

Realising the Human Right to a Social Minimum? A Comparative Socio-Legal Study of EU Member States

Hannah Mirjam Adzakpa

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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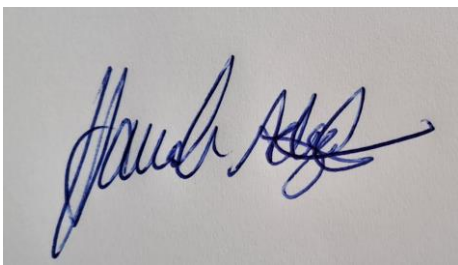
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Realising the Human Right to a Social Minimum?

A Comparative Socio-Legal Study of EU Member States

Summary

Europe is generally seen as a continent with well-developed welfare state systems and social protection buffers. Nevertheless, disadvantaged and marginalized groups are disproportionately affected by poverty and social exclusion. According to international human rights law, states need to adhere to the minimum core doctrine by realising minimum essential levels of rights without discrimination. My thesis conceptualises the minimum core doctrine as a substantive right to a social minimum. I define this right to a social minimum as non-discriminatory access to minimum essential levels of subsistence and argue that conceptualising the minimum core doctrine as a substantive right makes it more tangible, less abstract, and frankly, easier to realise. In order to answer the research question how EU Member States should realise the right to a social minimum, I compare the Concluding Observations of five UN human rights treaty bodies across all EU Member States in the period of 2009-2019. In three case studies, I address the particular challenges of realising the right to a social minimum for persons with disabilities, children, and Roma. I demonstrate that the European survey on income and living conditions (EU-SILC), which is the official instrument to measure poverty and social exclusion across the EU, is insufficient to satisfy the human rights requirements for disaggregated data. However, it is still a useful tool for cross-national comparisons. Besides doctrinal analysis, I engage in qualitative content analysis with the software MAXQDA. By integrating the human rights analysis with a statistical reading of EU-SILC data across the EU, I address the divide between human rights lawyers and social policy scholars. The final argument of my thesis is that in order to realise the right to a social minimum, EU Member States need to prioritise the collection of disaggregated data for persons with disabilities, children, and Roma.

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List of Abbreviations

Art	Article
Arts	Articles
AROP	At-Risk-of-Poverty (a sub-indicator of AROPE)
AROPE	At-Risk-of-Poverty or Social Exclusion indicator
AT	Austria
BE	Belgium
BG	Bulgaria
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CO	Concluding Observations (singular, i.e., the CO is addressed to one state party)
COs	Concluding Observations (plural, i.e., several COs are addressed to more than one state party)
CESCR	Committee on Economic, Social and Cultural Rights
CRC	UN Convention on the Rights of the Child
CRPD	UN Covenant on the Rights of Persons with Disabilities
CSR	Country-Specific Recommendation
CY	Cyprus
CZ	Czech Republic
DE	Germany
DEP	Severe Material Deprivation Rate (a sub-indicator of AROPE)
DK	Denmark
E	'social exclusion' (as sub-indicator of AROPE)
EB	Eurobarometer
ECSR	European Committee of Social Rights
EE	Estonia
EL	Greece
EHIS	European Health Interview Survey
ES	Spain
ESC	European Social Charter
ESPN	European Social Policy Network
ESR	Economic and Social Rights
ESS	European Social Survey
EQLS	European Quality of Life Survey
EU	the European Union

EU-28	the 28 EU Member States (including the UK)
EU-27	the 27 EU Member States (excluding the UK)
EU-15	the 15 EU Member States before the accession of the Eastern EU MS in 2008
EU MS	EU Member States
EU-SILC	the European survey on income and living conditions
EWCS	European Working Conditions Survey
FI	Finland
FR	France
FRA	the Fundamental Rights Agency of the European Union, based in Vienna
GC	General Comment
GCs	General Comments
GGP	Generations & Gender Programme
GR	General Recommendation
GRs	General Recommendations
HBSC	Survey on Health Behaviour in School-Aged Children
HR	Croatia
HU	Hungary
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IE	Ireland
IT	Italy
LFS	Labour Force Survey
LOI	List of Issues
LOIPR	List of Issues Prior to Reporting
LOT	List of Themes (CERD Committee)
LT	Lithuania
LU	Luxembourg
LV	Latvia
LWI	Low-Work Intensity (a sub-indicator of AROPE)
MD	Material Deprivation Dimension of the Right to a Social Minimum
MIPS	Minimum Income Protection Scheme(s)
MS	Member State(s)
MT	Malta

MW	Minimum Wage
NHRI	National Human Rights Institution
NL	Netherlands
OHCHR	Office of the High Commissioner of Human Rights
OMC	Open Method of Coordination
P	Poverty Dimension of the Right to a Social Minimum
PL	Poland
PT	Portugal
QCA	Qualitative Comparative Analysis
QDA	Qualitative Data Analysis
QPR	List of Issues Prior to Reporting
RESC	Revised European Social Charter
RCO	Replies to the Concluding Observations
RLOI	Replies to the List of Issues
RO	Romania
SDGs	Sustainable Development Goals
SMSD	'severe material and social deprivation' rate
SE	Sweden
SI	Slovenia
SK	Slovakia
SPR	State Party Report
SPRs	State Party Reports
UDHR	Universal Declaration of Human Rights
UN	United Nations
UK	United Kingdom of Great Britain and Northern Ireland
W	Work Dimension of the Right to a Social Minimum

Chapter 1: Introduction

1.1 Introduction

After a short period of economic recovery from the economic crisis of 2007/2008, COVID-19 has disrupted 'business as usual' on an unprecedented scale. Prolonged lockdown periods across Europe have resulted in increasing unemployment and poverty across many member states (MS)¹ of the European Union (EU).² Additionally, the energy crisis following the Russian invasion of Ukraine has resulted in more and more households across EU MS experiencing poverty.³ Europe is generally regarded as a continent with very high levels of prosperity and access to welfare.⁴ Despite these highly developed welfare systems and general wealth, poverty is still a reality across the EU MS.⁵ In 2021, across the EU MS, 95.4 million people, or 21.7 % of the total

¹ For better readability, the abbreviation MS was chosen to mean 'Member States' (instead of using the more grammatically correct abbreviation MSs), see also List of Abbreviations. During the period under analysis in this thesis (2009-2019), Brexit had not been finalised yet, which is why I have kept the UK in my analysis, despite it no longer being an EU MS.

² Wim van Lancker and Zachary Parolin, 'COVID-19, School Closures, and Child Poverty: A Social Crisis in the Making' (2020) 5 *The Lancet Public Health* E243; Margo Barker and Jean Russell, 'Feeding the Food Insecure in Britain: Learning from the 2020 COVID-19 Crisis' (2020) 12 *Food Security* 865; Madeleine Power and others, 'How Covid-19 Has Exposed Inequalities in the UK Food System: The Case of UK Food and Poverty' (2020) 2 *Emerald Open Research* 11.

³ Whereas the war in Ukraine has accelerated the understanding of energy poverty as a serious policy issue in Europe, in the wake of the economic crisis 2007/2008, and also during the COVID-19 crisis the issue had already been explored, see for example Victor Jack, 'Ukraine War Heats up Energy Poverty Debate: Soaring Gas Prices across the Continent Are Focusing Attention on the Issue' *POLITICO* (17 May 2022) <<https://www.politico.eu/article/ukraine-war-heats-up-energy-poverty-debate/>> accessed 1 January 2023; Maïke Pfeiffer and Tara Marwah, 'Energy Poverty in Europe: Using Evidence to Address an Urgent Challenge' (*Abdul Latif Jameel Poverty Action Lab (J-PAL)*, 12 September 2022) <<https://www.povertyactionlab.org/blog/9-12-22/energy-poverty-europe-using-evidence-address-urgent-challenge>> accessed 1 January 2023; Stefan Bouzarovski, Harriet Thomson and Marine Cornelis, 'Confronting Energy Poverty in Europe: A Research and Policy Agenda' (2021) 14 *Energies* 858; George E Halkos and Eleni-Christina Gkampoura, 'Evaluating the Effect of Economic Crisis on Energy Poverty in Europe' (2021) 144 *Renewable and Sustainable Energy Reviews* 110981; Indre Siksnelyte-Butkiene, 'Combating Energy Poverty in the Face of the COVID-19 Pandemic and the Global Economic Uncertainty' (2022) 15 *Energies* 3649; Steve Pye and others, 'Energy Poverty Across the EU: Analysis of Policies and Measures' in Manuel Welsch and others (eds), *Europe's Energy Transition* (Academic Press 2017); Athanasios Dagoumas and Fotis Kitsios, 'Assessing the Impact of the Economic Crisis on Energy Poverty in Greece' (2014) 13 *Sustainable Cities and Society* 267.

⁴ Sonja Blum, Johanna Kuhlmann and Klaus Schubert (eds), *Routledge Handbook of European Welfare Systems* (2nd edn, Routledge 2020).

⁵ Lena Dominelli, 'Reconceptualising Poverty in Europe: Exclusion, Marginality and Absolute Poverty Reframed through Participatory Relational Space' in Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019), p. 17.

population, were at risk of poverty or social exclusion.⁶ Poverty and inequality are re-emerging as research subjects in Europe.⁷

Despite high rates of poverty and inequality across EU MS, the EU has historically not given the same level of attention, political will, and resources to social policy issues as it has to economic governance and macroeconomic convergence.⁸ The heavy austerity measures following the 2007-2008 economic crisis that resulted in even more unemployment, poverty, and social exclusion, have been heavily criticised.⁹ In an effort to re-socialise Europe, the EU proclaimed the European Pillar of Social Rights (EPSR) in 2017.¹⁰ While the EPSR is not legally binding, it uses the language of rights to uphold the EU's social values in 20 principles, which are complemented by a measurement instrument, the so-called Scoreboard, and a corresponding action plan.¹¹ On the one hand, the EPSR has provoked critical

⁶ Eurostat works with so-called codes that display a certain combination of publicly available statistics. For example, the code [ilc_peps01] is the AROPE-rate by age and sex. The columns of the data table display the years, and the rows depict the EU MS and some summary statistics like the EU-28, EU-27 or EU-15. The Data Explorer for the Eurostat code [ilc_peps01] is available at <https://ec.europa.eu/eurostat/databrowser/view/ilc_peps01/default/table?lang=en> (latest update 22 December 2022, accessed 2 January 2023). In 2019, the AROPE-rate for the EU-27 (without the UK) was 21.1 %, see Eurostat codes [ilc_pees01] (for AROPE intersections) and [ilc_peps01] (for disaggregation by age and/or sex).

⁷ Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019).

⁸ Charles R Bean and others, *Social Europe: One for All?* (Centre for Economic Policy Research 1998); Stephan Leibfried and Paul Pierson, 'Prospects for Social Europe' (1992) 20 *Politics & Society* 333; Eric Marlier and David Natali, *Europe 2020: Towards a More Social EU?* (Peter Lang 2010); Iain Begg, 'Economic and Social Governance in the Making: EU Governance in Flux' (2010) 32 *Journal of European Integration* 1; Jon Kvist, 'The Post-Crisis European Social Model: Developing or Dismantling Social Investments?' (2013) 29 *Journal of International and Comparative Social Policy* 91; Sonja Bekker and Saskia Klosse, 'EU Governance of Economic and Social Policies: Chances and Challenges for Social Europe' (2013) 2 *European Journal of Social Law* 103; Christoph Hermann, 'Crisis, Structural Reform and the Dismantling of the European Social Model(s)' (2017) 38 *Economic and Industrial Democracy* 51.

⁹ Colm O'Connell, 'Austerity and the Faded Dream of a "Social Europe"' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); Stefano Civitarese and Simon Halliday, 'Social Rights, the Welfare State and European Austerity' in Stefano Civitarese and Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2018); Paolo Graziano and Miriam Hartlapp, 'The End of Social Europe? Understanding EU Social Policy Change' (2019) 26 *Journal of European Public Policy* 1484.

¹⁰ European Commission, 'Proposal for an Interinstitutional Proclamation of the European Pillar of Social Rights' (2017) COM(2017) 251 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0251&from=EN>> accessed 30 December 2022.

¹¹ European Commission, 'The European Pillar of Social Rights in 20 Principles' (2017) <https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_en> accessed 31 December 2022; Eurostat, 'European Pillar of Social Rights - Social Scoreboard Indicators' <<https://ec.europa.eu/eurostat/web/european-pillar-of-social-rights/indicators/social-scoreboard-indicators>> accessed 30 December 2022; European Commission, 'European Pillar of Social Rights Action Plan' (2021) <<https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/>> accessed 30 December 2022.

reactions, mostly due to the ‘paper tiger’ nature of the pillar.¹² On the other hand, the importance of the EPSR in re-balancing the ‘economic’ and the ‘social’ has been analysed with careful optimism.¹³ In September 2022, the Commission adopted a Proposal for a Council Recommendation on adequate minimum income ensuring active inclusion.¹⁴ The explicit goal of the proposal is to reduce poverty and social exclusion in Europe. In particular, EU MS are supposed to improve the adequacy, coverage and take-up of their minimum income protection schemes (MIPS). As I show in section 4.4.2.1 of this thesis, due to their widespread inadequacy in combination with the long-term effects of the economic crises and austerity measures MIPS no longer fulfil their central role of providing a social safety net to prevent extreme poverty.¹⁵

Another reason for optimism is that Directive 2022/2041 on adequate minimum wages in the European Union was finally adopted on 19 October 2022.¹⁶ While the EU does not have the competence to set a common European minimum wage, the Directive aims at improving adequacy of minimum wages and closing gaps in the coverage of minimum wage protection by setting a framework for minimum standard. Hence, it is definitely a step in the right direction to put the aspirational Pillar of Social Rights into legislative action. However, all these initiatives are characterised by an

¹² Bart Vanhercke and Sebastiano Sabato, ‘Towards a European Pillar of Social Rights: From a Preliminary Outline to a Commission Recommendation’ in Bart Vanhercke, Sebastiano Sabato and Denis Bouget (eds), *Social Policy in the European Union: State of Play 2017, 18th Annual Report* (ETUI 2019) 92.

¹³ Sacha Garben, Claire Kilpatrick and Elise Muir, ‘Towards a European Pillar of Social Rights: Upgrading the EU Social Acquis’ (2017) #1.17 College of Europe Policy Brief 1; Eleanor Brooks, ‘The “Last Chance for Social Europe”: The European Pillar of Social Rights Can Only Work If Integrated into the EU’s Existing Policies’ (2017) <<https://blogs.lse.ac.uk/euoppblog/2017/05/22/last-chance-for-social-europe-european-pillar-social-rights/>> accessed 31 December 2022; Ane Aranguiz, ‘Social Mainstreaming through the European Pillar of Social Rights: Shielding “the Social” from “the Economic” in EU Policymaking’ (2018) 20 *European Journal of Social Security* 341; Sacha Garben, ‘The European Pillar of Social Rights: An Assessment of Its Meaning and Significance’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 101; Konstantinos Alexandris Polomarkakis, ‘The European Pillar of Social Rights and the Quest for EU Social Sustainability’ (2020) 29 *Social & Legal Studies* 183.

¹⁴ European Commission, Proposal for a Council Recommendation on Adequate Minimum Income Ensuring Active Inclusion 2022 [COM/2022/490 final].

¹⁵ Bea Cantillon, Zachary Parolin and Diego Collado, ‘A Glass Ceiling on Poverty Reduction? An Empirical Investigation into the Structural Constraints on Minimum Income Protections’ (2020) 30 *Journal of European Social Policy* 129; Jon Erik Dølvik and Andrew Martin, ‘From Crisis to Crisis’ in Jon Erik Dølvik and Andrew Martin (eds), *European Social Models from Crisis to Crisis: Employment and Inequality in the Era of Monetary Integration* (Oxford Scholarship Online 2015); András Gábos and others, ‘Employment and Poverty Dynamics Before, During, and After the Crisis’ in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019).

¹⁶ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on Adequate Minimum Wages in the European Union 2022 [OJ L 275].

absence of international human rights *law*. While they might use the *language* of social rights, the existence and relevance of international human rights law for the European context tends to be forgotten. Indeed, the grim reality of widespread poverty, unemployment and social exclusion across EU MS stands in stark contrast with numerous international human rights commitments. All EU MS have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁷ In general, socio-economic rights - as protected under the ICESCR - are not subject to immediate application. Instead, states parties must adhere to the principle of progressive realization with the requirement to 'take steps' in fulfilling all Covenant obligations, depending on available resources.¹⁸ Nevertheless, states parties have the immediate obligation to adhere to the minimum core doctrine by protecting 'minimum essential levels' of all rights protected in the Covenant and by fully respecting the obligation of non-discrimination.¹⁹

Reflecting their response in the aftermath of the financial crisis of 2007/2008, the Committee on Economic, Social and Cultural Rights (CESCR)²⁰ responded to the COVID-19 pandemic by adopting a statement urging states that the 'minimum core obligations imposed by the Covenant should be prioritized'.²¹ Academics, agencies and activists alike were quick to adopt the minimum core doctrine as a central aspect of CESCR's crisis-criteria. The purpose of this doctrine is to give clear guidance on how to respect at least a basic level of socio-economic rights guarantees in times of crisis.²² However, states are often either ignorant about, or unwilling to apply the

¹⁷ ICESCR, 'International Covenant on Economic, Social and Cultural Rights' (1976) adopted 16 December 1966, entered into force 3 January 1976.

¹⁸ Art 2(1) ICESCR.

¹⁹ CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)' (1990) UN Doc E/1991/23 para 10. The non-discrimination obligation is a free-standing, immediately applicable obligation, which is protected under Arts 2(2) and 3 ICESCR. Yet, it is also a crucial component of the minimum core doctrine itself.

²⁰ Subsequently also abbreviated as 'the Committee'.

²¹ CESCR, 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights' (2020) UN Doc E/C.12/2020/1.

²² United Nations Development Programme, 'Checklist for a Human Rights-Based Approach to Socio-Economic Country Responses to COVID-19' (UNDP, 28 July 2020)

<https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human_rights/checklist-for-a-human-rights-based-approach-to-socio-economic-co.html> accessed 27 December 2022; Diane A Desierto, 'Calibrating Human Rights and Necessity in a Global Public Health Emergency: Revive the UN OHCHR's ICESCR Compliance Criteria' (*EJIL: Talk!*, 26 March 2020) <<https://www.ejiltalk.org/calibrating-human-rights-and-necessity-in-a-global-public-health-emergency-revive-the-un-ohchrs-icescr-compliance-criteria/>> accessed 30 December 2022; Ana Babic, 'COVID-19 and Inequality: The Human Rights Impact of Economic Austerity Measures in the UK' (*Human Rights Pulse*, 5 August 2020) <<https://www.humanrightspulse.com/mastercontentblog/covid-19-and-inequality-the-human-rights->

minimum core doctrine, mostly to the detriment of already disadvantaged or marginalized groups. The doctrine's lack of a clear substantive content means that it has sometimes been totally disregarded.²³ Without knowing exactly what is required of them, states are less likely to protect the essential rights of the most disadvantaged or marginalized in times of crisis. The non-derogable, immediately applicable minimum core of rights stands in stark contrast with the factual reality of poverty and deprivation for some disadvantaged and marginalized groups, even in the richest states of Europe. Legal standards to protect minimum core obligations are manifold, but state practice does not follow suit. How then can states parties prioritise minimum essential levels of all rights for everyone, including disadvantaged and marginalized groups?

In this thesis, I conceptualise the minimum core doctrine as a substantive right to a social minimum according to international human rights law. I define this right to a social minimum as non-discriminatory access to minimum essential levels of subsistence. By adopting this definition of the right to a social minimum as the central core concept of my thesis, states parties are given a succinct yet comprehensive definition of their most essential human rights obligations. I do not claim that my conceptualisation of the minimum core doctrine as a right to a social minimum with a specific substantive normative content will automatically guarantee its effectiveness. However, a more workable conceptualisation is one of the necessary elements that can contribute to the effective realisation of the right to a social minimum. In chapter 4 of this thesis, I discuss the broader hindering conditions that states parties must be aware of when aiming to realise the right to a social minimum. In chapter 5, I argue in particular that the realisation of this right to a social minimum must be furthered by prioritising the availability of disaggregated data for disadvantaged and marginalized groups. Since the ICESCR protects the right to work (Arts 6, 7), the right to social security (Art 9) and the right to an adequate standard of living (Art 11), states parties must ensure that everybody has access to the social minimum needed to survive, regardless of whether it is gained through work, social security, or social assistance benefits. Hence, reading Arts 6, 7, 9 and 11 ICESCR in conjunction with the minimum

impact-of-economic-austerity-measures-in-the-uk> accessed 31 December 2022; Tim Fish Hodgson and Ian Seiderman, 'COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2)' (*Opinio Juris*, 1 April 2020) <<http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/>> accessed 16 December 2022.

²³ Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113.

core doctrine provides the normative foundation for conceptualising an international human right to a social minimum. In my thesis, I will show that by conceptualising the minimum core doctrine as a substantive right to a social minimum, it becomes more tangible, less abstract, and hence easier to realise.

The remainder of this introduction is structured in the following way. Section 1.2 lays out the building blocks of my thesis and examines the corresponding research questions in their research context. There, I also present the structure of the thesis. Section 1.3 introduces my socio-legal methodology. Section 1.4 justifies the material, geographical, and temporal focus of my thesis. Section 1.5 concludes.

1.2 Building Blocks of the Thesis: Research Question and Research Context

The overarching research question of my thesis is: *How should EU MS realise the international human right to a social minimum?* To answer this research question, I structure my thesis in four building blocks, as depicted in Figure 1. In the first building block, I deal with the different perspectives of human rights and social policy regarding poverty and social exclusion across the EU MS. The second building block establishes my conceptualisation of the right to a social minimum. In the third building block, I discuss the main hindering conditions for realising a right to a social minimum for my three case studies: persons with disabilities, children, and Roma. Finally, I argue in the fourth building block that the widespread unavailability of disaggregated data underlies most of the conditions that prevent EU MS from realising the right to a social minimum. This is also the final answer to my research question: EU MS should realise the right to a social minimum by prioritising the collection and availability of disaggregated data.



Figure 1. The Four Building Blocks of my Thesis

1.2.1 Building Block 1: Poverty across EU Member States - Social Policy and Human Rights Perspectives

In building block 1, which corresponds to chapter 2 of my thesis, I examine poverty and social exclusion across the EU MS by contrasting social policy and human rights perspectives. One of the core research puzzles of my thesis is the normative obligation to respect the minimum core doctrine under international human rights law, which sits in stark contrast with high poverty and inequality across Europe, especially for disadvantaged and marginalized groups. At first sight, this puzzle might not seem like anything new or original – after all, debates about the usefulness of human rights for the plight of the vulnerable have a long academic history.²⁴ However, what is puzzling

²⁴ Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism Law and Neoliberalism' (2014) 77 *Law and Contemporary Problems* 147; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); Charles Beitz, 'Protections Against Poverty in the Practice of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right. Theory and Politics* (UNESCO 2010); Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Springer International Publishing 2016).

is that the minimum core doctrine, with its long history of academics (and EU MS) questioning its usefulness,²⁵ continues to re-surface in times of crisis.²⁶

The risk of poverty or social exclusion is not distributed equally across Europe. There are stark general differences between the predominantly rich EU-15 and the poorer new EU MS. In addition to these general differences, there are specific differences between those states that were heavily affected by austerity measures after the financial crisis of 2007/2008, and those that were not. There are also differences between welfare state systems that influence how poverty and social exclusion are buffered by social protection. Beyond Esping-Andersen's classic distinction between liberal, continental, and Nordic welfare states²⁷ there are now at least two more systems to consider, the Southern Mediterranean states,²⁶ and the post-communist CEE states.²⁸

While differences in poverty levels between countries are clearly pronounced in Europe, another important distinction to consider is the difference between different groups of people. It is no secret that marginalized and disadvantaged groups are disproportionately affected by poverty and social exclusion. From a human rights perspective, this poses a problem. Since states are supposed to adhere to the minimum core doctrine without discrimination, how can this obligation be reconciled

²⁵ Young (n 23); Lisa Forman, 'What Future for the Minimum Core? Contextualising the Implications of South African Socioeconomic Rights Jurisprudence for the International Human Right to Health' in John Harrington and Maria Stuttaford (eds), *Global Health and Human Rights: Legal and Philosophical Perspectives* (Routledge 2010); Max Harris, 'Downsizing Rights: Why the Minimum Core Concept in International Human Rights Law Should Be Abandoned' (2013) 2013 Public Interest Law Journal of New Zealand 169; Ingrid Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (2015) 16 German Law Journal 23; Lisa Forman and others, 'Conceptualising Minimum Core Obligations under the Right to Health: How Should We Define and Implement the "Morality of the Depths"' (2016) 20 The International Journal of Human Rights 531; Ingrid Leijten, 'Minimum Cores and the Scope of Fundamental Rights', *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018); Ben TC Warwick, 'Social Minima at the UN Treaty Bodies: Minimal Consistency?' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury Publishing 2019).

²⁶ Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1 Journal of Human Rights Practice 277; David Landau, 'The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); Diane A Desierto, 'Austerity Measures and International Economic, Social, and Cultural Rights' in Evan J Criddle (ed), *Human Rights in Emergencies* (Cambridge University Press 2016).

²⁷ Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990).

²⁸ Tobias Böger and Kerem Gabriel Öktem, 'Levels or Worlds of Welfare? Assessing Social Rights and Social Stratification in Northern and Southern Countries' (2019) 53 Social Policy & Administration 63; Kati Kuitto, 'Measuring Welfare Entitlement Generosity in Transitional Welfare States: The Case of Post-Communist Countries in Central and Eastern Europe' (2018) 136 Social Indicators Research 203.

with the stark poverty gaps between the general population and certain disadvantaged or marginalized groups? My three case studies are persons with disabilities, children, and Roma. All of these groups have higher poverty and social exclusion rates than the general population in almost all EU MS, no matter whether they live in a predominantly rich or a predominantly poor MS.

People with disabilities face higher poverty and employment gaps in almost all EU member states.²⁹ Children were particularly vulnerable in the aftermath of the euro-crisis, in particular due to austerity measures reducing net-incomes for many families across Europe.³⁰ This aftermath proved to be particularly long-lasting. In 2018 – ten years after the financial crisis started – almost half of single parent households with children (45%) across the EU were at risk of poverty or social exclusion.³¹ The widespread misery in which Roma people live in many European countries has been well-documented.³² According to a report by the EU Fundamental Rights Agency (FRA), over 90% of Roma in 11 EU member states were below the at-risk-of-poverty-threshold in 2011.³³ Little progress has been made to close this poverty gap. The FRA's Second European Union Minorities and Discrimination Survey (EU-MIDIS II) found that in 2016 over 80% of Roma lived below their country's poverty thresholds.³⁴ Rather than being the 'great equalizer', COVID-19 and the current energy crisis have intensified existing inequalities for these disadvantaged and marginalized groups across Europe.³⁵ Across the EU, extreme poverty and inequality have re-surfaced and require fresh scholarly attention.

²⁹ Stefanos Grammenos, 'European Comparative Data on Europe 2020 & People with Disabilities' (2013) GLADNET Collection 12-2013 The Academic Network of European Disability Experts (ANED) <<https://www.disability-europe.net/theme/statistical-indicators>> accessed 29 December 2022.

³⁰ Bea Cantillon and others (eds), *Children of Austerity: Impact of the Great Recession on Child Poverty in Rich Countries* (Oxford University Press 2017).

³¹ See Eurostat table [ilc_peps03], latest update 6 May 2020, accessed 26 May 2020.

³² The FRA follows the Council of Europe's usage of the word 'Roma' as an umbrella term, and refers to "Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies". I am going to follow this practice throughout this thesis.

³³ FRA, 'Poverty and Employment: The Situation of Roma in 11 EU Member States' (2014) <<https://fra.europa.eu/en/publication/2014/poverty-and-employment-situation-roma-11-eu-member-states>> accessed 29 December 2022.

³⁴ FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (2016) <<https://fra.europa.eu/en/publication/2016/second-european-union-minorities-and-discrimination-survey-roma-selected-findings>> accessed 29 December 2022.

³⁵ Human Rights Watch, 'COVID-19's Devastating Impact on Children: Governments Should Mitigate Harm, Protect Most Vulnerable' (*Human Rights Watch*, 9 April 2020) <<https://www.hrw.org/news/2020/04/09/covid-19s-devastating-impact-children>> accessed 16 December 2022; Human Rights Watch, 'Protect Rights of People with Disabilities During COVID-19: Ensure Access to Information, Essential Services for Those Most at Risk' (26 March 2020)

Hence, in building block 1 of my thesis, I show that social policy and human rights scholars usually ask different questions when it comes to the conceptualisation and measurement of poverty. I analyse how social policy scholars conceptualise and measure poverty by introducing the EU's flagship indicator for conceptualising poverty, the 'at-risk-of-poverty-or-social-exclusion' (AROPE)-indicator. This indicator consists of three sub-indicators, classifying households as at-risk-of-poverty (income-poor), severely materially deprived, or living in households with very low work intensity.³⁶ I contrast this social policy narrative with a human rights perspective on the conceptualisation of poverty, which recognises the human dignity inherent in all human beings as starting point. Moving from conceptualisation to measurement, I introduce the EU's survey on income and living conditions (EU-SILC) as underlying all official poverty measurements at EU level.³⁷ None of the abundant papers on a human rights approach to measuring poverty come close to the many advantages of the EU-SILC survey. Hence, a renewed interest in indicators and measurement should not be perceived as a 'seduction of quantification',³⁸ but rather a key skill necessary to address real challenges of data disaggregation, which are at the centre of any human rights approach to the measurement of poverty.

1.2.2 Building Block 2: From the Minimum Core Doctrine to the Right to a Social Minimum

In building block 2, which corresponds to chapter 3 of my thesis, I explain why it is necessary to shift from the minimum core doctrine to the right to a social minimum. I argue that conceptualising the minimum core doctrine as a substantive right to a social

<<https://www.hrw.org/news/2020/03/26/protect-rights-people-disabilities-during-covid-19>> accessed 16 December 2022; Titan M Alon and others, 'The Impact of COVID-19 on Gender Equality' (National Bureau of Economic Research 2020) Working Paper 26947 <<http://www.nber.org/papers/w26947>> accessed 31 December 2022; Power and others (n 2); Lucinda Platt and Ross Warwick, 'Are Some Ethnic Groups More Vulnerable to COVID-19 than Others?' (The Institute for Fiscal Studies 2020) The IFS Deaton Review <<https://www.ifs.org.uk/inequality/chapter/are-some-ethnic-groups-more-vulnerable-to-covid-19-than-others/>> accessed 16 December 2022.

³⁶ The at-risk-of-poverty (AROP) sub-indicator is calculated as the percentage of households that fall below 60% of the country-specific Gross Domestic Product (GDP). The severe material deprivation rate is a more direct poverty measure which measures whether people have access to at least four out of nine essential items (such as food, heating, or clothes). Very low work intensity is defined as a measure of the combined work-intensity of less than 20% of all working-age adult-members of the households (<60 years old).

³⁷ Eurostat, 'Income and Living Conditions – Overview' (2022)

<<https://ec.europa.eu/eurostat/web/income-and-living-conditions>> accessed 30 December 2022.

³⁸ Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (The University of Chicago Press 2016).

minimum provides the normative foundation upon which all realisation efforts should rest. By defining the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence, I anchor the non-discrimination obligation as an integral component of the minimum core doctrine.

The right to a social minimum builds upon the traditional human rights understanding of poverty by explicitly connecting the normative content of substantive rights with the minimum core doctrine. I argue that coining the minimum core doctrine as a substantive right makes it more tangible, less abstract, and frankly, easier to realise. By distilling the normative content of this right to a social minimum, I extract the obligations which states parties are bound to comply with under international law.³⁹ In particular, I use classical doctrinal analysis to distil relevant provisions from the ICESCR and the General Comments (GCs) adopted by CESCR. As a next step, I systematically analyse the jurisprudence of five human rights treaty bodies (HRTBs) to the EU MS between 2009-2019. Besides doctrinal analysis, I engage in qualitative content analysis with the help of MAXQDA, a qualitative data analysis software.⁴⁰ The use of this software allows me to analyse the COs systematically, using a coding-frame which allows me immediate access to the primary sources in a structured way.

The grim reality of poverty and social exclusion across Europe, as established in building block 1, stands in stark contrast with numerous international human rights commitments. Most notably, every EU MS has ratified the ICESCR.⁴¹ In general, socio-economic rights protected under the ICESCR are not subject to immediate application. Instead, states parties must adhere to the principle of progressive realization (Art 2(1) ICESCR). This principle does not require states parties to realise all obligations immediately but requires them rather to ‘take steps’ to fulfil all Covenant obligations, depending on available resources. Nevertheless, states parties are required to immediately comply with minimum core obligations, which consist of the

³⁹ For an example of using the word ‘extraction’ in a similar way as I am using the word ‘distilling’, see Colm O’Cinneide, ‘Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities’ in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff Publishers 2009).

⁴⁰ VERBI, ‘MAXQDA: Software for Qualitative Data Analysis, Version 2022, Berlin (Germany)’.

⁴¹ OHCHR, ‘UN Treaty Body Database - View the Ratification Status by Country or by Treaty’ <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=119> accessed 16 December 2022.

principle of non-discrimination (Arts 2(2), 3 ICESCR) and the protection of 'minimum essential levels' of every Covenant right.⁴²

Minimum core obligations contain specific normative content. In addition to the general remark of protecting 'minimum essential levels', CESCR specified that lack of 'essential foodstuffs' or 'basic shelter and housing' would be a violation of the minimum core obligation.⁴³ Since 1999, CESCR has provided specific normative content of the minimum core doctrine in its rights-specific GCs.⁴⁴ For example, CESCR states regarding the right to work that 'states parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work'.⁴⁵ Regarding the right to social security, CESCR reiterates the original wording from GC 3 on the nature of states parties' obligations, stating that states parties have to protect the 'minimum essential levels' of all the rights protected under the Covenant.⁴⁶

The minimum core doctrine has become the normative anchor in the aftermath of the 2007/2008 economic crisis. It establishes a minimum level of socio-economic rights protection which states parties must always provide, despite the challenging economic circumstances.⁴⁷ Austerity measures were commonplace across many EU member states.⁴⁸ Some countries were more affected than others, especially those for

⁴² CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

⁴³ *ibid.*

⁴⁴ CESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (2003) UN Doc E/C.12/2002/11 para 37; CESCR, 'General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15 (1) (c) of the Covenant)' (2006) UN Doc E/C.12/GC/17 para 39; CESCR, 'General Comment No. 18: The Right to Work (Art. 6)' (2005) UN Doc E/C.12/GC/18 para 31; CESCR, 'General Comment No. 19: The Right to Social Security (Art. 9)' (2008) UN Doc E/C.12/GC/19 para 39; CESCR, 'General Comment No. 21: The Right of Everyone to Take Part in Cultural Life (Art 15 (1) (a) of the Covenant)' (2009) UN Doc E/C.12/GC/21 para 55; CESCR, 'General Comment No. 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)' (2016) UN Doc E/C.12/GC/22 para 49; CESCR, 'General Comment No. 23: The Right to Just and Favourable Conditions of Work (Art. 7)' (2016) UN Doc E/C.12/GC/23 para 65.

⁴⁵ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 65.

⁴⁶ CESCR, 'GC 19: The Right to Social Security' (n 44) para 59.

⁴⁷ CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76; CESCR, 'Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (2016) UN Doc E/C.12/2016/1.

⁴⁸ Stijn Claessens and others, 'Cross-Country Experiences and Policy Implications from the Global Financial Crisis' (2010) 25 *Economic Policy* 267; Mairéad Considine and Fiona Dukelow, 'Ireland and the Impact of the Economic Crisis: Upholding the Dominant Policy Paradigm' in Kevin Farnsworth and Zoë Irving (eds), *Social Policy in Challenging Times: Economic Crisis and Welfare Systems* (Policy Press 2011); Kevin Farnsworth and Zoë Irving, 'Varieties of Crisis, Varieties of Austerity: Social Policy in Challenging Times' (2012) 20 *Journal of Poverty and Social Justice* 133; Cantillon and others (n 30); Manos Matsaganis, 'The Impact of the Great Recession on Child Poverty in Greece' in Bea

which austerity measures were a pre-condition for receiving bailouts by the troika.⁴⁹ The effective protection of socio-economic rights is often not a top priority for states even in the best of times. Therefore, it is not surprising that states were sometimes not able to honour their wide-ranging human rights commitments in times of crisis, if the choice was between that or balancing their budgets. In this balancing act of enacting austerity measures while still being held accountable to protect socio-economic rights, the minimum core doctrine emerged once more as the normative limit, which no state party must transgress. While the progressive realisation doctrine experienced some normative backlash and adaptations in response to the crisis,⁵⁰ the minimum core doctrine received a boost and was reinforced as the definitive normative anchor to prevent rights backsliding in times of crisis.

The core motivation behind my thesis is a discontent with this legal promise of a non-derogable, immediately applicable minimum core of rights which stands in stark contrast with the factual reality of hunger and deprivation for the most disadvantaged and marginalized, even across the rich states of Europe. Indeed, legal standards to protect minimum core obligations are manifold, but there is a lacuna of how states can realise their obligations practice. In other words, how can states parties prioritise minimum essential levels of all rights for disadvantaged and marginalized groups? In chapter 3, I conceptualise a substantive right to a social minimum as the central core concept of my thesis, hence providing an alternative framing of the minimum core doctrine. Conceptualising the minimum core doctrine as a substantive right to a social minimum overcomes some of the most serious drawbacks of the piecemeal approach by giving states parties a general and short definition of their most essential human rights obligations. Hence, my substantive right to a social minimum makes the minimum core doctrine more tangible and consequently easier to realise.

The initial inspiration for my chosen wording of a right to a 'social minimum' stems from my involvement as an administrative assistant in an Oñati Workshop on

Cantillon and others (eds), *Children of Austerity: Impact of the Great Recession on Child Poverty in Rich Countries* (Oxford University Press 2017).

⁴⁹ Klaus Armingeon, 'The Politics of Fiscal Responses to the Crisis of 2008-2009' (2012) 25 Governance 543; Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 Oxford Journal of Legal Studies 325; Claire Kilpatrick, 'The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality' (2017) 70 Current Legal Problems 337.

⁵⁰ Ben TC Warwick, 'Socio-Economic Rights during Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65 International and Comparative Law Quarterly 249.

'Specifying and Securing a Social Minimum' (2017).⁵¹ This workshop brought together social scientists and lawyers in order to discuss the concept and measurement of a 'social minimum', resulting in the publication of a book in 2019.⁵² According to the introduction of the book, a social minimum 'can be understood as the floor of socio-economic protection states are required to provide'.⁵³ However, this definition does not preserve the key normative content of the minimum core doctrine, but is rather linked to disputes in philosophy and welfare studies surrounding the exact meaning of 'social minimum'. According to the Stanford Encyclopaedia of Philosophy, the social minimum is defined as a 'bundle of resources which suffices in the circumstances of a given society to enable someone to lead a minimally decent life'.⁵⁴ Waldron considers the social minimum to be 'a level of material well-being beneath which no member of society should be allowed to fall'.⁵⁵ But what exactly is this 'level of material well-being' or a sufficient 'bundle of resources'? Who should decide what is necessary to 'lead a minimally decent life'? Since society is complex, individual needs depend on context and circumstances. Hence, there is no easy answer as to what exactly a social minimum contains for every specific individual. In my thesis, while not claiming to provide an easy answer, I do define the right to a social minimum. I define this right to a social minimum as 'non-discriminatory access to minimum essential levels of subsistence' and show what EU MS could do better to protect it.

Since 'non-discriminatory access' is a crucial sub-component of my definition of the right to a social minimum, this building block aims to understand which groups are seen as particularly disadvantaged or marginalized by CESCR. Hence, I conduct a frequency analysis of the COs to the EU MS from 2009-2019, which shows that persons with disabilities, children and Roma belong to some of the most marginalized

⁵¹ A short report of the workshop is available at <http://www.globaljusticeblog.ed.ac.uk/2017/08/07/specifying-and-securing-a-social-minimum/> accessed 2 January 2023. Due to my role as administrative assistant in the workshop, I had full access to the unpublished workshop papers, participated in all the discussions, and commented on Frans Penning's piece.

⁵² Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury 2019).

⁵³ Ingrid Leijten, Toomas Kotkas and Frans Pennings, 'Introduction' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury 2019) 2.

⁵⁴ Stuart White, 'Social Minimum' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2015, Metaphysics Research Lab, Stanford University 2015) <https://plato.stanford.edu/archives/win2015/entries/social-minimum/> accessed 16 December 2022.

⁵⁵ Jeremy Waldron, 'John Rawls and the Social Minimum' (1986) 3 *Journal of Applied Philosophy* 21, p. 21.

groups across the EU MS. These three groups will serve as case studies throughout my thesis. To specify how EU MS should realise the right to a social minimum for persons with disabilities, children, and Roma, I widen my primary sources beyond CESCER to include the COs of group specific UN human rights treaty bodies (HRTBs).⁵⁶ Besides the Committee on the Rights of the Child (CRC Committee) and the Committee on the Rights of Persons with Disabilities (CRPD Committee), I also consider the Committee on the Elimination of All Forms of Racism (CERD Committee), due to its particular expertise on the Roma. Additionally, I also consider the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), so as to specifically include female persons with disabilities, female girls and Roma women and girls. In other words, I consider gender for any instances of intersectionality with one of my three groups. This gender-inclusive approach will be further developed in chapter 3 of this thesis.

By identifying the poverty, material deprivation, and work dimensions to the right to a social minimum, I am fleshing out differences and similarities between the groups, the EU MS and the HRTBs. While for persons with disabilities, the work dimension is prevalent, for children it is the poverty dimension and for Roma the material deprivation dimension. EU MS need to be aware of these differences. This will allow them to realise the right to a social minimum not only for the general population, but also for specific disadvantaged and marginalized groups. To sum up, in building block 2, I argue that, in order to realise the right to a social minimum, EU MS should make sure that everybody in their jurisdiction has access to 'minimum essential levels of subsistence'. This translates to actively fighting against poverty and social exclusion by ensuring that MIPS are adequate and function as a last safety net. Hence, building block 2 serves as the normative foundation of my thesis by distilling the normative content of the right to a social minimum. Hence, it answers the question of how EU MS should realise the right to a social minimum in light of the COs of five HRTBs which were issued to the EU MS from 2009-2019.

⁵⁶ CEDAW, 'Convention on the Elimination of All Forms of Discrimination against Women' (1981) adopted 18 December 1979, entered into force 3 September 1981; ICERD, 'International Convention on the Elimination of All Forms of Racial Discrimination' (1969) adopted 21 December 1965, entered into force 4 January 1969; CRC, 'Convention on the Rights of the Child' (1990) adopted 20 November 1989, entered into force 2 September 1990; CRPD, 'United Nations Convention on the Rights of Persons with Disabilities' (2008) adopted 13 December 2006, entered into force 3 May 2008.

1.2.3 Building Block 3: Realising the Right to a Social Minimum

In building block 3, which corresponds to chapter 4 of my thesis, I examine in depth what *realising* the right to a social minimum means. I argue that it is not enough to only consider formal legal means like domestic application or justiciability. Instead, I identify broader hindering conditions such as austerity measures to explain why certain EU MS fail to realise the right to a social minimum. Countless books and articles have been written on how to close the ‘rights gap’, acknowledging the fact that if human rights are nothing more than legal rights on paper, they do not help in achieving the practical realisation of rights.⁵⁷ However, among human rights scholars, there still seems to be a preoccupation with justiciability and formal legal implementation, especially among the socio-economic rights community.⁵⁸ Legal scholars frequently affirm the importance of doctrines like the non-derogability of the minimum core obligation which has to be adhered to at all times, even in times of crisis or resource constraints.⁵⁹ Yet, these affirmations of core human rights doctrines arguably have not yet achieved a real change of circumstances and better rights realisation – not even at the most minimal level – for the most vulnerable. This building block aims to shed some light on these two conflicting stories, human rights on paper, on the one hand, and, on the other, the state failure of realising human rights on the ground for the most vulnerable. An open conversation about the rights gap is all the more pressing an issue in these times of COVID-19, another severe crisis which has not affected everybody equally. On the contrary, the most vulnerable and disadvantaged groups

⁵⁷ LaDawn Haglund and Robin Stryker (eds), *Closing the Rights Gap: From Human Rights to Social Transformation* (University of California Press 2015); Wade M Cole, ‘Mind the Gap: State Capacity and the Implementation of Human Rights Treaties’ (2015) 69 *International Organization* 405; Debra L DeLaet, ‘Lost in Legation: The Gap between Rhetoric and Reality in International Human Rights Law Governing Women’s Rights’ (2018) 8 *Global Discourse* 387.

⁵⁸ Michael K Addo, ‘The Justiciability of Economic, Social and Cultural Rights’ (1988) 14 *Commonwealth Law Bulletin* 1425; Deval Desai, ‘Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights’ (2009) 4 *Interdisciplinary Journal of Human Rights Law* 25; Aoife Nolan, Bruce Porter and Malcom Langford, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’ in Menno T Kamminga (ed), *Challenges in International Human Rights Law* (Routledge 2014); Alice Diver and Jacinta Miller (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer 2016); Katie Boyle, ‘Constitutionalising a Social Minimum as a Minimum Core’ in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury Publishing 2019).

⁵⁹ Landau (n 26); Magdalena Sepúlveda Carmona, ‘Alternatives to Austerity: A Human Rights Framework for Economic Recovery’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); Sally-Anne Way, Nicholas J Lusiani and Ignacio Saiz, ‘Economic and Social Rights in the “Great Recession”: Towards a Human Rights-Centred Economic Policy in Times of Crisis’ in Eibe H Riedel, Giacca Gilles and Christopher Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford Scholarship Online 2014).

were often the most affected, unable to realise their most basic rights to health, an adequate standard of living or social security. In other words, COVID-19 is yet another reminder that the realisation of the right to a social minimum requires immediate action prioritising the most marginalized and disadvantaged groups.

In this building block, I analyse explanatory conditions which hinder EU MS from realising the right to a social minimum. In particular, I highlight the contrasting methods of social policy scholars on the one hand, and legal human rights scholars on the other. The conditions under which EU MS are failing to realise the right to a social minimum for the most vulnerable are not well understood. Even though the minimum core obligation is of immediate effect, with no derogations permitted, this does not mean that states parties are all doing similarly well in protecting the right to a social minimum. On the contrary, there is ample evidence that resource constraints are one of the primary reasons why states fail to realise even the most minimal rights protection for disadvantaged and marginalized groups. At the same time, resources are not the only thing that matters. For example, a state can be extremely wealthy and still spend little on social welfare programmes which would benefit disadvantaged groups. Or a state can be moderately wealthy but nevertheless introduce minimum wages which allow for an adequate standard of living. Besides resources and the welfare state architecture, stereotypes and deservingness-conceptions also matter. In many countries, the most vulnerable groups are also the ones most prone to being discriminated against. States have different ways of handling these issues, and the strictly legal focus on the formal non-discrimination framework and justiciability is only one tiny piece of this puzzle. It is time for human rights lawyers to move beyond the narrow legal emphasis on justiciability and formal implementation of human rights norms by acknowledging and confronting the practical conditions and constraints under which states parties are operating.

By bridging the gap between human rights and social policy, I show how a human rights perspective can challenge standard social policy approaches which do not account for human rights. My aim is to demonstrate to legal human rights scholars that the toolbox of the social sciences is indeed useful to identify the conditions under which EU MS fail to realise the right to a social minimum. I address the widespread lack of cross-fertilization of ideas between comparative welfare state scholars measuring differences in institutional design and welfare outcomes and human rights scholars focusing on the enforcement of socio-economic rights.

1.2.4 Building Block 4: Necessity of Disaggregated Data to Realise the Right to a Social Minimum

Finally, in building block 4, which corresponds to chapter 5 of my thesis, I argue that the condition that most often hinders EU MS from realising the right to a social minimum for my three groups is the widespread lack of disaggregated data. Without disaggregated data, it is close to impossible to design effective policies that would enable persons with disabilities, children, and Roma to fully enjoy their right to a social minimum. Hence, I argue that, above all, EU MS must prioritise the collection and use of disaggregated data to realise the right to a social minimum in a non-discriminatory manner.

I examine how the lack of disaggregated statistics for persons with disabilities, children, and Roma hinders EU MS from realising their right to a social minimum. I establish how official statistical data tends to fall short of the data collection and disaggregation requirements under international human rights law. In order to do so, I provide a human rights critique of the EU-SILC survey. This survey fails to capture almost all of the most disadvantaged and marginalized groups as identified through the doctrinal analysis of CESCR and the qualitative content analysis of the group specific human rights treaty bodies. This shortcoming is even more problematic given that EU-SILC is the survey which underlies all official statistics on income and poverty across the EU.

The non-inclusion of disadvantaged and marginalized groups as identified by CESCR poses a serious problem to EU MS, which have an obligation under international human rights law to realise the right to a social minimum by providing *non-discriminatory access* to minimum essential levels of subsistence. How can EU MS realise the right to a social minimum if there is no data available to assess which groups might be discriminated against? It is a well-known fact that the risks of poverty or social exclusion are not distributed equally in society. Marginalized and disadvantaged groups are affected disproportionately.

The main argument in this building block is that the realisation of the right to a social minimum requires the collection of disaggregated data. Nevertheless, across EU MS it is often very difficult, costly, or even illegal to collect disaggregated data. For most of the groups that CESCR identifies as disadvantaged or marginalized, data is either not available at all, or not in disaggregated form. Yet, producing disaggregated data on disadvantaged and marginalized groups is a necessary condition to realise

the right to a social minimum. Making this data more freely available to human rights actors and scholars would allow them to hold states parties more fully to account when it comes to their obligation of realising the right to a social minimum.

1.3 Methodology: From Doctrinal Methods to Socio-Legal Analysis

To answer my overarching research question for the thesis, I have designed an explicitly comparative socio-legal project. Besides doctrinal analysis, I engage in qualitative content analysis with the MAXQDA software⁶⁰ and additionally employ descriptive, comparative statistics across the EU MS. Hence, my methodology consists of three separate, but complementary approaches, namely doctrinal analysis (Section 1.3.1), qualitative content analysis (Section 1.3.2) and descriptive statistics in the form of frequency analyses using EU-SILC (Section 1.3.3). Finally, I justify why there is added value in my comparative socio-legal methodology (Section 1.3.4). By adding a human rights critique to the statistical reading of EU-SILC data across the EU, I address the divide between traditional human rights law on the one hand, and social policy scholarship on the other hand. Hence, I provide added value through my explicitly interdisciplinary and comparative approach.

1.3.1 Doctrinal Methods: The Authoritative Value of General Comments and Concluding Observations

By using the classical doctrinal method, I establish the authoritative value of my primary sources in the form of General Comments (GCs), General Recommendations (GRs)⁶¹ and Concluding Observations (COs). These sources of the Human Rights Treaty Bodies (HRTBs) are sometimes underappreciated. In my thesis, I demonstrate the value of these sources and argue that the full normative content of the right to a social minimum should be derived from them.

While CESCR uses GCs to give general interpretative guidelines on the ICESCR, COs are addressed to individual states parties and constitute the final stage of the periodic reporting cycle.⁶² The monitoring process of the reporting system starts with states reporting on their progress in adhering with their obligations under the Covenant

⁶⁰ VERBI (n 40).

⁶¹ Whereas CESCR, the CRPD and CRC Committees adopt General Comments, the CERD and CEDAW Committees adopt General Recommendations.

⁶² Zdzisław Kędzia, 'Social Rights Protection under the ICESCR and Its Optional Protocol – the Role of the Committee on Economic, Social and Cultural Rights' in Christina Binder and others, *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020).

in so-called state party reports (SPRs). Since 2009, states parties are required to report according to harmonised reporting guidelines.⁶³ CESCR is mandated to examine the SPRs,⁶⁴ by adopting a so-called 'List of Issues' (LOI). In turn, the state party replies to the LOI in their 'Replies to the List of Issues' (RLOI). Finally, an oral session takes place in Geneva. After the session, CESCR adopts the COs, which states parties need to consider for their next periodic report.

I use GCs and COs to distil the normative content of the international human right to a social minimum. Distilling the normative content means identifying the obligations which states parties are bound to comply with under international law.⁶⁵ Yet, what is the classical doctrinal method and how can it be distinguished from other methods? Legal scholars tend to be somewhat uneasy when it comes to questions of methodology, and how to define the doctrinal method. Classical legal training consists mainly of learning the law, how to interpret it and apply it to real life cases, without putting an emphasis on how to distinguish the doctrinal method from other methods. The doctrinal method 'is one that concentrates on the primacy of critical reasoning based around authoritative texts'.⁶⁶ This means that lawyers are trained to distinguish which sources are authoritative and which are not, which is at the heart of any doctrinal analysis. As such, the doctrinal method consists of a 'close analysis of authoritative texts intrinsic to the discipline of law'.⁶⁷ Consequently, as a first step of any doctrinal analysis, there needs to be clarity about the hierarchical status and authority of the analysed norms.

In principle, applying the doctrinal method to international human rights law is not different. In order to distil the normative content of the international human right to a social minimum, I am first of all considering the text of ICESCR. In a second step, I analyse the GCs issued by CESCR as 'authoritative guidance' on how to interpret the

⁶³ International Human Rights Instruments, 'Compilation of Guidelines on the Form and Content of Reports to Be Submitted by States Parties to the International Human Rights Treaties' (2009) UN Doc HRI/GEN/2/Rev.6; CESCR, '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' (2009) UN Doc E/C.12/2008/2.

⁶⁴ Under Article 16 (2) ICESCR, the Economic and Social Council (ECOSOC) was tasked to consider states parties reports. In 1987, ECOSOC created CESCR as a separate body, see ECOSOC Resolution 1985/17 (28 May 1985).

⁶⁵ For an example of using the word 'extraction' in a similar way as I am using the word 'distilling', see O'Conneide (n 39).

⁶⁶ Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, p. 633.

⁶⁷ Suzanne Egan, 'The Doctrinal Approach in International Human Rights Scholarship' in Lee McConnell and Rhona KM Smith (eds), *Research Methods in Human Rights* (Routledge 2018), p. 25.

Covenant.⁶⁸ While the binding nature of GCs under international law has been disputed, they nevertheless enjoy high authoritative standing and ‘provide an excellent starting point for examining its normative content’.⁶⁹ My exercise of distilling the normative content of the right to a social minimum is a process which aims to translate the abstract norms of the ICESCR into a more practical understanding. As such, I understand GCs to be ‘an increasingly authoritative form of soft law’.⁷⁰

However, if my thesis was a purely doctrinal analysis, my pragmatic understanding of GCs as authoritative soft law might come under attack. After all, isn’t the whole point of the doctrinal method to clearly distinguish between hard law and soft law, rather than taking a conscious decision to stand in the ambiguity of GCs as authoritative soft law? Soft law challenges the ‘normative structure, the traditional sources, the subjects and subject matter of international law’.⁷¹ It has even been argued that scholars of international law increasingly rely on extra-legal sources even though they ‘intrinsically lie outside the limits of international law’.⁷² However, in the field of international human rights law, the normative value of GCs is generally accepted. Indeed, most commentaries on international human rights treaties routinely cite GCs as the most authoritative interpretation of the treaty provisions.⁷³ Even positivists increasingly acknowledge the normative value of GCs, despite classifying them as soft law.⁷⁴ In a nutshell, the ‘informative and educative role’ of soft law⁷⁵ in both its ‘norm-filling’ and ‘norm-creating’ capacities⁷⁶ plays a major part in applying the doctrinal method in my

⁶⁸ International Human Rights Instruments, ‘Consultation Process for the Elaboration of Treaty Body General Comments: Note by the Secretariat’ (2015) UN Doc HRI/MC/2015/4, para 1.

⁶⁹ Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014), Introduction, p. 5.

⁷⁰ Kasey L McCall-Smith, ‘Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer’ in Stéphanie Lagoutte, Thomas Gammelthoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016), p. 29.

⁷¹ CM Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *The International and Comparative Law Quarterly* 850, p. 866.

⁷² Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ (2008) 19 *European Journal of International Law* 1075, p. 1091.

⁷³ Saul, David Kinley and Mowbray (n 69); Ilias Bantekas, Michael Ashley Stein and Dēmētrēs Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (1st edn, Oxford University Press 2018).

⁷⁴ Mátyás Bódig, ‘Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights’ in Stéphanie Lagoutte, Thomas Gammelthoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016).

⁷⁵ Chinkin (n 71), p. 862.

⁷⁶ Thomas Gammelthoft-Hansen, Stéphanie Lagoutte and John Cerone, ‘Introduction’ in Stéphanie Lagoutte, Thomas Gammelthoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016), pp. 6-7.

thesis. Additionally, in the field of socio-economic rights, the soft law created through GCs can 'function as a safety valve for hard law when it is in need of some normative development that hard law fails to provide'.⁷⁷ In sum, due to their interpretative value to provide content to human rights standards,⁷⁸ CESCR's GCs are perfectly suitable to serve as primary sources of my doctrinal analysis. Hence, in chapter 3 of this thesis, I apply the doctrinal method by using the text of the ICESCR and GCs as authoritative sources to distil the normative content of the right to a social minimum.

In 2012, the Office of the High Commissioner for Human Rights (OHCHR) released a report on how to strengthen the HRTBs,⁷⁹ resulting in a General Assembly Resolution.⁸⁰ To this end, biennial reports have been produced on the treaty body system in 2016, 2018 and 2020.⁸¹ The overall review of the treaty body system was to be released in 2020. Yet, according to a letter from the President of the General Assembly, this timeline could no longer be respected due to the COVID-19 pandemic.⁸² The treaty body monitoring system has been criticised on several grounds, for example insufficient funding, late state party reporting and non-compliance.⁸³ Even though the reporting processes of the HRTBs have been continuously criticised, they remain the backbone of international human rights law. Therefore, a close analysis of HRTBs' jurisprudence is the most authoritative method of applying doctrinal analysis in this field of law.

In the context of the reporting cycles of HRTBs, COs are crucial documents to analyse normative developments on treaty interpretation. COs have the status of authoritative statements which states parties need to consider for the next periodic state party report. However, similarly to GCs, the binding nature of COs has been

⁷⁷ Mátyás Bódig, 'Legal Validity, Soft Law, and International Human Rights Law' in Pauline Westerman and others (eds), *Legal Validity and Soft Law* (Springer International Publishing 2018), p. 239.

⁷⁸ McCall-Smith (n 70), p. 29.

⁷⁹ Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (OHCHR 2012).

⁸⁰ United Nations General Assembly, 'Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System' (2014) General Assembly Resolution 68/268, UN Doc A/RES/68/268.

⁸¹ OHCHR, 'Treaty Body Strengthening' <<https://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening>> accessed 27 December 2022.

⁸² Tijjani Muhammad-Bande, 'Letter by the President of the General Assembly' <<https://www.ohchr.org/Documents/HRBodies/TB/LetterPG8Apr20.pdf>> accessed 27 December 2022.

⁸³ Lutz Oette, 'The UN Human Rights Treaty Bodies: Impact and Future' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).

contested.⁸⁴ Not only has the authoritative value of COs been debated, but also their impact and effectiveness has been questioned, in particular the issue of whether the periodic reporting system induces positive changes in states' behaviour.⁸⁵ Yet, my doctrinal analysis does not ask whether or not COs are effective. Rather, I am using the COs as authoritative, albeit non-binding interpretative guidelines of what the right to a social minimum means under international human rights law. Building upon this normative foundation, I contrast this legal reality of the right to a social minimum with the empirical-statistical reality found across Europe. In other words, I do not argue for a causal link between COs and policy change, but rather understand COs as the underlying normative framework and information source for how the right to a social minimum should be realised.

In doctrinal analysis, it is very common to go beyond analysis of what the law says to make claims about what the law *should* say. Such explicitly normative research questions are very common in legal academic research.⁸⁶ For my project, it is important to distinguish between the two uses of the word 'normative'. When I distil the normative content of the right to a social minimum, my analysis uses international human rights law in the form of UN HRTBs jurisprudence as authoritative sources. When I ask the overarching research question of how EU MS *should* realise the right to a social minimum, I am asking a normative research question. However, my analysis does not stop with distilling the normative content. Rather, the normative content of the right to a social minimum is the authoritative foundation on which I build my normative argument of how EU MS should realise the right to a social minimum in subsequent chapters. Lawyers sometimes ask 'should'-questions without making their normative assumptions explicit. Yet, it is crucial to reflect on the particular methodological assumptions that come with the framing of a 'should' research question. As established above, my thesis asks the overarching normative research question: *How should EU Member States realise the human right to a social minimum?* This framing springs directly from the doctrinal foundation of my project, taking the authoritative jurisprudence of HRTBs as primary sources. However, my analysis does

⁸⁴ *ibid.*

⁸⁵ Rodley Nigel, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013); Surya P Subedi, 'Effectiveness of the UN Human Rights Treaty Bodies', *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Routledge 2017); Oette (n 83).

⁸⁶ Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing 2012).

not stop at theoretical discussions regarding how to find the correct interpretation of human rights treaty bodies.⁸⁷ Nor do I aim to engage in some sort of rating on whether or not HRTBs are authoritative or not.⁸⁸ Rather, I take the authoritative nature of the HRTBs as a given and complement the classical doctrinal analysis by systematic qualitative content analysis, which I introduce in the next section.

1.3.2 Enhancing the Doctrinal Method through Qualitative Content Analysis with MAXQDA

There is a general trend in academic scholarship to move beyond the application of a purely doctrinal analysis towards socio-legal and 'law-in-action' approaches.⁸⁹ Yet, it is still not common for human rights scholars to be explicit about one's methodological choices.⁹⁰ Nevertheless, it is now a given that methods do matter in legal scholarship, and that it is important to be explicit about how exactly the doctrinal and the non-doctrinal methodological choices interact and complement each other.⁹¹ Some consider any non-doctrinal parts of a project a challenge,⁹² whereas others stress the need of human rights law to go beyond doctrinal approaches.⁹³

In my thesis, I am distilling the normative content of the right to a social minimum in a particular geographical and temporal context. I analyse the latest COs of the HRTBs for all 28 EU MS from 2009-2019 (see section 1.4 for a full justification of the geographical and temporal scope). This endeavour requires a systematic, comprehensive, and rigorous approach in the analysis of the HRTB's jurisprudence. To do that, I engage in qualitative content analysis with the software MAXQDA, which is a specific research software for qualitative data analysis (QDA).⁹⁴

⁸⁷ Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

⁸⁸ Egan (n 67), p. 33.

⁸⁹ Rossana Deplano (ed), *Pluralising International Legal Scholarship the Promise and Perils of Non-Doctrinal Research Methods* (Edward Elgar Publishing 2019).

⁹⁰ Eva Brems, 'Methods in Legal Human Rights Research' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009).

⁹¹ Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292.

⁹² Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2013).

⁹³ Damian Gonzalez-Salzburg and Loveday Hodson (eds), 'Introduction: Human Rights Research beyond the Doctrinal Approach', *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm* (Routledge 2019).

⁹⁴ VERBI (n 40).

By assigning categories to text segments (called ‘codes’), MAXQDA helps the researcher to develop a systematic coding frame.⁹⁵ It is a very effective tool to explore the different sources,⁹⁶ and then use the materials to compare different cases and groups.⁹⁷ My first step of using MAXQDA for my thesis was to import the COs of the HRTBs in PDF format into the software, and then to structure them by EU MS and by HRTB in the so-called ‘document system’ (see Figure 2).

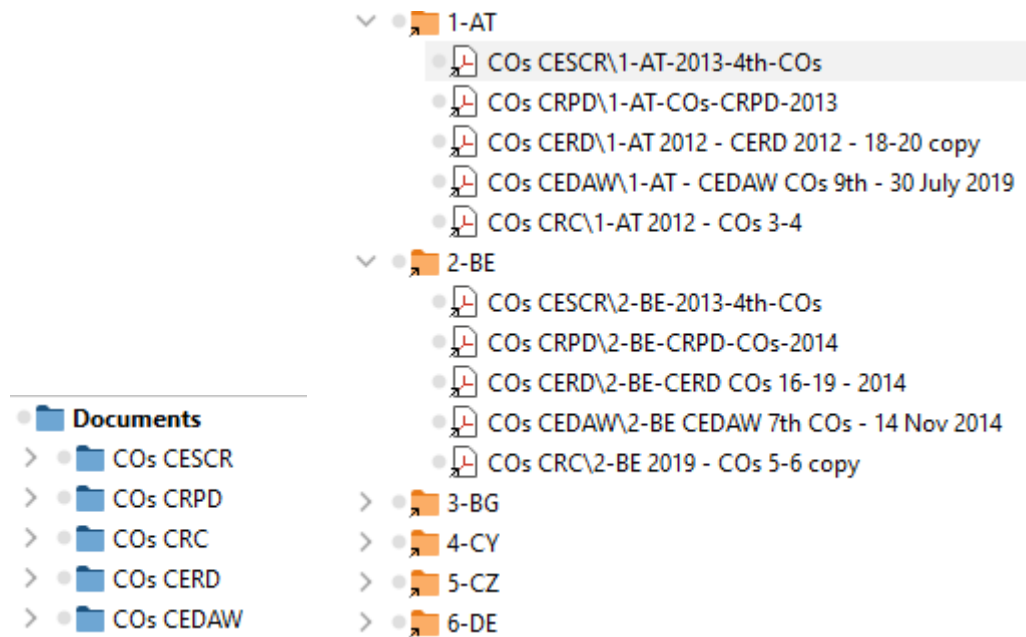


Figure 2. Excerpts of my Document System in MAXQDA

Once imported, the software allows categories, called codes, to be attached to individual words or paragraphs in the COs, which can then be stored in the so-called ‘code-system’ for further analysis. During a research project, these codes usually change along with the developing research questions. For example, at the very beginning of my PhD-programme, my idea was to map the specific paragraphs in the COs on specific rights protected by the ICESCR against immediate core obligations and vulnerable groups (see Figure 3).

⁹⁵ Udo Kuckartz and Stefan Rädiker, ‘Building a Coding Frame’ in Udo Kuckartz and Stefan Rädiker (eds), *Analyzing Qualitative Data with MAXQDA: Text, Audio, and Video* (Springer International Publishing 2019).

⁹⁶ Udo Kuckartz and Stefan Rädiker, ‘Exploring the Data’ in Udo Kuckartz and Stefan Rädiker (eds), *Analyzing Qualitative Data with MAXQDA: Text, Audio, and Video* (Springer International Publishing 2019).

⁹⁷ Udo Kuckartz and Stefan Rädiker, ‘Comparing Cases and Groups, Discovering Interrelations, and Using Visualizations’ in Udo Kuckartz and Stefan Rädiker (eds), *Analyzing Qualitative Data with MAXQDA: Text, Audio, and Video* (Springer International Publishing 2019).

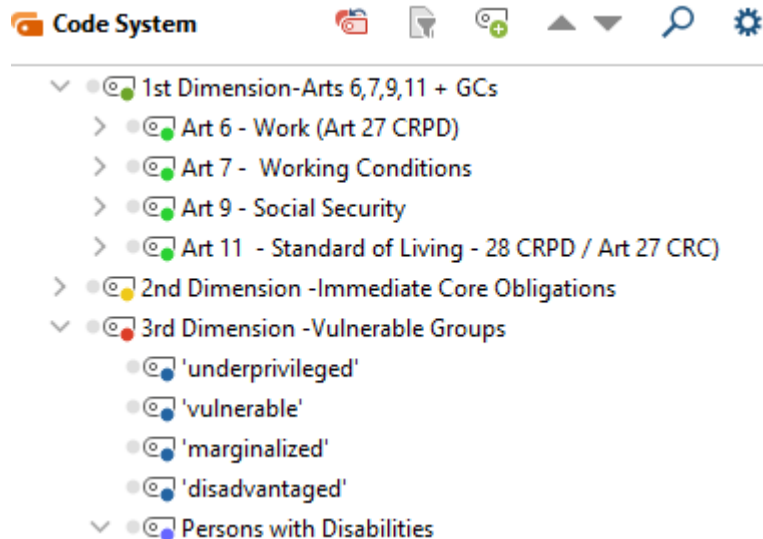


Figure 3. Excerpts of my Initial Code System in MAXQDA

In the course of my research journey, I changed this initial code system several times. In my final code system, on which the analysis in the following chapters is based, I kept my original idea to map certain groups against certain rights. However, due to my conceptualisation of the right to a social minimum and my focus on three specific disadvantaged groups (persons with disabilities, children, and Roma), I was able to specifically capture this research focus in my new code system. Figure 4 shows an excerpt of my final code system. I divided the analysis of the realisation of the right to a social minimum in my assessment of the outcome and hindering conditions. Under the outcome category, I sub-divided my three dimensions of the right to a social minimum: poverty (P), material deprivation (MD) and work (W). As an example, structuring my code system in this way has allowed me to use the MAXQDA software to contrast the realisation of the poverty dimension for persons with disabilities and children.

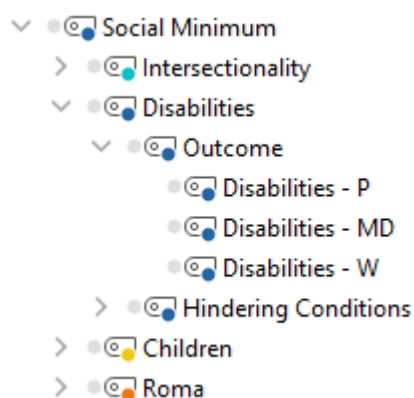


Figure 4. Excerpts of my Final Code System in MAXQDA

One other key function of the MAXQDA software is its advanced keyword search. The benefit of using a tool like MAXQDA is that it allows systematic keyword searches (with as many search terms as desirable) across many documents at once. As a benefit to the classical “Ctrl plus F”-search in each individual document, a systematic keyword search with MAXQDA allows faster and more rigorous search queries. One other key advantage is that the results can be systematically stored, and re-categorised in the form of codes. For example, my conceptualisation of the right to a social minimum was mainly carried out through a series of keyword searches with MAXQDA that allowed me to systemically assess the HRTB’s jurisprudence (see the example in Figure 5). In a nutshell, with the help of systematic keyword searches across many documents at once, repeated phrases or thematic priorities can be easily identified.

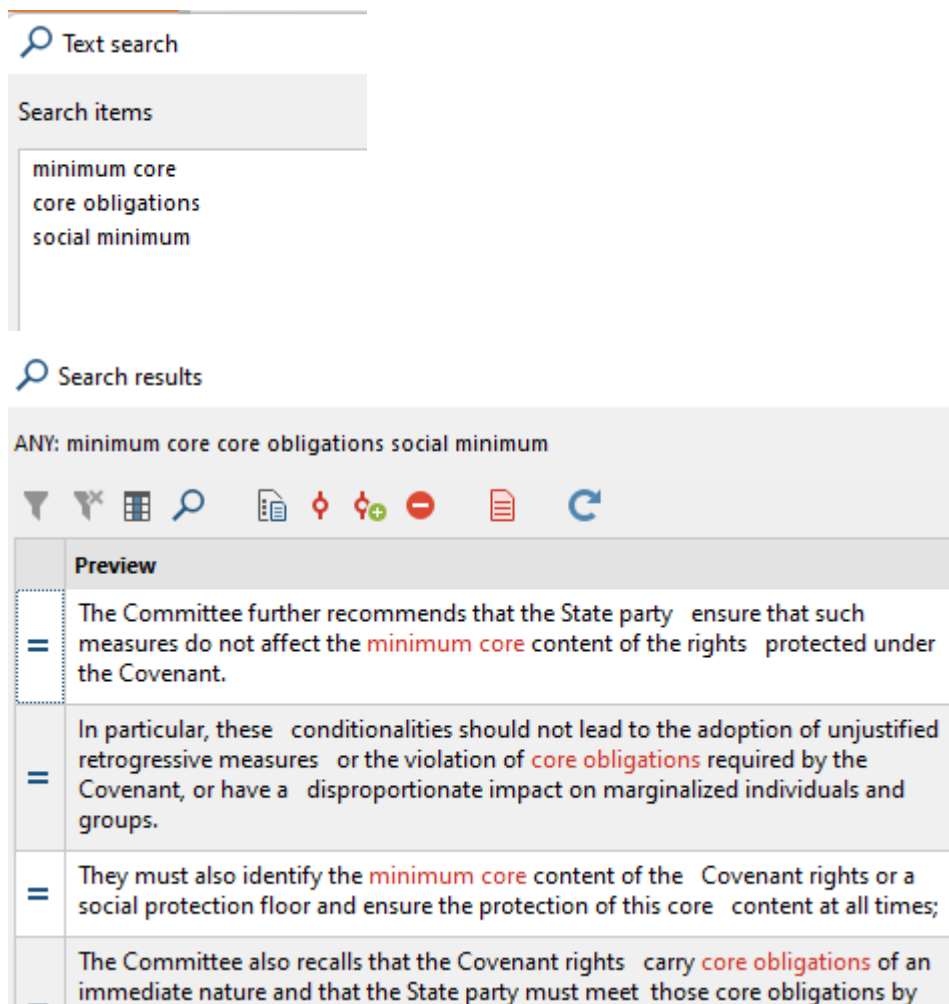


Figure 5. Example of a Keyword Search Across All Documents in MAXQDA

By retrieving the codes in either simple or complex coding queries, information is easily accessible and replicable. For example, a complex coding query called ‘intersection’

makes it possible to search for the co-occurrence of a vulnerable group in combination with a substantive provision of the Covenant. Figure 6 shows the complex coding query 'intersection' between the codes 'Art 11' and 'Children'.

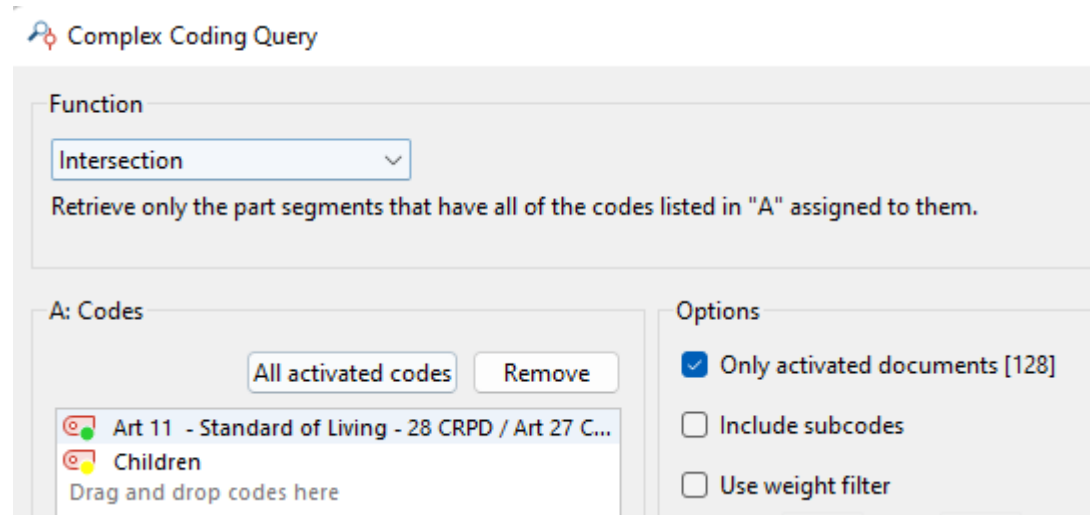


Figure 6. Example of a Complex Coding Query ('Intersection')

The results are displayed in the so-called 'retrieved segments' window (see Figure 7). One can immediately see that the HRTBs were concerned about Art 11 and children in 18 cases. These results can be exported, analysed, and coded for further analysis, which enables a rigorous and in-depth reading of the HRTB's jurisprudence.

Retrieved Segments

26 coded segments (from 18 documents, 2 document groups)

 **COs CESCR > 2-BE-2013-4th-COs**

18. The Committee is disturbed by the poverty experienced by the most underprivileged children and persons of foreign origin. The Committee regrets the lack of effective social integration — including the First Federal Anti-Poverty Plan and the National Strategy on poverty reduction (art. 11). The Committee encourages the State party to pay particular attention to underprivileged and marginalized sectors of the population, including children and persons of foreign origin. The Committee recommends that the State party continue to implement its Second Federal Anti-Poverty Plan so that they have a real impact on poverty reduction. The Committee further recommends that the State party continue to benefit from more specific anti-poverty measures. (Statement on poverty and the International Covenant on Economic, Social and Cultural Rights, 12/2001/17, annex VII).

 [2-BE-2013-4th-COs, p. 4](#)

 **COs CESCR > 3-BG - CESCR COs 6th - 2019**

Figure 7. Excerpt of the 'Retrieved Segments'-Window Showing the Results of the Complex Coding Query

The use of analytical coding with the help of software MAXQDA is hence a novel approach in human rights research, as it permits a comprehensive assessment of a large number of documents. While similar software like Atlas.Ti or NVivo exists and is being used,⁹⁸ the added value of MAXQDA lies in its mixed method functions which explicitly favour the integration of qualitative and quantitative data.⁹⁹ The classical doctrinal method cannot compete with the rigour and systematic analysis which software-enhanced qualitative document analysis offers.

While using COs as an interpretative aid is common in most doctrinal analyses of the ICESCR, the specific focus on a comparative and comprehensive analysis of COs is novel. The added value of analysing COs across states and over time is to identify 'repeated core concerns' and to give 'a more elaborate understanding of what

⁹⁸ Megan Woods and others, 'Advancing Qualitative Research Using Qualitative Data Analysis Software (QDAS)? Reviewing Potential Versus Practice in Published Studies Using ATLAS.Ti and NVivo, 1994–2013' (2016) 34 *Social Science Computer Review* 597.

⁹⁹ Tim Guetterman, John W Creswell and Udo Kuckartz, 'Using Joint Displays and MAXQDA Software to Represent the Results of Mixed Methods Research' in Matthew T McCrudden, Gregory J Schraw and Chad W Buckendahl (eds), *Use of Visual Displays in Research and Testing: Coding, Interpreting, and Reporting Data* (Information Age Publishing 2015).

the ICESCR requires'.¹⁰⁰ Recent examples that study COs more systematically include work on the right to health,¹⁰¹ issues of disability,¹⁰² and intersectionality.¹⁰³ Rather than picking and choosing which COs to analyse, I analyse the most recent COs of the most recent reporting cycles of all EU Member States at a particular time (2009-2019), as depicted in Table 1 below.¹⁰⁴ Appendixes 1 to 5 contain the full list of the most recent COs to EU MS from 2009-2019 for all five HRTBs.

¹⁰⁰ Saul, David Kinley and Mowbray (n 69), Introduction, p. 5.

¹⁰¹ Benjamin Mason Meier and Yuna Kim, 'Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation' (2015) 26 *Duke Journal of Comparative and International Law* 139; Benjamin Mason Meier and Virgínia Brás Brás Gomes, 'Human Rights Treaty Bodies: Monitoring, Interpreting, and Adjudicating Health-Related Human Rights', *Human Rights in Global Health: Rights-Based Governance for a Globalizing World* (Oxford University Press 2018).

¹⁰² Kjersti Skarstad and Michael Ashley Stein, 'Mainstreaming Disability in the United Nations Treaty Bodies' (2018) 17 *Journal of Human Rights* 1.

¹⁰³ Gauthier de Beco, 'Protecting the Invisible: An Intersectional Approach to International Human Rights Law' (2017) 17 *Human Rights Law Review* 633; Gauthier de Beco, 'Intersectionality and Disability in International Human Rights Law' (2020) 24 *The International Journal of Human Rights* 593.

