Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse

Joe Wills* and Ben TC Warwick**

This article argues that whilst socioeconomic rights have the potential to contribute towards the contestation of austerity measures and the re-imagining of a ‘post-neoliberal’ order, there are a number of features of socioeconomic rights as currently constructed under international law that limit these possibilities. We identify these limitations as falling into two categories: ‘contingent’ and ‘structural’. We classify contingent limitations as shortcomings in the current constitution of socioeconomic rights law that undermine its effectiveness for challenging austerity measures. By contrast, the structural limitations of socioeconomic rights law are those that pertain to the more basic presuppositions and axioms that provide the foundations for legal rights discourse. We address these limitations and conclude by arguing that it is possible to harness the strengths of socioeconomic rights discourse whilst mitigating its shortcomings. A key element in moving beyond these shortcomings is the development of an understanding of such rights as just one component in a portfolio of counter-hegemonic discourses that can be mobilised to challenge neo-liberalism and austerity.

INTRODUCTION

At the turn of the century Perry Anderson described neoliberalism as ‘the most successful ideology in world history’.1 Since those words were written, neoliberalism has undergone a series of crises, and following the 2008 financial meltdown there has been an unprecedented public debate concerning the relevance, credibility and durability of neoliberalism as an economic, political and social order.2 The financial crash, widely attributed to the failure of governments to effectively regulate the financial sector, has undoubtedly dealt a heavy blow to the free market credo that is integral to neoliberalism’s ideological self-representation.3 Many mainstream commentators have joined radical opponents of neoliberalism in identifying the unsustainability of the current economic order.4 Indeed, the impact of the crisis even led the associate editor

---

1 Perry Anderson, Renewals, 1 NEW LEFT REV. 1, 13 (2000).
4 Gill, supra note 2 at 4.
and chief economics commentator at the London Financial Times to declare that ‘the world of the last three decades has gone’.  

Despite the challenge seemingly posed to the legitimacy of neo-liberalism by the current economic crisis, assumptions that neo-liberalism is dead or that we have now moved to a ‘post-neoliberal world’ are premature. Indeed, it is clear that the response to economic recession by many national governments and global governance organisations has been to impose austerity, cut social protection and further privatise and commodify pensions, health and education. In other words, the structural and discursive power of neoliberalism has enabled the economic recession to be ‘used by many Western governments as a means of further entrenching the neoliberal model’. The International Monitory Fund (IMF), European Commission and the European Central Bank’s joint promotion and enforcement of austerity and privatisation in Greece, Italy, Spain, Portugal and Ireland in response to the economic crisis in the Eurozone demonstrates the continued pervasiveness of neoliberal practice in global governance.

The neoliberal ‘solution’ to the crisis of its own making is widely perceived as unjust and unsustainable. Whilst the wealthy financial actors responsible for the crisis were saved by public funds, the massive public debt incurred in the wake of these bailouts is now being serviced through austerity cuts that have disproportionately fallen upon the already marginalised and exploited. The growing pressure to adopt these measures - ostensibly for reasons of fiscal consolidation - is undermining social protection, public health and education programs that are depended upon by the vulnerable, the poor and working people.

There are innumerable critiques that could be deployed to challenge the current neo-liberal driven wave of ‘austerity politics’. However this paper will focus upon the role that the discourse of socioeconomic rights might play in contesting the current social and economic impasse. For the purpose of this paper, socioeconomic rights are understood as the subcategory of human rights concerned with the material bases of human wellbeing. Their primary normative function is to secure a basic quality of life for

5 Martin Wolf, Seeds of its own destruction, FINANCIAL TIMES, March 8, 2009.
6 E.g., COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM (2011); Manuel B. Aalbers, Neoliberalism is Dead ... Long Live Neoliberalism!, 37 INT. J. URBAN RES. RES. 1083 (2013).
7 Robin Blackburn, Crisis 2.0, 72 NEW LEFT REV. 33, 34 (2011).
13 E.g., POLITICS IN THE AGE OF AUSTERITY, (Wolfgang Streeck & Armin Schafer eds., 2013).
individuals and communities through guaranteeing access to material goods and services such as food, water, shelter, education, healthcare and housing. These rights find legal expression in a number of international instruments and national constitutions.  

This article will argue that socioeconomic rights discourse contains a number of principles that can be used to interrogate the present neo-liberal austerity drive, namely the principles of progressive realisation, non-retrogression, maximum available resource mobilisation, non-discrimination and equality, minimum core duties and participation and accountability. These principles can serve as important counter-frames to the dominant neo-liberal fixation on competitiveness, efficiency and economic rationality.

However, whilst socioeconomic rights have the potential to contribute toward the re-imagining of a ‘post-neoliberal’ order there are a number of features of socioeconomic rights as currently constructed under international law that limit these possibilities. We identify these limitations as falling into two categories: ‘contingent’ and ‘structural’. We classify contingent limitations as shortcomings in socioeconomic rights law as it is currently constituted that undermine its effectiveness in challenging austerity measures. These shortcomings can be overcome through clarifying and extending existing principles within the normative architecture of international socioeconomic rights law. By contrast, the structural limitations of socioeconomic rights law are those that pertain to the more basic presuppositions and axioms that provide the foundations for legal rights discourse. Unlike contingent limitations, these structural limitations cannot be overcome simply by tweaking the extant framework. Instead, they require moving beyond, or supplementing, appeals to legal rights with more overtly political demands and programs.

Part I of this paper will examine key philosophical and legal principles that underpin socioeconomic rights law which can provide a basis for contesting neo-liberal driven austerity measures. Part II will focus on two contingent shortcomings of socioeconomic rights for these purposes. The first is the failure of existing socioeconomic rights standards to adequately address the responsibilities of transnational actors such as the IMF and World Bank, which have played a major role in promoting and maintaining austerity measures that have negatively impacted upon socioeconomic rights. The second limitation is the absence of clear standards with respect to the presumptive proscription of ‘retrogressive measures’ in the context of austerity programs. This lack of clarity on the doctrine’s criteria limits the possibilities to deploy it against cuts to social protection systems. Part III will explore some of the structural limitations of legal rights discourse. These include the formal and abstract character of this discourse, well documented in critical legal literature, and the ways this undermines its capacity to address the systemic driving forces behind austerity and obscures, and to some extent naturalises, the social systems and power structures that determine who will suffer and who will be shielded from harm. Finally, the paper will conclude by arguing that it is possible to harness the strengths of socioeconomic rights discourse whilst mitigating its

15 See infra, section 1 b.
shortcomings by understanding it as just one component of a portfolio of counter-hegemonic discourses that can be mobilised to challenge neo-liberalism and austerity.

