009), *Toimeentuloturvan nykytilanne pääpiirteissään* [The situation of the basic income today], Helsinki, Helsinki University Press, Appendix 4, p.23. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7508.pdf [4.5.2011].

¹²² Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, p.215

¹²³ *ibid*, p.122.

¹²⁴ *ibid*, p.203.

¹²⁵ Eide, A., Krause, C. and Rosas, A. (2001), *Economic, Social and Cultural Rights A Textbook Second Revised Edition*, 2nd ed., Hague, Kluwer Law International, p.75.

3.6 Principles of the administrative law

The general administrative law principles have to be considered in all kinds of administrative work, including in social law. These are; 1 Equality, 2 Objectivity, 3 Proportionality, and 4 Intentional liability of purpose. There has also been discussion on 5 Reasonableness and 6 Confidentiality as general administrative legal principles.

1 Equality: equality of Treatment expects that the matters that are similar in the core meaningful areas will be solved alike. In a coherent practice custom, equality means approaching the matter by the same authority point of view and by adding a time line.

2 Objectivity: This approach requires objectivity from the authority deciding on the matter.

3 Proportionality: The means used have to be sensible and proportionate to the goals achieved.

4 Intentional: Authorities are only allowed to use their authority in matters that can be rationalized.

5 Reasonableness: Used in matters that has a specific nature that has to be taken into consideration and therefore enables a deviant decision argument.

6 Confidentiality: The party involved has to have confidence for a favorable decision making by the authority.¹²⁶

3.7 The national independent social security institution

The Social Insurance Institution of Finland (KELA)¹²⁷ is an independent legal entity, remaining outside the real governmental subjection. Although, the Parliament has a constitutional right, in section 36 subsection 1, to supervise KELA. This means that the recommendations of the Finnish Ministry of Social Affairs and Health are only considered as weakly obligating legal sources.¹²⁸ Yet, KELA does not have the authority to give legally binding norms that would have an effect on an individual benefit decision. This is due to the accuracy requirements on delegating the authority to give or create legal norms.¹²⁹

¹²⁶ Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, pp.152-153.

¹²⁷ “Supervised by the Finnish Parliament, Kela is an independent social security institution with its own administration and finances. The parliamentary supervision is exercised by a group of Trustees appointed by Parliament.” [online] Available from: <http://www.kela.fi/in/internet/english.nsf/NET/260302104637EH?OpenDocument> [4.5.2011].

¹²⁸ Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, pp.145-146.

¹²⁹ *ibid*, pp.147-148.

3.8 Implementing international law into Finnish national law

The ratification of an agreement or another international obligation in accordance of the Finnish Constitution, section 94, only creates international effects (i.e. a dualistic system). In order to have implementations into the Finnish legal system they need to be enforced separately (section 95). If an agreement or another international obligation will have regulations belonging to the legislation these will be enforced by the Parliamentary Act. In any other case the enforcement can be legalized with a decree. According to section 22, the Finnish law should favour the human rights supporting interpretations to its most extent, stating that “The public authorities shall guarantee the observance of basic rights and liberties and human rights.”. This is also to avoid conflicts within situations of *lex superior* and *lex posterior*.¹³⁰

The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter (ESC) obligate the involved parties, including Finland. As a general rule, ICESCR and ESC do not establish the same kind of rights to individuals. The State orientation of the agreements is reflected by the obedience of the agreements based on the compulsory reporting policies. Individual complaints are not allowed. Therefore, the economic, social and cultural based agreements and treaties have positive legal effects that require the State to act positively toward executing the rights stated in the agreements/treaties.¹³¹

According to Tuori, the possible legal effects of the economic, social and cultural (esc) rights in the Finnish legal system are listed below.

1. The effect of a subjective right. The rights provide to the individual an immediate right against the state (government) a subjective right to social benefit. In Finland, an example of direct applicability is minimum income support.
2. Competence effect. They give the legislator competence that they would not otherwise have, for example, because of some other basic right.
3. Mandate effect. They set the right to the state or the legislator an obligation to take actions to achieve justice.
4. An exemption to undermine. They forbid the state or the national legislator to undermine the achieved implementation of justice.
5. Displacing effect. A court or another authority can not apply a regulation that is in conflict with an esc right.
- 6 Interpretation effect. Interpretation of the esc rights has an effect on other legislation.
- 7 Counseling effect. The esc rights set the states or national legislators only a political or moral obligation to pursue to carry out justice or not to undermine what has already been achieved by them.¹³²

¹³⁰ *ibid*, pp.126-127.

¹³¹ *ibid*, pp.184-185.

¹³² *ibid*, p.189.