¹⁰⁴ See Appendix 1 for the most recent full reporting cycles of the EU-28 between 2009-2019. Croatia has not reported since 2001, Malta since 2004 and Hungary since 2008. Both Latvia and Luxemburg have submitted reports in 2020 (with a delay of 12 and 17 years respectively), but no COs are available yet. No full citation is given for subsequent references to country-specific COs. Instead, the reader should consult Appendix 1 for the exact date and reporting cycle of the respective CO.

Table 1. Most Recent COs to the EU MS by Five HRTBs (2009-2019)

	CESCR	CERD	CEDAW	CRPD	CRC	HRTBs
AT	2013	2012	2019	2013	2012	5
BE	2013	2014	2014	2014	2019	5
BG	2019	2017	2012	2018	2016	5
CY	2016	2017	2018	2017	2012	5
CZ	2013	2019	2016	2015	2011	5
DE	2018	2015	2017	2015	2014	5
DK	2019	2010	2015	2014	2017	5
EE	2019	2014	2016	n/a ¹⁰⁵	2017	4
EL	2015	2016	2013	2019	2012	5
ES	2019	2016	2015	2019	2018	5
FI	2014	2017	2014	n/a ¹⁰⁶	2011	4
FR	2016	2010	2016	n/a ¹⁰⁷	2016	4
HR	n/a ¹⁰⁸	2009	2015	2015	2014	4
HU	n/a ¹⁰⁹	2019	2013	2012	2014	4
IE	2015	2011	2017	n/a ¹¹⁰	2016	4
IT	2015	2017	2017	2016	2015	5
LT	2015	2019	2019	2016	2013	5
LU	n/a ¹¹¹	2014	2018	2017	2013	4
LV	n/a ¹¹²	2018	n/a ¹¹³	2017	2016	3
MT	n/a ¹¹⁴	2011	2010	2018	2019	4
NL	2017	2010	2016	n/a ¹¹⁵	2015	4

¹⁰⁵ On 5 May 2021, the CRPD Committee adopted COs in response to Estonia's initial report. These could be considered in future research.

¹⁰⁶ Finland submitted its initial state party report to the CRPD Committee on 9 August 2019. So far, no session has been scheduled to consider the report.

¹⁰⁷ France submitted its initial state party report to the CRPD Committee on 8 May 2016. This report has been considered in the Committee's 25th session which took place in virtual format between 16 August 2021 and 10 September 2021.

¹⁰⁸ CESCR Committee considered Croatia's initial state party report in December 2001. Since then, no report has been submitted.

¹⁰⁹ CESCR Committee considered Hungary's third state party report in January 2008. The report was due on 30 June 1994 and submitted on 29 September 2005. For reasons of comparability, the COs have not been considered for this analysis. The combined 4th – 6th periodic report was due on 30 June 2009, but Hungary has not submitted it yet.

¹¹⁰ Ireland ratified the CRPD on 20 March 2018. The initial state party report was due on 20 Apr 2020, but it has not been submitted yet.

¹¹¹ CESCR Committee adopted COs in response to Luxembourg's third state party report on 26 June 2003. The fourth periodic report was due on 30 June 2008, yet Luxembourg only submitted it on 24 January 2020. No session has been scheduled yet to consider the report.

¹¹² CESCR Committee adopted COs in response to Latvia's initial report on 7 January 2008. Latvia was supposed to submit its second, third and fourth periodic reports by 30 June 2009, but it has only submitted the report on 3 April 2019. The COs were adopted on 30 March 2021 and could be considered in future research.

¹¹³ The CEDAW Committee considered the combined initial, 2nd and 3rd periodic report of Latvia and adopted COs in 2004. The COs regarding the combined 4th to 7th periodic report were adopted on 10 March 2020. They could be considered in future research.

¹¹⁴ CESCR Committee considered Malta's initial report and adopted its COs on 14 December 2004. The second periodic report was due on 30 June 2009, but Malta has not submitted it yet.

¹¹⁵ The Netherlands submitted its first state party report to the CRPD Committee on 13 July 2018. So far, no session has been scheduled to consider the report.

	CESCR	CERD	CEDAW	CRPD	CRC	HRTBs
PL	2015	2019	2014	2018	2015	5
PT	2014	2017	2015	2016	2014	5
RO	2014	2010	2017	n/a ¹¹⁶	2017	4
SE	2016	2018	2016	2014	2015	5
SI	2014	2016	2015	2018	2013	5
SK	2019	2018	2015	2016	2016	5
UK	2016	2016	2019	2017	2016	5
Total COs	23	28	27	22	28	

By focusing on the jurisprudence of five human rights treaty bodies addressed to the EU-28 in the period 2009-2019, I do not engage in typical comparative law approaches of focusing on courts and single countries.¹¹⁷ Rather, by comparing 28 EU MS, my approach explicitly engages in a broad scale comparison in a particular region at a particular time. This approach allows me to find out whether and how states parties are realising the right to a social minimum, and for whom. If I had chosen to do a single case study, I would not be able to draw these conclusions.

Why then did I widen my focus from analysing CESCR's jurisprudence to include four other HRTBs? Since the ICESCR is a general international human rights treaty, its focus is not directed towards one particular disadvantaged or marginalised group. However, CESCR does mention a lot of different disadvantaged or marginalized groups in the COs to states parties. As I establish in chapter 3 of this thesis, the non-discrimination obligation is crucial for a comprehensive understanding of the minimum core doctrine. Hence, I count and categorize all references to particular disadvantaged or marginalised groups in CESCR's COs. This exercise sheds light on the prevalence of any disadvantaged or marginalized groups as identified by CESCR. The results show that according to CESCR, women, migrants, persons with disabilities, children and Roma are among the most marginalized across countries. Therefore, I have widened my primary sources beyond CESCR to include the COs of four additional group specific UN human rights treaty bodies.¹¹⁸ While the group specific treaties do not cover all disadvantaged or marginalized groups as identified by CESCR, the large majority of references to disadvantaged or

¹¹⁶ Romania ratified the CRPD on 31 Jan 2011. The initial state party report was due on 3 Mar 2013, but it has not been submitted yet.

¹¹⁷ Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018).

¹¹⁸ CEDAW (n 56); ICERD (n 56); CRC (n 56); CRPD (n 56).

marginalized groups can be subsumed into the particular focus of the four additional HRTBs that I consider: the CEDAW, CERD, CRC and CRPD Committees. One of the biggest advantages of including group specific treaties is the deep expertise of the treaty bodies on that particular group. Furthermore, issues of intersectionality have come to the forefront since the introduction of specific articles in the text of the newer group specific covenants dealing with two disadvantaged groups at the same time, such as children with disabilities focused on by both the CRC and CRPD Committees.

By taking such a broad comparative perspective between treaty bodies and EU member states, my methodology goes further than the usual doctrinal analysis of single COs. I demonstrate that the framing of disadvantaged and marginalised groups depends not only on the particular treaty bodies, but also differs between countries. With the help of the MAXQDA software, I compare the COs of five UN human rights treaty bodies across all EU member states in the period of 2009-2019. The geographical scope is limited to the EU member states, specifically including the latest full reporting cycle of each treaty body in the period of 2009-2019. Since the minimum core doctrine has been revived by CESCR in the aftermath of the Euro-Crisis, the choice of this period ensures maximum relevance for our current COVID-19 times. A full justification of the geographical and temporal scope of my thesis is provided in section 1.4.2 for the former, and section 1.4.3 for the latter.

Even though doctrinal developments of group specific treaty bodies tend to be distinct from CESCR, the minimum core doctrine has been specifically developed by CESCR and is generally applicable to the socio-economic rights contained in the group specific treaties. My framing of the minimum core doctrine as a right to social minimum helps to conceptualise the minimum core doctrine in a tangible way. However, prioritising the realisation of the right to a social minimum for disadvantaged and marginalized groups is impossible without disaggregated data. In the absence of statistical disaggregated data outside of human rights law, the expertise of the group specific treaty bodies is a very relevant and useful source of information. As such, my claim is not to give full justice to each normative nuance of the group specific treaty bodies, but rather to stick with the common denominators of all treaties: Establishing how the EU-28 should realise the right to a social minimum for the most disadvantaged and marginalized groups.

1.3.3 Descriptive Statistics and a Human Rights Critique of Social Policy Data

The third methodological approach which I utilise in my thesis is a critical use of descriptive statistics, by engaging in frequency analyses of the EU-SILC. I engage in a human rights critique of the use of social policy data, in particular regarding the widespread unavailability of disaggregated data for some of the most disadvantaged and marginalized groups.

In 2018, the OHCHR published a report which emphasized disaggregation as one of the central principles of a human rights approach to data.¹¹⁹ The CRPD is the first international human rights treaty which contains a direct obligation on statistics and data collection in the text of the treaty. Under Art 31(2) CRPD, states parties are specifically required to collect disaggregated data. Despite this obligation, most state party reports do not rely on appropriate and comparable disaggregated statistical data. As a response, the CRPD Committee has routinely voiced its concerns about this lack of compliance with Art 31. Indeed, it has done so in all COs addressed to EU MS from 2009-2019.¹²⁰ Despite the lack of a specific Article in the Covenant itself, CESCR has also been concerned in many instances about insufficient disaggregated data.¹²¹

Unfortunately, comparable disaggregated statistics across the EU are difficult to find. If surveys do collect socio-demographic variables on poverty and living conditions, it is almost never possible to disaggregate those further by age, ethnicity, migrant status, or disability. One key reason is that the sample size is too small to ensure the anonymity of survey respondents, and as such privacy concerns do not allow the disaggregation of data. Some EU member states even enforce strict legal

¹¹⁹ OHCHR, 'A Human Rights Based Approach to Data - Leaving No One Behind in the 2030 Agenda for Sustainable Development' (2018) <<https://www.ohchr.org/en/documents/tools-and-resources/human-rights-based-approach-data-leaving-no-one-behind-2030-agenda>> accessed 27 December 2022.

¹²⁰ CRPD Committee, COs to EU 2015, paras 72-73; AT 2013, paras 50-51; BE 2014, paras 42-45; BG 2018, paras 67-68; CY 2017, paras 61-62; DE 2015, paras 15-16, 57-58; DK 2014, paras 64-65; EL 2019, paras 46-47; ES 2019, paras 58-59; HR 2015, paras 9-10, 49-50; HU 2012, paras 47-50; IT 2016, paras 77-78; LT 2016, paras 63-64; LU 2017, paras 54-55; LV 2017, paras 52-53; MT 2018, paras 45-46; PL 2018, paras 50-51; PT 2016, paras 59-61; SE 2014, paras 55-56; SI 2018, paras 53-54; SK 2016, paras 83-84; UK 2017, paras 64-65.

¹²¹ CESCR, COs to AT 2013, paras 9, 20; COs to BE 2013, para 12; COs to BG 2019, para 54; COs to CY 2016, paras 19-20, 37-38, 48; COs to CZ 2013, para 14; COs to DE 2018, paras 54-55, 64; COs to DK 2019, paras 10-11; COs to EE 2019, paras 38-39, 57; COs to EL 2015, paras 9-10, 23-24, 39-40; COs to ES 2018, para 53; COs to FI 2014, paras 13, 28; COs to FR 2016, paras 16-17; COs to IE 2015, paras 6, 16, COs to IT 2015, paras 58-59; COs to LT 2015, para 13; COs to NL 2017, paras 27-28, 37-38, 52-53, 59; COs to PL 2015, paras 41-42, 63; COs to PT 2014, paras 7, 15, 21; COs to RO 2014, paras 9, 26; COs to SE 2016, paras 37-38, 51; COs to SI 2014, para 6; COs to SK 2019, paras 30-31, 64; COs to UK 2016, paras 40-41, 71.

prohibitions of the collection of any ethnicity data.¹²² This is a particular problem when trying to access comparable data regarding the Roma, the EU's largest minority.

While the EU has developed a range of cross-national statistical surveys to monitor economic growth, unemployment and living standards across all EU member states, the EU-SILC is the official instrument and underlying data source to measure poverty and material deprivation across the EU MS.¹²³ The EU's statistical agency, Eurostat, is responsible for the operation of these large-scale surveys. I argue that the EU-SILC survey is a very useful tool to give a first indication about the realisation of the right to a social minimum comparatively across EU MS. Since the EU-SILC is the underlying survey for most statistics on income and poverty across the EU, it serves as the database for EU-wide poverty reduction targets like Europe 2020. Its biggest strength is the coverage of all EU MS and its yearly repetition, which allows for the identification of trends over time and across countries.

Unfortunately, data collected through large-scale comparative surveys like EU-SILC are seldom used in the HRTB's reporting cycle process. This is because states parties do not tend to refer to cross-national surveys in their periodic reports. In the constructive dialogue and the subsequent LOIs and COs, HRTBs do not normally engage with any information which has not been brought up in the state party reports or shadow reports by NGOs. Further, their mandate is not to compare states between each other but rather to assess one state's progress over time. If states parties started to make use of the data collected in EU-SILC, HRTBs still might not be willing to fully engage with this evidence in their COs, but at least they would have to acknowledge it. This would enable some bridge building between social policy data, which is typically not oriented towards human rights, and the reporting process, which usually does not make use of the rich social policy data that would be available but is underutilised.

Using EU-SILC data also comes with serious problems and pitfalls. For example, EU-SILC only covers people living in private households, thus excluding anybody who lives in any type of institution, such as care homes, prisons, shared accommodations for asylum seekers and university housing. Additionally, anybody

¹²² Lilla Farkas, 'Data Collection in the Field of Ethnicity: Analysis and Comparative Review of Equality Data Collection Practices in the European Union' (European Commission 2017).

¹²³ For general information on EU-SILC, see <<https://ec.europa.eu/eurostat/web/microdata/european-union-statistics-on-income-and-living-conditions>> accessed 16 December 2022.

without an address is not covered, hence excluding homeless persons. By design, the EU-SILC does not disaggregate by ethnicity. A large number of reports and books have been published on the issue of 'hard-to-reach' groups in general, and disaggregation by ethnicity in particular, with a special emphasis on Roma.¹²⁴ For persons with disabilities, similar but distinct problems of coverage exist. Besides not covering anybody with a disability living in an institution, EU-SILC defines persons with disabilities according to self-reported limitations in carrying out every-day activities.¹²⁵ Across the EU, there are very large differences in the prevalence of self-reported disability, which might be due to inconsistent definitions¹²⁶ or regional discrepancies.¹²⁷ Hence, one of the biggest disadvantages of using EU-SILC as a data source to establish how EU MS should realise the right to a social minimum is its insufficient coverage of marginalized groups.

Besides the problems of disaggregation by ethnicity or privacy concerns in general, it would also be extremely costly and cumbersome to enlarge the sample size to reach very specific population groups, for example poor female children with disabilities. While the public information on EU-SILC on the Eurostat database allows basic disaggregation by age and by health status, it is not possible to combine the two. Thus, one can indirectly find poverty statistics regarding children via the household, and separately one can find poverty statistics for persons with disabilities, but it is not possible to combine the two and learn about comparable poverty statistics for children with disabilities across the EU.

In order to overcome these problems with the lack of accessible disaggregated data, I have gained access to the restricted microdata underlying the publicly available

¹²⁴ Vera Messing, 'Methodological Puzzles of Surveying Roma/Gypsy Populations' (2014) 14 *Ethnicities* 811; Gordon B Willis and others, 'Overview of the Special Issue on Surveying the Hard-to-Reach' (2014) 30 *Journal of Official Statistics* 171; Roger Tourangeau and others, *Hard-to-Survey Populations* (Cambridge University Press 2014); Annabel Tremlett and Aidan McGarry, 'Challenges Facing Researchers on Roma Minorities in Contemporary Europe: Notes towards a Research Program' (European Centre for Minority Studies 2013) ECMI Working Paper #62 <https://www.ecmi.de/publications?tx_ifmpublications_categorylisting%5Baction%5D=show&tx_ifmpublications_categorylisting%5Bcontroller%5D=Publication&tx_ifmpublications_categorylisting%5Bpublication%5D=240&cHash=40130de656b236007de9d6de0d373376> accessed 31 December 2022; Pamina Firchow and Roger Mac Ginty, 'Including Hard-to-Access Populations Using Mobile Phone Surveys and Participatory Indicators' (2020) 49 *Sociological Methods & Research* 133.

¹²⁵ The EU-SILC asks if a person has 'any chronic (long-standing) physical or mental health problem, illness or disability' (for at least six months) and whether this 'limits' their 'daily activities' (Q43–44).

¹²⁶ Nolan (n 49), p. 124.

¹²⁷ Emmanuelle Cambois, Aïda Solé-Auró and Jean-Marie Robine, 'Economic Hardship and Educational Differentials in Disability in 26 European Countries' (2016) 28 *Journal of Aging and Health* 1214.

EU-SILC data.¹²⁸ The microdata essentially consist of four large datasets containing information about each household member that was interviewed in a particular survey year. This allows the researcher to see the data in its most disaggregated form, namely comparable individual-level, and household-level data. Since I have gained access to the microdata, I was able to overcome some of the data disaggregation problems, such as the publicly available data not allowing for disaggregation by more than one characteristic. However, even microdata do not remedy the design faults of EU-SILC which systematically exclude some of the most marginalised groups. For example, since EU-SILC only collects information on people living in private households, children with disabilities living in institutions would never be covered.

Despite its official status, the EU-SILC survey fails to capture almost all of the most disadvantaged and marginalized groups as identified through the doctrinal analysis of CESCR and the qualitative content analysis of the group specific human rights treaty bodies. From a human rights perspective, this situation is not tenable. By adding a human rights critique to the most typical descriptive statistics produced with the EU-SILC data, I offer a fresh look upon the (non-) availability of disaggregated data across the EU-28. I argue that without disaggregated data, it is impossible to realise the right to a social minimum for disadvantaged and marginalised groups.

1.3.4 The Added Value of a Comparative, Socio-Legal Methodology

What then is the added value in my explicitly socio-legal, interdisciplinary, and comparative methodological approach? By combining classical doctrinal analysis with systematic quantitative content analysis, I apply abstract normative standards to a particular time and place. The mass analysis of the COs of five HRTBs across the EU-28 from 2009-2019 provides a comprehensive picture about how international human rights law envisages that the right to a social minimum should be realised. However, my analysis does not stop there. Only by using a human rights lens to interrogate the EU's official statistics on poverty and social exclusion am I able to show how EU MS fail to realise the right to a social minimum in practice, in particular for disadvantaged and marginalised groups.

For human rights scholars, my framing of the minimum core doctrine as a practical substantive right to a social minimum can be considered a key innovation. I

¹²⁸ Project number RPP 387/2018.

bring together the often-separate realms and research strands of non-discrimination lawyers with international human rights lawyers focusing on search of content for the minimum core doctrine. By doing so, I propose a practical way for the EU MS to realise the right to a social minimum, in particular for disadvantaged and marginalized groups. At the same time, I demonstrate to human rights scholars that an intensive interrogation of the official EU statistics on poverty and social exclusion is a necessary precondition to find which practical barriers prevent EU MS from realising the right to a social minimum. To that end, the toolbox of the social sciences is useful to achieve a more practical and relevant framing of core human rights doctrines. I also show that an intensive reading of core international human rights standards challenges the standard social policy approaches prevalent across Europe, which do not account for human rights.

Since my thesis develops an innovative way of how to think about the realisation of the right to a social minimum, my results will address the need for more comprehensive indicators and benchmarks for realisation. Consequently, the exchange of methods and strategies between the enforcement of human rights and the specification of their content in terms of policy design will be strengthened. My explicitly socio-legal, interdisciplinary and comparative methodological approach bridges the gap between the contrasting approaches of human rights law and social policy. My methodological choices will be particularly attractive to anybody in the academic community interested in interdisciplinary debates and socio-legal research. By addressing the widespread lack of cross-fertilization of ideas between comparative welfare state scholars measuring differences in institutional design and welfare outcomes and human rights scholars focusing on the enforcement of socio-economic rights, my thesis is a humble attempt at providing a bridge between the disciplines.

1.4 Justifying the Material, Geographical and Temporal Scope

In this section, I first justify the material scope of my thesis regarding my conceptualisation of the minimum core doctrine as a substantive, composite right to a social minimum (Section 1.4.1). Secondly, I justify my geographical scope on the EU MS and on the HRTBs (Section 1.4.2). Finally, I justify my temporal scope of 2009-2019 (Section 1.4.3).

1.4.1 Material Scope: Why a Human Right to a Social Minimum?

The 'social minimum' is a central concept in philosophy and welfare studies, yet its precise definition is disputed. According to the Stanford Encyclopaedia of Philosophy, the social minimum is defined as a 'bundle of resources which suffices in the circumstances of a given society to enable someone to lead a minimally decent life'.¹²⁹ Waldron considers the social minimum to be 'a level of material well-being beneath which no member of society should be allowed to fall'.¹³⁰ But what exactly is this 'level of material well-being' or a sufficient 'bundle of resources'? Who should decide what is necessary to 'lead a minimally decent life'? Since society is complex, individual needs depend on context and circumstances. This is why there is no agreement among social policy scholars, and no easy answer as to what exactly a social minimum contains.

In human rights law, a similar problem exists. According to the so-called minimum core doctrine, states are required to respect the 'minimum essential levels' of all rights contained in the international human rights law treaties they have ratified.¹³¹ Ever since this coining of the minimum core doctrine more than 20 years ago, the academic reception has been lukewarm at its best. In an influential article, Young argued in 2008 that the minimum core doctrine does not have clear content.¹³² Even in 2022 it seems to still be unclear to many what exactly the minimum core doctrine means.

Besides this indeterminacy critique, which has haunted international human rights law for quite some time now, a more recent development is Moyn's criticism against human rights law more generally.¹³³ In essence, he argues that in the best-case scenario human rights do nothing to address material inequality while the worst-case scenario makes human rights complicit to neoliberalism. Essentially, Moyn criticises the perceived failure of human rights law to counteract inequality and neoliberalism.¹³⁴ A related common critique of the minimum core doctrine is the fear that any focus on a however defined minimum might distract states from moving

¹²⁹ White (n 54).

¹³⁰ Waldron (n 55), p. 21.

¹³¹ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

¹³² Young (n 23). On 15 October 2022, her article had 471 citations on Google Scholar and her piece continues to be cited as evidence to disregard the usefulness of the minimum core doctrine.

¹³³ Moyn, *Not Enough* (n 24), p. 216.

¹³⁴ *ibid*, p. 216.

progressively towards the full level of protection.¹³⁵ Instead of focusing on a minimum level, should human rights not rather be focusing on achieving equality? However, why would states do a better job of achieving the greater goal of equality when they mostly fail to realise their obligations to protect a social minimum? States parties routinely fail to protect even the bare minimum subsistence rights for a large number of people in Europe, specifically those from disadvantaged and marginalized groups. However, according to the minimum core doctrine, states parties are required to prioritize the protection of minimum essential levels of rights for disadvantaged and marginalized groups.¹³⁶ Therefore I argue - in line with CESCR - that states need to meet minimum core obligations as a matter of priority. A renewed focus on minimum core obligations will help states to prioritize disadvantaged and marginalized groups in the light of competing policy demands. Rather than being a distraction, this obligation will help states to realise the full content of rights progressively.

As mentioned above, the initial inspiration of my research focus on the right to a social minimum stems from the Oñati Workshop on 'Specifying and Securing a Social Minimum' (2017),¹³⁷ and the subsequent edited book published in 2019.¹³⁸ According to the introduction of the book, a social minimum 'can be understood as the floor of socio-economic protection states are required to provide'.¹³⁹ The book shows an effort to bridge legal approaches to the social minimum with social policy approaches. While legal scholars are often primarily concerned with fleshing out concrete state obligations, social policy scholars are concerned with precise measurements and data matching the definitions. Although the book offers a very rich collection of both approaches in separate chapters, it fails to truly bring the two together. Since the chapters are authored by either lawyers or social scientists, the book does not manage to fully answer the question of what a social minimum should consist of conceptually and how to measure it. With this thesis, I seek to fill this gap and provide an interdisciplinary analysis that takes the normative foundation of

¹³⁵ Leijten, Kotkas and Pennings (n 53); Leticia Morales, 'The Discontent of Social and Economic Rights' (2018) 24 Res Publica 257; Young (n 23).

¹³⁶ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

¹³⁷ A short report of the workshop is available at

<<http://www.globaljusticeblog.ed.ac.uk/2017/08/07/specifying-and-securing-a-social-minimum/>> accessed 2 January 2023. Due to my role as administrative assistant in the workshop, I had full access to the unpublished workshop papers, participated in all the discussions, and commented on Frans Penning's piece.

¹³⁸ Kotkas, Leijten and Pennings (n 52).

¹³⁹ Leijten, Kotkas and Pennings (n 53), p. 2.

international human rights law seriously. On the one hand, I conceptualise and define the right to a social minimum according to international human rights law. On the other hand, I am using this normative content of the right to a social minimum to ask the question how EU MS have realised the right to a social minimum in the period 2009-2019. In order to understand which conditions hinder states from realising the right to a social minimum, I am considering both the human rights approach and the social policy approach.

Additionally, I offer a pragmatic, a holistic and a consent justification for why I conceptualise the minimum core doctrine as a right to a social minimum. The pragmatic justification realizes that poverty is very often a vicious cycle in which people might find themselves without a job, which might result in losing their homes, which might consequently lead to not being able to claim benefits, since for this one would need a fixed address. Hence, it is pragmatic not to consider these scenarios neatly separated into different rights violations (e.g., the rights to housing, food, or social security), but to consider the right to a social minimum as a composite right. The holistic justification criticizes human rights and social policy scholars' tendency to be too narrowly focused on one policy scheme (e.g., unemployment insurance), one right (e.g., the right to food) or one disadvantaged group (e.g., persons with disabilities). In order to look at how EU MS should realise the right to a social minimum, we must consider the right to a social minimum more broadly and holistically. Finally, the consent justification considers that social policy scholars generally agree that poverty is not a desirable state of affairs, and that welfare state systems have an important role to play in providing some sort of minimum income for those affected by it. Similarly, legal human rights scholars tend to agree that the right to non-discrimination and the minimum core doctrine are real normative obligations that states parties must fulfil immediately. Less agreement exists regarding the consequences to be drawn from this consensus. By proposing a right to a social minimum, I address the social policy concern with a minimum income by reading international human rights law sources in a new way, so as to make them accessible to social policy scholars. In other words, by relating human rights sources directly to social policy concerns, my aim is to lead social policy conversations into a relationship that can make sense of international human rights law sources and materials.

However, by conceptualising the right to a social minimum, I do not *invent* a new human right. Rather, by carefully analysing the HRTBs' jurisprudence, I *read* the

existence of the right to a social minimum *into already existing obligations*. I argue that the normative content of what it means to realise the right to a social minimum is already fully contained in the rich jurisprudence of the HRTBs. Hence, I do not argue that the right to a social minimum should be formally included in the reporting process or treaty changes. In other words, my goal in framing the minimum core doctrine as a substantive right to a social minimum is not to coin a new right on paper. Instead, I offer a new understanding of already existing immediately applicable obligations, which will help states parties to realise the minimum core doctrine more fully.

1.4.2 Geographical Scope: Why a Focus on the EU Member States and the Human Rights Treaty Bodies?

My geographical scope is the 28 EU MS. Despite Brexit, I have decided not to exclude the UK from my analysis since the UK was still bound by EU law during the period examined by the thesis. The ICESCR was born out of the very origins of modern international human rights law. To give legal effect to the 1948 Universal Declaration of Human Rights (UDHR),¹⁴⁰ states parties adopted two separate covenants: the International Covenant on Civil and Political Rights (ICCPR) on the one hand,¹⁴¹ and the ICESCR on the other hand. The early history of modern human rights law has not only been impacted by opposing viewpoints between the East and West due to the Cold War, but also by disagreements between the Northern and Southern hemispheres. While the West focused almost exclusively on civil and political rights, claims for the better protection of socio-economic rights came almost exclusively from the South and the East.¹⁴² The historic neglect of socio-economic rights in Europe must be understood with this genealogy of modern human rights law in mind.

Most of the important doctrinal developments regarding the justiciability of minimum socio-economic rights have been fought in courts outside of Europe, most importantly in South Africa and in South America. In Europe, there is still a tendency to disregard socio-economic rights as ‘not real’ if they are not fully justiciable in court. Consequently, justiciability has been a particular focus of legal scholars working on

¹⁴⁰ UDHR, ‘Universal Declaration of Human Rights’ (1948) General Assembly Resolution 217 A (III), UN Doc A/RES/3/217A.

¹⁴¹ ICCPR, ‘International Covenant on Civil and Political Rights’ (1976) adopted 16 December 1966, entered into force 13 March 1976.

¹⁴² Mashood A Baderin and Robert McCorquodale, ‘The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development’ in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (Oxford University Press 2007).

socio-economic rights in Europe since it is more contested than in relation to civil and political rights.¹⁴³ By distilling the normative content of the right to a social minimum not through court cases, but through CESCR's COs to EU MS, my aim is to fill this regional gap in social rights scholarship. I show that in order to realise the right to a social minimum for disadvantaged and marginalized groups in Europe, it is not necessary to demand better justiciability. As such, my geographical focus on Europe is justified since it addresses the normative value of international human rights law besides the realm of justiciability. Since socio-economic rights are overwhelmingly considered as non-justiciable in Europe, I do not focus on the few positive case-law examples of justiciability,¹⁴⁴ but rather specify the normative content of the right to a social minimum, so that states parties can adapt their policy responses to become human rights compliant.

Historically, CESCR's jurisprudence has not been seen as particularly important or relevant to the EU legal order. This holds particularly true when it comes to the protection of social rights across EU MS, which is often seen as secondary or irrelevant when market freedoms are at stake.¹⁴⁵ There are many other human rights regimes besides CESCR's jurisprudence that EU MS are subject to, most importantly the European Convention on Human Rights (ECHR), the European Social Charter (ESC)¹⁴⁶, the Revised European Social Charter (RESC),¹⁴⁷ the EU Charter of

¹⁴³ Sanna Hyttinen, 'A Second View from Elsewhere – The EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse' (2006) 24 *Nordic Journal of Human Rights* 1; O Gerstenberg, 'The Justiciability of Socio-Economic Rights, European Solidarity, and the Role of the Court of Justice of the EU' (2014) 33 *Yearbook of European Law* 245; Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020).

¹⁴⁴ For example, the Hartz IV-Decision of the German Constitutional Court in 2010 has been widely praised as a positive example of justiciability in Europe, compare Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (n 25).

¹⁴⁵ See in particular the scholarship after the Viking / Laval saga, for example discussed by Sjoerd Feenstra, 'How Can the Viking/ Laval Conundrum Be Resolved? Balancing the Economic and the Social: One Bed for Two Dreams?' in Frank Vandenbroucke, Catherine Barnard and Geert De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017); Sybe A De Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More "Holistic Approach"' (2016) 32 *The International Journal of Comparative Labour Law and Industrial Relations* 203; Cecilia Bruzelius, Constantin Reinprecht and Martin Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) 55 *Journal of Common Market Studies* 1239.

¹⁴⁶ Council of Europe, European Social Charter (ETS No. 035) 1961.

¹⁴⁷ Council of Europe, European Social Charter (revised) (ETS No. 136) 1996.

Fundamental Rights (CFR),¹⁴⁸ but also recent policy developments like the European Pillar of Social Rights (EPSR).¹⁴⁹

The ECHR focuses exclusively on civil and political rights, whereas socio-economic rights are contained in the ESC and RESC. However, these two regimes were never considered as being on equal footing. The ECHR's success is largely considered to be due to its enforcement mechanism, the European Court of Human Rights (ECtHR), which allows individuals to claim violations of their rights protected under the ECHR, provided that they have exhausted all domestic remedies before. On the contrary, a reporting system has been established for the ESC/RESC-system, with the European Committee of Social Rights (ECSR) interpreting the Charter.¹⁵⁰

Even though the ECHR does not contain socio-economic rights, there have been attempts to interpret Art 1 of the First Protocol to the ECHR on the right to property with a social dimension.¹⁵¹ Another interpretative device is the concept of vulnerability, which has led to some more 'social' judgements of the ECtHR.¹⁵² However, due to its very limited engagement with social rights, the ECHR is not suitable for a comparative study on the realisation of the right to a social minimum across the EU MS. One of the main disadvantages of the European Social Charter system is what Nolan (a current member of the ECSR) calls the 'à la carte system' of ratification.¹⁵³ Rather than having to accept the whole ESC or RESC, states parties must only accept a minimum number of provisions in Part II.¹⁵⁴ In practice, not all EU MS have accepted to be bound by Art 30 on the right to protection from poverty. Furthermore, Art 30 is only part of the RESC, which means that states that ratified the ESC but not the RESC are not bound by it. Hence, the main reason why I do not focus on the ESC/RESC system in this thesis is its limited geographical scope, which would have hindered me from comparing the realisation of the right to a social minimum across *all* EU MS.

¹⁴⁸ Charter of Fundamental Rights of the European Union 2012 [2012/C 326/02].

¹⁴⁹ European Commission, 'Proposal for an Interinstitutional Proclamation of the European Pillar of Social Rights' (n 10); European Commission, 'The European Pillar of Social Rights in 20 Principles' (n 11); European Commission, 'European Pillar of Social Rights Action Plan' (n 11).

¹⁵⁰ Council of Europe, 'Reporting System of the European Social Charter' <<https://www.coe.int/en/web/european-social-charter/national-reports>> accessed 2 January 2023.

¹⁵¹ Ingrid Leijten, 'The Right to Minimum Subsistence and Property Protection under the ECHR: Never the Twain Shall Meet?' (2019) 21 *European Journal of Social Security* 307.

¹⁵² Dimitrios Kagiros, 'Vulnerability as a Path to a "Social Minimum"? An Analysis of ECtHR Jurisprudence' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury Publishing 2019).

¹⁵³ Nolan, 'Protecting the Child from Poverty: The Role of Rights in the Council of Europe' (n 143), p.

7.

¹⁵⁴ Art 20 ESC; Art A RESC.

When the CFR was incorporated into the EU's legal order through the Lisbon Treaty in 2009, it became an enforceable instrument where civil and political rights on the one hand and socio-economic rights on the other hand were given equal treatment for the first time in Europe's human rights history. In particular, the CFR protects the right to social security and social assistance in Art 34, the right to fair and just working conditions in Art 31, the rights of the child in Art 24, and the 'integration' of persons with disabilities in Art 26. Further, Art 21 stipulates that 'discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'. Hence, from a textual perspective, it would have been entirely possible to conceptualise the right to a social minimum out of the CFR, instead of the COs of HRTBs. However, Art 51 CFR severely limits the Charter's field of application. Indeed, according to Art 51 (1), the provisions of the Charter only apply when 'the institutions, bodies, offices and agencies of the Union (...) are implementing Union law'. Further, Art 51 (2) CFR specifies that the Charter 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. The EU's very limited competences in the social realm severely curtails the usefulness of the CFR as an instrument to establish a right to a social minimum which does not only exist on paper but in reality. A further reason underlying my choice to focus only on the HRTBs' mechanisms is the CFR's lack of a reporting or monitoring mechanism.

Hence, I deliberately chose not to focus on these other human rights regimes in this thesis, but instead place my emphasis on international human rights treaty bodies, by analysing GCs and COs as having authoritative normative value.¹⁵⁵ The ICESCR has been ratified by all 28 EU MS, and 23 out of 28 EU MS have participated in the reporting cycles in the period of 2009-2019. As has been established in the methodology section above, I analyse the COs of the most recent reporting cycle of five HRTBs addressed to the EU-28 in the period of 2009-2019.¹⁵⁶ By doing that, I can paint a truly comprehensive comparative picture of how EU MS are (not) realising the right to a social minimum. My thesis aims to do justice to this existing normative reality

¹⁵⁵ Compare section 1.3.1 for a justification on why GCs and COs have authoritative normative value.

¹⁵⁶ See Appendixes 1-5 for the HRTB's most recent reporting cycles addressing the EU-28 (2009-2019).

of international human rights by engaging in a broad-scale comparison of the COs addressed to the 28 EU MS. As such, rather than focusing on one particular state party, the geographical scope of my analysis consists of the 28 EU MS.¹⁵⁷

In international human rights law, scholars usually choose to do in-depth case studies of one, two or three states parties, often focused on the implementation of one particular human right.¹⁵⁸ In contrast, by distilling the specific normative content of the right to a social minimum as developed by CESCR, I am able to draw conclusions as to the overall state of the protection of essential social rights across the EU. None of the other regional human rights regimes that EU member states are subject to possess the same legal and historical authority on socio-economic rights as the jurisprudence developed by CESCR. By engaging in a broad-scale comparison of the EU-28, I attempt to bridge two sides of scholarly literature, on the one hand justiciability scholars that are often focused on non-European jurisdictions and on the other hand, non-justiciability scholars which are engaging in single case studies. I contend that the normative reality of CESCR's jurisprudence has informative and persuasive value for Europe as continent, the EU as a legal order and the EU MS. Additionally, by widening the scope to include the COs issued by group specific HRTBs, I am putting a particular focus on the non-discrimination aspect of the right to a social minimum. Therefore, I am not only comparing the EU MS in general, but I am comparing how particular disadvantaged and marginalized groups differ in their realisation of the right to a social minimum.

¹⁵⁷ Brexit had not been finalised in the period under study (2009-2019), which is why the United Kingdom has been kept inside the scope of my thesis.

¹⁵⁸ See for example Jasper Krommendijk, *The Domestic Impact and Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-Pushing or Policy Prompting?* (Intersentia 2014); Jean Allain, 'The Right to Safe Food: Can the International Food System Deliver to the United Kingdom?' (2018) 22 *The International Journal of Human Rights* 350; Philip Alston, 'The Right to Social Insecurity: A Human Rights Perspective on the Evolution of Australian Welfare Policy' (2018) 24 *Australian Journal of Human Rights* 253; Carla Cubillos Vega, Magdalena Ferrán Aranaz and Jane McPherson, 'Bringing Human Rights to Social Work: Validating Culturally Appropriate Instruments to Measure Rights-Based Practice in Spain' (2019) 62 *International Social Work*; Koldo Casla, 'The Rights We Live in: Protecting the Right to Housing in Spain through Fair Trial, Private and Family Life and Non-Retrogressive Measures' (2016) 20 *International Journal of Human Rights* 285; Paul Chaney, 'Human Rights and Social Welfare Pathologies: Civil Society Perspectives on Contemporary Practice across UK Jurisdictions – Critical Analysis of Third Cycle UPR Data' (2021) 25 *The International Journal of Human Rights* 639; Ingo Stamm, 'The Human Right to Social Security and Its Impact on Socio-Political Action in Germany and Finland' (2017) 2 *Journal of Human Rights and Social Work* 25.

1.4.3 Temporal Scope: Why a Focus on 2009-2019?

As stated above, the goal of the systematic qualitative content analysis with the MAXQDA software is to compare the COs of five UN HRTBs across the EU-28 in the period of 2009-2019. This time frame was chosen to only include COs that were issued *after* the height of the financial and economic crises of 2007/2008, but *before* the onset of the Covid-19 pandemic in 2020. In the aftermath of the economic crisis, austerity measures were commonplace across many EU MS, which negatively affected the protection of socio-economic rights.¹⁵⁹ For crisis-struck states, the implementation of austerity measures was often a pre-condition for receiving bailouts by the troika.¹⁶⁰ In these crisis-times, CESCR reinforced the non-derogable and immediate nature of the minimum core doctrine in two separate statements.¹⁶¹ Beyond CESCR, academic and activists alike stressed the importance of the minimum core doctrine as the definitive normative anchor to prevent rights backsliding in times of crisis.¹⁶² Despite these normative requirements, states parties were often not able or willing to honour their commitments to socio-economic rights. In particular, states usually did not make the effort to engage with the minimum core doctrine when justifying austerity measures in their reports. Therefore, there seems to be a mismatch between the human rights community's insistence on the relevance of the minimum core doctrine in crisis times and states' lack of willingness to engage with it.

Due to the timing of the reporting cycles and considerable backlog in the reporting procedures, most COs refer to SPRs that were submitted two or three years before. For example, CESCR issued COs to Hungary and Latvia between 2008-2010, referring to SPRs that were submitted as early as 2005. Including these COs would distort my analysis in later chapters, for example when assessing to what extent austerity serve as a hindering condition to realise the right to a social minimum. Hence,

¹⁵⁹ Claessens and others (n 48); Considine and Dukelow (n 48); Farnsworth and Irving (n 48); Cantillon and others (n 30); Matsaganis (n 48).

¹⁶⁰ Armingeon (n 49); Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (n 49); Kilpatrick, 'The EU and Its Sovereign Debt Programmes' (n 49).

¹⁶¹ CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (n 47); CESCR, 'Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (n 47).

¹⁶² Saiz (n 26); Landau (n 26); Desierto (n 26).

to ensure maximum temporal comparability in the face of the economic crisis, I only included COs that were issued in 2009 or later.

When it comes to the cut-off date of COs, which I set for 2019, critics might question whether the financial crisis is still relevant in those newer COs. However, an analysis of all COs issued in 2019 shows that austerity measures introduced as a reaction to the financial crisis have sometimes stayed for the long term, thus impeding the realisation of the right to a social minimum. For example, in its 2019 COs to Spain, the CRPD Committee is concerned that the ‘co-payments system for services, which was introduced as an austerity measure, has not been withdrawn’.¹⁶³ In its 2019 COs to Italy, the CRC Committee notes that high levels of unemployment and child poverty are a ‘result of the austerity measures taken by the Government since 2010’. Hence, ‘the Committee is concerned that the austerity measures continue to undermine the effective protection of children’s rights’.¹⁶⁴ Since COs issued in 2019 relate back to SPRs submitted in the years before, my choice of 2019 as the cut-off date for COs is justified.

After a short period of recovery from the economic crisis, COVID-19 resulted in increasing unemployment and poverty across many EU member states.¹⁶⁵ Similarly as in the aftermath of the financial crisis, CESCR adopted a statement in response to the pandemic, urging states that ‘the inherent dignity of all people must be respected and protected, and the minimum core obligations imposed by the Covenant should be prioritized’.¹⁶⁶ Academics, agencies and activists alike were likewise quick to adopt the minimum core doctrine, which supposedly gives clear guidance to respect at least a basic level of socio-economic rights guarantees in times of crisis.¹⁶⁷ Hence, my choice of the 2009-2019 time frame allows me to analyse how EU MS realised the right to a social minimum after the economic crisis of 2007/2008. The results will prove essential to answer the overarching research question of how EU MS *should* realise the right to a social minimum, taking the overall context of the COVID-19 crisis into account.

¹⁶³ CRPD Committee, COs to Spain 2019, para 52b.

¹⁶⁴ CRC Committee, COs to Italy 2019, para 7.

¹⁶⁵ van Lancker and Parolin (n 2); Barker and Russell (n 2); Power and others (n 2).

¹⁶⁶ CESCR, ‘Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights’ (n 21).

¹⁶⁷ United Nations Development Programme (n 22); Desierto (n 22); Babic (n 22); Hodgson and Seiderman (n 22).

1.5 Conclusion

How then should EU MS realise the international human right to a social minimum? My thesis answers this overarching research question in several steps. I argue that coining the minimum core doctrine as a substantive right to a social minimum is the normative foundation upon which all realisation efforts should rest. By defining the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence, I anchor the non-discrimination obligations as an integral component of the minimum core doctrine. In this thesis, I focus on the realisation of the right to a social minimum for three specific groups: persons with disabilities, children and Roma. Promising avenues for future research would be to expand the analysis to more groups, in particular migrants or non-citizens. EU MS can only prioritise the realisation of the social minimum once they know which groups are disadvantaged and marginalized, and in which way. It is not enough for EU MS to pledge the fight against poverty *in abstractum*. Rather, they should prioritise the collection of disaggregated data, so that the right to a social minimum can be realised in a non-discriminatory manner.

Chapter 2: Poverty across EU Member States: Social Policy and Human Rights Perspectives

2.1 Introduction

Legal human rights scholars usually ask different questions than social policy scholars when it comes to the conceptualisation, measurement, and debates about the underlying causes of poverty. Whereas legal human rights scholars are mostly concerned about the legal demarcation of key socio-economic rights like the right to food or the right to housing, social policy scholars' core interest lies in the analysis of public welfare programmes that were developed to confront poverty. Whereas legal human rights scholars discuss issues of justiciability and enforcement, social policy scholars tend to dismiss any 'rights talk' as wishful thinking at best. Whereas legal human rights scholars write books about the legal definition of 'essential levels' and the 'minimum core content' of rights, social policy scholars collect comparable statistics as to which items count as 'essential' when defining poverty levels.

In this chapter, my aim is to challenge the social policy frame for the conceptualisation and measurement of poverty across Europe by providing a human rights approach as feasible alternatives. Who decides what level of subsistence is considered a 'minimum' and who judges the meaning of essential levels? Put in another way – who decides who is counted as poor or non-poor across the EU MS? To answer these questions, I interrogate the conceptualisation and measurement of poverty and social exclusion at EU level. I compare and contrast two separate viewpoints on poverty and social exclusion: the legal human rights framing on the one hand and the social policy framing on the other hand. As such, I show the discrepancy between the human rights approach to poverty - which requires all EU MS to realise 'minimum essential levels of subsistence' for everybody in their jurisdiction, and the reality of high poverty and social exclusion rates in most EU MS. In other words, why are EU MS failing to realise even the most minimal human rights commitments, despite having non-derogable and immediately applicable obligations to protect minimum essential levels of all rights for everybody?

I begin by introducing the EU's flagship indicator for conceptualising poverty, the 'at-risk-of-poverty-or-social-exclusion' (AROPE)-indicator (section 2.2). I contrast this social policy narrative with the human rights perspective on the conceptualisation

of poverty, which recognises the human dignity inherent in all human beings as starting point (section 2.3). Moving from conceptualisation to measurement, I first introduce the EU's survey on income and living conditions (EU-SILC) as underlying all official poverty measurements at EU level (section 2.4). None of the abundant papers on a human rights approach to measuring poverty come close to the many advantages of the EU-SILC survey, which is why I argue that a renewed interest in quantitative measurement is not a 'seduction of quantification', but rather a key skill necessary to address real challenges of data disaggregation, which are at the centre of any human rights approach to the measurement of poverty (section 2.5). Section 2.6 concludes.

2.2 Conceptualising Poverty: A Social Policy Perspective

How to conceptualise poverty has been heavily debated, resulting in a vast body of literature.¹⁶⁸ Section 2.2.1 introduces the EU's official framing of poverty, in particular the at-risk-of-poverty or social exclusion (AROPE) indicator. Section 2.2.2 provides a historical perspective on the development of this AROPE-indicator. In section 2.2.3 I analyse some contrasting viewpoints on the underlying causes of poverty. In particular, I assess deservingness theory as one of the main reasons why the EU tends to see individual level causes as more relevant than structural level causes.

2.2.1 The AROPE-Indicator as the EU's Official Conceptualisation of Poverty

This section analyses the AROPE-indicator as the EU's official framing of poverty, as part of the EU 2020 Strategy poverty reduction target.¹⁶⁹ The AROPE indicator

¹⁶⁸ Peter Krause, Gerhard Bäcker and Walter Hanesch (eds), *Combating Poverty in Europe: The German Welfare Regime in Practice* (Ashgate Publishing 2003); Louis-Marie Asselin, *Analysis of Multidimensional Poverty: Theory and Case Studies* (Springer 2009); Christian Arndt and Jürgen Volkert, 'The Capability Approach: A Framework for Official German Poverty and Wealth Reports' (2011) 12 *Journal of Human Development and Capabilities* 311; Sabina Alkire and others, *Multidimensional Poverty Measurement and Analysis* (Oxford University Press 2015); Rolf Aaberge and Andrea Brandolini, 'Multidimensional Poverty and Inequality' in Anthony B Atkinson and François Bourguignon (eds), *Handbook of Income Distribution*, vol 2 (Elsevier 2015); David Brady and Linda Burton (eds), *The Oxford Handbook of the Social Science of Poverty* (Oxford University Press 2016); Beate Althammer, Lutz Raphael and Tamara Stazic-Wendt, *Rescuing the Vulnerable: Poverty, Welfare and Social Ties in Modern Europe* (Berghahn Books 2016); Alexander Ahammer and Stefan Kranzinger, 'Poverty in Times of Crisis' (2017) Working Paper Working Paper 1703, Department of Economics, Johannes Kepler University of Linz <<https://www.econstor.eu/handle/10419/162460>> accessed 31 December 2022; Henning Lohmann and Ive Marx (eds), *Handbook on In-Work Poverty* (Edward Elgar Publishing 2018).

¹⁶⁹ All indicators and terms are defined in Eurostat's publicly available glossary pages, see for example Eurostat 2021, "Glossary: At risk of poverty or social exclusion (AROPE)", available at <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:At_risk_of_poverty_or_social_exclusion_\(AROPE\)](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:At_risk_of_poverty_or_social_exclusion_(AROPE))>, accessed 16 December 2022.

underlies most of the statistics used to compare poverty and social exclusion rates between the EU MS. In the context of the European Semester – a main governance tool born from the financial crisis – the EU routinely refers to AROPE-rates to assess EU MS' progress in combating poverty and social exclusion. Structural EU funds are often distributed by comparatively assessing aggregated AROPE-rates. Therefore, it is of crucial importance to understand how the AROPE-indicator is constructed.

The AROPE-indicator is a merger of two separate concepts: the 'at-risk-of-poverty'-rate (AROP) on the one hand and the 'social exclusion'-rate (E) on the other hand. Put together, AROP + E becomes AROPE, the 'at-risk-of-poverty or social exclusion'-rate. The AROP-rate is calculated as a percentage of households with less than 60% of the national median equivalised disposable income after social transfers.¹⁷⁰ Hence, the AROP-indicator is an indirect and relative conceptualisation of poverty, which accounts for the vast differences of living standards across the EU MS. It would not make sense to adopt a fixed poverty threshold of a certain amount of money when purchasing standards across the EU MS are so different. In Denmark, 60% of the median GDP translates into a totally different amount of money when compared with Bulgaria; yet living standards between Denmark and Bulgaria are also very different.

Big structural events like the financial crisis of 2007/2008 or the first COVID-19 lockdown in 2020 often mean that national GDP rates plummet, compared to the same month of the previous year. Since the AROP-rate is calculated taking national GDP as the starting point, the indicator does not reflect well those periods of economic recession, where GDP is suppressed on a societal level. For better comparability between the years, it can be useful to use a so-called 'anchored' AROP-rate, which anchors the AROP-rate to the national GDP of a particular year.¹⁷¹ A comparison of the AROP rate for Greece, which has been anchored in 2008, would thus allow how living standards have been affected since that time. Consequently, this would give a

¹⁷⁰ Eurostat: Statistics Explained, 'Glossary: At-Risk-of-Poverty Rate' (2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:At-risk-of-poverty_rate> accessed 30 December 2022.

¹⁷¹ For the exact calculation of the AROP-rate anchored at a fixed point in time see Eurostat, 'EU Statistics on Income and Living Conditions (EU-SILC) Methodology - Monetary Poverty, Point 7: At-Risk-Of-Poverty Rate Anchored at a Fixed Point in Time' (2021) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_statistics_on_income_and_living_conditions_\(EU-SILC\)_methodology_-_monetary_poverty](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_statistics_on_income_and_living_conditions_(EU-SILC)_methodology_-_monetary_poverty)>, accessed 16 December 2022.

more realistic picture of how the AROP-rate changes, even considering major economic shocks.

Critics have pointed out the arbitrariness of the 60% mark for the calculation of the AROP-rate. When considering very high-income EU MS such as Luxembourg or Denmark, it seems almost ironic to consider households that live below 60% of the median GDP as being 'at-risk-of-poverty'. Therefore, the EU's official statistical bureau additionally calculates other AROP-rates, such as the 40% or the 50%-mark. These lower marks are also used by non-EU-bodies, for example the European Committee on Social Rights (ECSR). The ECSR is the body that watches over the enforcement of the European Social Charter and the Revised European Social Charter. When issuing their 'statements of non-conformity', the ECSR often relies on a 50%-mark of the EU's official AROP-rates.¹⁷² On the other hand, when considering the issue of non-anchored AROP-rates in austerity states in combination with the arbitrariness of any mark, it might already prove difficult to survive on 60% of a median GDP which in real monetary terms might be much lower than the years before.

Besides the AROP-rate, the AROPE-indicator also captures a so-called 'social exclusion'-rate (E), which is constructed from two sub-indicators. The first sub-indicator is the severe material deprivation rate (DEP), which 'means the inability to afford some items considered by most people to be desirable or even necessary to lead an adequate life'.¹⁷³ Concretely, the list consists of nine items, with any household being unable to be pay for at least four of them being counted as severely materially deprived.¹⁷⁴ The nine items are: (1) ability to pay their rent, mortgage or utility bills; (2) ability to keep their home adequately warm; (3) ability to face unexpected expenses; (4) ability to eat meat or proteins regularly; (5) ability to go on holiday away from home for at least one week per year; (6) a TV; (7) a washing machine; (8) a car; (9) a

¹⁷² compare Karin Lukas, 'The European Social Charter' in Christina Binder and others, *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 135 who analysed the ECSR's Conclusions 2017, finding that poverty levels in many EU MS are 'far too high'.

¹⁷³ See Eurostat: Statistics Explained, 'Glossary: Material Deprivation' (2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Material_deprivation>, accessed 16 December 2022.

¹⁷⁴ The nine items are: (1) ability to pay their rent, mortgage, or utility bills; (2) ability to keep their home adequately warm; (3) ability to face unexpected expenses; (4) ability to eat meat or proteins regularly; (5) ability to go on holiday away from home for at least one week per year; (6) a TV; (7) a washing machine; (8) a car; (9) a telephone.

telephone.¹⁷⁵ This list has been heavily criticised due to its perceived arbitrariness. It is a very subjective matter how to define which items are deemed essential on the one hand, and which other items are classified as luxuries on the other hand. Besides the question whether some items are really necessities – like a car, holidays away from home or a TV – the other question is why some items are *not* deemed necessities. In 2021, it is almost impossible to go about life without a functioning smart phone or a computer to access the internet; yet none of these items are included in the EU's list.

The EU has taken some of this criticism to heart and has updated the list in the context of the new EU 2030 targets. The new list consists of 13 items, with a separate list applicable to children. The new indicator is called 'severe material and social deprivation'-rate (SMSD), 'defined as the proportion of the population experiencing an enforced lack of at least 7 out of 13 deprivation items (6 related to the individual and 7 related to the household)'.¹⁷⁶ At the household-level, the 7 items no longer include the TV, washing machine or telephone but do include a new item, defined as the ability to replace worn-out furniture. At the individual level, there are 6 new items including internet connectivity or a social get-together at least once per month.¹⁷⁷ Since I cover the period of 2011-2019 in this thesis, this new list does not apply to the research undertaken for the purposes of this thesis.

The second sub-indicator of the 'social exclusion'-rate measures whether individuals are living in households with very low work intensity (LWI). Very low work intensity is defined as a combined work-intensity of less than 20% of all working-age adult-members of the households (<60 years old).¹⁷⁸ By including a measurement of work intensity, any household which does not follow the conventional norm of being

¹⁷⁵ See Eurostat: Statistics Explained, 'Glossary: Material Deprivation' (2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Material_deprivation>, accessed 16 December 2022.

¹⁷⁶ —, 'Glossary: Severe material and social deprivation rate' (2021), <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Severe_material_and_social_deprivation_rate_\(SMSD\)&stable=0&redirect=no](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Severe_material_and_social_deprivation_rate_(SMSD)&stable=0&redirect=no)>, accessed 16 December 2022.

¹⁷⁷ Full individual list: (1) having internet connection; (2) replacing worn-out clothes by some new ones; (3) having two pairs of properly fitting shoes (including a pair of all-weather shoes); (4) spending a small amount of money each week on him/herself; (5) having regular leisure activities; (6) getting together with friends/family for a drink/meal at least once a month.

¹⁷⁸ For Europe 2020, the official definition has been: 'People from 0-59 years living in households where the adults (those aged 18-59, but excluding students aged 18-24) worked a working time equal or less than 20 % of their total combined work-time potential during the previous year', see Eurostat: Statistics Explained, 'Glossary: Persons Living in Households with Low Work Intensity' (2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Persons_living_in_households_with_low_work_intensity> accessed 30 December 2022.

employed is categorized as being at-risk-of social exclusion. This framing of poverty brings in a behavioural component into the poverty conceptualisation, seemingly aiming to differentiate the deserving from the non-deserving poor. The tendency to frame specific households as 'non-deserving' is discussed more in section 2.2.3 below.

The EU's official framing of poverty in the form of the AROPE-indicator is hence a combination of direct, indirect, and multidimensional approaches to the conceptualisation of poverty. Households are classified as AROPE if they fall under one of the three sub-indicators. In other words, the '**or**' which connects the 'at-risk-of-poverty'-rate (AROP) and the 'social exclusion'-rate (E) is of crucial importance. To fall under the AROPE-indicator, it is sufficient that households are either captured by the 'at-risk-of-poverty'-rate or by the 'social exclusion'-rate; it is hence not necessary to be captured by both. There are households across the EU that are only income poor, or only materially deprived or only living in households with very low work intensity. Being classified into one of those sub-indicators is enough to fall under the summary AROPE measure. Yet, there are also households where risk-types intersect. Hence, households could be classified as being at-risk-of-poverty and materially deprived, but not living in households with very low work intensity. Similarly, households with very low work intensity could be at-risk-of-poverty, but not materially deprived, for example due to subsistence farming.

Figure 8 depicts the AROPE-rate across the EU-27 (without the UK) in 2019.¹⁷⁹ The three AROPE-sub-indicators are depicted as circles, with the intersections showing the possible overlaps between the sub-indicators.

¹⁷⁹ EU-27 (without UK), in 2019. Source: <https://ec.europa.eu/eurostat/statistics-explained/images/1/13/People_AROPE_by_risk_type.png>, accessed 16 December 2022, Eurostat Code: [ilc_pees01].

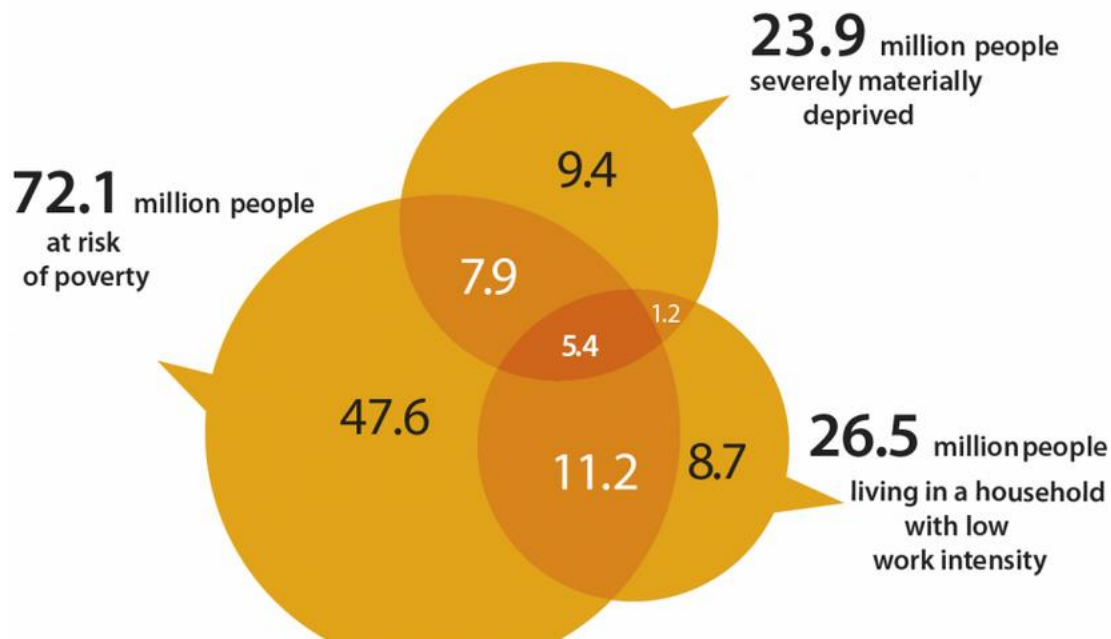


Figure 8. Intersecting AROPE-Rates, EU-27 (without the UK), Eurostat 2019

The graph illustrates that the AROPE-rate is mostly driven by the AROP-indicator, with 72.1 million people across the EU-27 being classified as living in households that are at-risk-of-poverty.¹⁸⁰ 26.5 million people lived in households with low work intensity, and 23.9 million people were severely materially deprived. When it comes to intersections, it is most common that households are classified as being of low work intensity and at-risk-of-poverty (11.2 million). The least common intersection consists of households that are severely materially deprived and of low work intensity at the same time (1.2 million people). For 5.4 million people across the EU-27, all three sub-indicators intersect: households were simultaneously classified as being at-risk-of-poverty, low work intensity and severely materially deprived. In the literature, there have been several attempts of capturing this most extreme form of poverty, one of the most recent attempts being the concept of extreme or absolute poverty.¹⁸¹ In Figure 8, these households are represented in the very inner circle, where the three circles of the AROP-rates, MD and LWI intersect.

¹⁸⁰ Out of a total EU population of 447.7 million in 2019.

¹⁸¹ While the concept of 'absolute' poverty is mostly linked to having less than 1 USD per day for people mostly living in the Global South, recently this concept has been given a new meaning for Europe, see Jonathan Bradshaw and Oleksandr Movshuk, 'Measures of Extreme Poverty Applied in the European Union' in Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019).

These intersections show that work is often, but not always a way out of poverty. On the contrary, the fast spread of whole sectors of new low-wage jobs like platform work proves that it is not enough to have a job to make ends meet. Without social protection systems that buffer this systemic in-work poverty, those 9 million people across the EU MS will continue to be at-risk-of-poverty and social exclusion. Yet, the AROPE indicator does not cover social protection buffers. For example, the AROP-rate does not show whether somebody is classified as AROP due to non-take up of social protection payments or due to lack of entitlement.

This is particularly an issue for minimum income protection schemes (MIPS), since their original function in the welfare state system was to provide a social safety net, under which nobody should fall. However, it is notoriously difficult to design representative studies that would shed a light on the percentage of people living under the at-risk-of-poverty threshold due to non-sufficient MIPS. It is concerning that the official instrument to measure poverty and social exclusion across the EU MS considers low-work-intensity as a crucial component of the AROPE-indicator but does not give any indication as to whether households are covered by any social protection system. I remedy this by explicitly demonstrating in section 4.4.2.1 of this thesis that EU MS are often hindered from realising the right to a social minimum due to inadequate MIPS.

2.2.2 A Historical Overview of the EU's Official Framing of Poverty

This section provides a historical overview on the development and adoption of the AROPE-indicator. With the official endorsement of the AROPE-indicator as underlying the Europe 2020 strategy in 2008, the EU has taken its stance in fundamental yet contentious questions: What is poverty? What is inequality? How are the two concepts linked? Should poverty be understood as something absolute, like a threshold under which no one should be allowed to fall? Or should poverty be rather conceptualised as a percentage of median income levels? These questions have been debated for a very long time, poverty being a complex phenomenon with a long history of academic study.¹⁸² The literature routinely identifies a common distinction in the

¹⁸² Asselin (n 168); Arndt and Volkert (n 168); Alkire and others (n 168); Aaberge and Brandolini (n 168); Brady and Burton (n 168); Althammer, Raphael and Stazic-Wendt (n 168); Ahammer and Kranzinger (n 168); Lohmann and Marx (n 168); Krause, Bäcker and Hanesch (n 168).

conceptualisation of poverty, namely the difference between direct, indirect, and multidimensional approaches to poverty.

The direct approach is prevalent in the work of the ‘pioneers of poverty research’, who all highlighted low income as the main determinant of poverty.¹⁸³ In Rowntree’s ground-breaking research in York, the aim was to define ‘absolute poverty’ by developing monetary minimal levels at which one could survive.¹⁸⁴ Already Adam Smith, the founder of modern economics, drew a distinction between necessities and luxuries.¹⁸⁵ The World Bank’s approach of counting everybody as poor that lives below 1 USD per day is probably the most famous direct approach in conceptualising poverty.¹⁸⁶ While it is generally accepted that such a rigid low absolute measurement of poverty is not a very useful indicator for the Global North, the social policy literature on direct poverty in Europe has grown substantially in recent years.¹⁸⁷ No longer is poverty only of concern to scholars of the Global South, where the direct conceptualisation of poverty dominates. Indeed, absolute poverty is a re-emerging research subject across Europe.¹⁸⁸ Among those that advocate for direct approaches to the conceptualisation of poverty on the European continent, the general idea is to focus on the lack of essential items such as food or clothing.¹⁸⁹ Typical images of

¹⁸³ According to Walker, these pioneers include Booth (1892), Du Bois (1899) and Rowntree (1901), see Robert Walker, ‘Measuring Absolute Poverty: Shame Is All You Need’ in Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019) 98.

¹⁸⁴ Dominelli (n 5) 20.

¹⁸⁵ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Feedbooks 1776).

¹⁸⁶ The original ‘dollar a day’ conceptualisation has been heavily criticized and consequently adapted, see Martin Ravallion, Shaohua Chen and Prem Sangraula, ‘Dollar a Day Revisited’ (2009) World Bank Report No. 77619 <<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/403331468147538738/Dollar-a-day-revisited>> accessed 16 December 2022.

¹⁸⁷ Among those that advocate for direct approaches to poverty measurement, the general idea is to count the lack of essential items such as food or clothing, see for example Sabina Alkire and James Foster, ‘Understandings and Misunderstandings of Multidimensional Poverty Measurement’ (2011) 9 *The Journal of Economic Inequality* 289; Satya R Chakravarty and Nachiketa Chattopadhyay, ‘Multidimensional Poverty and Material Deprivation: Theoretical Approaches’ in Conchita D’Ambrosio (ed), *Handbook of Research on Economic and Social Well-Being* (Edward Elgar Publishing 2018); Anne-Catherine Guio, ‘Multidimensional Poverty and Material Deprivation: Empirical Findings’ in Conchita D’Ambrosio (ed), *Handbook of Research on Economic and Social Well-Being* (Edward Elgar Publishing 2018); Selçuk Bedük, ‘Understanding Material Deprivation for 25 EU Countries: Risk and Level Perspectives, and Distinctiveness of Zeros’ (2018) 34 *European Sociological Review* 121.

¹⁸⁸ Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019).

¹⁸⁹ Sabina Alkire and James Foster, ‘Understandings and Misunderstandings of Multidimensional Poverty Measurement’ (2011) 9 *The Journal of Economic Inequality* 289; Satya R Chakravarty and Nachiketa Chattopadhyay, ‘Multidimensional Poverty and Material Deprivation: Theoretical Approaches’ in Conchita D’Ambrosio (ed), *Handbook of Research on Economic and Social Well-Being* (Edward Elgar Publishing 2018); Anne-Catherine Guio, ‘Multidimensional Poverty and Material Deprivation: Empirical Findings’ in Conchita D’Ambrosio (ed), *Handbook of Research on Economic*

extreme forms of poverty across Europe include beggars on the streets, the homeless that are seeking shelters in metro stations or under bridges, or a single mother with a few children who just got evicted from their apartment due to rent arrears. In essence, it is people that are 'suffering from hunger, or lacking essential goods'.¹⁹⁰ All modern approaches that aim at establishing a minimum 'basket of goods' needed for subsistence have their roots in this idea of measuring poverty in a direct way.¹⁹¹

The indirect approach to poverty is usually traced back to the work of Townsend, who criticised any absolute or direct understanding of poverty as not being relevant to the realities of rich Western democracies.¹⁹² In contrast to the direct approach to poverty with its focus on being deprived of some essential goods, the indirect approach to poverty is a relative one. Townsend defined relative poverty as a 'condition wherein an individual's resources are substantially below the levels held by an average individual or family, that they are seriously excluded from ordinary living patterns, customs and activities.'¹⁹³ Hence, Townsend considered poverty to be a 'complex, multidimensional, and cumulative problem'. This relative understanding of poverty has become a standard, mainstream approach. Poverty is seen as 'inherently relative to place, time and individual circumstances'.¹⁹⁴ Most often, an indirect poverty rate is calculated by the number of people living below a certain percentage of the country-specific median GDP. Hence, indirect approaches to poverty could also be conceived as a measure of inequality. For example, people living below 50% of median GDP in a country are unequal to the richer population. The indirect approach as the 'relative poverty paradigm' has been extremely powerful not only in academic circles, but also through its heavy use in official statistics.¹⁹⁵ I will discuss the use of official statistics further in section 2.4.

and Social Well-Being (Edward Elgar Publishing 2018); Selçuk Bedük, 'Understanding Material Deprivation for 25 EU Countries: Risk and Level Perspectives, and Distinctiveness of Zeros' (2018) 34 *European Sociological Review* 121.

¹⁹⁰ Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak, 'Absolute Poverty in Europe: Introduction' in Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019) 3.

¹⁹¹ Lucinda Platt, 'Income, Wealth and Poverty', *Understanding Inequalities: Stratification and Difference* (2nd edn, Polity Press 2019).

¹⁹² Peter Townsend, 'Measuring Poverty' (1954) 5 *The British Journal of Sociology* 130.

¹⁹³ András Gábos and others, 'Employment and Poverty Dynamics Before, During, and After the Crisis' in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019).

¹⁹⁴ Stijn Oosterlynck and others, 'Improving Poverty Reduction: Lessons from the Social Innovation Perspective' in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019) 194.

¹⁹⁵ Gaisbauer, Schweiger and Sedmak (n 190) 3.

Both the direct and indirect approaches have been criticised for not adequately capturing all the different forms of poverty. In particular, Townsend's strictly relative approach is often seen as 'insufficient'.¹⁹⁶ This has been acknowledged by Townsend himself in later works, where he claims that 'poverty covers more than income inequality'.¹⁹⁷ In an effort to combine the best of all these diverse conceptualisations and measurements, a strong research tradition highlights the need for multi-dimensional poverty measures.¹⁹⁸ Even Townsend recognises the 'multidimensionality of relative poverty'.¹⁹⁹ By combining at least two approaches, multidimensional indices claim to capture a fuller picture of the multiple expressions of poverty. Hence, multidimensional approaches understand poverty as 'explicitly social and relational'.²⁰⁰ A multidimensional understanding of poverty is also prevalent in Goal 1 of the Sustainable Development Goals (SDGs): Ending poverty in all its forms everywhere. This simple yet powerful expression of poverty 'in all its forms' is closely linked to a multidimensional understanding of poverty. As such, the SDGs mark a notable departure from the earlier Millennium Development Goals (MDGs) with its more limited understanding of poverty.²⁰¹

One of the criticisms of multidimensional approaches is the tendency to keep adding more items as they become fashionable. What is seen as 'essential' might also change over time. For example, even Townsend, the founding father of the relative poverty approach, added holidays and leisure activities to his list of essential items.²⁰² As a new consensus on what constitutes 'essential items' emerges, the development of so-called reference budgets has become quite common.²⁰³ These aim to develop

¹⁹⁶ Dominelli (n 5) 17.

¹⁹⁷ *ibid* 21.

¹⁹⁸ Asselin (n 168); Alkire and Foster (n 189); Alkire and others (n 168); Aaberge and Brandolini (n 168); Chakravarty and Chattopadhyay (n 189).

¹⁹⁹ Dominelli (n 5) 21.

²⁰⁰ Platt (n 191) 225.

²⁰¹ Sakiko Fukuda-Parr, 'From the Millennium Development Goals to the Sustainable Development Goals: Shifts in Purpose, Concept, and Politics of Global Goal Setting for Development' (2016) 24 *Gender & Development* 43.

²⁰² Dominelli (n 5) 23.

²⁰³ Elena Carrillo Álvarez, Irene Cussó-Parcerisas and Jordi Riera-Romaní, 'Development of the Spanish Healthy Food Reference Budget for an Adequate Social Participation at the Minimum' [2016] *Public Health Nutrition* 1; Tim Goedemé and others, 'What Does It Mean to Live on the Poverty Threshold? Lessons from Reference Budgets' in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019); Walker (n 183); Tess Penne, Ilse Cornelis and Bérénice Storms, 'All We Need Is...: Reference Budgets as an EU Policy Indicator to Assess the Adequacy of Minimum Income Protection' (2020) 147 *Social Indicators Research* 991.

lists of items that are deemed essential and calculate their cost in a given society, in order to then anchor poverty rates with these budgets.

Scholars have continuously developed new innovative ways of how poverty could be conceptualised in a more comprehensive way. For example, in Amartya Sen's influential work, capabilities are seen as more meaningful indicators of poverty than monetary approaches.²⁰⁴ Sen became famous for developing the Human Development Index and the Human Poverty Index,²⁰⁵ that were nevertheless criticised due to their limited value to rich democracies. Participatory approaches to poverty stress that a monetary understanding is too narrow. Rather, the goal to any poverty reduction strategy should be full participation in society, including political representation. Closely related is the idea of empowerment. By 'empowering the poor as citizens',²⁰⁶ these approaches aim at providing access to resources, which go beyond income. Recently, it has been proposed that poverty-related shame is the only criteria to distinguish the poor from the non-poor.²⁰⁷ Another important development is the effort to link poverty research with approaches of measuring happiness and quality of life, for example in the form of a multidimensional quality of life index.²⁰⁸ However, it remains to be said that most European countries simply adopt a mixture of direct and indirect approaches when conceptualising poverty in their jurisdictions, and are less prone to adopt an official multidimensional understanding of poverty. As has been shown above, the AROPE-indicator is no exception to this – the EU's official framing of poverty consists of a mixture of direct and indirect approaches but does not consider multidimensional ones.

In order to put the EU's decision to adopt the AROPE-indicator in context, I provide a brief historical overview of the EU's official framing of poverty. By giving this short historical analysis of how the official poverty framing was adopted by the EU, I aim to contextualise my critique of this current instrument for poverty measurement. When the European integration process started after WWII, the focus of the Coal and Steel Union was solely on economic matters. With subsequent treaties, the European project kept its original focus on furthering economic integration. With this, a common

²⁰⁴ Amartya Sen, *Poverty and Affluence* (Oxford University Press 1995).

²⁰⁵ Amartya Sen, 'A Decade of Human Development' (2000) 1 *Journal of Human Development* 17.

²⁰⁶ Oosterlynck and others (n 194) 191.

²⁰⁷ Walker (n 183).

²⁰⁸ Christopher T Whelan, Dorothy Watson and Bertrand Maître, 'From Income Poverty to Multidimensional Quality of Life' (2019) 50 *The Economic and Social Review* 683.

approach on how to conceptualise poverty across member states became desirable. Due to the economic differences between member states, the Council of the European Communities coined a common European definition of poverty in 1975 which takes a relative approach: Persons are defined as poor when their 'resources are so small as to exclude them from the minimum acceptable way of life of the member state in which they live'.²⁰⁹ With subsequent enlargements, in particular in 2004 when Eastern member states joined the community, this relative approach to poverty seemed even more justified.

At the European Summit in Lisbon in 2000, it was decided that 'steps must be taken to make a decisive impact on the eradication of poverty by setting adequate targets'.²¹⁰ This Summit marked the beginning of the so-called 'Lisbon-Phase' (2000-2010), which has been characterised by rather vague targets and phrases like 'eradicating poverty', without attributing clear responsibility for who should do what.²¹¹ In 2001, the Council adopted the very first European poverty indicators at the Laeken Summit, with the goal of creating high quality, comparable and cross-national statistics.²¹² In 2008, the Europe 2020 Strategy came into force, with the aim of lifting 'at least 20 million people out of poverty and social exclusion by 2020'. This Strategy was integrated into the 'European Semester', which is the yearly monitoring cycle of the EU's economic governance. Through the multi-annual framework EU MS were required to fight poverty through the European Social Fund's resources. Nevertheless, the Open Method of Coordination (OMC) as the chosen instrument to implement Europe 2020 did not have the same force as the compliance with mandatory budgetary constraints of memoranda of understanding to implement austerity measures after the 2007/2008 crisis. In particular, the National Reform Programmes as key documents in the European Semester process did not contain many national commitments to fight poverty in the period 2011-2014.²¹³ When it comes to the Country-Specific

²⁰⁹ Council of the European Communities, 1975.

²¹⁰ Frank Vandenbroucke, 'Foreword: A Self-Critical Flashback on the European Union's Anti-Poverty Regime' in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019) ix.

²¹¹ Ilaria Madama and Matteo Jessoula, 'Fighting Poverty and Social Exclusion in the Europe 2020 Framework: An Introduction' in Matteo Jessoula and Ilaria Madama (eds), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020* (Routledge 2018) 1.

²¹² Vandenbroucke (n 210) ix.

²¹³ Sebastiano Sabato and others, 'Europe 2020 and the Fight against Poverty: From Target to Governance' in Matteo Jessoula and Ilaria Madama (eds), *Fighting Poverty and Social Exclusion in the EU: A Chance in Europe 2020* (Routledge 2018) 21.

Recommendations, only three EU MS received concerns regarding poverty in 2011.²¹⁴ Indeed, social policy scholars have routinely voiced their concerns that the Europe 2020 Strategy has not been effective in counteracting the negative effects of the economic crisis in the form of rising poverty levels across the EU MS.²¹⁵ The goal of lifting 20 million people out of poverty by 2020 has not been achieved.²¹⁶ Indeed, already the mid-term review of the Europe 2020 strategy in 2014 pointed out that the target would be unreachable.²¹⁷ Rather than lifting 20 million people out of poverty by 2020, less than 4 million people were lifted out of poverty by 2020.

The EU's adoption of the relative understanding of poverty in the form of the AROPE-indicator originates from the Laeken summit in 2001. This long history has served as a justification for seeing the indicator as a 'legitimate key benchmark'.²¹⁸ However, it has been argued that the EU is guided by a 'restrained, short-term focused understanding of poverty as remaining below a monetary threshold'.²¹⁹ By complementing the at-risk-of poverty indicator with a more direct conceptualisation in the form of the material deprivation indicator, the EU has responded to this criticism.

The history of the EU's official poverty conceptualisation went hand in hand with new academic developments. For example, key publications on indicators²²⁰ or on changes across European welfare states²²¹ are often directly linked to the EU's adoption of official targets or indicators. All debates on the conceptualisation of poverty inform official approaches to poverty measurement. This is why it is crucial to understand the contrasting views on what causes poverty, which is the focus of the next section.

²¹⁴ BG, CY and EE received CSRs on poverty. Additionally, AT, BE, DE, HU, SK received recommendations regarding low income workers, see Olivier Derruine and Anne Tiedemann, 'The First European Semester and Its Contribution to the EU 2020 Strategy' (2011) European Policy Study <https://www.greens-efa.eu/files/assets/docs/study_on_european_semester_and_eu_2020.pdf> accessed 30 December 2022.

²¹⁵ Paul Copeland and Mary Daly, 'Poverty and Social Policy in Europe 2020: Ungovernable and Ungoverned' (2013) 42 Policy and Politics 351; Caroline de la Porte and Elke Heins (eds), *The Sovereign Debt Crisis, the EU and Welfare State Reform* (Palgrave Macmillan UK 2016).

²¹⁶ Madama and Jessoula (n 211) 1.

²¹⁷ Sabato and others (n 213) 14; Koen Decancq and others, 'The Evolution of Poverty in the European Union: Concepts, Measurements, and Data' in Bea Cantillon and Frank Vandenbroucke (eds), *Reconciling Work and Poverty Reduction. How Successful are European Welfare States?* (Oxford University Press 2014).

²¹⁸ Vandenbroucke (n 210) xiii.

²¹⁹ Oosterlynck and others (n 194) 184.

²²⁰ Anthony Barnes Atkinson, *Social Indicators: The EU and Social Inclusion* (Oxford University Press 2002).