I. THE POTENTIAL OF INTERNATIONAL SOCIOECONOMIC RIGHTS STANDARDS

A. Neo-liberalism and Socioeconomic Rights: Foundational Tensions

It is widely recognised in the human rights literature that neo-liberalism as a doctrine is hostile to socioeconomic rights at a foundational level. Historically, neo-liberals have rejected socioeconomic rights on two main grounds: one libertarian and one utilitarian. The libertarian argument is based upon a conception of ‘negative freedom’ which holds that individuals are free when they are not subject to coercion by others. As socioeconomic rights seem to carry the guarantee that individuals have access to certain material goods and services - such as food, housing, health services etc. - neo-liberals believe that in the final analysis they are premised upon coercive acts, such as taxation or appropriation, and therefore undermine individual freedom. The most notable of the purported interferences is with the individual’s right to private property, which is one of the central rights of a free society for neo-liberals. As Erich Weede of the libertarian think-tank the Cato Institute puts it: ‘Since positive rights or entitlements need funding, the attempt to provide positive rights requires an infringement of negative rights, especially of the right to enjoy the fruits of one’s labor’. It follows for neo-liberals that rights protection should be limited to traditional civil and political rights that only impose duties of forbearance (i.e. non-interference).

The utilitarian objection to socioeconomic rights is based upon the belief that such rights constitute an unacceptable interference with the ‘spontaneous order’ of the free market. On the neo-liberal account, markets are not only an intrinsic expression of

18 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE 102–103 (1976); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 238 (1974). Nozick is usually classified as a libertarian rather than a neo-liberal. Nevertheless, as Raymond Plant notes, Nozick’s theories have been influential in the development of neo-liberalism. See PLANT, supra note 16 at 96.
19 HAYEK, supra note 17 at 140; MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 67 (1980); JAMES M. BUCHANAN, PROPERTY AS A GUARANTOR OF LIBERTY 59 (1993). Murray Rothbard goes so far as to argue that ‘not only are there no human rights, which are also property rights, but the former rights lose their absoluteness and clarity and become fuzzy and vulnerable when property rights are not used as the standard’; MURRAY ROTHBARD, THE ETHICS OF LIBERTY 113 (1998). Also see generally DAVID KELLEY, A LIFE OF ONE’S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE (1998).
21 It should be noted that the neo-liberal argument that social rights impose positive obligations whereas civil and political rights only impose negative obligations is based upon a false and oversimplified dichotomy that has been largely rejected in the human rights literature; E.g., SANDRA FRIEDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 66–70 (2008). See further Aoife Nolan, Bruce Porter & Malcolm Langford, The Justiciability of Social and Economic Rights: An Updated Appraisal, CENT. HUM. RIGHTS GLOB. JUSTICE WORK. PAP. NUMBER 15, 7 (2007).
22 HAYEK, supra note 18 at 103, 107–132; Cass R. Sunstein, Against Positive Rights, 2 EAST EUR. CONST. REV. 35 35, 35 (1993) (arguing against constitutionalised socioeconomic rights on the basis that they compel governments to interfere with free markets); Weede, supra note 20 at 40.
freedom but also have instrumental value as vehicles for welfare maximisation, information co-ordination and the guarantee of broader political freedom.23 Whereas the state is regarded as bureaucratic, unresponsive and inefficient, markets are held to be flexible, responsive and self-correcting.24 The superiority of the market stems from its ability to ‘spontaneously’ co-ordinate the dispersed, separate and partial knowledge of individuals through the price mechanism and the laws of supply and demand.25 Markets are threatened by central authority interventions that seek to achieve particular outcomes because such interventions distort their information-coordinating capacity.26 Socioeconomic rights are at least in part concerned with achieving particular outcomes – for example, assuring that individuals have access to affordable water - and therefore favour the distribution of resources according to normative criteria such as human dignity or need.27 In order to achieve this, a central authority would have to determine how and on what basis goods and services should be distributed. The effect of such interference would be to ‘distort’ the information-coordinating role of markets.28

Hence neo-liberals argue for a strict separation of the political sphere of the state, which has the responsibility of upholding fundamental civil and political rights, and the economic sphere of the market, which should be left to its own mechanisms to determine social and economic entitlement.29 Particular levels of education, healthcare, social security and so forth are not regarded as legal or moral entitlements, but rather as commodities to be acquired through the market.30 It follows from this that neo-liberals tend to welcome cuts to public services currently being undertaken on the basis that the reduction in state spending and the privatisation of formerly public services create better conditions for individual freedom and economic efficiency.31

Advocates of socioeconomic rights contest these arguments. Firstly, they question why freedom is the sole criterion for rights on the neo-liberal account. Freedom is undoubtedly an important human value, but it is not the only value: not being subjected to mental and physical suffering, the ability to participate in democratic life and substantive equality amongst citizens are also all important human values that can be served by rights. More fundamentally however, advocates of socioeconomic rights question the very account of ‘freedom’ advanced by neo-liberals. They argue that ‘negative freedom’, i.e. freedom from coercion, is not an end in itself, but rather is valuable or instrumental in achieving a broader and more basic good: the good of autonomy i.e. ‘living a life shaped by one’s aims and goals – the exercise of our capacity

23 FRIEDMAN AND FRIEDMAN, supra note 19 at 9–38; HAYEK, supra note 17 at 120; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 10 (1962).
24 FRIEDMAN AND FRIEDMAN, supra note 19 at 9–70.
25 Id. at 13–24.; HAYEK, supra note 17 at 120.
26 HAYEK, supra note 17 at 128–129.
27 The Universal Declaration of Human Rights states that everyone is entitled, ‘as a member of society’, to the realization of “the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), (adopted 10 December 1948) UNGA RES 217 A(III) art 22.
28 FRIEDMAN AND FRIEDMAN, supra note 19 at 17; HAYEK, supra note 17 at 75.
30 HAYEK, supra note 18 at 106.
31 Austerity measures that threaten macroeconomic stability may however be subject to critique within the neo-liberal/neo-classical paradigm. See Jonathan D Ostry, Atish R. Ghosh & Raphael Espinoza, When Should Public Debt Be Reduced?, SDN/15/10 IMF STAFF DISCUSS. NOTE (2015) (warning against low-risk governments adopting needless austerity measures).
for agency’. Freedom on this account is not simply the absence of coercion but rather the ability to exercise genuine choice and act upon those choices. This requires the removal of all sources of ‘unfreedom’ including poverty, social deprivation and neglect of public facilities. As Raymond Plant argues

For the capacity for agency to exist there has to be a degree of physical integrity and health insofar as this is achievable and alterable by human agency; there has to be an appropriate level of education; and there has to be an appropriate level of security in terms of income and social security in that individuals will not develop the capacity for autonomy if the whole of each individual’s life is devoted to securing the basic means of subsistence.

As such, socioeconomic rights are regarded as freedom enhancing rather than freedom reducing.

The utilitarian objection to socioeconomic rights has also been subject to critique. Firstly, the empirical assertion that governmental intervention in the market reduces aggregate welfare through it’s ‘distorting’ effect has been challenged. Indeed, it is widely agreed that it was government under-regulation of the market that was the most immediate cause not just of the present economic crisis but also of previous ones, such as the Wall Street Crash or the 1997 Asian Financial Crisis. At a deeper level, advocates of human rights question the aggregative logic of utilitarian calculations in neo-classical economics. It is argued that the fixation with maximising the aggregate welfare of society loses sight of individuals as the principle locus of moral value.

Advocates of socioeconomic rights are concerned not only with maximising aggregate welfare but also with the distribution of welfare gains in ways that respect the inherent dignity of every individual. In particular, they are concerned that distributional patterns are not only non-discriminatory but also prioritarian, i.e. they give greater weight to interests of the most disadvantaged and marginalised members of society.