The social policies and social law in its means separate the livelihood and other social security from the mechanisms of markets. The social benefits and rights guarantee some level of welfare regardless of work performance and goods that are paid by the income benefits. Nevertheless, the basic rights and human rights have obtained more efficiency from the constitutional reforms but also from the affiliations with the international human rights conventions. At the same time, the ethical and moral justifications of social politics and social law have strengthened.¹³³

The legal effect of social rights has two main rules. 1. The rules are meant to be legally obligating, not only declaratory. 2. The rules do not directly establish subjective rights instead they are mainly objective rights to the government. However, an exception in section 19 subsection 1 in the Finnish Constitution; The right to social security to “those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care”.¹³⁴

3.9 Maintenance of the social security system in Finland

All the rights in the ICESCR are binding the parties involved. The ESC allows the States to have option to choose to a certain extent which Articles or sections they prefer to have obligated (Art. 20). The Articles in the ESC are more precise than in the ICESCR. In the ESC the States only guarantee the rights to their nationals; whereas, in the ICESCR there is no option for that kind of restriction. In the Charter’s Part II, Article 12 – “The right to social security: With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

- 1 to establish or maintain a system of social security;
- 2 to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
- 3 to endeavour to raise progressively the system of social security to a higher level;
- 4 to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
 - a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
 - b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.”

¹³³ *ibid*, p.93.

¹³⁴ *ibid*, pp.201-202.

Once the ESC was enforced by law its injunctions prevail a decree and everything lower in hierarchy in conflict with the ESC.¹³⁵ This causes, the ESC to have a hierarchy higher than the ILO Convention No. 102 which is in a level of decree in the Finnish legislation.

The ICESCR poses alone an obligation to Finland to with maximum resources and by progressive means to fulfil the obligations in the Covenant, i.e. also social security (Article 9). “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.” (Article 2.1)

According to the Limburg principles, the maximum and progressive principles require the party to the agreement, to execute the obligations as soon as possible within their resources. It is also expected that the rights recognized in the agreements are given priority when the states decide the use of their finance resources.

It is clear that the mandate’s other aspect is a prohibition of weakening. If a state weakens the execution of the rights in the agreement, the state is not complying with the mandate. The legal literature also states that the prohibition of weakening is drawn from the progressive principle. Additionally, the weakening should not only focus on a right/s but also to the entirety of the rights.¹³⁶

In the ESC, Article 12 appears to have a progressive clause: “to endeavour to raise progressively the system of social security to a higher level” (12.3). Even at times of recession the maximum clause needs to be considered as a priority to the rights in recognition when allocating resources. Nevertheless, the exceptions can only be temporary, because it is not so clear if economic crises can be held to be a public emergency. As some times speculated the ESC, Part V, Article F – “Derogations in time of war or public emergency: 1 In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

Yet, many of the contracting parties are using the opportunity in addition of the a la carte options, the declaratory side of the ESC. Each Party undertakes “to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means”. (ESC Part III, Article A – Undertakings) However, ESC has legal obligations and declaratory obligations separately. Nevertheless, the legal effects of the ICESCR and ESC are diminished by the supervision mechanism which almost entirely is based on reports by states

¹³⁵ *ibid*, p.190.

¹³⁶ *ibid*, pp.191-192.

except possible mass complaints within the ESC. Neither there are any in-state supervisory mechanisms that could have legal effects in complaints.¹³⁷ The rising dilemma in the weakening is how an economic recession and the related difficulties in public finances can justify the social security system that is restricting the basic rights. The Government and the Constitutional Law Committee raised this issue during the obligation to develop social security. The social security is planned and developed by the economic resources. The Constitutional Law Committee returned to investigate this statement if there could be conflicts in actions that could weaken the social security system and therefore weaken the basic income right. The Committee believes that it is logical that the national capital and public economy are considered planning on benefits that the government finances. (PeVL 34/1996 vp)

The international human rights obligations have to be considered when evaluating the possibility of deteriorating the social security system. As the prohibition was mentioned, in the ICESCR and ESC the consideration of economic situation is however allowed. The Finnish Government has perceived that the obligations of the agreements are met based on the current circumstances in the society. However, the rules of ESC are uncertain if the economic issues in the society can be seen as a public emergency. The esc rights should be perceived as priority that obligates the government when economic resources and savings are targeted in times of recession. Therefore it complicates the estimation cutting social security if necessary and complicates the basic rights' general restriction rules.¹³⁸

3.10 Municipal self-government in Finland

Executing esc rights the primary duty bearer is the state and the state organs that regulate the rights are the objects of those regulations. However, "Finland is divided into municipalities¹³⁹, whose administration shall be based on the self-government of their residents." (Section 121 of the Constitution) Due to the self-government of the municipals there are separate laws regulating their competence in social rights.¹⁴⁰ The European Charter of Local Self-Government, Article 9(2) states that the municipals should have equal economic resources in relation to obligations that are set to them in the constitution or in other laws. However, the Constitutional Law Committee has stated that the State cannot exclude its obligations to fulfill a guaranteed right by transferring them to the municipals. Nevertheless, the municipal can require, relying on the human rights

¹³⁷ *ibid*, pp.192-193.

¹³⁸ *ibid*, pp.205-206.

¹³⁹ In Finland there are 336 municipalities. [online] Available from: <http://www.kunnat.net/fi/tietopankit/tilastot/aluejaot/kuntien-lukumaara/Sivut/default.aspx> [25.4.2011].

¹⁴⁰ Tuori, K. (2000) *Sosiaalioikeus* [Social Law], 2nd ed., Porvoo, WS Bookwell, p.209.

treaties, that the state bears the economic obligations of the transferred responsibilities.¹⁴¹

3.11 Labour market policies on youth in Finland

The Constitutional Law Committee has stated that general law can have the ability to change and regulate the conditions on benefits. One of these is conditions on unemployment period that defines how to describe unemployment. For example, the availability of an individual to the labour market during the unemployment period, and these characteristics determine the right and amount to an unemployment benefit. The Committee has also suggested that the personal circumstances can have a positive impact on his/her own employment.