²²¹ Gøsta Esping-Andersen, *Why We Need a New Welfare State* (Oxford University Press 2002).

2.2.3 Deservingness Theory and Contrasting Views on the Main Causes of Poverty

This section introduces deservingness theory as the underlying justification for the framing of poverty in the EU, embedding it into the other main theories on the causes of poverty. Controversial opinions about how to conceptualise poverty are often linked to underlying disagreements about the main causes of poverty.²²² In a recent review article, Brady divides the prevalent theories on the causes of poverty into three categories, namely behavioural, structural and political theories.²²³ A theory on the causes of poverty should 'explain why some are poor and others are not, and why poverty is greater in one setting than another'.²²⁴ While behavioural theories emphasise the individual's responsibility for their plight of being poor,²²⁵ structural theories highlight demographics,²²⁶ or the economic context,²²⁷ whereas political theories stress the importance of power and institutions.²²⁸

In behavioural theories, the prevalent framing connects individual 'failing' with deservingness theory.²²⁹ Accordingly, the sole cause for poverty is seen on an individual level. If an individual changed their behaviour, that individual would no longer be poor. However, this individual understanding of poverty is in tension with the

²²² For reviews about poverty theories see David M Gordon, *Theories of Poverty and Underemployment: Orthodox, Radical and Dual Labor Market Perspectives* (DC Heath and Co 1972); David Calnitsky, 'Structural and Individualistic Theories of Poverty' (2018) 12 *Sociology Compass* e12640; David Brady, 'Theories of the Causes of Poverty' (2019) 45 *Annual Review of Sociology* 155.

²²³ Brady (n 222) 157.

²²⁴ *ibid.*

²²⁵ Isabel V Sawhill, 'The Behavioral Aspects of Poverty' (2003) 153 *Public Interest* 79; Marianne Bertrand, Sendhil Mullainathan and Eldar Shafir, 'A Behavioral-Economics View of Poverty' (2004) 94 *American Economic Review* 419.

²²⁶ See some applications of demographic analyses in the journal 'Demography', Lisa Kaida, 'Ethnic Variations in Immigrant Poverty Exit and Female Employment: The Missing Link' (2015) 52 *Demography* 485; Annamaria Milazzo and Dominique van de Walle, 'Women Left Behind? Poverty and Headship in Africa' (2017) 54 *Demography* 1119; Inhoe Ku and others, 'The Role of Family Behaviors in Determining Income Distribution: The Case of South Korea' (2018) 55 *Demography* 877; see also Marcio Cruz and S Amer Ahmed, 'On the Impact of Demographic Change on Economic Growth and Poverty' (2018) 105 *World Development* 95.

²²⁷ Calnitsky (n 222); Brady (n 222).

²²⁸ In particular, Korpi's tradition of power resources theory must be mentioned here, see Walter Korpi and Joakim Palme, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 *American Sociological Review* 661; Evelyne Huber and John D Stephens, *Development and Crisis of the Welfare State: Parties and Policies in Global Markets* (The University of Chicago Press 2001); David Brady, *Rich Democracies, Poor People: How Politics Explain Poverty* (Oxford University Press 2009).

²²⁹ Wim van Oorschot, 'Solidarity towards Immigrants in European Welfare States' (2008) 17 *International Journal of Social Welfare* 3; Jeroen van der Waal, Willem De Koster and Wim Van Oorschot, 'Three Worlds of Welfare Chauvinism? How Welfare Regimes Affect Support for Distributing Welfare to Immigrants in Europe' (2013) 15 *Journal of Comparative Policy Analysis* 37; Wim van Oorschot and others, *The Social Legitimacy of Targeted Welfare: Attitudes to Welfare Deservingness* (Edward Elgar Publishing 2017).

common public perception that the seriously ill or people with disabilities are usually considered less individually to blame for their plight and hence more deserving of public benefits.²³⁰ An able-bodied healthy man is usually considered less deserving.²³¹ Indeed, deservingness perceptions exist throughout Europe, with a strikingly similar “ranking” of deservingness: persons with disabilities are usually considered most deserving whereas foreigners and the long-term unemployed are considered least deserving.²³² Hence, it is not surprising that welfare state systems are built on the necessity to differentiate the “deserving” from the “non-deserving” poor, in particular by creating eligibility criteria.²³³ Putting the blame on the individual’s “failure” is a century-old practice, rooted in the infamous poor laws, which required the undeserving poor to work in workhouses in the UK.²³⁴

The framing of poverty as behavioural, structural, or political is not only an academic debate, but also a political question.²³⁵ Even though poor relief has mostly been organised by categorizing the poor in “non-deserving” and “deserving”, such a focus does not recognise the wider structural and systemic causes for poverty. The human rights perspective on poverty, which is the focus of the next section, is a counter-narrative to the prevalent social policy perspective. By stressing the inherent dignity of the human being and prohibiting discrimination, a differentiation between ‘deserving’ and ‘non-deserving’ people living in poverty becomes more difficult to justify.

2.3 Conceptualising Poverty: A Human Rights Perspective

What is missing in the predominant social policy narrative on poverty is the human rights perspective. While some human rights scholars focus on the enforcement of specific socio-economic rights (like the right to food or the right to housing), few

²³⁰ Although, it is a common conception that an ill and/or disabled person has a duty to do everything in their power to „get better“ and contribute economically. Hence, behavioural requirements are often introduced as a condition to be able to claim benefits.

²³¹ Vanessa Hubl and Michaela Pfeifer, ‘Categorical Differentiation in the Light of Deservingness Perceptions: Institutional Structures of Minimum Income Protection for Immigrants and for the Disabled’ in Ive Marx and Kenneth Nelson (eds), *Minimum Income Protection in Flux* (Palgrave Macmillan 2013).

²³² *ibid.*

²³³ Oorschot and others (n 229).

²³⁴ Cosma Orsi, ‘The Political Economy of Inclusion: The Rise and Fall of the Workhouse System’ (2017) 39 *Journal of the History of Economic Thought* 453.

²³⁵ Gaisbauer, Schweiger and Sedmak (n 190) 7.

specialise in poverty as such.²³⁶ At the same time, the discipline of law tends to be predominantly occupied with whether violations of individual rights can be claimed in courts. Normally, legal scholars are neither used to engaging with the political processes that counteract or reinforce poverty, nor are they used to thinking in terms of predominant political theories, such as the distinction between behavioural, structural, or political theories. Despite an increasing quest towards more interdisciplinary connections,²³⁷ social policy scholars on the one hand and legal human rights scholars on the other hand often speak different languages. Social policy frames tend to view human rights as purely aspirational and without any real-world consequences. This 'law-less' human rights *talk* must be viewed as distinct from the framing of international human rights *law*. While social policy scholars could learn from human rights lawyers' in-depth insight and conceptualisation of key legal questions, human rights lawyers could learn from social policy scholars how to take non-legal processes into account. Hence, I contrast the prevalent social policy frame in the form of the AROPE-indicator with a human rights frame, shifting the focus towards human beings as rights-holders, as persons who deserve to be treated with dignity.

2.3.1 The Historical Origins of Poverty as a Matter of Concern under International Human Rights Law

Knowing the historical background of the contested origins of human rights law is necessary to understand the key tensions that underlie a human rights understanding of poverty. The history of poverty and international human rights law is usually traced back to the Universal Declaration of Human Rights (UDHR).²³⁸ In this document, civil and political rights on the one hand, and socio-economic rights on the other hand are contained in the same document, as such giving witness to the indivisibility of human rights. However, the legal status of the UDHR as a 'declaration' means that states

²³⁶ Elizabeth Ashford, 'Responsibility for Violations of the Human Right to Subsistence' in Diana Tietjens Meyers (ed), *Poverty, Agency, and Human Rights* (Oxford University Press 2014); Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 *Human Rights Law Review* 411; Geraldine van Bueren, 'Alleviating Poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* 52; Anna Chadwick, 'Human Rights, Poverty and Capitalism' in Suzanne Egan and Anna Chadwick (eds), *Poverty and Human Rights* (Edward Elgar Publishing 2021); Beitz (n 24); Fernanda Doz Costa, 'Poverty and Human Rights: From Rhetoric to Legal Obligations a Critical Account of Conceptual Frameworks' (2008) 5 *Sur - Revista Internacional de Direitos Humanos* 81.

²³⁷ Brady and Burton (n 168).

²³⁸ Roland Burke and James Kirby, 'The Universal Declaration of Human Rights: Politics and Provisions (1945–1948)' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).

parties were not bound by it. The ICCPR and the ICESCR give legal force to the UDHR.²³⁹ However, due to ideological oppositions in the Cold War era, these two Covenants did not enjoy the same salience and force. The nature of legal obligations under the ICESCR are different from the ICCPR. Whereas according to Art 2 (1) of the ICCPR states parties are immediately obliged to fulfil their obligations, under the ICESCR states parties are only required to ‘take steps’, subject to available resources.²⁴⁰ The weaker legal obligation to implement the ICESCR shows that socio-economic rights do not enjoy the same salience as civil and political ones. Even though the interconnectedness, indivisibility, and interdependence of all human rights has continuously been stressed,²⁴¹ the usefulness of this approach has been subject to debate.²⁴²

Neither the UDHR, nor the ICESCR, nor any group specific human rights treaty contains a “right not to be poor”. Nevertheless, the right to an adequate standard of living, the right to social security and the right to work are all linked to poverty. The Committee on Economic, Social and Cultural Rights (CESCR), which is tasked with the monitoring of the ICESCR, adopted a Statement on Poverty in 2001.²⁴³ This document has become very influential in CESCR’s jurisprudence. In it, CESCR defines poverty ‘as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living.’²⁴⁴ By doing so, CESCR explicitly understands poverty holistically, in a multi-dimensional way. Besides the Statement on Poverty, CESCR routinely mentions poverty in some of their rights-specific General

²³⁹ ICCPR (n 141); ICESCR (n 17).

²⁴⁰ Art 2 (1) ICESCR obliges each state party to ‘take steps (...), 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.’

²⁴¹ The World Conference on Human Rights, ‘Vienna Declaration and Programme of Action’ (1993) 48th Session, 22nd Plenary Meeting, UN Doc A/CONF.157/24 para 5; CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 8; CESCR, ‘Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights’ (2001) UN Doc E/C.12/20/2001/10 para 8.

²⁴² See for example Scott Leckie, ‘Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20 Human Rights Quarterly 81; James W Nickel, ‘Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights’ (2008) 30 Human Rights Quarterly 984, who attempts a conceptual categorization of indivisibility; Amsalu Darge Mayessa, ‘Overview on the Notion of Integration of Human Rights: Giving Pragmatic Value to Socio-Economic Rights Rather than Rim Service’ (2014) 83 Nordic Journal of International Law 168.

²⁴³ CESCR, ‘Statement on Poverty’ (n 241).

²⁴⁴ *ibid* 8.

Comments (GCs), for example in GC 23 on the right to work. There, CESCR is specifically concerned about people ‘living in poverty or being homeless’ being discriminated against because of their economic and social situation, which ‘may result in pervasive discrimination, stigmatization and negative stereotyping’.²⁴⁵ By taking such a broad approach to poverty, the human rights framing of poverty as identified by CESCR goes much further than the EU’s AROPE indicator which does not account for any non-monetary aspects of poverty.

Beyond CESCR, the group specific treaty bodies have also on occasion been concerned about poverty as such. While only the ICESCR has an explicit focus on socio-economic rights, all group specific rights contain at least some hints that are relevant for the human rights approach to poverty. For example, the CEDAW Committee seems to pay little attention to socio-economic rights at first sight. However, gendered poverty and inequality have recently been addressed in an in-depth study.²⁴⁶ Both the CRC and the CRPD indirectly protect children from poverty through their articles on the right to an adequate standard of living.

In 1998, the United Nations Commission on Human Rights established the mandate of a Special Rapporteur on extreme poverty and human rights, with the objective to ‘promote and protect the rights of those living in extreme poverty, with a view to advancing the eradication of such poverty’.²⁴⁷ To date, there have been five mandate holders, A.M. Lizin (1998–2004), Arjun Sengupta (2004–2008), Magdalena Sepúlveda Carmona (2008–2014), Philip Alston (2014–2020), and Olivier de Schutter (since 2020). In 2006, the Human Rights Council replaced the United Nations Commission on Human Rights. In Resolutions 8/11 (2008)²⁴⁸ and 44/13 (2020)²⁴⁹, both on human rights and extreme poverty, the tasks of the mandate holders were confirmed as consisting of country visits, communication with states and affected parties, and submission of annual reports to the Human Rights Council and to the General Assembly.

²⁴⁵ CESCR, ‘GC 23: The Right to Just and Favourable Conditions of Work’ (n 44) para 35.

²⁴⁶ Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart Publishing 2018).

²⁴⁷ OHCHR, ‘About the Mandate’ (*Special Rapporteur on Extreme Poverty and Human Rights*) <<https://www.ohchr.org/en/special-procedures/sr-poverty>> accessed 27 December 2022.

²⁴⁸ Human Rights Council, ‘Resolution 8/11. Human Rights and Extreme Poverty’ (2008) 28th Meeting, UN Doc A/HRC/RES/8/11.

²⁴⁹ Human Rights Council, ‘Resolution 44/13. Extreme Poverty and Human Rights’ (2020) 44th Session, Agenda Item 3, UN Doc A/HRC/RES/44/13.

In his final report, the second mandate-holder Sengupta defines extreme poverty as follows (structure and emphasis added):

- 'people suffering from **income poverty** (being below an agreed level of minimum disposable income or expenditure required for leading a sustainable life)
- people suffering from human development poverty (**without access to, or availability of, certain basic goods and services** to make it possible for them to lead a meaningful life)
- as well as people in **social exclusion** (without **basic security** to lead an adequate social existence, dependent on the structure of social relationships)'.²⁵⁰

While there is a certain overlap with the EU's AROPE-indicator (AROP, MD and LWI), Sengupta's definition contrasts most strongly in the social exclusion dimension. Whereas the EU's AROPE-indicator defines social exclusion as solely consisting out of LWI, the human rights approach focusses on the lack of 'basic security' as the defining feature of social exclusion. This shows that a human rights approach to poverty must never define human beings solely via their ability to earn money on the labour market.

In 2016, the then mandate holder Philip Alston published a report, in which he specifically connected the question of poverty and human rights with the wider issue of the lack of realisation of socio-economic rights. He argues that the 'failure to take those rights seriously diminishes the prospects for eliminating extreme poverty, even in contexts where overall economic growth levels are high'.²⁵¹ The current mandate holder, Olivier de Schutter, visited the EU institutions from 25 November 2020 to 29 January 2021. In his report, he is very concerned about the 'weak status of social rights in the European Union's constitutional framework'.²⁵² Furthermore, he specifically emphasizes the structural causes of poverty and argues that 'it is necessary to recognize the gaps that remain in the legal and policy framework under which European Union institutions operate and align them better with the professed intention to eradicate poverty'.²⁵³

²⁵⁰ Human Rights Council, 'Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Arjun Sengupta' (2008) 7th Session, Agenda Item 3, UN Doc A/HRC/7/15 para 31.

²⁵¹ Human Rights Council, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (2016) 33rd Session, Agenda Item 3, UN Doc A/HRC/32/31 para 13.

²⁵² Human Rights Council, 'Visit to the European Union: Report of the Special Rapporteur on Extreme Poverty and Human Rights, Olivier de Schutter' (2021) 47th Session, Agenda Item 3, UN Doc A/HRC/47/36/Add.1 para 20.

²⁵³ *ibid* 6.

In 2012, the Human Rights Council adopted the Guiding Principles on Extreme Poverty and Human Rights, which are the most authoritative normative source when it comes to the conceptualisation of poverty from a human rights perspective.²⁵⁴ The history of these Guiding Principles can be traced back to 2001 – which is also the year where CESCR’s statement on poverty was adopted – when the former UN sub-Commission on the Promotion and Protection of Human Rights tasked an expert group with the first draft of the Guiding Principles. In parallel, the OHCHR published two documents on poverty and human rights in 2004 and 2005.²⁵⁵ The Draft Guiding Principles were published in 2006.²⁵⁶ ²⁵⁷ After many consultations and seminars, the Human Rights Council mandated the then Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, to further the work on the Draft Guiding Principles through a progress report, which was presented to the Human Rights Council in 2010.²⁵⁸ In 2012, the Human Rights Council finally adopted the Guiding Principles through its Resolution 21/11.²⁵⁹ Since its adoption, the Guiding Principles remain the most authoritative source on poverty and human rights, whose normative force has repeatedly been pointed out by subsequent Special Rapporteurs.²⁶⁰ Due to the authoritative status of this document, human dignity as the core value of a human rights approach to poverty can be extracted from these Guiding Principles, which I will do in the next section.

2.3.2 Human Dignity as Key Principle of the Human Rights Approach to Poverty

According to the Guiding Principles on Extreme Poverty and Human Rights, dignity, universality, indivisibility, interrelatedness and interdependence of all rights are crucial

²⁵⁴ Human Rights Council, ‘Guiding Principles on Extreme Poverty and Human Rights’ (2012) Resolution 21/11 <<https://www.ohchr.org/en/special-procedures/sr-poverty/guiding-principles-extreme-poverty-and-human-rights>> accessed 27 December 2022.

²⁵⁵ OHCHR, ‘Human Rights and Poverty Reduction: A Conceptual Framework’ (2004) UN Doc HR/Pub/04/01; OHCHR, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ (2005) UN Doc HR/Pub/06/12.

²⁵⁶ OHCHR, ‘Report of the United Nations High Commissioner for Human Rights on the Draft Guiding Principles on Extreme Poverty and Human Rights: The Rights of the Poor’ (2008) UN Doc A/HRC/7/32.

²⁵⁷ Report of the United Nations High Commissioner for Human Rights on the draft guiding principles on extreme poverty and human rights: the rights of the poor, 11 February 2008, UN Doc. A/HRC/7/32.

²⁵⁸ Human Rights Council, ‘Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona, on the Draft Guiding Principles on Extreme Poverty and Human Rights’ (2010) Fifteenth session, Agenda Item 3, UN Doc A/HRC/15/41.

²⁵⁹ Human Rights Council, ‘Guiding Principles on Extreme Poverty and Human Rights’ (n 254).

²⁶⁰ Olivier de Schutter, ‘A Human Rights-Based Approach to Measuring Poverty’ in Martha F Davis, Morten Kjaerum and Amanda Lyons (eds), *Research Handbook on Human Rights and Poverty* (Edward Elgar Publishing 2021).

when conceptualising poverty as a human rights violation.²⁶¹ Sepúlveda Carmona, a former Special Rapporteur on Extreme Poverty and Human Rights, lists the following core values for the human rights approach to poverty: ‘universality, equality and non-discrimination, participation, access to information and accountability’.²⁶² The title of her piece – ‘from undeserving poor to rights-holder’ – is telling in exposing the vastly different perspectives between social policy approaches on the one hand and human rights approaches on the other hand. In Section 2.2.3, I introduced behavioural social policy approaches with their focus on dividing scarce public resources to those people living in poverty that are deemed most deserving. The human rights approach to poverty does the opposite by affirming the inherent dignity of all human beings, countering the notion of a clear distinction between the deserving and the undeserving poor.

A firm commitment to the inherent dignity of all human beings can be traced back to the very beginnings of the development of human rights approaches to poverty.²⁶³ When people living in poverty are categorized into deserving or non-deserving, the inherent dignity of every human being is routinely denied. Hence, the human rights perspective which stresses this very dignity is an important counter-narrative to the prevalent social policy perspective. Dignity has been central to the notion of human rights since the very beginning, when the UDHR was birthed out of the aftermath of two World Wars. The UDHR declares the inherent dignity of every human being in its very first sentence of the preamble.²⁶⁴ Dignity has not only been understood as the underlying justification of human rights in general,²⁶⁵ but also when specifically looking at poverty from a human rights informed social policy perspective.²⁶⁶

²⁶¹ Human Rights Council, ‘Guiding Principles on Extreme Poverty and Human Rights’ (n 254) paras 15–17.

²⁶² Magdalena Sepúlveda Carmona, ‘From Undeserving Poor to Rights Holder: A Human Rights Perspective on Social Protection Systems’ [2014] Development Pathways 8 <<https://socialprotection.org/discover/publications/undeserving-poor-rights-holder-human-rights-perspective-social-protection>> accessed 27 December 2022.

²⁶³ Danilo Türk, ‘Realization of Economic, Social and Cultural Rights: Progress Report’ [1990] UN Doc E/CN.4/Sub.2/1990/19 para 142.

²⁶⁴ UDHR (n 140).

²⁶⁵ Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015); Pablo Gilabert, *Human Dignity and Human Rights* (Oxford University Press 2018).

²⁶⁶ Dharmendra Kumar Singh, ‘Poverty and Human Dignity: A Human Rights Approach’ (2017) 22 IOSR Journal of Humanities and Social Science 48; Christian Neuhäuser, ‘Dignity, Self-Respect and Real Poverty in Europe’ in Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019).

Human dignity as a human rights core principle has not diminished with time; on the contrary, it is still one of the most-cited principles by CESCR. In particular, CESCR has continuously stressed dignity when making statements on poverty. As soon as the COVID-19 crisis started, CESCR adopted a statement in response to the pandemic, urging states that ‘the inherent dignity of all people must be respected and protected, and the minimum core obligations imposed by the Covenant should be prioritized’.²⁶⁷ In GC 12 on the right to adequate food, CESCR first of all stressed that the ‘right to adequate food is indivisibly linked to the inherent dignity of the human person’, before stating that it is ‘inseparable from social justice’ and hence requires national policies that are ‘oriented to the eradication of poverty’.²⁶⁸ Similarly, in GC 18 on the right to work, CESCR connects work directly with dignity, since access to employment is paramount for living a ‘life in dignity’.²⁶⁹ According to GC 19 on the right to social security, social protection schemes must pay ‘full respect to the principle of human dignity’.²⁷⁰ These examples show that dignity is like a justification anchor for why human rights matter in the poverty discourse. Besides CESCR, other actors, like the International Labour Organisation (ILO), also stress the importance of ‘respect for the rights and dignity of people’, as is the case in ILO’s Recommendation No. 202 on Social Protection Floors.²⁷¹ Hence, human rights actors like CESCR continuously reinforce the inseparability of the human rights approach to poverty and human dignity.

Beyond the level of international human rights, some national constitutions also stress the importance of dignity, with Germany being the paramount example.²⁷² This has led to quite some scholarly engagement with the German right to an *Existenzminimum* (subsistence minimum) which flows directly from the principle of dignity.²⁷³ In short, the question about the added value of a human rights approach to

²⁶⁷ CESCR, ‘Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights’ (n 21) para 12.

²⁶⁸ CESCR, ‘General Comment No. 12: The Right to Adequate Food (Art. 11)’ (1999) UN Doc E/C.12/1999/5 para 17.

²⁶⁹ CESCR, ‘GC 18: The Right to Work’ (n 44) para 31.

²⁷⁰ CESCR, ‘GC 19: The Right to Social Security’ (n 44) para 22.

²⁷¹ International Labour Organisation, ‘Recommendation No. 202 on Social Protection Floors’ para 3.

²⁷² Art 1 (1) Grundgesetz (German Basic Law), <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 2 January 2023.

²⁷³ Eckart Riehle, ‘Der Menschenrechtliche Gehalt Des Existenzminimums in Art. 11 Des Internationalen Paktes Über Soziale, Wirtschaftliche Und Kulturelle Rechte’ (2008) 11 ZFSH/SGB 643; Luise Buschmann, *Das Menschenrecht auf soziale Grundsicherung aus Art. 9 und Art. 11 ICESCR* (Agenda-Verlag 2013); Leijten, ‘The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection’ (n 25).

poverty is not new.²⁷⁴ Yet, what is rather new is an increased understanding by social policy scholars that ‘denying people access to a decent minimum income constitutes a violation of human rights’.²⁷⁵ The notion of rights is also evident in the discourse on the European Pillar of Social Rights (EPSR).²⁷⁶ The EPSR acknowledges that ‘everyone lacking sufficient resources has the *right* to adequate minimum income benefits ensuring a life in dignity’ (emphasis added).²⁷⁷ This is a bold statement which uses the central notion of dignity in a very similar way as human rights actors like CESCR. However, in the EPSR’s next sentence, the necessity to maintain work incentives is reiterated: ‘minimum income benefits should be combined with incentives to (re)integrate into the labour market’.²⁷⁸ This shows that the EPSR does not fully develop the same strong dignity language as international human rights actors like CESCR. However, dignity is strongly acknowledged in Art 1 CFR, which reads: ‘Human dignity is inviolable. It must be respected and protected.’ However, due to the limited applicability of the CFR to individuals, this textual acknowledgement does not immediately produce tangible effects for a human rights approach to poverty.²⁷⁹ In the next section, I give a comprehensive overview over this human rights perspective on poverty by focusing on the historical origins of the so-called minimum core doctrine.

2.3.3 The Historical Origins of the Minimum Core Doctrine

Even though there is no “right not to be poor”, the minimum core doctrine comes close to such a right. The minimum core doctrine is closely linked to the principle of progressive realization which requires states parties ‘take steps’ to progressively realize all the rights protected under the ICESCR, depending on available resources.²⁸⁰ This principle of progressive realisation means that socio-economic rights protected under the ICESCR are not subject to immediate application. However,

²⁷⁴ Hans-Otto Sano, ‘How Can a Human Rights-Based Approach Contribute to Poverty Reduction? The Relevance of Human Rights to Sustainable Development Goal One’ in Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer International Publishing 2020).

²⁷⁵ Anne van Lancker, Ane Aranguiz and Herwig Verschueren, ‘Expert Study on a Binding EU Framework on Adequate Minimum Income Schemes: Making the Case for an EU Framework Directive on Minimum Income’ (2020) Study Commissioned by the European Anti-Poverty Network (EAPN) 8 <<https://www.eapn.eu/expert-study-on-a-binding-eu-framework-on-adequate-national-minimum-income-schemes-a-van-lancker-a-aranguiz-h-verschueren/>> accessed 26 December 2022.

²⁷⁶ European Commission, ‘Proposal for an Interinstitutional Proclamation of the European Pillar of Social Rights’ (n 10).

²⁷⁷ European Pillar of Social Rights, Art 14.

²⁷⁸ *ibid.*

²⁷⁹ For a full discussion of why I do not focus on the CFR in this thesis, see section 1.4.2.

²⁸⁰ Art 2(1) ICESCR.

states parties do have an immediate obligation to adhere with the minimum core doctrine by protecting ‘minimum essential levels’ of all rights protected in the Covenant and by fully respecting the obligation of non-discrimination.²⁸¹ This obligation is non-derogable,²⁸² and does not depend on the availability of states parties’ resources. States parties must ‘demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.²⁸³ This wording clarifies that minimum core obligations should not only be realised immediately, but also ‘as a matter of priority’. As such, the immediacy requirement of minimum core obligations stands in stark contrast to the usual requirement of progressive realization under Art 2(1) ICESCR.²⁸⁴

The origins of this minimum core doctrine are usually traced back to GC 3 on the nature of states parties’ obligations, where CESCR specifies that states parties have a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ protected in the Covenant.²⁸⁵ However, GC 3 on the nature of states parties’ obligations was only adopted in 1990, almost 15 years after the ICESCR entered into force, while the term ‘minimum level of adequacy’ was already used in 1969. In a meeting of experts on social policy and planning, it was proposed that the ‘elaboration of a minimum level of adequacy, including levels of adequacy for young children, should be undertaken both within countries and in the United Nations’.²⁸⁶ In 1976, the Special Rapporteur of the Commission on Human Rights published an extensive study on the realisation of socio-economic rights, in which he concluded ‘that the implementation of the concept of the minimum level of

²⁸¹ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 10. The non-discrimination obligation is a free-standing, immediately applicable obligation, which is protected under Arts 2(2) and 3 ICESCR. Yet, it is also a crucial component of the minimum core doctrine itself.

²⁸² CESCR, ‘Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (n 47); CESCR, ‘Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights’ (n 47).

²⁸³ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 10.

²⁸⁴ This contrast has been emphasized by CESCR in substantive GCs, see for example CESCR, ‘GC 15: The Right to Water’ (n 44) para 37; see also Bódig (n 74), who holds the view that the minimum core doctrine is so different from progressive realisation that it cannot be seen as a faithful interpretation of the treaty.

²⁸⁵ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 10.

²⁸⁶ United Nations Economic and Social Council, ‘Social Policy and Planning in National Development: Report of the Meeting of Experts on Social Policy and Planning in National Development Held at Stockholm from 1 to 10 September 1969’ (1969) UN Doc E/CN.5/445, para 39.

adequacy in each country is essential for the guaranteeing of economic, social and cultural rights to all'.²⁸⁷

When the UN Economic and Social Council adopted the Limburg Principles in 1987, the terminology shifted from a 'minimum level of adequacy' to 'minimum subsistence rights'.²⁸⁸ According to Principle 25, states parties need to 'ensure respect for minimum subsistence rights for all'.²⁸⁹ Türk, the UN Special Rapporteur on the Realization of Economic, Social and Cultural Rights published a progress report on the realization of socio-economic rights, which persisted with the subsistence terminology.²⁹⁰ At first sight, the report seems to recommend the establishment of 'thresholds for subsistence minima in a number of spheres'.²⁹¹ However, in the next paragraph, this idea is immediately withdrawn, when pointing out the 'dangers which the idea of a minimum content may have when it leads to the exercise of minimum rights'.²⁹² But what exactly are those dangers? According to the report, the danger consists in a neglect of structural issues surrounding poverty, giving the examples of lack of better living conditions, lack of employment opportunities and prevalence of low-paid work that is perceived as a 'punishment for being poor'.²⁹³ Very low wages might allow somebody 'to survive but not to live'. Hence, the report sees a violation of the inherent dignity of all human beings as the most important danger of the minimum subsistence concept.²⁹⁴

It is interesting to note that this idea of the dangerous nature of the minimum core doctrine continues to haunt the socio-economic rights community.²⁹⁵ However, what is rarely reported – and might have simply been forgotten in history – is how the report continues after having pointed out this dangerous nature of minimum subsistence rights. Rather than throwing the baby out with the bathwater, Türk develops the concept of 'spring-board rights' 'as a semantic alternative to the language

²⁸⁷ Manouchehr Ganji, 'The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress' (1975) Report by the Special Rapporteur of the Commission on Human Rights UN Doc E/CN.4/1108/Rev.1 para 39.

²⁸⁸ United Nations Economic and Social Council, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) Commission on Human Rights, 43rd Session, Annex, Provisional Agenda Items 8, 18, UN Doc E/CN.4/1987/17, see Principles 25 and 72.

²⁸⁹ *ibid* Principle 25.

²⁹⁰ Türk (n 263) para 200.

²⁹¹ *ibid* 201.

²⁹² *ibid* 202.

²⁹³ *ibid* 203.

²⁹⁴ *ibid* 204.

²⁹⁵ Harris (n 25).

of a minimum core. Hence, he conceptualises the minimum core as spring-board rights that are ‘dynamic rights’ and ‘driving forces of development’, which ‘can form the basis for combating poverty’.²⁹⁶ How could this become a reality? Only if the ‘minimum content’ is not seen as an absolute minimum, as to impose an artificial ceiling of some pre-defined level of rights protection, but rather when the minimum becomes an ‘instrument for promoting human rights’.²⁹⁷ As mentioned above, one key characteristic of effective ‘spring-board rights’ is the commitment to the inherent dignity of all human beings. Whenever someone is ‘threatened with poverty or social exclusion’, the doctrine of spring-board rights means that they must be ‘restored into society with their heads held high’.²⁹⁸ Hence, spring-board rights do not mean yet another careful elaboration of what exactly the normative content of one particular right is under one particular human rights mechanism, but instead it means a practical commitment to core human rights principles and in particular human dignity.

Finally, the terminology of ‘minimum essential levels’ was normatively fixed in CESCR’s GC 3 on the nature of states parties’ obligations.²⁹⁹ This means that, while it is true that the particular expression of ‘minimum essential levels’ originated in GC 3, the history of the minimum core doctrine as such dates back much further than that. The terminological shifts from adequacy to subsistence and finally essentialism can be perceived as different sides of the same puzzle: the question of how to specify the substantive content of the minimum core doctrine. In section 3.2 of this thesis, I will develop a novel understanding of the substantive content of the minimum core doctrine by conceptualising a substantive right to a social minimum.

2.4 Measuring Poverty: A Social Policy Perspective

After having discussed the conceptualisation of poverty, this section deals with the measurement of poverty. Since the framing of poverty is political and linked to a positioning on the primary drivers of poverty,³⁰⁰ it is not surprising that the adoption and implementation of official poverty measurements, for example in the form of a national poverty line, is highly contested in most countries. Official poverty measurements are intrinsically linked to the overall conceptualisation of poverty as

²⁹⁶ Türk (n 263) para 206.

²⁹⁷ *ibid.*

²⁹⁸ *ibid.*

²⁹⁹ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19).

³⁰⁰ Gaisbauer, Schweiger and Sedmak (n 190) 7.

direct, indirect, or multidimensional. Hence, the debate on national poverty measurements is dependent on the political question whether poverty is caused mainly by individual ‘failing’, economic macro conditions or the institutional set-up of the welfare state.

As discussed in Section 2.2, the EU uses the AROPE summary indicator as the official tool to measure poverty and inequality across Europe. The underlying data-source of the AROPE indicator is the European survey on income and living conditions (EU-SILC). While the EU has developed a range of cross-national statistical surveys,³⁰¹ the EU-SILC is the official instrument to measure poverty and social exclusion in the form of the AROPE-indicator across the EU MS.³⁰² The EU’s statistical agency, Eurostat, is responsible for the operation of EU-SILC. In the following, I will first point out key advantages and disadvantages of EU-SILC (section 2.4.1), before delving into a key problem for researchers: the lack of data disaggregation possible in the publicly available statistics (section 2.4.2). As a next step, I comparatively assess AROPE-rates across EU MS (section 2.4.3) before ending with a general critique of the EU-SILC (section 2.4.4).

2.4.1 The EU-SILC: Advantages and Disadvantages

The EU-SILC is a private household survey, which only covers people living in private households, as such excluding anybody who lives in any type of institution or collective households. Hence, people living in care homes, prisons, shared accommodations for asylum seekers or shared university housing are not covered by the EU-SILC. Additionally, anybody without an address is not covered. The requirement to have a registered address systematically excludes homeless people, but also most Roma and Travellers.³⁰³

³⁰¹ See for example the EU Labour Force Survey (LFS) and the European Health Interview Survey (EHIS), Eurostat, ‘What Is the EU Labour Force Survey?’ (*Overview - Employment and unemployment (LFS) - Eurostat*) <<https://ec.europa.eu/eurostat/web/lfs>> accessed 30 December 2022; Eurostat, ‘European Health Interview Survey (EHIS)’ <<https://ec.europa.eu/eurostat/web/microdata/european-health-interview-survey>> accessed 30 December 2022.

³⁰² For general information on EU-SILC, see <<https://ec.europa.eu/eurostat/web/microdata/european-union-statistics-on-income-and-living-conditions>> accessed 2 January 2023.

³⁰³ Ides Nicaise, Ingrid Schockaert and Tuba Bircan, ‘The Uncounted Poor in EU-SILC: A Statistical Profile of the Income and Living Conditions of Homeless People, Undocumented Immigrants and Travellers in Belgium’ in Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds), *Absolute Poverty in Europe: Interdisciplinary Perspectives on a Hidden Phenomenon* (Policy Press 2019).

One of the biggest strengths of EU-SILC is the coverage of all EU MS, and the yearly repetition, which allows for the identification of trends over time and across countries. EU-SILC consists of a cross-sectional element, where different households are selected by random sampling and a longitudinal element, where the same households are followed for a certain number of years. For measures like the persistent poverty rate, the longitudinal element is essential. However, it is not possible to combine the cross-sectional and longitudinal elements of the survey, a limitation which greatly restricts the possibility of cross-national longitudinal surveys.

Some of the common pitfalls for any survey which aims at comparability between countries are also a concern for an analysis of EU-SILC data. One of those is the impact of cross-national geographical differences. For example, the vast differences in income levels between Eastern and Western Europe seriously distort some of the figures retrieved from EU-SILC.³⁰⁴ Geographical differences in poverty levels are also pronounced within countries, for example the much wealthier Northern part of Italy when compared to the South. Another key difference is between urban and rural areas. Sometimes, comparative studies have sought to overcome these conceptual difficulties by focusing on countries located in a sub-region.³⁰⁵

Beyond these problems with how to account for poverty differences between countries and regions, a particular emphasis of my thesis is to account for poverty differences between groups. Indeed, EU MS will not be able to realise the right to a social minimum as *non-discriminatory access* to minimum essential levels of subsistence unless they know which groups are at what risk of poverty. This problem is closely linked to the difficulty of collecting and analysing disaggregated data, which is the focus of chapter 5 of this thesis. By design, the EU-SILC does not collect statistics on the ethnicity of the respondents. This is a particular problem when trying to access comparable data regarding the Roma, the EU's largest minority. A large number of reports and books has been published on the issue of 'hard-to-reach'-groups in general, and disaggregation by ethnicity in particular, with a special emphasis on Roma.³⁰⁶ Some EU member states even enforce strict legal prohibitions

³⁰⁴ Pim Verbunt and Anne-Catherine Guio, 'Explaining Differences Within and Between Countries in the Risk of Income Poverty and Severe Material Deprivation: Comparing Single and Multilevel Analyses' (2019) 144 *Social Indicators Research* 827.

³⁰⁵ Arkadiusz Piwowar and Maciej Dzikuc, 'Poverty and Social Exclusion: Is This a Problem in Rural Areas in the Visegrad Group Countries?' (2020) *XXIII European Research Studies Journal* 45.

³⁰⁶ Messing (n 124); Willis and others (n 124); Tourangeau and others (n 124); Tremlett and McGarry (n 124); Firchow and Mac Ginty (n 124).

of the collection of any ethnicity data.³⁰⁷ In the next section, I discuss these specific challenges of disaggregation.

2.4.2 Using the EU-SILC for Research: Challenges of Disaggregation

The EU-SILC is not only the official underlying data source to comparatively assess living standards across the EU, but it is also one of the most commonly used survey by researchers. However, the EU-SILC is not an easy survey to work with. The publicly available data is accessible via the Eurostat website. With the help of the Data Explorer, everybody can find aggregated summary statistics on most aspects of the AROPE indicator.³⁰⁸ However, when trying to disaggregate those statistics, things start to become more difficult. Sometimes, disaggregation by gender or age is allowed, yet it is never possible to disaggregate by gender and age at the same time. One can find poverty statistics of children on the one hand and poverty statistics for persons with disabilities on the other hand. Yet, it is not possible to combine the two different tables, as to produce poverty statistics of children with disabilities across the EU MS. Even if this was a technical possibility, the very stringent anonymization requirements preclude further disaggregation. Often, the sample size is too small to ensure the anonymity of survey respondents, and privacy concerns do not allow the disaggregation of data. It would also be extremely costly and cumbersome to enlarge the sample size to reach very specific population groups, for example poor female children with disabilities.

Yet, there are positive developments. For example, during my time as a study visitor at the European Union Agency for Fundamental Rights (FRA), I was involved in a project cooperating with the Bulgarian National Statistical Office on how to generate data on hard-to-reach populations.³⁰⁹ Working on this project has allowed me to see the practical difficulties and constraints when trying to collect disaggregated data in a general household survey, in particular ethical & privacy concerns, cost

³⁰⁷ Farkas (n 122).

³⁰⁸ One of the easiest ways to work with the publicly available Data Explorer is to do a Google search for the respective Eurostat codes. For example, the code [ilc_peps01] is the AROPE-rate by age and sex. The columns of the data table display the years, and the rows depict the EU MS and some summary statistics like the EU-28, EU-27 or EU-15. The Data Explorer for the Eurostat code [ilc_peps01] is available at https://ec.europa.eu/eurostat/databrowser/view/ilc_peps01/default/table?lang=en (accessed 29 January 2022).

³⁰⁹ See Project F 1.2, FRA, 'FRA Programming Document 2020-2022' (*Work Programme*) <https://fra.europa.eu/en/about-fra/what-we-do/annual-work-programme> accessed 3 January 2023.

issues and, last but not least, how to meaningfully capture complex normative human rights obligations into meaningful survey questions.³¹⁰

It is indeed a very welcome development that national statistical offices are seeking expertise on how to better collect disaggregated data. However, the issue often is that EU MS' national statistical offices do not see the collection of disaggregated statistics as a priority, even though they are required to do so under international human rights law. While EU MS are legally required to participate in large-scale European surveys such as EU-SILC, they normally do not see their human rights obligations to provide disaggregated statistics with the same urgency. Besides legal constraints regarding the collection of ethnicity data in particular, most EU MS value privacy and data protection concerns higher than the added value of gathering more and better disaggregated data to fulfil their human rights obligations. As such, it is not surprising that the HRTBs keep asking EU MS for disaggregated statistics.

2.4.3 A Comparative Analysis of Poverty in EU MS Applying EU-SILC

In 2019, well over 107 million people across the EU-28 were classified as AROPE, corresponding to 21.4% of the population.³¹¹ The Europe 2020 target aimed at lifting 20 million people out of poverty by 2020, with the reference year of 2008. Yet, the figures for 2019 show that so far, only 9.86 million people were lifted out of poverty since 2008.³¹² As depicted in Figure 8 above, there are about 5.4 million people across the EU-27 for whom all three AROPE-sub-indicators intersect: households were simultaneously classified as being at-risk-of-poverty, low work intensity and severely materially deprived. How are these people that are affected by this extreme form of poverty and social exclusion dispersed across the EU MS? Were there any differences over time? Figure 9 below depicts the differences between the EU MS for households of low work intensity that are also at-risk-of-poverty and severely materially deprived, sorted from smallest to largest in 2018.³¹³ The blue bars show the percentage of households in 2010, and the orange bars show the percentage of households in 2018.

³¹⁰ For example, I remember vividly a three-hour discussion on the wording of one single question on the discrimination experience of Roma, trying to make sure to be as accurate as possible while also ensuring a high-response rate.

³¹¹ Exact number is 107,535 million, Eurostat code [ilc_pees01].

³¹² Exact number is 9.856 million.

³¹³ Please note that for better readability, I only added data labels for a few EU MS.

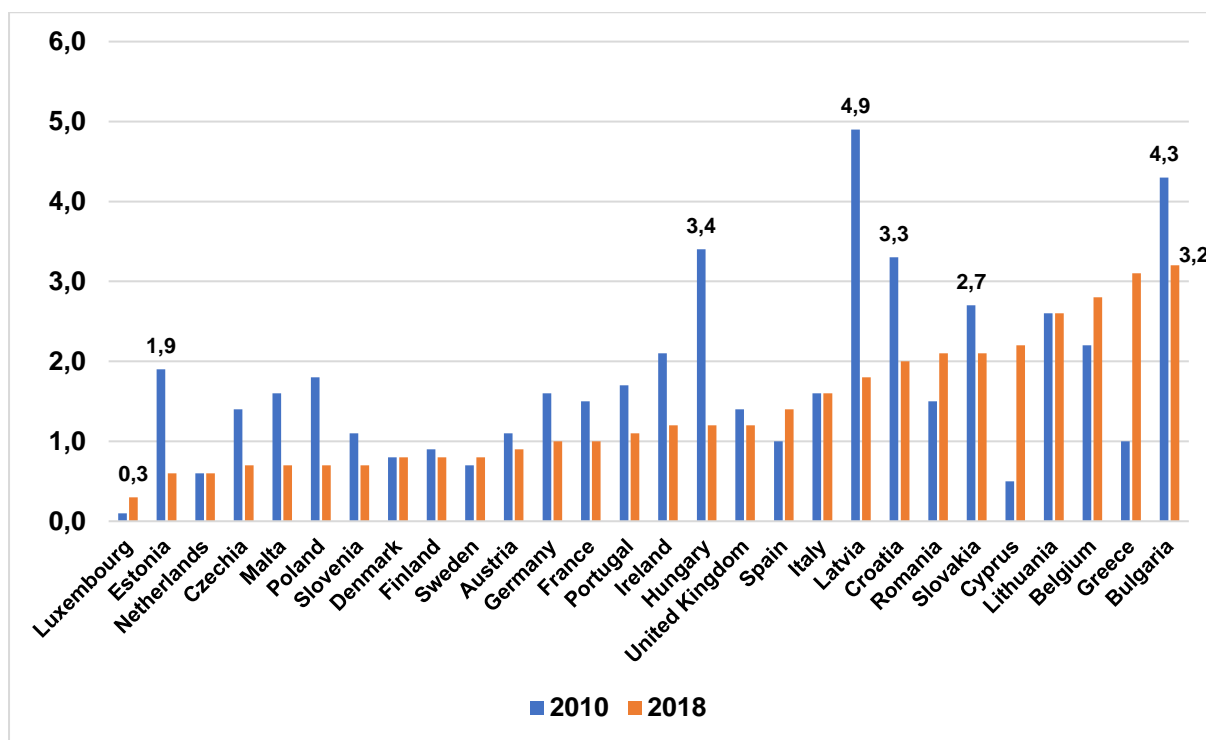


Figure 9. Intersecting AROPE-Rates across the EU-28 in 2010 and 2018

Figure 9 shows that there were considerable improvements between 2010 and 2018 in some EU MS, like Hungary, Latvia, or Croatia. At the same time, in EU MS that were negatively affected by the economic crisis, the situation deteriorated. For example, in Greece only 1% of households were affected by low work intensity, severe material deprivation and poverty in 2008, compared to over 3% of households in 2018. Even more pronounced, in Cyprus only 0.5% of households were at extreme AROPE risk in 2008, which was one of lowest levels of all EU MS. Yet, in 2018, the figure rose to over 2%, as such ranking Cyprus as one of the five EU MS with the highest level of extreme AROPE risk.

When considering the development of the three sub-indicators of the AROPE rate over time, the effects of the financial crisis 2007/2008 is clear. Figure 10 below depicts the development of the AROPE sub-indicators for the period of 2010-2019.³¹⁴ It shows that the at-risk-of-poverty rate stayed more or less stable from 2010-2019. However, the graph ignores the general suppression of GDP-levels as a direct consequence of the financial crisis. Both the severe material deprivation rate, and the low work intensity rate rose from 2010-2012. For the low work intensity, the peak was

³¹⁴ EU-27 (without UK), in 2019. Eurostat codes [ilc_li02] [ilc_lvhl11], [ilc_mddd11].

only reached in 2014. This is clear evidence that structural issues of unemployment need to be considered in any discussion on poverty and social exclusion for Europe. In times of economic crisis, it is not enough to point individuals towards the need to find a new job. Instead, I argue in chapter 4 that EU MS should design adequate social protection buffers, by putting a specific emphasis on MIPS.³¹⁵

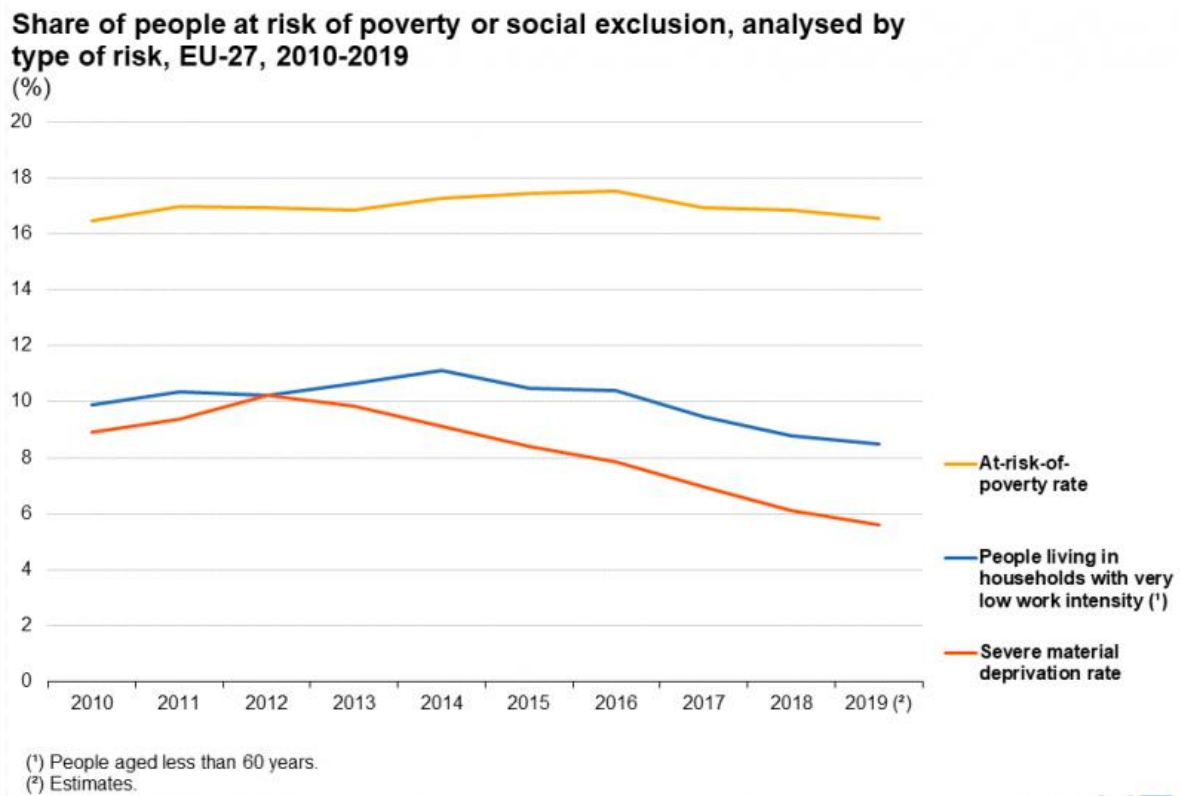


Figure 10. Aggregate AROPE Sub-Indicators 2010-2019, EU-27 (without the UK)

Figure 11 below shows the differences in the AROPE rates of the EU MS in 2010 and 2018 respectively, sorted from low to high for the 2018 values (depicted in orange). The graph shows that, overall, the situation seems to have improved in quite a number of EU MS, mostly in CEE states like Poland and Hungary, but also Bulgaria and Romania. At the same time, the negative long-term effects of the economic crisis that were visible in the intersecting AROPE indicator (see Figure 9 above) in countries like Greece are much less pronounced. Indeed, the non-intersecting AROPE indicator is heavily skewed towards the at-risk-of-poverty (AROP) rate since this indicator affects most households. However, as discussed above, the AROP rate is a relative indicator of poverty and says more about the overall inequality in countries than about the

³¹⁵ For MIPS, see in particular section 4.4.2.1.

experience of monetary poverty. Hence, in times of recession and austerity, a disproportionate number of people have lost their jobs, and hence median wages and median GDP sink. This means that the AROP rates sink as well, but without any improvement in people's living situations. On the other hand, sinking wages and job losses often make it more difficult for households to afford basic necessities.

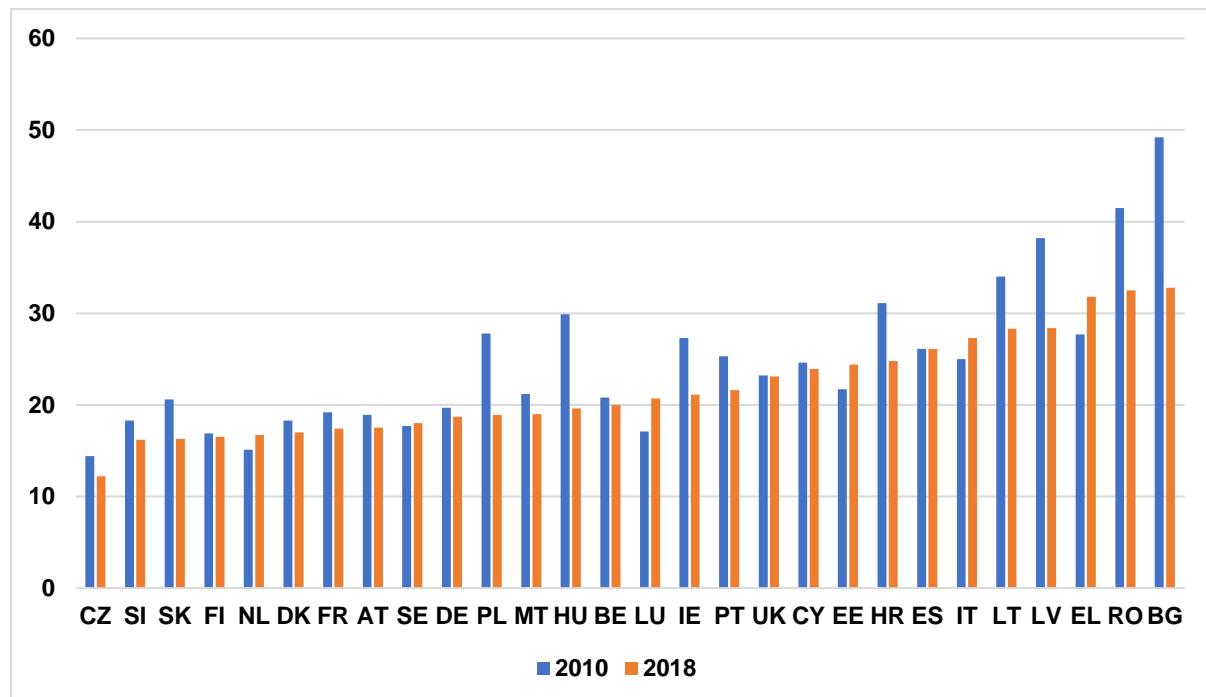


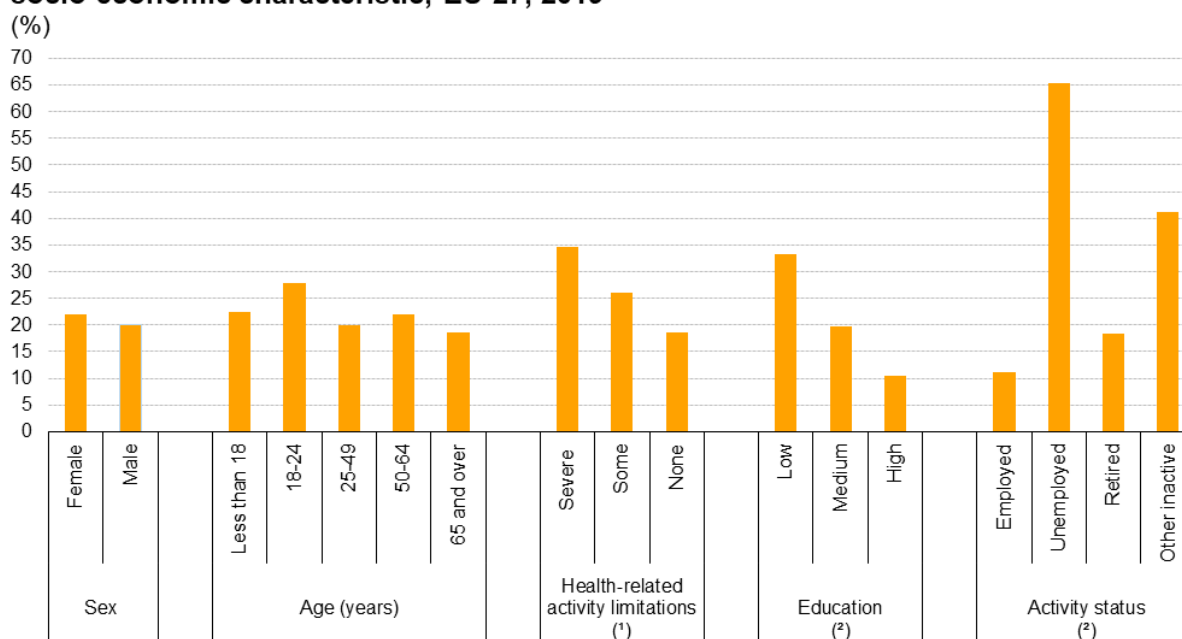
Figure 11. Comparison of AROPE-Rates of the EU MS in 2010 and 2018

2.4.4 Criticising the EU-SILC as Underlying Data Source for the Measurement of Poverty

The EU tends to consider individual-level socio-economic issues more relevant than structural and systemic issues when it comes to how the poverty discourse is framed and measured across the EU MS. Figure 12 below shows the AROPE-rate across the EU-27 (without the UK) when analysed by individual-level socio-economic characteristics.³¹⁶

³¹⁶ See Figure 2, Eurostat: Statistics Explained, 'Living Conditions in Europe - Poverty and Social Exclusion' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_poverty_and_social_exclusion> accessed 3 January 2023.

Share of people at risk of poverty or social exclusion, analysed by socio-economic characteristic, EU-27, 2019



Note: estimates.

(1) Population aged 16 years and over.

(2) Population aged 18 years and over.

Source: Eurostat (online data codes: ilc_peps01, ilc_peps02, ilc_peps04, hlth_dpe010)

eurostat

Figure 12. Individual Socio-Economic Characteristics Correlated with AROPE-Rates in 2019, EU-27 (without the UK)

The graph shows that 65% of all unemployed people are at-risk-of-poverty or social exclusion, which is a higher percentage than for any other individual-level correlation, like poor health, low education or age. It might seem tempting to understand this graph as evidence of the crucial role of unemployment as an explanatory factor for high AROPE rates.³¹⁷ However, this assessment neglects the limited nature of the AROPE indicator, since it does not consider the crucial role that social protection buffers should play to prevent unemployed people from living in poverty. In particular, the widespread inadequacy and patchy coverage of MIPS across the EU MS has been widely documented.³¹⁸ Since the AROPE indicator includes the contentious indicator of a household's low work intensity but excludes any assessment of social protection buffers, it seems intentionally to put the blame for being in a situation of poverty or social exclusion on the individual himself, as such tacitly accepting a behavioural understanding of the causes of poverty.

³¹⁷ David Brady, Ryan M Finnigan and Sabine Hübgen, 'Rethinking the Risks of Poverty: A Framework for Analyzing Prevalences and Penalties' (2017) 123 *American Journal of Sociology* 740.

³¹⁸ For a full analysis of MIPS as a key hindering condition to realise the right to a social minimum, see section 4.4.2.1.

Besides not considering the structural and systemic issues of unemployment, the EU's AROPE indicator does not take the discrimination aspects of labour market access into account. In chapter 5 of this thesis, I discuss these issues of hidden poverty or social exclusion due to the lack of disaggregated data and corresponding lack of sensitivity to specific poverty risks of certain disadvantaged or marginalized groups. For example, for persons of disabilities, the official AROPE measurement neither considers the extra costs of disability in its AROP measure, nor the structural problems of accessing employment in its LWI indicator. Even more, the SMD rate does not consider that persons with disabilities will find other things essential than persons without disabilities. For example, the question whether or not a household can afford a standard car is not useful for somebody with a physical impairment who would need a specifically fitted car.

Having explored some poverty statistics for the EU-28 that are routinely used in the common discourse, there is one key take-away: the invisibility of disadvantaged and marginalized groups. While the EU ensures that its statistical agency Eurostat continues to provide fast and easy access to comparable, aggregate statistics through the Data Explorer, the same does not hold true for disaggregated statistics. Indeed, the importance of disaggregation seems to only be on the radar of legal human rights scholars with a research speciality in socio-economic rights. However, those scholars often lack the necessary statistical skills to be able to criticise this lack of disaggregated data in a meaningful way. My thesis aims to fill this gap, since better disaggregation relies heavily on fruitful cross-fertilization between the distinct languages and approaches of social policy scholars on the one hand and legal human rights scholars on the other hand. I argue for the necessity of data disaggregation to realise the right to a social minimum more fully in chapter 5 of this thesis.

2.5 Measuring Poverty: A Human Rights Perspective

Even though the aim of the AROPE indicator is to measure poverty comprehensively and comparatively across EU MS, it is a fallacy to believe that it is value neutral. Rather, every conceptualisation and measurement of poverty – including the official one – is rooted in a specific understanding of poverty. From a human rights perspective, the EU's lack of attention to structural and political approaches to poverty is very serious. In this section, I contrast the measurement of poverty from a human rights perspective with the EU's official AROPE indicator. Section 2.5.1 discusses

human rights indicators. Section 2.5.2 introduces disaggregation as one of the core principles of the human rights approach to data. In section 2.5.3, I demonstrate that human rights indicators must be populated with disaggregated data in order for a true cross-fertilization to happen between the social policy and human rights perspectives. In sum, I argue that the human rights perspective can and should make a useful contribution to the measurement of poverty.

2.5.1 Human Rights Indicators

In this section, I discuss human rights indicators as tools for poverty measurement. To ground the discussion, I first provide a short overview of human rights indicators in general. In the so-called Türk Report (1990), which I discussed in section 2.3.3 above, indicators are defined as ‘pure statistical information’.³¹⁹ However, the report does not specify any concrete requirements for what would make statistics ‘pure’, or what would distinguish human rights statistics from non-human rights statistics. In 2001, Green defined human rights indicators as ‘a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation’.³²⁰ Another definition describes indicators as ‘a set of statistics that can serve as a proxy or metaphor for phenomena that are not directly measurable’.³²¹

Due to their wide scope, these definitions are not particularly useful. What exactly does this ‘piece of information’ consist of? How would one find a ‘proxy’ or ‘metaphor’ for something that is ‘not directly measurable’, like the enjoyment of human rights? More than twenty years ago, Thede summarized these basic questions surrounding the definition of human rights indicators in the following way: ‘What do we mean by indicators? What exactly are we trying to measure? How to ensure that the indicators we identify tell us what we need to know? Should indicators be used to establish a comparative index? In short: under what conditions can indicators be considered a valid and useful tool?’³²² These questions show that indicators were routinely discussed in solely quantitative terms, but that it has not been easy to define what kind of statistics would be suitable to measure human rights. Indeed, human

³¹⁹ Türk (n 263) Principle 4.

³²⁰ Maria Green, ‘What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 *Human Rights Quarterly* 1062, 1065.

³²¹ *ibid* 1076.

³²² Nancy Thede, ‘Human Rights and Statistics: Some Reflections on the No-Man’s-Land between Concept and Indicator’ (2001) 18 *Statistical Journal of the United Nations ECE* 259, 259.

rights indicators are closely linked to the overarching question of how to measure human rights, which the literature has continuously described as a challenge.³²³

In 2006, the OHCHR published a conceptual and methodological framework to monitor compliance with international human rights instruments.³²⁴ While the framework did not focus on indicators *per se*, it did create the necessary foundations for the 2008 report on indicators, addressing the question of how indicators can help to 'promote and monitor the implementation of human rights'.³²⁵ In 2012, another report on human rights indicators developed the idea of distinguishing between structure-, process- and outcome-indicators.³²⁶ Whereas structure-indicators aim at describing the institutional set-up necessary to implement human rights, process-indicators focus on the participation of rights-holders and outcome-indicators deal with the question of whether rights are actually realised. This distinction between structure-, process- and outcome-indicators has remained the defining conceptualisation of human rights indicators for the past 10 years.

2.5.2 Disaggregation as a Core Principle of a Human Rights Approach to Data

In 2018, the OHCHR published a detailed report outlining a human rights approach to data, where data disaggregation is identified as one of the core principles.³²⁷ In short, the collection of disaggregated data is an obligation under international human rights law. Each of the analysed HRTBs (CESCR, CRPD, CRC, CERD and CEDAW) have introduced the obligation to collect disaggregated data through their General Comments or General Recommendations. In 1981, CESCR adopted its very first GC on reporting by states parties and immediately clarified that the reporting obligations of states 'cannot be achieved only by the preparation of aggregate national statistics'.³²⁸ In 1999, in its GC 13 on education, CESCR requested data that 'should

³²³ Fernande Raine, 'The Measurement Challenge in Human Rights' (2006) 3 Sur. Revista Internacional de Direitos Humanos 6; Simon Walker, 'Challenges of Human Rights Measurement' in Bård-Anders Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017).

³²⁴ International Human Rights Instruments, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (2006) UN Doc HRI/MC/2006/7.

³²⁵ International Human Rights Instruments, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (2008) UN Doc HRI/MC/2008/3.

³²⁶ OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) <<https://www.ohchr.org/en/publications/policy-and-methodological-publications/human-rights-indicators-guide-measurement-and>> accessed 3 January 2023.

³²⁷ OHCHR, 'A Human Rights Based Approach to Data - Leaving No One Behind in the 2030 Agenda for Sustainable Development' (n 119).

³²⁸ CESCR, 'General Comment No. 1: Reporting by States Parties' (1981) UN Doc E/1989/22 para 3.

be disaggregated by the prohibited grounds of discrimination'.³²⁹ The same wording is used in its GC 19 on social security, where CESCR specifies that social security indicators should be 'disaggregated on the prohibited grounds of discrimination'.³³⁰ In its GC 23 on working conditions, CESCR voiced its concern that certain groups of disadvantaged workers 'are often excluded from national statistics',³³¹ hence bringing in a new interpretative nuance of disaggregation beyond the clearly defined categories of prohibited grounds of discrimination. CESCR then specifies that 'relevant disaggregated data' must be collected on workers of the informal economy.³³²

Beyond the realm of GCs on specific rights, CESCR also addressed the issue of disaggregated data in its GC 20 on non-discrimination, by clarifying that 'national strategies, policies and plans should use appropriate indicators and benchmarks', which must be 'disaggregated according to the prohibited grounds of discrimination'.³³³ Beyond CESCR, most group specific HRTBs also specify a clear obligation to provide disaggregated statistical data either in their reporting guidelines or in their GCs and GRs. For example, in its GR 9 on statistical data concerning the situation of women, the CEDAW Committee recommends 'that States parties should make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender, with regard to both absolute numbers and percentages, so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested'.³³⁴ Additionally, all HRTBs are routinely concerned about the lack of disaggregated data and statistics in states parties' periodic reports.

The CRPD is the first international human rights treaty which contains a direct obligation concerning statistics and data collection in the text of the treaty.³³⁵ Under

³²⁹ CESCR, 'General Comment No. 13: The Right to Education (Art. 13)' (1999) UN Doc E/C.12/1999/10 para 37.

³³⁰ CESCR, 'GC 19: The Right to Social Security' (n 44) para 75.

³³¹ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 47 (d).

³³² *ibid.*

³³³ CESCR, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) UN Doc E/C.12/GC/20 para 41.

³³⁴ CEDAW Committee, 'General Recommendation No. 9: Statistical Data Concerning the Situation of Women' (1989) UN Doc A/44/38 para 4.

³³⁵ Mads Pedersen, 'Article 31 [Statistics and Data Collection]' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing 2017).

Art 31(2) CRPD, states parties are specifically required to collect disaggregated data. In its GC 6 on non-discrimination and equality, the CRPD Committee clarifies that data ‘must be disaggregated on the basis of disability and intersectional categories’.³³⁶ The CRPD Committee goes one step further than CESCR in this GC 6 by specifying that the collection of disaggregated data should happen in a participatory way, in particular through disability-inclusive indicators and in consistency with the 2030 Agenda for Sustainable Development.³³⁷ Despite this obligation in the treaty itself, and the clear elaboration of the normative content of this Article through GC 6, most state party reports to the CRPD Committee do not report the use of any appropriate and comparable disaggregated statistical data. In chapter 5 of this thesis, I will demonstrate that this failure to collect disaggregated data is one of the key reasons why EU MS are not able to realise the right to a social minimum.

2.5.3 Populating Indicators with Disaggregated Data

In order to measure poverty, the establishment of a human rights indicator is not enough. Instead, one needs to populate it with data that will provide the empirical evidence of what is being measured. As the previous section established, it is not enough to provide aggregated data. Instead, data must be disaggregated by common equality characteristics like sex, age, disability status or race. For the SDG goals, to which the HRTBs repeatedly refer to,³³⁸ so-called metadata templates exist which one can utilise to populate indicators with data.³³⁹ According to SDG Goal 1, poverty must end in all its forms everywhere. To achieve this goal, several targets with its indicators and corresponding data series have been identified. For example, Target 1.3 reads: “Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.” It is accompanied by the corresponding indicator which is the proportion of the population that is ‘covered by social protection floors / systems’.³⁴⁰

³³⁶ CRPD Committee, ‘General Comment No. 6 on Equality and Non-Discrimination’ (2018) UN Doc CRPD/C/GC/6 para 71.

³³⁷ *ibid.*

³³⁸ The five HRTBs under study in this thesis referred to the SDGs 253x in its COs to the EU MS between 2009-2019.

³³⁹ United Nations, Department of Economic and Social Affairs, Statistics Division, ‘SDG Indicators: Metadata Repository’ (*Goal 1. End Poverty in All its Forms Everywhere*) <<https://unstats.un.org/sdgs/metadata/>> accessed 1 January 2023.

³⁴⁰ The European concept of MIPS is conceptually the same as the UN term of ‘social protection floors’.

Disaggregation is required not only by sex or disability, but the indicator also includes very specific categories, like 'pregnant women' or 'work-injury victims'. To populate this indicator, the Metadata template specifies that the following data should be collected:

- 'Proportion of population covered by at least one social protection cash benefit
- Proportion of children covered by social protection benefits
- Proportion of women giving birth covered by maternity benefits
- Proportion of persons with disabilities receiving benefits
- Proportion of unemployed receiving benefits
- Proportion of workers covered in case of employment injury
- Proportion of older persons receiving a pension
- Proportion of vulnerable persons receiving benefits
- Proportion of poor population receiving social assistance cash benefit'³⁴¹

This data is obtained from the International Labour Organisation's (ILO) Social Security Inquiry (SSI) survey.³⁴² Methodologically, the ILO collects the data using the SSI questionnaires to collect national data by Ministries of Labour, Welfare, Finance, or National Statistical Institutions. Since Target 1.3 specifically requires data on the proportion of the population that is covered by social protection floors, the Metadata template operationalizes these coverage calculations by the population groups. However, the template only refers to disaggregation regarding sex and gender and disregards other characteristics like ethnic origin or disability that the HRTBs tend to highlight. Even though the HRTBs frequently cross-reference the SDGs in their COs,³⁴³ no initiative exists that would connect substantive rights like the right to social security (Art 9 ICESCR) with concrete corresponding targets, indicators or data sources.

Maybe one reason for the HRTBs' lack of engagement with the population of indicators is an overall reluctance of some legal human rights scholars regarding the value of relying on quantitative data to further the realisation of human rights.³⁴⁴ In recent years, there has been a large amount of scholarly engagement with the perceived overflow of statistical approaches to human rights measurement.³⁴⁵ One of

³⁴¹ United Nations, Department of Economic and Social Affairs, Statistics Division (n 339).

³⁴² For the questionnaire, see <<https://qpss.ilo.org>> accessed 3 January 2023.

³⁴³ The five HRTBs under study in this thesis referred to the SDGs 253 times in their COs to the EU MS between 2009-2019.

³⁴⁴ Merry (n 38).

³⁴⁵ AnnJanette Rosga and Margaret L Satterthwaie, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 *Berkeley Journal of International Law* 253; Kevin E Davis and others, *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press 2012);

the most often referred accounts is Sally Engle Merry's book on the 'Seductions of Quantification'.³⁴⁶ One of her core claims is that efforts to quantify human rights outcomes often prove futile, due to the quantitative data being misleading, misconstrued, or simply wrong. Instead, she argues for an increasing use of qualitative in-depth approaches, pointing out the need to engage in truly participatory data collection efforts. However, her critique might have the unintended side effect that some legal human rights scholars – the majority of whom did not enjoy any statistical education throughout their legal training – will feel confident to simply reject any engagement with quantitative methods, indicators, and benchmarks.

However, the lack of statistical training coupled with lack of engagement with statistical approaches does not help to address the 'seduction of quantification'. What would be helpful instead is teaching the basics of statistical methods in law schools. Without a basic understanding of how quantitative data is collected, how comparable surveys are construed, or why the distinction between correlation and causation in regression analysis is crucial, any further calls on why disaggregation of data is crucial for human rights will not lead to any practical results. Indeed, I claim that to take the consistent concern of the lack of *disaggregated* data seriously, one first needs to learn the basic statistical principles of data *aggregation*.

In the past, indicators were routinely discussed in solely quantitative terms. For example, in the so-called Türk Report (1990), which has been discussed above, indicators are defined as 'pure statistical information'.³⁴⁷ However, the report does not specify any concrete requirements for what would make statistics 'pure', or what would distinguish human rights statistics from non-human rights statistics. In more recent times, the value of qualitative data sources has come to light, with mixed methods approaches becoming the new gold standard. Indeed, it is now common knowledge that it is necessary to gather both qualitative and quantitative information to populate

Gauthier de Beco, 'Human Rights Indicators: From Theoretical Debate to Practical Application' (2013) 5 Journal of Human Rights Practice 380; FRA, 'The Right to Political Participation for Persons with Disabilities: Human Rights Indicators' (2014) <<https://fra.europa.eu/en/publication/2014/right-political-participation-persons-disabilities-human-rights-indicators>> accessed 27 December 2022; Jody Heymann, Kristen McNeill and Amy Raub, 'Rights Monitoring and Assessment Using Quantitative Indicators of Law and Policy: International Covenant on Economic, Social and Cultural Rights' (2015) 37 Human Rights Quarterly 1071; Merry (n 38); Sakiko Fukuda-Parr, 'Keeping Out Extreme Inequality from the SDG Agenda – The Politics of Indicators' (2019) 10 Global Policy 61.

³⁴⁶ Merry (n 38).

³⁴⁷ Türk (n 263) Principle 4.

the three indicator-categories (structure-, process- and outcome).³⁴⁸ My focus in this thesis lies on outcome-indicators, aiming to answer the research question of how EU MS should realise the right to a social minimum. Hence, it is of crucial importance to move from the generic indicator debate into the more specific question on what human right measurements of poverty might look like. In other words, the more general questions on how to measure human rights, or whether indicators are necessarily quantitative, should be understood as part of the wider question on how to ensure that poverty measurement is not only seen as a realm of social policy scholars, but necessarily also as a realm of human rights scholars.

While the human rights literature is full of papers about how to construct the perfect human rights indicator, almost no papers and resources exist on how to practically populate human rights indicators with real-world data. In other words, human rights indicators tend to not be operationalized in databases. Even when they are, those efforts are on a much smaller scale than Eurostat's big, recurrent, and comparable cross-national surveys. When it comes to the measurement of poverty across EU MS, no database exists that would populate a human rights informed measurement of poverty and which simultaneously would come close to the EU-SILC in terms of comparability, frequency of data collection, and quality. This is surely because narratives on poverty and human rights in Europe neglect the issue of *measuring* poverty from a human rights perspective.

2.6 Conclusion

This chapter has shown that social policy and legal human rights scholars usually ask different questions when it comes to the conceptualisation and measurement of poverty. However, the aftermath of the economic crisis 2007/2008 in the form of unemployment and high poverty rates has led to tacit convergence of a central question. In the words of a social policy scholar, this question is: 'Why did European governments fail to deliver on their promise (...) to reduce poverty among European citizens?'³⁴⁹ In the words of this thesis, the question could be framed in this way: Why are EU MS failing to realise the right to a social minimum, despite having made non-derogable and immediately applicable commitments to protect minimum essential levels of all rights for everybody?

³⁴⁸ Green (n 320) 1076.

³⁴⁹ Vandenbroucke (n 210) ix.

This chapter has started to answer this question by pointing out the different ways how social policy scholars conceptualise poverty (section 2.2). I then provided a human rights critique to the narrative of poverty as being a behavioural problem, which is only worthy of social support for ‘deserving’ people. I analysed human dignity as the human rights perspective’s most powerful counterfactual to the deservingness-claim (section 2.3). In section 2.4, I provided a social policy perspective on the measurement of poverty, before coming back to the realm of human rights in section 2.5. I have argued that human rights indicators should not be seen as a ‘seduction of quantification’ but are rather key tools to address challenges of data disaggregation, which are at the centre of any human rights approach to the measurement of poverty.

Chapter 3: Distilling the Normative Content of the Human Right to a Social Minimum

3.1 Introduction

According to international human rights law, states parties to the ICESCR need to adhere to the minimum core doctrine by realising the minimum core content of all Covenant rights without discrimination. In this chapter, I conceptualise the minimum core doctrine as a substantive right to a social minimum and define it as non-discriminatory access to minimum essential levels of subsistence. My research goal is to subsequently distil the normative content of this right to a social minimum. Distilling means to extract and specify the obligations which states parties are bound to comply with under international law.³⁵⁰ Distilling the normative content would not be fruitful without specifying the particular geographical and temporal scope of this exercise. As justified in the introduction of this thesis, my geographical scope covers the EU MS, and my temporal scope consists of the period from 2009-2019. My methodology consists of a hybrid of doctrinal analysis and qualitative content analysis as my methodology. To aid the qualitative content analysis, I make use of MAXQDA, a software for qualitative data analysis, as explained in further detail in the introduction.³⁵¹

To explore the normative content of the right to a social minimum, I give particular emphasis to the rich normative jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR), which is tasked with the monitoring of the ICESCR in the form of periodic state party reporting. Yet, *distilling* this normative content for a particular place and a particular time demands us to go one step further. By systematically analysing the Concluding Observations (COs) of five UN Human Rights Treaty bodies (HRTBs), which were issued to the EU MS from 2009-2019, I am able to show what the right to a social minimum means for this particular time and place. To do so, I am taking the COs of the most recent reporting cycle of each HRTB as my unit of analysis.³⁵²

³⁵⁰ For an example of using the word 'extraction' in a similar way as I am using the word 'distilling', see O'Conneide (n 39).

³⁵¹ VERBI (n 40).

³⁵² See Appendixes 1-5 for a complete overview of the reporting cycles of the five HRTBs between 2009-2019.

The remainder of this chapter is structured as follows. In section 3.2, I argue for a new framing of the minimum core doctrine in the form of a new substantive right to a social minimum, defined as non-discriminatory access to minimum essential levels of subsistence. Section 3.3 analyses CESCR's jurisprudence in the form of the most recent COs addressed to the EU-28 from 2009-2019. I show that CESCR is consistently highly concerned about the non-discrimination aspect of the right to a social minimum, highlighting the necessity to ensure minimum essential levels of subsistence rights to particularly disadvantaged and marginalized groups. This is why section 3.4 widens the analysis to four group specific HRTBs (CESCR, CRPD, CRC, CERD and CEDAW), in order to specify how EU MS should realise the right to a social minimum for three particular disadvantaged or marginalised groups, which serve as case studies throughout this thesis: persons with disabilities, children and Roma. I distil the specific normative content of the right to a social minimum for these three groups by identifying three substantive dimensions that are aligned with the EU's-AROE indicator, namely the three dimensions of poverty (P), material deprivation (MD) and work (W). Section 3.5 addresses intersectionality, with the particular analytical lens of multiple and concurrent discrimination of my three case studies. Section 3.6 concludes.

3.2 Framing the Minimum Core Doctrine as a Substantive Right to a Social Minimum

In this section, I use classical doctrinal analysis to conceptualise the minimum core doctrine as a substantive right to a social minimum. By defining the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence, I keep all key components of the minimum core doctrine as interpreted over time. In particular, I engage in a close reading of the ICESCR and CESCR's GCs. My conceptualisation of the right to a social minimum does not stay in the abstract, but rather offers meaningful content to the minimum core doctrine.

I discuss the origin of each of the three sub-components of my definition, namely the concepts of 'minimum essential levels' (Section 3.2.1), 'subsistence' (Section 3.2.2), and 'non-discriminatory access' (Section 3.2.3). In these three sections, I show that my framing of the right to a social minimum preserves the historical normative content of the minimum core doctrine. In other words, I give concrete normative content to the minimum core doctrine by arguing for a substantive right to a social minimum. This new substantive right to a social minimum is derived

from composite minimum core obligations related to a subsistence floor. In section 3.2.4, I discuss the core obligation to realise the right to a social minimum before finally arguing in section 3.2.5 that I overcome the piecemeal approach of specifying the minimum core doctrine for each specific Covenant right separately by instead conceptualising a composite, substantive right to a social minimum.