Having identified some of the core foundational differences between neo-liberal and socioeconomic rights discourse, the next section will examine some of the principles that govern the international law of socioeconomic rights and consider their potential as

---

33 Fredman, supra note 21 at 10–16.
35 Plant, supra note 32 at 17.
36 There are a number of other critiques that could be made here that will not be explored for the sake of brevity. The first is that the neo-liberal argument that social rights impose positive obligations whereas civil and political rights only impose negative obligations is based upon a false and oversimplified dichotomy. See Fredman, supra note 21 at 66–70. The other argument, advanced by Cohen, points out a fundamental contradiction in the neoliberal account: namely that the neo-liberal valorisation of private property contradicts their defence of negative liberty as property rights require restrictions on the negative liberty of the non-property holder (e.g. if x owns a field she may exclude y from walking across it, thereby infringing y’s negative liberty). See G A Cohen, Self-Ownership, Freedom and Equality chapter 2 (1995).
important counter-frames to the neo-liberal logic that underpins the current austerity drive.

B. Socioeconomic Rights under International Law

The Universal Declaration of Human Rights (UDHR), the foundational constitution of international human rights law, contains civil and political protections as well as socioeconomic guarantees. The process of translating this Declaration into binding international standards was a protracted affair significantly shaped by the geopolitical rivalries of the Cold War. The initial unity seen in the UDHR was fractured into two binding inter-state treaties; socioeconomic rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and civil and political rights in the International Covenant on Civil and Political Rights (ICCPR). Two separate UN committees - the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee - monitor the implementation of each of these treaties, reviewing states on a regular basis and providing guidance through ‘General Comments’.

Despite their historically subordinate status as the ‘poor cousins’ of their civil and political counterparts, socioeconomic rights have gained in prominence in the last three decades and have been incorporated in a number of international instruments, regional treaties, and national constitutions, all of which have helped to develop ‘an increasingly expansive’ international socioeconomic rights jurisprudence. In spite of

---

40 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), supra note 27. See also Restatement (Third) of the Foreign Relations Law of the United States, para 701 rep. note 6 (1987) (describing the UDHR as the ‘accepted articulation of recognized rights’).


44 The Human Rights Committee monitoring the ICCPR and, since 1987, the Committee on Economic, Social and Cultural Rights has monitored the implementation of the ICESCR; Philip Alston & Bruno Simma, First Session of the UN Committee on Economic, Social and Cultural Rights, 81 AM. J. INT. LAW 747, 748–9 (1987).


past treatment of socioeconomic rights as mere non-binding ‘aspirations’ at best or as lacking the intrinsic character of rights at worst, nowadays the status of socioeconomic rights is settled: they are *bona fide* legal rights that generate binding normative obligations under international law.

The socioeconomic rights framework applied in this article is based upon the ICESCR. Whilst this is not the only international socioeconomic rights instrument, it is the oldest, the most widely ratified and the most wide-ranging instrument of its kind. The ICESCR contains a number of rights, including rights to work, just and favourable conditions of work, to form and join trade unions, to social security, to the protection of the family, to an adequate standard of living, to health related rights, education and cultural rights. The generally applicable obligations of States Parties in relation to these rights are set out in articles 2 and 3 of the ICESCR. Articles 2(2) and 3 require States Parties ensure non-discrimination in relation to the enjoyment of the Covenant rights whilst article 2(1) stipulates that:

> 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.

Whilst the requirements of this rather convoluted obligation were subjected to considerable debate in the past, since 1990 the CESCR have issued ‘General Comments’ and other statements to delineate the normative content of state obligations under the ICESCR.

This section will briefly outline some of these obligations and discuss the ways in which they could be useful to challenge the dominance of austerity policies.

1. **Progressive Realisation and Non-Retrogression**

The requirement of ‘progressive realisation’ set out in article 2(1) of the ICESCR imposes an obligation on States Parties ‘to move as expeditiously and effectively’ towards ensuring the fulfilment of socioeconomic rights. The obligation to realise socioeconomic rights continues to apply, and is perhaps more pertinent, during times of

---


54 *Id.* art 2(1) (emphasis added).

economic contraction. 56 As such, the primary obligation upon States is to continue to progressively realise socioeconomic rights at a rate commensurate to the ‘maximum available resources’ of the State.

Where States cannot (or do not) comply with this obligation to progressively improve rights realisation, a major ‘corollary’ duty is engaged. 57 This duty – to avoid enacting deliberately ‘retrogressive measures’ – is said to derive from the obligation to progressively realise socioeconomic rights. The principle of non-retrorgression promotes a strong presumption against States Parties deliberately adopting laws and policies that would jeopardise existing achievements in the realisation of socioeconomic rights. 58 The presumption against retrogressive measures has important salience in the context of austerity measures, which have involved cuts to social protection systems and other socioeconomic rights-related services that have adversely impacted people’s enjoyment of these rights. 59

Where deliberately retrogressive measures are taken, the burden of proof is on a State party to demonstrate that a number of conditions have been met. These conditions have varied throughout the previous two decades, 60 however the most recent guidance requires that a proposed policy change in response to financial crisis must meet a number of human rights requirements: first, it must be temporary, in the sense that it covers only the period of crisis; second, it must be necessary and proportionate, in the sense that the adoption of any other policy, or failure to act, would be more detrimental to economic, social and cultural rights; third, the policy must not be discriminatory (discussed below); and finally the policy should identify the minimum core of rights and ensure the protection of this core content at all times. 61

58 Id. See also GLOBAL ECONOMIC GOVERNANCE AND NATIONAL POLICY AUTONOMY IN THE PURSUIT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: BACKGROUND PAPER SUBMITTED TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS PREPARED BY HAMIS JENKINS, PARA 8 (2001).
The dual aims of the progressive realisation and non-retrogression obligations are to establish ‘clear obligations’ while also being a ‘necessary flexibility device’. As such, the progressive realisation obligation and especially the doctrine of non-retrogression provide an ‘escape hatch’ which allows states to reduce protection of socioeconomic rights in some (limited) circumstances.

2. Maximum Available Resources

Although there has been growing attention to the expenditures of states, in respect of fiscal income there has been an historical ‘hesitation’ to dealing with taxation frameworks from a human rights perspective. Sepúlveda, grounding her analysis in article 2(1) of the ICESCR, notes that the obligation of governments to realise socioeconomic rights requires that they must mobilise resources within their country to their utmost availability. Available resources are not limited to financial resources, but may also include human and organisational resources. To that end, taxation constitutes a vital source of revenue in the context of utilising maximum available resources. The design and structure of a taxation framework, as well as the State’s willingness and ability to implement and enforce it, is of vital importance in this respect.

One of the controversies in the current period of austerity is that whilst governments justify reductions in social programs on the basis that they do not have the resources to finance them, large amounts of tax are often not collected due to weak enforcement, corruption, criminal tax evasion and illicit practices of tax avoidance. Yet, a recent report by the Special Rapporteur on Extreme Poverty and Human Rights notes that the effective collection of tax is the most ‘straightforward’ way of ensuring such rights, as it means that governments have sufficient resources for high quality public services. For these reasons demands for ‘tax justice’ are increasingly being conceptualised as a human rights issue.