The employment opportunities have been taken into consideration in relation to labour market support to improve youth (between ages 18 and 19, 20 and 24) employment. The prerequisite was that they should have the right to be included in the labour market support actions. However, there are set time restrictions that regulate the youth labour market activities and if they are not met, the time restriction is abolished on the labour market benefit.¹⁴²

In the Constitutional Law Committee statement (17/1996), it was reviewed whether it was acceptable to set certain requirements for youth between ages 18 and 24 to be eligible for the labour market support in order to improve their employment. It is stated in the employment legislation youth is defined as under 25 year old jobseekers. The Constitutional Law Committee also regarded that youth lack the occupational education and that youth unemployment situation was accepted to have specific attention. Also, it was considered that the higher the age the more difficult it would be reasoning acceptable motives. If the age limit is only set to economize it could pose arbitrary elements.¹⁴³

The duty norms that the authorities apply on the benefits which follow the “rule of conditionals” are similar to subjective rights. The authority has to grant the benefit unconditionally when the applicant fulfils the requirements of the conditionality.¹⁴⁴ The significance of a subjective right is extremely powerful; therefore the municipal must grant the benefit regardless of the budget that is allocated for it.¹⁴⁵ Yet, the diversity of guidance policies in the municipals generates dilemmas that lead to incoherent decisions.¹⁴⁶

¹⁴¹ *ibid*, p.211.

¹⁴² *ibid*, p.223.

¹⁴³ *ibid*, p.225.

¹⁴⁴ *ibid*, p.240.

¹⁴⁵ *ibid*, p.244.

¹⁴⁶ *ibid*, p.258.

3.12 Constitutional reform in Finland

The aim of the long and prolonged process of the Constitution reform was to incorporate the esc rights to the Constitution to be in compliance with the human rights standards. The intention was also to increase equality in the society and to support the rights based claims by individuals. The renewed Constitution was found in March 2000.¹⁴⁷

3.12.1 Human Rights influence on the Constitution

Human rights treaties influenced the Finnish Constitution, securing the rights of the individuals. The following provisions in the Constitution support these encounters:

“Everyone is equal before the law.” (Chapter 2, section 6, subsection 1 - Equality) This statement expresses a principle that the authorities are not allowed to treat people unequally unless the grounds are stated in law. “Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.” (Chapter 2, section 21 – Protection under the law)

Provisions require good governance and fair trial aspects, not only within the state and municipal authorities but also in social security institutions. These institutions are obligated by section 21 to provide a speedy and appropriate processing and to have the decision judged in an independent legal institution. In section 21 the legal requirement of good governance applies the social security institutions outside the state and municipal organizations.¹⁴⁸

Section 6, subsection 1 and section 22 of the Constitution provide protection to the clients of social security matters in the administrative proceedings. As earlier mentioned they possess a nature of mass rulings and are quite often evaluated by non-legal professionals, especially in the first stages of the proceedings.

The Constitution is the supreme of the national laws.

¹⁴⁷ *ibid*, p.200.

¹⁴⁸ *ibid*, pp.200-201.

In Chapter 10 – Supervision of legality, section 106 states the primacy of the constitution: “If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.”

Section 107 states the sub-ordination of the lower-level statutes: “If a provision in a Decree or another statute of a lower level than an Act is in conflict with the Constitution or another Act, it shall not be applied by a court of law or by any other public authority.”

The authorities are required to apply the social rights with the best of their knowledge to advance the meaning of basic rights.¹⁴⁹

¹⁴⁹ *ibid*, pp.202-203.

4 Youth Employment in Finland

4.1 Introduction

The general view of the institutions of the state seems to be that the person who needs the service of the institutions has the obligation to have some common knowledge and self educated him or herself, despite the fact that the authorities have an informative obligation. The basics are available to everyone who knows what to ask and demand. The state guarantees the services which sometimes might have a different nature depending on whose point of view they are examined. The state might see the services as options and chances whereas the client might see them obligatory and interfering. The difficulty of drawing the line might have several implications on the clients on borderlines.

For now, the demand for labour is focused on highly educated labour. This reflects the demands for constant improvement of productivity and quality focused on the workforce, together with the demand for increased flexibility. The internal division on the labour market has deepened, and in many sectors, the demand for labour exceeds supply while long-term unemployment remains high.

Since 2003, the differences between the age groups entering working age (15-24 year olds) have been smaller than the age groups retiring from the labour market (55-64 year olds).

To attain the aim of a 75 per cent employment rate, people must work longer, both in terms of starting work earlier in life and continuing to work for longer, and yet, foreign workers are required. The future prospects are for education and training, attractiveness of work, work ability and rehabilitation, along with the coordination of work and family life.¹⁵⁰

The bellow table is to show the prediction of the population in Finland from 2010 to 2060. As seen in the table, the population of the country increases but not evenly. Since the birth rate is declining the proportion of the age group of 15-65 does not have so drastic changes either. However, the age group of 65 and above increases dramatically.