3.2.1 Minimum Essential Levels

In this section, I establish the ‘minimum essential levels’ part of my definition of a right to a social minimum. When CESCR proclaimed in 1990 that states parties have a minimum core obligation to protect ‘minimum essential levels’ of all Covenant rights,³⁵³ no substantive GCs regarding specific rights existed yet. What then does the concept of ‘minimum essential levels’ of each Covenant right mean specifically? How would states parties be able to distinguish between minimum and non-minimum levels, essential and non-essential levels? In GC 3 on the nature of states parties’ obligations, CESCR specified that deprivation from ‘essential foodstuffs’ and ‘basic shelter and housing’ would be a failure to protect ‘minimum essential levels’.³⁵⁴ However, until CESCR adopted GC 12 on the right to food in 1999, it did not specify what the exact normative content of the minimum core obligations for each of the Covenant rights consists of exactly. Indeed, CESCR neither used the terms ‘minimum essential levels’, nor ‘minimum core’ or ‘core obligations’ before 1999. In GC 4 on the right to housing, CESCR did use the term ‘essential’ when specifying that an ‘adequate house must contain certain facilities essential for health, security, comfort and nutrition’, which consist of ‘sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services’.³⁵⁵ However, in other General Comments on substantive rights, like GC 7 on forced evictions,³⁵⁶ or GC 11 on primary education,³⁵⁷ the Committee kept silent about delineating anything as ‘essential’, or specifying the normative content of minimum core obligations.

³⁵³ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 10.

³⁵⁴ *ibid.*

³⁵⁵ CESCR, ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)’ (1991) UN Doc E/1992/23 para 8b.

³⁵⁶ CESCR, ‘General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): Forced Evictions’ (1997) UN Doc E/1998/22.

³⁵⁷ CESCR, ‘General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)’ (1999) UN Doc E/1992/23.

This silence regarding the minimum core doctrine only changed with GC 12 on the right to food, where CESCR specifies that the Covenant is violated ‘when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger’.³⁵⁸ But what do those minimum essential levels mean? According to CESCR, the normative content of minimum essential levels of the right to food consists of states parties having an obligation to provide access to ‘minimum essential food which is sufficient, nutritionally adequate and safe’.³⁵⁹ GC 12 on the right to food hence marks an era of CESCR specifying concrete criteria for what ‘minimum essential levels’ mean for specific Covenant rights. This process continued in subsequent GCs, such as in GC 13 on education,³⁶⁰ or GC 14 on health.³⁶¹

Ever since the adoption of GC 12, CESCR has developed minimum core obligations in a piecemeal fashion for substantive provisions of the Covenant. For example, regarding the right to work, CESCR states that ‘states parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work’.³⁶² Regarding the right to social security, CESCR reiterates the original wording of GC 3 on the nature of states parties’ obligations, stating that states parties have to protect the ‘minimum essential levels’ of all the rights protected under the Covenant.³⁶³ Indeed, most of the GCs issued after GC 12 on the right to food in 1999 contain a specification of the minimum core content for each Covenant right.³⁶⁴ However, CESCR does not always use the specific term of ‘minimum essential levels’ when it delineates the rights-specific normative content of the minimum core doctrine. While this was the term chosen with the normative establishment of the minimum core doctrine in GC 3 on the nature of states parties’

³⁵⁸ CESCR, ‘GC 12: The Right to Adequate Food’ (n 268) para 17.

³⁵⁹ *ibid*, para 14.

³⁶⁰ CESCR, ‘GC 13: The Right to Education’ (n 329) para 57.

³⁶¹ CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (2000) UN Doc E/C.12/2000/4 para 43.

³⁶² CESCR, ‘GC 23: The Right to Just and Favourable Conditions of Work’ (n 44) para 65.

³⁶³ CESCR, ‘GC 19: The Right to Social Security’ (n 44) para 59.

³⁶⁴ CESCR, ‘GC 15: The Right to Water’ (n 44) para 37; CESCR, ‘General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15 (1) (c) of the Covenant)’ (n 44) para 39; CESCR, ‘GC 18: The Right to Work’ (n 44) para 31; CESCR, ‘GC 19: The Right to Social Security’ (n 44) para 39; CESCR, ‘General Comment No. 21: The Right of Everyone to Take Part in Cultural Life (Art 15 (1) (a) of the Covenant)’ (n 44) para 55; CESCR, ‘General Comment No. 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)’ (n 44) para 49; CESCR, ‘GC 23: The Right to Just and Favourable Conditions of Work’ (n 44) para 65.

obligations,³⁶⁵ there seems to be ‘minimal consistency’ in CESCR’s choice of terms.³⁶⁶ Regarding substantive rights, CESCR reiterates the minimum core obligation as consisting of ‘minimum essential levels’ in GC 13 on the right to education,³⁶⁷ GC 18 on the right to work,³⁶⁸ GC 19 on the right to social security,³⁶⁹ and GC 23 on the right to just and favourable working conditions.³⁷⁰ In all other instances where CESCR specifies the normative content of minimum core obligations in GCs, it does not use the term ‘minimum essential levels’.

Despite CESCR’s efforts to provide very detailed normative content of the minimum core doctrine for each Covenant right, and despite giving the minimum core doctrine a boost in times of crisis, states parties are generally not engaging with the minimum core doctrine in their state party reports (SPRs).³⁷¹ There is no evidence that states parties are prioritising any of the normative content of the rights-specific minimum core doctrine. Due to CESCR’s piecemeal approach, which is how I label CESCR’s habit of defining the specific normative content one right at a time in GCs, it can be extremely challenging for states parties to apply the exact requirements of the minimum core doctrine. Additionally, all EU states have ratified group specific international human rights treaties as well,³⁷² like the Convention on the Rights of the Child (CRC)³⁷³ or the Convention on the Rights of Persons with Disabilities (CRPD)³⁷⁴. This means that states then need to discern which interpretative standards apply for which group under which UN human rights treaty regime. And this is without taking into account the other human rights regimes that most EU member states are subject to, such as the recent strand of case law on vulnerable groups and systemic deficits by the European Court of Human Rights, the mechanisms of the European Social Charter, or even new policy developments such as the European Pillar of Social Rights.³⁷⁵ Hence, even if states parties wanted to comply with their minimum core

³⁶⁵ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 10.

³⁶⁶ Warwick (n 25).

³⁶⁷ CESCR, ‘GC 13: The Right to Education’ (n 329) para 57.

³⁶⁸ CESCR, ‘GC 18: The Right to Work’ (n 44) para 31.

³⁶⁹ CESCR, ‘GC 19: The Right to Social Security’ (n 44) para 59.

³⁷⁰ CESCR, ‘GC 23: The Right to Just and Favourable Conditions of Work’ (n 44) para 65.

³⁷¹ See Warwick (n 25) who conducts an analysis of a comprehensive sample of human rights treaty bodies’ reporting cycles and finds that only four states have engaged with the minimum core doctrine in their state party reports.

³⁷² OHCHR, ‘UN Treaty Body Database - View the Ratification Status by Country or by Treaty’ (n 41).

³⁷³ CRC (n 56).

³⁷⁴ CRPD (n 56).

³⁷⁵ Hasheem Mannan, Malcolm MacLachlan and Joanne McVeigh, ‘Core Concepts of Human Rights and Inclusion of Vulnerable Groups in the United Nations Convention on the Rights of Persons with

obligations, the efforts required to do so tend to not outweigh the tediousness of the exercise.

I overcome the piecemeal approach of specifying the normative content for each Covenant right individually by framing a substantive right to a social minimum. At the same time, I do not change the key terminology of the minimum core doctrine, by keeping the term ‘minimum essential levels’ for my definition of the right to a social minimum. My approach of giving an overarching definition to the minimum core doctrine is in line with key concepts like the indivisibility and interdependency of all human rights. This approach was also recognised by CESCR when cross-referencing between rights when delineating the minimum core content. For example, in GC 14 on the right to health, CESCR specified that the minimum core content of the right to health includes ‘access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone’.³⁷⁶ In 2001, CESCR issued a statement on poverty, where it reiterated that the minimum essential levels of food, education and health care must be respected at all times.³⁷⁷ Why I chose the term ‘subsistence’ in order to provide substantive meaning to the interrelated and indivisible material scope of the minimum core doctrine is the focus of the next sub-section.

3.2.2 Subsistence

In this section, I establish the ‘subsistence’ part of my definition of a right to a social minimum. A decade before CESCR specified the minimum core doctrine to consist of ‘minimum essential levels’ of each Covenant right in 1990,³⁷⁸ Shue developed a basic right to ‘subsistence’ in his influential book on ‘Basic Rights’.³⁷⁹ Shue’s right to subsistence consisted of food, clothing and shelter, constituting ‘a line beneath which no one is to be allowed to sink’.³⁸⁰ From the very beginning, ensuring basic subsistence for all was at the heart of the minimum core doctrine. This means that

Disabilities’ (2012) 6 Alter 159; Alexander Kornezov, ‘Social Rights, the Charter, and the ECHR: Caveats, Austerity, and Other Disasters’ in Frank Vandenbroucke, Catherine Barnard and Geert de Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017); Aranguiz (n 13); Sara Benedi Lahuerta and Ania Zbyszewska, ‘EU Equality Law after a Decade of Austerity: On the Social Pillar and Its Transformative Potential’ (2018) 18 *International Journal of Discrimination and the Law* 163; Kagiarios (n 152).

³⁷⁶ CESCR, ‘GC 14: Right to Health’ (n 361) para 43.

³⁷⁷ CESCR, ‘Statement on Poverty’ (n 241) para 16.

³⁷⁸ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 10.

³⁷⁹ Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press 1980) 18.

³⁸⁰ *ibid.*

even before CESCR developed rights-specific minimum core obligations for each right, there was a common understanding that subsistence is the delineating factor between core and non-core obligations. Somehow it seems that, in the process of specifying the normative content of the minimum core doctrine for each Covenant right individually, CESCR sometimes failed to stick with the most fundamental interpretation of the minimum core doctrine: ensuring minimum levels of subsistence. At the same time, even though the minimum core doctrine is now 30 years old, states parties are still not particularly willing to engage with it.³⁸¹ Would it then not be useful to come back to the roots of securing basic subsistence rights for everyone?

Yet, it has been argued that a return to subsistence rights bears the inherent danger of no longer aiming to achieve the full progressive realisation of all rights, but rather only some kind of minimal version of rights, barely enough to survive.³⁸² Indeed, during the 1980s before the minimum core doctrine was normatively anchored in GC 3 on the nature of states parties' obligations, it seemed to be 'more pragmatic to pursue a minimal understanding of rights, even if this meant foreclosing more redistributive claims'.³⁸³ However, it is far from settled that pursuing the minimum core doctrine indeed means a neglect of the full progressive realisation of socio-economic rights. Rather, the minimum core doctrine should serve as a 'prioritization' device which enables states parties to identify where to start when realising their socio-economic rights obligations.³⁸⁴ As Tasioulas notes, it is an 'intuitively compelling idea' that the minimum core doctrine helps states to prioritise their resources.³⁸⁵ This prioritization function of the minimum core doctrine is not only established in the academic literature but has been consistently invoked by CESCR. For example, in response to the COVID-19 crisis, CESCR released a statement urging states that 'the minimum core obligations imposed by the Covenant should be prioritized'.³⁸⁶

³⁸¹ Compare section 1.4.1.

³⁸² Harris (n 25).

³⁸³ Julia Dehm, "A Pragmatic Compromise between the Ideal and the Realistic": Debates over Human Rights, Global Distributive Justice and Minimum Core Obligations in the 1980s' in Christian Olaf Christiansen and Steven LB Jensen (eds), *Histories of Global Inequality: New Perspectives* (Springer International Publishing 2019) 97.

³⁸⁴ David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 *International Journal of Constitutional Law* 710.

³⁸⁵ John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now' (World Bank 2017) 12 <<http://elibrary.worldbank.org/doi/book/10.1596/29144>> accessed 27 December 2022.

³⁸⁶ CESCR, 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights' (n 21) para 12.

However, without a clear understanding of what should be prioritised exactly, states cannot fulfil this obligation.

CESCR's piecemeal approach in defining the minimum core doctrine on a right-by-rights basis sometimes seems to lack clarity and coherence, as if CESCR has difficulty deciding which of the various conceptualisations and definitions of the minimum core doctrine to focus on.³⁸⁷ How much more difficult must it be for states parties who most often lack the political will to assume any normative force of the minimum core doctrine, even theoretically. As established above, this is one of the key disadvantages of the piecemeal approach which consists of a very detailed, rights-to-rights delineation of the minimum core, dispersed in several GCs over a thirty-year span. While the prioritization function of the minimum core doctrine might theoretically help states to distinguish between core and non-core obligations, the piecemeal approach to delineating the normative content of the minimum core doctrine does not help them to determine whether and how they should prioritise between the various rights-specific minimum cores.

To prioritise between the various rights-specific minimum core obligations, it is useful to come back to the historical roots of the minimum core doctrine and focus on securing basic subsistence rights for everyone. Since the ICESCR protects the right to work (Arts 6, 7), the right to social security (Art 9) and the right to an adequate standard of living (Art 11), states parties should ensure that everybody has access to the social minimum needed to survive. This social minimum can be gained through work, social security, social assistance benefits, or a combination between them.³⁸⁸ I argue that a composite understanding of the minimum core doctrine derived from Arts 6, 7, 9 and 11 ICESCR provides the normative foundation for protecting a right to a social minimum.

The substantive boundaries of this right to a social minimum all fall under the umbrella term 'subsistence', stemming from a monetary understanding of the right to a social minimum. This limitation to a monetary understanding means that I exclude

³⁸⁷ Warwick (n 25).

³⁸⁸ In the German academic literature, some scholars have proposed the establishment of the right to a social protection as a composite right between Arts 9 and 11 ICESCR. However, this approach is quite different from my conceptualisation, since I only consider minimum core obligations (and not progressive realisation), and also include the work-dimension (Arts 6 and 7 ICESCR) as a legitimate and appropriate way to realise one's right to a social minimum. See Buschmann (n 273); Nina-Claire Himpe, *Die Universalisierung Sozialer Menschenrechte Am Beispiel Sozialer Grundsicherung* (Nomos 2017), see also Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (n 25).

health and education, since they are very big policy fields with diverse characteristics and their own strands of literature and specialised research. Their inclusion would not enhance, but rather blur my analysis. Hence, to maximise comparability between EU MS, I only focus on a monetary social minimum. Furthermore, in the European context, minimum essential levels of education in the form of providing primary education³⁸⁹ are already guaranteed. Yet, there are interlinkages with my limited monetary right to a social minimum: Children living in poverty might go to school without breakfast, or do not have the necessary financial means to purchase learning materials. Issues of school segregation are of particular relevance to my case studies of persons with disabilities and Roma and will be analysed whenever there is a clear link to my monetary research focus.

My composite understanding of the right to a social minimum is linked to CESCR's focus on the interconnectedness of all human rights. By analysing the full spectrum of a monetary right to a social minimum, I capture the links between several underlying factors that could lead to somebody not being able to access their right to a social minimum. When realising the right to a social minimum, states parties should ensure that everybody has non-discriminatory access to minimum essential levels of subsistence, regardless of whether this subsistence is gained through work, social security, or social assistance benefits. Figure 13 depicts a graphical illustration of the right to a social minimum by explicitly providing for the interlinkages between the right to work (Arts 6,7), the right to social security (Art 9) and the right to an adequate standard of living (Art 11).

³⁸⁹ CESCR, 'GC 13: The Right to Education' (n 329), where the Committee clarifies in paragraph 57 that '(...) in the context of article 13, this core includes an obligation (...) to provide primary education for all in accordance with article 13 (2) (a)'.

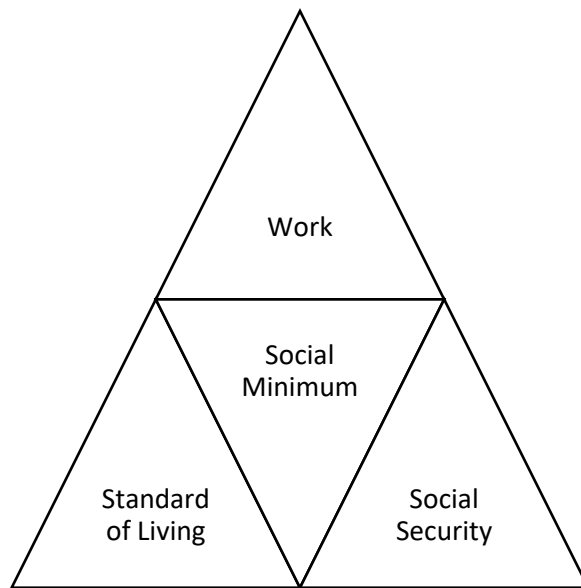


Figure 13. Substantive Links of the Right to a Social Minimum

How then does CESCR define the normative content of these substantive links? And in which way does CESCR's piecemeal approach inform my umbrella definition of a substantive right to a social minimum? Regarding the right to work (Arts 6 and 7), CESCR defines the minimum core obligation as ensuring 'non-discrimination and equal protection of employment'.³⁹⁰ In particular, the Committee stresses that this core obligation includes the 'right of access to employment', in particular for disadvantaged or marginalised groups, 'permitting them to live a life in dignity'.³⁹¹ States parties are further required to act upon their national employment strategies, in particular regarding indicators and benchmarks for vulnerable groups.³⁹² Under Art 7, sufficient remuneration for paid work is a key ingredient to enable an adequate standard of living.³⁹³ When it comes to the minimum core obligation, states parties must 'ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work'.³⁹⁴ In particular, minimum wages should be 'non-discriminatory and non-derogable, fixed by taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families'.³⁹⁵ This shows that the work dimension of the right to a social minimum requires states to fight unemployment on the one hand, and low pay

³⁹⁰ CESCR, 'GC 18: The Right to Work' (n 44) para 31.

³⁹¹ *ibid.*

³⁹² *ibid.*

³⁹³ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 18.

³⁹⁴ *ibid.* 65.

³⁹⁵ *ibid.* 65 (c).

on the other hand. CESCR is concerned about inadequate minimum wages in 12 EU MS, in particular for vulnerable and disadvantaged groups.³⁹⁶

Regarding the right to social security (Art 9, ICESCR), CESCR requires an available social protection system which makes sure that 'benefits are provided for the relevant social risks.'³⁹⁷ In addition to availability,³⁹⁸ social security systems should be adequate³⁹⁹ and accessible.⁴⁰⁰ Specifically, CESCR mentions nine branches of social security and refers in a footnote to ILO Convention No. 102 (1952) on Social Security (Minimum Standards).⁴⁰¹ To counter the poverty risks associated with unemployment, states parties need to provide contributory unemployment benefits for a reasonable amount of time. At their expiry they must 'ensure adequate protection of the unemployment worker, for example through social assistance'.⁴⁰² All social protection schemes must ensure adequacy 'in amount and duration', paying 'full respect to the principle of human dignity', and ensuring 'non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided'.⁴⁰³ Additionally, CESCR requires states parties to ensure accessibility through coverage, eligibility, affordability, participation and information, and physical access.⁴⁰⁴ The interlinkages between the right to social security and other rights, such as the right to work and the right to an adequate standard of living are explicitly provided for in GC 19 on the right to social security.⁴⁰⁵ In 2015, CESCR adopted a statement on social protection floors, a concept that has originally been developed by the International Labour Organization (ILO).⁴⁰⁶ CESCR considers social protection floors to be 'essential social guarantees, in cash and in kind', according to national definitions.⁴⁰⁷ On a conceptual level, CESCR clarifies that states parties do first and foremost have the obligation to protect the 'minimum core content' of rights at all times.⁴⁰⁸ Yet,

³⁹⁶ CESCR's COs to CY 2016, paras 23-24; CZ 2013, paras 10, 13; DE 2018, paras 32-37; EE 2019, paras 36-37; EL 2015, paras 19-20; IE 2015, paras 17, 30-31; LT 2015, para 10; PL 2015, paras 18-20; PT 2014, paras 12-13; RO 2014, para 13; UK 2016, paras 36-37.

³⁹⁷ CESCR, 'GC 19: The Right to Social Security' (n 44) para 11.

³⁹⁸ *ibid* 11-21.

³⁹⁹ *ibid* 22.

⁴⁰⁰ *ibid* 23-27.

⁴⁰¹ *ibid* 12, fn 8.

⁴⁰² *ibid* 16.

⁴⁰³ *ibid* 22.

⁴⁰⁴ *ibid* 23-27.

⁴⁰⁵ *ibid* 28.

⁴⁰⁶ CESCR, 'Statement on Social Protection Floors: An Essential Element of the Right to Social Security and of the Sustainable Development Goals' (2015) 54th session, UN Doc E/C.12/54/3.

⁴⁰⁷ *ibid* 1.

⁴⁰⁸ *ibid* 2.

substantively, CESCR links the concept of a Social Protection Floor with the right to social security. Indeed, CESCR even considers social protection floors to ‘constitute the core obligation’ of the right to a social security pursuant to GC 19.⁴⁰⁹ In even stronger terms, CESCR states that without ‘the concept of social protection floors as a core obligation (...), economic and social rights, including the right to social security, are rendered meaningless’.⁴¹⁰

When it comes to the right to an adequate standard of living (Art 11), the Committee defines the minimum core content of the human right to adequate food as consisting of freedom from hunger.⁴¹¹ Regarding the right to adequate housing, the Committee clarifies that adequacy includes the ‘availability of services, materials, facilities and infrastructure’, ‘affordability’ and ‘accessibility’.⁴¹² The right to an adequate standard of living is often linked to poverty. Even though there is no direct prohibition of poverty in the Treaty, CESCR defines poverty ‘as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living.’⁴¹³ In 2001, CESCR issued a statement on poverty, where it reiterated that the minimum essential levels of food, education and health care must be respected at all times.⁴¹⁴ In the view of the Committee, the right to an adequate standard of living has ‘a direct and immediate bearing upon the eradication of poverty’.⁴¹⁵ After having distilled the normative content of the right to a social minimum by an analysis of the terms ‘minimum essential levels’ in the previous section, and the term ‘subsistence’ in this section, the next section focuses on ‘non-discriminatory access’. How should EU MS realise non-discriminatory access to these minimum essential levels of subsistence?

3.2.3 Non-Discriminatory Access

In this section, I establish the ‘non-discriminatory access’ part of my definition of a right to a social minimum. Without making sure that minimum essential levels of subsistence are guaranteed also for the most disadvantaged and marginalized

⁴⁰⁹ *ibid* 7–8.

⁴¹⁰ *ibid* 10.

⁴¹¹ CESCR, ‘GC 12: The Right to Adequate Food’ (n 268) para 8.

⁴¹² CESCR, ‘GC 4: The Right to Adequate Housing’ (n 355) para 8b.

⁴¹³ CESCR, ‘Statement on Poverty’ (n 241) para 8.

⁴¹⁴ *ibid* 16.

⁴¹⁵ *ibid* 1.

groups, the minimum core doctrine remains an empty promise. The obligation of non-discrimination is a sub-component of the minimum core obligation, which does not fall under the nature of resource-dependent progressive realization but is rather applicable immediately.⁴¹⁶ However, the crucial importance of non-discrimination to understand the minimum core doctrine has not received a lot of scholarly attention. Scholars of international human rights law usually choose to focus either on one particular right,⁴¹⁷ or on one particular disadvantaged or vulnerable group,⁴¹⁸ whereas a more holistic approach seems to be largely missing. This is despite the fact that non-discrimination is one of the only common denominators in CESCR's piecemeal approach of delineating the minimum core obligations for each Covenant right. Yet, it seems that legal scholars that focus on the minimum core obligation typically do not consider non-discrimination as a relevant part of the normative content of the minimum core doctrine,⁴¹⁹ hence ignoring CESCR's insistence that non-discrimination is indeed an integral part of the minimum core doctrine.

My framing of the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence re-focuses the discussion about the normative content of the minimum core doctrine on the crucial relevance of non-discrimination. Rather than acknowledging non-discrimination as a sub-component of the minimum core doctrine, non-discrimination is commonly understood as a general

⁴¹⁶ CESCR, 'Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (n 47) para 4.

⁴¹⁷ See for example Krommendijk (n 158); Allain (n 158); Alston (n 158); Cubillos Vega, Ferrán Aranaz and McPherson (n 158); Casla (n 158); Chaney (n 158); Stamm (n 158).

⁴¹⁸ For persons with disabilities see for example Alexander Hoefmans and Gauthier de Beco, 'The UN Convention on the Rights of Persons with Disabilities: An Integral and Integrated Approach to the Implementation of Disability Rights' (2010) Background Document prepared for the International Work Forum for the Implementation of the UN Convention on the Rights of Persons with Disabilities Conference; Andrea Broderick, 'The United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?' (2018) 7 Cambridge International Law Journal 199; Lisa Waddington and Anna Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (Oxford University Press 2018); for children, see for example Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart 2011); Rebecca Thorburn Stern, 'Much Ado about Nothing? The Road to the Incorporation of the UN Convention on the Rights of the Child in Sweden' (2019) 27 The International Journal of Children's Rights 266; Manfred Liebel, 'Economic and Labour Rights of Children' in Jonathan Tordres and Shani M King (eds), *The Oxford Handbook of Children's Rights Law* (Oxford University Press 2020); for issues of intersectionality, see for example Maya Sabatello, 'Children with Disabilities: A Critical Appraisal' (2013) 21 The International Journal of Children's Rights 464 focusing on children with disabilities; for a general discussion on intersectionality, see for example Pok Yin S Chow, 'Has Intersectionality Reached Its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) 16 Human Rights Law Review 453.

⁴¹⁹ Warwick (n 25).

principle of human rights law. However, the requirement of non-discrimination is also a free-standing obligation under the Covenant. Art 2(2) ICESCR reads:

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

Besides this general prohibition of non-discrimination, the Covenant explicitly provides for gender equality in Art 3. The immediate nature of non-discrimination obligation has already been acknowledged in the drafting history of the Covenant.⁴²⁰ This position is confirmed in GC 3 on the nature of state obligations, where the Committee states that the obligation of non-discrimination is of 'immediate effect'.⁴²¹ In 2009, the Committee adopted GC 20 on non-discrimination, which deals with non-discrimination as a self-standing, overarching principle, confirming non-discrimination as 'an immediate and cross-cutting obligation'.⁴²² Before the adoption of GC 20, CESCR usually dealt with non-discrimination in specific GCs concerning the application of substantive provisions of Covenant.⁴²³ However, even after GC 20 was enacted, the Committee still spells out in detail what non-discrimination means for specific substantive provisions of the Covenant, for example in GC 23 on just and favourable and working conditions.⁴²⁴ In newer GCs, the obligation of non-discrimination is subsumed as a sub-provision of the minimum core.⁴²⁵ No matter whether one approaches the non-discrimination obligation as a self-standing obligation or as part and parcel of the minimum core obligation, the key is that non-discrimination does not fall under the nature of resource-dependent progressive realization but is rather applicable immediately, as already confirmed in GC 3 on the nature of states parties' obligations.⁴²⁶

⁴²⁰ Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 203–205.

⁴²¹ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 1.

⁴²² CESCR, 'GC 20: Non-Discrimination' (n 333) para 7.

⁴²³ CESCR, 'GC 4: The Right to Adequate Housing' (n 355) paras 6, 9, 17; CESCR, 'GC 7: The Right to Adequate Housing (Forced Evictions)' (n 356) paras 10, 17; CESCR, 'GC 12: The Right to Adequate Food' (n 268) paras 18, 19, 26; CESCR, 'GC 18: The Right to Work' (n 44) paras 12, 13, 16, 17, 18, 19, 23, 31, 32, 33, 34, 44; CESCR, 'GC 19: The Right to Social Security' (n 44) paras 2, 4, 18, 21, 22, 23, 29, 30, 32, 35, 36, 39, 40, 42, 59, 69, 73, 75, 78.

⁴²⁴ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) paras 3, 5, 13, 16, 23, 26, 31, 33, 47, 48, 52, 53, 58, 61, 65, 77.

⁴²⁵ CESCR, 'GC 18: The Right to Work' (n 44) para 31; CESCR, 'GC 19: The Right to Social Security' (n 44) para 59 (b); CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 65 (a), (b).

⁴²⁶ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 1.

Regarding the specific scope of non-discrimination obligations, the Committee explains that the requirement to 'guarantee' (Art 2(2) ICESCR) means the elimination of both formal and substantive discrimination.⁴²⁷ Both direct and indirect discrimination are prohibited.⁴²⁸ The Committee is very concerned about instances of systemic discrimination, which is 'pervasive and persistent and deeply entrenched in social behaviour and organization', defined as 'legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups'.⁴²⁹ The specific reference to 'other status' as a protected ground (Art 2(2) ICESCR) means that the Covenant should be interpreted with a 'flexible approach (...) in order to capture other forms of differential treatment that cannot be reasonably and objectively justified'.⁴³⁰ Of particular interest to the normative content of the human right to a social minimum is that CESCR is specifically concerned about people 'living in poverty or being homeless' being discriminated against because of their economic and social situation, which 'may result in pervasive discrimination, stigmatization and negative stereotyping'.⁴³¹ In order to implement the immediate core obligation of non-discrimination, states should 'adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights'.⁴³² States parties should further adopt strategies, policies, and plans of action.⁴³³ The elimination of systemic discrimination 'will frequently require devoting greater resources to traditionally neglected groups'.⁴³⁴

Even though CESCR has established non-discrimination as a key component of the minimum core doctrine, the usefulness of subsuming the non-discrimination obligation under the minimum core doctrine has been explicitly critiqued. For example, Warwick traces the different terminological choices of CESCR in relation to the minimum core doctrine and finds that non-discrimination is established as part of the core in seven out of eleven 'relevant' GCs.⁴³⁵ However, Warwick argues that there is 'no additional (legal) urgency added by the core concept', since non-discrimination is

⁴²⁷ CESCR, 'GC 20: Non-Discrimination' (n 333) para 8.

⁴²⁸ *ibid* 10.

⁴²⁹ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 12.

⁴³⁰ *ibid* 27.

⁴³¹ *ibid* 35.

⁴³² *ibid* 37.

⁴³³ *ibid* 38.

⁴³⁴ *ibid* 39.

⁴³⁵ Warwick (n 25) 218.

already a free-standing immediate obligation under the Covenant.⁴³⁶ On the contrary, I argue in line with CESCR that non-discrimination is indeed a crucial component of the minimum core doctrine which requires states parties to prioritise disadvantaged and marginalized groups. Of particular interest to the normative content of the human right to a social minimum is that CESCR is specifically concerned about people 'living in poverty or being homeless' being discriminated against because of their economic and social situation, which 'may result in pervasive discrimination, stigmatization and negative stereotyping'.⁴³⁷

After having distilled the normative content of the right to a social minimum for each of the three sub-components, i.e., 'minimum essential levels', 'subsistence', and 'non-discriminatory access', it is now possible to provide the full analysis of how the right to a social minimum should be realised according to CESCR. Table 2 below conceptualises the right to a social minimum as composite minimum core obligations under the substantive links of Arts 6, 7, 9 and 11. The full text of each GC specifying the minimum core obligations is given, with substantive requirements marked in green and non-discrimination requirements marked in orange.

⁴³⁶ *ibid* 219.

⁴³⁷ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 35.

Table 2. Conceptualisation of the Right to a Social Minimum as Composite Minimum Core Obligations according to CESCR's GCs

<p>GC 3 on the Nature of State Parties' Obligations</p>	<p>The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its <i>raison d'être</i>.⁴³⁸</p>
<p>Right to Work (Art 6)</p>	<p>In general comment No. 3 (1990) the Committee confirms that States parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant. In the context of article 6, this "core obligation" encompasses the obligation to ensure non-discrimination and equal protection of employment. Discrimination in the field of employment comprises a broad cluster of violations affecting all stages of life, from basic education to retirement, and can have a considerable impact on the work situation of individuals and groups. Accordingly, these core obligations include at least the following requirements:</p> <ul style="list-style-type: none"> (a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity; (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups; <p>To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.⁴³⁹</p>
<p>Right to just and favourable conditions of work (Art 7)</p>	<p>States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work. Specifically, this requires States parties to:</p> <ul style="list-style-type: none"> (a) Guarantee through law the exercise of the right without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, sexual orientation, gender identity, intersex status, health, nationality or any other status; (b) Put in place a comprehensive system to combat gender discrimination at work, including with regard to remuneration; (c) Establish in legislation and in consultation with workers and employers, their representative organizations and other relevant partners, minimum wages that are non-discriminatory and non-derogable, fixed by taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families; (d) Adopt and implement a comprehensive national policy on occupational safety and health; (e) Define and prohibit harassment, including sexual harassment, at work through law, ensure appropriate complaints procedures and mechanisms and establish criminal sanctions for sexual harassment;

⁴³⁸ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

⁴³⁹ CESCR, 'GC 18: The Right to Work' (n 44) para 31.

	<p>(f) Introduce and enforce minimum standards in relation to rest, leisure, reasonable limitation of working hours, paid leave and public holidays.⁴⁴⁰</p>
<p>Right to Social Security (Art 9)</p>	<p>States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. This requires the State party:</p> <p>(a) To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies;</p> <p>(b) To ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups</p> <p>(c) To respect existing social security schemes and protect them from unreasonable interference;</p> <p>(d) To adopt and implement a national social security strategy and plan of action;</p> <p>(e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;</p> <p>(f) To monitor the extent of the realization of the right to social security.⁴⁴¹</p>
<p>Right to an Adequate Standard of Living (Art 11)</p>	<p>Right to food: States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.⁴⁴²</p> <p>The Committee considers that the core content of the right to adequate food implies:</p> <ul style="list-style-type: none"> - The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; - The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.⁴⁴³ <p>Accessibility encompasses both economic and physical accessibility:</p> <ul style="list-style-type: none"> - Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes. - Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need

⁴⁴⁰ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 65.

⁴⁴¹ CESCR, 'GC 19: The Right to Social Security' (n 44) para 59.

⁴⁴² CESCR, 'GC 12: The Right to Adequate Food' (n 268) para 6.

⁴⁴³ *ibid* 8.

	<p>special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.⁴⁴⁴</p>
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In sum, the requirement of non-discrimination is a key component of my definition of the right to a social minimum. Only by securing non-discriminatory access to minimum essential levels of subsistence can the minimum core doctrine be guaranteed also for the most disadvantaged and marginalized groups.

3.2.4 The Core Obligation to Realise the Right to a Social Minimum

In the previous three sections I have established the abstract normative content of the substantive right to a social minimum as consisting of non-discriminatory access to minimum essential levels of subsistence. However, this does not mean that I have established a new, self-standing, individual right. However, I do argue for the existence of a composite substantive right to a social minimum as a useful framing device. In other words, calling the right to a social minimum a *right* has the added value of communicating clearly to states parties what their minimum core obligations regarding the subsistence provisions contained in Arts 6, 7, 9 and 11 ICESCR are. Hence, the reframing of several minimum core obligations of individual rights into a single substantive composite right to a social minimum has a powerful heuristic function. I read the existence of the right to a social minimum into already existing minimum core obligations. What exactly then is the relationship between my conceptualisation of a composite substantive right to a social minimum and these core obligations?

As elaborated on in section 2.3.3, the origin of the minimum core doctrine reaches further back than the usually cited reference in CESCR's GC 3 on the nature of states parties' obligations specifying that states must realise 'minimum essential levels' of all rights protected in the Covenant.⁴⁴⁵ The semantic evolution from adequacy to subsistence and finally essentialism that I described in section 2.3.3 has been concerned with how to specify the substantive content of minimum core *rights*. With CESCR's subsequent elaboration of the normative content of the minimum core doctrine in its GCs on specific rights, the language slowly moved from core *rights* to core *obligations*. This, however, does not mean that CESCR denies the existence of minimum core rights. Instead, CESCR rightfully takes the existence of the rights

⁴⁴⁴ *ibid* 12.

⁴⁴⁵ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

protected under the Covenant as a given. CESCR's terminological emphasis on core *obligations* instead of core *rights* should be seen as a rejection of the stubborn assumption that socio-economic rights are not "real" rights. By clearly delineating immediately applicable core *obligations* that all states parties must immediately adhere to, CESCR makes sure that states parties know what is required of them in terms of realising the *rights* protected in the Covenant.

In order to understand the relationship between rights and obligations, one must carefully consider the text of the Covenant itself and CESCR's GCs. The preamble of CESCR notes the 'obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights'. Here the existence of human rights is intrinsically linked with the corresponding state duty. In GC 9 on the domestic application of the Covenant, CESCR states that the 'central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein'.⁴⁴⁶ In order to 'give effect' to the rights contained in the ICESCR, states have the obligation to respect, protect and fulfil these rights. While this tripartite obligation does not have a direct textual basis in the Covenant itself, CESCR has consistently specified it in its GCs on specific rights.

For example, in its GC 19 on the right to social security, CESCR notes that the 'right to social security, like any human right, imposes three types of obligations on States parties: the obligation to respect, the obligation to protect and the obligation to fulfil'.⁴⁴⁷ In the subsequent paragraphs, CESCR defines the specific meaning of the three obligations for the right to security. Whereas the obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security',⁴⁴⁸ under the obligation to protect State parties must prevent third parties 'from interfering in any way with the enjoyment of the right to social security'.⁴⁴⁹ Finally, the obligation to fulfil 'requires States parties to adopt the necessary measures (...) directed towards the full realization of the right to social security'.⁴⁵⁰ CESCR then goes on to specify the subdivision of the obligation to fulfil into the obligations to 'facilitate, promote and provide'.⁴⁵¹

⁴⁴⁶ CESCR, 'General Comment No. 9: The Domestic Application of the Covenant' (1998) UN Doc E/C.12/1998/24 para 1.

⁴⁴⁷ CESCR, 'GC 19: The Right to Social Security' (n 44) para 43.

⁴⁴⁸ *ibid* 44.

⁴⁴⁹ *ibid* 45.

⁴⁵⁰ *ibid* 47.

⁴⁵¹ *ibid*.

After having outlined the tripartite obligations to respect, protect and fulfil the right to social security, CESCR then repeats the general doctrine that states parties have a 'core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant'.⁴⁵² Hence, CESCR does not speak of core *rights*, but rather of core *obligations* to respect 'minimum essential levels' of rights. However, these minimum essential levels of rights can also be described as the inviolable inner 'core' of rights. This is the approach of the German *Wesensgehaltsgarantie*, found in Art 19 Section 2 of the German Basic Law of 1949, which reads: '*In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden*'.⁴⁵³ This *Wesen* of a right is its intrinsic core, without which – in the words of CESCR – it 'would be largely deprived of its *raison d'être*'.⁴⁵⁴ Even though this quote refers to the core *obligation* instead of the core of a *right*, these two are intrinsically linked. In a piece titled 'Core Rights and Obligations', Scheinin disentangles these linkages by distinguishing between three common approaches to core rights and obligations: first, that some rights are core; second that all rights have an essential core; and third that states have core obligations, as stipulated by CESCR.⁴⁵⁵ He argues that CESCR's core obligations approach should be seen as a 'methodology for how to operationalize the second approach', i.e. that all rights consist of an intrinsic core which must never be violated.⁴⁵⁶

However, one might ask, is this conceptualisation of a substantive right to a social minimum then a new, *individual* right? My answer to this question is negative. As stated above, it is not the aim of this thesis to invent and argue for a new right. Instead of establishing a new, self-standing individual right, the right to a social minimum exists by virtue of being composited of real, self-standing and individual rights, namely the rights to an adequate standard of living, work and social security. Even though CESCR in its GCs indeed focuses more on core obligations than the inviolable core of rights, the reason for these obligations are the real, self-standing and individual rights that states parties have recognized in the Covenant. While the

⁴⁵² *ibid* 59.

⁴⁵³ On the *Wesensgehaltsgarantie*, see the excellent historical analysis by Ingrid Leijten, 'Core Rights as Limits to Limitations', *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018).

⁴⁵⁴ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

⁴⁵⁵ Martin Scheinin, 'Core Rights and Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (2013).

⁴⁵⁶ *ibid* 538.

language of individual rights is not as prevalent in CESCR's GCs than in the jurisprudence of other treaty bodies, this does not mean that it is non-existent. For example, in its GC 8 on economic sanctions, the Committee stipulates that states parties must 'provide the greatest possible protection for the economic, social and cultural rights of each *individual* living within its jurisdiction' (emphasis added).⁴⁵⁷

Often, however, CESCR is more concerned about the structural realisation of rights than about individual rights. For example, CESCR's most often cited formulation of the minimum core doctrine in its GC 3 on the nature of states parties' obligations reads that 'a State party in which *any significant number of individuals* is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant' (emphasis added).⁴⁵⁸ Hence, it is not the individual per se that CESCR is concerned with in relation with the minimum core doctrine, but rather systemic defects that need to reach 'any significant number of individuals'. This, however, does not mean that CESCR uses some sort of quantitative measurement to reach this number of significance. Instead, over and over again, CESCR emphasizes that states parties must prioritise certain groups of individuals, in particular the disadvantaged or marginalized. For example, in its definition of the core obligation of the right to a social security CESCR emphasizes that states parties must 'ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized *individuals* and groups' (emphasis added).⁴⁵⁹ This focus on the rights of disadvantaged and marginalized groups is also evident in CESCR's COs. For example, in its COs to Austria, CESCR recommends to 'guarantee asylum seekers' right to adequate standard of living'.⁴⁶⁰

How then, can this right to a social minimum be violated? In its more recent substantive GCs on individual rights, CESCR usually follows the same steps which I will outline by again using the example of CESCR's GC 19 on the right to social security. CESCR first specifies the normative content of the right to social security,⁴⁶¹ before outlining the obligations of states parties, in particular the obligations to respect,

⁴⁵⁷ CESCR, 'General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (1997) UN Doc E/C.12/GC/8 para 10.

⁴⁵⁸ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 10.

⁴⁵⁹ *ibid* 59.

⁴⁶⁰ CESCR, COs to AT 2013, para 13.

⁴⁶¹ CESCR, 'GC 19: The Right to Social Security' (n 44) Section II.

protect and fulfil.⁴⁶² The tripartite obligations are followed by a definition of the core obligations,⁴⁶³ before specifying violations that can occur through acts of commission or omission.⁴⁶⁴ In particular, a violation through an act of omission is the ‘failure to meet the core obligations’.⁴⁶⁵ Hence, if states parties fail to realise the right to a social minimum, they are failing to meet the core obligation and hence violate this very composite right.

By framing the minimum core doctrine as a substantive right to a social minimum, I build upon Scheinin’s argument that the core obligations approach is a methodology to operationalize the approach that each right has a core that consists of minimum essential levels of each right. In other words, conceptualising a composite, substantive right to a social minimum specifies the minimum essential levels of certain aspects of the rights to an adequate standard of living, work and social security. This conceptualisation of the right a social minimum as a substantive core *right* then directly aids states parties in realising their core *obligation* to secure non-discriminatory access to minimum essential levels of subsistence, without having to first examine the normative content of each of the minimum essential levels of all the Covenant rights.

3.2.5 Overcoming the Piecemeal Approach: The Added Value of Conceptualising a Substantive Right to a Social Minimum

In this section, I argue that my framing of the social minimum as non-discriminatory access to minimum essential levels of subsistence makes the minimum core doctrine more tangible, less abstract, and hence easier to realise. In their quest of addressing the indeterminacy critique, CESCR and academic scholars have followed a piecemeal approach to the minimum core doctrine, specifying the content of minimum core obligations one-by-one in rights-specific General Comments. While this exercise in specifying the content of the minimum core has resulted in ever more detailed descriptions of specific obligations, states parties nevertheless have the tendency not to engage with the minimum core doctrine in their states party reports.⁴⁶⁶

This seems to suggest several drawbacks to the piecemeal approach of specifying the minimum core. First of all, finding out what exactly is required of them

⁴⁶² *ibid* Section III.

⁴⁶³ *ibid* 59.

⁴⁶⁴ CESCR, ‘GC 19: The Right to Social Security’ (n 44) Section IV.

⁴⁶⁵ *ibid* 65.

⁴⁶⁶ Warwick (n 25) 222.

in terms of the minimum core doctrine for each individual right is very impractical for states parties. It would require bureaucrats that are tasked with the already extensive reporting requirements to not only consider the previous COs and Reporting Guidelines, but also the specific GCs of each Covenant right, which would amount to an additional several hundred pages of reading materials. It is unrealistic to require states parties to engage in such extensive research on the exact nature of the minimum core doctrine for each and every right. Secondly, the specified minimum core of each right is not linked to available indicators or disaggregated data. This means that states parties would have to discern themselves which kind of indicators and data would best match with the normative content as established in the rights-specific GCs. Third, the piecemeal approach also seems to be in direct contrast with the principles of interdependence and indivisibility of all human rights.⁴⁶⁷ If rights were truly interdependent and indivisible, wouldn't it make more sense for CESCR to provide a general and sufficiently clear normative content for the minimum core doctrine which can be applied not only to the protection of individual rights, but also to overarching, more systemic issues such as disproportionate poverty rates for specific groups, or inadequate pension schemes?

My approach of framing the minimum core doctrine as a substantive right to a social minimum addresses most of these existing drawbacks of the piecemeal approach. Even though CESCR continues to uphold the minimum core doctrine as the definitive normative anchor in crisis times,⁴⁶⁸ states parties are not engaging with the

⁴⁶⁷ The world conference on human rights, 'Vienna declaration and programme of action', 48th session, 22nd plenary meeting, UN Doc A/CONF.157/24 (1993) (Vienna Declaration), para 5; Committee on Economic, Social and Cultural Rights, 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights', 25th session, UN Doc E/C.12/2001/10 (10 May 2001) (Statement on Poverty), para 8; GC3 (n 41), para 8. Nevertheless, the usefulness of this declaration has been subject to debate. See for example Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 81; Amsalu Darge Mayessa, 'Overview of the notion of integration of human rights: giving pragmatic value to socio-economic rights rather than rim service' (2014) 83 Nordic Journal of International law 168. A conceptual categorization of indivisibility has been attempted by James W Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30 Human Rights Quarterly 984.

⁴⁶⁸ CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (n 47); CESCR, 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights' (n 21).

concept.⁴⁶⁹ This does not only point towards a realisation gap, but also towards a conceptual gap. Despite the continuous efforts of specifying the minimum core doctrine for every Covenant right, states parties still either do not seem to understand what exactly is required of them, or they are simply unable or unwilling to comply with their obligations. By defining the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence, I do not give up on the minimum core doctrine. Rather, I synthesize the key normative content of the various specifications of the minimum core into one definition. By doing that, my goal is to focus the attention of states parties to immediate applicability of the minimum core doctrine, which includes the obligation of non-discrimination, and requires them to prioritise disadvantaged and marginalized groups.

The previous sections have shown that my framing of the right to a social minimum as a substantive human right preserves the historical normative content of the minimum core doctrine. My definition of the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence is practically relevant to all aspects of how to realise a monetary subsistence levels across the EU MS. Another strong argument for the usefulness of developing a substantive right to a social minimum is its clearly demarcated normative content. While legal human rights scholars continue to lament the perceived lack of substantive content of the minimum core doctrine and consequently question its usefulness,⁴⁷⁰ I argue that this content actually exists. It is not the lack of content that is the crux of the issue, but rather the lack of operationalisation in such a way that policymakers, lawmakers, and statisticians would understand its substance and agree with its importance. This is why I argue throughout this thesis that coining the minimum core doctrine as a substantive right to a social minimum makes it more tangible, less abstract, and frankly, easier to realise. However, the realization of rights does not end with conceptualisation. On the contrary, the most beautiful concept is worth almost nothing without operationalization and measurement, which I will address in the next sections.

⁴⁶⁹ See Warwick (n 25) who conducts an analysis of a comprehensive sample of human rights treaty bodies' reporting cycles and finds that only four states have engaged with the minimum core doctrine in their state party reports.

⁴⁷⁰ Young (n 23); Forman (n 25); Harris (n 25); Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (n 25); Forman and others (n 25); Leijten, 'Minimum Cores and the Scope of Fundamental Rights' (n 25); Warwick (n 25).

3.3 Giving Normative Teeth to the Right to a Social Minimum

In this section, I distil the specific normative content of the right to a social minimum by analysing CESCR's jurisprudence in the form of the most recent COs addressed to the EU MS in the period of 2009-2019. In this period, 23 out of 28 EU MS received COs. I employ a hybrid between the traditional doctrinal method and qualitative content analysis as my methodology. It is very common in doctrinal analysis to use human rights treaty bodies' jurisprudence in the form of COs as interpretative aid. Indeed, most textbooks and commentaries on socio-economic rights cite isolated COs as evidence for a particular interpretation of a particular right. However, the novelty of my approach lies in my systematic, comparative, and comprehensive analysis of COs in a given region (the EU-28) at a particular time (2009-2019).

I am not using singular or isolated COs as evidence for a particular interpretation of a particular individual right. Rather, my focus is on how to give collective meaning to the right to a social minimum in the European context in post-crisis times. Since the meaning of a 'minimum' is generally perceived as being something different in the Global North than the Global South, my focus on the EU MS allows me to consider what this minimum means for a particular region that is held together in the common history of EU integration.⁴⁷¹ I present systematic evidence of which groups are disadvantaged in respect of which aspect of the right to a social minimum, which is why I overcome one of the perceived disadvantages of a human rights law approach to social injustice, namely its sole focus on the correct interpretation of particular rights for particular groups. My hybrid approach in this section does not sacrifice any of the interpretative depth of the doctrinal method, but rather enhances it by providing a comprehensive, systematic, and comparative approach of what the right to a social minimum means in a European context in the period of 2009-2019. Hence, my evidence is not circumstantial or solely exemplary, but it is systematic and explicitly comparative.

From a technical point of view, I analyse the most recent COs addressed to each EU MS in this time frame (n=23, see Appendix 1). While I am generally most interested in finding out how the right to a social minimum features between EU MS,

⁴⁷¹ Tim Goedemé and others, 'Pilot Project for the Development of a Common Methodology on Reference Budgets in Europe: The Development of a Methodology for Comparable Reference Budgets in Europe - Final Report of the Pilot Project' (2015) European Commission, Directorate-General for Employment, Social Affairs and Inclusion <<https://data.europa.eu/doi/10.2767/096631>> accessed 27 December 2022.

my main units of analysis are those 23 COs. However, for terms like ‘non-discrimination’ that feature consistently throughout all 23 COs addressed to EU MS between from 2009-2019, it is more beneficial to analyse in which context CESCR mentions these terms *within* one CO. For example, when counting instances of non-discrimination, it is crucial to find out regarding which group and regarding which right CESCR mentions this obligation.⁴⁷²

In order to find out in which way CESCR refers to the right to a social minimum in their COs addressed to the EU MS from 2009-2019, this section engages in a series of frequency analyses, counting how often CESCR mentions the composite elements of the right to a social minimum, which I define as non-discriminatory access to minimum essential levels of subsistence. In order to do that, in section 3.3.1 I analyse all instances where CESCR mentions ‘minimum essential levels’, in section 3.3.2 ‘subsistence’ and in section 3.3.3 ‘non-discriminatory access’. In section 3.3.4, to provide concrete normative content to the notion of non-discriminatory access, I analyse the different groups that CESCR categorizes as disadvantaged or marginalized. This frequency analysis is the foundation for the selection of my three case studies (persons with disabilities, children, and Roma).

3.3.1 Distilling the Normative Content of ‘Minimum Essential Levels’

In this section, I distil the normative content of the ‘minimum essential levels’ part of my definition of a right to a social minimum by conducting a comprehensive CO-analysis of CESCR’s jurisprudence to the EU MS between 2009-2019. CESCR is not very consistent in its terminology when engaging with the minimum core doctrine in COs to states parties.⁴⁷³ Terms like ‘minimum core’, ‘core obligation’, or ‘minimum essential levels’ all point towards a normative anchoring in the minimum core doctrine. Since my definition of the right to a social minimum adopts the wording of ‘minimum essential levels’, I first of all conducted a simple word search with the MAXQDA software. The results show that CESCR uses the particular term ‘minimum essential

⁴⁷² Hence, when analysing terms within COs, I count CESCR’s concerns and recommendations together as one instance, even if they are numbered as two paragraphs. This reflects the fact that CESCR has recently changed its way of numbering paragraphs. Earlier COs, such as the ones addressed to Austria or the Czech Republic (2013), count both concern and recommendation as one paragraph. Later COs, such as the ones addressed to Poland (2016) or Germany (2018), count them separately. To maintain consistency, I code both concerns and recommendations as one single instance throughout this thesis.

⁴⁷³ Warwick (n 25).

levels' in three out of a total of 23 COs addressed to EU MS from 2009-2019.⁴⁷⁴ In these three instances, CESCR is concerned about the non-discrimination aspect of the right to a social minimum, highlighting the necessity to ensure minimum essential levels of subsistence to particularly disadvantaged and marginalized groups.

Hence, in its CO to Italy, CESCR is concerned about the 'substandard living conditions of Roma' and recommends that Italy should determine the 'minimum essential levels as core elements of housing required to meet the needs of disadvantaged and marginalized groups'.⁴⁷⁵ In its COs to the Netherlands, CESCR is concerned about the 'precarious situation for undocumented migrants and rejected asylum seekers'.⁴⁷⁶ Hence, the Committee makes clear that the Netherlands should 'ensure that all persons in its jurisdiction enjoy the minimum essential levels of each of the rights in the Covenant, including the rights to food, housing, health, water and sanitation.'⁴⁷⁷ According to CESCR's CO to Sweden, the Roma and 'vulnerable foreigners' 'face major obstacles in accessing basic social services and social assistance benefits'.⁴⁷⁸ As a response, the Committee 'recalls that the Covenant rights carry core obligations of an immediate nature and that the State party must meet these core obligations by ensuring that the minimum essential levels relating to the rights to housing, health, social security and education are respected, protected and fulfilled'.⁴⁷⁹ These three instances of how CESCR uses the term 'minimum essential levels' show that it is not enough to conceptualise the minimum core doctrine *in abstractum*. Rather, states parties are required to consider the substantive links of 'minimum essential levels of subsistence'. While sub-standard living conditions is one specific failure to realise the right to a social minimum for the Roma, obstacles to access basic social services is another. Hence, my definition of the right to a social minimum aligns with these findings. In order to give concrete normative content to the minimum core doctrine, what is needed is a deep understanding of what minimum essential levels of subsistence mean in practice for disadvantaged and marginalized groups.

⁴⁷⁴ CESCR CO to Italy 2015, paras 44-45; CESCR CO to the Netherlands 2017, paras 39-40, CESCR COs to Sweden 2016, paras 19-20.

⁴⁷⁵ CESCR CO to Italy 2015, paras 44-45

⁴⁷⁶ CESCR CO to the Netherlands 2017, para 39.

⁴⁷⁷ CESCR CO to the Netherlands 2017, para 40.

⁴⁷⁸ CESCR COs to Sweden 2016, para 19.

⁴⁷⁹ CESCR COs to Sweden 2016, para 20.

Beyond the narrow focus on ‘minimum essential levels’, CESCR also uses the term ‘core obligations’ in its CO to Sweden.⁴⁸⁰ The other instance of the term ‘core obligations’ is found in a CO addressed to Germany, where CESCR required Germany to take its obligations as a state member of international financial institutions seriously. It recommended that Germany should ensure that ‘conditionalities should not lead to the adoption of unjustified retrogressive measures or the violation of core obligations required by the Covenant’.⁴⁸¹

Besides ‘minimum essential levels’ and ‘core obligations’, the Committee used the terminology of ‘minimum core content’ and ‘core content’ in five instances.⁴⁸² The three instances of the term ‘minimum core content’ were issued under the heading of ‘maximum available resources’ in the context of austerity or retrogressive measures. In 2014, CESCR required Slovenia to ‘ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights.’⁴⁸³ In its COs to Ireland, CESCR recommended to ‘identify the minimum core content of the Covenant rights or a social protection floor and ensure the protection of this core content at all times’.⁴⁸⁴ The recommendation to Bulgaria in 2019 was to ensure that retrogressive measures ‘do not affect the minimum core content’.⁴⁸⁵ The two instances of the term ‘core content’ were issued under the heading of ‘austerity measures’. In its COs to Spain, the Committee reiterates its previous COs that any austerity measures must be ‘compatible with the core content of the rights recognized in the Covenant, with the aim of ensuring that such measures do not impinge, disproportionately, on the rights of the most disadvantaged and marginalized groups and individuals’.⁴⁸⁶ The exact same wording is found in CESCR’s COs to the UK.⁴⁸⁷

Counting the instances of ‘minimum essential levels’, ‘core obligation’ and ‘(minimum) core content’ together, CESCR has used the terminology of minimum core

⁴⁸⁰ CESCR COs to Sweden 2016, para 20.

⁴⁸¹ CESCR, COs to Germany 2018, paras 16-17.

⁴⁸² CESCR, COs to Slovenia 2014, paras 8-9, CESCR, COs to Ireland 2015, para 11, CESCR, COs to Bulgaria 2019, para 9, CESCR, COs to Spain 2018, para 14, CESCR, COs to the UK 2016, para 19.

⁴⁸³ CESCR, COs to Slovenia 2014, paras 8-9.

⁴⁸⁴ CESCR, COs to Ireland 2015, para 11.

⁴⁸⁵ CESCR, COs to Bulgaria 2019, para 9.

⁴⁸⁶ CESCR, COs to Spain 2018, para 14.

⁴⁸⁷ CESCR, COs to the UK 2016, para 19, citing CESCR, ‘Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (n 47).

obligations in a total of nine out of 23 COs to EU MS from 2009-2019.⁴⁸⁸ While this does not seem to be that many at first sight, the amount is considerable given that I only analysed EU MS which typically are advanced welfare states with functioning democracies and well-funded administrations to support the realisation of human rights. Indeed, nine out of 23 COs amounts to 39.1%, which means that CESCR is concerned about the minimum core doctrine in more than one third of EU MS. This is ample proof that a renewed focus on how EU MS should realise the right to a social minimum is timely and necessary. In addition, the evidence shows that CESCR has consistently pointed towards the minimum core doctrine as a key obligation for states parties under austerity regimes, always highlighting the obligation of non-discrimination as an essential component. Before analysing the non-discrimination obligation in more depth, in the next section I will first of all discuss the term 'subsistence' as key component of my definition of the right to a social minimum.

3.3.2 Distilling the Normative Content of 'Subsistence'

In this section, I distil the normative content of the 'subsistence' part of my definition of a right to a social minimum by conducting a comprehensive CO-analysis of CESCR's jurisprudence to the EU MS between 2009-2019. In order to shed light on the question how EU MS should realise minimum essential levels of 'subsistence', I analyse the four articles contained in the ICESCR which speak towards subsistence. As explained before, these are the rights to work (Art 6), to just working conditions (Art 7), to social security (Art 9) and to an adequate standard of living (Art 11). In other words, CESCR identifies several substantive links between different Covenant articles which are relevant to my conceptualisation of a composite right to a social minimum. Methodologically, I conduct frequency analyses in MAXQDA regarding these substantive links, by using my primary sources consisting of CESCR's 23 COs addressed to EU MS from 2009-2019. While the idea of a human right to social protection benefits has been conceptualised before,⁴⁸⁹ the novelty of my approach lies in the equal relevance of the work dimension protected under Arts. 6 and 7 ICESCR for the right to a social minimum.

⁴⁸⁸ CESCR CO to Italy 2015, paras 44-45; CESCR CO to the Netherlands 2017, paras 39-40, CESCR COs to Sweden 2016, paras 19-20, CESCR, COs to Germany 2018, paras 16-17, CESCR, COs to Slovenia 2014, paras 8-9, CESCR, COs to Ireland 2015, para 11, CESCR, COs to Bulgaria 2019, para 9, CESCR, COs to Spain 2018, para 14, CESCR, COs to the UK 2016, para 19.

⁴⁸⁹ Buschmann (n 273).

Regarding the right to work (Art 6), CESCR is concerned about high levels of unemployment in 20 out of 23 cases.⁴⁹⁰ Taking a closer look at the circumstances under which high unemployment poses a concern to CESCR, one of the most prevalent issues is high youth unemployment. Long-term unemployment or regional discrepancies also feature as problematic. Additionally, CESCR notes that other disadvantaged or marginalized groups, like persons with disabilities, Roma, or non-citizens (in particular ethnic minorities, asylum seekers and migrants) are often disproportionately affected by unemployment. Even though CESCR does not use the language of minimum core obligations in any of these instances, CESCR is concerned about disproportionately high levels of unemployment for disadvantaged and marginalized groups in almost all EU MS. This is evidence for the failure to realise non-discriminatory access to employment, and hence a failure to realise the right to a social minimum regarding the substantive link of Art 6.

Regarding the right to just working conditions (Art 7), CESCR issued concerns about minimum wages in 12 cases.⁴⁹¹ In almost all of these instances, the levels of

⁴⁹⁰ CESCR, COs to AT 2013, para 16 (concerning youth unemployment), CESCR, COs to BE 2013, paras 12 (concerning youth unemployment), CESCR, COs to BG 2019, paras 19-20 (concerning youth unemployment), CESCR, COs to CY 2016, paras 19-20 (concerning general high levels of unemployment, long-term unemployment and youth unemployment), CESCR, COs to DE 2018, paras 34-35 (high unemployment among persons with disabilities, in particular women), CESCR, COs to EE 2019, paras 8-9 (concerning regional unemployment), paras 12-13 (concerning high levels of unemployment for the non-Estonian speaking population), paras 22-23 (concerning structural causes of unemployment), CESCR, COs to EL 2015, paras 13-14 (concerning youth unemployment and long-term unemployment), CESCR, COs to ES 2018, paras 21-22 (concerning high unemployment rates for youth, women, the Gitano population and migrants, in addition to long-term unemployment), CESCR, COs to FI 2014, para 16 (concerning youth unemployment and long-term unemployment), CESCR, COs to IE 2015, para 16 (concerning high unemployment rates for Travellers, Roma, young people and persons with disabilities), CESCR, COs to IT 2016, paras 24-25 (concerning high unemployment for the youth, persons with disabilities and migrant workers, in addition to regional discrepancies), CESCR, COs to LV 2015, para 11 (concerning youth unemployment, high unemployment rates for people aged 50+, and regional discrepancies), CESCR, COs to NL 2017, paras 25-26 (high unemployment rates for ethnic minorities, in particular Turkish and Moroccan women), paras 27-28 (high unemployment rates for persons with disabilities), CESCR, COs to PL 2015, paras 16-17 (high unemployment for young persons, the long-term unemployed and Roma), CESCR, COs to PT 2014, para 8 (concerning youth unemployment), CESCR, COs to RO 2014, para 11 (concerning high unemployment rates among young persons, Roma, and persons with disabilities), CESCR, COs to SE 2016 (high unemployment rates for persons with disabilities, youth, Roma and persons from ethnic minorities), CESCR, COs to SI 2014, para 14 (more likely for women to be unemployed), para 16 (high unemployment affecting the youth, persons with disabilities, persons belonging to ethnic minorities, job insecurity faced by short-term contract workers), CESCR, COs to SK 2019, paras 20-21 (long-term unemployment, particularly among minority groups, high rates of youth unemployment, regional disparities, barriers in accessing the labour market for migrants, refugees and asylum seekers), CESCR, COs to UK 2016, paras 29-30 (high unemployment among persons with disabilities, young people and persons belonging to ethnic, religious or other minorities).

⁴⁹¹ CESCR, COs to CY 2016, paras 23-24 (low coverage, insufficient level to provide a decent living), CESCR, COs to CZ 2013, para 10 (migrants being paid below minimum wage), para 13 (insufficient

the minimum wages were deemed insufficient to provide a decent living. Other problems include low coverage, precarious employment in a wider sense, or the exclusion of particular groups from being captured by minimum wage legislation. For example, in its COs to Germany, CESCR is concerned that no minimum wages exist for persons with disabilities.⁴⁹² Another concern is that some groups are systematically paid below minimum wage levels, for example migrants in the Czech Republic.⁴⁹³ When considering Arts 6 and 7 together as the work dimension of the realisation of the right to a social minimum, CESCR issued concerns in all 23 EU MS.

In general, CESCR is concerned about some aspect of the right to social security (Art 9) in all 23 EU MS. However, I do not include all branches of social security in the substantive scope of my thesis but specifically exclude health and education, as justified in the Introduction. Further, pensions are not part of my analysis. For the purposes of securing subsistence for everybody, unemployment insurance, unemployment assistance and social assistance play a major role. To aid cross-national comparisons, social policy scholars have introduced the concept of minimum income protection schemes (MIPS), since unemployment insurance, unemployment assistance and social assistance consist of very different systems across the EU MS. MIPS are supposed to serve as a safety net to buffer the worst consequences of unemployment and poverty,⁴⁹⁴ This is why my thesis places a particular focus on the role MIPS in the realisation of the right to a social minimum.⁴⁹⁵ Since MIPS have this distinct function of serving as a last safety net if everything else fails, including any other non-means tested unemployment benefit; it is a particular matter of interest whether the Committee mentions MIPS in its COs to the EU MS between 2009-2019.

level to provide a decent living), CESCR, COs to DE 2018, paras 32-33 (precarious employment in the form of low wages and low social protection, in particular for women), paras 34-35 (no minimum wages for persons with disabilities), paras 36-37 (many workers paid below minimum wage), CESCR, COs to EE 2019, paras 36-37 (high tax rates on workers covered by minimum wages, resulting in poverty), CESCR, COs to EL 2015, paras 19-20 (reduction of minimum wages due to austerity measures, disproportionately affecting young workers, insufficient level for a decent living), CESCR, COs to IE 2015, para 17 (exemptions for employers to pay the minimum wage, insufficient level to provide a decent living, inadequate conditions for workers on zero hour contracts), CESCR, COs to IT 2016, paras 30-31 (coverage, insufficient level), CESCR, COs to LT 2015, para 10 (inadequate level), CESCR, COs to PL 2015, paras 18-19 (low pay, insufficient coverage), CESCR, COs to PT 2014, para 12 (insufficient level), CESCR, COs to RO 2014, para 13 (insufficient level), CESCR, COs to UK 2016, paras 36-37 (insufficient level).

⁴⁹² CESCR, COs to DE 2018, paras 34-35.

⁴⁹³ CESCR, COs to CZ 2013, para 10.

⁴⁹⁴ Ive Marx and Kenneth Nelson, 'A New Dawn for Minimum Income Protection' in Ive Marx and Kenneth Nelson (eds), *Minimum Income Protection in Flux* (Palgrave Macmillan 2013).

⁴⁹⁵ For a full discussion on the role of inadequate MIPS in hindering EU MS from realising the right to a social minimum, see section 4.4.2.1 of this thesis.

In order to find out, I ran a systematic key word search with the MAXQDA-software.⁴⁹⁶ After the keyword search, I checked each of the COs manually, in particular with regards to the country-specific terminology of the MIPS. The results of the frequency analysis show that CESCR is concerned about inadequate MIPS in 14 out of 23 EU MS.⁴⁹⁷ When issuing these COs about inadequate MIPS, CESCR often refers to GC 19 on the right to social security as the underlying normative principle.⁴⁹⁸

When it comes to the right to an adequate standard of living (Art 11), the Committee is concerned about poverty in 22 cases,⁴⁹⁹ food in 11 cases,⁵⁰⁰ water in 10 cases,⁵⁰¹ and housing in all 23 cases.⁵⁰² Sometimes, CESCR cites GC 19 on the right

⁴⁹⁶ For MIPS, the following terms were included in the keyword-search: 'subsistence minimum', 'means-tested', 'livelihood protection benefits', 'jobseeker's allowance', 'minimum income', 'non-contributory', 'social integration income', 'social safety net', 'non-contributory', 'maintenance support', 'social minimum', 'assistance in material need', 'minimum guaranteed income', 'means-test' and 'social assistance'. After the keyword search, I checked manually what the country-specific term for the MIPS is, since CESCR sometimes refers to the country-specific term instead of a general term.

⁴⁹⁷ CESCR, COs to AT 2013, para 13 (referring to asylum seekers), para 17 (inadequacy); CESCR, COs to BG 2019, paras 25-26 (inadequacy), CESCR, COs to CY 2016, paras 15-16 (referring to asylum seekers), para 29-30 (inadequacy), paras 36-37 (recommendation to increase MIPS as a measure to fight poverty), CESCR, COs to EL 2015, paras 23-24 (benefits reduced), CESCR, COs to ES 2018, paras 30-31 (inadequacy), CESCR, COs to FI 2014, para 20 (inadequacy), CESCR, COs to FR 2016, paras 29-30 (stigma of social assistance benefits, non-take up), CESCR, COs to LT 2015, para 10 (inadequacy), CESCR, COs to PL 2015, paras 12-13 (non-accessibility of social assistance to Roma), paras 27-28 (inadequacy), CESCR, COs to PT 2014, para 14 (inadequacy), CESCR, COs to RO 2014, para 15 (inadequacy), CESCR, COs to SE 2016, paras 19-20 (lack of access to social assistance for Roma), CESCR, COs to SI 2014, para 18 (inadequacy), CESCR, COs to UK 2016, paras 40-41 (adverse impacts of cuts on women, children, persons with disabilities, low-income families and families with two or more children).

⁴⁹⁸ CESCR, COs to AT 2013, para 17; COs to CZ 2013, para 14; COs to DE 2018, para 21; COs to EE 2019, para 18; COs to FI 2014, para 20; COs to NL 2017, para 31; COs to RO 2014, para 15; COs to SI 2014, para 18.

⁴⁹⁹ CESCR, COs to AT 2013, para 17; COs to BE 2013, para 18; COs to BG 2019, paras 33-34; COs to CY 2016, para 35-36; COs to DE 2018, paras 50-51; COs to DK 2019, paras 45-45; COs to EE 2019, paras 36-37; COs to EL 2015, paras 29-30; COs to ES 2018, paras 33-34; COs to FI 2014, para 23; COs to FR 2016, paras 31-32; COs to IE 2015, paras 24-25, COs to IT 2015, paras 38-39; COs to NL 2017, paras 37-38; COs to PL 2015, paras 34-35; COs to PT 2014, para 14; COs to RO 2014, para 17; COs to SE 2016, paras 35-36; COs to SI 2014, para 20; COs to SK 2019, paras 26-27; COs to SK 2019, paras 47-48.

⁵⁰⁰ CESCR, COs to AT 2013, para 17; BG 2019, paras 38-39 (regarding reception centres for migrants and asylum seekers); COs to DE 2018, paras 52-53; COs to EL 2015, paras 11-12 (regarding migrants, asylum seekers and refugees); COs to IE 2015, para 25; COs to IT 2015, paras 18-19 (regarding migrants, asylum seekers and refugees), paras 50-51; COs to LT 2015, para 19; COs to NL 2017, paras 39-41 (regarding undocumented migrants); COs to PL 2015, paras 39-42; COs to SK 2019, paras 37-38; COs to UK 2016, paras 53-54.

⁵⁰¹ CESCR, COs to EE 2019, paras 40-41; COs to EL 2015, paras 33-34 (regarding the Roma); COs to IT 2015, paras 44-45 (regarding the Roma); COs to LT 2015, para 17 (regarding the Roma); COs to NL 2017, paras 39-41 (regarding undocumented migrants); COs to PT 2014, para 15 (regarding the Roma); COs to RO 2014, para 20; COs to SI 2014, para 21 (regarding the Roma); COs to SK 2019, paras 33-34 (regarding the Roma); COs to SK 2019, paras 49-50 (regarding the Roma); COs to UK 2016, paras 49-50 (regarding the Roma).

⁵⁰² CESCR, COs to AT 2013, para 20; COs to BE 2013, paras 19-20; COs to BG 2019, paras 35-37; COs to CY 2016, paras 37-38; COs to CZ 2013, para 9 (regarding the Roma); paras 16-17; COs to DE 2018, paras 54-55; COs to DK 2019, paras 47-51; COs to EE 2019, paras 38-39; COs to EL

to social security when issuing concerns about poverty,⁵⁰³ even though it more frequently refers to its 2001 Statement on Poverty.⁵⁰⁴ Of particular relevance are the interlinkages that CESCR's draws between poverty on the one hand and issues of unemployment, low minimum wages or inadequate MIPS on the other hand. This shows the relevance of my framing of the right to a social minimum as minimum essential levels of subsistence. In the highly developed welfare states of Europe, the ways in which individuals can realise their right to a social minimum are often interconnected. No longer does having employment guarantee the ability to enjoy minimum essential levels of subsistence. Nor does the receipt of MIPS guarantee it. This is why 'subsistence' as a key component of my definition of the right to a social minimum must be understood in a comprehensive way. 'Subsistence' does not only mean the right to an adequate standard of living according to Art 11. Rather, the right to social security protected under Art 9, coupled with the right to work (Art 6), and the right to just working conditions (Art 7) must be considered as well. These function like umbrella rights which enable EU MS to realise the right to a social minimum. In a nutshell, my argument is that in order to realise the right to a social minimum, all substantive links (Arts 6, 7, 9 and 11) must be analysed together.

When considering the instances where CESCR voices concerns about unemployment, minimum wages, poverty and inadequate MIPS together, no EU MS fully manages to realise the right to a social minimum.⁵⁰⁵ This means that the social minimum, defined as non-discriminatory access to minimum essential levels of subsistence, is endangered not only due to high levels of poverty, but also due to inadequate MIPS, high unemployment rates, lack of access to housing and inadequate minimum wages. Table 3 below summarizes how often CESCR mentions

2015, paras 33-34 (regarding the Roma); COs to ES 2018, para 35; COs to FI 2014, para 24; COs to FR 2016, paras 35-40; COs to IE 2015, paras 26-27; COs to IT 2015, paras 40-42; COs to LT 2015, para 17; COs to NL 2017, paras 42-43; COs to PL 2015, paras 36-37; COs to PT 2014, para 15 (regarding the Roma), para 16; COs to RO 2014, paras 18-19; COs to SE 2016, paras 37-40; COs to SI 2014, para 21 (regarding the Roma), para 22; COs to SK 2019, paras 30-32; COs to UK 2016, paras 49-52.

⁵⁰³ CESCR, COs to AT 2013, para 17; COs to PL 2015, paras 27-28.

⁵⁰⁴ CESCR, COs to BE 2013, para 18; COs to CY 2016, para 36; COs to EL 2015, para 30; COs to ES 2018, para 34; COs to FI 2014, para 23; COs to IT 2015, para 39; COs to LT 2015, para 18; COs to PL 2015, para 35; COs to SI 2014, para 20; COs to UK 2016, para 48.

⁵⁰⁴ CESCR, COs to AT 2013, para 17; COs to PL 2015, paras 27-28.

⁵⁰⁵ For example, even in CESCR's COs to CZ 2016, which does not mention MIPS or poverty, there are still three COs explicitly connected to the right to a social minimum (para 12 regarding unemployment, para 13 regarding minimum wages and para 14 regarding social security cuts more broadly).

the substantive links of the right to a social minimum (Arts 6, 7, 9, 11) across the 23 EU MS that received a CO from 2009-2019. The table shows is that CESCR is concerned about the right to social security (Art 9) and an adequate standard of living (Art 11) in all 23 COs (100%). Poverty specifically is of concern in 22 out of 23 COs (95.65%). The rights to work (Art 6) and to just working conditions (Art 7) feature a bit less frequently.

Table 3. Frequencies of Substantive Links of the Right to a Social Minimum Addressed to the EU MS between 2009-2019

Substantive Links	Number of COs	Percentage
Art 6	21	91.30%
- Unemployment	20	86.96%
Art 7	22	95.65%
- Minimum Wage	12	52.17%
Art 9	23	100%
- MIPS	15	65.22%
Art 11	23	100%
- Poverty	22	95.65%
- Food	9	39.13%
- Water	10	43.48%
- Housing	23	100%
Total	23 COs	100%

While Table 3 shows the composite nature of the right to a social minimum according to the substantive links (Arts 6, 7, 9, 11), it does not show us which aspects of the right to a social minimum feature most prominently across the EU MS. How often did CESCR mention which substantive link in which CO addressed to which EU MS? In order to answer this question, Figure 14 below shows the total frequencies of the substantive links across the EU MS.⁵⁰⁶ Art 11 features a bit more frequently than Arts 6, 7 and 9, mostly due to the Committee separating its concerns of poverty, food, water, and housing.

⁵⁰⁶ As mentioned in the introduction of this thesis, I count CESCR's concerns and recommendations as one instance, even if they are contained in two or more paragraphs.

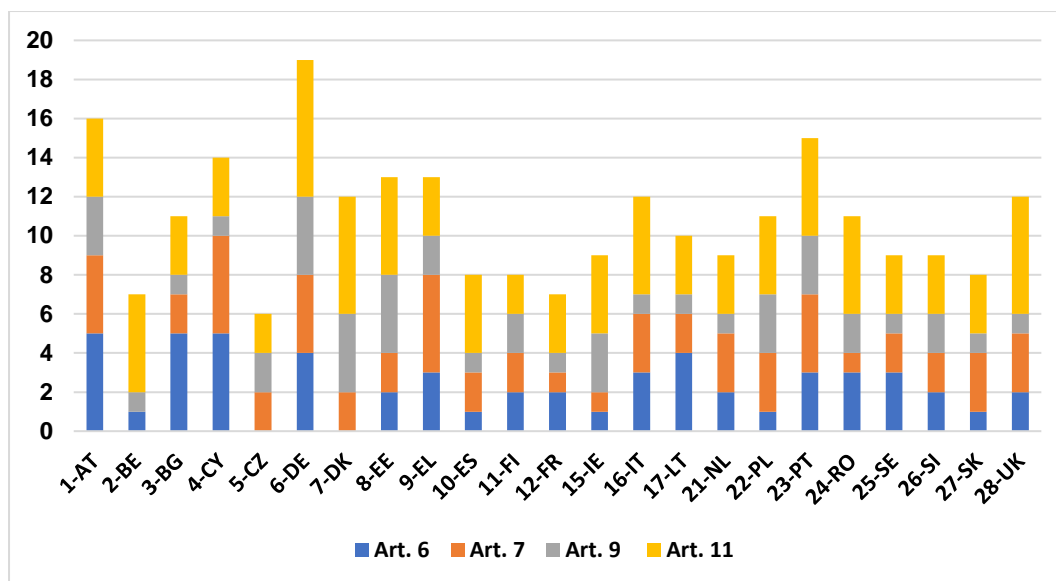


Figure 14. Substantive Links of the Right to a Social Minimum across the EU MS

The figure demonstrates that CESCR is concerned about the four substantive links across all the 23 EU MS that received a CO between 2009-2019. However, the overall frequency of the substantive links is not representative of how well a country is doing, the graph only exemplifies the occurrence of the four substantive links across the EU MS. As an example of why the overall frequency is not representative, I will contrast Germany (highest number) with Czechia (lowest number).

Regarding Germany, it might be surprising that Germany is the EU MS with the highest instances of substantive links, even though it was not affected by austerity measures or other grave hindering conditions that I will discuss in further detail in chapter 4. The reason for this is twofold: first, CESCR covers several issues under the four substantive links that are not directly linked to the right to a social minimum. Secondly, the same instance covers several substantive links and is hence double- or triple-counted. For example, the Committee is concerned about Art 6 in four instances. When looking at the specific paragraphs, CESCR voices concerns about discrimination at work in church-run institutions,⁵⁰⁷ the prevalence of precarious employment,⁵⁰⁸ the high incidence of unemployment among persons with disabilities,⁵⁰⁹ and high sanctions for jobseekers ‘which cut the benefits by 30 to 100 per cent and particularly affect young people, whose benefits are removed entirely if

⁵⁰⁷ CESCR COs to DE, paras 22-23.