The pressures upon state resources are intensified during a financial crisis. Yet the CESCR has made clear that a crisis or public deficit does not absolve governments of
their obligations to utilise their maximum available resources to realise socioeconomic rights. Quite the opposite, it requires that they take extra care in allocating their available resources to protect marginalised and vulnerable groups.73

The presumed impermissibility of retrogressive measures is inseparably connected to the requirement of States to use the maximum of their available resources to implement ICESCR rights. The CESCR has affirmed that ‘even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the most vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes’.74 Furthermore, if a State uses ‘resource constraints’ as an explanation for a retrogressive measure, the CESCR will assess the situation considering, inter alia, the country’s level of development, the severity of the breach, whether the situation concerned the enjoyment of the minimum core content and whether the State had identified low-cost options, or had sought international assistance.75

3. Minimum Core Obligations

In 1990, the CESCR established that ‘a core obligation’ of immediate effect is to ensure the satisfaction of, at the very least, the ‘minimum essential levels’ of each of the ICESCR rights was incumbent upon all States Parties.76 A State party is, prima facie, failing to discharge its obligations under the ICESCR where a significant number of individuals under its jurisdiction are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.77 Thus, where cuts are made to social security schemes that impinge upon the minimum core of these rights, a State party is prima facie in breach of its ICESCR obligations.78 Therefore the burden of proof lies with the State to demonstrate that it has done everything possible to make full use of all available resources to satisfy these minimum obligations as a matter of priority.79 In the context of austerity, the CESCR have argued that any policy change or adjustment should identify the minimum core content of rights, or a social protection floor, as developed by the International Labour Organisation (ILO), and ensure the protection of this core content at all times.80

4. Non-Discrimination and Equality

---

73 This is reflected in the work of the Committee; Chairperson of the Committee on Economic, Social and Cultural Rights, supra note 61. See further, David Bilchtz, Socio-Economic Rights, Economic Crisis and Legal Doctrine, 12 INT. J. CONST. LAW 710 (2014).
74 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 3, supra note 55 at para 12.
76 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 3, supra note 55 at para 10.
77 Id.
78 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 19, supra note 60 at para 59(a).
79 Id. at para 60.
80 Chairperson of the Committee on Economic, Social and Cultural Rights, supra note 61.
The ICESCR requires that State parties ensure that protection of the rights contained within it is without discrimination of any kind. Non-discrimination is an immediate obligation that requires not merely the proscription of arbitrary differentiation between groups but also the promotion of substantive equality in the enjoyment of rights. This obligation requires, *inter alia*, that States ensure the satisfaction of socioeconomic rights is available and affordable for all and that poorer households are not disproportionately burdened with expenses. In relation to austerity measures, States must demonstrate that they have taken all possible measures, including tax measures, to support social transfers and mitigate the inequalities that can grow in times of crisis. This may require States to adopt progressive tax structures and avoid regressive sales taxes or value added taxes (VAT) that may be incompatible with these principles given the disproportionate impact they have on those already experiencing financial difficulties.

States parties are also under an obligation to attenuate laws, policies and practices that are *indirectly discriminatory*, i.e. that appear neutral on face value, but which have a disproportionate impact on the right of certain groups’ enjoyment of socioeconomic rights. This is a particularly critical obligation during times of economic and financial crisis, as austerity measures have been documented to have significant and disproportionate negative impacts on disadvantaged and marginalized individuals and groups. Particularly affected groups have included the poor, women, children, persons with disabilities, older persons, people with HIV/AIDS, indigenous peoples, ethnic minorities, migrants, refugees, and the unemployed.

5. Obligations to Respect, Protect and Fulfil

The CESCR have also used General Comments to advance a tripartite typology of state obligations. This imposes three ‘types’ or ‘levels’ of obligations on state parties: to *respect*, *protect* and *fulfil*. The duty to respect simply requires that states refrain from

---

81 ICESCR, *supra* note 42 arts 2(2) and 3.
83 E.g., UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 14, *supra* note 60 at para 12(b)(iii); UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 15, *supra* note 60 at para 27.
84 Chairperson of the Committee on Economic, Social and Cultural Rights, *supra* note 61.
85 E.g., Special Rapporteur on the Right to Food, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, OLIVIER DE SCHUTTER: MISSION TO GUATEMALA para 87(e), UN Doc. A/HRC/13/33/Add.4 (2010); Saiz, *supra* note 71 at 77; Obenland, *supra* note 69.
87 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 20, *supra* note 82 at para 10(b).
89 Henry Shue, *Rights in Light of Duties*, in HUMAN RIGHTS AND U.S FOREIGN POLICY, 51–64 (Peter G. Brown & Douglas MacLean eds., 1979) (arguing that human rights impose three core duties on States: the duty to avoid depriving, the duty to protect from deprivation and the duty to aid the deprived); Asbjørn Eide, The International Human Rights System, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (Asbjørn Eide, Catarina Krause, & Allan Rosas eds., 1995) (arguing that that human rights obligations can be classified into three categories: the State’s obligations to respect, protect and fulfil).
interfering with the enjoyment of a right.\textsuperscript{91} The duty to protect requires the adoption of measures to ensure that third parties do not interfere with the socioeconomic rights of individuals and collectives under the State Party’s jurisdiction.\textsuperscript{92} Given the increasing tendency towards privatisation of socioeconomic rights related services in the context of austerity, the duty to protect will at least require that the State regulate and monitor private service providers to ensure that the objects of socioeconomic rights enjoyment remain affordable, accessible, adequate and are provided in a non-discriminatory manner.\textsuperscript{93}

The duty to fulfil requires states to take positive measures to assist individuals and communities to enjoy their rights. Such measures are particularly important in the context of economic crisis, where high unemployment and rising costs of living can push individuals and communities further into poverty. Measures that should be adopted include appropriate low-cost techniques and technologies to ensure essential goods are affordable; appropriate pricing policies, for instance free or low-cost access to goods such as water and services such as healthcare; as well as income supplements.\textsuperscript{94} Where individuals are unable to realise rights for themselves for reasons beyond their control, such as being made redundant for example, States are obliged to directly provide the right.\textsuperscript{95}

II. CONTINGENT LIMITATIONS OF SOCIOECONOMIC RIGHTS FOR CHALLENGING AUSTERITY

In the previous section, it was shown that the international law of socioeconomic rights contains a number of principles that can be mobilised to contest neo-liberal driven austerity measures. Nevertheless, whist socioeconomic rights discourse contains a number of potentially counter-hegemonic frames, there are also a number of limitations to the discourse. This section will address two of the contingent limitations, i.e. shortcomings in socioeconomic rights law as it is currently constituted that undermine its effectiveness for challenging austerity measures. We shall look in turn at the failure of human rights standards to adequately address the responsibilities of transnational actors and ambiguity in the interpretation of the ‘non-retrogression’ doctrine.