This prediction of population underlines the importance of youth unemployment and the need for that to decrease. As there will be more older people in the future to support in forms of pensions and other social security forms, the youth should have a higher employment rate.

¹⁵⁰ Ministry of Social Affairs and Health. (2006) Strategies for Social Protection 2015 – towards a socially and economically sustainable society. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=28707&name=DLFE-3930.pdf [15.5.2011]. p.43.

	Unit	2010	2020	2030	2040	2050	2060
Population	1000	5 378	5 636	5 850	5 985	6 090	6 213
0-14 yrs	%	16	17	16	15	16	15
15-64 yrs	%	66	60	58	58	57	56
65- yrs	%	18	23	26	27	28	29

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According to Statistics Finland's statistics on the population structure, there were 255.912 persons aged 80 and over in Finland's population at the end of 2010. The number has grown five-fold over the last 40 years¹⁵², whereas the population of 65 and above is 941.041 and ages between 20 to 24 is 327.780 at the end of 2010.¹⁵³

The proportion of persons aged over 65 in the population is estimated to rise from the present 17 per cent to 27 per cent by 2040 and to 29 per cent by 2060. The proportion of people of working age in the population will diminish from the present 66 per cent to 58 per cent by 2040 and to 56 per cent by 2060. The number of persons of working age will start to fall in 2010 when the large, post-war baby boom generations reach retirement age.¹⁵⁴

Therefore the need for high continuous youth employment is needed, as the number of youth is not matching the number of older people. Considering, that the age expectance is also higher now than it has previously been, this increases the reliance on the social security of the older people also.

In April 2011, the total number of unemployed people in Finland was 237.579, the unemployment degree being 8,6% (and 53.719 in Uusimaa¹⁵⁵).¹⁵⁶ The number of youth unemployment was 34.000, and 4.918 in Uusimaa, of which 992 were under 20 years old.¹⁵⁷ The numbers showing

¹⁵¹ [online] Available from: http://www.stat.fi/tup/suoluk/suoluk_vaesto.html [9.6.2011].

¹⁵² [online] Available from: http://www.stat.fi/til/vaerak/index_en.html [9.6.2011].

¹⁵³ [online] Available from: http://www.stat.fi/tup/suoluk/suoluk_vaesto.html [9.6.2011].

¹⁵⁴ [online] Available from: http://www.stat.fi/til/vaenn/2009/vaenn_2009_2009-09-30_tie_001_en.html [9.6.2011].

¹⁵⁵ [online] "Helsinki-Uusimaa Region is at the heart of northern Europe. Located on the south coast of Finland it is home to around 1.5 million people or more than a quarter of the country's total population. The Region includes the only metropolitan area of the nation." Available from: <http://www.uudenmaanliitto.fi/?l=en> [21.6.2011].

¹⁵⁶ Center for Economic Development and Transport and the environment, 2011.

Työllisyyskatsaus, huuhtikuu 2011. [online] Available from: http://www.ely-keskus.fi/fi/ELYkeskukset/uudenmaanely/AJueentilajanakymat/Documents/Uudenmaan_ELY_tyollisyyskatsaus_2011_huhti.pdf [9.6.2011]. p.1.

¹⁵⁷ *ibid.* p.2.

that the number of the unemployed under 20 year olds is almost every fifth. Noteworthy is that in that age some of the youth have not necessarily obtained an occupational education for themselves. The lack of education that was earlier mentioned to be one of the concerns relating to youth and youth unemployment.

The economic maintenance ratio, i.e. the relation of the unemployed and the people outside work force in relation to those within work force, was 124,3 in 2008.¹⁵⁸ According to Ilpo Airio¹⁵⁹ the current maintenance ratio is: $5.375.000/2.447.000$ which is proximately 2,2 or in index number 122.¹⁶⁰ In other words, one working person is covering the costs for 2,2 unemployed persons. With the predicted age development in mind, to have the social security system sustained, the older generation retiring earlier could also have a huge impact on the social security payments.

Nevertheless, the employment rate, i.e. the per centage of the employed persons between ages 15 to 64 was in last April (2011) 68,2 per cent.¹⁶¹ Whereas the unemployment rate in April was 8,2 per cent, meaning that it was 1,1 per cent lower than a year before. The unemployment of men was 9,6 per cent and women 6,7 per cent. The trend of the unemployment rate was 8,0 per cent. Of these numbers the unemployment rate of the youth, ages between 15 to 24 was 23,5 per cent in April which was 3,1 per cent lower than in the previous year. The trend of the youth unemployment was 21,1 per cent.¹⁶²

4.2 Example of actions at the local government level in Porvoo, Finland

The future concern in the labour market in Finland is the ageing population retiring and the lack of work force for the future. It is stated that it is important to prolong the working careers and stabilize the permanence of jobs.¹⁶³ As pointed out in the interview¹⁶⁴ by Mr. Niclas Tåg, a local

¹⁵⁸ [online] Available from: <http://www.findikaattori.fi/32/> [9.6.2011].

¹⁵⁹ Airio, I., 2011. Muutama kysymys pro-gradu -tutkielmaan. [email]. Message to L. Suntio Sent Friday 6 May 2011, 16:11. [6.5.2011].