⁵⁰⁸ CESCR COs to DE, paras 32-33.

⁵⁰⁹ CESCR COs to DE, paras 34-45.

they are found to have breached their duties'.⁵¹⁰ Regarding Art 11, CESCR is concerned in seven instances, namely a 'disproportionately high incidence of poverty among older women',⁵¹¹ an insufficient level of basic social benefits which 'is not sufficient to allow recipients and their families to enjoy an adequate standard of living',⁵¹² the 'situation of older persons living in degrading conditions, including in some nursing homes',⁵¹³ child poverty,⁵¹⁴ children that go to school without breakfast,⁵¹⁵ and the inadequacy of social housing.⁵¹⁶ Of those seven instances, there is one repetition with Art 6 (the concern about social security), and two instances about the situation of older women (that concern different aspects in different paragraphs, which means that they are counted twice). Hence, even though Germany has the highest number of instances of the four substantive links, this does not mean that Germany is doing least well in realising the right to a social minimum. Instead, the graph simply shows that all four dimensions of the right to a social minimum must be considered for a comprehensive understanding.

In contrast, Czechia presents with the lowest number of substantive links. Nevertheless, this does not automatically mean that Czechia can be considered as a role model when it comes to the realisation of the right to a social minimum. Even though CESCR does not issue a concern about Art 6 directly, it is concerned about high unemployment, especially among the youth.⁵¹⁷ The minimum wage is deemed too low, which means that it does not provide 'a decent living for workers and their families'.⁵¹⁸ The latter of the two could very well be considered as a substantive link for Art 11 in addition to Art 7. However, since the Committee does not specify this explicitly, it has not been counted as a substantive link for Art 11. Regarding Art 9, CESCR is concerned about 'cuts to social security benefits, introduced by the State party under its austerity measures programme, despite the State party's claim that some of the cuts are temporary and will be reversed',⁵¹⁹ and social security for

⁵¹⁰ CESCR COs to DE, paras 46-47.

⁵¹¹ CESCR COs to DE, paras 38-39.

⁵¹² CESCR COs to DE, paras 46-47.

⁵¹³ CESCR COs to DE, paras 48-49.

⁵¹⁴ CESCR COs to DE, paras 50-51.

⁵¹⁵ CESCR COs to DE, paras 52-53.

⁵¹⁶ CESCR COs to DE, paras 54-55.

⁵¹⁷ CESCR COs to CZ, para 12.

⁵¹⁸ CESCR COs to CZ, para 13.

⁵¹⁹ CESCR COs to CZ, para 14.

migrants.⁵²⁰ Regarding Art 11, the Committee issues concerns on social housing,⁵²¹ and forced evictions.⁵²² In sum, even though Czechia is one of the few EU MS that does not receive a concern on poverty directly, the indirect message about too low minimum wages, cuts to social benefits or social housing all point towards the fact that Czechia does not do all it could do to realise the right to a social minimum for everyone in their jurisdiction.

In sum, the exercise of counting substantive links shows that in order to find out how EU MS could realise minimum essential levels of *subsistence*, one needs to carefully consider all four substantive links that I analysed throughout this section. Since lacking subsistence means different things in different EU MS, the piecemeal approach to the minimum core doctrine is not useful for a comprehensive analysis. Whereas in some EU MS, the low minimum wages or general high unemployment might be the key driver; other EU MS might struggle with inadequate minimum income protection systems that fail to be a last safety net to some of the most disadvantaged groups in society. I further address the question of how EU MS should *realise* the right to a social minimum by examining the hindering conditions in chapter 4 of this thesis.

3.3.3 Distilling the Normative Content of ‘Non-Discriminatory Access’

In this section, I distil the normative content of the ‘non-discriminatory access’ part of my definition of a right to a social minimum by conducting a comprehensive CO-analysis of CESCR’s jurisprudence to the EU MS between 2009-2019. As established above, the non-discrimination obligation is a crucial component of the minimum core doctrine, which is why I include it in my definition of the right to a social minimum. This crucial role has often been neglected in the literature. Hence, it is the purpose of this section to show the importance of bringing non-discrimination back on the agenda. As shown in Section 3.2.3 above, most instances where CESCR is concerned about any aspect of the minimum core doctrine concerns disadvantaged or marginalized groups which are disproportionately hindered in their realisation of the social minimum. The results of my analysis in this section show that CESCR continuously stresses the importance of ‘non-discriminatory access’ in its COs to the EU MS from 2009-2019.

⁵²⁰ CESCR COs to CZ, para 15.

⁵²¹ CESCR COs to CZ, para 16.

⁵²² CESCR COs to CZ, para 17.

Non-discrimination is not only a crucial sub-component of the minimum core doctrine, but also a self-standing obligation in the Covenant under Arts 2(2) and 3 ICESCR. Hence, in order to gain a complete picture of CESCR's concerns regarding non-discriminatory access in realising the right to a social minimum, it is necessary to count all instances of non-discrimination.⁵²³ In order to do so, I first of all counted all instances of CESCR mentioning Arts 2(2) and 3 in its COs to the EU MS from 2009-2019. I also counted any instance of CESCR referring to its GC 20 on non-discrimination. Additionally, any direct mention of the word 'non-discrimination' and its derivatives was counted as one instance. In order to arrive at a total count of non-discrimination, I added the counts of Arts 2(2) and 3, GC 20 and the results of the lexical search together. The results are depicted in Figure 15 below. They show clearly that CESCR refers to non-discrimination in all its COs addressed to the EU MS between 2009-2019 – and not only once, but several times.

Figure 15 emphasizes the vast differences between the 23 EU MS in its total non-discrimination count. Whereas two EU MS received less than five counts (Belgium and Portugal), one received 17 counts (Slovakia), and three EU MS received between 10 and 15 counts (Denmark, Bulgaria, and Slovenia).

⁵²³ As established above, one 'instance' is the combined para of concern and recommendation, which are contained in the same para in older COs, and in two separate paras in newer COs.

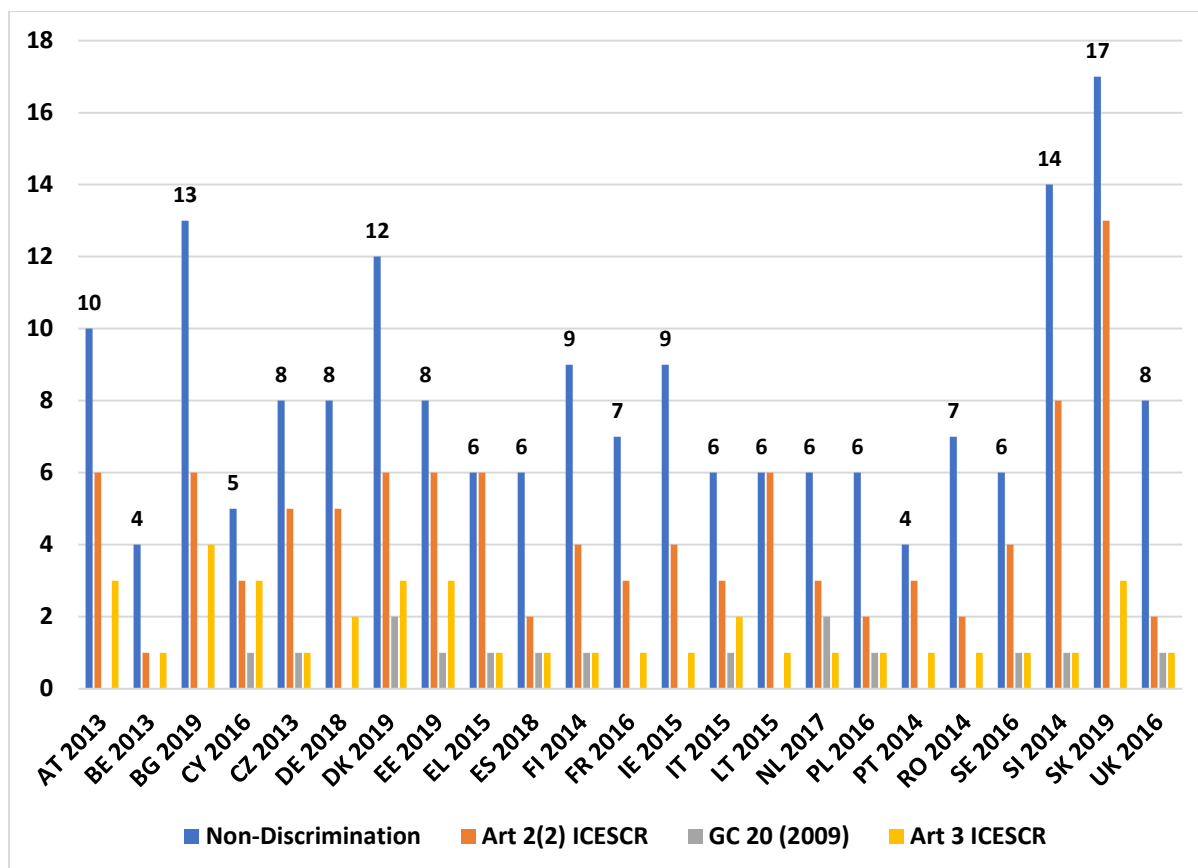


Figure 15. The Non-Discrimination Obligation across the EU MS

However, this particular way of counting the non-discrimination obligation omits the instances where the Committee points out that certain marginalized or disadvantaged groups are disproportionately affected in their exercise of socio-economic rights. Sometimes, CESCR talks about a particular group without explicitly mentioning the term non-discrimination or linking it to Art 2(2) or Art 3 ICESCR. Therefore, I conducted a second analysis where I counted all instances of the Committee talking about particularly vulnerable, disadvantaged, or marginalized groups. This analysis is depicted in Figure 16, showing the differences between the EU MS and contrasting them with the overall non-discrimination count. The results show that CESCR uses the term ‘marginalized’ the most often (in 21 out of 23 COs to EU MS), followed closely by ‘disadvantaged’ (in 20 out of 23 COs). The term ‘vulnerable’ was used less often, in only 6 COs. In its COs to Belgium, CESCR also mentioned the term ‘underprivileged’, but this was not repeated in any other CO, which is why I excluded it from the graph and the analysis.⁵²⁴

⁵²⁴ CESCR, COs to BE 2013, para 18.

As Figure 16 below shows, a strict non-discrimination count does not always capture all instances where the Committee is concerned about discrimination in an indirect way, namely through the mentioning of particularly disadvantage or marginalized groups. This is most obvious in Poland's CO (2016) where the 'disadvantaged' and 'marginalized' bars exceed the non-discrimination. Yet, on the other hand, for Slovenia (2014) and even more Slovakia (2019), the Committee mentioned the non-discrimination obligation far more often than the terms 'vulnerable', 'disadvantaged' or 'marginalized'.

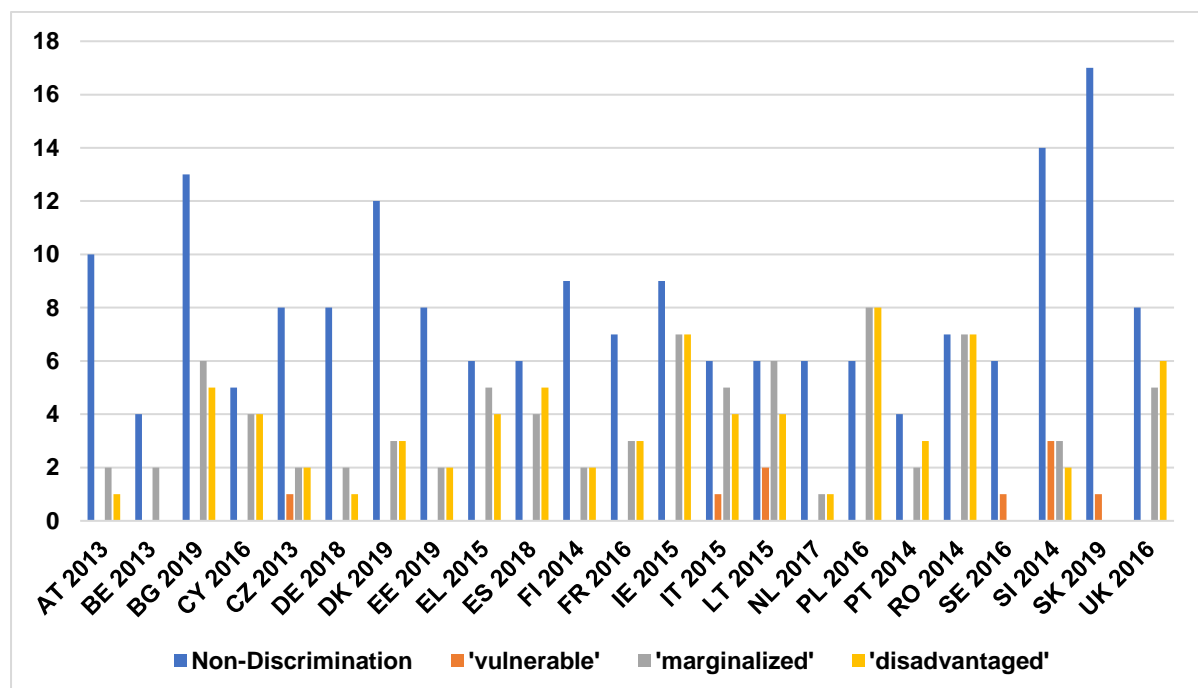


Figure 16. Non-Discrimination and Vulnerable, Marginalized or Disadvantaged Groups

Since the Committee is concerned about non-discrimination in all 23 COs addressed to EU MS between 2009-2019, non-discrimination must be considered a key component of a comprehensive normative content of the right to a social minimum. Indeed, it is not enough to look for evidence of the wording 'minimum core' or 'minimum essential levels' in the COs, but the non-discrimination obligation must crucially supplement a full understanding of the right to a social minimum. Only if one takes the non-discrimination as a sub-component of the minimum core obligations seriously will it be possible to distil the *specific* normative content for particular disadvantaged and marginalized groups, which then moves from an abstract to a concrete understanding of the right to a social minimum.

3.3.4 Non-Discriminatory Access in Practice: Classifying Specific Groups as Disadvantaged or Marginalized

In the previous three sections, I have used the 23 COs issued by CESCR to the EU MS from 2009-2019 as authoritative primary sources to back up my definition of the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence. The CO-analysis demonstrates that my definition is not only a theoretical concept. Instead, it provides practical evidence that the right to a social minimum already exists, even if it is not called like this and is separated into the substantive links of Arts. 6, 7, 9 and 11. In particular, the CO-analysis in form of my distillation exercise of what the right to a social minimum means for a particular geographical location (the 23 EU MS) and a particular time frame (2009-2019) goes much further than merely providing an abstract theoretical definition. In the introduction of this chapter, I have defined *distilling* of the normative content as extracting the obligations which states parties are bound to comply with under international law.⁵²⁵ By doing the comprehensive CO-analysis of the previous sections, this extraction work is almost complete. In order to give even more evidence to how the realisation of the right to a social minimum might be achieved more practically, I will apply the CO-analysis to certain groups that CESCR sees as particularly disadvantaged or marginalized.

As established in sections 3.2.3 and 3.3.3, it is crucial to conceptualise the non-discrimination obligation as key component of the minimum core doctrine. This is why I have framed the minimum core doctrine as a substantive right to a social minimum and define it as *non-discriminatory access* to minimum essential levels of subsistence. By giving this concise definition, I am prioritising both the non-discrimination aspect and the subsistence aspect of the right to a social minimum. Since non-discrimination is a crucial sub-component of the minimum core doctrine and a key aspect of my definition of the right to a social minimum, the purpose of this section is to assess how EU MS should realise the right to a social minimum for disadvantaged and marginalized groups.

To find out which groups CESCR sees as particularly disadvantaged or marginalized, I conduct a qualitative content analysis where I count the co-occurrence of any disadvantaged or marginalized groups with the substantive links (Arts 6, 7, 9,

⁵²⁵ For an example of using the word 'extraction' in a similar way as I am using the word 'distilling', see O'Conneide (n 39).

11) of the right to a social minimum. Since the ICESCR is a general international human rights treaty, its focus is not directed towards one particular disadvantaged or marginalised group. However, CESCR frequently mentions particular different disadvantaged or marginalized groups in accessing particular rights in the COs to states parties. In order to act upon the obligation of non-discrimination as crucial for a comprehensive understanding of the minimum core doctrine, I count all instances where CESCR refers to specific disadvantaged or marginalised groups. CESCR mentions women as being particularly disadvantaged in all 23 COs issued to the EU MS between 2009-2019, closely followed by persons with disabilities (22x) and children (21x). Non-Citizens were also a particular concern to CESCR, in particular refugees and asylum-seekers (17x) and the generic term 'migrant' (17x). Roma and Travellers occur 17 times as well. I display the frequency analysis of which groups are disadvantaged in how many EU MS in column two of Table 4 below, which is sorted from highest to lowest number of EU MS. Whereas women were mentioned as being a particularly disadvantaged or marginalized group in all 23 EU MS to whom CESCR addressed a CO between 2009-2019, street children were only of concern in two EU MS.

A second way of understanding the frequencies of disadvantaged or marginalized groups is by counting the total number of coded segments (instances), which is displayed in the third column of Table 4 below. This way of counting highlights CESCR's several concerns and recommendations about the same group. For example, in its COs to Bulgaria in 2019, the Committee voices its concern about the Roma facing 'discrimination in the fields of employment, housing, health care and education',⁵²⁶ a very high number of young Roma that are neither in education, employment or training,⁵²⁷ the Roma being 'disproportionately affected by poverty',⁵²⁸ and many Roma living in 'inadequate housing conditions in the State party, in some cases without access to sanitation and water facilities'.⁵²⁹ Hence, CSECR is concerned about Roma in four different instances that I counted as coded segments for the purposes of Table 4. When considering the total number of coded segments across the 23 EU MS, the order of which group is mentioned most frequently changes

⁵²⁶ CESCR, COs to BG 2019, paras 12-13.

⁵²⁷ CESCR, COs to BG 2019, paras 19-20.

⁵²⁸ CESCR, COs to BG 2019, paras 33-34.

⁵²⁹ CESCR, COs to BG 2019, paras 35-36.

a bit. While women are still the group that is mentioned most often (91x), Roma follow in second place with 73 coded segments, while children are mentioned 70 times and persons with disabilities 68 times.

Table 4. Frequency of Disadvantaged or Marginalized Groups across the EU MS

Group	EU MS	Coded Segments across all COs
Women	23 (all)	91
Persons with Disabilities	22	68
Children	21	70
Young People	18	22
Refugees/Asylum-Seekers	17	30
Migrants	17	34
Roma	17	73
Minorities	13	22
Elderly	12	16
Homeless	11	11
Undeclared/ Undocumented	8	10
Single-Parent	8	10
Origin	6	9
Families with Many Children	5	5
Low-Income	5	6
LGBTQ+	4	4
Immigrants	3	4
Intersex	3	3
Muslims	3	4
Non-EU Migrants	3	3
Street Children	2	2

The frequency analysis has shed light on the prevalence of specific disadvantaged or marginalized groups as identified by CESC. The results show that women, migrants, persons with disabilities, children and Roma are among the most marginalized across countries. In order to analyse the realisation of the right to a social minimum in Europe more concretely, I am focusing on three specific groups, namely persons with disabilities, children, and Roma. While I did not include women as a group by itself, intersectionality between gender and any of those groups is necessarily included. This means that I do consider female persons with disabilities, children, and Roma, but did not consider women in general.

Migrants would have been a very interesting case study for further analysis, yet CESC is not consistent in its classification of different categories of migrants. Since migration is such a huge field where it is very important to specify very concretely what exactly the target group under investigation is, I have decided to exclude non-citizens

completely from my analysis. However, an in-depth analysis of migration would be a very fruitful avenue for further research. The main justification for the choice of the three groups is therefore that Roma, children, and persons with disabilities are among the most disadvantaged and marginalized across the EU MS. Indeed, after having excluded any categorizations of non-citizens and women other than in cases of intersectionality, my three case studies are the most frequently mentioned groups. Hence, the next section engages with the question how EU MS should realise the right to a social minimum for persons with disabilities, children, and Roma, according to CESCR.

3.4 Analysing Substantive Dimensions according to five HRTBs

So far, I have distilled the normative content of the right to a social minimum based on CESCR's jurisprudence in the form of GCs and the 23 COs addressed to EU MS from 2009-2019. This exclusive consideration of CESCR has provided a solid definition of the right to a social minimum, which is firmly rooted in CESCR's GCs and COs as authoritative primary sources. However, when asking the question of how EU MS should realise the right to a social minimum for persons with disabilities, children, and Roma, an exclusive focus on CESCR is no longer justified. In the history of international human rights law, it has been recognised that certain groups are particularly disadvantaged or marginalized, resulting in the adoption of group specific human rights treaties. For each of my three case studies, a separate human rights treaty with its own human rights treaty body exists. In addition to the ICESCR, all EU MS have ratified all group specific international human rights treaties that concern my three groups.⁵³⁰ By far the biggest advantage of including group specific treaties is the deep expertise of the treaty bodies on that particular group. Therefore, in order to understand how EU MS should realise the right to a social minimum for persons with disabilities, children, and Roma, it is necessary to widen my primary sources to the jurisprudence of the group specific HRTBs. To utilise their group specific expertise, I have widened my primary sources beyond CESCR to include the COs of four additional group specific human rights treaty bodies.

⁵³⁰ OHCHR, 'UN Treaty Body Database - View the Ratification Status by Country or by Treaty' (n 41). The only group specific international human rights treaty that EU MS predominantly did not ratify is the convention on Migrant workers and their families. This is one other reason why I had to exclude migrants as one of my potential case studies.

The rights of persons with disabilities are protected in the Convention on the Rights of Persons with Disabilities (CRPD).⁵³¹ The relevant human rights treaty body to which states parties need to report their progress is the CRPD Committee.⁵³² In the International Convention on the Rights of the Child (CRC), states parties have committed themselves to protect children's rights,⁵³³ with the relevant human rights treaty body being the CRC Committee.⁵³⁴ Regarding the protection of the rights for the Roma, no specific human rights treaty body exists. However, the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is very relevant,⁵³⁵ and the CERD Committee has repeatedly pointed out the necessity to protect Roma rights, not only in COs but also in General Recommendations.⁵³⁶ Indeed, when it comes to coverage of the EU MS, no treaty achieves as high participation in the reporting cycle as the ICERD. All 28 EU MS have participated in CERD's reporting cycle from 2009-2019, as can be seen in Appendix 1. In this time frame, the CERD Committee has voiced concerns about the marginalization of Roma in 24 EU MS. This prevalence of Roma rights in the jurisprudence of the CERD Committee is the justification for the inclusion of this treaty body into my analysis.

Besides the COs issued by the CRPD, the CRC and the CERD Committees, I have also included the COs of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which entered into force in 1981.⁵³⁷ As justified in the introduction,⁵³⁸ I consider gender in my analysis for any instances of intersectionality. The gendered dimension of poverty is of particular relevance for each of my three case studies. Female children, female persons with disabilities and female Roma are disproportionately disadvantaged in accessing their right to a social minimum when compared to their male counterparts. Even though CEDAW might

⁵³¹ CRPD (n 56).

⁵³² 'The Committee on the Rights of Persons with Disabilities (CRPD) is the body of independent experts which monitors implementation of the Convention by the States parties', see OHCHR, 'Committee on the Rights of Persons with Disabilities' <<https://www.ohchr.org/en/treaty-bodies/crpd>> accessed 27 December 2022.

⁵³³ CRC (n 56).

⁵³⁴ 'The Committee on the Rights of the Child (CRC) is the body of 18 independent experts that monitors implementation of the Convention on the Rights of the Child by its States parties', see OHCHR, 'Committee on the Rights of the Child' <<https://www.ohchr.org/en/treaty-bodies/crc>> accessed 27 December 2022.

⁵³⁵ ICERD (n 56).

⁵³⁶ CERD Committee, 'General Recommendation XXVII on Discrimination against Roma' (2000) UN Doc A/55/18.

⁵³⁷ CEDAW (n 56).

⁵³⁸ See Section 1.2.2.

seem to pay little attention to socio-economic rights, the issue of gendered poverty and inequality has recently been addressed in an in-depth study on CEDAW.⁵³⁹ The inclusion of CEDAW allows me to not only engage in intersectionality between groups (for example children with disabilities), but additionally consider the gendered aspects of intersectionality. Due to this approach, I gain a more comprehensive understanding of particular groups that suffer from multiple discrimination, for example Roma girls with disabilities – who tend to be even more marginalized than Roma boys with disabilities.

In addition to CESCR's COs, I therefore engage in a qualitative content analysis of four additional group specific UN human rights treaty bodies, namely the CERD, CRPD, CRC and CEDAW Committees. By taking such a broad comparative perspective between treaty bodies and EU member states, my methodology goes further than the usual doctrinal analysis of single COs. By comparing how different HRTBs and HRTs approach different groups and disadvantage, I demonstrate that the realisation of the right to a social minimum needs to take the non-discrimination obligation seriously. I also show that the framing of disadvantaged and marginalised groups depends not only on the particular treaty bodies but differs between countries. Thus, I compare the COs of five UN human rights treaty bodies across all EU member states in the period of 2009-2019.

In this section, I make use of the technical possibilities offered by the MAXQDA software in order to apply the normative content of the right to a social minimum to my three case studies: children, persons with disabilities and Roma. By using specific functions such as complex retrieval queries, I am able to specify which groups have most difficulty in accessing the three substantive dimensions of the right to a social minimum, namely poverty, material deprivation and work. This is how I overcome the perceived legalism and abstract nature of the non-discrimination obligation. Only by applying the non-discrimination obligation to the concrete substantive content of the right to a social minimum, will it be possible to analyse how EU MS can do better in realising this very right.

⁵³⁹ Campbell (n 246).

3.4.1 Re-Conceptualising the Substantive Links into Three Dimensions

In Section 3.3 I have developed the substantive content of the right to a social minimum by reading CESCR's jurisprudence of Arts 6, 7, 9 and 11 ICESCR into its normative content. While it is generally agreed that CESCR has developed the most sophisticated jurisprudence on the right to a social minimum due to its particular expertise and particular focus on socio-economic rights, the group specific HRTBs also develop their own interpretative standards in the form of GCs (CRPD and CRC Committee) and GRs (CERD and CEDAW Committee). Indeed, the HRTBs are following a pattern of developing normative standards in a piecemeal-fashion, on a right-by-right and group-by-group basis. Closely linked to this pattern is its reception by legal human rights scholars that are often specialising in one particular disadvantaged group or one particular human right.⁵⁴⁰ Sometimes, the interpretative standards of other HRTBs are not so much seen as providing additional doctrinal richness but rather produce a sense of competition. For example, CESCR's sophisticated normative developments on almost every socio-economic right have not only been praised but also warned against, since an 'overspill' of doctrines that were developed under CESCR and are consequently applied by a group specific HRTB might water down this HRTB's particular group specific expertise.⁵⁴¹

For states parties, this piecemeal approach by the HRTBs leads to a situation where they are subject to parallel reporting obligations regarding each right and for each disadvantaged or marginalized group. For example, if one state party wanted to report on the state of the right to work for persons with disabilities, they would not only have to consider the substantive content of Arts 6 and 7 ICESCR and their corresponding GCs,⁵⁴² but also CESCR's GCs on non-discrimination in general and persons with disabilities in particular.⁵⁴³ In a second step, they would need to move

⁵⁴⁰ For persons with disabilities, see for example Catalina Devandas Aguilar, 'Social Protection and Persons with Disabilities' (2017) 70 *International Social Security Review* 45; Anna Arstein-Kerslake and Eilionóir Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law' (2016) 20 *The International Journal of Human Rights* 471; Andrea Broderick, 'Equality of What? The Capability Approach and the Right to Education for Persons with Disabilities' (2018) 6 *Social Inclusion* 29; Waddington and Lawson (n 418).

⁵⁴¹ See for example Nolan and Pells (2020) who warn against an over-reliance of CESCR's jurisprudence when analysing children's rights Aoife Nolan and Korrily Pells, 'Children's Economic and Social Rights and Child Poverty: The State of Play' (2020) 28 *The International Journal of Children's Rights* 111.

⁵⁴² CESCR, 'GC 18: The Right to Work' (n 44); CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44).

⁵⁴³ CESCR, 'General Comment No. 5: Persons with Disabilities' (1994) UN Doc E/1995/22; CESCR, 'GC 20: Non-Discrimination' (n 333).

towards the CRPD Committee's own interpretative standards on non-discrimination and equality,⁵⁴⁴ while additionally considering Art 27 CRPD on the right to work for persons with disabilities and its corresponding GC 8 on the right to work.⁵⁴⁵ Not only is there considerable overlap in which rights are protected between treaty bodies, but there is also overlap between protected groups, in particular regarding the issue of intersectionality. For example, children with disabilities are specifically protected under Art 7 CRPD, but they have also been subject to the CRC's interpretative standards developed in its GC 9 on the rights of children with disabilities.⁵⁴⁶

In order to overcome this piecemeal approach, in this section I transform the substantive links of the right to a social minimum into three dimensions of the right to a social minimum, which transcends the Article-by-Article nature of the HRTBs' jurisprudence. Specifically, I group the right to an adequate standard of living (Art 11 ICESCR) into one dimension called 'poverty' (P) and one dimension called 'material deprivation' (MD). The right to work and to fair working conditions (Arts 6 and 7 ICESCR) are merged together into a dimension called 'work' (W). Any references or concerns expressed by the HRTBs regarding high unemployment rates or discrimination experiences in securing employment would fall into this dimension. I do not turn the substantive link of Art 9 ICESCR (right to social security) into a dimension of the right to a social minimum, but rather identify the inadequacy of social protection systems as one of the core hindering conditions in chapter 4 of this thesis.

One of the reasons for this choice is that the EU's AROPE indicator that was introduced in chapter 2 does not consider social protection. Rather, AROPE is solely composed of the relative at-risk-of-poverty-rate, severe material deprivation and low-work intensity of households. In order to make my conceptualisation of the minimum core doctrine as a substantive right to a social minimum as practical as possible for social policy scholars, I decided to adapt the poverty, material deprivation, and work dimensions of the right to a social minimum to the AROPE's sub-indicators. Doing this allows me to not only consider the HRTBs' jurisprudence regarding the right to a social minimum, but to read them in conjunction with official EU's statistics on poverty and

⁵⁴⁴ CRPD Committee, 'General Comment No. 6 on Equality and Non-Discrimination' (n 336).

⁵⁴⁵ CRPD Committee, 'General Comment No. 8 on the Right of Persons with Disabilities to Work and Employment' (2022) UN Doc CRPD/C/GC/8. Please note, however, that this GC was only adopted in 2022, so it was not available to states parties for the period under consideration in this thesis (2009-2019).

⁵⁴⁶ CRC Committee, 'General Comment No. 9: The Rights of Children with Disabilities' (2007) UN Doc CRC/C/GC/9.

social exclusion. Since I argue for an increased salience and relevance of the human rights perspective in official EU statistics, I needed to make sure that the normative content of international human rights law fits into the measurement categories of the EU's flagship indicator on poverty and social exclusion.

The rest of this chapter analyses the poverty, material deprivation, and work dimensions of the right to a social minimum. I use MAXQDA to conduct a qualitative content analysis of the COs of the five relevant HRTBs (CESCR, CRPD, CRC, CERD, CEDAW) issued to EU MS between 2009-2019. This approach allows me to establish any co-occurrence between my three groups (children with disabilities, children, and Roma) and the three substantive dimensions of the right to a social minimum. By analysing co-occurrence, I hence examine the poverty, material deprivation, and work dimensions of the right to a social minimum for persons with disabilities, children and Roma respectively. I collectively capture all 28 EU MS by analysing the jurisprudence of five HRTBs, even though not all EU MS have participated in a full reporting cycle for each of the HRTBs in the time frame of 2009-2019. Even though some EU MS persistently lack reporting discipline to some of the HRTBs, I am still able to include them in my analysis since all EU MS have concluded a full reporting cycle with at least a few HRTBs between 2009-2019. A full overview over the reporting cycles of all EU MS from 2009-2019 across the HRTBs is provided in Appendixes 1-5.

By widening my analysis to five HRTBs, I am also able to collectively capture the concerns on my three groups. While the group specific HRTBs are necessarily invested into their particular group, a parallel analysis of five HRTBs enables a more comprehensive picture that also takes intersectionality into account. For example, it is not only the CRPD Committee that is concerned about persons with disabilities, but also the CESCR, the CRC Committee (for children with disabilities) and the CEDAW Committee (for women and girls with disabilities).⁵⁴⁷ Regarding this comprehensive analysis of the three groups, two caveats are in order: First, a low frequency of one particular group in the HRTBs' jurisprudence on one particular EU MS does not necessarily mean that this group is not disadvantaged in that state. For example, the fact that the CRPD Committee has not yet adopted COs on Ireland does obviously not mean that the right to a social minimum has already been fully realised for persons

⁵⁴⁷ The CERD Committee does not mention persons with disabilities, yet Roma with disabilities are captured by the other four HRTBs.

with disabilities. It rather points to the contrary - Ireland took a very long time to finally ratify the CRPD after its signature, with an even longer delay until the first state party report was submitted.⁵⁴⁸ Secondly, not all groups are equally represented across the EU MS. While these differences are not as pronounced for children and people with disabilities, for the Roma the situation looks different. In general, the Roma-dense countries of Central and Eastern Europe tend to receive more concerns by the HRTBs in terms of realising their right to a social minimum than less Roma-dense countries. To sum up, by widening my analysis to the COs of five HRTBs, I am able to concretise what the realisation of the right to a social minimum means for my three groups. I argue that this treaty-body-transcending and rights-transcending, yet group specific right to a social minimum makes it easier for EU MS to understand how they should realise the right to a social minimum.

3.4.2 The Poverty Dimension (P)

In chapter 2 I have argued that the EU's AROPE-indicator fails to integrate a human rights perspective on poverty. This section engages in a systematic analysis of the concerns of five HRTBs regarding the poverty dimension of the right to a social minimum. While I have already laid the groundwork by distilling the right to a social minimum by analysing CESCR's jurisprudence, this section's focus is on how the poverty dimension applies to my three case studies: persons with disabilities, children, and Roma.

Beyond CESCR, the group specific treaty bodies have also at times been concerned about poverty as such. While only the ICESCR has an explicit focus on socio-economic rights, all group specific rights contain at least some Articles that are relevant for the human rights approach to poverty. For example, the CEDAW Committee seems to pay little attention to socio-economic rights at first sight. However, gendered poverty and inequality have recently been addressed in an in-depth study.⁵⁴⁹ While I am not focusing on gender as such, the gendered dimension of poverty is of particular relevance for each of my three case studies.

I counted the poverty dimension by running a key-word search for 'poverty', 'poor', and 'low income' with the help of the MAXQDA software. However, poverty was

⁵⁴⁸ Compare Appendix 2: Signature in 2007, ratification in 2018 and submission of the initial state party report to the CRPD Committee on November 8th, 2021 (and hence outside of the temporal scope of this thesis).

⁵⁴⁹ Campbell (n 246).

only counted if it was a general concern in itself, not when one of the HRTBs Committees sees it as the cause of something else, like low educational achievements of poor children. For example, the CRC Committee is concerned that in Croatia, 'children living in poverty, children living in remote areas and foreign children, do not have equal access to the education system'.⁵⁵⁰ This was not counted as an instance of child poverty, since poverty is the cause for something else (no equal access to education) instead of a concern in itself.

After completing the key-word search with the MAXQDA software, I then manually cross-checked the prevalence of persons with disabilities, children, and Roma. Due to this manual check, I was also able to refine my keywords for subsequent search by including more synonyms for poverty, such as 'precarious socio-economic situation'.⁵⁵¹ In situations where more than one dimension of the right to a social minimum could be observed, these concerns were coded in both dimensions. For example, CESCR expresses its concerns regarding Lithuania that the 'levels of the minimum wage and of unemployment benefits, pensions and social assistance in the State party are inadequate to ensure a decent standard of living for the recipients and members of their families'.⁵⁵² This was coded as an instance of concern for the poverty dimension for children, and additionally as an instance of concern regarding the work dimension.

Figure 17 below depicts the poverty dimension of the right to a social minimum across the EU, according to the jurisprudence of the five HRTBs.⁵⁵³ This graph shows that some groups are mentioned more often than others. For example, child poverty seems to be an overall bigger concern to the five HRTBs than the poverty dimension for persons with disabilities. However, the CERD Committee does not mention persons with disabilities at all, whereas persons with disabilities are mentioned not only by the CRPD Committee, but also by the CRC Committee (children with disabilities) and CEDAW Committee (women and girls with disabilities). Hence, there seems to be a hidden 'ranking' in terms of intersectionality, which has the effect of some groups being mentioned more often than others.

⁵⁵⁰ CRC Committee, COs to HR 2014, para 50.

⁵⁵¹ CERD Committee, COs to SI 2010, para 8.

⁵⁵² CESCR, COs to LT 2015, para 10.

⁵⁵³ Multiple instances of the poverty dimension in each CO to an EU MS are counted only once, even if poverty is mentioned several times in the same document.

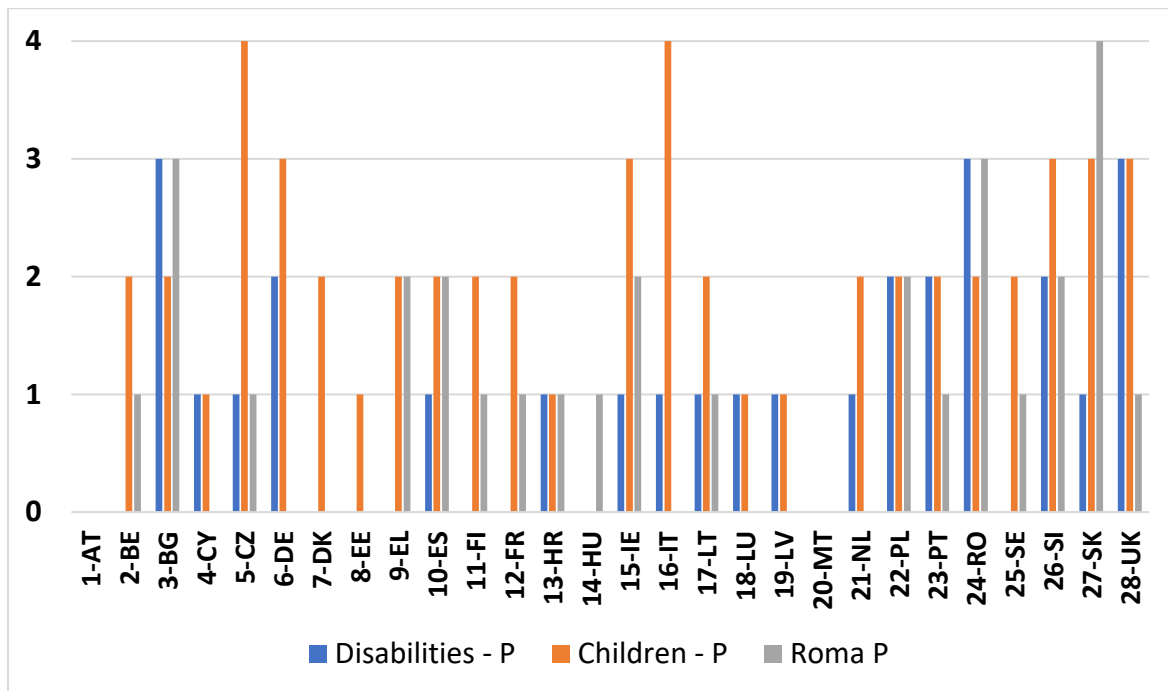


Figure 17. HRTBs' Concerns about the Poverty Dimension

Figure 17 also highlights that different groups are not equally exposed to poverty in all EU MS, for example the poverty dimension of the Roma is mentioned by four HRTBs in Slovakia, whereas persons with disabilities are only mentioned once.

This analysis of how the poverty dimension is of concern for persons with disabilities, children and Roma does not consider intersectionality, for example when groups are affected by more than one category of disadvantage. Hence, as an additional step of analysis, I counted any poverty-references across the HRTBs for particularly disadvantaged sub-groups where more than one dimension of intersectionality comes into play. Figure 18 compares the HRTBs in how often they are concerned about the prevalence of the poverty-dimension for children of single parents, Roma children, and children with disabilities when compared to “singular” child poverty.⁵⁵⁴ The bottom bar shows that not only the CRC Committee, but also CESCRCR is concerned about child poverty in almost every EU MS that received a CO from 2009-2019.

⁵⁵⁴ The figure only refers to four HRTBs here (excluding CERD, since no P-Dimension reference was made by the CERD Committee).

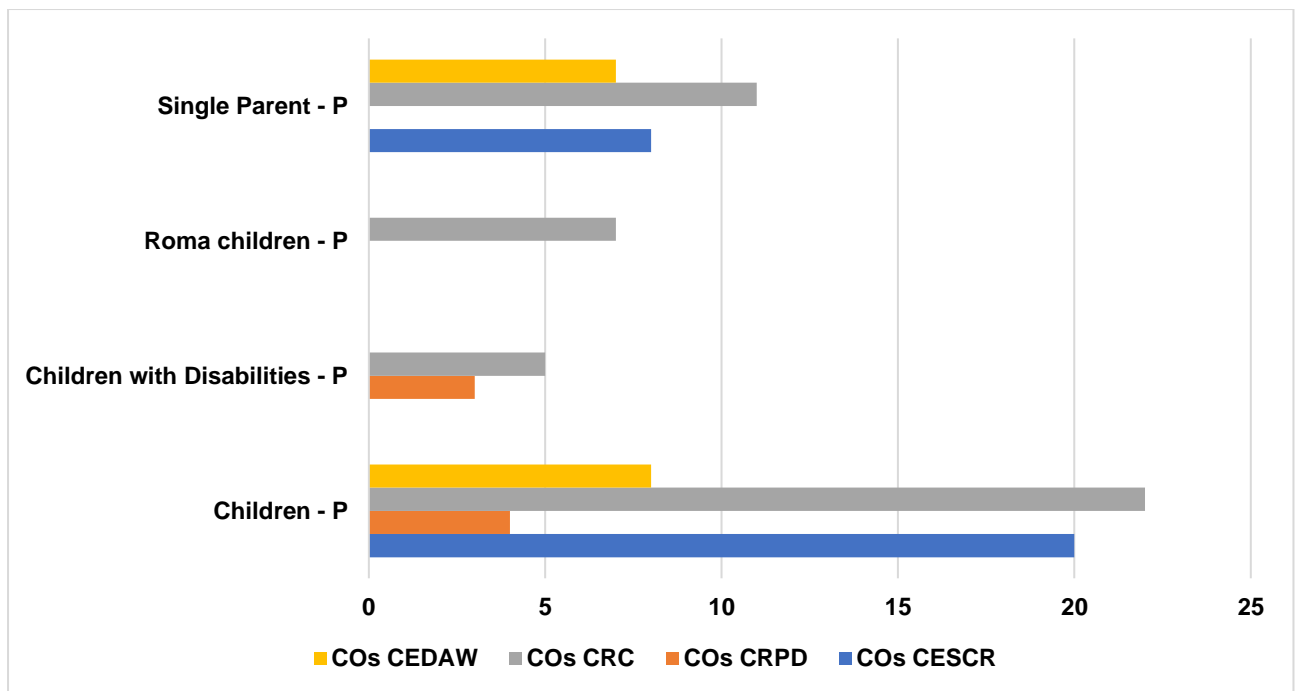


Figure 18. Prevalence of the Poverty Dimension for Groups of Disadvantaged Children

The graph evidences the nuances and complexities of the poverty dimension, but still does not capture all possible combinations of intersectionality. For example, CEDAW routinely points out the high poverty-rates of children living in household with a single mother, which reflects the fact that the large majority of single-parent households is headed up by women. The issue of intersectionality is further discussed in section 3.5 below.

3.4.3 The Material Deprivation Dimension (MD)

The material deprivation dimension of the right to a social minimum is closely linked to the poverty dimension. The reason for distinguishing between the two is the HRTB's tendency to discern between general concerns about poverty and specific concerns about material deprivation, in particular in relation to the right to food and the right to housing, as sub-categories of the right to an adequate standard of living. At the same time, the EU's AROPE indicator also distinguishes between the at-risk-of-poverty rate (AROP) and the severe material deprivation rate (DEP).

In order to operationalize the material deprivation dimension as evidenced by the HRTBS, I count any references to inadequate housing, lack of food or water, and lack of basic sanitation facilities as evidence for the prevalence of the material deprivation dimension. Any of those references to material deprivation in the COs of the five HRTBs to the EU MS from 2009-2019 is counted as one instance of material

deprivation. Figure 19 depicts the material deprivation dimension of the right to a social minimum for persons with disabilities, children, and Roma across the EU MS.⁵⁵⁵ Please note the abbreviation ‘MD’ when referring to the material deprivation dimension of the right to a social minimum.

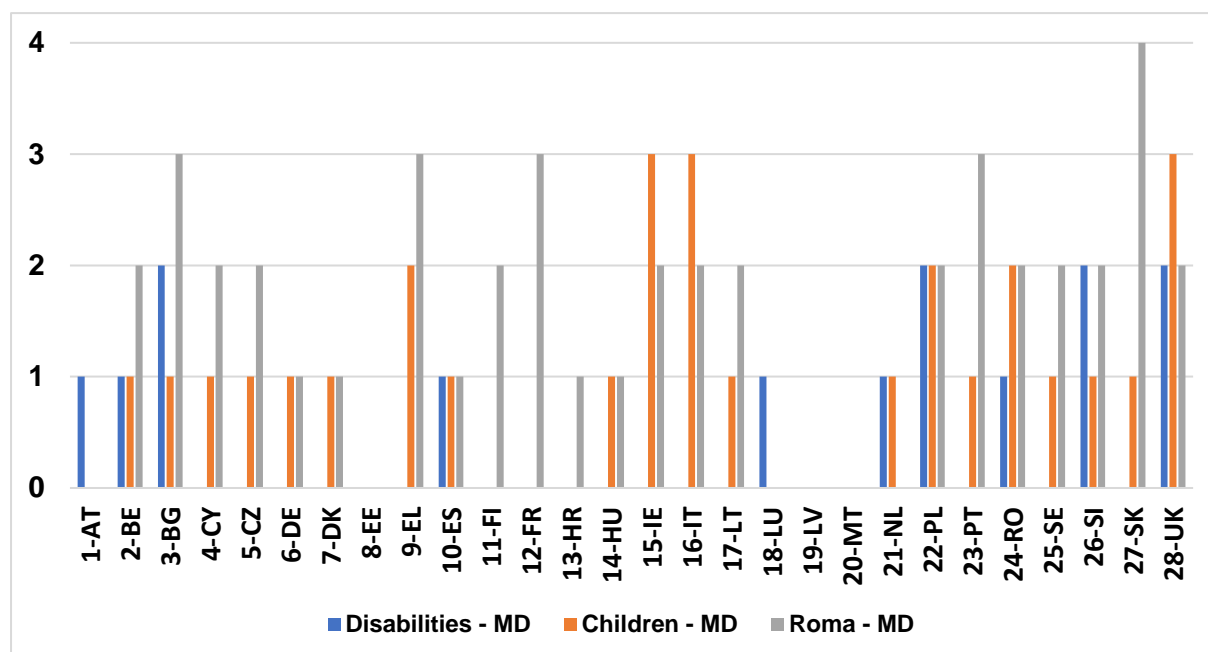


Figure 19. HRTBs’ Concerns about the Material Deprivation Dimension

The graph shows is that overall, children and Roma received more concerns in the material deprivation dimension than persons with disabilities. At the same time, there are country-specific differences with some EU MS without any sizeable Roma population, and some other EU MS that are so-called “Roma-dense”.⁵⁵⁶ Slovakia received four concerns about material deprivation of their Roma population, which is the highest number of concerns contained in this graph. This is not surprising, since Slovakia is an EU MS with a large Roma population.⁵⁵⁷ Bulgaria, Greece, France, and Portugal received three concerns each regarding their Roma population. This shows that Roma are overall the group with the highest number of concerns regarding the material deprivation dimension of the right to a social minimum, followed by children.

⁵⁵⁵ Each CO is counted only once, even if several instances of material deprivation (e.g. food and housing) are mentioned by the same treaty body.

⁵⁵⁶ This is the term utilised by the FRA. For a critique of this approach see chapter 5 of this thesis, discussing data disaggregation for the Roma.

⁵⁵⁷ For an in-depth discussion about the problems of counting how many Roma live in which EU MS, see section 5.5.1 of this thesis.

3.4.4 The Work Dimension (W)

I counted the work dimension of the right to a social minimum by running a keyword-search with the MAXQDA software, containing the terms 'employment', 'unemployment', 'labour market' and 'work' across the COs of the five HRTBs to the EU MS from 2009-2019. These results were then manually checked. For children, it was particularly tricky to decide which concerns and recommendations to include in the work dimension. Child labour is not the focus of this thesis, and any COs with concerns or recommendations in this realm were excluded. However, I did include three other issues that the HRTBs highlighted, which are of particular relevance to realising the right to a social minimum for children.

The first is the issue of youth unemployment, which has been a very high concern across the EU MS in the aftermath of the 2007/2008 crisis. In most EU MS, young people below 18 to take up full-time employment, with varying minimum ages. Most often, 15- or 16-year-old teenagers are indeed allowed to take up employment. Since the CRC considers anybody below 18 as a child for the purposes of the Convention, I included references to youth unemployment in my frequency analysis. As a concrete example, CESCR is concerned that in Austria the 'youth unemployment rate remains 60 per cent higher than the unemployment rate of adults'.⁵⁵⁸ A second issue of relevance for the work dimension of the right to a social minimum for children is gender discrimination in the labour market, in particular due mothers experiencing higher poverty rates after childbirth and maternity. For example, CEDAW is concerned about the "lack of labour market opportunities after childbirth" in Italy, which I coded as one instance of the work dimension for children.⁵⁵⁹ The third issue are concerns about difficult labour market access for single parents, which I also coded as an instance of the work dimension for children.⁵⁶⁰

Lack of access to employment for Roma is a wide-spread problem, and which was consequently counted as an instance of the work dimension for the Roma. However, sometimes HRTBs are concerned about the employment prospects for young Roma boys and girls. Since the terminology of 'boys' or 'girls' most likely means that those are children below the age of 18, I additionally counted this as an instance of the work dimension for children. For example, the CERD Committee recommended

⁵⁵⁸ CESCR, COs to AT 2013, para 16.

⁵⁵⁹ CEDAW, COs to IT 2017, para 38.

⁵⁶⁰ CEDAW, COs to ES 2015, para 28.

in its COs to Lithuania to 'provide young Roma boys and girls with vocational training opportunities adapted to the needs of the employment market'.⁵⁶¹ Hence, I counted this instance as evidence for the work dimension of the right to a social minimum not only for the Roma, but also for children.⁵⁶² Figure 20 depicts the work dimension of the right to a social minimum for persons with disabilities, children and Roma across the EU MS according to three HRTBs.⁵⁶³

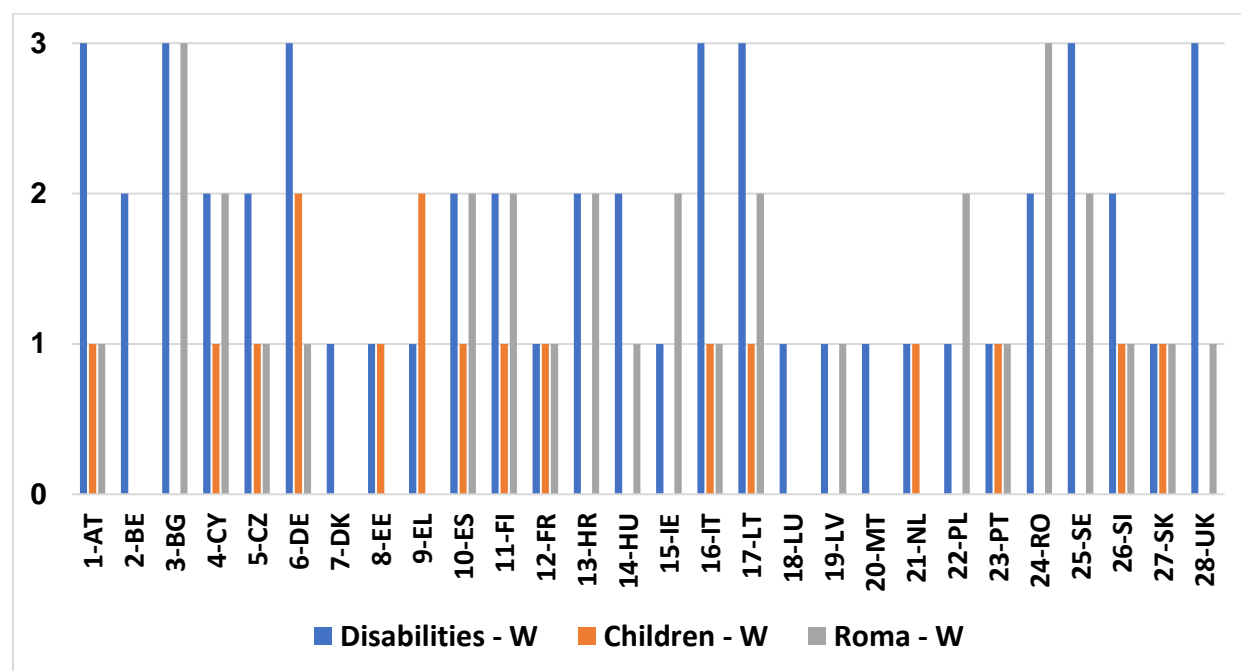


Figure 20. HRTBs' Concerns about the Work Dimension Across the EU MS

As Figure 20 shows, persons with disabilities are the group with the most concerns in the work dimension. Austria, Bulgaria, Germany, Italy, Lithuania, Sweden, and the UK received three concerns regarding the work dimension for persons with disabilities.⁵⁶⁴ Yet, in countries with high Roma prevalence, the Roma are also very disadvantaged on the work dimension. For example, this is the case in Bulgaria and Romania, where

⁵⁶¹ CERD Committee, COs to LT 2019, para 18.

⁵⁶² See also section 3.5 on intersectionality.

⁵⁶³ Each CO is counted only once, even if work-related concerns are mentioned several times by the same treaty body.

⁵⁶⁴ CESCR, COs to AT 2013, para 19; CRPD, COs to AT 2013, paras 44-47; CEDAW, COs to AT 2019, paras 32-33. CESCR, COs to BG 2019, paras 21-22; CRPD, COs to BG 2018, paras 57-58; CEDAW, COs to BG 2012, paras 43-34. CESCR, COs to DE 2018, paras 34-45; CRPD, COs to DE 2015, paras 49-50; CEDAW, COs to DE 2017, paras 35-36. CESCR, COs to IT 2015, paras 20-21 and 24-25, CRPD, COs to IT 2016, paras 69-70, CEDAW, COs to IT 2017, paras 37-38 and 47-48. CESCR, COs to LT 2015, para 12, CRPD, COs to LT 2016, paras 51-52, CEDAW, COs to LT 2019, paras 36-37 and 42-43. CESCR, COs to SE 2016, paras 23-24, CRPD, COs to SE 2014, para 49, CEDAW, COs to SE 2016, paras 34-35. CESCR, COs to UK 2016, paras 29-30, CRPD, COs to UK 2017, paras 56-57, CEDAW, COs to UK paras 43-44.

persons with disabilities and Roma receive concerns by three HRTBs regarding the work dimension.⁵⁶⁵

The previous three sections have shown how the three dimensions of the right to a social minimum – poverty, material deprivation and work – manifest themselves differently across my three case studies. According to the HRTBs, for persons with disabilities, the work dimension tends to be the most significant barrier to being able to realise their right to a social minimum. For children, it is the poverty dimension; and for Roma the material deprivation dimension. With this CO-analysis I have provided comprehensive evidence of how my definition of the right to a social minimum as ‘*non-discriminatory* minimum essential levels of *subsistence*’ affects persons with disabilities, children and Roma differently. Applying the ‘*non-discriminatory*’ part of the definition to how it affects three particularly disadvantaged groups has therefore shown that the ‘*subsistence*’ part of the definition looks very different not only across the three groups, but also across the EU member states. Due to the comprehensive nature of my CO-analysis for a particular geographic location (the EU MS) at a particular time (2009-2019), the variations between dimensions and states will be crucial together in my analysis of the conditions that hinder EU MS from realising the right to a social minimum, which will follow in chapter 4.

3.5 Intersectionality

While it might seem to be an almost simplistic analytical tool to assign the prevalent dimensions of the right to a social minimum to the three groups, this exercise becomes more complex when more categories are added. Certain disadvantaged groups seem to ‘trump’ other disadvantaged groups in terms of added vulnerabilities. For example, children are rarely seen as simply children (for whom the poverty dimension was prevalent) as soon as another layer of disadvantage appears. In popular newspapers, a Roma child does not enjoy the same presumed innocence and deservingness of public resources as a non-Roma child. Similarly, a girl with disabilities will not immediately attract the attention of disability advocates who tend to focus on access to the labour market instead of intertwined family constellations of deprived households that happen to include one female child with disabilities.

⁵⁶⁵ CESCR, COs to BG 2019, paras 12-14 (on discrimination), paras 19-20 (on youth unemployment). CERD, COs to BG 2017, paras 19-20, CEDAW, COs to BG 2012, paras 33-34. CESCR, COs to RO 2014, para 11. CERD, COs to RO 2010, para 14; CEDAW, COs to RO 2017, paras 28-29 and 36-37.

Intersectionality is a term coined by Crenshaw in 1989, addressing the multiple discrimination experience stemming from the intersecting categories of gender and race.⁵⁶⁶ To address intersectionality, Section 3.5.1 establishes 11 constellations of intersectionality between my three case studies. Out of those 11, I choose to study two groups more in depth, namely children with disabilities (Section 3.5.2) and Roma children (Section 3.5.3), with a thorough analysis of the poverty, material deprivation, and social protection dimensions of the right to a social minimum Section 3.5.4 is devoted to a comparative analysis between children with disabilities on the one hand and Roma children on the other hand.

3.5.1 Intersectional Categories for Persons with Disabilities, Children and Roma

This section considers possible intersections of disadvantage between my three case studies. The more intersectionality manifests itself in overlapping and multiple disadvantages, the more complex the analysis becomes. Figure 21 below shows my three case studies as three overlapping circles, labelled as persons with disabilities, children, and Roma. The graph shows two-dimensional intersections (Roma children, Roma with disabilities, children with disabilities), and the three-dimensional intersection of Roma children with disabilities.



Figure 21. Possible Intersections Between Persons with Disabilities, Children, and Roma

⁵⁶⁶ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139.

In addition, the non-depicted gender dimension adds additional complexity. A graph with the gender perspective as an additional circle would overlap on four dimensions of discrimination in the type of a female Roma child with a disability. Hence, Roma girls, Roma women with disabilities, girls with disabilities, and Roma girls with disabilities will need to be included in the analysis. However, gender comes into play already on the two-dimensional level in the form of female children, female Roma and female persons with disabilities.

Mathematically, the intersections of four dimensions would result in 16 constellations. However, I do not consider women and not-women as separate individual groups, but only consider gender as an additional category of intersectionality if one of my three case studies is affected. For example, my analysis includes a distinction between Roma girls and boys, but not between boys and girls in general. Hence, for the purposes of my thesis, I am interested in a total of 11 intersectional constellations. In addition to my three non-intersectional case studies (persons with disabilities, Roma, and children), the following 11 intersectional constellations could be considered: Roma women, girls, women with disabilities, children with disabilities, girls with disabilities, Roma children, Roma girls, Roma with disabilities, Roma Women with Disabilities, Roma children with disabilities, and Roma girls with disabilities. In the COs addressed to the EU MS from 2009-2019, the HRTBs have started to address issues of intersectionality on two dimensions, such as Roma children or children with disabilities. However, it is very rare to find COs dealing with three or four intersectional categories. In the following, I analyse two groups' right to a social minimum in depth, namely children with disabilities and Roma children.

3.5.2 Children with Disabilities

When it comes to the HRTBs, children with disabilities could be protected from three different angles. First, they could be mentioned by CESCR as on the disadvantaged or marginalized groups that are emphasized throughout the COs. Secondly, they could be covered under the CRPD and thirdly under the CRC. Looking at these three options from a historical point of view, the ICESCR was the first to be adopted. Yet, with its generalist nature, it is not very likely that children with disabilities would receive a "special treatment" over and above other disadvantaged and marginalized groups.

At first sight, it is surprising that Art 2(2) ICESCR does not explicitly cover disability as one of the grounds under which discrimination is prohibited. This

'oversight' was remedied by a wide understanding of 'other status', which includes disability. In 1994, CESCR published GC 5 on persons with disabilities, which explicitly mentions children with disabilities.⁵⁶⁷ In it, CESCR normatively anchors children with disabilities in Art10(3) ICESCR while at the same time quoting the 'corresponding provisions' of the CRC.⁵⁶⁸

This reference to the 'corresponding provisions' shows that in 1994, CESCR was well aware of the developments that led to the entry into force of the CRC in 1990.⁵⁶⁹ The CRC was the first international human rights treaty which recognised children with disabilities in a separate Article in the Treaty itself. Art 23 CRC is fully devoted to children with disabilities, recognizing the 'full and decent life' that children with disabilities should enjoy, 'in conditions which ensure dignity'. As established in chapter 2 of my thesis, this emphasis on human dignity is a core characteristic of the human rights perspective. Besides Art 23 CRC, children with disabilities are protected under the CRC's general non-discrimination provision in Art 2(1) CRC. Finally, the CRC Committee has further elaborated on the rights of children with disabilities in GC 9.⁵⁷⁰ When the CRC Committee's GC 9 was adopted in 2006, the negotiations for the CRPD which would finally enter into force in 2008 were long on the way. Hence it is not a surprise that children with disabilities are specifically protected under Art 7 CRPD.

In order to analyse the concerns of the HRTBs regarding children with disabilities, I conducted a key-word search with the MAXQDA software with the aim of filtering all COs where one of the five HRTBs is concerned children with disabilities. From a technical point of view, I not only searched for the keyword 'children with disabilities', but also 'child with disabilities' and 'boy(s) / girl(s) with disabilities'. This search resulted in 659 coded segments stemming from 68 COs across four HRTBs (CESCR, CRC, CRPD and CEDAW). Figure 22 below depicts the results-window as displayed in the MAXQDA software.

⁵⁶⁷ CESCR, 'GC 5: Persons with Disabilities' (n 540) paras 32, 35.

⁵⁶⁸ *ibid* 32.

⁵⁶⁹ CRC (n 56).

⁵⁷⁰ CRC Committee (n 543).

ANY: children with disabilities child with a disability child with disabilities boy with a disability boy with disabilities girls with disabilities girl with a disability

Vorschau	Dokumentgruppe	Dokumentname
The Committee notes with concern that many children with disabilities in the State party still attend special schools and are not included	COs CESC	2-BE-2013-4th-COs
The Committee recommends that the State party strengthen its efforts to include children with disabilities in the mainstream education system, by	COs CESC	2-BE-2013-4th-COs
disabilities in the mainstream education system, by adapting existing facilities and taking all the necessary measures to ensure that children with disabilities fully	COs CESC	2-BE-2013-4th-COs
The Committee is further concerned about the low rate of enrolment of children with disabilities in mainstream schools (arts	COs CESC	3-BG - CESC COs ...
awareness among parents belonging to different ethnic groups of the benefits of ethnic diversity; (d) Facilitate the access of children with disabilities to	COs CESC	3-BG - CESC COs ...
It is also concerned that children with disabilities still face difficulties in participating in inclusive education owing to the insufficient	COs CESC	4-CY-2016-6th-COs
of early identification of disabilities, the Committee remains concerned that the mechanism is not effective in identifying and supporting children with disabilities at	COs CESC	4-CY-2016-6th-COs

Figure 22. Excerpts of the MAXQDA Keyword-Search for Children with Disabilities across the HRTBs

Since the results as depicted in Figure 22 do not differentiate the context within the COs, as a next step I conducted a manual check of all results from the key-word search. As explained in the methodology section of the introduction, I code concerns and recommendations together, due to the HRTBs' shift in numbering paragraphs. The end result consists in a comprehensive code named "children with disabilities" which consists of all instances where one of the HRBTs is concerned about children with disabilities in one of the COs addressed to the 28 EU MS from 2009-2019. As a next step, I analyse the poverty and material deprivation dimensions⁵⁷¹ of the right to a social minimum for children with disabilities.

3.5.2.1 The Poverty Dimension for Children with Disabilities

In order to analyse the concerns of the HRTBs regarding the poverty dimension for children with disabilities, my starting point was the code named "children with disabilities" which consists of all the instances where one the HRTBs is concerned about children with disabilities in one of the COs addressed to the 28 EU MS from 2009-2019. In order to filter out the poverty references, I conducted a new keyword-search across all these instances, searching for 'poverty', 'poor', and 'lack of (financial) resources'. This search resulted in 74 coded segments from 16 COs, stemming only

⁵⁷¹ The work dimension was not relevant for my analysis, since the HRTBs did not specify any childcare-issues that would prevent mothers of children with disabilities from working.

from the CRPD and CRC. In a next step, I manually checked these 74 coded segments to filter out any references that did not concern the poverty dimension of the right to a social minimum for children with disabilities. For example, a high number of results of the automatic keyword search concerned the adjective “poor”, connected to other areas of life, e.g., “poor accessibility”, “poor infrastructure” etc. Since these adjectives do not concern the poverty dimension of the right to a social minimum, I did not include them in my analysis.

The resulting code named “CD-P” (children with disabilities – poverty dimension of the right to a social minimum) consists of 14 coded segments, of which six instances stem from the CRPD and eight instances from the CRC. These coded segments translate into COs to nine EU MS where either the CRPD or the CRC Committee was specifically concerned about child poverty (see also Table 5 below). This seems to suggest that both HRTBs put almost equal importance on poverty of children with disabilities. The CRC Committee addressed all 28 EU MS in a CO from 2009-2019, whereas the CRPD only addressed 22 EU MS in the same time period.⁵⁷² Table 5 qualitatively compares the CRPD and CRC Committee’s concerns regarding the poverty dimension of the right to a social minimum for children with disabilities.

⁵⁷² See Appendix 3 for a full overview of the CRC Committee’s most recent reporting cycle addressing the EU MS (2009-2019), and Appendix 2 for the CRPD Committee.

Table 5. Qualitative Comparison between the CRPD and CRC Committee’s Concerns regarding the Poverty Dimension of the Right to a Social Minimum for Children with Disabilities

EU MS	CRPD	CRC
BG		‘families with children with disabilities are at higher risk of experiencing multidimensional poverty’ ⁵⁷³
CY	‘inadequate financial allowances available for families of children with disabilities’ ⁵⁷⁴	
CZ	‘adverse effect on the enjoyment of the rights to an adequate standard of living and to social protection of persons with disabilities, including boys and girls with disabilities’ ⁵⁷⁵	
IT	‘high level of poverty among persons with disabilities and their families, in particular children with disabilities’ ⁵⁷⁶	
PL		‘families with children with disabilities are at a higher risk of experiencing multidimensional poverty’ ⁵⁷⁷
PT		‘children with disabilities, who are disproportionately at risk of poverty’ ⁵⁷⁸
RO		‘Ensure that social services are (...) focusing on children living below the poverty line, in particular (...) families with children with disabilities’ ⁵⁷⁹
SI		‘children with disabilities fully enjoy their rights [...to an] adequate standard of living’ ⁵⁸⁰
UK	‘higher level of poverty among families with children with disabilities’ ⁵⁸¹	‘rate of child poverty remains high, disproportionately affects children with disabilities, children living in a family or household with a person or persons with a disability’ ⁵⁸²

For better readability, only one coded segment per CO was included in the Table. To decide which one to include, I chose the one which brought out the poverty dimension of the right to a social minimum for children with disabilities more fully. For example,

⁵⁷³ CRC Committee, COs to BG 2016, paras 46-47.

⁵⁷⁴ CRPD Committee, COs to CY 2017, paras 19-20.

⁵⁷⁵ CRPD Committee, COs to CZ 2015, paras 53-54.

⁵⁷⁶ CRPD Committee, COs to IT 2016, paras 71-72.

⁵⁷⁷ CRC Committee, COs to PL 2015, paras 40-41.

⁵⁷⁸ CRC Committee, COs to PT 2014, paras 45-46.

⁵⁷⁹ CRC Committee, COs to RO 2017, para 37.

⁵⁸⁰ CRC Committee, COs to SI 2013, paras 50-51.

⁵⁸¹ CRPD Committee, COs to UK 2017, paras 20-21.

⁵⁸² CRC Committee, COs to UK 2016, paras 70-71.

in the CRPD Committee's COs to the UK in 2017, I coded two separate instances as "CD-P". One instance was under the heading 'children with disabilities', where the CRPD Committee is concerned about the 'lack of a policy framework addressing the poverty of many families with children with disabilities', giving a recommendation of 'eliminating the higher level of poverty among families with children with disabilities'.⁵⁸³ The second instance is found under the heading 'adequate standard of living and social protection', where the CRPD Committee is concerned about 'severe economic constraints among persons with disabilities and their families, particularly families with children with disabilities, including increased reliance on food banks'.⁵⁸⁴ Even though 'severe economic constraints' should be considered a synonym of poverty, the recommendation of 'eliminating the higher level of poverty among families with children with disabilities' speaks more directly to the poverty dimension of the right to a social minimum. Hence, only this instance was recorded in Table 5.

Among the nine EU MS that received a particular concern regarding child poverty, only the UK was covered by both the CRPD and the CRC Committee. One of the reasons could be a cross-fertilization of the COs issued by the CRC Committee in 2016 into the reporting cycle by the CRPD Committee which culminated in COs adopted in 2017. In other words, the close timing between those two reporting cycles suggests that the UK did not have any time to implement the CRC Committee's concerns before the CRPD Committee adopted its respective COs. Table 5 also shows that only by reading both Committees' COs in parallel does one get a fairly complete picture of which EU MS are particularly in need of addressing the poverty dimension of the right to a social minimum for children with disabilities. At the same time, CESCR's all-encompassing mandate does not seem to be specific enough for it to capture the particular experience of poverty for children with disabilities.

Both the CRPD Committee and the CRC Committee sometimes address child poverty directly under the heading "children with disabilities" (protected under Art 7 CRPD and Art 23 CRC respectively).⁵⁸⁵ At the same time, both Committees also address poverty of children with disabilities under the heading 'standard of living'.⁵⁸⁶

⁵⁸³ CRPD Committee, COs to UK 2017, paras 20-21.

⁵⁸⁴ CRPD Committee, COs to UK 2017, paras 58-59.

⁵⁸⁵ CRPD Committee, COs to CY 2017, paras 19-20; COs to UK 2017, paras 20-21; CRC Committee, COs to PT 2014, paras 45-46; COs to SI 2013, paras 50-51.

⁵⁸⁶ While the CRC Committee uses the heading 'standard of living', the CRPD Committee utilizes the header 'adequate standard of living and social protection', since Art 28 CRPD merges the two concepts that have been addressed in separate articles in previous treaties like the ICESCR and the

In Italy, the CRPD Committee is concerned about the inadequate policy framework and ‘monitoring mechanisms’ on child poverty.⁵⁸⁷ Under the heading ‘standard of living’, the CRC Committee goes on to point out the ‘high level of poverty among persons with disabilities and their families, in particular children with disabilities’.⁵⁸⁸ The CRC Committee links poverty of children with disabilities to the heading ‘family environment’, pointing out the negative effect of the economic crisis.⁵⁸⁹ In one instance, the CRC Committee addresses the poverty dimension of the right to a social minimum for children with disabilities in Romania under the heading of ‘non-discrimination’, pointing out that the ‘Committee remains deeply concerned that (...) children with disabilities (...) continue to face discrimination with regard to access to (...) a decent standard of living’.⁵⁹⁰ While this concern does not mention the words ‘poverty’ or ‘poor’ directly, it is not a stretch to consider the lack of access to a decent standard of living as having a direct bearing towards the poverty dimension. This example also speaks to the limits of the MAXQDA software. While simultaneous keyword-searches across a large number of documents do help to gain a first overview of the HRTBs’ concerns, it is never an end in itself. Only a thorough manual reading of the COs helps to navigate the nuances of the HRTBs’ engagement with children of disabilities experience of poverty.

3.5.2.2 The Material Deprivation Dimension for Children with Disabilities

In order to analyse the concerns of the HRTBs regarding the material deprivation dimension for children with disabilities, I once again started with the code named ‘children with disabilities’, consisting of all instances where one the HRTBs is concerned about children with disabilities in one of the COs addressed to the 28 EU MS from 2009-2019. In order to filter out the references referring to material deprivation, I conducted a keyword-search in MAXQDA across all these instances, searching for ‘material deprivation’, ‘housing’, ‘food’, ‘clothing’, ‘water and sanitation’. The search resulted in 35 instances stemming from 11 COs across three HRTBs

CRC. See CRPD Committee, COs to CZ 2015, paras 53-54; COs to IT 2016, paras 71-72; CRC Committee, COs to BG 2016, paras 46-47; COs to PL 2015, paras 40-41; COs to RO 2017, para 37; COs to UK 2016, paras 70-71.

⁵⁸⁷ CRPD Committee, COs to IT 2016, paras 17-18.

⁵⁸⁸ CRPD Committee, COs to IT 2016, paras 71-72.

⁵⁸⁹ CRC Committee, COs to PT 2014, paras 39-40.

⁵⁹⁰ CRC Committee, COs to RO 2017, paras 16-17.

under the heading ‘right to education’, linking it to discrimination against children with disabilities.⁵⁹¹

In order to contrast the CRPD and CRC Committee’s concerns about material deprivation, I switched the quantitative results displayed by the code matrix browser into the so-called interactive segment matrix. This tool allows me to see all COs that I coded with “CD-MD” in two columns, one for the CRPD Committee and one for the CRC Committee respectively. With this tool I can examine all coded segments, not only those that I counted in the code matrix browser. While the results of the code matrix browser as displayed in Figure 23 show that the CRPD Committee issued concerns to three EU MS and the CRC Committee to four EU MS, the interactive segment matrix shows that the CRC Committee’s concerns to four EU MS translate into nine coded segments. Table 6 below compares the seven EU MS that received a CO from either the CRPD or the CRC Committee regarding the sub-categories of the material deprivation dimension of the right to a social minimum for children with disabilities.

Table 6. Comparative Analysis of the Material Deprivation Dimension for Children with Disabilities

	Housing	Food	Water and Sanitation	Fuel
BG	CRC 2016, paras 46-47	CRC 2016, paras 46-47	CRC 2016, paras 46-47	
EL	CRC 2012, para 17	CRC 2012, para 17		CRC 2012, para 17
HR	CRPD 2015, paras 11-12			
PL	CRC 2015, para 41	CRC 2015, para 41	CRC 2015, para 41	
RO	CRC 2017, para 37	CRC 2017, para 37	CRC 2017, para 37	
SI	CRPD 2018, paras 10-11			
UK		CRPD 2017, paras 58-59		

Table 6 shows that both the CRC and the CRPD Committees usually express their concerns about the material deprivation dimension of the right to a social minimum for children with disabilities by listing one or more sub-categories. This is not surprising, given that the material deprivation is a social policy category stemming from the

⁵⁹¹ CESCR, COs to IE 2015, para 31.

AROPE-indicator, whereas in particular the right to food and the right to housing are linked to a long history of jurisprudence and academic commentary. The right to water has a more recent history. In 2002, CESCR normatively established the right to water in its GC 15.⁵⁹² Despite the authoritative nature of this general comment, the exact nature of the right to water has been disputed, with particular regards to the question of justiciability. This is probably why the CRC only refers to children with disabilities' right to water and sanitation in its more recent COs to the EU MS.

Finally, the sub-category of 'fuel' regarding the material deprivation dimension has not been fully promoted into a human right in either jurisprudence or academic discourse. Nevertheless, policymakers and academic researchers on the EU have gained an interest in the subject of fuel/energy poverty, with new suggestions for its relevance and how to study it. Hence, the CRC Committee's reference to 'basic needs' also comprising 'fuel' (beyond the 'usual' food and housing) in its COs to Greece in 2012 can be considered ahead of its times.⁵⁹³

3.5.3 Roma Children

In many aspects, Roma children do not enjoy the same visibility as children with disabilities. Neither the CRC, nor the CERD have specific articles protecting Roma children. Instead, Roma children are more indirectly pinpointed, for example via Art 2(1) CRC or Art 1 CEDAW. While the CERD Committee adopted a General Recommendation on discrimination against Roma in 2000,⁵⁹⁴ no such GR or GC exists for Roma children specifically. This comparative lack of attention in the international human rights treaties, GCs or GR does not mean, however, that Roma children are not on the radar of the HRTBs at all. On the contrary, they feature prominently throughout the COs addressed to the EU from 2009-2019. To filter the coded segments that address Roma children, I conducted a key-word search with the MAXQDA software, searching for 'Roma child(ren)', 'Roma boy(s)' and 'Roma girl(s)'. The search resulted in 241 coded segments, stemming from 56 COs and all five HRTBs. I saved my search results in an automatic code named 'Autocode – ANY: Roma children'. Figure 24 below depicts these 241 coded segments in a quantitative way across the five HRTBs, displayed via an extract of the code matrix browser

⁵⁹² CESCR, 'GC 15: The Right to Water' (n 44).

⁵⁹³ CRC Committee, COs to EL 2012, paras 17-18.

⁵⁹⁴ CERD Committee, 'General Recommendation XXVII on Discrimination against Roma' (n 533).

function in MAXQDA. The Figure shows that the CRC Committee seems to be the one that – purely numerically speaking – puts the most emphasis on Roma children in its COs to the EU MS from 2009-2019.

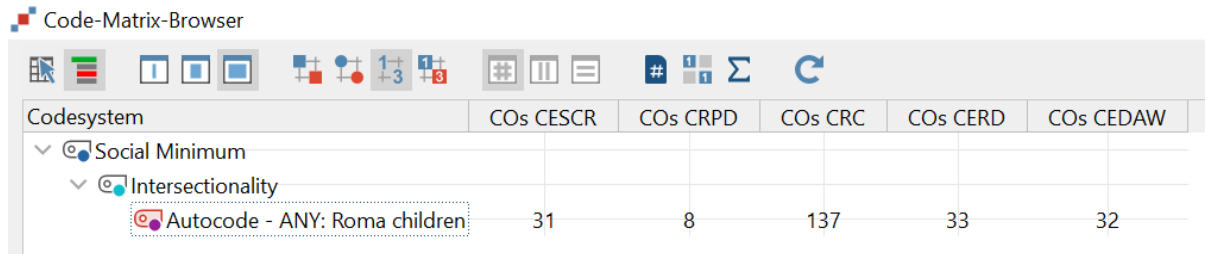


Figure 24. Prevalence of Roma Children across the HRTBs

When considering how many EU MS received a CO with a concern about Roma children (instead of counting the total number of coded segments), the emphasis slightly shifts. Figure 25 shows that the CRC Committee issues the highest number of concerns regarding Roma children (to 17 EU MS). The CEDAW Committee comes second place with concerns addressed to 13 EU MS, followed by CESC (12 EU MS) and the CERD Committee (11 EU MS). Last but not least, the CRPD Committee made a remark on Roma children in three EU MS. In sum, it is surprising that Roma children feature so consistently across the EU MS and the HRTBs, even though the Roma population is not evenly spread across the different EU MS.