A. Human Rights Standards Fail to Adequately Address the Responsibilities of Transnational Actors

\textsuperscript{92} UN Committee on Economic, Social and Cultural Rights, \textit{General Comment 14}, supra note 60 at para 33.
\textsuperscript{94} UN Committee on Economic, Social and Cultural Rights, \textit{General Comment 15}, supra note 60 at para 27.
\textsuperscript{95} \textit{Id.} at para 25.
Some critics have questioned the adequacy of traditional territorially bounded conceptions of human rights obligations for addressing the types of violations of socioeconomic rights associated with neo-liberal globalisation. The traditional human rights paradigm imposes obligations on States Parties to respect, protect and fulfil the human rights of those subjects within their territorial jurisdiction. However, the capacity of States to regulate certain aspects of economic and social affairs within their own borders has been significantly weakened by developments in the financial and commodity markets, the consolidation of global productive capacity by TNCs and the economic and ideological leverage of IFIs like the IMF and World Bank. Across the 1990s and 2000s, much ink was spilled documenting the negative impact of IMF and World Bank imposed ‘structural adjustment programs’ on poverty levels and income inequality.

Today, IFIs are playing a key role in imposing austerity across Europe. The recent sovereign debt crisis in the Eurozone triggered joint activities by the IMF, the European Commission (EC) and the European Central Bank (ECB) – often termed the ‘Troika’ – in imposing budgetary cuts upon heavily indebted European Nations such as Ireland, Cyprus, Spain, Portugal and Greece. These measures have had negative - and in the case of Greece, catastrophic – consequences for socioeconomic rights. A report by the Center for Economic and Social Rights concluded that measures adopted by Ireland that were negotiated by Troika had ‘severely reduced enjoyment of a range of economic and social rights’. In his End of Mission Statement to Greece, the UN Independent Expert on Foreign Debt and Human Rights concluded that the imposition of austerity on Greece had imposed significant social costs of the Greek people, including high unemployment, homelessness, poverty and inequality as well as setbacks in the rights to work, social security, health and housing.

Advocates of socioeconomic rights have argued that the traditional territorially bound and state centric model of human rights enforcement creates an ‘accountability gap’

---

100 Martin McKee et al., Austerity: A Failed Experiment on the People of Europe, 12 CLIN. MED. 346 (2012).
whereby transnational actors whose actions have an enormous impact on the protection and promotion of human rights are nevertheless not bound by any direct human rights obligations. Margot Salomon illustrates the nature of this accountability gap through an examination of the EU’s response to the Greek Sovereign Debt Crisis. The ‘Troika’ established a European Stability Mechanism (ESM) through which consecutive loan agreements have been provided to Greece. Continued support has been conditional on reductions in public spending, drastic labour market reform and welfare state retrenchment, policies that have brought extreme poverty and hardship on the Greek people.

Greece’s imposition of these austerity conditionalities led to a finding by the Council of Europe’s European Committee of Social Rights that Greece had violated the right to social security under the European Social Charter (ESC). Yet as Salomon notes, the IFIs that imposed these austerity conditions upon Greece were able to avoid any human rights accountability for their actions because the ESC only binds ratifying States and not international organisations. Furthermore, the ESM was constituted as a separate international organisation rather than an EU agency, which means that the ESM member States are not applying EU law and thus are not bound by the socioeconomic rights guarantees contained in the EU Charter. The upshot is that human rights claims can only be bought against ‘enfeebled governments’ but not the transnational actors that enforce ‘disciplinary neo-liberalism’ upon them.

Two proposed reforms to dominant understandings of human rights obligations are put forward to plug this gap. The first argues that institutions such as the IMF and the World Bank, as legal personalities under International Law, are directly bound to at least respect the rights contained within the ICESCR in their operations. Whatever the correctness of this legal argument is, it should be noted that representatives of these institutions have staunchly resisted any imposition of binding human rights standards. The second line of argument is that the individual Member States that

---

105 See Stuckler and Basu’s harrowing account, which documents the return of HIV and malaria epidemics to Greece as a result of ‘health service reforms’ required by the Troika; STUCKLER AND BASU, supra note 10.
109 ‘Disciplinary Neo-liberalism’ is the term Stephen Gill uses to describe the role played by transnational structures to expand the scope and increase the power of market-based structures and forces so that governments and other economic agents are disciplined by market mechanisms. See Stephen Gill, Globalisation, Market Civilisation, and Disciplinary Neoliberalism, 24 MILLENN. J. INT. STUD. 399, 412 (1995).
111 E.g., FRANÇOIS GIANVITI, ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE INTERNATIONAL MONETARY FUND paras 10–30 (2002), http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf (arguing that the ICESCR does not apply to the IMF); THE WORLD BANK INSPECTOR PANEL IN PRACTICE, 241 (Ibrahim F.I. Shihata ed., 2nd ed. 2000) (“There is no legal obligation on behalf of the Bank or its staff to guarantee that the project it finances will succeed or
make up these organisations should be held accountable for the ‘extraterritorial’ violations of human rights that they cause or contribute to vis-à-vis their conduct within these institutions, particularly the rich States that wield disproportionate power and influence within them.\(^{112}\) There is some textual support for this argument within the ICESCR, as well as the jurisprudence of the CESCR, which we now explore.

In respect of the ICESCR, two points can be made. Firstly, the ICESCR, unlike the majority of international human rights treaties, makes no explicit mention of the scope of its territorial application.\(^ {113}\) Whereas article 2(1) of the International Covenant on Civil and Political Rights imposes obligations on States Parties to respect and ensure the rights of all individuals ‘within its territory and subject to its jurisdiction’, there is no mention of territory or jurisdiction in the wording of article 2(1) of the ICESCR.\(^ {114}\) Secondly, there is an explicit reference within article 2(1) of the ICESCR to international assistance and cooperation as a means to achieve the full realisation of the rights provided by the Covenant. This reference to international assistance and cooperation is reiterated in several other articles.\(^ {115}\)

Furthermore, the CESCR have established in their General Comments that States Parties to the ICESCR have a number of international obligations. From General Comment No.14 onwards, the CESCR have consistently used mandatory language to express the international obligations of States to respect and protect the enjoyment of ICESCR rights of people in third countries (‘have to’), whilst obligations to fulfil have been expressed in recommendatory language (‘should’).\(^ {116}\) For example, in relation to the right to health, the CESCR have held:

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.\(^ {117}\)

---


\(^ {114}\) *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 2(1).

\(^ {115}\) ICESCR, supra note 42 arts 11(2), 15(4), 22, 23.

\(^ {116}\) E.g., UN Committee on Economic, Social and Cultural Rights, *GENERAL COMMENT 15*, supra note 60 at paras 31, 36.

\(^ {117}\) Recall the taxonomy of duties to respect, protect and fulfil set out in section I(B)5 above.