¹⁶⁰ The economic maintenance ratio measures that what is the number of the people who are dependants in between the numbers outside the work force in relation to number in the work force. The economic maintenance ratio is reported in an index number which is calculated by deviding the number of unemployed and the number of people outside the work force with the number of the employed people and then that result times hundred. [online] Available from: <http://www.findikaattori.fi/32/> [9.6.2011].

¹⁶¹ [online] Available from: <http://www.findikaattori.fi/41/?show=teema> [9.6.2011].

¹⁶² [online] Available from: <http://www.findikaattori.fi/34/?show=teema> [9.6.2011].

¹⁶³ Ministry of Employment, 2005. Työvoima 2025 -väliraportti: Osaamisen ja työelämän kehittäminen ovat avaimia pidempiin työuriin. [online] Available from:

director of the Employment and Economic Development Office (Office) in Porvoo, Finland, the driving force is to have people to the labour markets. He continues that to do that part of the Office's responsibilities are to analyze the local need and supply of the labour market but the Office cannot be run like a business enterprise with business world ideas and philosophies. The operation is based on actions of free will of the clients and balancing between the legislation. Yet, it is not possible to please everyone at the same time or even individually if something specific. The activities of the Office are generally planned around the current needs of labour market and in the best interest to adjust them to the labour force. The differences between the mentalities of the clients challenge the Office to further activities but in limits of its budget and legislation. Nevertheless, it is the responsibility of a welfare society to ensure that people have a reasonable income and that protection is provided for the socially excluded¹⁶⁵.

The guiding legislation of the Office is based on several national Acts and decrees along side with guidelines and norms. The legislation in practice forms more specific norms and action models. The inequalities between the Offices are usually due to the budgetary allocations. The allowances of the Offices are budgeted individually in each Office. This means that the local focus points will also vary in the allocations, creating inequality between the clients in different Offices. Although the client can freely choose in which Office to be a client, as it is part of his/her subjective right. However, the Offices cooperate in helping their clients.

Considering the threats of the of the youth unemployment, Mr. Tåg states that the biggest threat would be if the focus from youth would be disregarded. He also thinks that youth should obtain more or at least special protection via the institutions fostering them into the labour market. In his opinion the demand and supply of the employees and employers should be considered more concretely than it is currently. The structures of employment change and the attitudes should also follow the changes. One of the positive actions could be creating different labour market needs for people with less or poor skills. An idea of quotas might have a positive impact creating better and easier chances and accesses to labour markets and at the same time, it would promote actions of solidarity.

The Office has a good relationship with the other actors on social field, like with the social service and health care. The relationships enhance the services of everyone and also benefit the client in more complete ways. In addition, having more professionals cooperating generates additional and versatile expertise. Although there are no set educational requirements for a

http://www.esr.fi/mol/fi/06_tyoministerio/05_tiedotteet/01_2005/2005-11-30-01/index.jsp [10.5.2011].

¹⁶⁴ Niclas Tåg. 2011. Interview on youth unemployment in local governance in Porvoo, Finland by Laura Suntio. Porvoo, Finland 19.-20.5.2011.

¹⁶⁵ Ministry of Social Affairs and Health. (2006) Strategies for Social Protection 2015 – towards a socially and economically sustainable society. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=28707&name=DLFE-3930.pdf [15.5.2011]. p.4.

clerk at the Office, the preference is to have a bachelor degree. The work itself educates rest.

The Offices also concentrate on activating the job seekers by organizing several activating and educating courses and events. Particularly in Porvoo, the Office has organized courses like first aid, fire safety, safety at work, hygiene diplomas for catering businesses, etc. Of course, these courses alone do not qualify to a degree as such but they are additional education that everyone can have to enhance better chances in job seeking. Other supportive actions, for example, are to increase the unemployment benefit if the client takes part in an additional education programmes. General supportive actions are to give guidance in vocational selection, peer support, rehabilitation support, coaching and training, and especially for youth there are designed officers to help in their matters.

4.3 Critics of activation measures in unemployment

According to Van Aerschot¹⁶⁶, the impact of the activation measures have been poor if the criteria is to see how many people have been employed. He continues that despite the unsatisfactory results in the labour policies, the activations still continue and have become part of the social service agendas as well, to solve the economical problems of the customers by enhancing their abilities on the labour markets. Apparently, the employment policy and social service policy do no longer have a clear separation.

Van Aerschot considers that the motives behind the activation policy as a means to reduce the responsibility of the public sector and to increase the personal obligations of the individual also reflects the established principles and morals of the labour markets and in some degree a justified social control. However, the activation measures are easily justified and reasoned publicly as they aim to motivate, empower and prevent social exclusion.

Therefore, he criticizes toward the decision making on the activation actions that the ultimate decision is not within the client. Although the actions are individual and based on the personal needs of the client by mapping the qualities, strengths and weaknesses of the client, the actual activation measure might not be designed to the personal needs of the client. This is due to the budgetary differences in each Office. Nevertheless, the client is obligated to take part on these activation measures or programmes in fear of sanctions if s/he does not comply, regardless if that will enhance the prospects of being employed or not.