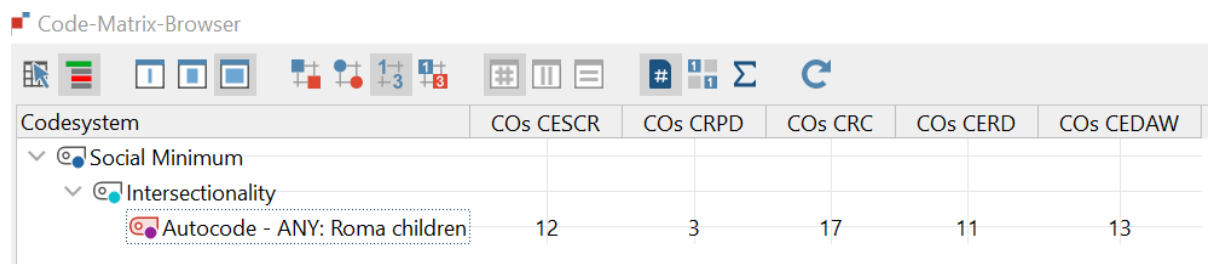


Figure 25. Code Matrix Browser: Number of EU MS Receiving a Concern about Roma Children by the HRTBs

As a next step, I manually checked the automatically coded segments on Roma children. By filtering out only those that relate to the right to a social minimum, I was left with 82 coded segments across the five HRTBs. Figure 26 depicts the code-matrix-browser for my code “Roma Children”, counting each coded segment only once per

EU MS.⁵⁹⁵ The graph shows that the CRC Committee has – once again – the most concerns about Roma children, issuing concerns to a total of 19 EU MS.

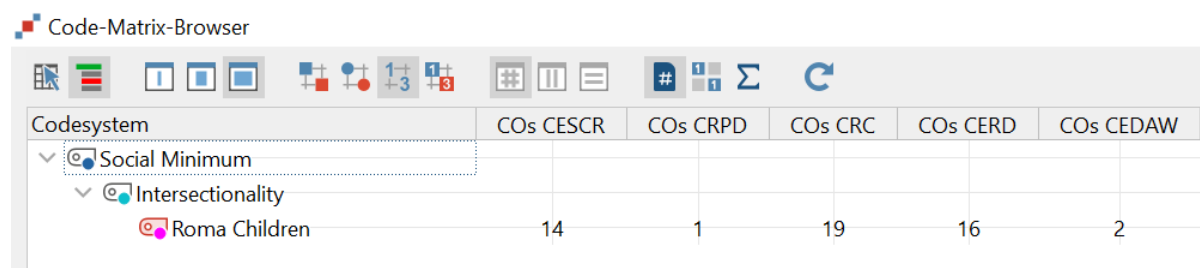


Figure 26. Roma Children’s Right to a Social Minimum across the HRTBs

In the next sub-sections, I analyse these COs more in depth, by specifying the poverty and material deprivation dimensions⁵⁹⁶ for Roma children respectively.

3.5.3.1 The Poverty Dimension for Roma Children

The poverty dimension of the right to a social minimum for Roma children is most prevalent for the CRC Committee, issuing concerns to seven EU MS, as specified in Table 7 below. The CRC Committee is mostly concerned about poverty under the heading ‘standard of living’ (five times), followed by ‘non-discrimination’ (three times). The outlier is Greece, where the CRC Committee issues a concern directly under the heading ‘Roma children’.⁵⁹⁷

Table 7. The Poverty Dimension for Roma Children (CRC Committee)

EU MS	CRC
BG	Standard of Living ‘Roma families (...) at higher risk of experiencing multidimensional poverty’ ⁵⁹⁸
EL	Roma children ‘deeply concerned at the negative attitudes, prejudices and discrimination against (...) Roma children, especially with regard to (...) poverty’ ⁵⁹⁹
FI	Non-discrimination ‘concerned at the social exclusion and structural discrimination of the Roma population, which leads to (...) a poor standard of living for Roma children’ ⁶⁰⁰
IE	Standard of Living ‘poverty disproportionately affects children from Traveller, Roma and refugee backgrounds’ ⁶⁰¹
RO	Non-discrimination

⁵⁹⁵ For reasons of space, I did not include the Figure depicting all coded segments here.

⁵⁹⁶ The work dimension was not relevant for my analysis, since the HRTBs did not specify any childcare-issues that would prevent mothers of Roma children from working.

⁵⁹⁷ CRC Committee, COs to EL 2012, para 71.

⁵⁹⁸ CRC Committee, COs to BG 2016, para 46.

⁵⁹⁹ CRC Committee, COs to EL 2012, para 71.

⁶⁰⁰ CRC Committee, COs to FI 2011, para 25.

⁶⁰¹ CRC Committee, COs to IE 2016, para 59.

EU MS	CRC
	<p>'Roma children (...) continue to face discrimination with regard to access to (...) a decent standard of living'⁶⁰²</p> <p>Standard of living</p> <p>'focusing on children living below the poverty line, in particular Roma families'⁶⁰³</p>
SI	<p>Standard of living</p> <p>'children belonging to minority groups, in particular Roma children, are poorer than children belonging to the majority population'⁶⁰⁴</p>
SK	<p>Non-discrimination</p> <p>'Roma children, especially in segregated settlements, continue to face multiple forms of discrimination, mainly in the fields of (...) standard of living,'⁶⁰⁵</p> <p>Standard of living</p> <p>'disproportionately negative effect on the socioeconomic well-being and right to social security of marginalized Roma families and their children'⁶⁰⁶</p>

The other HRTBs do issue concerns about the disproportionate poverty rates of the Roma community in many EU MS, but do not specify Roma children. This is why I do not include them in my count. While the CERD Committee does issue concerns about the poverty dimension of the right to a social minimum for Roma, there is no specification regarding Roma children directly. For example, in its COs to Poland in 2019, the CERD Committee is concerned about the 'extreme poverty and substandard living conditions faced by Roma in segregated neighbourhoods'.⁶⁰⁷ Since most Roma families have children, I could have included these COs into my count of the poverty dimension for Roma children. However, I decided against this, as not to read my preconceptions and stereotypes (e.g., Roma families having many children) into the HRTBs' COs. Another reason for not including those COs into my count is the fact that the CERD Committee does mention Roma children in other COs that do not mention the poverty dimension, in particular regarding the issue of school segregation. This shows that the CERD Committee has not "forgotten" Roma children, but that their focus is on *everybody* in the Roma community, not just children. Similarly, it is due to the CRC Committee's clear mandate and focus on *all children*, which lead to an emphasis on particularly disadvantaged groups of children (like Roma children).

⁶⁰² CRC Committee, COs to RO 2017, para 16.

⁶⁰³ CRC Committee, COs to RO 2017, para 37.

⁶⁰⁴ CRC Committee, COs to SI 2013, para 58.

⁶⁰⁵ CRC Committee, COs to SK 2016, para 15.

⁶⁰⁶ CRC Committee, COs to SK 2016, para 42.

⁶⁰⁷ CERD Committee, COs to to PL 2019, para 21.

3.5.3.2 The Material Deprivation Dimension for Roma Children

I have argued before that the HRTBs' tend to emphasize the material deprivation dimension of the right to a social minimum for the Roma. Yet, does this also hold true for Roma children? My analysis shows that the material deprivation dimension for Roma children is closely linked to the poverty dimension of the right to a social minimum. As with the poverty dimension, the CRC Committee routinely points out the abhorrent living conditions under which Roma children have to survive in several EU MS. In concrete numbers, the CRC Committee is concerned in its COs addressed to eight EU MS and the CERD Committee in its COs addressed to two EU MS.⁶⁰⁸ Table 8 below lists the different sub-categories of the material deprivation dimension, according to the CRC and CERD Committees.

⁶⁰⁸ CRC Committee, COs to BG 2016, paras 46, 52; COs to EL 2012, para 71; COs to ES 2018, para 37; COs to IE 2016, para 69; COs to RO 2017, para 37; COs to SK 2016, para 15.

Table 8. The Material Deprivation Dimension for Roma Children

EU MS	Housing Evictions	Housing General	Housing Substandard	Water & Sanitation	Food
Bulgaria ⁶⁰⁹	CRC			CRC	
Greece ⁶¹⁰		CRC			
Spain ⁶¹¹	CRC		CRC		
Ireland ⁶¹²			CRC	CRC	
Italy ⁶¹³	CERD		CERD		
Poland ⁶¹⁴	CERD		CERD		
Romania ⁶¹⁵		CRC		CRC	CRC
Slovenia ⁶¹⁶			CRC	CRC	
Slovakia ⁶¹⁷		CRC			
UK ⁶¹⁸		CRC			

As the Table shows, concerns about housing are the most prevalent, in particular regarding forced evictions and sub-standard housing conditions. Often, concerns about water and sanitation are mentioned in the same sentence as the concern substandard housing.

3.5.4 Comparative Analysis between Children with Disabilities and Roma Children

How then can we compare how the different dimensions of the right to a social minimum play out for children with disabilities on the one hand and Roma children on the other hand? Table 9 below contrasts the HRTBs' take on the poverty and material deprivation dimensions of the right to a social minimum.

⁶⁰⁹ CRC Committee, COs to BG 2016, paras 46, 52.

⁶¹⁰ CRC Committee, COs to EL 2012, para 71.

⁶¹¹ CRC Committee, COs to ES 2018, para 37.

⁶¹² CRC Committee, COs to IE 2016, para 69.

⁶¹³ CERD Committee, COs to IT 2017, para 21

⁶¹⁴ CERD Committee, COs to PL 2019, para 21

⁶¹⁵ CRC Committee, COs to RO 2017, para 37.

⁶¹⁶ CRC Committee, COs to SI 2013, para 58.

⁶¹⁷ CRC Committee, COs to SK 2016, para 15.

⁶¹⁸ CRC Committee, COs to UK 2016, para 70.

Table 9. Dimensions of the Right to a Social Minimum for Children with Disabilities and Roma Children

	CESCR	CRPD	CRC	CERD	CEDAW
Children with Disabilities	11	22	28		1
- Poverty		4	6		
- Material Deprivation	1	3	4		
- Social Protection		15	17		
Roma Children	14	1	19	16	2
- Poverty	1		7	1	
- Material Deprivation			8	2	
- Social Protection			7		1

The table shows that the HRTBs' have different priorities, depending mostly on their treaty-specific mandates. For example, it is obvious that the CERD Committee does not mention children with disabilities in their COs to the EU MS, since this particular disadvantaged group does not fall under the CERD Committee's mandate of racial discrimination. Similarly, it is no surprise that the CRPD committee does not tend to mention Roma children, since this group does not fall under the CRPD Committee's mandate of discrimination on the grounds of disability. At first sight, the table seems to point towards a well-balanced picture when it comes to comparing the instances of how many EU MS have received COs on children with disabilities and Roma children respectively. However, this comparison fails to show that Roma children are not equally present across the EU MS. Indeed, only few EU MS have a sizeable Roma population.⁶¹⁹ If one took only those EU MS with a sizeable Roma population into account, CESCR would have voiced its concern about Roma children failing to realise their right to a social minimum in all of those EU MS.

3.6 Conclusion

In this chapter, I reframed the minimum core doctrine as a substantive right to a social minimum, defined as non-discriminatory access to minimum essential levels of subsistence. Establishing the right to a social minimum as a substantive right makes it more tangible and easier to realise. In order to move beyond the abstract normative content of the right to a social minimum as distilled from CESCR's GCS, I have

⁶¹⁹ Compare section 5.5.1 of this thesis for a discussion on the challenges with counting how many Roma are present in which EU MS.

analysed CESCR's COs to the EU MS from 2009-2019 using a hybrid of the classical doctrinal method and qualitative content analysis with MAXQDA. The use of this software has allowed me to analyse the COs systematically, using a coding-frame which gives me immediate access to the primary sources in a structured way.

Since 'non-discriminatory access' is a crucial sub-component of my definition of the right to a social minimum, I have identified three particularly disadvantaged groups across the EU MS which will serve as in-depth case studies in subsequent chapters of this Thesis. In order to distil the normative content of the right to a social minimum for persons with disabilities, children, and Roma, I have widened my primary sources beyond CESCR to include the COs of four additional group specific HRTBs. The biggest advantage of including the group specific treaty bodies is their deep expertise on their specific group.

In Section 3.2, I have distilled the specific normative content of the right to a social minimum for the 28 EU MS in the period of 2009-2019 according to CESCR, using a hybrid of doctrinal analysis and qualitative content analysis. In Section 3.3, I have widened my analysis to include the group specific HRTBs, in order to specify how EU MS should realise the right to a social minimum for my three case studies: persons with disabilities, children and Roma. I have identified the poverty, material deprivation and work dimensions to the right to a social minimum. In section 3.4, I addressed intersectionality, by analysing the prevalent dimensions of the right to a social minimum for children with disabilities on the one hand, and Roma children on the other hand. I fleshed out the important differences and similarities between the groups, the EU MS and the HRTBs. While for persons with disabilities, the work dimension is prevalent, for children it is the poverty dimension and for Roma the material deprivation dimension. However, this clear categorisation does not hold true when taking intersectionality into account, which I focused on in section 3.5. EU MS need not only be aware of the differences between groups, but also about the crucial importance of considering the added layers of disadvantage stemming from intersectionality. This will allow them to realise the right to a social minimum not only for the general population, but also for specific disadvantaged and marginalized groups. Summing up, this chapter serves as the normative foundation for the remainder of this thesis, in particular my analysis of the explanatory conditions which hinder EU MS from realising the right to a social minimum for my three case studies.

Chapter 4: Realising the Right to a Social Minimum

4.1 Introduction

*Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient. It is the work of lawyers to make the law in action conform to the law in the books.*⁶²⁰

Few works can claim more impact than Pound's famous article on the difference between 'Law in Books' and 'Law in Action', published over a century ago. However, the article's central message, summarized in the above-cited quote has, worryingly, not lost any of its significance. There is still a big gap between 'law in books' and 'law in action'. Even though interdisciplinary research has become more mainstream, there has hardly been any improvement from Pound's critique of the perceived self-sufficiency of lawyers. Lawyers still tend to struggle with the task of taking the insights of other disciplines on board. In general, lawyers tend to perceive of justiciability – the ability of claiming rights in courts – as the panacea for all questions of how the gulf between 'law in books' and 'law in action' could finally be abridged. In this chapter, I challenge this over-reliance on justiciability as an explanatory condition to realise rights.

In chapter 3, I have distilled the normative content of the right to a social minimum from an international human rights law perspective. However, the story of legal human rights is in open conflict with another story: the lived reality of poverty and material deprivation for many disadvantaged and marginalized groups, even across the predominantly rich EU MS. How does the lived reality of extreme poverty in Europe fit together with the vast number of human rights guarantees, fundamental rights, social pillars, scoreboards, and indicators that are all promising yet failing to protect one the most vulnerable from accessing their most basic human rights? In other words, what is the value of a multitude of legal paper obligations, human rights reports, and high-level meetings if they are not corresponding to the lived reality on the ground?

Hence, the gap between 'law in books' and 'law in action' lies at the heart of a certain strand of legal human rights scholarship that aims at translating rights into reality. Their basic claim is that if human rights are nothing more than legal rights on

⁶²⁰ Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12, 36.

paper, they do not help in achieving the practical realisation of rights.⁶²¹ The rights gap creates concrete demands ‘to move from abstract conceptualization to practical concretization’.⁶²² Due to the gap between human rights’ mighty promises and the contrasting, imperfect reality, human rights have been defined as ‘bridging concepts’, connecting the ‘is’ and the ‘ought’.⁶²³ Instead of being content with abstract norms, the rights gap mandates that we move towards ‘practical concretization’.⁶²⁴ A rich strand of literature exists on this rights gap, pondering on the question of how to achieve this practical realisation of rights. Indeed, human rights exist to provide a call to action and remedy these gaps when they arise.

As discussed above, the first scholarly mention of some kind of ‘gap’ is the one between ‘law in books’ and ‘law in action’.⁶²⁵ How to define ‘law in action’ has been assessed by several separate strands of literature. One of these strands concerns itself with the analysis of quantifiable changes after the ratification of international human rights treaties, defined as a ‘compliance gap’.⁶²⁶ The compliance gap persists because states tend to commit themselves to international human rights norms (‘commitment’) without necessarily acting upon those norms (‘compliance’). Most of this literature tends to be sceptical of human rights’ potential for positive change, but nevertheless does find quantitative proof of some positive change.⁶²⁷ One of the most sophisticated global comparative quantitative studies found that international human rights law had at least a somewhat positive impact on state behaviour – even when controlling for general improvement of living standards during the studied time period.⁶²⁸ A recent study has shown that in the context of civil and political rights, it is

⁶²¹ Haglund and Stryker (n 57); DeLaet (n 57).

⁶²² David Bilchitz, ‘Fundamental Rights as Bridging Concepts: Straddling the Boundary Between Ideal Justice and an Imperfect Reality’ (2018) 40 *Human Rights Quarterly* 119, 142.

⁶²³ *ibid* 128.

⁶²⁴ *ibid* 142.

⁶²⁵ Pound (n 617) 36.

⁶²⁶ Emilie M Hafner-Burton and Kiyoteru Tsutsui, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (2005) 110 *American Journal of Sociology* 1373; Cole (n 57).

⁶²⁷ Compare for example Ann Marie Clark, ‘The Normative Context of Human Rights Criticism: Treaty Ratification and UN Mechanisms’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013) 144 who first shows a negative effect between commitment and compliance, but in the end concludes that due to the ‘tension between compliance and commitment’, change can become effective.

⁶²⁸ Todd Landman, *Protecting Human Rights: A Comparative Study* (Georgetown University Press 2005).

not only ratification but also accession and even the mere act of signature (without ratification) that tends to improve human rights outcomes.⁶²⁹

However, all of these studies attesting to positive effects of international human rights law acknowledge the fact that the gap between human rights' mighty promises and the imperfect reality of our world still exists. This gap has been described as existing between 'human rights principles and practices',⁶³⁰ between 'de jure and de facto protection',⁶³¹ between 'legal theory and political behaviour',⁶³² or even between 'ideals (...) and the reality'.⁶³³ Despite numerous studies grappling with this gap, there is no general agreement regarding which strategies are needed to close the gap.

Among legal human rights scholars, there is a preoccupation with formal legal means and in particular with justiciability.⁶³⁴ At the same time, among scholars of other disciplines – such as sociology, international relations, social policy, or economics – there is little understanding of this preoccupation with formal legal means and justiciability. In this thesis, and in particular in this chapter, I argue that formal legal means are anything but sufficient to fully realise rights and close the gap between principles and practices. It is almost paradoxical that many legal human rights scholars keep pointing out the rights gap, and argue for justiciability as the perceived panacea, but without any noticeable improvement for rights realisation, despite a very high level of justiciability in key jurisdictions such as South Africa or Brazil. On the contrary, justiciability can even produce harmful effects for the realisation of socio-economic rights on a more systemic level. According to Ferraz's study, making the right to health justiciable in Brazil has mostly benefited the richer segments of society in gaining access to expensive medicines by claiming their right to health before the courts. However, justiciability did not achieve justice on a systemic level, e.g., in the form of better access to essential primary healthcare for the poorer segments of society that

⁶²⁹ Audrey L Comstock (ed), *Committed to Rights: UN Human Rights Treaties and Legal Paths for Commitment and Compliance*, vol 1 (Cambridge University Press 2021).

⁶³⁰ Ann Marie Clark, 'Laws, Talk, and Human Rights: The Impact of Treaty Ratification, UN Criticism, and Democratic Change on Torture' (2018) 17 *Journal of Human Rights* 418, 422.

⁶³¹ Landman (n 625) 34.

⁶³² David P Forsythe, *Human Rights in International Relations* (Third edition, Cambridge University Press 2012) 6.

⁶³³ Michael Freeman, 'Conclusion: Reflections on the Theory and Practice of Economic and Social Rights' in Lanse Minkler (ed), *The State of Economic and Social Human Rights* (Cambridge University Press 2012) 158.

⁶³⁴ Addo (n 58); Desai (n 58); Nolan, Porter and Langford (n 58); Diver and Miller (n 58); Boyle, 'Constitutionalising a Social Minimum as a Minimum Core' (n 58).

cannot afford to go to court to claim their rights.⁶³⁵ Similarly, in South Africa many socio-economic rights are fully justiciable. Consequently, the scholarly reception of how to realise socio-economic rights has been very focused on justiciability and the proper role of courts in adjudicating rights.⁶³⁶ Non-judicial ways in moving from an abstract legal formulation to the concrete realisation of rights have been discussed much less.⁶³⁷

In this chapter, I argue that legal human rights scholarship tends to focus too much on formal legal means and does not sufficiently consider other means of realisation. I understand 'formal legal means' as the applicability of international human rights law in the domestic legal order (including incorporation, implementation, and compliance) and justiciability (enforcement through legal remedies before domestic courts). I show that formal legal means of domestic application and justiciability are not the only way how EU MS should realise the right to a social minimum. Rather, realising rights requires an in-depth look at other socio-economic, political, and structural factors. To identify these factors, I utilise the jurisprudence of the HRTBs that do consider other means of realisation in their COs to EU MS. Even though CESCR continues to advocate for better domestic application and justiciability in its COs addressed to EU MS,⁶³⁸ there are several other explanatory conditions that hinder the realisation of the right to a social minimum that are worth considering.

This chapter is divided in several sections. In Section 4.2, I argue why formal legal means are not enough to realise the right to a social minimum. Section 4.3 widens the analysis to consider 'all appropriate means' for realisation, which is done by analysing the HRTBs' jurisprudence on realisation. Through this analysis of HRTBs' jurisprudence, I identify three wider hindering conditions in section 4.4, namely austerity, social protection gaps, and patterns of discrimination. In section 4.5, I analyse these overlapping but also distinct conditions which hinder my three case

⁶³⁵ Octavio Luiz Motta Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil Symposium: Latin American Constitutionalism: Section II: Social and Economic Rights' (2010) 89 *Texas Law Review* 1643.

⁶³⁶ Bilchitz, 'Fundamental Rights as Bridging Concepts' (n 619) 128.

⁶³⁷ David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007); David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 *International Journal of Constitutional Law* 710; David Landau and David Bilchitz (eds), 'The Evolution of the Separation of Powers in the Global South and Global North', *The Evolution of the Separation of Powers* (Edward Edgar Publishing 2018).

⁶³⁸ See sections 4.2.1 and 4.2.2.

studies (persons with disabilities, children, and Roma) from realising their right to a social minimum. Finally, in section 4.6, I consider intersectional discrimination which is cutting across these groups, by focusing on educational segregation regarding children with disabilities on the one hand, and Roma children on the other hand. Section 4.7 concludes.

4.2 The Limits of Formal Legal Means

This section considers the limits of formal legal means, consisting of domestic application and justiciability. I argue that we need to think more about how to link and contextualise domestic application and justiciability with wider non-legal understandings of realisation. In particular, this means to discuss the limits of a narrow and overly emphasised focus on domestic application and justiciability.

I distinguish the terminology of realising rights from formal legal means, such as incorporation, implementation, compliance, and enforcement. States' parties' obligation to realise the right to a social minimum goes beyond formal legal means of realisation. This is in line with Art 2 (1) ICESCR, stating that states parties must achieve the full realisation of rights 'by all appropriate means'. In its GC 9 on the domestic application of the Covenant, CESCR reiterates that states parties must 'use all the means at [their] disposal to give effect to the rights recognized in the Covenant'.⁶³⁹ Despite this insistence on 'all' means, CESCR only lists formal legal means of realisation in the remainder of this paragraph, consisting of domestic application on the one hand, and justiciability, i.e. the availability of judicial remedies, on the other.⁶⁴⁰ This shows that CESCR still places more emphasis on formal legal means in the form of domestic application and justiciability than on other means of realisation.

What about the group specific HRTBs (CRPD, CRC, CERD, CEDAW)? Do CESCR's standards on domestic application and justiciability apply equally to them? It can be observed that the group specific HRTBs often adopt their own interpretative standards in the form of GCs or General Recommendations (GRs). They tend to cite their own GCs or GRs in their respective COs to the states parties, rather than citing GCs of other HRTBs. However, due to the historically grown authority which CESCR holds on specific normative or dogmatic questions regarding socio-economic rights,

⁶³⁹ CESCR, 'GC 9: The Domestic Application of the Covenant' (n 446) para 2.

⁶⁴⁰ *ibid.*

the group specific HRTBs usually look towards CESCR. In order to give full justice to the group specific expertise of the CRPD, CRC, CERD, and CEDAW Committees, I do not only consider CESCR's jurisprudence on domestic application and justiciability, but also the group specific HRTBs' jurisprudence.

The section is structured as follows: I consider domestic application in section 4.2.1 and justiciability in section 4.2.2. I argue that that it is fully doctrinally sound to consider 'all appropriate means' of realisation. To identify the meaning of 'appropriate means', I widen my analysis beyond CESCR to also include the group specific HRTBs' jurisprudence in the form of COs to the EU MS from 2009-2019. Finally, section 4.2.3 links my analysis of the HRTBs' jurisprudence to the scholarly literature, reiterating my argument that formal legal means are neither necessary nor sufficient to realise the right to a social minimum.

4.2.1 Domestic Application According to the HRTBs

In this section, I argue that the HRTBs' jurisprudence on domestic application focuses mainly on formal legal incorporation and implementation, which is neither necessary nor sufficient to realise rights. The section is structured as follows: First, I analyse domestic application in CESCR's GCs (section 4.2.1.1), before moving on to its jurisprudence in the form of COs to the EU MS (section 4.2.1.2). I show that CESCR repeatedly points out its concerns regarding the lack of domestic application in its COs to EU MS, without considering other means of realisation with similar rigorousness. Finally, in section 4.2.1.3, I widen my analysis to the group specific HRTBs. There, I show that due to their focus on one specific group, the group specific HRTBs more often connect issues of domestic application with other means of realisation that are more meaningful to that particular group.

4.2.1.1 Domestic Application in CESCR's General Comments

CESCR's normative work on the domestic application of the Covenant can be traced back to GC 3 on the nature of states' parties' obligations, issued in 1990.⁶⁴¹ While GC 3 does not mention the term domestic application, it goes to great lengths to specify what the obligation 'to take steps' under Art 2 (1) ICESCR entails.⁶⁴² After pointing out that the French and Spanish language versions of the phrase 'to take steps' point

⁶⁴¹ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19).

⁶⁴² *ibid* 2–9.

towards an obligation to take 'deliberate, concrete and targeted' steps,⁶⁴³ CESCR then analyses the meaning of 'all appropriate means' under Art 2 (1) ICESCR.⁶⁴⁴ In particular, CESCR considers the adoption of legislative measures, constitutional recognition, and the provision of judicial remedies as formal legal means.⁶⁴⁵ According to the Reporting Guidelines, that were also issued in 1990, states parties are required to specify whether specific Covenant rights 'are protected either in the Constitution or by separate legislation'.⁶⁴⁶ Hence, even though CESCR does not take a clear stand in GC 3 on the nature of states parties' obligations whether it considers the incorporation of the Covenant into the national Constitution or opt for simple legislation instead, states parties are required to report on this issue.

In 1998, CESCR adopted GC 9 on the domestic application of the Covenant.⁶⁴⁷ In GC 9, CESCR specifies that it is an obligation under international human rights law to 'give effect' to the ICESCR in domestic law.⁶⁴⁸ This means that all 'Covenant norms must be recognized in appropriate ways within the domestic legal order'.⁶⁴⁹ What exactly are 'appropriate ways'? Here, CESCR specifies that 'the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account'.⁶⁵⁰ Even though there is flexibility depending on the constitutional set-up of the state party, the Committee argues that 'legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party'.⁶⁵¹

In public international law, there is a well-known distinction between jurisdictions where international law is directly applicable in the national legal order (sometimes called monist states) and those where international law is not directly applicable (sometimes called dualist states). In jurisdictions where international law is not directly applicable, states have to formally incorporate international law into their

⁶⁴³ *ibid* 2.

⁶⁴⁴ *ibid* 3–4.

⁶⁴⁵ *ibid* 5–6.

⁶⁴⁶ CESCR, 'Revised Guidelines Regarding the Form and Contents of Reports to Be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (1990) 5th Session, Annex IV para A.1 (d) (iii).

⁶⁴⁷ CESCR, 'GC 9: The Domestic Application of the Covenant' (n 446).

⁶⁴⁸ *ibid* 1.

⁶⁴⁹ *ibid* 2.

⁶⁵⁰ *ibid* 1.

⁶⁵¹ *ibid* 4.

national legal orders. In the words of CESCR, states parties 'should modify the domestic legal order as necessary in order to give effect to their treaty obligations'.⁶⁵² However, there is no obligation that states parties have to comprehensively incorporate the whole Covenant into its national legal order. In the words of CESCR, 'there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law.'⁶⁵³ Instead, CESCR identifies different various ways how states parties choose to (not) give effect to the Covenant in the national legal order. Some states parties refuse any measures of incorporation and do not make any effort to give effect to the Covenant provisions in the domestic legal order. Of those that have taken measures, CESCR differentiates between states parties that give effect to the Covenant 'without invoking the specific terms of the Covenant' and states parties that give formal validity to the Covenant through incorporation, 'so that its terms are retained intact'.⁶⁵⁴ Among the latter, CESCR highlights the state practice of giving effect through 'constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws'.⁶⁵⁵ Hence, while CESCR cannot force states parties where international human rights law is not immediately applicable in the domestic legal order to change their constitutional set-up and its approach to international treaties, the Committee makes a very strong effort to encourage states parties to incorporate the Covenant into the national legal order.⁶⁵⁶ According to CESCR, formal incorporation is 'desirable', since it 'avoids problems that might arise in the translation of treaty obligations into national law'.⁶⁵⁷

4.2.1.2 Domestic Application in CESCR's COs to EU MS from 2011-2019

CESCR issued COs to 23 EU MS from 2011-2019. Out of those 23 EU MS, 19 received specific concerns on domestic application, always directly quoting GC 9 on domestic application as the frame of reference.⁶⁵⁸ Since CESCR points out the issue

⁶⁵² *ibid* 3.

⁶⁵³ *ibid* 5.

⁶⁵⁴ *ibid* 6.

⁶⁵⁵ *ibid*.

⁶⁵⁶ *ibid* 8.

⁶⁵⁷ *ibid*.

⁶⁵⁸ CESCR, COs to AT 2013, para 5; COs to BE 2013, para 7; COs to CY 2016, paras 5-6; COs to CZ 2013, para 5; COs to DK 2019, paras 4-5; COs to EE 2019, paras 4-5; COs to EL 2015, paras 5-6; COs to ES 2018, para 5-7; COs to FI 2014, para 6; COs to FR 2016, paras 5-6; COs to IE 2015, para 7; COs to IT 2015, paras 6-7; COs to NL 2017, paras 5-6, 16-17; COs to PL 2015, paras 5-7; COs to

of domestic application by referring to GC 9 with such frequency, this shows that CESCR considers formal legal means as particularly important for the realisation of the right to a social minimum. Only Bulgaria, Germany, Lithuania, and Portugal did not receive a concern on GC 9 and in all of these four cases, CESCR did not mention domestic application at all.⁶⁵⁹ This shows that CESCR equates the normative content of the domestic application of the Covenant with the normative content of GC 9. Besides GC 9, CESCR also sometimes refers back to GC 3 on the nature of states parties' obligations, albeit in a much less frequent manner.⁶⁶⁰

When considering the concrete normative content of how these concerns on domestic application are structured, vast differences between EU MS can be observed. CESCR is most concerned about those states parties where norms of public international law are not directly applicable. A particular serious issue is the refusal of states parties to incorporate the Covenant at all. This is the case in Denmark, Ireland, and the United Kingdom.⁶⁶¹ Among those three, the most serious case is Ireland since it blatantly refuses incorporation. Hence, in its COs to Ireland in 2015, CESCR voices its regret that 'no steps have been taken to incorporate the Covenant in domestic law and that the State party does not intend to do so'.⁶⁶² In several EU MS, the Covenant has only been partially or not effectively incorporated.⁶⁶³ In Austria and Germany, issues of federalism preclude effective incorporation.⁶⁶⁴ Table 10 below shows examples of CESCR's concerns and recommendations to states parties where the Covenant has either not been incorporated into the domestic legal order at all or has only been partially incorporated.

RO 2014, para 5; COs to SE 2016, paras 5-8; COs to SI 2014, para 5; COs to SK 2019, paras 4-5; COs to UK 2016, paras 5-6.

⁶⁵⁹ Compare CESCR's COs to BG 2019, DE 2018 (but see the specific concern on federalism in paras 5-6), LT 2015, PT 2014.

⁶⁶⁰ CESCR's COs containing references to GC 3 were issued to AT 2013, paras 5, 16-17; NL 2017, paras 16-17; PL 2015, paras 5-6; SE 2016, paras 7-8; SI 2014, para 10.

⁶⁶¹ CESCR, COs to DK 2019, paras 4-5, COs to IE 2015, para 7, COs to UK 2016, paras 5-6.

⁶⁶² CESCR, COs to IE 2015, para 7.

⁶⁶³ CESCR, COs to CY 2016, paras 5-6; COs to CZ 2013, para 5; COs to IT 2015, paras 6-7; COs to SE 2016, paras 5-6.

⁶⁶⁴ CESCR, COs to AT 2013, para 5; COs to DE 2018, paras 5-6.

Table 10. CESCR's COs to States Parties Concerning (Partial) Incorporation

	Concerns	Recommendations
No incorporation	Denmark 2019 'the rights of the Covenant are still not given full effect in the State party' 'certain economic, social and cultural rights are not recognized in the Constitutional Act of Denmark' 'Covenant has not been incorporated in the domestic legal order' ⁶⁶⁵	'take the necessary measures to give full effect to economic, social and cultural rights' 'incorporate the provisions of the Covenant in domestic law' ⁶⁶⁶
	Ireland 2015 'no steps have been taken to incorporate the Covenant in domestic law and that the State party does not intend to do so' ⁶⁶⁷	'take all appropriate measures to ensure the direct applicability of Covenant provisions, including through incorporation of the Covenant in its domestic legal order' ⁶⁶⁸
	UK 2016 'the Committee takes note of the State party's views on the incorporation of the Covenant rights into the domestic legislation' ⁶⁶⁹	'urges the State party to fully incorporate the Covenant rights into its domestic legal order' ⁶⁷⁰
Partial incorporation	Austria 2013 'progress has not been made to systematically incorporate the provisions of the Covenant into the State party's domestic legislation' 'provisions of the Covenant are not effectively applied in the Länder' ⁶⁷¹	'ensure that the provisions of the Covenant are given full effect in the State party's domestic legal order' 'review of its domestic legislation vis-à-vis the provisions of the Covenant to identify and rectify any legal omission or discrepancy' ⁶⁷²
	Italy 2015 'Covenant provisions are not fully reflected in the State party's Constitution' ⁶⁷³	'take steps to fully incorporate the Covenant in the State party's legal order' ⁶⁷⁴
	Sweden 2016 'several Covenant rights are still not incorporated into domestic law' ⁶⁷⁵	'take the necessary legislative measures to incorporate the Covenant into its domestic legislation' ⁶⁷⁶

In some cases where the ICESCR is directly applicable, CESCR is routinely concerned that the relevant provisions in the domestic legal order do not have direct effect, or are only considered as guiding principles, or are seen as non-self-executing

⁶⁶⁵ CESCR, COs to DK 2019, para 4.

⁶⁶⁶ CESCR, COs to DK 2019, para 5.

⁶⁶⁷ CESCR, COs to IE 2015, para 7.

⁶⁶⁸ CESCR, COs to IE 2015, para 7.

⁶⁶⁹ CESCR, COs to UK 2016, para 5.

⁶⁷⁰ CESCR, COs to UK 2016, para 6.

⁶⁷¹ CESCR, COs to AT 2013, para 5.

⁶⁷² CESCR, COs to AT 2013, para 5.

⁶⁷³ CESCR, COs to IT 2015, para 6.

⁶⁷⁴ CESCR, COs to IT 2015, para 7.

⁶⁷⁵ CESCR, COs to SE 2016, para 5.

⁶⁷⁶ CESCR COs to SE 2016, para 6.

or considered as being only of programmatic nature.⁶⁷⁷ Table 11 below shows some of CESCR's concerns and recommendations to EU MS where the Covenant is directly applicable. Two scenarios are distinguished: In the first scenario, the provisions of the Covenant have either been incorporated directly in the Constitution or – in cases of partial incorporation – the Covenant norms must take precedence over conflicting national law. Hence, even when incorporation efforts are incomplete, the precedence of international law still justifies the classification into the 'directly applicable'-table. In the second scenario, the Covenant is fully incorporated into the national legal order, but issues arise with state-specific interpretations that consider obligations to protect socio-economic rights as only non-binding or programmatic.

⁶⁷⁷ CESCR, COs to BE 2013, para 7; COs to ES 2018, para 5; COs to NL 2017, paras 5-6; COs to PL 2015, paras 5-7.

Table 11. CESCR's Concerns and Recommendations to States Parties where the Covenant is Directly Applicable

	Concerns	Recommendations
(Partial) Incorporation and Covenant takes precedence over national law	Cyprus 2016 'Covenant has supremacy over all domestic laws under the Constitution' 'the Constitution does not incorporate all the rights enshrined in the Covenant.' ⁶⁷⁸	'take all appropriate measures to ensure that the rights enshrined in the Covenant are fully incorporated in its domestic legal order and, as with civil and political rights, have constitutional rank' ⁶⁷⁹
	Estonia 2019 'some Covenant rights are protected in the Constitution, and that article 123 of the Constitution establishes the primacy of international treaties over domestic law' ⁶⁸⁰	'Incorporate all the rights enshrined in the Covenant in the domestic legal order' ⁶⁸¹
	Greece 2015 'Covenant constitutes an integral part of Greek domestic law and prevails over any contrary provision of law' ⁶⁸²	'provide (...) information on decisions taken by courts at all levels that invoke the Covenant' ⁶⁸³
	Romania 2014 'Covenant takes precedence over domestic laws' ⁶⁸⁴	'increase judges', lawyers' and prosecutors' familiarity with the Covenant in order to ensure that its provisions are taken into account in domestic court decisions' ⁶⁸⁵
	Slovakia 2019 'the Covenant takes precedence over domestic laws' ⁶⁸⁶	'increase judges', lawyers' and prosecutors' knowledge of the Covenant in order to ensure that its provisions are taken into account in domestic court decisions' ⁶⁸⁷
	Slovenia 2014 'Covenant has been fully incorporated into the State party's domestic law' ⁶⁸⁸	'raise awareness among members of the judiciary, lawyers and the general public about the Covenant and the justiciability of economic, social and cultural rights' ⁶⁸⁹
Directly applicable, but only programmatic nature	Netherlands 2017 'although international treaties that are binding on all persons prevail over domestic legislation in the Constitution of the Netherlands (Arts 93 and 94), the State party has taken the view that in general the provisions of the Covenant are not binding on all	'fully incorporate the Covenant rights into its domestic legal order and to ensure their application in the legislative and policy formulation process' ⁶⁹¹

⁶⁷⁸ CESCR, COs to CY 2016, para 5.

⁶⁷⁹ CESCR, COs to CY 2016, para 6.

⁶⁸⁰ CESCR, COs to EE 2019, para 4.

⁶⁸¹ CESCR, COs to EE 2019, para 5.

⁶⁸² CESCR, COs to EL 2015, para 5.

⁶⁸³ CESCR, COs to EL 2015, para 6.

⁶⁸⁴ CESCR, COs to RO 2014, para 5.

⁶⁸⁵ CESCR, COs to RO 2014, para 5.

⁶⁸⁶ CESCR, COs to SK 2019, para 4.

⁶⁸⁷ CESCR, COs to SK 2019, para 5.

⁶⁸⁸ CESCR, COs to SI 2014, para 5.

⁶⁸⁹ CESCR, COs to SI 2014, para 5.

⁶⁹¹ CESCR, COs to NL 2017, para 6.

	Concerns	Recommendations
	persons and that they are of a programmatic nature ⁶⁹⁰	
	Poland 2015 'Constitution establishes the primacy of international agreements over national law (...) provisions of the Covenant are still considered as setting programmatic objectives' ⁶⁹²	Ensure that all provisions of the Covenant are given full effect in its domestic legal order ⁶⁹³

When comparing the differences between CESCR's recommendations to states parties that do not ensure direct applicability of the Covenant with those that do, one interesting observation can be made: Recommendations in the former group focus very much focus on ensuring incorporation, whereas recommendations in the latter group tend to focus on justiciability. The issue of justiciability will be fully discussed in section 4.2.2.

4.2.1.3 Domestic Application in the COs of the Group Specific HRTBs

CESCR did not issue COs to Croatia, Hungary, Luxembourg, Latvia, and Malta in the period 2009-2019. This does not mean, however, that those five EU MS were not scrutinised by the group specific HRTBs on their domestic application of those treaties. For example, regarding Croatia, the CRC Committee complains about the 'lack of effective and full implementation of all legislation relevant to the Convention',⁶⁹⁴ while the CEDAW Committee is concerned about the 'lack of visibility and direct application of the Convention'.⁶⁹⁵ In Hungary, the CERD Committee complains about the 'lack of full and consistent implementation'.⁶⁹⁶ This wording is strikingly similar to Latvia, where the CERD Committee is concerned about the 'lack of a comprehensive anti-discrimination law, which may hinder the full implementation of the rights in the Convention'.⁶⁹⁷ In Malta, the CRPD Committee complains that 'the articles of the Convention are not yet all enforceable under national Legislation',⁶⁹⁸ whereas the CERD Committee 'is concerned that the Convention has not yet fully been incorporated in the domestic legal order of the State party'.⁶⁹⁹ These examples show

⁶⁹⁰ CESCR, COs to NL 2017, para 5.

⁶⁹² CESCR, COs to PL 2015, para 5.

⁶⁹³ CESCR, COs to PL 2015, para 5.

⁶⁹⁴ CRC Committee, COs to HR 2014, para 6.

⁶⁹⁵ CEDAW Committee, COs to HR 2015, para 10.

⁶⁹⁶ CERD Committee, COs to HU 2019, para 10.

⁶⁹⁷ CERD Committee, COs to LV 2018, para 12.

⁶⁹⁸ CRPD Committee, COs to MT 2018, para 5.

⁶⁹⁹ CERD Committee, COs to MT 2011, para 7.

that issues of domestic application are also very prominent in the group specific HRTBs' concerns.

A similar observation can be made for those other four EU MS that did not receive a CO on domestic application by CDESCR but were nevertheless captured by one of the group specific HRTBs. For example, CDESCR did not issue a specific concern on domestic application to Germany. However, the CRC Committee is concerned about the lack of children's rights in the Basic Law.⁷⁰⁰ The CERD Committee is concerned about the lack of a statutory definition of racial discrimination,⁷⁰¹ and the CEDAW Committee is concerned that the Act on Equal Treatment does not cover the private sphere.⁷⁰² In Portugal, the CRPD Committee is concerned about the very first step of domestic application – which consists of reviewing all existing legislation to bring it into line with the Convention. In the words of the CRPD Committee, Portugal 'has not yet conducted a cross-cutting, comprehensive review of its legislation with a view to bringing it into line with the Convention'.⁷⁰³ The CRC Committee reminds Portugal in a similar vein to 'continue to take steps to ensure that domestic legislation is fully compatible with the principles and provisions of the Convention and ensure the effective implementation of child-related laws'.⁷⁰⁴ These examples show that the role of the group specific treaty bodies is strikingly similar among those 9 EU MS, no matter whether they were under CDESCR's scrutiny between 2009-2019 or not.⁷⁰⁵

Domestic applicability is hence a concern for all five HRTBs under review, often pointing out similar issues and recommendations. These qualitative remarks can be illustrated in a quantitative way. Figure 27 below depicts how many HRTBs are concerned about domestic application. To aid comparability, if there is more than one paragraph addressing concerns on domestic application in the same CO, I only counted this CO once. By only counting one instance per HRTB's CO, a bird's eyes' view is achieved on how all EU MS compare in terms of domestic application of international human rights law into their national legal orders. At the same time, due

⁷⁰⁰ CRC Committee, COs to DE 2014, para 9.

⁷⁰¹ CERD Committee, COs to DE 2015, para 7.

⁷⁰² CEDAW Committee, COs to DE 2017, para 13.

⁷⁰³ CRPD Committee, COs to PT 2016, para 9.

⁷⁰⁴ CRC Committee, COs to PT 2014, para 10.

⁷⁰⁵ As mentioned above, five EU MS did not receive any CO by CDESCR between 2009-2019 (Croatia, Hungary, Luxembourg, Latvia, and Malta), whereas four EU MS did receive COs by CDESCR, but those COs did not include specific concerns on domestic application referencing GC 9 (Bulgaria, Germany, Lithuania, and Portugal).

to this decision to only count one instance per CO means that in Figure 27, I underestimate the prevalence of HRTBs' concerns on domestic application.⁷⁰⁶ Despite this underestimation, Figure 27 shows that in all EU MS at least two HRTBs are concerned about issues of domestic application. This is even the more surprising when considering the fact that some EU MS did not receive COs from all HRTBs in the period from 2009-2019.⁷⁰⁷ In the graph, I have marked these EU MS with red dots. As an example, Croatia, Ireland, and Hungary only received COs from four HRTBs in the period from 2009-2019.

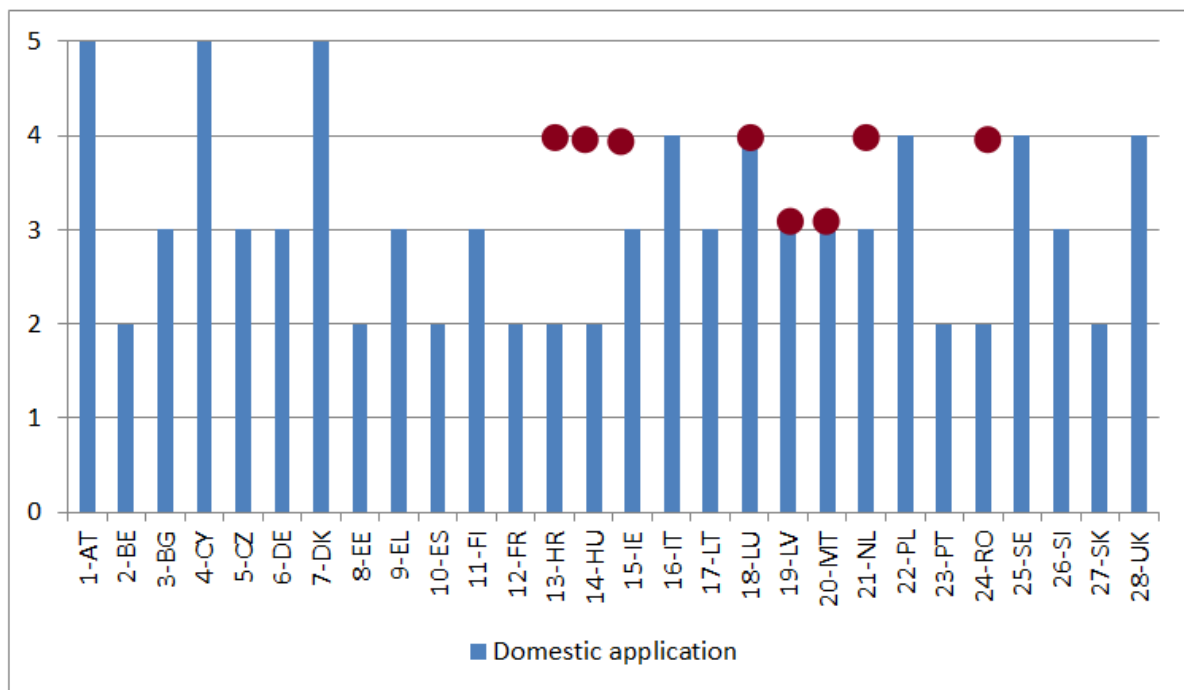


Figure 27. Concerns about Domestic Application by the HRTBs

In three EU MS, all five HRTBs were concerned about domestic application (Austria, Cyprus, and Denmark).⁷⁰⁸ Luxembourg received COs from four HRTBs in the period from 2009-2019 and all four of them were concerned about domestic application. At the same time, Malta and Latvia received only three COs, yet all three issued concerns on domestic application. This means that all HRTBs that issued COs to Austria, Cyprus, Denmark, Luxembourg, Malta, and Latvia from 2009-2019 considered the (lack of) domestic application a big enough issue for it to be mentioned in the COs. In

⁷⁰⁶ Had I counted all instances of concerns on domestic application, the numbers would be: AT-6x, BE-2x, BG-3x, CY-5x, CZ-3x, DE-4x, DK-7x, EE-2x, EL-3x, ES-2x, FI-3x, FR-2x, HR-3x, HU-2x, IE-4x, IT-6x, LT-4x, LU-5x, LV-3x, MT-3x, NL-3x, PL-5x, PT-3x, RO-2x, SE-4x, SI-3x, SK-2x, UK-4x.

⁷⁰⁷ See Appendixes 1-5 for the full reporting cycles of the HRTBs 2009-2019.

⁷⁰⁸ AT, CY, DK.

four EU MS, four out of five HRTBs issued concerns on domestic application.⁷⁰⁹ Concerns in three out of five HRTBs occurred in seven EU MS;⁷¹⁰ and in two out of five HRTBs in six EU MS.⁷¹¹

Figure 28 below illustrates two of the HRTBs' specific concerns on domestic application contained in the COs issued to EU MS between 2009-2019. The first issue is the lack of incorporation (green bar) and the second issue is the non-conformity of specific laws (purple bar). The blue bar (domestic application) is exactly the same as in Figure 27 above, while the red bar exemplifies which EU MS' received a CO regarding GC 9 on domestic application. Please note that this graph does not consider the total instances (coded segments) of domestic application, lack of incorporation and non-conformity of specific laws. Rather, it compares how many of the five HRTBs were concerned about these three issues.

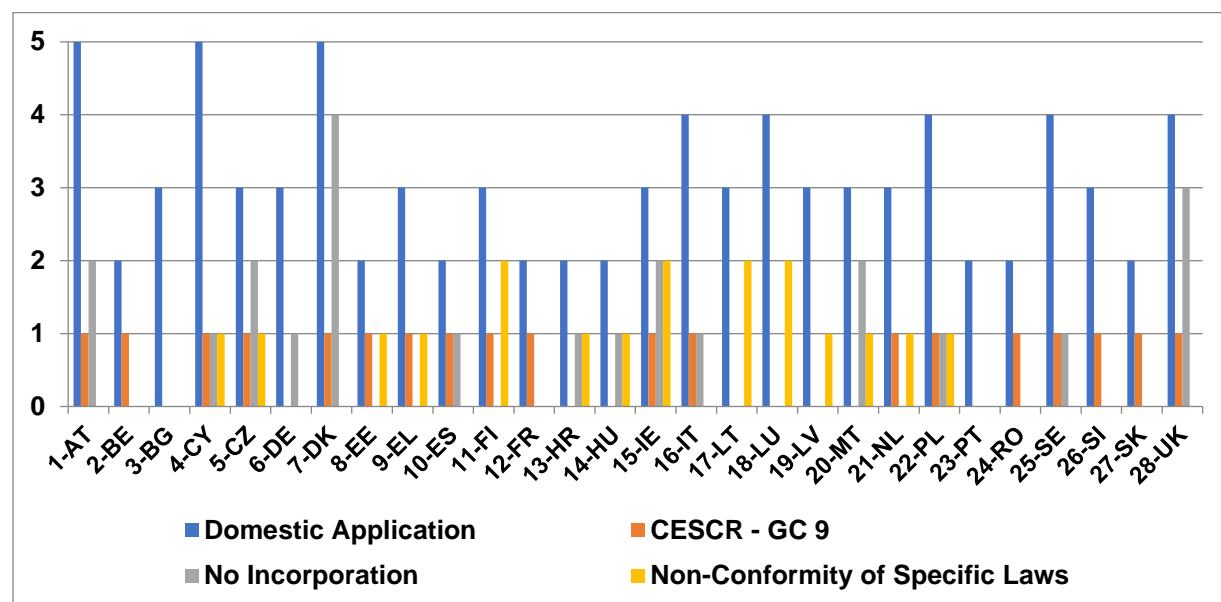


Figure 28. HRTBs' Concerns on Lack of Incorporation and Non-Conformity of Specific Laws Across the EU MS

The graph illustrates several points. While all EU MS received concerns about domestic application from at least two HRTBs (see blue bars), CESC's special focus on the importance of GC 9 on domestic application stands out in Figure 28 (see orange bars). While the group specific HRTBs do not cite GC 9 as normative anchor on domestic applicability, the graph shows that there is a certain correlation between receiving a gentle nudge to take GC 9 into account by CESC, and subsequent

⁷⁰⁹ IT, PL, SE, UK.

⁷¹⁰ BG, CZ, DE, EL, FI, LT, SI.

⁷¹¹ BE, EE, ES, FR, PT, SK.

concerns by the group specific HRTBs regarding domestic applicability. The green bars show all concerns regarding non-incorporation of the HRTBs into the domestic legal order, while the purple bars specify concerns about the non-conformity of specific laws.

As an example, Austria received COs on domestic applicability from all five HRTBs (CRC 2012, CERD 2012, CESCR 2013, CRPD 2013, CEDAW 2019). What is noticeable in these five COs is the HRTBs' clear focus on one central issue: how Austria's complex federal structure inhibits the effective domestic application of international human rights treaties. In 2019, the CEDAW Committee 'reiterates its previous recommendation' that the Federal Government must ensure effective coordination between State and Länder with regards to the domestic application of the Convention.⁷¹² The COs issued to Austria by CESCR Committee in 2013 speak of a similar lack of improvement: 'progress has not been made to systematically incorporate the provisions of the Covenant into the State party's domestic legislation'.⁷¹³ Already in 2012, the CRC Committee had noted that the Constitution 'does not include all the rights protected under the Convention, in particular social and cultural rights of children'.

On the federalism issue, the CRC Committee notes that 'the Länder continue to have divergent standards'.⁷¹⁴ In its very first COs to Austria in 2013, the CRPD Committee is concerned about federalism since it 'has led to undue fragmentation of policy, especially as the Länder (regions) are the providers of social services'.⁷¹⁵ The past tense suggests that the CRPD Committee is well aware that the lack of domestic application due to Austria's federalist system has been a continuous hindering condition, not only for the effective realisation of the CRPD but for all HRTBs. Finally, the CERD Committee also 'notes the constitutional requirement that the Länder must implement the State party's obligations under the Convention. However, it is concerned that the application of this rule is not uniform in the case of the Convention among the Länder'.⁷¹⁶ The Austrian example shows that the interplay between the five HRTBs brings out the central issue of federalism much more than when looking only at one single HRTB. After having examined the issue of domestic application in

⁷¹² CEDAW Committee, COs to AT 2019, para 11.

⁷¹³ CESCR, COs to AT 2013, para 5.

⁷¹⁴ CRC Committee, COs to AT 2012, para 10.

⁷¹⁵ CRPD Committee, COs to AT 2013, para 10.

⁷¹⁶ CERD Committee, COs to AT 2012, para 7.

CESCR's GCs and the COs issued by the HRTBs to the EU MS from 2009-2019, the next section does the same for justiciability.

4.2.2 Justiciability According to the HRTBs

Justiciability is commonly defined as the ability of courts to adjudicate rights.⁷¹⁷ To give effect to international human rights law in the national legal order, states parties must not only ensure domestic applicability but also justiciability. Whether and to what extent justiciability is possible depends on the constitutional set-up of the respective state party.⁷¹⁸ Most often courts do not consider norms to be justiciable when they are insufficiently concrete and precise or if the norms are considered to be the sole competence of the legislative branch of government. Key doctrines like the minimum core obligation or the exact normative content of the right to an adequate standard of living are arguably not sufficiently concrete and precise. At the same time, there are good arguments why the elaboration of how to distribute resources in a society is better suited for the legislative branch of government than the judiciary. This is why the justiciability of socio-economic rights has historically been a thorny issue, which is subject to considerable academic debate. In the following, I will first give a quick overview of how CESCR has argued for the justiciability of socio-economic rights from the very beginning of its activities in the form of its GCs (section 4.2.2.1). In a next step, I will widen my analysis to the COs issued to the EU MS from 2009-2019 by CESCR (section 4.2.2.2) and the group specific HRTBs (section 4.2.2.3).

⁷¹⁷ Compare Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (n 143) 42 who cites these definitions in footnote 166: 'See, for example, the definition provided by Dennis and Stewart, "Among scholars and nongovernmental advocates, the term 'justiciability' seems to be used most often to refer merely to the existence of a mechanism or procedure to resolve alleged violation of the rights in question. In this view, rights (or disputes about rights) are justiciable when there is a mechanism capable of adjudicating them, and non-justiciable when one is lacking." Michael Dennis and David Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 *The American Journal of International Law* 462; or by Arambulo, "Justiciability of a human rights means that a court of law or another type of supervisory body deems the right concerned to be amenable to judicial scrutiny", Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Hart Intersentia, 1999), 16–18; or by Craven, "[T]he justiciability of a particular issue depends, not on the quality of the decision, but rather on the authority of the body to make the decision.", Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on Its Development* (Clarendon Press and OUP, 1995), 102.'

⁷¹⁸ Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social, and Cultural Rights: A Textbook* (Second Revised Edition, Brill Nijhoff 2001).

4.2.2.1 *Justiciability in CESCR's General Comments*

While the justiciability of civil and political rights are guaranteed through the provision of an effective remedy according to Art 2 (3) (a) ICCPR, a similar provision is missing for the ICESCR. In GC 3 on the nature of state parties' obligations, CESCR insists on the 'provision of judicial remedies' to give effect to the Covenant in the domestic legal order.⁷¹⁹ In particular, CESCR argues for the direct justiciability of specific Covenant rights.⁷²⁰ According to the original Reporting Guidelines, states parties were required to report whether Covenant rights 'can be invoked before, and directly enforced by, the courts, other tribunals or administrative authorities'.⁷²¹ In cases of direct applicability 'the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts)'.⁷²²

In GC 9 on the domestic application of the Covenant, CESCR reiterates that states parties have a duty to give effect to the Covenant rights 'by all appropriate means'.⁷²³ Besides domestic applicability, the process of giving effect also requires that 'appropriate means of redress, or remedies, must be available to any aggrieved individual or group'.⁷²⁴ CESCR justifies this claim by citing Art 8 UDHR which proclaims the 'right to an effective remedy'.⁷²⁵ Even though this right is missing from the ICESCR, states parties still have to justify their failure to provide legal remedies either through showing that such remedies are not 'appropriate means' or that 'they are unnecessary'.⁷²⁶ CESCR argues that non-judicial means 'could be rendered ineffective if they are not reinforced or complemented by judicial remedies'.⁷²⁷ Hence, CESCR argues for a rebuttable presumption of justiciability. The rebuttal is only acceptable to CESCR when states parties can clearly show that judicial remedies are neither appropriate nor necessary due to the availability of other effective means of remedies. In other words, there is a 'need to ensure justiciability (...) when determining the best way to give domestic legal effect to the Covenant rights'.⁷²⁸ CESCR is

⁷¹⁹ CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 5.

⁷²⁰ Arts. 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) ICESCR, see *ibid* para 5.

⁷²¹ CESCR, 'Reporting Guidelines' (n 643) para IV.

⁷²² CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 6.

⁷²³ CESCR, 'GC 9: The Domestic Application of the Covenant' (n 446) para 1.

⁷²⁴ *ibid* 2.

⁷²⁵ *ibid* 3.

⁷²⁶ *ibid*.

⁷²⁷ *ibid*.

⁷²⁸ *ibid* 7.

recommends that the Covenant should be ‘directly and immediately’ applicable in the national legal order, ‘thereby enabling individuals to seek enforcement of their rights before national courts and tribunals’.⁷²⁹ Since incorporation of Covenant norms into the domestic legal order ‘provides a basis for the direct invocation of the Covenant rights by individuals in national courts’,⁷³⁰ this approach is highly desirable for CESCR.

According to CESCR, not all rights protected in the Covenant are equally justiciable. While every Covenant right has ‘some significant justiciable dimensions’,⁷³¹ CESCR has continuously affirmed the direct justiciability of several Covenant rights that are ‘capable of immediate implementation’.⁷³² While none of these immediately justiciable rights are linked to the substantive dimensions of the right to social minimum, CESCR argues that the obligation of non-discrimination should always be made fully justiciable. In particular, CESCR already established in GC 3 on the nature of states parties’ obligations that the overarching prohibition of discrimination needs to be given effect ‘through the provision of judicial or other effective remedies’.⁷³³ While for other issues, administrative remedies might ‘be adequate’, CESCR reiterates in GC 9 on the domestic application of the Covenant that ‘the provision of some form of judicial remedy would seem indispensable’ for the obligation of non-discrimination.⁷³⁴ Only by ensuring justiciability will courts be able to ‘protect the rights of the most vulnerable and disadvantaged groups in society’.⁷³⁵ In its GC 5 on persons with disabilities, CESCR points out that the discrimination of persons with disabilities requires anti-discrimination legislation. This legislation must also provide for ‘judicial remedies as far as possible and appropriate’.⁷³⁶ In its GC 20 on non-discrimination, CESCR clarifies that these remedies can consist of ‘compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies’.⁷³⁷ Hence, CESCR consistently points out that, for issues of discrimination, judicial remedies are indispensable. It is the proper role of courts to ensure that everybody – and in

⁷²⁹ *ibid* 4.

⁷³⁰ *ibid* 8.

⁷³¹ *ibid* 10.

⁷³² CESCR quotes GC 3 which renders Arts. 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), 13 (3), 13 (4) and 15 (3) ICESCR justiciable ‘by way of example’, see *ibid*.

⁷³³ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19) para 5.

⁷³⁴ CESCR, ‘GC 9: The Domestic Application of the Covenant’ (n 446) para 9.

⁷³⁵ *ibid* 10.

⁷³⁶ CESCR, ‘GC 5: Persons with Disabilities’ (n 540) para 16.

⁷³⁷ CESCR, ‘GC 20: Non-Discrimination’ (n 333) para 40.

particular the most vulnerable and disadvantaged groups – can enjoy their socio-economic rights without discrimination.

Even though CESCR does not mention the substantive dimensions of the right to a social minimum in the closed list of directly justiciable rights first developed in GCs 3, the justiciability of specific rights is dealt with in the GCs. For example, in its GC 4 on the right to housing, CESCR singles out those jurisdictions where ‘the right to adequate housing is constitutionally entrenched’.⁷³⁸ In the next paragraph, the Committee considers possible domestic remedies as examples of justiciability of the right to housing, including legal procedures, complaints, and legal appeals. In particular, any ‘allegations of any form of discrimination in the allocation and availability of access to housing’ should be covered through the provision of judicial remedies.⁷³⁹ In GC 7 on forced evictions, the provision of legal remedies is considered a key element of procedural protection.⁷⁴⁰

In GC 12 on the right to food, CESCR establishes a whole section on ‘remedies and accountability’ which specifies that everybody ‘who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies’.⁷⁴¹ The entitlement ‘to adequate reparation’ consists of an exemplary list of ‘restitution, compensation, satisfaction or guarantees of non-repetition’.⁷⁴² In the next paragraph, CESCR explains that incorporation or direct applicability of the right to food ‘can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases’.⁷⁴³ In other words, incorporation and direct applicability are seen as the necessary first step to empower courts ‘to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant’.⁷⁴⁴ In chapter 3 I have established the right to a social minimum as a composite right that is directly linked to CESCR’s jurisprudence on minimum core obligations. CESCR’s insistence on justiciability of the core content of the right to food shows that it considers the issues of justiciability and the issue of the core content like two sides of the same coin. The core content thus becomes a legitimizing factor for the justiciability of socio-economic rights. At the same time, heated debates on

⁷³⁸ CESCR, ‘GC 4: The Right to Adequate Housing’ (n 355) para 16.

⁷³⁹ *ibid* 17.

⁷⁴⁰ CESCR, ‘GC 7: The Right to Adequate Housing (Forced Evictions)’ (n 356) para 15.

⁷⁴¹ CESCR, ‘GC 12: The Right to Adequate Food’ (n 268) para 32.

⁷⁴² *ibid*.

⁷⁴³ *ibid* 33.

⁷⁴⁴ *ibid*.

justiciability can be somewhat tamed by emphasizing the justiciability of the *core* of socio-economic rights rather than justiciability of their full normative content.

CESCR uses almost the same line of argument and words when discussing the justiciability of the other two dimensions of the right to a social minimum, namely work (GC 18) and social security (GC 19). As in GC 12 on the right to food, CESCR addresses justiciability of the right to work in GC 18 under the header of 'remedies and accountability'. Everybody 'who is a victim of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level'.⁷⁴⁵ The list of 'adequate reparation' consists of 'restitution, compensation, satisfaction or a guarantee of non-repetition'.⁷⁴⁶ CESCR particularly encourages states parties to incorporate the right to work into the domestic order or to recognise its direct applicability. This 'significantly enhances the scope and effectiveness of remedial measures and is encouraged in all cases'.⁷⁴⁷ CESCR goes on to argue that courts 'would then be empowered to adjudicate violations of the core content of the right to work by directly applying obligations under the Covenant'.⁷⁴⁸ Hence, CESCR again connects justiciability with the core content. This shows that CESCR does seem to make a difference between the particular aspects of rights that are deemed justiciable. Besides the non-discrimination obligation, the core content of the right to work must be made justiciable in the domestic orders of the states parties.

Likewise, in GC 19 on the right to social security, CESCR addresses justiciability under the header of 'remedies and accountability'.⁷⁴⁹ The list of 'adequate reparation' is the same as for the right to work, 'including restitution, compensation, satisfaction or guarantees of non-repetition'.⁷⁵⁰ In particular, 'legal recourse and remedies' must be available.⁷⁵¹ To enhance justiciability, CESCR recommends states parties to incorporate the right to a social security into their domestic legal order. This would allow 'courts to adjudicate violations of the right to social security by direct reference to the Covenant'.⁷⁵² On the justiciability of the core content of the right to a social security, CESCR is even a little bit more specific than regarding the right to

⁷⁴⁵ CESCR, 'GC 18: The Right to Work' (n 44) para 48.

⁷⁴⁶ *ibid.*

⁷⁴⁷ *ibid.* 49.

⁷⁴⁸ *ibid.*

⁷⁴⁹ CESCR, 'GC 19: The Right to Social Security' (n 44) Part D.

⁷⁵⁰ *ibid.* 76.

⁷⁵¹ *ibid.* 78.

⁷⁵² *ibid.*

work. According to CESCR, nobody shall 'be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits'.⁷⁵³ This 'minimum essential level' is linked to the specific definition contained in para 59a of the same GC.⁷⁵⁴ While CESCR cannot force states parties to incorporate the Covenant or to allow justiciability, GC 19 nevertheless shows CESCR's eagerness and persuasive argumentation convincing states parties of the importance of justiciability that runs like a red thread throughout the right-specific GCs.

4.2.2.2 Justiciability in CESCR's COs to EU MS from 2011-2019

CESCR issued COs to 23 EU MS from 2011-2019 and raised concerns about justiciability in 18 of them.⁷⁵⁵ The word 'justiciability' itself is contained in 14 cases. In all of those COs, the Committee routinely point out the lack of justiciability as a key hindering factor for the lack of realisation of socio-economic rights. The five EU MS that did not receive a CO on justiciability are Bulgaria, Germany, Ireland, Lithuania, and Portugal. However, this does not mean that socio-economic rights are fully justiciable in those jurisdictions. Quite on the contrary, sometimes, the lack of domestic application is so severe that CESCR focuses on this issue rather than insisting on justiciability.

For example, CESCR does not issue a specific concern on justiciability to Ireland, but nevertheless expresses its deepest regrets that that 'no steps have been taken to incorporate the Covenant in domestic law and that the State party does not intend to do so'.⁷⁵⁶ Due to this blatant refusal of incorporation, justiciability is factually impossible. Since it is a prerequisite for effective justiciability that the Covenant is given effect in the domestic legal order, the Committee most often mentions domestic application before justiciability. This is also due to the fact that justiciability is so closely connected to the constitutional set-up of the respective state party. Hence, lack of justiciability can be seen as the direct consequence of a lack of domestic application.

This is also evidenced by the typical structure of CESCR's justiciability COs, where the Committee tends to connect issues of domestic applicability with issues of justiciability in either the same or the following paragraph. Most often, the lack of justiciability directly follows from the lack of domestic applicability. Only in very few

⁷⁵³ *ibid.*

⁷⁵⁴ *ibid* 59a.

⁷⁵⁵ No COs on justiciability: BG, DE, IE, LT.

⁷⁵⁶ CESCR, COs to IE 2016, para 8.

cases the Committee does not raise the issue of domestic application, but nevertheless issues a concern about justiciability.⁷⁵⁷ When CESCR expresses its regrets about issues of both domestic application and justiciability, it most often voices its concerns in the same paragraph. At the same time, domestic applicability is no guarantee for justiciability. Hence, states parties must not only allow and empower courts to rule on socio-economic rights protected under international human rights law treaties. Instead, they must start one step earlier and provide for direct applicability not only in the books but also in practice.

As to the concrete substantive normative content of CESCR's concerns on justiciability, the lack of case law is omnipresent. While some EU MS fail to provide information about case law in the state party reports, some others simply report back that there were no cases that evidence the justiciability of Covenant rights in the domestic legal order. Concerns about the lack of information regarding court cases that invoke the provisions of the ICESCR are paramount. CESCR therefore often recommends states parties to offer specific training of the judiciary on the justiciability of all the rights protected in the Covenant.

The lack of justiciability is very often directly linked to a lack of awareness about the nature of state obligations and a lack of training among the judiciary.⁷⁵⁸ In order to increase the justiciability of socio-economic rights, CESCR insists that 'judicial training should take full account of the justiciability of the Covenant'.⁷⁵⁹ In their periodic reports, states parties must 'provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant'.⁷⁶⁰ In particular, 'courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant'.⁷⁶¹

4.2.2.3 Justiciability in the COs of the Group Specific HRTBs

The group specific HRTBs rely on CESCR's extensive normative jurisprudence when it comes to the justiciability of socio-economic rights contained in their respective

⁷⁵⁷ CESCR, COs to AT 2013, para 6; COs to CZ 2013, para 5; COs to EL 2015, paras 5-6; COs to ES 2018, paras 5-7; COs to SI 2014, para 10 (under the heading 'non-discrimination').

⁷⁵⁸ CESCR, COs to AT 2013, para 6; COs to BE 2013, para 7; COs to CY 2016, paras 5-6; COs to CZ 2013, para 5; COs to DK 2019, para 4; COs to EE 2019, paras 4-5; COs to EL 2015, para 5; COs to ES 2018, para 6; COs to FI 2014, para 6; COs to FR 2016, paras 5-6; COs to IE 2015, para 7; COs to IT 2015, paras 6-7; COs to PL 2015, paras 5-6; COs to RO 2014, para 5; COs to SE 2016, paras 5-6; COs to SI 2014, para 5; COs to SK 2019, paras 4-5; COs to UK 2016, paras 5-6.

⁷⁵⁹ CESCR, 'GC 9: The Domestic Application of the Covenant' (n 446) para 11.

⁷⁶⁰ *ibid.*

⁷⁶¹ *ibid.* 14.

treaties. This is why no group specific HRTB has issued a General Comment or General Recommendation that deals with the justiciability of socio-economic rights. However, this does not mean that the group specific HRTBs do not issue concerns on justiciability their COs to the EU MS. Figure 29 illustrates that almost all EU MS received a CO on justiciability by more than one HRTB.⁷⁶² Whereas the blue bars signify how many HRTBs were concerned about justiciability in general, the red bars illustrate the specific concern of lack of access to remedies and the green bars lack of case law.

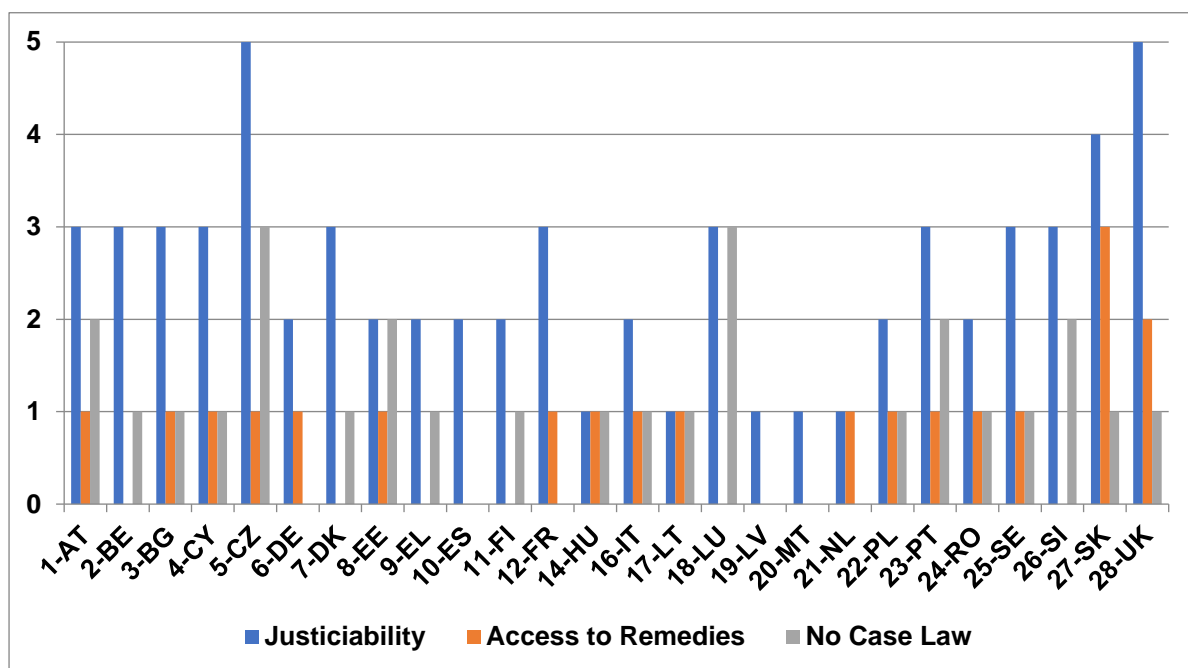


Figure 29. Concerns about Justiciability in the HRTBs to the EU MS

At first sight, there seems to be a big variation between EU MS. In the United Kingdom and the Czech Republic, all five HRTBs issued concerns about justiciability, whereas in Latvia, Malta, and the Netherlands only one HRTB mentioned it. Croatia and Ireland were excluded from the graph since they did not receive a specific concern on justiciability.⁷⁶³

Denmark is another state party that historically does not wish to incorporate international human rights treaties into the national legal order, which makes

⁷⁶² Only Croatia and Ireland did not receive a CO on justiciability by any HRTB from 2009-2019, which is why I excluded those two EU MS from the graph.

⁷⁶³ However, the HRTBs were very concerned about domestic applicability, e.g. CEDAW Committee, COs to HR 2015: 'not possible to apply, invoke and/or refer to the provisions of the Convention directly' (para 11); see also CRC Committee, COs to HR 2014: 'most of the case law is not disclosed publicly' (para 6); CESCR, COs to IE 2016: 'that 'no steps have been taken to incorporate the Covenant in domestic law and that the State party does not intend to do so' (para 8).

justiciability very unlikely. For example, the CRPD Committee notes that Denmark provided ‘insufficient information about the application of the Convention by the State party’s courts and authorities’.⁷⁶⁴ After the CERD Committee had already issued recommendations on incorporation in the previous reporting cycle, it ‘notes with regret’ that ‘the State party finds it unnecessary to do so’.⁷⁶⁵ This lack of incorporation is clearly linked with the lack of justiciability, since ‘the non-incorporation of international treaties results in reluctance by lawyers and judges to invoke such treaties in Danish courts’.⁷⁶⁶

This close connection between domestic application and justiciability is illustrated in Figure 30 below. It shows that at least two out of five HRTBs were concerned about domestic application and justiciability in every EU MS. The wide variations in the degrees of justiciability are therefore linked to the extent to which EU MS have given effect to the international human rights treaties in the national legal order.

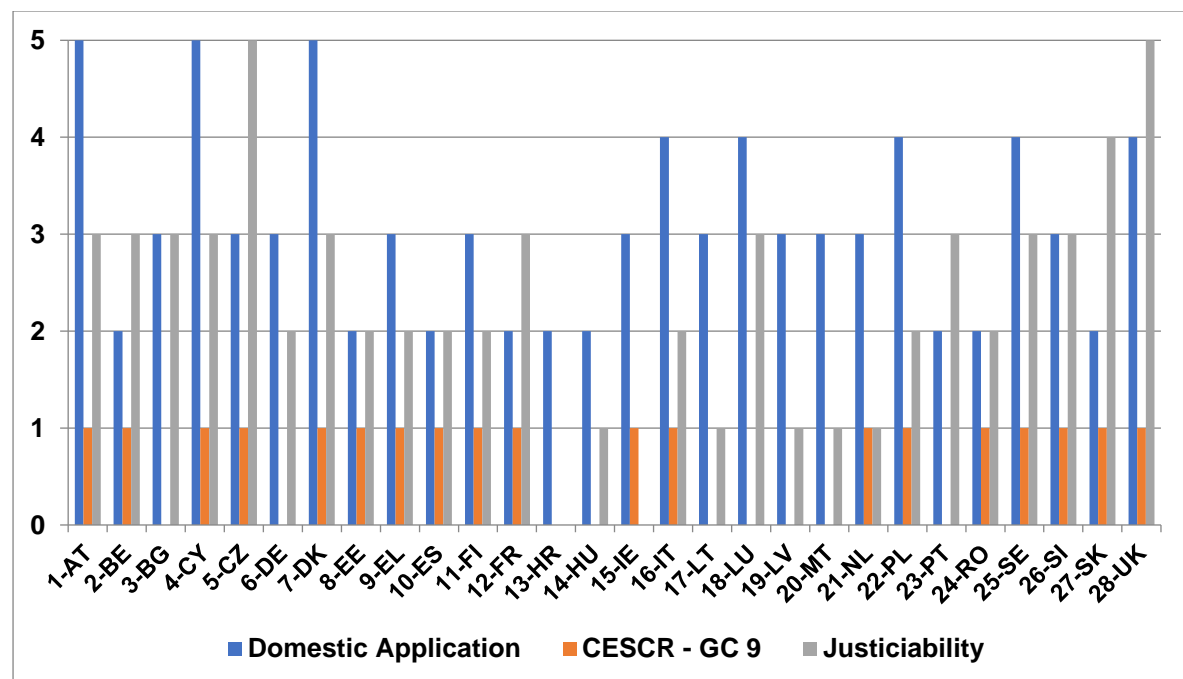


Figure 30. Concerns about Domestic Application and Justiciability across the EU MS

Figure 31 below shows an extract of my code system in the MAXQDA software for justiciability. The HRTBs were concerned about justiciability in all of the eight EU MS that I included in the graph. As to the specific concerns, the HRTBs were most often

⁷⁶⁴ CRPD Committee, COs to DK 2014, para 2.

⁷⁶⁵ CERD Committee, COs to DK 2010, para 8.

⁷⁶⁶ CERD Committee, COs to DK 2010, para 8.

concerned about the lack of domestic case law and the lack of access to justice. As to the recommendations, awareness-raising and training were mentioned most frequently.