\(^ {117}\) UN Committee on Economic, Social and Cultural Rights, *GENERAL COMMENT 14*, supra note 60 at para 39.
This robust language would indicate that Member States acting within organisations such as the IMF and World Bank have mandatory obligations to respect and protect socioeconomic rights, such that they may not formulate loan conditionalities or other lending policies that will negatively impact upon the enjoyment of socioeconomic rights in the recipient country. As a minimum, this might require IFI’s to engage in some basic consultation on the projected socio-economic effects of their policies. Unfortunately however, whenever the CESCR expressly mentions the obligations of States Parties as Member States of IFIs, it qualifies the nature of their extraterritorial obligations in recommendatory language (‘should’):

Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

This is a particularly weakly worded obligation: firstly, it is framed in recommendatory terms (‘should’); secondly, it is relativized (‘greater’ – in relation to what?); and thirdly, it is expressed in terms that could be satisfied in a purely tokenistic manner. For example, greater attention could be paid to the right to health in lending policies and then simply be ignored in the policy’s formulation. This is an extremely important point, as the policy design of conditionality loans can have severe adverse impacts upon a country’s capacity to ensure socioeconomic rights. As Stuckler and Basu show in their harrowing account, the ‘health service reforms’ and budget cuts imposed on Greece by the Troika have had disastrous consequences on the nation’s health, including helping to foster the return of HIV and malaria epidemics. Such dire health indicators in any European nation would have been scarcely imaginable a few years ago.

The jurisprudence of the CESCR is therefore ambiguous in terms of the strength of the obligations of States Parties within IFIs. This is most unfortunate given that, as we saw in relation to Greece, IFI activity has a considerable influence on States Parties abilities to comply with their obligations under international socioeconomic rights instruments. It is hoped that, with the maturation of the Optional Protocol to the ICESCR, a more detailed and concretised jurisprudence with regard to extraterritorial application of socioeconomic rights will be developed through periodic reporting procedures, individual complaints and inquiry procedures. This path, however, is likely to be a slow one. To

---

118 Consultation which was sometimes omitted (or prevented) from taking place; Salomon, supra note 107 at 530.
119 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 14, supra note 60 at para 39. See also mutatis mutandis UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 15, supra note 60 at paras 31, 35; UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 19, supra note 60 at paras 53, 58.
120 In her account of conditionality in the Greek case, Salomon notes the highly prescriptive nature of the Troika conditions including, for example, a requirement to ‘[e]liminate pension bonuses’; Salomon, supra note 107 at 528–9.
date there are only 21 parties to the Optional Protocol and, as former CESCR member (1997-2012) Eide Riedel has argued:

‘The Committee should take great care not to overstep it’s role once the Optional Protocol comes into force... It would be wise to choose micro-level issues first and keep away from macro-issues such as extraterritorial application of the ICESCR... This would definitely frighten off many states from ratifying’

In the interim period, the CESCR could adopt a new, more detailed General Comment dedicated to the question of the extraterritorial scope of socioeconomic rights, building upon recent scholarly work in the area, especially pertaining to questions of jurisdiction, causation and division of responsibility.

B. Ambiguity of the Concept of ‘Non-Retrogression’

As outlined above, a major component of the ICESCR obligation to ‘progressively realise’ socioeconomic rights is the obligation to avoid reductions in the protection of these rights. Given the propensity of austerity programmes to reduce enjoyment of socioeconomic rights, the duty of non-retrogression has clear potential to limit the damage done. By enforcing a strong version of non-retrogression there is the prospect of ‘locking in’ rights protection and using the doctrine to counter the logic of austerity. The core of this duty of non-retrogression is a presumption against backwards steps or ‘backsliding’ in the protection of rights. States which wish to enact such a retrogressive measure have the burden of proving that the measure is justified according to criteria set down by the CESCR. Yet these criteria against which States are tested have been subject to frequent change. The resulting lack of clarity, and the CESCR’s weak examination of the obligation, has caused the principle of non-retrogression to be of limited effect in challenging austerity measures.

In various statements the CESCR have outlined multiple versions of the criteria that it will use in testing for a retrogressive measure. From a modest starting point in 1991, the CESCR’s doctrine of non-retrogression developed into a more fully textured obligation in the period from 1999 to November 2007. Although the Committee

123 On 09-12-2015.
125 Olivier De Schutter et al., Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 34 HUM RTS Q 1084 (2012). See generally Langford et al. (eds) supra note 111.
128 Jill Cottrell & Yash Ghai, The Role of Courts in the Protection of Economic, Social and Cultural Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE, 61 (Jill Cottrell & Yash Ghai eds., 2004); Nolan, Lusiani, and Courtis, supra note 127 at 123.
129 E.g., UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 13, supra note 60 at para 45.
130 Nolan, Lusiani, and Courtis, supra note 127 at 140.
131 Beginning with UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 13, supra note 60 at para 45.
originally only required States to justify retrogressive measures by reference to the ‘totality of rights’ and to use the maximum of available resources in order to avoid a finding of an impermissible retrogressive measure. These criteria burgeoned in later years. By November 2007 the CESCR had developed some seven factors that would purportedly be examined, including; whether the State had examined alternative measures, whether the measure had been justified by reference to other ICESCR rights, whether there was a ‘reasonable justification’ for the measure, whether there had been participation of affected groups in devising the policy, whether there would be a sustained or unreasonable impact resulting from the measure, and whether there had been independent review of the measure.

However, this relatively comprehensive framework was subject to significant revisions in 2012 when the Chairperson of the CESCR released a letter addressing the financial and economic crises. That letter purported to substantially alter the test for a retrogressive measure. On that instance, the Committee noted that to avoid enacting a retrogressive measure, States’ measures should be temporary, necessary and proportionate, non-discriminatory and must not infringe the minimum core of the right. This is a clear weakening of earlier standards. Such an alteration of the standards of scrutiny is particularly concerning given the context of wide-reaching austerity programmes, and raises the question of why a period of retrenchment for socioeconomic rights was seen as the appropriate juncture for such changes.

While there remains a need for greater conceptual clarity around non-retrogression and, in particular, a reversal of the weak position taken in the 2012 letter, a balance must be struck between change and stability. It is likely that the regular variation of the doctrine of non-retrogression over the past fifteen years has contributed somewhat to its weak enforcement in the CESCR’s examinations of State Parties. Only infrequently has the CESCR addressed the issue of retrogression in its Concluding Observations on States. On such occasions the Committee has been tentative about finding a violation of the obligation, opting instead to remind States of their obligations.

132 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 3, supra note 54 at para 9.
133 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 19, supra note 60 at para 42.
134 Chairperson of the Committee on Economic, Social and Cultural Rights, supra note 61.
136 Chairperson of the Committee on Economic, Social and Cultural Rights, supra note 61.
137 Nolan, Lusiani, and Courtis, supra note 127 at 121.
139 This is especially the case in recent years. Compare, for example, ‘The Committee is also concerned about the re-introduction of fees at the tertiary level of education, which constitutes a deliberately retrogressive step’ (in 1994) (UN Committee on Economic, Social and Cultural Rights, CONCLUDING OBSERVATIONS OF THE CESCR: MAURITIUS, supra note 138 at para 16.) with ‘avoiding any retrogressive step with regard to the protection of workers’ labour rights’ (in 2012) (UN Committee on Economic, Social and Cultural Rights, CONCLUDING OBSERVATIONS OF THE CESCR: BULGARIA, supra note 138 at para 11).
terms of the doctrine is likely to be beneficial in addressing this enforcement gap. With the progress of States being examined approximately every five years, having a constantly shifting set of criteria for such a key general obligation lends little certainty to the CESCR or to States about the scope of non-retrogression, or the standard against which examinations are made.