Using the sanctions (like suspending or decreasing the unemployment benefit or income support) is precarious not only from the legal perspective

¹⁶⁶ Aerschot Van, P., (2011). Aktiivisessa sosiaalipolitiikassa on myös riskejä. [The risks also exist in an active social policy]. *Haaste*, (1/2011), pp.16-17.

but also from the perspective of social policies. An authority to have the capacity to punish or narrow the rights of a citizen should have valid reasons. Enhancing employment is regarded as a valid reason. Although to force people to enhance their employment in threats of sanctions has to be effective enough to justify the compelling actions and to have the clients to waive their self determination. As Mr. Van Aerschot sees, the employment effects are poor, the sanctions violate individual rights and therefore the provisions concerning them should be abolished. He continues that the punishments and the threats of punishments are in contradiction of some of the administrative and social law principles. The Nordic model of strengthening the position of an individual in relation to authorities and the self determination of a client of social services is legislated. To apply these principles in practice it would require genuine options of selection to be made available without a threat of sanction or arranging a position of work.

The social policy problems of the sanctions can also be problematic. The sanctions increase poverty in between the clients even though the main goal of the social policy is to do the opposite. A constant participation on the activation actions only motivated by the threat of sanctions is to create negative reactions. It will deteriorate the trust to the authorities and might complicate the commitment on the decision making process which almost is in the hands of the authorities only. It will not necessarily increase the client's empowerment but rather indicates the power that the authorities have over him/her. A long-term history of activation measures might "stamp" the person to be an unwanted employee. These negative results are to create risks of social exclusion and also to produce growing informal economy.

4.3.1 Education, employment and criminality

An alarming matter in the group of youth unemployment is the emerging criminality. Not having education after secondary school and in a long-term unemployment period can predict criminal behavior. Mr Aaltonen¹⁶⁷, in his article has stated that if the risk of committing a crime of violence by a young man who has graduated from the higher secondary school or has a higher education is 1, the risk of a young man who is only a secondary school graduate is 8 times one.

Not only the perpetrators of crimes of violence have a lower education and long term unemployment but the victims also tend to have a lower education and long term unemployment also.

¹⁶⁷ Aaltonen, M. (2011). Koulupudokkuus ja työttömyys vahvasti yhteydessä rikollisuuteen. [School dropout and unemployment is in a strong connection to criminality]. *Haaste*, (1/2011), pp.18-19.

4.3.2 Results of the relations in education and employment

A lower education and unemployment exposes to a bad lifestyle and poor health. In their article, Kestilä, Heino and Solantaus¹⁶⁸, have studied the division of youth with lower and higher education and the complications of those choices.

It has been identified that for some of the youth the unemployment and lower education is a conscious choice of life (deviations of becoming an adult, postponing choices, etc.). Nevertheless, there is a clear division in the society between the youth who have opportunities, knowledge, access, skills and connections and youth who do not. The latter group is more depended on the social security system, in its services and the actors who develop and organize the system. The latter group is a vulnerable group to education and labour markets and therefore in a risk to fall back.

Different studies show that to help the youth and families to survive in hardships, constructive ways to communicate with the parties involved and authorities to find a solution, needs to be on the practical level. It should be realized that to improve the situation in general, cooperation is needed not only between the authorities and other staff but also with children, youth and parents and other supportive persons to encounter, listen and participate. To have the opportunity to participate and enforce it there should be organized more opportunities for hearings, openness and to general ways in cooperative processes of matters.

The weaknesses of the present system in development of living conditions are; growing income differences, long-term dependency on benefits, danger of social exclusion for risk groups and growing regional differences.¹⁶⁹

4.4 The threats of the youth employment

Based on the interviews of Mikkola, Tåg and Arajärvi, the threat might be the actual legislation that is around the youth in unemployment matters. The fairly harsh approach to push young people to education and work might just do the opposite if suitable work is not found or wanted and the benefit might be lost in some proportions. The loss of benefits could then drive the individual to even worse situation economically and the previous examples

¹⁶⁸ Kestilä, L. Heino, T. and Solantaus, T. (2011). Nuorten syrjäytyminen – epäsuotuisia polkuja aikuisuuteen. [Social exclusion of youth – unfavourable paths to adulthood]. *Haaste*, (1/2011), pp.21-23.

¹⁶⁹ Ministry of Social Affairs and Health. (2006) Strategies for Social Protection 2015 – towards a socially and economically sustainable society. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=28707&name=DLFE-3930.pdf [15.5.2011]. p.37.

of the side effects with youth unemployment could take over. Cutting off the benefits will also make it questionable if the income is then adequate. At the moment in Finland, the poverty level is 13.770 €/year/single household (2008) which makes 1.147,50 €per month.¹⁷⁰

Also as a threat could be the lack of attention to youth. Recently, the youth unemployment has been introduced as a special focus group for attention. As the age structure of the population is that there are more older people than younger people, the youth unemployment will definitely be an issue in the future if not just yet, in its full scale. To balance the reduction of the older ones the youth unemployment should be under control.