Codesystem	1-AT	2-BE	3-BG	4-CY	5-CZ	6-DE	7-DK	8-EE
Conditions								
Hindering Conditions								
Justiciability	3	3	3	3	5	2	3	2
Concerns								
Access to Justice	1		1	1	1	1		1
Not in Constitution				1				
Non-applicability								
programmatic								
no case law	2	1	1	1	3		1	2
Lower Courts				1	1			
Lack of training on justici	1							
Recommendations								
Incorporation / Impleme						1		
Awareness-Raising		1	1		1	1		1
Training	2		1	1		2		1

Figure 31. Extract of HRTBs' Concerns and Recommendations about Justiciability

Regarding the concerns on the lack of case-law, the particular wording of COs tends to be somewhat similar. For example, CESCR is concerned about Austria's 'lack of court decisions invoking the provisions of the Covenant'.⁷⁶⁷ In Belgium, CESCR bemoans that the Covenant is 'rarely invoked before the State party's courts and Tribunals, and even then from an ancillary or secondary perspective'.⁷⁶⁸ Concerns about the absence of case law are also voiced by the group specific HRTBs. For example, the CRC Committee uses very similar vocabulary in its COs to the Czech Republic, being concerned that the 'provisions of the Convention are rarely invoked or directly enforced by tribunals, courts and administrative authorities'.⁷⁶⁹

Sometimes, the non-discrimination aspect of the group specific HRTBs is being emphasised. This is the case when the CRPD Committee complains in its COs to the Czech Republic about the 'absence of case law relating to judicial protection from disability-based discrimination'.⁷⁷⁰ Similarly, in its COs to Austria, the CERD

⁷⁶⁷ CESCR, COs to AT 2013, para 6.

⁷⁶⁸ CESCR, COs to BE 2013, para 7.

⁷⁶⁹ CRC Committee, COs to CZ 2011, para 10.

⁷⁷⁰ CRPD Committee, COs to CZ 2015, para 11.

Committee complains about the ‘lack of examples of cases of racial discrimination where the provisions of the Convention have been applied by domestic courts’.⁷⁷¹

In its COs to Germany in 2015, the CRPD Committee is concerned that ‘legal remedies and recognition of the Convention before the courts are not ensured’.⁷⁷² Later on, the Committee recommends that reasonable accommodation for persons with disabilities should be ‘legally enforceable and justiciable before the courts’.⁷⁷³ This shows that justiciability is not only CESCR’s special avenue for how to realise rights, but it is considered important for the group specific HRTBs as well. When it comes to racial discrimination, Germany does not fare better. In fact, the CERD Committee considered it necessary to provide a detailed explanation as to why judicial remedies are sorely lacking in Germany (emphasis added):

The General Equal Treatment Act does not address racial discrimination by public authorities, does not allow for collective action and *does not sufficiently encourage litigation*, owing to the costs of legal suits, which can be an obstacle to gaining access to an effective remedy. The Committee is also concerned that while the Basic Law can in principle be invoked in court against public authorities, in practice, *administrative courts only infrequently address racial discrimination through the Basic Law*, and compensation cannot be obtained through the same proceedings. The Committee is therefore concerned that the existing gaps in domestic legislation make it difficult to adequately combat racial discrimination.⁷⁷⁴

Hence, in Germany the issue is not so much a blatant refusal of incorporation (as is the case in Ireland). Rather, the problem is that the current avenues for justiciability are not effective. Summing up, the lack of case-law on the non-discrimination obligation is very concerning given that it has been considered justiciable by CESCR since the very early normative foundations developed in GC 3 on the nature of states parties’ obligations.⁷⁷⁵

Often, states parties do not report on the existence of court cases or justiciability in general, resulting in COs on the *lack of information* about case law. For example, in its COs to Bulgaria in 2017, the CERD Committee ‘regrets the lack of information on court cases in which the Convention’s provisions were invoked before, or applied by,

⁷⁷¹ See CERD Committee, COs to AT 2012, para 5. The interplay between domestic applicability and justiciability is evidenced by the fact that this concern is situated under the heading ‘applicability of the Convention under domestic law’.

⁷⁷² CRPD Committee, COs to DE 2015, para 11.

⁷⁷³ CRPD Committee, COs to DE 2015, para 45.

⁷⁷⁴ CERD Committee, COs to DE 2015, para 8.

⁷⁷⁵ CESCR, ‘GC 3: The Nature of States Parties’ Obligations’ (n 19).

domestic courts'.⁷⁷⁶ Sometimes there is a difference between the hierarchies of domestic courts – with lower courts typically being much less able to invoke the justiciability of socio-economic rights protected under international human rights treaties. For example, in CESCR's COs to Cyprus in 2016, the Committee is concerned about the 'lack of information on decisions invoking the Covenant adopted by lower courts'.⁷⁷⁷ In its COs to the Czech Republic in 2013, the Committee 'regrets the lack of information on decisions adopted by lower courts and administrative instances that invoke the Covenant'.⁷⁷⁸ While the addition of 'lower courts' is a differentiating factor in the wordings used, it is nevertheless striking that separate HRTBs adopt similar COs on the exactly same issue – the lack of evidence of justiciability on socio-economic rights in Europe.

Sometimes, the HRTBs provide details about the state-party-specific reasoning behind the lack of case law. For example, in its COs to Belgium, CESCR is concerned about Belgium's position that the ICESCR does 'not directly declare subjective individual rights'.⁷⁷⁹ Belgium's position against the justiciability of socio-economic rights is somewhat typical in Europe. Hence, CESCR's bold normative developments on justiciable elements of every single Covenant right seem to be out of place with the current state practice across EU MS.

4.2.3 Why Formal Legal Means are Neither Sufficient nor Necessary to Realise Rights

The last sections have shown that the HRTBs, and CESCR in particular, are eagerly pushing for domestic application and justiciability in their COs to EU MS. At the same time, EU MS still seem to be quite reserved about allowing courts to adjudicate socio-economic rights. This ambivalence is also reflected in the academic debate. Justiciability has historically been on the forefront of academic scholarship, in particular in the field of socio-economic rights and constitutionalism in the Global South. From a historical point of view, constitutional lawyers focused on justiciability in the Global South,⁷⁸⁰ or new democracies more generally.⁷⁸¹ South Africa is a case in point. Scholars have focused on this jurisdiction due to its 'transformative

⁷⁷⁶ CERD Committee, COs to BG 2017, para 5.

⁷⁷⁷ CESCR, COs to CY 2016, para 5.

⁷⁷⁸ CESCR, COs to CZ 2013, para 5.

⁷⁷⁹ CESCR, COs to BE 2013, para 7.

⁷⁸⁰ Varun Gauri and Daniel M Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008).

⁷⁸¹ Roberto Gargarella, Pilar Domingo and Theunis Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006).

constitution',⁷⁸² which made many socio-economic rights fully justiciable. Landmark cases like *Grootboom v South Africa*,⁷⁸³ where the South Africa Constitutional Court arguably did not go far enough to uphold constitutional rights, have consequently resulted in some disillusionment among scholars. Whereas Bilchitz criticised the Court on a more dogmatic level for failing to impose immediate minimum core obligations,⁷⁸⁴ others pointed out the lack of implementation of the Court's decision and particularly the lack of tangible improvement of the Grootboom community's housing situation.⁷⁸⁵ The often-cited headline of a newspaper article, showing that Grootboom died 'homeless and penniless', is a case in point.⁷⁸⁶ It seems that even full justiciability of socio-economic rights due to the constitutional protection of these rights does not necessarily lead to better socio-economic rights outcomes for societies' poorest communities.

Studies in favour of justiciability tend to distinguish between strong and weak forms of judicial review. Whereas strong review allows courts to directly enforce rights, e.g. through striking down legislation, under the weak form of judicial review courts might recognise a rights violation but will not enforce it.⁷⁸⁷ While it seems questionable that weak judicial review will live up to CESCR's high expectations of the justiciability of all socio-economic rights (albeit to varying extents), it nevertheless has gained considerable traction, especially in common law jurisdictions.⁷⁸⁸ In the US, one particular strand of the weak form of judicial review is called judicial minimalism, where particular emphasis placed is on the courts' role to decide individual cases, while leaving the more systemic and broader questions to the legislative process.⁷⁸⁹ In a more recent edited work, the argument moves from justiciability alone to more flexible

⁷⁸² Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010).

⁷⁸³ *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC) (2017) 2001.

⁷⁸⁴ Bilchitz, *Poverty and Fundamental Rights* (n 634).

⁷⁸⁵ Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Human Rights Quarterly* 796, 807–808; Kameshni Pillay, 'Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights' (2002) 6 *Law, Democracy and Development* 255.

⁷⁸⁶ Pearlie Joubert, 'Grootboom Dies Homeless and Penniless' *Mail&Guardian* (8 August 2008) <<https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless/>> accessed 1 January 2023.

⁷⁸⁷ Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008).

⁷⁸⁸ Mark V Tushnet, 'The Rise of Weak-Form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

⁷⁸⁹ Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999).

approaches considering also the other spheres of governments as influential for transformation.⁷⁹⁰

While most commentators continue to focus on non-European jurisdictions where socio-economic rights tend to be more justiciable, there has been a renewed interest in how and why justiciability might also matter to the realisation of socio-economic rights in Europe.⁷⁹¹ Hence, academic discussion is not limited to the Global South, on the contrary, a current book on judicial review and constitutionalism sets the scene of the discussion in Europe.⁷⁹² Under the umbrella question of examining the nature of judicial constitutional power, the edited volume contains pieces on what exactly is political about constitutional adjudication,⁷⁹³ on judicial power and European integration in Germany,⁷⁹⁴ on constitutional court and politics in Poland,⁷⁹⁵ or on the reform of European judicial appointment.⁷⁹⁶

In the UK, the lack of incorporation of international human rights norms into the national legal order makes justiciability almost impossible. Boyle challenges this pessimism and makes a strong argument about how justiciability could help in realising socio-economic rights in the UK.⁷⁹⁷ What stands out is her argument for substantive (as opposed to purely procedural) judicial review in all instances ‘when the violation is so obvious and severe as to directly impact on the applicant’s dignity and meaningful enjoyment of the minimum level of rights, the dignity or social minimum threshold.’⁷⁹⁸ By focusing on dignity, Boyle joins a line of thought that has argued for dignity as a principle of human rights adjudication that should allow for substantive judicial

⁷⁹⁰ Sony Pellissery and others, *Transformative Law and Public Policy* (Taylor & Francis 2019).

⁷⁹¹ Compare Jeff King, *Judging Social Rights* (Cambridge University Press 2012) who makes a persuasive argument for the need to ensure justiciability, while not foregoing realisation through legislative or administrative means.

⁷⁹² Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

⁷⁹³ Dieter Grimm, ‘What Exactly Is Political about Constitutional Adjudication?’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

⁷⁹⁴ Franz C Mayer, ‘Judicial Power and European Integration: The Case of Germany’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

⁷⁹⁵ Lech Garlicki, ‘Constitutional Court and Politics: The Polish Crisis’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

⁷⁹⁶ Mitchel Lasser, ‘European Judicial Appointments Reform: A Neo-Institutionalist Approach’ in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019).

⁷⁹⁷ Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (n 143).

⁷⁹⁸ *ibid* 35.

review.⁷⁹⁹ However, this argument is not without its critics, in particular in the European context. A recent article compared case law of constitutional courts regarding social rights claims in France, Italy, Germany, and the UK.⁸⁰⁰ In all four jurisdictions, courts did not use the concept of human dignity to engage in substantive judicial review.⁸⁰¹ Nevertheless, the authors claim that human dignity has an 'expressive function' which could help courts in assessing the legality of certain laws, for example in connection with harsh sanction regimes.⁸⁰²

In one of the first quantitative study of the world's constitutions of 2006, the authors mapped all constitutions according to two ideological poles: libertarian constitutions on the one hand, and statist constitutions on the other hand.⁸⁰³ While the former constitutions foresee a more limited role of the state, the latter expand the state's mandate to include provision of socio-economic rights. While the authors claim that many European welfare states are among the latter category, their analysis fails to include those rights that matter most for the right to a social minimum, namely the rights to social security, work, and an adequate standard of living.⁸⁰⁴ In Europe, those rights are typically not covered by constitutions.⁸⁰⁵ This, in turn, makes justiciability much more difficult to achieve, since social rights still tend to be seen as aspirational and not legally binding.

⁷⁹⁹ Conor Gearty, 'The Principle of Human Dignity', *Principles of Human Rights Adjudication* (Oxford University Press 2005); Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 *Constitutional Court Review* 165.

⁸⁰⁰ Stefano Civitarese Matteucci and Giorgio Repetto, 'The Expressive Function of Human Dignity: A Pragmatic Approach to Social Rights Claims' (2021) 23 *European Journal of Social Security* 120.

⁸⁰¹ *ibid.*

⁸⁰² *ibid.* 135.

⁸⁰³ David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

⁸⁰⁴ *ibid.* 1229.

⁸⁰⁵ For a comparative analysis, see George S Katrougalos, 'The Implementation of Social Rights in Europe' (1995) 2 *Columbia Journal of European Law* 277; Cécile Fabre, 'Social Rights in European Constitutions' in Gráinne de Búrca, Bruno de Witte and Larissa Ogertschnig (eds), *Social Rights in Europe* (Oxford University Press 2005); Elizabeth Pascal, 'Welfare Rights in State Constitutions' (2007) 39 *Rutgers Law Journal* 863; for an argument about dignity as constitutional value, see Arthur Chaskalson, *Human Dignity as a Constitutional Value* (Brill Nijhoff 2001); for an application of how dignity is being utilized for establishing a minimum existence threshold in Germany's constitution Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (n 25); for two positive examples across the EU MS, see Grega Strban, 'Constitutional Protection of the Right to Social Security in Slovenia' (2016) 23 *Studia z Zakresu Prawa Pracy i Polityki Społecznej* <<https://ruj.uj.edu.pl/xmlui/handle/item/259152>> accessed 12 December 2022; MB Vieira and FC Da Silva, 'Getting Rights Right: Explaining Social Rights Constitutionalization in Revolutionary Portugal' (2013) 11 *International Journal of Constitutional Law* 898.

4.3 Realising Rights

As I have shown above, I distinguish the terminology of realising rights from formal legal means, such as incorporation, implementation, compliance, and enforcement. For the purposes of my thesis, I use the term realise to refer to all 'legislative, institutional and policy measures' for the effective and practical fulfilment of the right to a social minimum.⁸⁰⁶ This definition requires justifications on three issues. Firstly, how exactly is realising rights distinct from formal legal means? Secondly, if realisation means effective and practical rights fulfilment, how does realisation differ from the 'fulfil'-element of the 'respect, protect, fulfil' doctrine of international human rights law? Thirdly, how does my definition of 'realisation' interact with the doctrine of progressive realisation of socio-economic rights?

Regarding the first question, on the distinction between realisation and formal legal compliance, two scenarios can be envisaged. The first scenario concerns a state party that fully achieves formal legal compliance, but nevertheless does not realise the right to a social minimum. If realisation was the same as formal legal compliance, any state party that fully achieves formal legal compliance should also fully achieve the realisation of the right to a social minimum. However, this is not the case. Even when states parties fully incorporate all international human rights treaties and conventions into their national constitutions and allow for full justiciability, they do not automatically realise the right to a social minimum. An example would be South Africa with its post-Apartheid-Constitution which includes many socio-economic rights.⁸⁰⁷ Nevertheless, according to the well-known Gini-index, it is the most unequal country in the world.⁸⁰⁸ While the rights to housing or the right to health are anchored in the Constitution, the promise and practice of justiciability did not achieve much-needed systemic change. Landmark cases like *Grootboom* are taught in law-schools around the world and have been subject to extensive scholarly analysis.⁸⁰⁹ However, South Africa's very high

⁸⁰⁶ This understanding of realisation is in line with CESCR's jurisprudence, see for example CESCR COs to SK 2019, para 3.

⁸⁰⁷ Liebenberg (n 779).

⁸⁰⁸ Stats SA: Statistics South Africa, 'How Unequal Is South Africa?'

<<https://www.statssa.gov.za/?p=12930>> accessed 27 December 2022.

⁸⁰⁹ Sandra Liebenberg, 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *South African Journal on Human Rights* 232; Sunstein (n 786); Pierre de Vos, 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *South African Journal on Human Rights* 258; Theunis Roux, 'Understanding *Grootboom* - A Response to Cass R. Sunstein' (2001) 12 *Constitutional Forum* 41; Marie Huchzermeyer, 'Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of *Grootboom*, *Alexandra*, and *Bredell*' (2003) 14 *Urban Forum* 80; Albie Sachs, 'The Judicial

levels of domestic application and justiciability run in parallel with a struggle to achieve basic dignity and minimal rights for their countries' poorest citizens. This shows that a single focus on formal legal means and justiciability is not sufficient to realise the right to a social minimum, but that it is rather necessary to widen the analysis to other hindering conditions.

The second scenario is a state party that does not achieve formal legal compliance, but nevertheless realises the right to a social minimum. For example, Denmark is a country where international human rights treaties are not directly applicable in the national legal order. In fact, Denmark has continuously refused to formally incorporate key international human rights treaties into its legal order. Arguably, without incorporation, Denmark has not yet fully achieved formal legal compliance. Nevertheless, Denmark has very advanced social protection systems that allow for a high standard of socio-economic rights realisation. Hence, it is entirely possible that a country does not take any formal steps to incorporate international human rights law into their national legal order, and nevertheless successfully achieves a high level of practical human rights fulfilment. The two scenarios show that there is indeed a clear difference between formal legal compliance and realisation. While my definition of realisation includes all legislative, institutional and policy measures for the effective and practical fulfilment of the right to a social minimum, formal legal compliance has a much narrower scope. I argue that it is not enough to only consider formal legal means like incorporation or implementation of international human rights law treaties. Instead, my focus on realisation calls for a closer look as how states parties are actually realising rights.

Regarding the second question on the distinction between *realising* rights on the one hand, and the terminology of *fulfilling* rights on the other hand, I consider the term 'realising' to encompass all three elements of the 'respect-protect-fulfil' doctrine. In other words, realising rights is wider than the 'fulfil' element of the 'respect-protect-fulfil' doctrine. Realising rights does not only mean fulfilling rights, but also respect for and protection of human rights. In chapter 3, I defined the right to a social minimum as non-discriminatory access to minimum means of subsistence. In order to realise

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this right to a social minimum, it must not only be fulfilled, but it must also be respected and protected.

Regarding the third question on the relationship of the realising rights terminology with the doctrine of progressive realisation, CESCR sometimes uses the term 'full realisation' to describe the aim of progressive realisation, which is to steadily keep increasing socio-economic rights protection subject to available resources.⁸¹⁰ In this thesis, I argue that the realisation of the right to a social minimum is a minimum core obligation, which is to be realised immediately. It might seem as if CESCR's terminology of 'full realisation' precludes the inclusion of minimum core obligations such as the right to a social minimum. However, this is not the case. On the contrary, the obligation to realise the right to a social minimum is immediately applicable and as such independent from the doctrine of progressive realisation. As argued before, I understand the right to a social minimum not as a 'minimum' right which acts as a ceiling, but rather as a 'springboard right', which acts as a floor.⁸¹¹ This is why there is an important distinction between my understanding of realising the right to a social minimum in this thesis (which is immediately applicable and not dependant on available resources), and CESCR's terminology of 'full realisation' of all socio-economic rights as a terminological alternative to 'progressive realisation' (which is to be achieved progressively, up to the maximum of available resources). This distinction, however, does not prejudice the fact that resources are needed to realise the right to a social minimum. Instead, states parties need to invest their resources with even more effort to comply with their immediate obligation to realise the right to a social minimum.

The section is structured in the following way: First, I argue in section 4.3.1 that it is fully doctrinally sound to consider 'all appropriate means' of realisation. Second, I

⁸¹⁰ See for example CESCR, COs to EL 2015, para 14: 'The Committee recommends that the State party step up its efforts to reduce unemployment, in particular unemployment among young persons and women, with a view to moving progressively towards the *full realisation* of the right to work.' (*emphasis added*); CESCR, COs to PT 2014, para 8: "The Committee recommends that the State party step up its efforts to reduce unemployment, in particular unemployment among young persons, with a view to moving progressively towards the *full realisation* of the right to work"; CESCR, COs to FR 2016, para 25 (a): in relationship to the right to just and favourable working conditions: regressive measures must be 'unavoidable and fully justified in relation to the totality of the rights under the Covenant in the light of the State party's obligation to pursue the *full realisation* of those rights to the maximum of its available resources'; CESCR, COs to RO 2014, para 7(b) 'Regularly assess whether the maximum available resources have been used to progressively achieve the *full realisation* of the rights recognized in the Covenant' (*emphasis added*).

⁸¹¹ See chapter 3.

show how the terminology of realising rights is used across CESCR's COs to the EU MS (section 4.3.2). Finally, I widen this perspective to also include the group specific HRTBs (section 4.3.3).

4.3.1 Realising Rights by All Appropriate Means

I have argued above that formal legal means are by no means sufficient to realise the right to a social minimum in Europe. While the HRTBs continue to emphasize the necessity of domestic application and justiciability to realise rights in their COs to EU MS, CESCR does make room for other ways of realising rights. CESCR mentions in GC 3 that states parties must make use of 'administrative, financial, educational and social measures' to realise rights by 'all appropriate means'.⁸¹² As explained above, I use the term realise to refer to all 'legislative, institutional and policy measures' for the effective and practical fulfilment of the right to a social minimum.⁸¹³

Whereas human rights scholars are usually focused on enforcement issues without considering the wider enabling or hindering conditions of rights fulfilment, social policy scholars often do not understand or appreciate the full normative dimension of international human rights law. Evolving social rights jurisprudence does not necessarily or immediately translate into welfare policy design. Justiciability alone, which transfers the debate about distribution of scarce resources from the political process to the courts, cannot produce long-lasting systemic change.⁸¹⁴ Nevertheless, justiciability remains a key concern among human rights scholars. The underlying assumption of many justiciability scholars is that once courts would finally be allowed to rule on the realisation of socio-economic rights, this would automatically improve the practical rights realisation on the ground. However, this assumption does not hold true in all circumstances. In fact, jurisdictions with strong constitutional protections of social rights, and strong possibilities to claim individual socio-economic rights in front of courts do not necessarily succeed in realising the right to a social minimum for the most disadvantaged groups.

Recently, purely court-centred approaches towards the realisation of social rights have been criticised in the human rights community.⁸¹⁵ Despite attempts in the

⁸¹² CESCR, 'GC 3: The Nature of States Parties' Obligations' (n 19) para 7.

⁸¹³ This understanding of realisation is in line with CESCR's jurisprudence, see for example CESCR COs to SK 2019, para 3.

⁸¹⁴ See King (n 788) who argues for judicial restraint and incrementalism.

⁸¹⁵ Sepúlveda Carmona (n 59).

human rights community to bridge the gap between the fulfilment of social rights and welfare design, the justiciability debate still dominates over more policy-oriented, substantive questions on the specific normative content of social rights protected under international human rights law. In the previous sections I have shown that the HRTBs are concerned about formal legal means of realisation (domestic application and justiciability) in every single one of the COs issued by the five HRTBs to the EU MS from 2009-2019. CESCR especially often fails to account for wider hindering conditions, which might have nothing to do with the domestic legal framework or the status of the Covenant in domestic law. This is despite CESCR's insistence that rights realisation must make use of 'all appropriate means'. In short, formal legal means are not sufficient to realise the right to a social minimum.

The question of which hindering conditions prevent EU MS from realising the right to a social minimum for some of the most disadvantaged groups in their jurisdiction is far from settled. Several strands of literature exist on what helps or hinders the realisation of rights.⁸¹⁶ Often, socio-economic rights scholars overwhelmingly focus on formal legal means like domestic applicability and justiciability without questioning whether these generalist conditions are meaningful for disadvantaged groups.⁸¹⁷ On the contrary, some legal scholars that focus on particularly disadvantaged groups are overwhelmingly concerned with the specific issues of their particular group, so that their research findings are not easily applicable

⁸¹⁶ Thomas Risse-Kappen, Steve C Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013); Xinyuan Dai, 'The Conditional Effects of International Human Rights Institutions' (2014) 36 *Human Rights Quarterly* 569; Adam S Chilton, 'Experimentally Testing the Effectiveness of Human Rights Treaties' (2017) 18 *Chicago Journal of International Law* 164; Paul J Nelson, 'Social Movements and the Expansion of Economic and Social Human Rights Advocacy among International NGOs' in LaDawn Haglund and Robin Stryker (eds), *Closing the Rights Gap: From Human Rights to Social Transformation* (University of California Press 2015); Jack Snyder, 'Empowering Rights Through Mass Movements, Religion, and Reform Parties' in Stephen Hopgood, Jack Snyder and Leslie Vinjamuri (eds), *Human Rights Futures* (Cambridge University Press 2017); Eva Maria Lassen and others, 'Report on Factors with Enable or Hinder the Protection of Human Rights' (2017).

⁸¹⁷ Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core Articles and Essays Analyzing Justiciability of Economic, Social, and Cultural Rights: Legal Approaches and the Contributions of Case Law' (2006) 22 *American University International Law Review* 163; Bilchitz, *Poverty and Fundamental Rights* (n 634); Gauri and Brinks (n 777); Miltiadis Sarigiannidis and Ioanna Pervou, 'Adequate Housing: Seeking Justiciability through the Right to Property' (2013) 1 *International Journal of Human Rights and Constitutional Studies* 27; Gerstenberg (n 143); Diver and Miller (n 58); Amaya Úbeda de Torres, 'Justiciability and Social Rights' in Christina Binder and others, *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020); Katie Boyle, 'Models of ESR Justiciability: Existing Mechanisms and Future Options', *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020).

to other groups or the general population.⁸¹⁸ For example, disability rights scholars overwhelmingly focus on identifying conditions that impede equitable labour market access or independent living.⁸¹⁹ These issues, however, are considered too ‘group specific’, so that they do not immediately fit within the generalist scholars’ discussions on the proper role of justiciability in the realisation of socio-economic rights.

The conditions that hinder EU MS from realising the right to a social minimum for the most vulnerable are perhaps not well enough understood. Even though the minimum core obligation is of immediate effect, with no derogations permitted, this does not mean that states parties are all doing similarly well in protecting the right to a social minimum. On the contrary, there is ample evidence that resource constraints are one of the primary reasons why states fail to fulfil even the most minimal rights protection for disadvantaged and marginalized groups. At the same time, resources are not the only thing that matters. For example, a state can be extremely wealthy and still spend little on social welfare programmes which would benefit disadvantaged groups. Or a state can be moderately wealthy but nevertheless introduce minimum wages which allow an adequate standard of living. Besides resources and the welfare state architecture, stereotypes and deservingness-conceptions also matter. In many countries, the most vulnerable groups are also the ones most prone to being discriminated against. States have different ways of how to handle these issues, and the legal non-discrimination framework is only one tiny piece of this puzzle. I am proposing that it is time for human rights lawyers to move beyond the narrow legal emphasis on justiciability and formal legal implementation of human rights norms by taking the practical conditions and constraints under which states parties are operating seriously.

⁸¹⁸ For persons with disabilities see for example Hoefmans and de Beco (n 418); Broderick (n 418); Waddington and Lawson (n 418); for children, see for example Nolan (n 418); Stern (n 418); Liebel (n 418); for issues of intersectionality, see for example Sabatello (n 418) focusing on children with disabilities; for a general discussion on intersectionality, see for example Chow (n 418).

⁸¹⁹ Siobhan Barron, ‘Employment of Persons with Disabilities - Effective Policy and Outcomes Requires Clear Strategy with All Relevant Actors Engaged’ in Gudrun Wansing, Felix Welti and Markus Schäfers (eds), *The Right to Work for Persons with Disabilities: International Perspectives* (1st edn, Nomos 2018); Gudrun Wansing, Felix Welti and Markus Schäfers (eds), *The Right to Work for Persons with Disabilities: International Perspectives* (Nomos 2018); Charlotte Pearson, ‘Independent Living and the Failure of Governments’, *Routledge Handbook of Disability Studies* (2nd edn, Routledge 2019); Steve Graby and Roxanne Homayoun, ‘The Crisis of Local Authority Funding and Its Implications for Independent Living for Disabled People in the United Kingdom’ (2019) 34 *Disability & Society* 320.

By examining a range of hindering conditions together, my aim is to discover different pathways of conditions which lead to a failure to fulfil the right to a social minimum for my three case studies (persons with disabilities, children, and Roma) in the next section. By focusing on identifying hindering conditions during a particular time frame (2009-2019) for a specific geographic region (EU MS) across three distinct disadvantaged groups (persons with disabilities, children, and Roma) I specify the abstract normative content developed in CESCR's GCs to the particularities of how to practically realise the right to a social minimum. Understanding the different pathways of hindering conditions – as combinations of political, economic, and institutional conditions – is hence an innovative way to bridge the human rights approaches to realising the right to a social minimum on the one hand, and the social policy approaches to realising the right to a social minimum on the other hand. In particular, analysing different hindering conditions together is a valuable resource for human rights scholars working on socio-economic rights, no matter whether they are proponents or opponents of justiciability.

4.3.2 Realising Rights in CESCR's COs to EU MS from 2011-2019

My definition of the term 'realisation' is in line with CESCR's jurisprudence. In its CO's to Slovakia in 2019, CESCR understands realisation as all 'legislative, institutional and policy measures taken by the State party'.⁸²⁰ When applying this general definition to specific policy realms, social protection benefits must be high enough to ensure an adequate standard of living. For example, very low unemployment benefits are a clear example of a legislative and policy measure that hinders the realisation of rights. This is evidenced in CESCR's COs to Denmark in 2019, where the Committee is concerned about the low level of unemployment benefits which do not allow 'beneficiaries to realise their Covenant rights'.⁸²¹

Besides legislative, institutional and policy measures, states parties must also realise rights by paying special attention to disadvantaged and marginalised groups. For example, CESCR is repeatedly concerned that the Roma are not able to realise their Covenant rights in several EU MS. In its COs to Slovakia in 2019, the Committee points out that 'Roma face multiple barriers to the realisation of their right to an

⁸²⁰ CESCR, COs to SK 2019, para 3.

⁸²¹ CESCR, COs to DK 2019, para 38.

adequate standard of living'.⁸²² In its COs to Slovenia in 2014, CESCR voices its concern 'about the absence of sufficient disaggregated data on the effective realisation of Covenant rights for disadvantaged and marginalized individuals and groups, in particular for Roma'.⁸²³ I further discuss the issue of disaggregated data as a key hindering condition to realise the right to a social minimum in chapter 5 of this thesis.

Besides policy- or group specific concerns on realising rights, CESCR puts specific focus on how to protect socio-economic rights in times of austerity and crisis. This shows that realising rights does not only apply to progressive realisation, but also to the obligation to immediately realise the right to a social minimum. For example, in CESCR's COs to the UK in 2016, the Committee is very concerned about the 'adverse impact' of tax policies which hindered the state party from addressing 'persistent social inequality and to collect sufficient resources to achieve the full realisation of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups'.⁸²⁴ Even though the Committee uses the term 'full realisation' here – hinting at progressive as opposed to immediate realisation – the Committee's focus on tax policy does permit an interpretation of realisation which goes beyond progressive realisation. Summing up, the three varieties of CESCR's usage of the term 'realise', i.e. 'immediate', 'progressive' and 'full' realisation, show that the Committee is very much concerned about the effective and practical fulfilment of Covenant rights, which goes beyond formal legal means like incorporation and implementation. In particular, CESCR's jurisprudence on the term 'realise' is fully in line⁸²⁵ with my definition of definition of realising, meaning all 'legislative, institutional and policy measures' for the effective and practical fulfilment of right to a social minimum.

4.3.3 Realising Rights in the COs of the Group Specific HRTBs

The group specific HRTBs also use the term 'realisation', albeit in a slightly different way than CESCR. In particular, they focus much more on resource availability and equality issues, in particular regarding the lack of disaggregated statistics. On the topic of resource availability, the CRPD Committee recommends in its COs to Lithuania to

⁸²² CESCR, COs to SK 2019, para 30.

⁸²³ CESCR, COs to SI, 2014, para 6.

⁸²⁴ CESCR, COs to UK 2016, para 16.

⁸²⁵ This understanding of realisation is in line with CESCR's jurisprudence, see for example CESCR, COs to SK 2019, para 3.

'regularly evaluate the national budget and its use of the European Union structural and investment funds to ensure that the maximum available resources are being used for the realisation of the rights of persons with disabilities'.⁸²⁶ What seems to be a single recommendation for the CRPD Committee is a standard recommendation for the CRC Committee, which routinely points states parties to its GC 19 (2016) on public budgeting for the realisation of children's rights.⁸²⁷

Besides the focus on resources, the group specific HRTBs dedicate much attention to concerns regarding the lack of disaggregated statistics and data collection. For example, the CRC Committee recommends the setting up of a 'comprehensive data collection system',⁸²⁸ a 'comprehensive database on children',⁸²⁹ 'indicators on children's rights',⁸³⁰ or the development of 'a comprehensive strategy for the overall realisation of the principles and provisions of the Convention'.⁸³¹ A fuller discussion of how data and indicators serve as the 'super-condition' for how EU MS are either enabled or hindered to realise the right to a social minimum will follow in chapter 5 of this thesis.

When it comes to the CEDAW Committee, the concern 'about the general lack of statistical data' is very prevalent. Disaggregated statistics are deemed necessary 'for informed and targeted policymaking and for the systematic monitoring and evaluation of progress achieved towards the realisation of women's substantive equality'.⁸³² This term, the 'realisation of substantive equality', is akin to a mantra that the CEDAW Committee continues to repeat in its COs to EU MS. In order to achieve substantive equality, the CEDAW Committee advises Denmark to 'systematically monitor and evaluate progress achieved towards the realisation of substantive equality'.⁸³³ Using similar words, the CEDAW Committee repeats this advice to Greece and Romania.⁸³⁴

⁸²⁶ CESCR, COs to UK 2016, para 9.

⁸²⁷ CRC Committee, COs to BE 2019, para 10; DK 2017 para 10; EE 2017 para 9; ES 2018 para 9; IT 2019 para 8; MT 2019 para 11; RO 2017 para 10.

⁸²⁸ CRC Committee, COs to AT 2012, para 19.

⁸²⁹ CRC Committee, COs to SI 2014, para 17.

⁸³⁰ CRC Committee, COs to DE 2014, para 16, PT 2014, para 18.

⁸³¹ CRC Committee, COs to LU 2014, para 15.

⁸³² CEDAW Committee, COs to BE 2014, para 46.

⁸³³ CEDAW Committee, COs to DK 2015, para 45.

⁸³⁴ CEDAW Committee, COs to EL 2013, para 38; RO 2017, para 40.

In its COs to Poland, the CEDAW Committee asks for an evaluation of ‘progress achieved towards the realisation of women’s de facto equality’.⁸³⁵ Hence, the mantra of ‘substantive equality’ is exchanged with a different term, namely ‘de facto equality’. This exchange of words can help us to clarify the intention behind the CEDAW Committee’s understanding of equality. The term ‘de facto’ (factual) is often used in contrast to the term ‘de iure’ (according to the law). This is why the CEDAW Committee’s insistence on ‘de facto’ or substantive equality is a clear sign of a gap between equality according to the law (which is guaranteed) and the factual equality experienced in every-day life. Monitoring the progress of ‘de facto’ or substantive equality therefore asks EU MS to be aware of the gap between the ‘ought’ of equality before the law and the ‘is’ of inequality in life experience.

Moving towards equality in practice does not happen without allocating adequate resources. This is why the CEDAW Committee repeatedly points out that EU MS should ‘accelerate the realisation of [...] substantive equality’ by allocating adequate resources.⁸³⁶ Yet, governments don’t have resources if they are not collecting enough tax revenue. While it is not particularly surprising that HRTBs call upon the states parties to reconsider how they collect taxes, it can be considered a small revolution when the CEDAW Committee connects Cyprus’ ‘financial secrecy policies, legislation on corporate reporting and taxation practices’ with the ability of other states parties to allocate adequate resources to the realisation of women’s rights.⁸³⁷ This interconnection between states parties is also prevalent in the CEDAW Committee’s call ‘for the realisation of substantive gender equality’ in relation to the agenda for sustainable development. In fact, this particular wording is repeated throughout several COs to EU MS.⁸³⁸ With less frequency, the CEDAW Committee shows international support for the Sustainable Development Goals ‘and calls for the realisation of de jure (legal) and de facto (substantive) gender equality’.⁸³⁹ Since the Committee defines ‘de facto’ equality as substantive equality, this shows that these two terms can be used interchangeably. Rather than consisting of two separate meanings, they evidence shifts in terminology instead of content.

⁸³⁵ CEDAW Committee, COs to PL 2014, para 45.

⁸³⁶ CEDAW Committee, COs to BG 2012, para 44; CZ 2016, para 37.

⁸³⁷ CEDAW Committee, COs to CY 2018, para 42.

⁸³⁸ CEDAW Committee, COs to CZ 2016, para 52; DE 2017, para 52; EE 2016, para 42; FR 2016, para 53; IE 2017, para 59; IT 2017, para 54; NL 2016, para 48; PT 2015, para 47; RO 2017, para 44; SE 2016, para 41; SI 2015, para 44; SK 2015, para 45

⁸³⁹ CEDAW Committee, COs to LT 2019, para 6, UK 2019, para 7.

Besides monitoring progress and allocating adequate resources, the CEDAW Committee is keen on enhancing the visibility of the Convention. In this regard, the Committee recommends in its COs to Malta that the CEDAW should play a role in ‘all legislation, policies and programmes aimed at the practical realisation of the principle of equality between women and men’.⁸⁴⁰ This terminology of ‘practical realisation’ can therefore be seen as yet another term of how the CEDAW Committee describes the goal of moving from ‘de jure’ to ‘de facto’ equality.

In its COs to Croatia and Romania, the CEDAW Committee connects the general concern of realising substantive equality with the specific concern of realising substantive equality for Roma women.⁸⁴¹ When it comes to Roma women, general indicators to achieve progress are not enough. Rather, in order to ‘eliminate all forms of discrimination against Roma women’, states parties should ‘formulate clear time-bound targets, especially on access to essential services’.⁸⁴² Furthermore, the CEDAW Committee recommends the introduction of temporary special measures to accelerate the realisation of substantive equality for Roma women.⁸⁴³

To sum up, there is ample evidence that the HRTBs indeed use the term ‘realise’ in line with my definition to refer to all ‘legislative, institutional and policy measures’ for the effective and practical fulfilment of right to a social minimum.⁸⁴⁴ Whereas CESCR does have a particular focus on the ‘legislative’ part of my definition of the term realise, the group specific HRTBs are more focused on ‘institutional and policy measures’. However, it is clear that realisation by ‘all appropriate means’ necessarily needs to move beyond CESCR’s focus on domestic legal means and justiciability. In the next section, I will therefore conduct a CO-analysis of the HRTBs to identify which conditions hinder EU MS from realising the right to a social minimum

4.4 Identifying Hindering Conditions in the HRTBs’ Jurisprudence

When Haglund & Aggarwal published their article in the Journal of Human Rights more than a decade ago, their advocacy for a wider understanding of how to turn economic and social rights norms into practice was pioneering work. In their words: ‘There is no magic bullet - no single path - that takes us from [...] discourses [on socio-economic

⁸⁴⁰ CEDAW Committee, COs to MT 2010, para 11.

⁸⁴¹ CEDAW Committee, COs to HR 2015, para 37; RO 2017, para 37.

⁸⁴² CEDAW Committee, COs to HR 2015, para 37.

⁸⁴³ CEDAW Committee, COs to HR 2015, para 37; RO 2017, para 37.

⁸⁴⁴ This understanding of realisation is in line with CESCR’s jurisprudence, see for example CESCR, COs to SK 2019, para 3.

rights] or legal norms to their full realisation'.⁸⁴⁵ This quest for a fuller appreciation and understanding of the conditions that might help or hinder the realisation of the right to a social minimum lies at the heart of this chapter.

I have argued above that *general* legal human rights scholars still mainly place their faith in formal legal means,⁸⁴⁶ while *group specific* legal scholars tend to focus on the realisation of one particular right at a specific time, space, and regarding one population group.⁸⁴⁷ What I do here is different. First, I argue that the single focus on domestic legal means and justiciability is neither necessary nor sufficient to move rights discourses towards practical improvements in living standards for the most disadvantaged. Instead, it is necessary to examine a whole range of wider socio-economic conditions that might hinder the realisation of rights. In order to decide which conditions to consider, I analyse the jurisprudence of the five HRTBs and aggregate the concerns expressed in their COs to the EU MS into three over-arching hindering conditions: austerity, social protection gaps, and patterns of discrimination. Secondly, I use an explicitly comparative approach on several levels. My analysis is not only comparative across EU MS, but also comparative among my three case studies. I argue that the three hindering conditions affect each of the groups differently, which EU MS must consider when designing strategies in how to make sure that these three groups can effectively realise their right to a social minimum.

In their COs to the EU MS, the HRTBs focus on identifying concerns and recommendations, rather than on pointing out good practice examples. To find out how EU MS should realise the right to a social minimum, I therefore first have to identify the conditions that hinder EU MS to realise this right. My take on how to identify these hindering conditions hence takes a different path. Rather than theorising potential conditions in an abstract way, I analyse the jurisprudence of the HRTBs in the form of their COs to 28 EU MS in the period of 2009-2019. The COs issued by CESCR play a distinct role of highlighting potentially hindering conditions in the most comprehensive way, whereas I benefit from the group specific expertise by analysing

⁸⁴⁵ Ladawn Haglund and Rimjhim Aggarwal, 'Test of Our Progress: The Translation of Economic and Social Rights Norms into Practice' (2011) 10 *Journal of Human Rights* 494, 3.

⁸⁴⁶ Lehmann (n 814); Bilchitz, *Poverty and Fundamental Rights* (n 634); Gauri and Brinks (n 777); Sarigiannidis and Pervou (n 814); Gerstenberg (n 143); Diver and Miller (n 58); Úbeda de Torres (n 814); Boyle, 'Models of ESR Justiciability' (n 814).

⁸⁴⁷ For persons with disabilities see for example Hoefmans and de Beco (n 418); Broderick (n 418); Waddington and Lawson (n 418); for children, see for example Nolan (n 418); Stern (n 418); Liebel (n 418); for issues of intersectionality, see for example Sabatello (n 418) focusing on children with disabilities; for a general discussion on intersectionality, see for example Chow (n 418).

the COs issued by CEDAW, CERD, CRPD and CRC to identify any group specific hindering conditions.

In its COs to the EU MS, the HRTBs mention several overarching strands of conditions that might inhibit the realisation of the right to a social minimum. For the purposes of my thesis, I focus on three of them: austerity (section 4.4.1), social protection gaps (section 4.4.2) and patterns of discrimination (section 4.4.3). Under the overarching condition of austerity, I focus mostly on the so-called crisis states that had to undergo wide-ranging budgetary cuts in the aftermath of the financial crises that started around 2007/2008 and reached its peak around 2010. Social protection gaps are sometimes due to a general insufficiency of the overall welfare state architecture. More often, gaps become more pronounced for particularly disadvantaged groups after a series of austerity measures has been introduced. Finally, patterns of non-discrimination are a frequent concern of the HRTBs. Besides stereotypes, hate crimes and negative portrayals in the media, the lack of political influence and lack of mobilisation is a key factor to understanding why EU MS overwhelmingly fail to realise the right to a social minimum for some of the most disadvantaged groups.

4.4.1 Austerity

The lack of resources is often invoked as a key hindering condition to effectively realise the right to a social minimum. Economic and financial crises, austerity measures and adjustment programmes are particularly damaging to that effect. Due to the 2007/2008 financial crisis and subsequent recession and austerity, a disproportionate number of people have lost their jobs. Coupled with sinking wages, households tend to find it more difficult to afford basic necessities. Additionally, austerity measures were commonplace across many EU member states.⁸⁴⁸ Some countries were more affected than others, especially those for which austerity measures were a pre-condition for receiving bailouts by the troika.⁸⁴⁹ While there are already stark economic differences between the predominantly rich EU-15 and the poorer new EU MS, these have become even more pronounced due to the euro-crisis.

⁸⁴⁸ Claessens and others (n 48); Considine and Dukelow (n 48); Farnsworth and Irving (n 48); Cantillon and others (n 30); Matsaganis (n 48).

⁸⁴⁹ Armingeon (n 49); Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (n 49); Kilpatrick, 'The EU and Its Sovereign Debt Programmes' (n 49).

As established in chapter 3, the minimum core doctrine has become the HRTBs' normative anchor in the aftermath of the 2007/2008 economic crisis. In these crisis-times, CESCR reinforced the non-derogable and immediate nature of the minimum core doctrine in two separate statements.⁸⁵⁰ They establish a minimum level of socio-economic rights protection which states parties must always provide, despite the challenging economic circumstances.⁸⁵¹ In this balancing act of enacting austerity measures while still being held accountable to protect socio-economic rights, the minimum core doctrine emerged once more as the normative limit, which no state party must transgress. In the words of the Guiding Principles on Extreme Poverty and Human Rights, adopted in 2012, states parties have a duty to ensure that austerity programmes do not negatively impact people in poverty.⁸⁵² While the progressive realisation doctrine experienced some normative backlash and adaptations in response to the crisis,⁸⁵³ the minimum core doctrine received a boost and was reinforced as the definitive normative anchor to prevent rights backsliding in times of crisis.

Beyond CESCR, academic and activists alike stressed the importance of the minimum core doctrine as the definitive normative anchor to prevent rights backsliding in times of crisis.⁸⁵⁴ Since the minimum core doctrine has been so prevalent in the aftermath of the crisis, one could think that states parties were quick to follow it. However, this was not the case. In an overwhelming way, states parties that were affected by austerity measures did not prioritise the realisation of the right to a social minimum in crisis-times. In other words, despite these normative requirements, states parties were often not able or willing to honour their commitments to socio-economic rights. In particular, states parties usually did not make the effort to engage with the minimum core doctrine when justifying austerity

⁸⁵⁰ CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (n 47); CESCR, 'Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (n 47).

⁸⁵¹ CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (n 47); CESCR, 'Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights' (n 47).

⁸⁵² Human Rights Council, 'Guiding Principles on Extreme Poverty and Human Rights' (n 254) para 54; compare also de Schutter (n 260) 8.

⁸⁵³ Warwick (n 50).

⁸⁵⁴ Saiz (n 26); Landau (n 26); Desierto (n 26).

measures in their reports. Therefore, there seems to be a mismatch between the human rights community's insistence on the relevance of the minimum core doctrine in crisis times and states parties' lack of willingness to engage with it.

When using the MAXQDA software to code the HRTBs' COs that are concerned about austerity, I made sure that I did not include general recommendations of human-rights budgeting that were not linked to a concrete situation of economic crisis or austerity. For example, I excluded the CRC Committee's recommendation to Belgium to 'define budgetary lines for all children, with special attention to those in disadvantaged or vulnerable situations and ensure that those budgetary lines are protected even in situations of economic crisis'.⁸⁵⁵ From a temporal point of view, crisis concerns were most prevalent at the peak of the crisis around 2010-2012. Nevertheless, some effects were so long-lasting that concerns were even voiced in 2019. For example, in its 2019 COs to Spain, the CRPD Committee is concerned that the 'co-payments system for services, which was introduced as an austerity measure, has not been withdrawn'.⁸⁵⁶

The COs to the EU MS provide ample evidence for the HRTBs' insistence that states parties must realise the minimum core content of socio-economic rights even in times of crisis and austerity. Hence, the realisation of the right to a social minimum is particularly relevant in those situations. For example, CESCR required Slovenia to 'ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights'.⁸⁵⁷ Under the header of 'austerity measures', CESCR recommended Ireland to 'identify the minimum core content of the Covenant rights or a social protection floor and ensure the protection of this core content at all times'.⁸⁵⁸ Bulgaria should ensure that retrogressive measures 'do not affect the minimum core content'.⁸⁵⁹ In its COs to Spain, the Committee reiterates its previous COs that any austerity measures must be 'compatible with the core content of the rights recognized in the Covenant, with the aim of ensuring that such measures do not impinge, disproportionately, on the rights of the most disadvantaged and marginalized groups and individuals'.⁸⁶⁰ The exact same wording is found in CESCR's COs to the UK.⁸⁶¹

⁸⁵⁵ CRC Committee, COs to BE 2019, para 10.

⁸⁵⁶ CRPD Committee, COs to ES 2019, para 52b.

⁸⁵⁷ CESCR, COs to SI 2014, paras 8-9.

⁸⁵⁸ CESCR, COs to IE 2015, para 11.

⁸⁵⁹ CESCR, COs to BG 2019, para 9.

⁸⁶⁰ CESCR, COs to ES 2018, para 14.

⁸⁶¹ CESCR, COs to the UK 2016, para 19.

Figure 32 shows an extract of my qualitative analysis of CESCR’s austerity concerns issued to Spain, Greece, Ireland and Italy. By displaying these concerns next to each other, a detailed analysis of CESCR’s choice of vocabulary is possible.

9-EL (5 Dokumente, 12 Codierte Segmente)	10-ES (5 Dokumente, 10 Codierte Segmente)	15-IE (4 Dokumente, 6 Codierte Segmente)	16-IT (5 Dokumente, 10 Codierte Segmente)
Obligations of the State party under the Covenant in the context of the economic crisis 7. The Committee notes with concern that, despite the measures taken by the State party to mitigate the economic and social impact of the austerity measures adopted in the framework of the memorandums of understanding in 2010, 2012 and 2015, the financial and economic crisis has had a severe impact on the enjoyment of economic, social and cultural rights, particularly by certain disadvantaged and marginalized groups with regard to the rights to work, to social	Austerity measures 13. The Committee takes notes of the fact that the State party is engaged in a process of economic growth recovery. It is concerned, however, that the extended application of certain austerity measures continues to affect disadvantaged and marginalized groups and individuals disproportionately with regard to the effective enjoyment of their economic, social and cultural rights, and has created further inequality. It is also concerned that five years after having introduced such measures, the State party has not carried out a full	Maximum available resources 11. While noting the unprecedented economic and financial crisis that the State party went through and its exit from the bailout programme during the reporting period, the Committee notes with concern that, in spite of the social transfers made by the State party to mitigate the impact of austerity measures: (a) The State party’s response to the crisis has been disproportionately focused on instituting cuts to public expenditure in the areas of housing, social security, health care and education, without altering its	Austerity measures 8. While recognizing the financial crisis faced by the State party, the Committee expresses concern that the levels of effective protection for the rights enshrined in the Covenant have been reduced as a result of the austerity measures adopted by the State party, which adversely affects enjoyment of the Covenant rights, particularly by disadvantaged and marginalized individuals and groups. 9. The Committee recommends that the State party review, based on a human rights impact assessment, all the

Figure 32. Extract of CESCR’s Concerns about Austerity in MAXQDA

In order to examine how austerity serves as a potential explanatory condition which inhibits the realisation of the right to a social minimum, I also examined CESCR’s concerns about any dimensions of the social minimum in connection with austerity in its COs to the EU MS. Austerity was a concern in relationship with the work dimension of the right to a social minimum in Czechia, Greece, and Italy.⁸⁶² The poverty dimension as a direct consequence of the financial crisis was referred to in Cyprus, Italy and Portugal.⁸⁶³ Besides the Czech Republic, these EU MS all experienced some form of loan conditionality or of memoranda of understanding. More generally, CESCR referred to austerity measures in 13 EU MS,⁸⁶⁴ mostly combined with a general concern on welfare cuts. In EU MS that were particularly affected by external loan conditionality like Greece, CESCR links concerns about austerity with all dimensions of the right to a social minimum.⁸⁶⁵ In many cases, issues of inadequate

⁸⁶² CESCR, COs to CZ 2013, para 12; COs to EL 2015, paras 13-14 (unemployment); paras 19-20 (minimum wages); COs to IT 2015, paras 26-27 (women’s employment).

⁸⁶³ CESCR, COs to CY 2016, paras 35-36; COs to IT 2015, paras 38-39; PT 2014, para 14.

⁸⁶⁴ CESCR, COs to BG 2019, paras 8-9; COs to CY 2016, paras 11-12, 35-36; COs to CZ 2013, paras 12, 14; COs to DE 2018, paras 16-17; COs to DK 2019, paras 12-13; COs to EL 2015, paras 7-8, 13-14, 19-20, 23-24; COs to ES 2018, paras 13-14, 35-36; COs to IE 2015, paras 6, 11, 13; COs to IT 2015, paras 8-9, 26-27, 34-35, 38-39; COs to PT 2014, paras 6, 14, 16; COs to RO 2014, para 15; COs to SI 2014, paras 8, 14; COs to UK 2016, paras 18-19.

⁸⁶⁵ CESCR, COs to EL 2015, paras 7-8, 13-14, 19-20, 23-24.

MIPS disability payment schemes were mentioned.⁸⁶⁶

The group specific HRTBs were concerned about austerity a bit less frequently than CESCR. Figure 33 shows the total number of austerity concerns by HRTB. While CESCR issued 35 concerns, the CRC Committee issued 26 concerns, the CEDAW Committee 19 concerns, and the CRPD and CERD Committee eight concerns each.

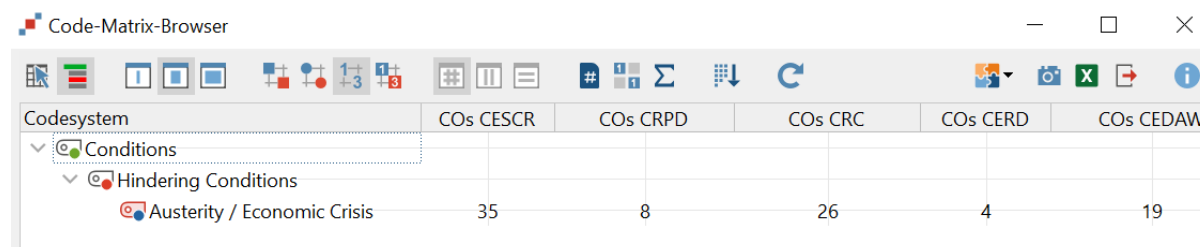


Figure 33. Total Number of Austerity Concerns by the HRTBs

The austerity concerns issued by the CRC Committee can be distinguished depending on the year that they were issued in (during the acute crisis phase or in the post-crisis phase) and depending on whether or not the respective EU MS experienced loan conditionality or not. Table 12 below illustrates the CRC Committee’s classification of austerity concerns in its COs to EU MS from 2009-2019.

Table 12. Classification of CRC’s Austerity Concerns

	Acute Crisis Phase (2011-2014)	Post-Crisis Phase (2015-2019)
‘Crisis States’ that experienced loan conditionality	EL 2012, HU 2014, PT 2014	ES 2018, IT 2019, LV 2016
States that did not experience loan conditionality	LT 2013, SI 2013	FR 2016, DK 2017, EE 2017

In the acute crisis phase, the CRC Committee’s issues a very similar austerity concern to two EU MS have been very heavily affected by the 2007/2008 economic crisis (Greece and Portugal), demanding that ‘in time of fiscal constraint, efforts must be made to sustain and expand social investment and social protection of those in the most vulnerable situations and to employ an equitable approach, giving priority to children’.⁸⁶⁷

⁸⁶⁶ CESCR, COs to CY 2016, paras 11-12; COs to CZ 2013, para 14; COs to EL 2015, paras 19-20, 23-24; COs to ES 2018, paras 13-14, 35-35; COs to IE 2015, paras 11, 13; COs to IT 2015, paras 34-35; COs to RO 2014, para 15; COs to SI 2014, para 8; COs to UK 2016, paras 18-19.

⁸⁶⁷ CRC Committee, COs to EL 2012, para 6; COs to PT 2014, para 7.

The EU MS that experienced some form of external loan conditionality were generally not able to easily ‘shake off’ austerity measures once the economic situation stabilized. In its COs addressed to Spain in 2018, hence in the post-crisis phase, the Committee is ‘seriously concerned that the level of investment in children by the State party has not been high enough to offset the negative impact of the severe economic and social crisis that began in 2008 and that has led to increased poverty and social inequality’.⁸⁶⁸ In a similar vein, in its COs to Italy in 2019, the CRC Committee ‘is concerned that the austerity measures continue to undermine the effective protection of children’s rights in the State party’.⁸⁶⁹ At the same time, it acknowledges that Italy did try to ‘mitigate the negative impact and in particular the high levels of unemployment and poverty, including child poverty, that are the result of the austerity measures taken by the Government since 2010’.⁸⁷⁰ Hungary received a CO by the CRC Committee in the acute crisis phase, which contained concerns due to the ‘still-prevalent discriminatory attitude of the public against children in marginalized and disadvantaged situations (...) which has been exacerbated by the economic crisis and poverty’.⁸⁷¹

In some EU MS, austerity measures are not linked to external loan conditionality, but are rather due to the general political climate, as in the cases of Denmark and the UK. For example, in light of recent spending cuts in Denmark that had a particularly negative impact on ‘children from low-income families’, the CRC Committee makes it very clear that no further spending cuts must be carried out ‘without having first carried out an assessment of the impact that austerity measures would have in areas that are directly and indirectly related to children’s rights’.⁸⁷² In the UK, the CRC Committee is ‘seriously concerned at the effects that recent fiscal policies and allocation of resources have had in contributing to inequality in children’s enjoyment of their rights, disproportionately affecting children in disadvantaged situations’.⁸⁷³

Nevertheless, being a ‘non-crisis’-state and receiving a CO after the acute crisis-phase does not mean that the CRC Committee has no concerns about austerity,

⁸⁶⁸ CRC Committee, COs to ES 2018, para 8.

⁸⁶⁹ CRC Committee, COs to IT 2019, para 7.

⁸⁷⁰ CRC Committee, COs to IT 2019, para 7.

⁸⁷¹ CRC Committee, COs to HU 2014, para 19.

⁸⁷² CRC Committee, COs to DK 2017, para 10.

⁸⁷³ CRC Committee, COs to UK 2016, para 12.

quite on the contrary. For example, in its COs to Estonia in 2017, the CRC Committee is concerned about the 'ongoing impact of structural adjustment and austerity measures on children's rights in the post-economic-crisis period'.⁸⁷⁴ In its COs to France in 2016, the Committee 'is particularly concerned about the worsening situation of children and families affected by the economic crisis living in poverty, particularly children in families headed by single parents'.⁸⁷⁵ In a similar vein, in its COs to Latvia in 2016, the Committee voices its concern 'about the continuing impact of austerity measures on children, which still endures despite the improvement in the economic situation'.⁸⁷⁶ In its COs to Slovenia in 2013, the CRC Committee complains about a national law (the 2012 Fiscal Balance Act) that adversely affects children. Hence, the Committee recommends to 'secure resources for children, particularly during a time of financial crisis'.⁸⁷⁷

The CEDAW Committee issued a total of 19 austerity concerns. For the states that were dependant on external loan conditionality, the CEDAW Committee uses a similar expression in its COs to Greece (2013), Spain (2015), Italy (2017) and Portugal (2015), voicing its concern that the financial crisis and austerity measures are having a 'detrimental' impact on women.⁸⁷⁸ The same expression is also used in its COs to Slovenia in 2015, despite Slovenia not being dependent on external bailouts. This is acknowledged in the CEDAW Committees wording that Slovenia's austerity measures were 'adopted in an effort to stabilize public finances', rather than mentioning the IMF or the EU.⁸⁷⁹

Besides these general remarks, CEDAW sometimes mentions austerity again when voicing the particular impact of austerity on disadvantaged groups of women. For example, in its COs to Spain in 2015 and Italy in 2017, the Committee uses the exact same wording when voicing its concern that 'the austerity measures introduced in response to the economic and financial crisis have had a severe and disproportionate impact on women, in particular women with disabilities, older women and women domestic workers. Women have faced unemployment, reductions in

⁸⁷⁴ CRC Committee, COs to EE 2017, para 8.

⁸⁷⁵ CRC Committee, COs to FR 2016, para 69.

⁸⁷⁶ CRC Committee, COs to LV 2016, para 54.

⁸⁷⁷ CRC Committee, COs to SI 2013, para 14.

⁸⁷⁸ CEDAW Committee, COs to EL 2013, para 6; COs to ES 2015, para 8; COs to IT 2017, para 9; COs to PT 2015, para 8.

⁸⁷⁹ CEDAW Committee, COs to SI 2015, para 7

social security and dependent care payments, wage freezes and the transformation of full-time jobs into part-time jobs with overtime hours'.⁸⁸⁰

For the post-crisis phase, the CEDAW Committee's concerns adjust to states parties' 'efforts towards economic recovery in order to alleviate the impact of austerity measures on economic and social benefits', as in its COs to Ireland in 2017.⁸⁸¹ Nevertheless, the Committee notes the disproportionate impact of the remaining austerity measures, particularly for 'those belonging to disadvantaged groups who were dependent on social budgets'.⁸⁸²

The CRPD Committee issued only eight austerity concerns to EU MS. For the states that experienced external loan conditionality, it voiced its concern about 'the adverse effect of austerity measures' in its COs to Italy in 2016.⁸⁸³ In its COs to Portugal in 2016, the CRPD Committee 'notes that austerity measures have led, among other things, to cuts to social services and to financial support for families, which has a particularly negative effect on women caregivers to persons with disabilities'.⁸⁸⁴ Further below, the CRPD Committee specifies that 'there are no support services of any kind for persons with disabilities who, as a result of the implementation of austerity measures, are forced, in the absence of family support or assistance networks, to live in poverty or extreme poverty'.⁸⁸⁵

Even after the peak of the economic crisis, austerity effects on the most disadvantaged groups often remain. For example, in its COs to Slovenia in 2018, the CRPD Committee is concerned that 'poverty disproportionately affects women with disabilities, especially older women, and that the economic crisis and subsequent austerity measures have had a negative impact on them'.⁸⁸⁶ Further down, the CRPD Committee specifies its concern due to the 'disproportionately negative impact on persons with disabilities of the austerity measures taken by the State party to deal with the economic crisis, such as cuts in unemployment insurance, health insurance, health care, social assistance and allowances for persons with disabilities, and the insufficient remedial action taken in this regard'.⁸⁸⁷ This list of cuts in social protection

⁸⁸⁰ CEDAW Committee, COs to ES 2015, para 28; COs to IT 2017, para 37.

⁸⁸¹ CEDAW Committee, COs to IE 2017, para 46.

⁸⁸² CEDAW Committee, COs to IE 2017, para 46.

⁸⁸³ CRPD Committee, COs to IT 2016, para 71.

⁸⁸⁴ CRPD Committee, COs to PT 2016, para 42.

⁸⁸⁵ CRPD Committee, COs to PT 2016, para 53.

⁸⁸⁶ CRPD Committee, COs to SI 2018, para 8.

⁸⁸⁷ CRPD Committee, COs to SI 2018, para 47.

systems shows that social protection gaps (as discussed in the next section) are often directly caused by austerity measures that were not withdrawn when the economic situation got better. This issue has also been very clearly expressed in the CRPD Committee's COs to Spain in 2019 with its concern that the 'co-payments system for services, which was introduced as an austerity measure, has not been withdrawn'.⁸⁸⁸ In its COs to UK in 2017, the CRPD Committee expressed its concern that 'austerity measures have hindered the advancement of accessibility for persons with disabilities'.⁸⁸⁹

The CERD Committee only issued four austerity concerns. Regarding the states that experienced external loan conditionality, it already issued a CO to Ireland in 2011 with a remark that 'the economic recession that has confronted the State party threatens to reverse the achievements that have been made in the State party's efforts to combat racial discrimination at all levels'.⁸⁹⁰ When comparing this early warning with the other HRTBs' COs that came at the peak and after the crisis, the CERD Committee's concern was fully justified. In its COs to Greece in 2016, it is concerned that 'austerity measures taken to address the economic crisis in the State party generated a disproportionate impact on minority groups, such as Roma, migrants, refugees and asylum seekers'.⁸⁹¹ This focus on marginalized groups mirrors the Committee's concern about the 'precarious socioeconomic situation of Roma, which are further exacerbated by the adoption of austerity measures' in its COs to Slovenia in 2016. Table 13 below classifies all austerity concerns to EU MS by the HRTBs.

⁸⁸⁸ CRPD Committee, COs to ES, 2019, para 52.

⁸⁸⁹ CRPD Committee, COs to UK 2017, para 24.

⁸⁹⁰ CERD Committee, COs to IE 2011, para 11.

⁸⁹¹ CERD Committee, COs to EL 2016, para 6.

Table 13. Classification of Austerity Concerns by the HRTBs

	Acute Crisis Phase (2011-2015)	Post-Crisis Phase (2016-2019)
'Crisis States' that experienced loan conditionality	Greece (CRC 2012, CEDAW 2013); Ireland (CERD 2011); Hungary (CRC 2014); Spain (CEDAW 2015); Portugal (CRC 2014, CEDAW 2015)	Greece (CERD 2016); Spain (CRC 2018), Ireland (CEDAW 2017); Italy (CEDAW 2017, CRPD 2016, CRC 2019); Latvia (CRC, 2016); Spain (CRPD 2019); Portugal (CRPD 2016)
States that did not experience loan conditionality	Lithuania (CRC 2013); Slovenia (CRC 2013, CEDAW 2015)	Denmark (CRC 2017), Estonia (CRC 2017), France (CRC 2016); Slovenia (CERD 2016, CRPD 2018); UK (CRPD 2017)

Figure 34 below compares the EU MS' austerity concerns. The orange bars show the total number of concerns, whereas the blue bars show how many HRTBs were concerned.

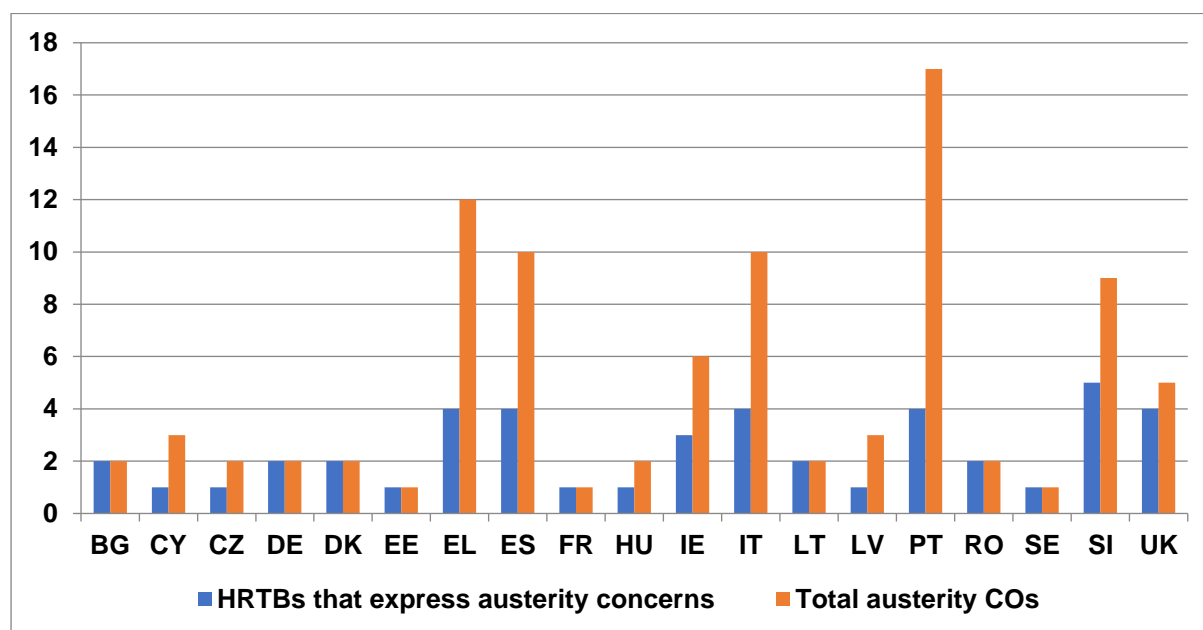


Figure 34. HRTBs' Concerns about Austerity

It is not surprising that EU MS that experienced external loan conditionality like Spain, Greece, Ireland, Italy, and Portugal received the most austerity concerns spread across the HRTBs. Slovenia and the UK also received a lot of austerity concerns due to their political decision to adopt heavy austerity measures. Most often, these measures led to serious cuts of various social benefits schemes, which I will explore more in depth in the next subsection.

4.4.2 Social Protection Gaps

Social protection gaps can occur in all spheres of a state's social security landscape. Typical problems are the lack of accessibility, coverage, and take-up of the usual schemes like unemployment insurance, disability benefits or social assistance. In Europe, most people are realising their right to a social minimum through employment. For people who become unemployed after a period of time as employees, most welfare systems across Europe provide for unemployment insurance, which covers a certain percentage of the wage for a period of time. For example, in Germany, the unemployment insurance for employees guarantees a payment of 60% of the previous monthly wage for the period of one year. Once unemployment insurance expires, some welfare systems provide for unemployment assistance, which is usually a lower, flat-rate benefit for an additional amount of time. Once this expires too, almost all EU member states provide for minimum income support which is designed to prevent destitution. Social assistance schemes are means-tested, which means that one has to already be poor in order to qualify for support. Additionally, most schemes have activity requirements, which tie the receipt of the benefit to the duty to actively apply for jobs.

Ever since Esping-Andersen's well-known publication of the 'Three Worlds of Welfare', a generation of comparative social policy scholars has aimed at explaining policy outcomes like unemployment or high poverty rates.⁸⁹² To do so, most scholars focus on one branch of social security, like unemployment insurance, and engage in comparative studies of how the structure or funding of the system leads to the identified outcome. One issue that has recently attracted renewed scholarly interest are those schemes that provide a last safety net when all other measures have failed.⁸⁹³ These so-called minimum income protection schemes (MIPS) are central systems to overcome poverty and social exclusion across EU MS. While a comparative analysis of other branches of social security like unemployment insurance has a long academic history, the comparative study of MIPS has only

⁸⁹² Esping-Andersen (n 27).

⁸⁹³ Francesco Figari, Manos Matsaganis and Holly Sutherland, 'Are European Social Safety Nets Tight Enough? Coverage and Adequacy of Minimum Income Schemes in 14 EU Countries' (2013) 22 *International Journal of Social Welfare* 3; Bob Deacon, 'From "Safety Nets" Back to "Universal Social Provision"' (2005) 5 *Global Social Policy* 19; Thomas Bahle, Vanessa Hubl and Michaela Pfeifer, *The Last Safety Net: A Handbook of Minimum Income Protection in Europe* (Policy 2011); Marcello Natili, 'Worlds of Last-Resort Safety Nets? A Proposed Typology of Minimum Income Schemes in Europe' (2020) 36 *Journal of International and Comparative Social Policy* 57.

recently caught the attention of scholars and policy makers.⁸⁹⁴ In fact, for many years, the comparative study of MIPS was not a central topic of the same salience as other branches of social security.

4.4.2.1 Minimum Income Protection Schemes as a ‘Last Safety Net’?

What makes any comparative study of MIPS extremely complicated is the lack of uniformity in how MIPS are structured across Europe. They can consist of many different categorical schemes as in Ireland or one scheme for everybody, as in the Czech Republic.⁸⁹⁵ The particularities of specific tax-credit systems as in the United Kingdom with the introduction of Universal Credit are also necessary to consider. Another complicating matter is the discretionary nature of awarding these benefits. By design, MIPS are systems of last resort that only come into play once all other means of supporting oneself have been depleted. This residual role of MIPS in the overall welfare state architecture is a cause for the historic neglect of comparative studies that aim to explain how the diverse MIPS across EU MS are connected to differing poverty and unemployment rates.

How then can MIPS be studied comparatively across the EU MS? A recent publication proposes to understand MIPS as ‘income support schemes which provide a safety net for people, whether in or out of work, and who have insufficient means of financial support’.⁸⁹⁶ Since MIPS across Europe function with a mandatory means-test, they come into play after any other possibilities of subsistence in the form of work or insurance-based benefits have diminished. The interlinkages with the right to work and the country-specific legislative framework for unemployment protection are very important in this context, since the length of unemployment benefits, the level of the minimum wage and the overall situation of poverty and social exclusion all play a role when assessing the adequacy, coverage, and take-up of MIPS. Recently, the question of how to comparatively study sanctions for failures to comply with the activity requirements of proving an active job search, has caught the attention of scholars.⁸⁹⁷

⁸⁹⁴ Most notable is the recent discussion around the legal feasibility of a European framework directive on minimum income protection schemes, see van Lancker, Aranguiz and Verschuere (n 275); Ane Aranguiz, ‘Securing Decent Incomes at a Crossroads: On the Legal Feasibility of a Framework Directive on Minimum Income’ (2020) 22 *European Journal of Social Security* 467.

⁸⁹⁵ Marx and Nelson (n 491).

⁸⁹⁶ van Lancker, Aranguiz and Verschuere (n 275) 6.

⁸⁹⁷ Michael Adler, ‘A New Leviathan: Benefit Sanctions in the Twenty-First Century’ (2016) 43 *Journal of Law and Society* 195; Anna Diop-Christensen, ‘Is “Making Work Pay” Effective for the “Unemployable”? The Impact of Benefit Sanctions on Social Assistance Recipients in Denmark.’ (2015) 25 *Journal of European Social Policy* 210; Anja Eleveld, ‘The Sanctions Mitigation Paradox in

From a historical perspective, one of the first broad-scale studies of social assistance schemes across OECD countries was produced by Eardley in 1996.⁸⁹⁸ He was a pioneer in using a model family approach to assess the adequacy of social assistance schemes for different typical household compositions, such as a single man, a couple with two children, or a single parent. Besides a more small-scale comparative study which discovered a ‘welfare paradox’ of Britain providing more generous social assistance benefits than Norway,⁸⁹⁹ the comparative research on MIPS across the EU MS was furthered considerably by Nelson.⁹⁰⁰ For example, he took a long-term perspective from 1990-2005 to assess the levels of MIPS across the EU MS,⁹⁰¹ and concluding in a later publication that EU MS have not succeeded in securing the adequacy of MIPS to protect against poverty and social exclusion (1990-2008).⁹⁰² The model family approach pioneered by Eardley entered into a new generation with the development of the CSB-MIPI dataset in Antwerp.⁹⁰³ The dataset allows researchers to comparatively assess the adequacy of MIPS and minimum wages for several model family situations. Recently, the development of a Hypothetical Household Tool which is integrated into the modelling software EUROMOD, is arguably one of the best ways to simulate different model family scenarios of MIPS and minimum wage reforms across the EU MS.⁹⁰⁴

In general, MIPS are designed to serve as a formal last safety net in case all other subsistence-ensuring mechanisms (such as work, unemployment insurance and

Welfare to Work Benefit Schemes More on Migrant Workers’ (2017) 39 *Comparative Labor Law & Policy Journal* 449; Michael Adler, ‘Benefit Sanctions as a Matter of Public Concern’ in Michael Adler (ed), *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Springer International Publishing 2018); Valery Gantchev, ‘Welfare Sanctions and the Right to a Subsistence Minimum: A Troubled Marriage’ (2020) 22 *European Journal of Social Security* 257.

⁸⁹⁸ Tony Eardley, *Social Assistance in OECD Countries: Synthesis Report* (HM Stationery Office 1996).

⁸⁹⁹ Ivar Lødemel, *The Welfare Paradox: Income Maintenance and Personal Social Services in Norway and Britain, 1946-1966* (Scandinavian University Press 1997).

⁹⁰⁰ Kenneth Nelson, ‘Fighting Poverty: Comparative Studies on Social Insurance, Means-Tested Benefits and Income Redistribution’ (Swedish Institute for Social Research 2003).

⁹⁰¹ Kenneth Nelson, ‘Minimum Income Protection and European Integration: Trends and Levels of Minimum Benefits in Comparative Perspective, 1990–2005’ (2008) 38 *International Journal of Health Services* 103.

⁹⁰² Kenneth Nelson, ‘Social Assistance and EU Poverty Thresholds 1990–2008. Are European Welfare Systems Providing Just and Fair Protection Against Low Income?’ (2013) 29 *European Sociological Review* 386.

⁹⁰³ Natascha van Mechelen and others, ‘The CSB-Minimum Income Protection Indicators Dataset (CSB-MIPI)’ (Herman Deleeck Centre for Social Policy, University of Antwerp 2011) CSB Working Paper No 11/05.

⁹⁰⁴ Sarah Marchal, Linus Siöland and Tim Goedemé, ‘Using HHoT to Generate Institutional Minimum Income Protection Indicators’ (2019) *Euromod Working Paper No. EM 4/19* <<https://www.econstor.eu/handle/10419/228383>> accessed 9 January 2023.

unemployment assistance) have failed. Consequently, MIPS should serve as safety nets to buffer the worst consequences of unemployment and poverty.⁹⁰⁵ This is the reason why MIPS play a particularly important role in realising the right to a social minimum. MIPS are like a glue which hold the different dimensions of the social minimum together since they are supposed to provide a last safety net if other income-generating mechanisms such as paid work or insurance-based benefits fail. Yet, in the last two decades, most MIPS across the EU MS have failed to provide adequate safety nets that succeed in lifting recipients out of poverty.⁹⁰⁶ The aftermath of the 2007/2008 financial crisis has brought the relevance of MIPS as a last safety net back on the agenda of governments and scholars alike.⁹⁰⁷ In short, MIPS across the EU MS no longer fulfil their central role of a last safety net, due to their inadequacy, low coverage and non-take-up. In fact, the widespread inadequacy of these MIPS in combination with the long-term effects of the economic downturn and austerity measures means that MIPS no longer fulfil their central role of providing a social safety net to prevent extreme poverty.⁹⁰⁸

The general inadequacy of MIPS across the EU MS has been subject to several studies.⁹⁰⁹ The typical approach is to assess the extent to which MIPS succeed in lifting recipients out of poverty, based on the EU's official at-risk-of-poverty indicator introduced above. Using this methodology, a study of the MIPS of 14 EU MS found

⁹⁰⁵ Marx and Nelson (n 491).

⁹⁰⁶ Figari, Matsaganis and Sutherland (n 890); Natascha van Mechelen and Sarah Marchal, 'Struggle for Life: Social Assistance Benefits, 1992-2009' in Ive Marx and Kenneth Nelson (eds), *Minimum Income Protection in Flux* (Palgrave Macmillan 2013); Hugh Frazer and Eric Marlier, 'Minimum Income Schemes in Europe: A Study of National Policies 2015' (European Commission: Employment, Social Affairs & Inclusion 2016) Catalog Number: KE-02-15-950-EN-N <<https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7882&furtherPubs=yes>> accessed 29 December 2022.

⁹⁰⁷ Sarah Marchal, Ive Marx and Natascha Van Mechelen, 'The Great Wake-Up Call? Social Citizenship and Minimum Income Provisions in Europe in Times of Crisis' (2014) 43 *Journal of Social Policy* 247; Anne van Lancker, 'Toward Adequate and Accessible Minimum Income Schemes in Europe: Analysis of Minimum Income Schemes and Roadmaps of 30 Countries Participating in the EMIN Project: Synthesis Report' (2015) <www.eapn.lv/emin/201501_emin_toward_syntesis_report.pdf> accessed 26 December 2022; Bea Cantillon, Diego Collado and Natascha Van Mechelen, 'The End of Decent Social Protection for the Poor? The Dynamics of Low Wages, Minimum Income Packages and Median Household Incomes' (2015) *Improve Working Papers. Discussion Paper No. 15/03*; Sarah Marchal, Ive Marx and Natascha Van Mechelen, 'Minimum Income Protection in the Austerity Tide' (2016) 5 *IZA Journal of European Labor Studies* 1.

⁹⁰⁸ Cantillon, Parolin and Collado (n 15); Dølvik and Martin (n 15); Gábos and others (n 15).