The choice to modify the doctrine of non-retrogression in the midst of a wave of austerity programmes meant, in concrete terms, that the CESCR’s changes were introduced in the same biannual session of the Committee that saw the examination of the significant and high-profile austerity measures of the Spanish State. The timing of this change limited the Committee to doing little more than ‘draw[ing] the State party’s attention’ to its modified standards on non-retrogression.

It is also a matter of concern that analysis of retrogression is largely absent from the ICESCR reporting guidelines. These guidelines request information on key aspects of a State’s performance on their socioeconomic rights obligations. However, at present States are not required to submit information, justifications or explanation on any backwards steps that have been enacted in the period under examination. Such an omission reduces the CESCR’s ability to systematically hold States accountable and prevents the Committee from subjecting socioeconomic rights-reducing policies to a full examination. In the context of wide-spread austerity programmes, where there are more frequent occurrences of backwards steps, there is even greater value to such information being provided.

Furthermore, this information must be appropriately circumscribed in order to be of use to the CESCR in its monitoring. Examples abound of national situations for which there are more general statistical indicators which raise issues of concern, but for which the specific information needed in order to demonstrate retrogression is limited. Thus there is much awareness, for instance, of the fact that health services in Ireland were subject to significant budget cuts at a time when need for the services was on the increase. Yet, the doctrine of non-retrogression does not extend to preventing ‘economic constraints’, but rather relies on showing some specific deterioration of rights standards. This necessitates a more focused statistical account of the enjoyment of some aspect of the right to health during the period of austerity.

While demanding greater information on retrogressive policies and ensuring a degree of doctrinal stability are important measures to ensure a more robust response to harmful backwards steps brought about by austerity, the system of State reporting addressed

---

140 In fact, the Letter containing the guidance was released on 16th May 2012; eight days after Spain had been examined by the Committee.
141 UN Committee on Economic, Social and Cultural Rights, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SPAIN, supra note 61 at para 8.
142 UN Committee on Economic, Social and Cultural Rights, GUIDELINES ON TREATY-SPECIFIC DOCUMENTS TO BE SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, UN Doc E/C.12/2008/2 (2009).
143 ANNE NOLAN ET AL., THE IMPACT OF THE FINANCIAL CRISIS ON THE HEALTH SYSTEM AND HEALTH IN IRELAND 1 (2014); CENTER FOR ECONOMIC AND SOCIAL RIGHTS (CESR), supra note 101 at 5.
above is a sluggish and deeply retrospective exercise. States report to the CESCR around every five years, and although there is a degree of chance inherent in when during a period of austerity this examination falls, such a length of time is significant when compared to the rapidity of some austerity programmes. This time period between State examinations is sufficient to allow an austerity programme to 'take hold', and even following a finding of retrogression by the CESCR, such delays might make reversal of enacted and embedded policies more difficult.

Two other methods, besides cyclical State examinations, offer greater responsiveness in challenging austerity measures on the basis of socioeconomic rights law. The first is the individual complaints mechanism which recently entered into force, and which allows individuals to bring a 'case' against a State which has ratified the terms of the Optional Protocol to the ICESCR. Although, there are currently only 21 States which have accepted the terms of the right of individual petition as this number of ratifications grows, the number of complaints is also likely to grow. Strategic litigation offers the potential for impermissible retrogressive measures to be identified by the CESCR much sooner after their enactment, and for the impacts of austerity on socioeconomic rights to be addressed more contemporaneously. The second method which might allow for more timely interventions requires the CESCR to provide further examples of, and greater detail on, the kinds of measures which it will find to be retrogressive. Currently, the only clear example given relates to the right to work. By providing further points of comparison in General Comments, Concluding Observations and in its Optional Protocol jurisprudence, the CESCR would aid rights advocates working in national settings to make well-grounded cases against proposed retrogressive measures. Such actions are crucially important in addressing potential socioeconomic rights violations at the ex ante stage, and before harms have resulted.

III. STRUCTURAL LIMITATIONS OF SOCIOECONOMIC RIGHTS FOR CHALLENGING AUSTERITY

Two contingent limitations of appeals to socioeconomic rights law were discussed above. Such limitations could conceivably be overcome through the clarification of existing

---

145 For example, by chance Spain fell to be examined relatively soon after it began its austerity programme (2012), whereas Ireland (2015) and the UK (2015/6) have had a longer period of austerity without having submitted a report to the CESCR; Office of the High Commissioner for Human Rights, EXPECTED DATE OF CONSIDERATION (2015), http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/MasterCalendar.aspx?Type=Session&Lang=En (last visited December 11, 2015).
149 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 18: THE RIGHT TO WORK, E/C.12/GC/18, para 34 (2005); “An example would be the institution of forced labour or the abrogation of legislation protecting the employee against unlawful dismissal”.
standards (i.e. better and more consistent definition of the meaning of non-retrogression) or extending their reach (i.e. to include transnational actors). There are however, a number of features of socioeconomic rights law which limit its ability to challenge austerity that are trickier to surmount. These are the more fundamental presuppositions and axioms that frame socioeconomic rights law which ignore and naturalise the factors and forces that drive the current austerity measures. We call these structural limitations.

The limitations of legal human rights discourse have been well documented in critical legal theory. Human rights are argued to be too narrow and legalistic as a discourse to be used to challenge the systematic and material bases for social deprivation that are governed by the systemic logic and organization of the global political economy. Such arguments are concerned that rights discourse channels oppositional movements into technical legal disputes around peripheral questions and diverts attention away from the need for meaningful social and political transformations. Human rights challenges, particularly in the form of litigation, often revolve around relatively narrow issues and underlying structural factors (political, social, cultural, economic etc.) are generally left unaddressed. It is true that in recent years, a number of human rights scholars have been developing tools and models to apply socioeconomic rights standards more broadly to budget analysis. Whilst undoubtedly a step forward and a valuable contribution to expanding the lens of socioeconomic rights analysis, these models can only address distributive patterns and state policies but not the underlying forces and factors that drive those patterns and policies.

What are the underlying structural factors associated with the current austerity drive? Robin Blackburn argues that the current financial crisis is the culmination of a number of trends strongly promoted by neo-liberal globalisation – ‘extreme inequality, poverty, financial deregulation and a pervasive commodification of the life course, via mortgages, credit card debt, student fees and private pensions’. Rising inequality both within and between countries led to low wages in emerging economies and growing indebtedness and extreme concentration of wealth in OCED economies which taken in conjunction with the deregulation of financial markets allowed investment banks and hedge funds to heedlessly pursue short term advantage through expanded credit schemes. This in turn generated the succession of asset bubbles that created the current crisis. Marxist political economists like David Harvey have argued financial crises such as the current are an inherent and recurrent feature the workings of the capitalist system. Legal socioeconomic rights discourse is ill suited to addressing these structural dynamics: it may address certain symptoms, but it has little to say about root causes. A failure to

---

151 Kennedy, supra note 150.
152 Id. at 10–13.
154 Blackburn, supra note 7 at 35.
155 Id.
156 See generally David Harvey, Seventeen Contradictions and the End of Capitalism (2014).
fully diagnose a problem inevitably means that the prescriptions will be limited or ephemeral.