On the other hand, if the labour policy activities are not in the interest of the unemployed youth, a closer examination of the policy and implementation of the policy should be in order. The matter to balance between the individual's rights to choose the occupation and education in accordance of his/her own wishes and the principle of the general public good. In this regard the individual's self determination has to prevail for the greater good. Ultimately, in that principle it is reasoned that the education or work is always for the benefit of the person him/herself too.

¹⁷⁰ [online] Available from: http://www.stat.fi/til/tjt/2008/tjt_2008_2010-05-20_tau_021_fi.html [8.5.2011]. (The median income of 22.950 €/year/single household (2008))

Conclusion

The social security system is an individual scheme that has several combinations that are related to each other by different legislation, norms, guideline, authorities in different institutions, and the people in between.

The international applications to improve and raise the level of social security and its maintenance pose large obligations to a state as in economical means and structural means. As the wellbeing of our society is rooted in the maintenance of work ability and general functional capacity allied to individual initiatives¹⁷¹, it has been suggested that the attention should be focused on an adequate base for lifelong social welfare, created in childhood and early youth. Cooperation between home, schools, social welfare and health care services, municipal sports and youth work, NGOs and the media helps improve young people's life management skills.¹⁷²

The focus should not be only on securing the livelihood of individuals but also to invest on the time before the actual and ultimate need. Regardless of the amount of legislation and provisions, the current trend in social rights seems to be stressing on solidarity and social justice and cohesion. These are actions that cannot be enforced by laws on individuals but a way should be found to adopt the concepts in anyhow.

The ILO Survey suggested burden sharing in the systems implemented. This is to consider the individual responsibilities of everyone and not only the ones being affected. Individual and collective empowerment of people has been lifted out of other contexts as to be a one solution.

As a conclusion of this study I would like to propose that the activation measures could be started earlier than in the target group. In Finland, as the country example in this thesis, the youth have during secondary schooling two periods when they are supposed to get acquainted to the labour market life. As being a conclusion based on the studies and interviews, some of the youth do not have realistic views on labour issues. Trying to implement education about the labour market requirements and standards already in those secondary schooling periods could have an impact on the future youth un/employment rates.

On the state level this could be argued to be a one approach and method of the international requirements of the ESC to improve and maintain the social security system and its quality. Education of social security and labour standards would also promote the ILO's Survey results to increase

¹⁷¹ Ministry of Social Affairs and Health. (2006) Strategies for Social Protection 2015 – towards a socially and economically sustainable society. [online] Available from: http://www.stm.fi/c/document_library/get_file?folderId=28707&name=DLFE-3930.pdf [15.5.2011]. p.6.

¹⁷² *ibid*, p.9.

the general understanding of social cohesion and solidarity. Not to mention to be along the lines of the Committee on Economic, Social and Cultural Rights, identified activities¹⁷³, though in the institutional level.

The national agenda on making work more attractive could also have an element of making work more realistic. Finland's good competitiveness already relies on a division of labour between economic, labour, social and education policy and on cooperation between these sectors, broad-based agreement on the goals and an ability to implement decisions made.¹⁷⁴

The president of the Federation of Finnish Enterprises, Mikko Simolinna, has introduced a new model for youth unemployment. This is called a "model of apprenticeship contract to labour market", and invented by Simolinna. The idea presents a two year contract that would pay 30 per cent less than in the collective labour agreement, though the young person could earn maximum of 50.000 Euros per year with 10 per cent tax rate. Simolinna continues that the model could also be applied to youth who graduate in time.

For the employers the attraction would be that after two year half of the salary expenses would be returned to the employer.

This would then mean that all the other support benefits would be eliminated, as currently, the benefits are encouraging the youth to increase their benefits and not to work. This however, is a model that at the time of the article published was not yet introduced to the unions or political parties.¹⁷⁵

As seen, some options for solutions exist but the actual benefit is related to the authority that introduces them. Again, the youth seem to be targeted when entering the work force rather than before that. Therefore, I see my proposal to contact the youth earlier, could also guide them on their future careers with a realistic view of the society and knowledge of their rights regarding labour and social matters.

¹⁷³ Chapter 2.13.1. pp.28-29.

¹⁷⁴ *ibid*, p.29.

¹⁷⁵ Lappalainen, E. 2011. Yrittäjät: Nuoret houkuteltava työelämään alhaisella tasaverolla. *Helsingin Sanomat*, [online]2 April. Available from: <http://www.hs.fi/talous/artikkeli/Yritt%C3%A4j%C3%A4t+Nuoret+houkuteltava+ty%C3%B6el%C3%A4m%C3%A4n+alhaisella+tasaverolla/1135265104067> [Accessed 2 April 2011].

Bibliography

Books

Clasen, Jochen (2001) What Future for Social Security? Debates and Reforms in National and Cross-national Perspective, Hague, Kluwer Law International

Eide, A., Krause, C. and Rosas, A. (2001) Economic, Social and Cultural Rights A Textbook Second Revised Edition, 2nd ed., Hague, Kluwer Law International

Mikkola, Matti (2010) Social Human Rights of Europe, Porvoo, Bookwell Ltd

Tuori, Kaarlo (2000) Sosiaalioikeus [Social Law], 2nd ed., Porvoo, WS Bookwell

Articles

Aerschot Van, P., (2011). Aktiivisessa sosiaalipolitiikassa on myös riskejä. [The risks also exist in an active social policy]. *Haaste*, (1/2011), pp.16-17.