Legal socioeconomic rights discourse is also limited in its perception of power dynamics. In human rights analysis, the identification of a violator, violation and remedy is foregrounded whilst broader relations and structures of power are bracketed or minimised. Susan Marks has suggested that the identification of human rights violators can often obscure the question of who the beneficiaries of such violations are. As Thomas Pogge has argued, material deprivation is not natural or inevitable but rather something that is happening as the result of a particular ‘global institutional order designed for the benefit of the affluent countries governments and corporations and of the poor countries military and political elites’. Denials of basic socioeconomic rights are not ‘accidents’ nor are they ‘random in distribution and effect’. Rather they are, as Paul Farmer has put it ‘symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer and who will be shielded from harm’. It is no coincidence that Western Governments responded to their economic crises by providing liquidity for the financial elites whilst cutting services that the poor and vulnerable rely upon. Nor is it a coincidence that:

... at the very same time we see millions of people pushed further into penury through conscious state policy (with all the right-denying effects that this has), we also see the number of wealthy people around the world steadily increasing, as well as governments introducing ‘business friendly’ tax regimes... (austerity) now provides a pretext for a more brutal and extensive application of the inequalitarian logics inherent within neo-liberal capitalism.

In other words, neo-liberalism functions, as David Harvey argues, to serve ‘the interests of private property owners, businesses, multinational corporations and financial capital.’ The atomising focus upon violations and remedies alone cannot identify these patterned logics, nor can it prescribe meaningful long term solutions to them.

In a sense, the above argument could be seen as stating the obvious. The UN human rights system is premised on the understanding that the legal and political are entirely distinct categories and it is the function of its relevant human rights bodies to clarify,
monitor and enforce the content of international legal norms whilst remaining neutral on questions of a political nature. This is the position of the CESCR who insist that

in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach.

However the broader point that can be made here is that casting legal doctrine as politically neutral is ‘at best a sleight of hand’ for it is ‘precisely in acting as though law were neutral that legal discourse operates ideologically, not merely masking social inequalities but making those inequalities appear the inevitable concomitant to a neutral and impartial legal order’. We can see the operation of this ‘sleight of hand’ in the jurisprudence of the CESCR, which despite its insistence of political neutrality, ends up embracing a variant of neo-liberalism that has been termed the ‘Post-Washington Consensus’ (PWC).

The CESCR has, in the face of overwhelming evidence, expressed concern about and criticism of the impact of adjustment measures and austerity on socioeconomic rights on numerous occasions. Nevertheless it also recognises ‘that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity’. The CESCR does not regard austerity to be necessarily incompatible with the realisation of socioeconomic rights. Rather, it has argued that such measures must be compensated for by approaches which enhance the compatibility of those trends and policies with full respect for socioeconomic rights. In response to the current wave of austerity measures the Chairperson of the CESCR has acknowledged ‘the pressures on many States Parties to embark on austerity programmes... in the face of rising public deficit and poor economic growth’ and notes further that ‘the Committee is acutely aware that this may lead many States to take decisions with sometimes painful effects’.

Whilst some retrogression in the enjoyment of socioeconomic rights is

165 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 3, supra note 54 at para 9.
169 UN Committee on Economic, Social and Cultural Rights, GENERAL COMMENT 2, supra note 56 at para 9.
170 UN Committee on Economic, Social and Cultural Rights, GLOBALIZATION AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS, supra note 56 at paras 2, 3.
171 Id. at para 4.
172 Chairperson of the Committee on Economic, Social and Cultural Rights, supra note 61.
‘inevitable’ it must be compatible with State obligations under the ICESCR. In short, the CESCR supports ‘adjustment with a human face’.

To make these observations is not necessarily to criticise the CESCR; given the limits of their mandate within the State-centric UN human rights system, the most pragmatic path for them to take may be to adopt a stance that scrutinises austerity measures and holds governments accountable for the ways in which they implement it when they do. Indeed, section 1(b) above argued that the CESCR have developed a number of principles that are useful for doing just that. However, the stance adopted by the CESCR does indicate the limits of international socioeconomic rights law: not only does it not allow for broad political critique of these policy trends, it may contribute towards normalising and naturalising austerity measures by describing them as ‘unavoidable’ and ‘inevitable’. This is the general paradox of ‘political neutrality’: failing to take a stance in relation to a dominant political trend can only be to politically acquiesce to that trend.

Austerity is neither natural nor ‘inevitable’: it is the product a particular political-economic order and the conscious political choice of governments and intergovernmental organisations. Legal socioeconomic rights norms can serve as a useful standard to measure and critique the adverse human impact of these policies. But they can only go so far. As Robin Blackburn, talking about human rights more generally, so eloquently put it:

> ‘Human rights’ can serve as a valuable watchword and measure. But because inequality and injustice are structural, constituted by multiple intersecting planes of capitalist accumulation and realization, more needs to be said—especially in relation to financial and corporate power and how these might be curbed and socialized. The plight of billions can be represented as a lack of effective rights, but it is the ‘property question’—the fact that the world is owned by a tiny elite of expropriators—that is constitutive of that plight. The slogan of rights takes us some way along the path; but it alone cannot pose the property question relevant to the 21st century.

CONCLUSION

This paper has argued that many of the principles underscoring international socioeconomic rights law can serve as useful discursive tools for contesting neo-liberal driven austerity measures. The principles of progressive realisation, non-retrogression, maximum available resource mobilisation, non-discrimination, equality, minimum core duties, participation and accountability were argued to constitute important counter frames to the neo-liberal fixation with economic growth, efficiency and competitiveness. However, the paper also argued that there a number of limitations to appeals to

173 Id.
socioeconomic rights discourse to challenge austerity, most notably its inability to address the structural forces that drive these policy choices or to articulate the radical forms of transformation that will be needed to overcome them.

These identified shortcomings should not however form the basis for the rejection of socioeconomic rights discourse altogether, but rather should be the impetus for a ‘two-track’ approach to socioeconomic rights. The first track is tactical: this involves mobilising and reforming current discourses of socioeconomic rights so as to make them better vehicles for contesting neo-liberal policy measures. This will require, amongst other things, clarifying the principle of non-retrogression and seeking to apply socioeconomic rights standards to transnational actors (if not in law then at least in political agitation). The second track is strategic: this consists of linking socioeconomic rights discourses to counter-hegemonic political discourses that articulate attempts to move beyond the neo-liberal logic of austerity. The recent emergence of anti-austerity movements such as the Coalition of the Radical Left (‘Syriza’) in Greece, Podemos in Spain, a socialist coalition government in Portugal, a revived social democratic Labour Party in the United Kingdom, the Scottish National Party in Scotland, as well as a variety of grassroots and popular movements across Europe shows that a continent-wide movement against austerity is growing. Socioeconomic rights advocates should work with grassroots campaigns and political movements against austerity, identifying intersections between these groups’ demands and the principles established in socioeconomic rights law.

176 For a distinction between tactical and strategic engagements with the law see Robert Knox, Strategy and Tactics, in FINNISH YEARBOOK OF INTERNATIONAL LAW (VOLUME 22), 193 (Jan Klabbers ed., 2010).