Aaltonen, M. (2011). Koulupudokkuus ja työttömyys vahvasti yhteydessä rikollisuuteen. [School dropout and unemployment is in a strong connection to criminality]. *Haaste*, (1/2011), pp.18-19.

Kestilä, L. Heino, T. and Solantaus, T. (2011). Nuorten syrjäytyminen – epäsuotuisia polkuja aikuisuuteen. [Social exclusion of youth – unfavourable paths to adulthood]. *Haaste*, (1/2011), pp.21-23.

Treaties, Conventions, Laws and other legal documents

The Universal Declaration of Human Rights 1948

The International Covenant on Economic, Social and Cultural Rights 1966

The International Covenant on Political and Civil Rights 1966

The European Social Charter 1961

The Revised European Social Charter 1996

The Convention on the Rights of the Child 1990

The European Code of Social Security in 1964

The Convention for the Protection of Human Rights and Fundamental Freedoms 1950

The Charter of Fundamental Rights of the European Union 2000

The Social Security (Minimum Standards) Convention of 1952 (No. 102)

The Revised European Code of Social Security 1990

Employment Promotion and Protection against Unemployment Convention,
1988 (No.168)

The European Charter of Local Self-Government 1988 (CETS No. 122)

The Constitution of Republic of Finland 731/1999

World Wide Web

Petman, J. (2010). Euroopan sosiaalinen peruskirja ja sen valvonta. [European Social Charter and its supervision]. [online]. Available from: [http://www.kela.fi/in/internet/liite.nsf/NET/171110152827HJ/\\$File/Petman_051010.pdf?openElement](http://www.kela.fi/in/internet/liite.nsf/NET/171110152827HJ/$File/Petman_051010.pdf?openElement) [26.4.2011].

Finland. Ministry of Social Affairs and Health (2010). Socially Sustainable Finland 2020. [online]. Available from: http://www.stm.fi/c/document_library/get_file?folderId=2765155&name=DLFE-15321.pdf [13.5.2011].

Finland. Ministry of Employment and Economy (2005). Työvoima 2025, väliraportti 2005. [Workforce 2025, mid-report 2005]. [online]. Available from: http://www.esr.fi/mol/fi/99_pdf/fi/06_tyoministerio/06_julkaisut/06_tutkimus/tpt289.pdf [13.5.2011].

Finland. Ministry of Employment and Economy (2005). Työvoima 2025, raportti 2007. [Workforce 2025, report 2007]. [online]. Available from: http://www.esr.fi/mol/fi/99_pdf/fi/06_tyoministerio/06_julkaisut/06_tutkimus/tpt325.pdf [13.5.2011].

Finland. Ministry of Social Affairs and Health (2008). Strategy Report on Social Protection and Social Inclusion 2008-2011. 2008:39. [online]. Available from: http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7103.pdf [13.5.2011].

Finland. Ministry of Social Affairs and Health (2006). Strategies for Social Protection 2015 – towards a socially and economically sustainable society.

[online]. Available

from: http://www.stm.fi/c/document_library/get_file?folderId=28707&name=DLFE-3930.pdf [13.5.2011].

Finland. Confederation of Finnish Industries EK. Osaava henkilöstö - menestyvät yritykset EK:n koulutus- ja työvoimapolitiittiset linjaukset vuoteen 2015. [Competent workforce – successful enterprises EK's educational and labour policies till year 2015]. [online]. Available from: http://www.ek.fi/www/fi/tutkimukset_julkaisut/2010/6_ksa/Osaava_henkilosto_menestyvat_yritykset.pdf [13.5.2001].

International Labour Committee. Available

from: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_152602/index.htm [15.3.2011].

The Social Insurance Institution of Finland. Available

from: <http://www.kela.fi/in/internet/english.nsf/NET/110908120300HS?OpenDocument&navtdid=220210095001PM> [4.5.2011].

The Social Insurance Institution of Finland. Available

from: <http://www.kela.fi/in/internet/english.nsf/NET/260302104637EH?OpenDocument> [4.5.2011].

Kunnat. [Local

Finland] <http://www.kunnat.net/fi/tietopankit/tilastot/aluejaot/kuntien-lukumaara/Sivut/default.aspx> [25.4.2011].

International Labour Organization. Industrial and Employment Relations Department. Social

dialogue. <http://www.ilo.org/public/english/dialogue/ifpdial/areas/social.htm> [3.5.2011].

Committee on Economic, Social and Cultural Rights (2000). Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural rights. [online]. Available

from: [http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf) [2.5.2011].

Committee for reforming social protection (SATA Committee)

(2009). Proposal of the Committee for reforming social protection (SATA Committee) for the main policy lines in the total reform of social protection.

Ministry of Social Affairs and Health, Finland. (2009:10). Available

from: http://www.stm.fi/c/document_library/get_file?folderId=39503&name=DLFE-7508.pdf [27.3.2011].

OECD Forum (2011). Growing income inequality in OECD countries: What drives it and how can policy tackle it? [online]. Available

from: <http://www.oecd.org/dataoecd/32/20/47723414.pdf> [10.5.2011].