⁹⁰⁹ According to Frazer & Marlier, only the MIPS of NL and CY were considered as 'adequate', see Frazer and Marlier (n 903); Natascha van Mechelen and Julie Janssens, 'Who Is to Blame? An Overview of the Factors Contributing to the Non-Take-up of Social Rights' (Herman Deleeck Centre for Social Policy, University of Antwerp 2017) CSB Working Papers 17/08; Figari, Matsaganis and Sutherland (n 890).

the vast majority inadequate.⁹¹⁰ In 2015, a comparative study of MIPS across the EU MS found that only the Netherlands and Cyprus had adequate MIPS, which lifted recipients out of poverty.⁹¹¹ Beyond the assessment of adequacy which is based solely on the AROP rate, the EU's Social Protection Committee has recently released a two-fold methodology of how to comparatively assess the adequacy of MIPS across EU MS.⁹¹² This methodology is based on the national poverty thresholds on the one hand and minimum wages on the other hand. The assessment by the SPC confirms the Netherlands in succeeding to provide MIPS above the AROP rate. Yet, in the vast majority of EU MS, MIPS are nowhere near adequate, and sometimes do not even reach 20% of the AROP rate.⁹¹³ Overall, MIPS tend to be wholly inadequate across the EU MS. In order to overcome some of the problems with assessing MIPS only in terms of the AROP rate, scholars have stressed the importance of developing detailed reference budgets.⁹¹⁴ The use of reference budgets would concretise what minimum essential levels of subsistence mean in practice, thus clarifying the exact levels of subsistence which MIPS are supposed to protect.

Beyond the widespread inadequacy of MIPS across the EU MS, low coverage and restricted eligibility is another structural problem, which is even worse when considering high levels of non-take-up.⁹¹⁵ In plain terms, low coverage of MIPS means that there are many people at-risk-of poverty or social exclusion that do not have access to MIPS as a way to realise their right to a social minimum. This situation often happens due to narrow eligibility criteria, for example in the form of very low-income thresholds, which are often way below the AROP threshold. Thus, the fact that most MIPS across the EU MS are not lifting recipients out of poverty is not only an adequacy issue, but also a coverage issue. By restricting the receipt of MIPS to the extremely poor, MIPS often fail in their function of safety nets for anybody who does not match

⁹¹⁰ Figari, Matsaganis and Sutherland (n 890).

⁹¹¹ Frazer and Marlier (n 903).

⁹¹² van Lancker, Aranguiz and Verschuere (n 275) 36.

⁹¹³ van Lancker, Aranguiz and Verschuere (n 275) giving the examples of Bulgaria, Romania and Hungary where MIPS do not reach 20% of the AROP-rate, and less than one third of low wages.

⁹¹⁴ See in particular Penne, Cornelis and Storms (n 203); For the Pilot Project, see Goedemé and others (n 468); Bérénice Storms and others, 'Pilot Project for the Development of a Common Methodology on Reference Budgets in Europe: Review of Current State of Play on Reference Budget Practices at National, Regional and Local Level' (Publications Office of the European Union 2014) European Commission, Directorate-General for Employment, Social Affairs and Inclusion.

⁹¹⁵ Olivier Bargain, Herwig Immervoll and Heikki Viitamäki, 'No Claim, No Pain: Measuring the Non-Take-Up of Social Assistance Using Register Data' (2012) 10 *Journal of Economic Inequality* 375; Eurofound, *Access to Social Benefits: Reducing Non-Take-Up* (Publications Office of the European Union 2015); van Mechelen and Janssens (n 906).

the narrow eligibility criteria. Another common problem for coverage is the application of very strict means-testing, which means that often any items of value need to be sold before being eligible for MIPS. While coverage and eligibility are problems that can be addressed by changing the institutional design of MIPS, the problem of non-take up is much more difficult to address. Scholars have long been trying to assess the reasons why people that are eligible for benefits choose not to apply for them.⁹¹⁶ One recurring theme of underlying issues for non-take-up is poverty-related shame.⁹¹⁷

The increase of in-work-poverty in Europe has recently caught the attention of academics and policy-makers alike.⁹¹⁸ In-work poverty is closely linked to inadequate minimum wages.⁹¹⁹ At the same time, inadequate minimum wages are often perceived as a 'glass ceiling' to even more inadequate MIPS, since most welfare states do not want to destroy work incentives by offering higher out-of-work than in-work benefits.⁹²⁰ In other words, if EU MS were really serious about wanting to realise the right to a social minimum while maintaining work incentives, this would not be a cheap option.⁹²¹ Recent EU level initiatives such as the European Pillar of Social Rights (EPSR),⁹²² or Directive 2022/2041 on adequate minimum wages in the European Union on minimum wages⁹²³ acknowledge this tension between the adequacy of MIPS and simultaneously maintaining work incentives.⁹²⁴ For example,

⁹¹⁶ van Mechelen and Janssens (n 906).

⁹¹⁷ Walker (n 183).

⁹¹⁸ Jeroen Horemans and Ive Marx, 'In-Work Poverty in Times of Crisis: Do Part-Timers Fare Worse?' (2013) Improve Working Papers. Discussion Paper No. 13/14; Jeroen Horemans and Wim van Lancker, 'Into the Great Wide Unknown: Untangling the Relationship Between Childcare Service Use and In-Work Poverty' (2017) CSB Working Papers 17/04, Herman Deleeck Centre for Social Policy, University of Antwerp; Lohmann and Marx (n 168); Dieter Vandelannoote and Gerlinde Verbist, 'The Impact of In-Work Benefits on Work Incentives and Poverty in Four European Countries' (2020) 30 *Journal of European Social Policy* 1.

⁹¹⁹ Herwig Immervoll, 'Minimum Wages, Minimum Labour Costs and the Tax Treatment of Low-Wage Employment' (2007) IZA Discussion Paper No. 2555; Stephan Kampelmann, Andrea Garnerio and F Rycx, 'Minimum Wages in Europe: Does the Diversity of Systems Lead to a Diversity of Outcomes?' (2013) ETUI Report 128 <<https://www.etui.org/publications/reports/minimum-wages-in-europe-does-the-diversity-of-systems-lead-to-a-diversity-of-outcomes>> accessed 28 December 2022; Cantillon, Collado and Mechelen (n 904); Anthony B Atkinson and others, 'Reducing Poverty and Inequality through Tax-Benefit Reform and the Minimum Wage: The UK as a Case-Study' (2017) 15 *The Journal of Economic Inequality* 303.

⁹²⁰ Cantillon, Parolin and Collado (n 15).

⁹²¹ Diego Collado and others, 'The End of Cheap Talk About Poverty Reduction: The Cost of Closing the Poverty Gap While Maintaining Work Incentives' in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019).

⁹²² European Commission, 'Proposal for an Interinstitutional Proclamation of the European Pillar of Social Rights' (n 10).

⁹²³ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on Adequate Minimum Wages in the European Union (n 16).

⁹²⁴ van Lancker, Aranguiz and Verschuere (n 275); Aranguiz (n 891).

the EPSR acknowledges that ‘everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity’, yet links this in the same sentence to the necessity to maintain work incentives: ‘minimum income benefits should be combined with incentives to (re)integrate into the labour market’.⁹²⁵ This important link between the prioritisation of work incentives over the adequacy of MIPS and minimum wages is a good reason to study them together.⁹²⁶

4.4.2.2 Social Protection Gaps in the HRTBs’ COs to the EU MS

In the previous section, I have shown that the HRTBs’ austerity concerns were closely linked to benefit cuts. Indeed, HRTBs are routinely concerned about low minimum wages and low MIPS across the EU MS. In this section, I comparatively assess the HRTBs’ COs to the EU MS in their treatment of social protection gaps. I argue that the welfare state’s architecture of the subsistence floor is a central condition which makes or breaks EU MS’ ability in realising the right to a social minimum. As justified in the introduction of this thesis, I do not include health, education, or pension systems in my scope of potential social protection gaps. My clear focus lies on MIPS that capture any means-tested minimum income. In addition to social assistance, I also include child benefits due to their central role in combating child poverty. Figure 35 below shows the HRTBs’ concerns about social protection gaps. All five HRTBs mentioned social protection gaps in their COs to EU MS, albeit with differing frequency.

⁹²⁵ European Pillar of Social Rights, Art 14.

⁹²⁶ Bea Cantillon, Sarah Marchal and Chris Luigjes, ‘Toward Adequate Minimum Incomes: Which Role for Europe?’ in Bea Cantillon, Tim Goedemé and John Hills (eds), *Decent Incomes for All: Improving Policies in Europe* (Oxford University Press 2019).

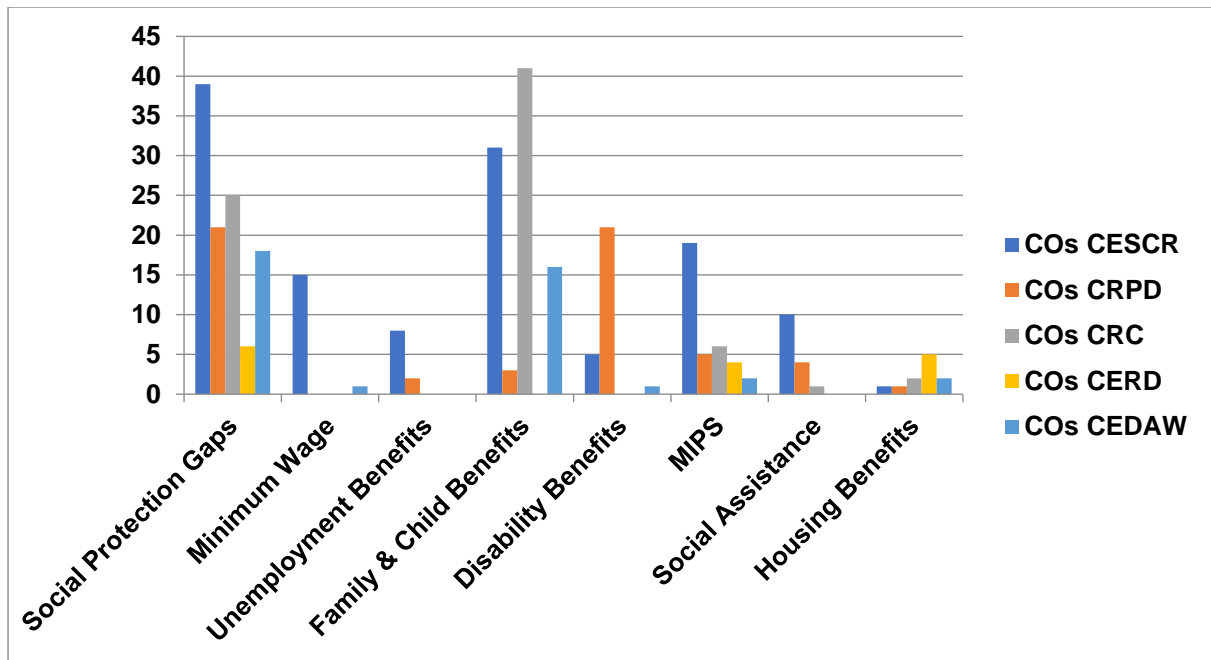


Figure 35. HRTBs' Concerns about Different Categories of Social Protection Gaps

The graph illustrates that besides disability and child benefits, the HRTBs' were most concerned about MIPS (which includes social assistance and housing). Since MIPS have such a prominent position in the HRTBs' concerns on social protection gaps, Figure 36 below shows how many HRTBs issued a concern to the EU MS regarding MIPS (orange columns), and social protection gaps (blue columns).

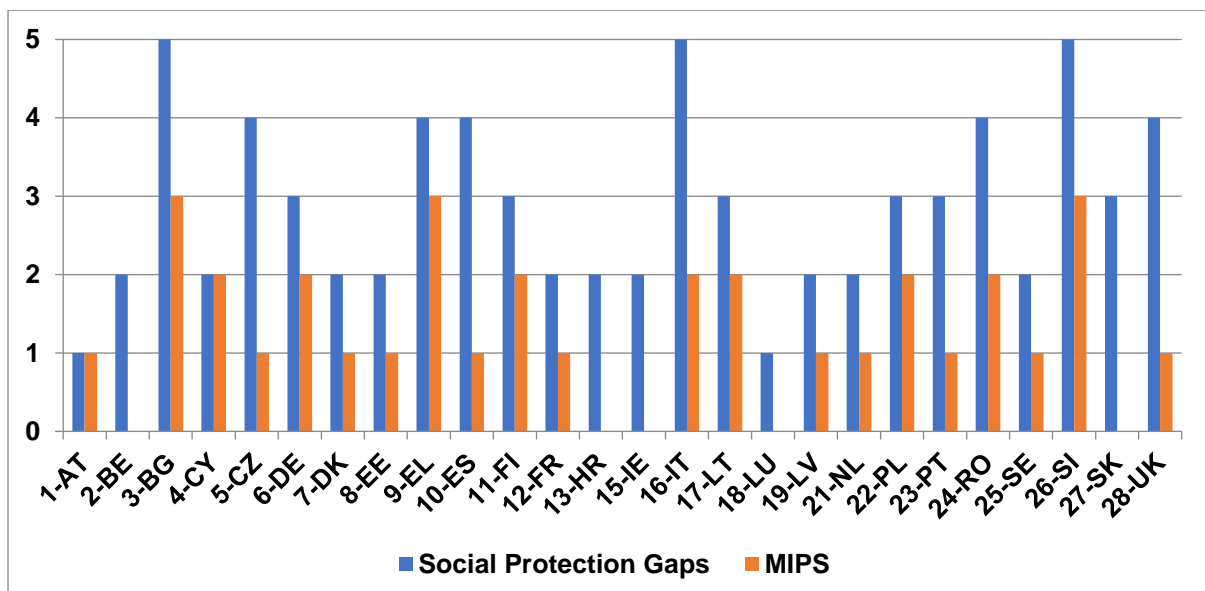


Figure 36. HRTBs' Concerns about Social Protection Gaps and MIPS

Unemployment benefits and minimum wages were almost exclusively of concern to CESC. While the CEDAW Committee mentioned minimum wages in one case, the

CRPD Committee mentioned unemployment benefits in two cases. This seems surprising, given that I have already established the prevalence of the work dimension for the realisation of the right to a social minimum for persons with disabilities in chapter 3 of this thesis. One explanatory factor is that disability benefits are usually structured as a replacement income for people that do not work at all. Hence, these benefits would not be labelled as ‘unemployment benefits’ by the CRPD Committee, but rather be counted as ‘disability benefits’.

4.4.3 Patterns of Discrimination

According to Olivier de Schutter, the current UN Special Rapporteur for Extreme Poverty and Human Rights, a human rights-based approach to poverty ‘seeks to identify the causes of poverty redefined as the result of a process of exclusion and discrimination’.⁹²⁷ When asking the question why EU MS often fail to realise the right to a social minimum for disadvantaged or marginalised groups, it is therefore necessary to unpack patterns of discrimination. I used a stepwise approach to arrive to code the HRTBs’ COs to EU MS. First of all, I categorized all concerns that directly linked back towards the non-discrimination provisions, like Art 2 (2) ICESCR or Art 5 CRPD. After running a keyword search for ‘non-discrimination’, ‘discriminatory’ and ‘discrimination’ and manual checks, I combined my article-based coding with the keyword-search coding. In a next step, I categorised particular issues as sub-codes: attitudes, prejudice and stereotypes; hate speech and hate crimes; and (lack of) participation in public and political life. Figure 37 illustrates this coding frame by HRTB. The graph shows that CESCR issued over 170 concerns on patterns of discrimination in its COs to EU MS. The CRPD and CRC Committees voiced over 60 concerns, whereas the CERD and the CEDAW Committees were concerned about patterns of discrimination over 30 times. Furthermore, there is a difference in emphasis between the group specific HRTBs. While the CRPD Committee is mostly focused on the lack of participation in public and political life as a sign of discrimination, the CERD Committee is most concerned about negative attitudes, prejudice, stereotypes, hate speech and hate crime against Roma. Hence, patterns of discrimination differ between groups, which I will discuss in more depth in section 4.5.

⁹²⁷ de Schutter (n 260).

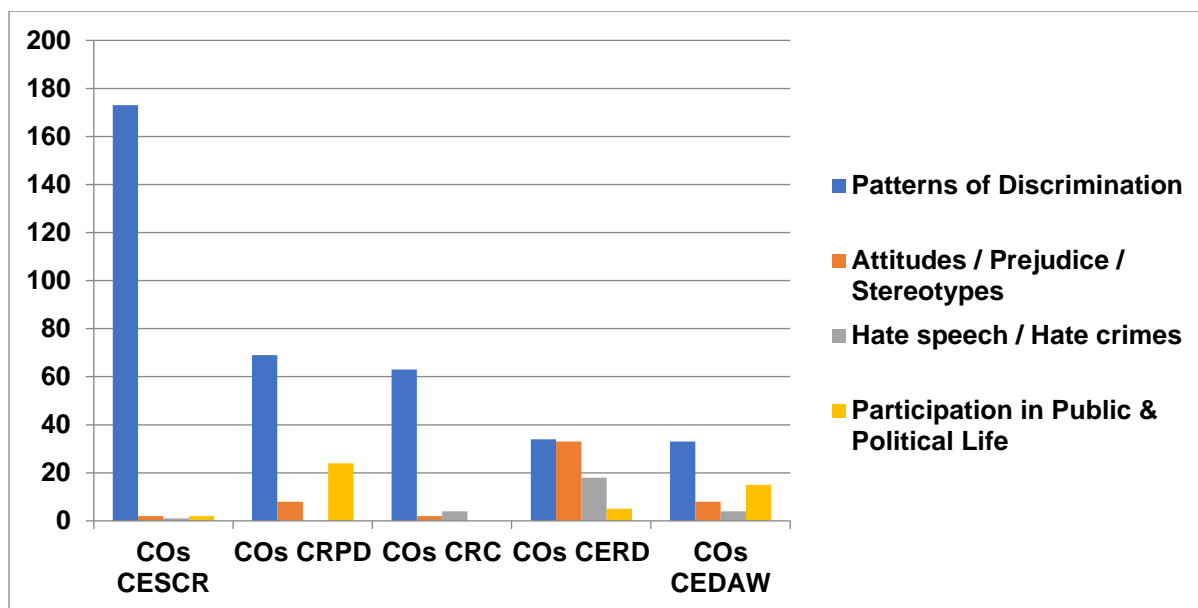


Figure 37. Patterns of Discrimination in the HRTBs' COs to EU MS

Figure 38 below illustrates how many HRTBs were concerned about patterns of discrimination across the EU MS. Discrimination experiences can seriously hinder disadvantaged and marginalized groups' ability to realise their right to a social minimum. The graph not only shows how many HRTBs are concerned about the umbrella term 'patterns of discrimination', but also the specific issues of harmful attitudes, prejudice, and stereotypes; the prevalence of hate speech, and hate crime; and the lack of participation in political and public life. Most of these issues are very common among minority groups. While the deservingness literature on MIPS,⁹²⁸ there is a general lack of acknowledgment that patterns of discrimination indeed are a very important explanatory condition in the realisation of the right to a social minimum.

⁹²⁸ Lauren D Applebaum, 'The Influence of Perceived Deservingness on Policy Decisions Regarding Aid to the Poor' (2001) 22 Political Psychology 419; Hubl and Pfeifer (n 231).

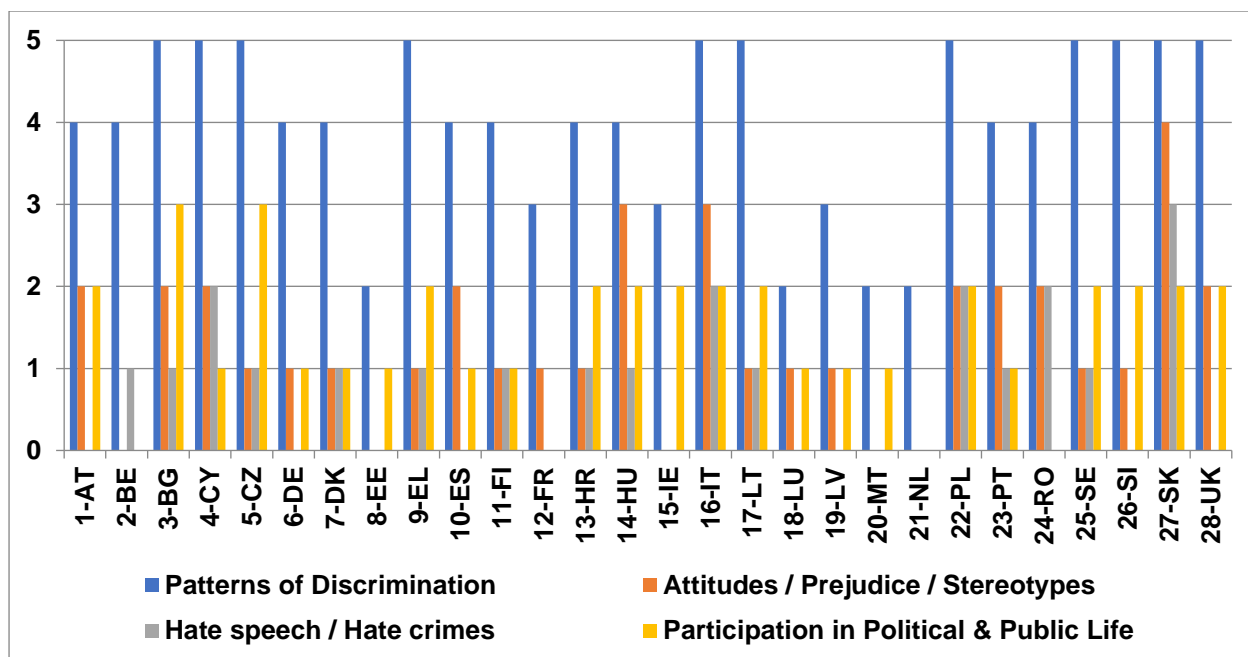


Figure 38. Patterns of Discrimination across the EU MS

The figure also illustrates a certain concentration of concerns in several EU MS. For example, all five HRTBs were concerned about patterns of discrimination in Bulgaria, while three of them voiced their concern about participation in public and political life (CRPD, CERD and CEDAW Committees), two of them on attitudes, prejudice, and stereotypes (CRC and CERD Committees) and one of them on hate speech and hate crimes (CERD Committee). A similar concentration of concerns on patterns of discrimination by several HRTBs can be observed in Cyprus, Czech Republic, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, and UK. However, the graph does not show the total number of concerns across the EU MS. For example, Slovakia received a total of 30 concerns on patterns of discrimination across all five HRTBs, whereas Malta only received 4.

In particular, regarding the category of attitudes, prejudice and stereotypes, CESCR 'is concerned about the persistence of an overall environment of hostility towards those perceived as being different to the majority population, including minority groups such as Roma' in its COs to Slovakia in 2019.⁹²⁹ At the same time, the CRPD Committee 'is concerned that the State party has not taken sufficient action to combat disability and gender stereotypes'.⁹³⁰ On hate speech and hate crime, the CERD Committee 'is seriously concerned about reports of verbal and physical attacks

⁹²⁹ CESCR, COs to SK 2019, para 5.

⁹³⁰ CRPD Committee, COs to SK 2016, para 27.

against ethnic minorities, including Roma'.⁹³¹ The CERD Committee is also 'seriously concerned about persistent hate speech in the media, and on the Internet [... and] the use of racist political discourse among politicians against ethnic minorities, particularly Roma'.⁹³² This is exacerbated by 'numerous reports of excessive use of force and ill-treatment, including verbal and physical abuse, by law enforcement officers against ethnic minorities, in particular Roma.'⁹³³ The issue of negative political discourse against the Roma had already been pointed out by the CEDAW Committee in 2015, where it showed concern 'at the recent resurgence of the negative discourse by political leaders, private organizations and religious groups and of violence directed against Roma women'.⁹³⁴ Regarding participation in public and political life, the CRPD Committee is concerned about the fact that people with disabilities 'are not able to fully exercise their right to vote and stand for election',⁹³⁵ whereas the CERD Committee voices its concern about the 'absence of statistical data on the political representation of ethnic minorities in the State party, as well as the lack of information on measures adopted to promote their political participation'.⁹³⁶

In Malta, only three HRTBs issued COs between 2009-2019, which is why it only received four concerns on patterns of discrimination. All four of those stemmed from the CRPD Committee which is very concerned about intersectional discrimination.⁹³⁷ A separate concern is issued on women with disabilities, stating that women with disabilities face 'multiple and intersectional discrimination'.⁹³⁸ The Committee is also concerned about the lack of participation in political and public life, due to the state party's reservation on Art 29 (a) (i) and (ii). This leads to the CRPD Committee's concern about the 'the lack of information on the representation and participation of persons with disabilities in political and public life and the fact that they do not effectively participate in the process of decision-making'.⁹³⁹

This short discussion of patterns of discrimination has shown that the lack of realisation of the right to a social minimum for disadvantaged and marginalized groups can often be directly traced back to the patterns of discrimination these groups

⁹³¹ CERD Committee, COs to SK 2018, para 11.

⁹³² CERD Committee, COs to SK 2018, para 13.

⁹³³ CERD Committee, COs to SK 2018, para 15.

⁹³⁴ CEDAW Committee, COs to SK 2015, para 39.

⁹³⁵ CRPD Committee, SOs to SK 2016, para 77.

⁹³⁶ CERD Committee, COs to SK 2018, para 19.

⁹³⁷ CRPD Committee, COs to MT 2018, para 7.

⁹³⁸ CRPD Committee, COs to MT 2018, para 9.

⁹³⁹ CRPD Committee, COs to MT 2018, para 41.

experience. For example, it is not an accident that Roma are facing horrendous hate crimes in Slovakia, and it is also not an accident that Roma are not able to realise their right to a social minimum there. However, it is highly doubtful that 'typical' legal responses of how to realise the right to a social minimum in the form of better domestic applicability and justiciability would change the Roma's fate in Slovakia. Rather, the focus needs to be put on these deep-running patterns of discrimination which are the root of why Slovakia constantly fails to realise the right to a social minimum for the Roma. The next section will explore this more in depth when analysing hindering conditions between my three case studies: children, persons with disabilities and Roma.

4.5 Analysis of Hindering Conditions for Persons with Disabilities, Children, and Roma

This section analyses how austerity, social protection gaps and patterns of discrimination hinder persons with disabilities, children, and Roma from realising their right to a social minimum. While it seems that austerity and social protection gaps are 'group-neutral', this is not the case. Instead, austerity measures often disproportionately impact disadvantaged and marginalized groups; and social protection gaps are more pronounced for those that are not represented in the political process deciding on the structure or level of benefits. Additionally, this section shows that the patterns of discrimination that persons with disabilities, children and Roma experience are similar but not the same. Section 4.5.1 focuses on persons with disabilities, section 4.5.2 on children and section 4.5.3 on Roma.

4.5.1 Persons with Disabilities

In chapter 3 I have shown that the right to a social minimum for persons with disabilities is on the radar of the HRTBs in every single EU MS. In its COs, they usually deploy a strong focus on the work dimension. This subsection focuses on the hindering conditions for people with disabilities across the 28 EU MS. Existing research points towards serious employment and poverty gaps across Europe, noting that people with disabilities face higher poverty rates⁹⁴⁰ and lower employment rates.⁹⁴¹ In other words,

⁹⁴⁰ Cambois, Solé-Auró and Robine (n 127); Dorothy Watson and others, 'Poverty Dynamics of Social Risk Groups in the EU: An Analysis of the EU Statistics on Income and Living Conditions, 2005 to 2014' (Department of Employment Affairs and Social Protection and the Economic and Social Research Institute 2018) Social Inclusion Report No 7.

⁹⁴¹ Yuliya Kuznetsova, Betul Yalcin and Mark Priestley, 'Labour Market Integration and Equality for Disabled People: A Comparative Analysis of Nordic and Baltic Countries' (2017) 51 *Social Policy & Administration* 577.

persons with disabilities are disproportionately affected by poverty and lack of equitable access to the labour market. Social policy scholars tend to over-emphasize employment over poverty gaps, without considering the extra costs of disability and inadequate MIPS across many EU MS as key hindering conditions to realise the right to a social minimum. Hence, this section discusses the evidence that persons with disabilities are facing these three hindering conditions to realise their right to a social minimum in every single EU MS. Figure 39 below shows how many HRTBs were concerned about the three conditions in their COs to EU MS from 2009-2019. Since the CERD Committee does not mention persons with disabilities, it is not included in the analysis.

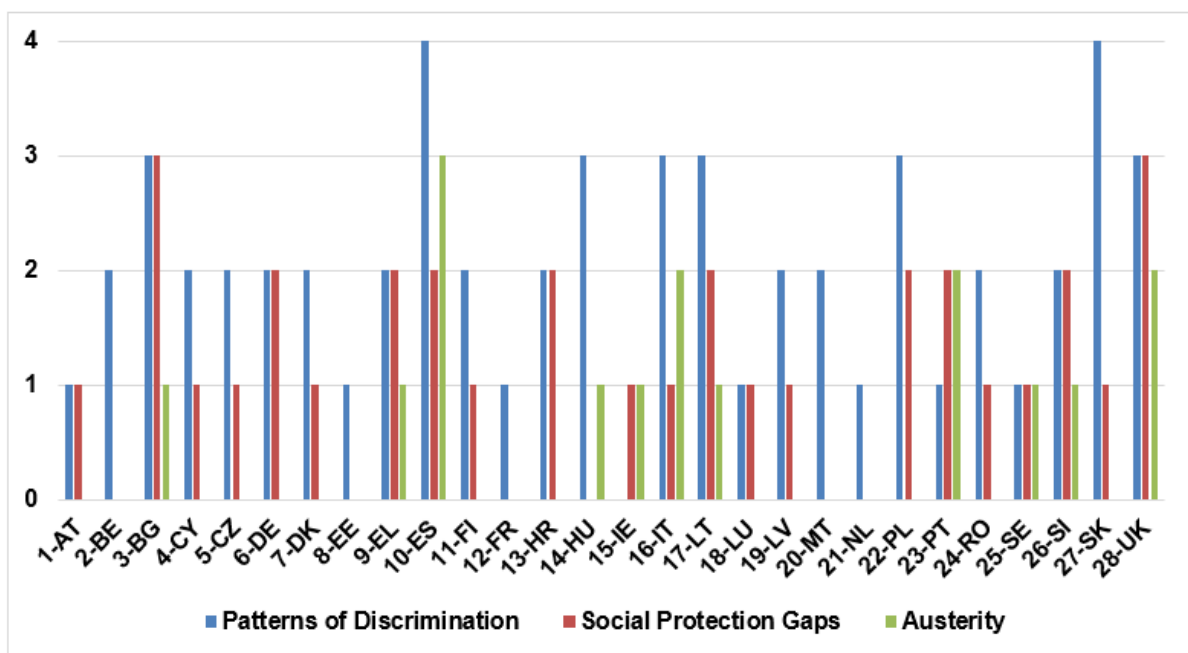


Figure 39. Hindering Conditions for Persons with Disabilities across the EU MS

The graph shows that patterns of discrimination are by far the most widespread concern across the EU MS – in fact, it is a concern that was issued to every single one. The HRTBs are also very concerned about social protection gaps in 22 out of 28 EU MS.⁹⁴² Austerity concerns for persons with disabilities are much less frequent. The HRTBs voice their concern in this regard in Bulgaria, Greece, Spain, Hungary, Ireland, Italy, Lithuania, Portugal, Sweden, Slovenia, and the UK. Widespread budget cuts and

⁹⁴² AT, BG, CY, CY, DE, DK, EL, ES, FI, HR, IE, IT, LT, LU, LV, PL, PT, RO, SE, SI, SK, UK.

austerity measures have a very noticeable impact on disability benefit packages, resulting in stricter eligibility, tighter conditionality, and lower-value benefits.⁹⁴³

Most often, persons with disabilities are facing serious obstacles when trying to find employment. This is evidenced by the persons with disabilities' very high employment gaps when comparing them to persons without disabilities.⁹⁴⁴ As a consequence, persons with disabilities are less able to gain their living through employment, which is one explanatory factor why persons with disabilities are often not able to realise their right to a social minimum. In particular, the large employment gaps experienced by persons with disabilities partly explain the poverty gaps and social exclusion.⁹⁴⁵ As I established in chapter 3, the CRPD Committee is concerned about some aspect of Art 27 CRPD (right to work) in every single CO that it issued to EU MS between 2009-2019.⁹⁴⁶ Since persons with disabilities are routinely discriminated against when trying to access the open labour market, it is not surprising that both CESCR and the CRPD-Committee frequently voice their concerns regarding the lack of accessibility and inclusive labour markets for persons with disabilities.⁹⁴⁷ The CRPD contains a general article on accessibility (Art 9), emphasizing general accessibility issues like access to transport, barrier-free buildings or sign language.

Since access to the labour market is so limited, most EU MS have established specific benefit systems for persons with disabilities that are usually separate or at least independent from the general structure of MIPS. This is why social protection

⁹⁴³ Christina Beatty and Steve Fothergill, 'Disability Benefits in an Age of Austerity' (2015) 49 *Social Policy & Administration* 161; Merry Cross, 'Demonised, Impoverished and Now Forced into Isolation: The Fate of Disabled People under Austerity' (2013) 28 *Disability & Society* 719; Susan Flynn, 'Perspectives on Austerity: The Impact of the Economic Recession on Intellectually Disabled Children' (2017) 32 *Disability & Society* 678.

⁹⁴⁴ Kuznetsova, Yalcin and Priestley (n 938).

⁹⁴⁵ See for example Michael Palmer, 'Disability and Poverty: A Conceptual Review' (2011) 21 *Journal of Disability Policy Studies* 210; Gerda Hooijer and Georg Picot, 'European Welfare States and Migrant Poverty: The Institutional Determinants of Disadvantage' (2015) 48 *Comparative Political Studies* 1879; Yekaterina Chzhen, 'Child Poverty and Material Deprivation in the European Union during the Great Recession' (2017) 27 *Journal of European Social Policy* 123.

⁹⁴⁶ CRPD Committee, COs to AT 2013, paras 44-47; COs to BE 2014, paras 38-39; COs to BG 2012, paras 57-58; COs to CY 2017, paras 53-54; COs to CZ 2015, paras 51-52; COs to DE 2015, paras 49-50; COs to DK 2014, paras 58-59; COs to ES 2019, paras 45-46; COs to HR 2015, paras 41-42; COs to HU 2012, paras 43-44; COs to IT 2016, paras 69-70; COs to LT 2016, paras 51-52; COs to LU 2017, paras 46-47; COs to LV 2017, paras 46-47; COs to MT 2018, paras 39-40; COs to PL 2018, paras 44-45; COs to PT 2016, paras 51-52; COs to SE 2014, paras 49-50; COs to SI 2018, paras 45-46; COs to SK 2016, paras 73-74; COs to UK 2017, paras 56-57.

⁹⁴⁷ CESCR, COs to AT 2013, para 19; COs to CY 2016, paras 15-16 (concerning intersectional discrimination with regards to disabled asylum seekers). CRPD Committee, COs to BE 2014, paras 38-39; COs to CY 2017, paras 53-54; COs to DE 2014, paras 49-50; COs to HR 2015, paras 41-42; COs to HU 2012, paras 43-44; COs to LT 2016, paras 51-52; COs to PL 2018, paras 44-45; COs to PT 2016, paras 51-52; COs to SI 2018, paras 45-46; COs to UK 2017, paras 56-57.

gaps are such an important indicator for whether or not states will be able to realise the right to a social minimum for persons with disabilities.⁹⁴⁸ In recent years, there has been a re-framing of disability benefits in many EU MS with the aim of bringing more persons with disabilities off benefits and into work.⁹⁴⁹ While this is generally admirable given the high discrepancies in employment rates for persons with disabilities as compared to persons without disabilities, the problem starts when this leads to inadequate benefit structures which might leave persons with disabilities at higher risk of poverty, or even destitution. One specific problem is the increasing use of conditionality and sanctions for persons with disabilities.⁹⁵⁰

There are several sub-components of social protection systems which can help to design enabling disability benefit schemes. For example, it is not only the amount of the disability benefits, but also the eligibility and targeting rules which are important. As such, in order to fulfil the obligations under the CRPD, persons with disabilities should 'receive equal access to mainstream social protection programmes and services (...) as well as access to specific programmes and services for disability-related needs and expenses.'⁹⁵¹ In particular, the issue of the extra-costs of disability is seldom adequately considered in comparative analyses of disability benefit systems. The problem of how to account for extra costs of disability is usually acknowledged in the literature, but without giving an answer on how to tackle it.⁹⁵² Yet, states parties have an immediate obligation to provide minimum essential levels of each Covenant right, by making sure that 'benefits are sufficiently high'.⁹⁵³ This minimum requirement of benefit levels necessarily has to take the additional costs of disability into account, even though it is difficult to find comparable data for this need.

One particular problem with disability benefits is that EU-SILC uses a disability-definition which is based on self-assessment, whereas the disability benefit systems across Europe are still mostly based on medical models, often using very complicated

⁹⁴⁸ Catalina Devandas-Aguilar, 'Report of the Special Rapporteur on the Rights of Persons with Disabilities' (2015) United Nations General Assembly, 70th Session, Agenda Item 73 (b), UN Doc A/70/297.

⁹⁴⁹ Kuznetsova, Yalcin and Priestley (n 938).

⁹⁵⁰ Ben Baumberg Geiger, 'Benefits Conditionality for Disabled People: Stylised Facts from a Review of International Evidence and Practice' (2017) 25 *Journal of Poverty and Social Justice* 107.

⁹⁵¹ Devandas-Aguilar (n 945) para 20.

⁹⁵² Stefanos Grammenos, 'Adequate Standard of Living and Social Protection: Statistical Indicators' (2017) The Academic Network of European Disability Experts (ANED) <<https://www.disability-europe.net/theme/statistical-indicators>> accessed 29 December 2022.

⁹⁵³ Devandas-Aguilar (n 945) para 65.

assessment tools whether somebody is indeed eligible for disability benefits that are usually expressed in percentages of inability to work.⁹⁵⁴ This is in clear contrast to the human rights model of disability that the CRPD Committee prescribes.

On the question of patterns of discrimination for persons with disabilities, I not only examined formal legal means like disability legislation, but also wider conditions like the lack of participation in public and political life, stereotypes, and negative attitudes. Regarding disability discrimination, it is telling that the CRPD Committee issued a CO voicing concerns about discrimination in all its COs issued the EU MS from 2009-2019.⁹⁵⁵ Disability discrimination is one of the main factors constraining employment opportunities, and as such adequate living standards for persons with disabilities.⁹⁵⁶ The lack of political participation of persons with disabilities is considered a violation under Art 29 CRPD. Hence, political participation and representation form part of the explanation for why EU MS are not realising the right to a social minimum for persons with disabilities.⁹⁵⁷ Sometimes, participation in public and political life is connected to mobilisation.⁹⁵⁸ In this regard, the FRA has developed specific indicators regarding political participation of persons with disabilities.⁹⁵⁹ Often, the political opportunity structures across Europe are linked to specific mobilisation strategies, such as NGO-advocacy and the impact of the CRPD.⁹⁶⁰

Deservingness conceptions, negative attitudes and stereotypes play a major role in how the public thinks about the legitimacy of social benefits. Therefore, the recent re-framing of persons with disabilities as 'un-deserving' has a negative impact

⁹⁵⁴ Grammenos (n 949).

⁹⁵⁵ CRPD Committee, COs to AT 2013, paras 12-13; COs to BE 2014, paras 11-12; COs to BG 2012, paras 15-16; COs to CY 2017, paras 11-12; COs to CZ 2015, paras 9-12; COs to DE 2015, paras 13-14; COs to DK 2014, paras 14-17; COs to ES 2019, paras 19-20; COs to HR 2015, paras 7-8; COs to HU 2012, paras 15-18; COs to IT 2016, paras 9-12; COs to LT 2016, paras 13-14; COs to LU 2017, paras 10-13; COs to LV 2017, paras 8-9; COs to MT 2018, paras 7-8; COs to PL 2018, paras 7-8; COs to PT 2016, paras 13-16; COs to SE 2014, paras 9-12; COs to SI 2018, paras 6-7; COs to SK 2016, paras 13-20; COs to UK 2017, paras 12-17.

⁹⁵⁶ Kuznetsova, Yalcin and Priestley (n 938).

⁹⁵⁷ Mark Priestley and others, 'The Political Participation of Disabled People in Europe: Rights, Accessibility and Activism' (2016) 42 *Electoral Studies* 1.

⁹⁵⁸ *ibid.*

⁹⁵⁹ FRA, 'The Right to Political Participation for Persons with Disabilities' (n 345); FRA, 'Background Reports on the Right to Political Participation for Persons with Disabilities' (2014) <<http://fra.europa.eu/en/country-data/2014/background-reports-right-political-participation-persons-disabilities>> accessed 29 December 2022.

⁹⁶⁰ Andreas Sturm and others, 'Exercising Influence at the European Level: Political Opportunity Structures for Disability Rights Advocacy and the Impact of the UN CRPD' in Rune Halvorsen and others (eds), *The Changing Disability Policy System: Active Citizenship and Disability in Europe Volume 1* (Routledge 2017).

on the realisation of the right to a social minimum for people with disabilities.⁹⁶¹ This is notwithstanding the fact that people with disabilities are generally considered “more deserving” than other groups when it comes to the justification of the benefit structure in the policy process.⁹⁶²

In sum, my analysis of the conditions that hinder the realisation of the right to social minimum for persons with disabilities has shown the fruitfulness of not restricting myself to the purely legal conditions like the formal non-discrimination framework or justiciability. In fact, CESCR’s preoccupation with justiciability concerns are much less prevalent in the COs issued by the CRPD-Committee. This is probably due to the fact that courts in general tend to be seen as less important enabling factors for effective mobilisation than wider societal structures.⁹⁶³ Rather, a combination of hindering labour markets, benefits structures and the lack of political mobilization need to be analysed together when trying to understand how the right to a social minimum for persons with disabilities could be realised better.

4.5.2 Children

This subsection explores three underlying conditions on why states are failing to realise the right to a social minimum for children, namely social protection gaps, childcare options, and austerity. Even though the vast literature on child poverty consists of very diverse strands of theory on the origins and causes of poverty, very little has been written on children’s rights theory,⁹⁶⁴ and even less on the origins of child poverty. For this reason, I have started my search for conditions not in theory, as would have been the first step for social science scholars, but rather in the explanatory statements and reasons that HRTBs give when issuing a concern on child poverty in their COs.

The bleak reality of very high child poverty rates across the richest nations on earth stands in sharp contrast with the most basic human rights guarantee: the realisation of the right to a social minimum, which consists of providing minimum essential levels of all Covenant rights without discrimination. Even the richest welfare states of Europe fail to realise their minimum core obligations for children living in

⁹⁶¹ Kuznetsova, Yalcin and Priestley (n 938).

⁹⁶² Hubl and Pfeifer (n 231).

⁹⁶³ Waddington and Lawson (n 418).

⁹⁶⁴ Karl Hanson and Noam Peleg, ‘Waiting for Children’s Rights Theory’ (2020) 28 *The International Journal of Children’s Rights* 15.

poverty and material deprivation. For children in single-parent families the situation is looking even bleaker. This means that the motivational driver of this subsection is how children might be able to exercise, enjoy and realise their right to a social minimum across Europe. This ability is not purely a legal issue and the factors that hinder and prevent the realisation of this right remain under-explored. In the words of Nolan:

‘Thus, the challenge (...) moving forward is how to engage with an ever growing, interdisciplinary field on child poverty so as to work towards addressing the underlying causes and phenomena that exacerbate poverty – a task that will require learning from other disciplines, yet without losing its core ‘rights’ focus and commitment.’⁹⁶⁵

Since childcare options are such an important factor on whether or not caregivers – and to a large extent mothers - can engage in employment, I also specifically include this condition. For children with multiple discrimination experiences, like Roma children or children with disabilities, the ‘patterns of discrimination’-condition is very meaningful. For example, discrimination educational segregation is mainly a concern for children with disabilities and Roma children. This is why I devote the next subsection on this particular issue of intersectionality, but do not include this condition here.

Figure 40 below illustrates the three overarching hindering conditions (social protection gaps, childcare and austerity) for realising the right to a social minimum across the EU MS. The numbers show how many HRTBs were concerned about each of these factors. Since Latvia and Malta did not receive any COs by the HRTBs that specify conditions that would hinder the respective state party from realising the right to a social minimum for children, I excluded these two EU MS from the graph. The three conditions are almost equally distributed among the EU MS, with a slight majority receiving COs on social protection gaps and childcare rather than austerity. Nevertheless, austerity has been extremely severe in EU MS that were mandated cuts through sovereign debt programmes. Children were particularly vulnerable in the aftermath of the euro-crisis, often due to austerity measures reducing net-incomes for many families across Europe.⁹⁶⁶ This aftermath proved to be long-lasting. In 2018 – ten years after the financial crisis started – almost half of single parent households with children (45%) across the EU were at risk of poverty or social exclusion.⁹⁶⁷ In its

⁹⁶⁵ Nolan and Pells (n 538), p. 123.

⁹⁶⁶ Cantillon and others (n 30).

⁹⁶⁷ See Eurostat table [ilc_peps03].

2019 COs to Italy, the CRC Committee notes that high levels of unemployment and child poverty are a ‘result of the austerity measures taken by the Government since 2010’. Hence, ‘the Committee is concerned that the austerity measures continue to undermine the effective protection of children’s rights’.⁹⁶⁸

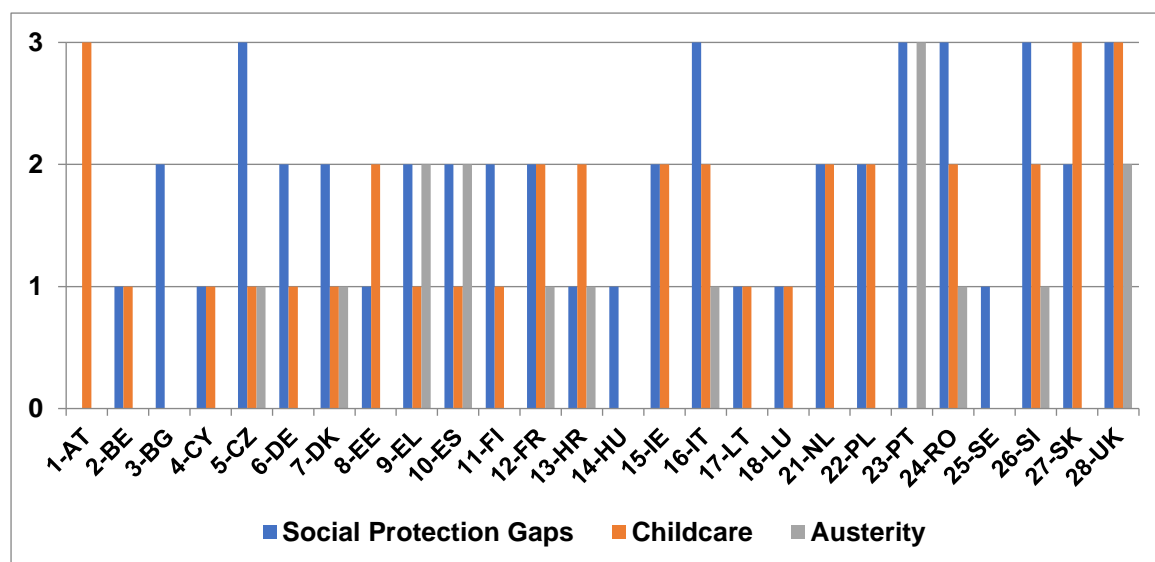


Figure 40. Hindering Conditions for Realising the Right to a Social Minimum for Children across the EU MS

In certain EU MS, the HRTBs point out their concerns regarding all three conditions. Those are not only those that experienced external loan conditionality due the financial crisis 2007/2008 (like Greece or Spain) but also those that enacted austerity measures for solely domestic political reasons (like the UK). Yet even Denmark, with its comprehensive social protection gaps and almost abundant resources, received concerns regarding all three conditions.

My analysis of the hindering conditions shows that the uneven increase in child poverty went hand in hand with the diverse hindering conditions in which EU MS found themselves. For example, harsh austerity measures were introduced in only a range of EU MS, sometimes as consequences of bailout programmes (e.g., Ireland, Greece), sometimes as consequences of domestic politics (e.g., the UK). These austerity measures often had a disproportionate impact on children. In particular, EU MS without comprehensive social protection systems often struggled to adequately protect their most vulnerable members of society.⁹⁶⁹

⁹⁶⁸ CRC, COs to IT 2019, para 7.

⁹⁶⁹ Cantillon and others (n 30).

4.5.3 Roma

This subsection analyses the most pressing conditions which hinder EU MS in their efforts to realise the right to a social minimum for Roma. The ‘patterns of discrimination’-condition is particularly relevant here. I place particular emphasis on the analysis of what ‘patterns of discrimination’ means in the COs, with a focus on hate speech and hate crimes, negative attitudes stereotypes and the lack of representation. I argue that it is important to tackle the root causes of the failure to realise the right to a social minimum for the Roma. It is not enough to focus only on the material deprivation aspect of the right to a social minimum. In order to realise the right to a social minimum one must fight against persistent negative stereotyping, hate speech and the overall lack of representation of Roma in the public sphere.

Figure 41 below illustrates how many HRTBs were concerned about each of the three hindering conditions across the EU MS. Since Austria, Estonia, Luxemburg, and Malta did not receive any COs by the HRTBs that specify conditions that would hinder the respective state party in realising the right to a social minimum for Roma, I excluded these EU MS from the graph.

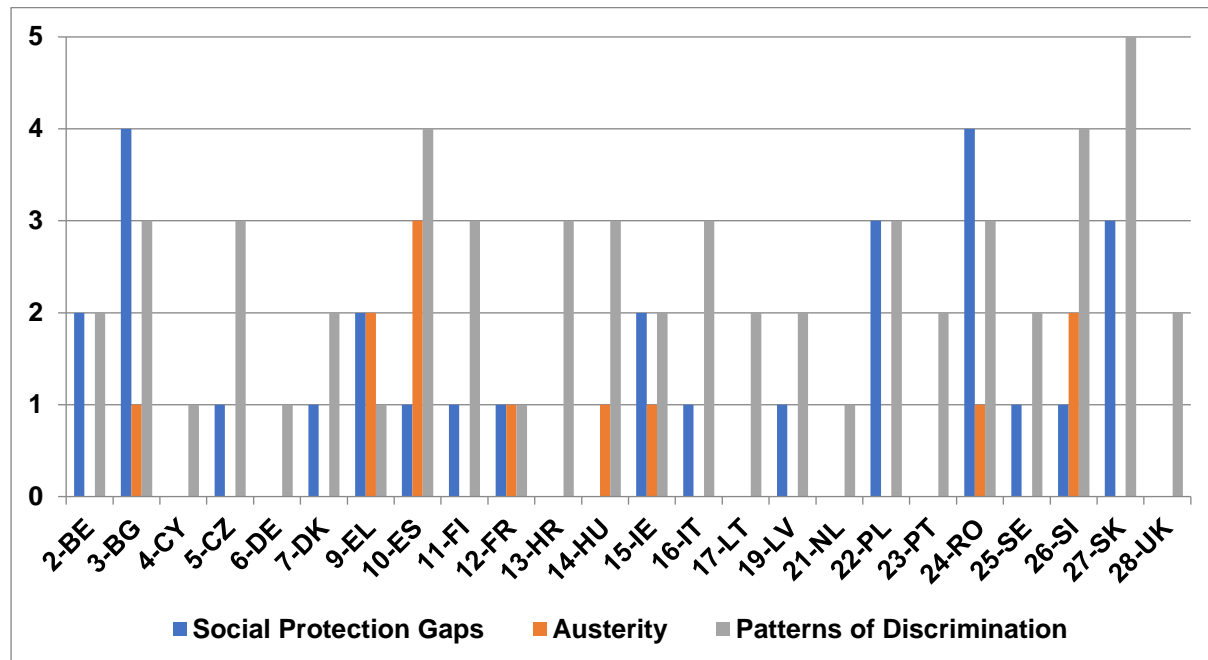


Figure 41. Hindering Conditions for Realising the Right to a Social Minimum for Roma across the EU MS

Patterns of discrimination is clearly the hindering condition that received the most concerns, followed by social protection gaps. Only few EU MS received specific COs

on the impact of austerity measures on Roma (Greece, Spain, Hungary, Ireland, Romania, and Slovenia).

4.6 Intersectionality

My previous analyses focused on persons with disabilities, children, and Roma separately. In other words, I had excluded the experience of multiple discrimination from my analysis. Since intersectionality is such an important issue to consider, I devote this section solely to this purpose. As a case study, I consider children with disabilities and Roma children. In the next two subsections I therefore focus on the hindering conditions in realising their right a social minimum for children with disabilities (section 4.6.1) and Roma children (section 4.6.2).

4.6.1 Children with Disabilities

4.6.1.1 Social Protection Gaps

I have argued before that the EU's AROPE-indicator falls short of including the social protection and social security, in particular regarding MIPS. This is of particular relevance for children with disabilities. Most often, households that include children with disabilities are dependent on public resources in the form of benefits to make ends meet. This is why it is crucial to include social protection gaps in my analysis of the right to a social minimum for children with disabilities. While I have defined MIPS as being the most relevant social protection scheme for a *general* understanding of the right to a social minimum, this does not hold true for children with disabilities *specifically*. Rather, a whole range of potential benefits such as disability benefits, specific childcare benefits and any other benefits covering the extra-costs for children with disabilities need to be considered as relevant social protection gaps.

In order to analyse the concerns of the HRTBs regarding social protection gaps for children with disabilities, I utilised the “children with disabilities”-code in MAXQDA, consisting of all the instances where one the HRTBs is concerned about children with disabilities in one of the COs addressed to the 28 EU MS from 2009-2019. In order to filter out any reference to social protection, I conducted a keyword-search for a range of benefits, namely for ‘social protection’, ‘benefit(s)’ and ‘allowance(s)’. I then manually checked these results and used the code-matrix-browser and interactive segment matrix for further visualization and analysis.

Figure 42 below depicts all EU MS that received a concern from the CRPD and CRC Committees regarding the social protection gaps in their most recent COs issued from 2009-2019. The graph shows that 20 out of 28 EU MS received such a CO from either of the two Committees combined, whereas 11 EU MS received COs from both the CRPD and CRC Committees. Considered separately, the CRPD Committee is concerned about social protection gaps for children with disabilities in 15 EU MS, compared to 16 EU MS for the CRC Committee.

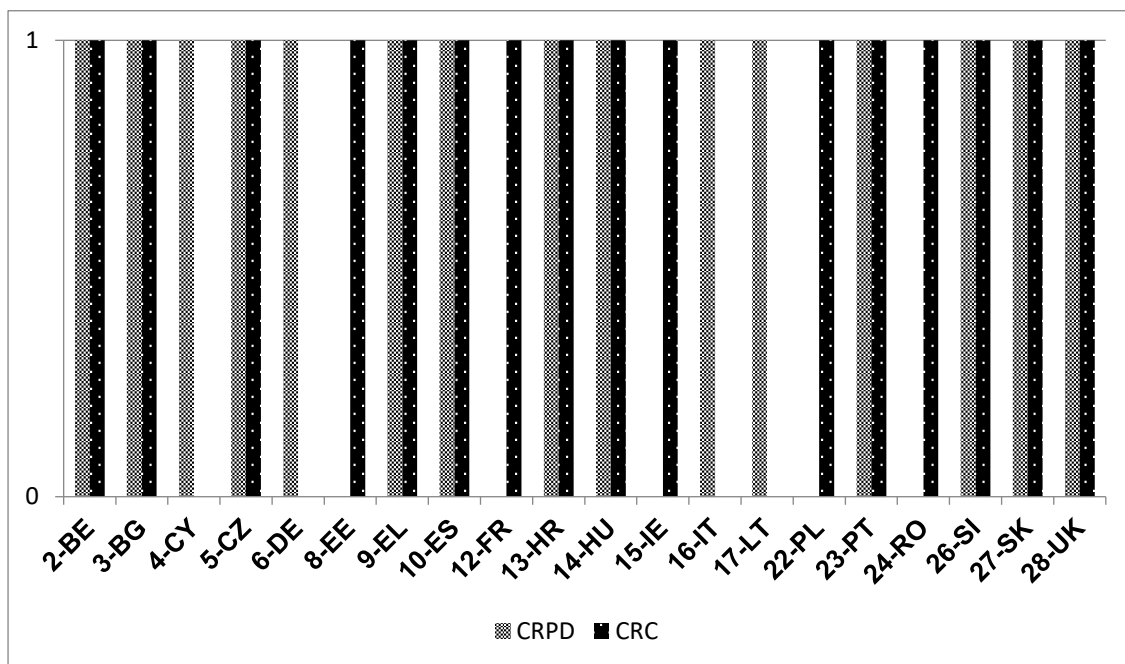


Figure 42. Social Protection Gaps for Children with Disabilities across the EU MS

To qualitatively consider the different concerns about social protection gaps I used the interactive segment matrix. As the extract in Figure 43 shows, this tool allows me to qualitatively compare the COs across EU MS, with the CRPD and CRC Committees' concerns towards each EU MS displayed per column. The interactive segment matrix is hence more detailed than the quantitative display of the code matrix browser, allowing me to investigate the respective coded segments in depth.

2-BE (5 Dokumente, 2 Codierte Segmente)	3-BG (5 Dokumente, 3 Codierte Segmente)	4-CY (5 Dokumente, 1 Codierte Segment)
Respect for home and the family (art. 23) 34. The Committee is concerned about the lack of support for parents of children with disabilities, particularly mothers, who often leave their jobs to care for their children. It is also concerned that the minimum	Respect for home and the family (art. 23) 45. The Committee notes with concern that the network of primary support services for children with disabilities and their families is not sufficiently or evenly developed throughout the State party.	Children with disabilities (art. 7) 19. The Committee is concerned about the limited access to early intervention and support provided to children with disabilities and their families, especially within the educational, health and social sector, and about the inadequate financial

Figure 43. Excerpt of the Interactive Segment Matrix: Social Protection Gaps for Children with Disabilities

One of the most concerning issues regarding social protection gaps is the widespread lack of support for families and households that care for children with disabilities. For example, in Belgium, the CRPD Committee is concerned of the 'lack of support for parents of children with disabilities, particularly mothers, who often leave their jobs to care for their children'.⁹⁷⁰ Five years later, under the heading of 'children with disabilities', the CRC Committee still notes that 'support for families to provide care for children is insufficient'.⁹⁷¹ This is notwithstanding a legal reform in between the adoption of these two COs, which the CRC Committee does mention as a positive aspect. Another example is Bulgaria, where the CRC Committee is concerned about a 'fragmented system of social assistance, which does not sufficiently encourage and support families to keep their children at home'.⁹⁷² Two years later, the CRPD Committee notes the same issue in a paraphrased way when stating that the 'network of primary support services for children with disabilities and their families is not sufficiently or evenly developed throughout the State party'.⁹⁷³ On a positive note, these two examples show that the same issues are mentioned by both CRPD and CRC Committees, owing to the prevalence of children with disabilities as a particularly protected disadvantaged group under both treaties. On a negative note, there seems to be little cross-fertilization between the two treaty bodies, beyond the odd reference to welcoming the ratification of the CRPD in some COs issued by the CRC Committee.⁹⁷⁴

The prevalence of children with disabilities as a particularly protected disadvantaged group under both treaties can be observed by the frequent mentioning

⁹⁷⁰ CRPD Committee, COs to BE 2014, para 34.

⁹⁷¹ CRC Committee, COs to BE 2019, para 29.

⁹⁷² CRC Committee, COs to BG 2016, para 38.

⁹⁷³ CRPD Committee, COs to BG 2018, para 45.

⁹⁷⁴ See for example CRC Committee, COs to BG 2016, para 38.

of the lack of social protection under the heading of ‘children with disabilities’.⁹⁷⁵ For example, the CRC Committee often brings up the issue of ‘insufficient’ support, financial allowances and services for families with children with disabilities.⁹⁷⁶ In a similar vein, the CRPD Committee addresses the need to allocate ‘sufficient resources to enable children with disabilities to continue living with their families’.⁹⁷⁷ In France, the CRC Committee is concerned about families ‘facing major obstacles to obtaining and maintaining the necessary support they are entitled to receive’.⁹⁷⁸

Sometimes, the CRPD Committee brings up the issue of lack of social protection under the heading of ‘respect for home and family’, protected under Art 23 CRPD. For example, in Spain, the Committee is concerned about the ‘lack of adequate policies and related services to support children with disabilities and their families’.⁹⁷⁹ The CRC Committee uses ‘family environment’ as a similar heading expressing some of the same issues. For example, in its COs to Croatia, the CRC Committee is concerned about the ‘[l]ack of quality support services for children with disabilities and their Families’.⁹⁸⁰

The CRPD Committee also mentions the issue of inadequate social protection as an implementing concern, under the heading of ‘equality and non-discrimination’ (Art 5 CRPD). For example, in its COs to Greece, the CRPD Committee is concerned about the ‘lack of effective implementation of the existing standards on equality and non-discrimination, including provision of specific measures and individualized support, particularly in the areas of education for children with disabilities’.⁹⁸¹ This concern shows that the inclusion of non-discrimination into my definition of the right to a social minimum is right at the heart of the matter. Without effective realisation of non-discrimination, it will not be possible to realise the social protection aspect of the right to a social minimum for children with disabilities.

Having discussed the poverty and material deprivation dimensions for children with disabilities in sections 3.5.2.1 and 3.5.2.2 respectively, a comparative analysis with the hindering condition of social protection gaps is in order. Doing so will result in

⁹⁷⁵ See for example CRC Committee, COs to EE 2017, para 37; COs to FR 2016, para 57; COs to HU 2014, para 44; CRPD Committee, COs to HR 2015, para 11; COs to HU 2012, para 21.

⁹⁷⁶ See for example CRC Committee, COs to HU 2014, para 44; COs to EE 2017, para 37.

⁹⁷⁷ CRPD Committee, COs to HU 2012, para 21.

⁹⁷⁸ CRC Committee, COs to FR 2016, para 57.

⁹⁷⁹ See for example CRPD COs to ES 2019, para 43.

⁹⁸⁰ CRC Committee, COs to HR 2014, para 38.

⁹⁸¹ CRPD Committee, COs to Greece 2019, para 7.

a better understanding of how the CRC and CRPD Committees are focusing on different aspects of the right to a social minimum, dependent on the specific situations of each EU MS. Figure 44 below compares the poverty (CD-P) and material deprivation (CD-MD) dimensions for children with disabilities with the hindering condition of social protection (CD-SP). The left axis shows whether none, one or two HRTBs have issued a CO. The graph demonstrates that the UK is the only country that has received concerns on both dimensions of the right to a social minimum (P and MD) and on the hindering condition of Social Protection, by both the CRC and the CRPD Committee. Bulgaria, Poland and Romania also received concerns on all three issues, but they were not issued by both the CRC and the CRPD Committees.

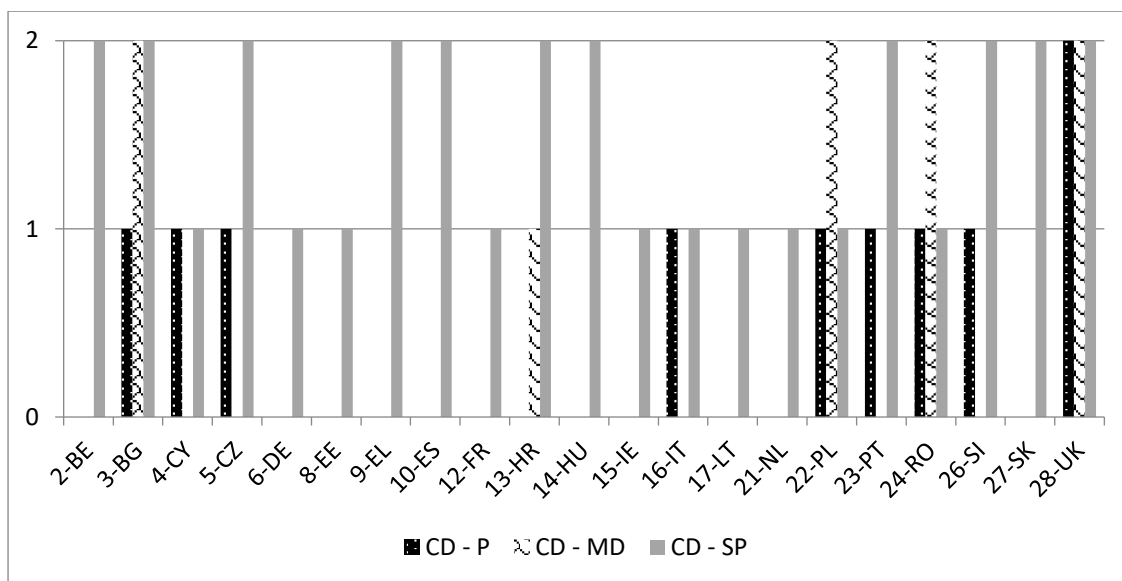


Figure 44. Comparative Analysis of the Poverty and Material Deprivation Dimensions of the Right to a Social Minimum with the Hindering Condition of Social Protection Gaps for Children with Disabilities

Figure 44 hence highlights the crucial importance of considering social protection gaps as a key hindering condition for the right to a social minimum. Without receiving adequate financial allowances, services and benefits, families that include children with disabilities are often not able to realise their right to a social minimum.

4.6.1.2 Educational Segregation, Austerity and Institutionalisation

The issue of educational segregation is pointed out by the HRTBs in every single EU MS, as Figure 45 below illustrates (red bars). In some countries, the situation is so severe that the issue is brought to attention not only by the group specific CRPD and CRC Committees, but also by CESCR and even the CEDAW Committee. This is the

case in the Czech Republic and Slovakia. In Belgium, Bulgaria, Germany, Greece and Romania, the issue was flagged by three HRTBs.

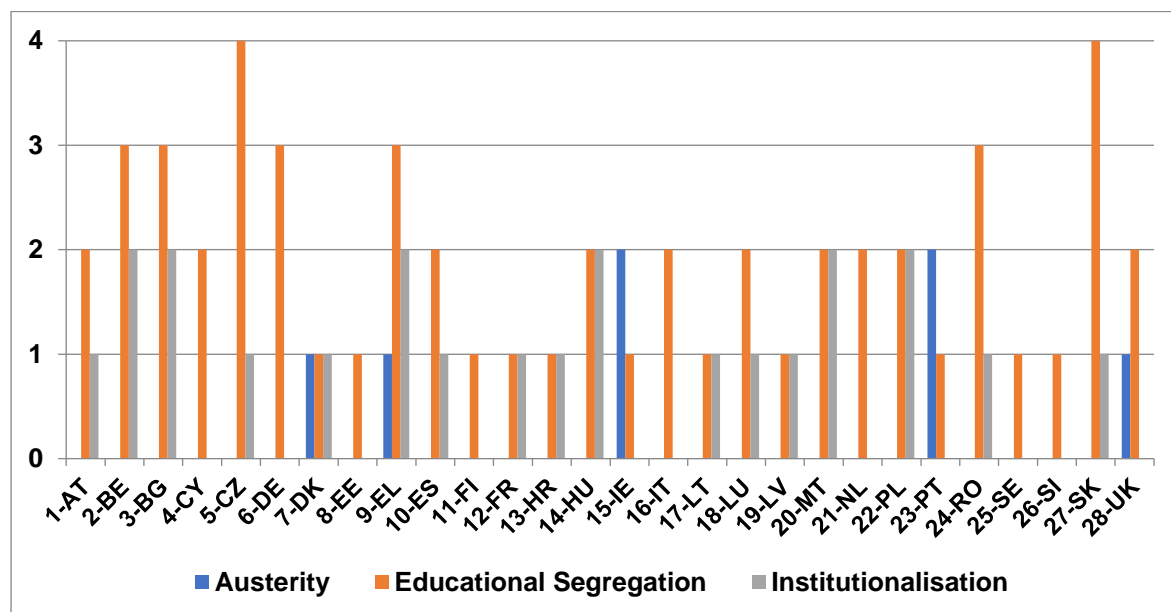


Figure 45. *Hindering Conditions in Realising the Right to a Social Minimum for Children with Disabilities*

The grey bars illustrate that institutionalisation is another key issue that hinders children with disabilities from exercising their right to a right to a social minimum. While institutionalisation is closely linked to the issue of educational segregation, the two concepts are not the same. It is possible for a child with disability to live in a family context, but nevertheless attend a segregated school. At the same time, it is possible for a child with a disability to live in an institution but attend a regular school, despite this being far more common. Sometimes the two issues converge, as the graph exemplifies. For example, Belgium, Bulgari, Greece, Hungary, Malta, and Poland all received concerns on both issues by at least two HRTBs. Finally, the graph also illustrates that austerity seems to not be a very widespread concern across the EU MS for hindering the realisation of the right to a social minimum for persons with disabilities. As the blue bars show, this issue is only flagged in Denmark, Greece, Ireland, Portugal, and the UK.

4.6.2 Roma Children

4.6.2.1 Social Protection Gaps

Roma children are often hindered from accessing their right to a social minimum, due to the inaccessibility of social benefits and services. The few services that are

accessible often fail to meet ‘the real costs of a decent living’, as the CRC Committee noted in its COs to Bulgaria or Romania.⁹⁸² In Croatia and Portugal, the CRC Committee used the exact same phrase to express its concern about the ‘negative effects of austerity measures on public spending, which affect benefits and services provided to families with children, especially the Roma’.⁹⁸³ In its COs to Romania, the CEDAW Committee points out the ‘low rates of birth registration of Roma babies and children, preventing them from benefiting from basic services’.⁹⁸⁴ Since access to adequate social protection crucially depends on administrative procedures, like being able to prove one’s birth, address and social security history, Roma children are very often not able to benefit from these very services. Table 14 below shows that the CRC Committee is the HRTB that points out concerns about Roma children in seven EU MS, sometimes contained in the same COs as those discussed above, when addressing the concerns about poverty and material deprivation of Roma children. The graph depicts the four headings, under which the CRC Committee expresses its concern about the hindering condition of social protection gaps for the realisation of the right to a social minimum.

⁹⁸² CRC Committee, COs to BG 2016, para 46; COs to RO 2017, para 37.

⁹⁸³ CRC Committee, COs to HR 2014, para 12; COs to PT 2014, para 15.

⁹⁸⁴ CEDAW Committee, COs to RO 2017, para 36.

Table 14. Social Protection Gaps of Roma Children (CRC Committee)

EU MS	Standard of Living	Children of Minority Groups	Non-Discrimination	Allocation of Resources
Bulgaria ⁹⁸⁵	SDG Goal 1.3	Access to social protection		
Greece ⁹⁸⁶			Access to essential services	
Croatia ⁹⁸⁷				Negative effects of austerity measures
Ireland ⁹⁸⁸		Habitual residence condition		Reductions in budget allocations
Portugal ⁹⁸⁹				Negative effects of austerity measures
Romania ⁹⁹⁰	SDG Goal 1.3			No adequate allocation for social protection
Slovakia ⁹⁹¹			Payment of benefits	

The ‘allocation of resources’ heading is the most prevalent (four out of seven), followed by ‘children of minority groups’, ‘standard of living’ and ‘non-discrimination’ (two out of seven). Under the ‘standard of living’ heading, the CRC Committee is mostly concerned about the poverty and material deprivation (see discussion above). In Bulgaria and Romania, the CRC Committee connects social protection gaps to the Sustainable Development Goals (SDGs), in particular Goal 1.3 on the effective implementation of social protection. This shows that the HRTBs are not operating in a vacuum, but that they sometimes make use of mechanisms outside of strictly doctrinal IHRL, in order to magnify the importance of their concerns.

Having discussed the poverty and material deprivation dimensions for Roma children in sections 3.5.3.1 and 3.5.3.2 respectively, a comparative analysis with the hindering condition of social protection gaps is in order. Figure 46 below compares the poverty (RC-P) and material deprivation (RC-MD) dimensions for Roma children (RC) with the hindering condition of social protection gaps (RC-SP).

⁹⁸⁵ CRC Committee, COs to BG 2016, paras 47, 52.

⁹⁸⁶ CRC Committee, COs to EL 2012, para 26.

⁹⁸⁷ CRC Committee, COs to HR 2014, para 14.

⁹⁸⁸ CRC Committee, COs to IE 2016, paras 15, 69.

⁹⁸⁹ CRC Committee, COs to PT 2014, para 9.

⁹⁹⁰ CRC Committee, COs to RO 2017, paras 9, 37.

⁹⁹¹ CRC Committee, COs to SK 2016, para 15.

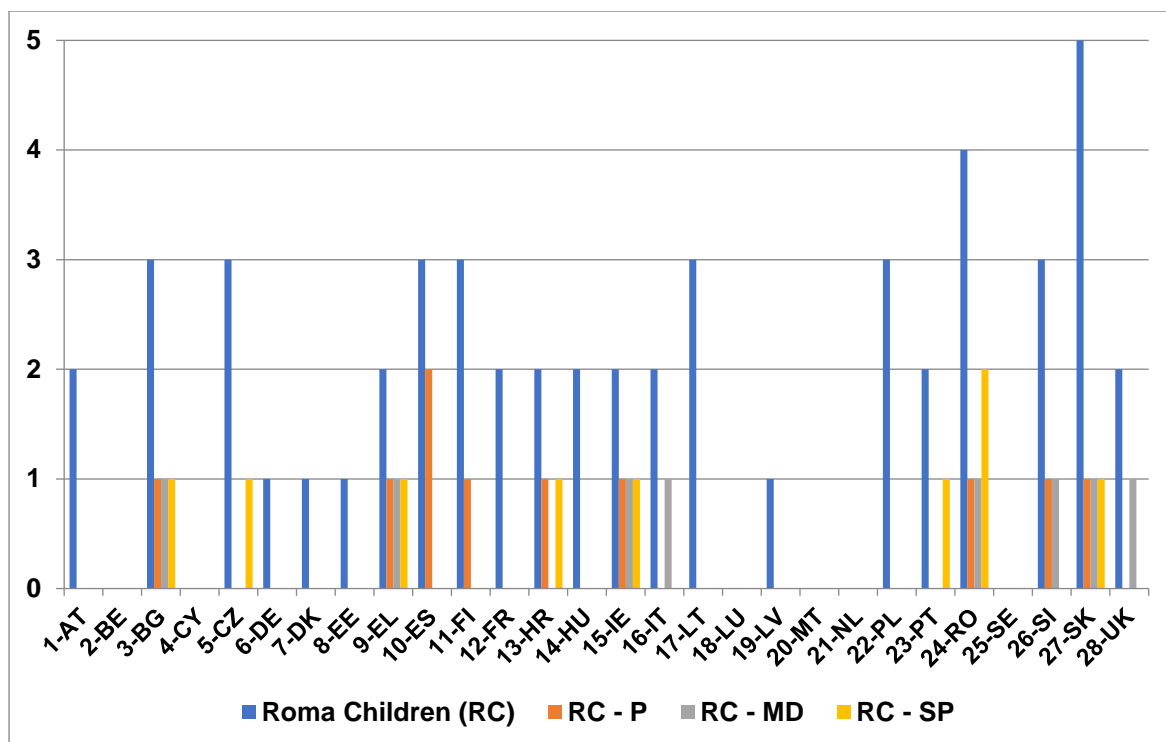


Figure 46. The Right to a Social Minimum for Roma Children across the EU MS

The graph shows that certain EU MS have received concerns on all three issues (Bulgaria, Greece, Ireland, Romania, and Slovakia), some on two issues (Slovenia, Croatia) and some on only one issue (Czech Republic, Italy, Spain, Portugal, and the UK). Finally, certain EU MS did not receive any concerns on Roma children at all, which is mostly due to the fact that Roma density is very diverse between EU MS.⁹⁹² Often the EU MS with higher Roma density face bigger challenges in ensuring their non-discriminatory access to the right to a social minimum.

4.6.2.2 Educational Segregation, Austerity and Patterns of Discrimination

For Roma children, the issue of educational segregation is widespread across all the EU MS with high Roma density. Figure 47 shows the number of HRTBs that were concerned about educational segregation, austerity, and social protection gaps across the EU MS. Since Luxemburg and Malta did not receive any COs by the HRTBs that specify conditions that would hinder the respective state party in realising the right to a social minimum for Roma children, I excluded these two EU MS from the graph.

⁹⁹² For an in-depth discussion on the issue of how to count the number of Roma across the EU MS, and Roma 'density' in particular, see section 5.5.1.

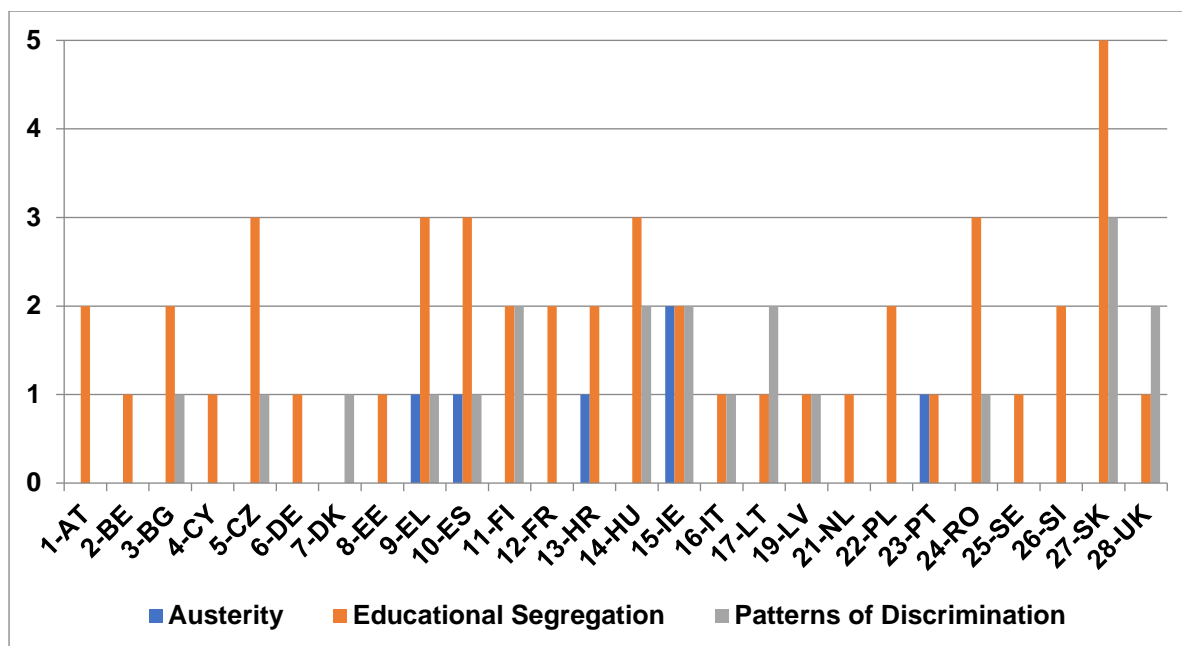


Figure 47. *Hindering Conditions in Realising the Right to a Social Minimum for Roma Children*

The graph illustrates that the issue of educational segregation is closely linked to general patterns of discrimination. Austerity is only mentioned as a concern in COs to Greece, Spain, Croatia, Ireland, and Portugal. In Croatia and Portugal, the CRC Committee use the exact same wording to express its concern about the ‘negative effects of austerity measures on public spending, which affect benefits and services provided to families with children, especially the Roma’.⁹⁹³

In the previous sections, I have shown that for children with disabilities and Roma children intersectional discrimination is a particularly pronounced problem in the realm of educational segregation. Figure 48 below gives additional evidence to this claim, by illustrating the total number of coded segments for the hindering conditions across the three groups. Instead of using my umbrella term of ‘patterns of discrimination’, I have decided to give evidence to the particular issues of lack of participation in public and political life and the prevalence of stereotypes separately.

⁹⁹³ CRC Committee, COs to HR 2014, para 12; COs to PT 2014, para 15.

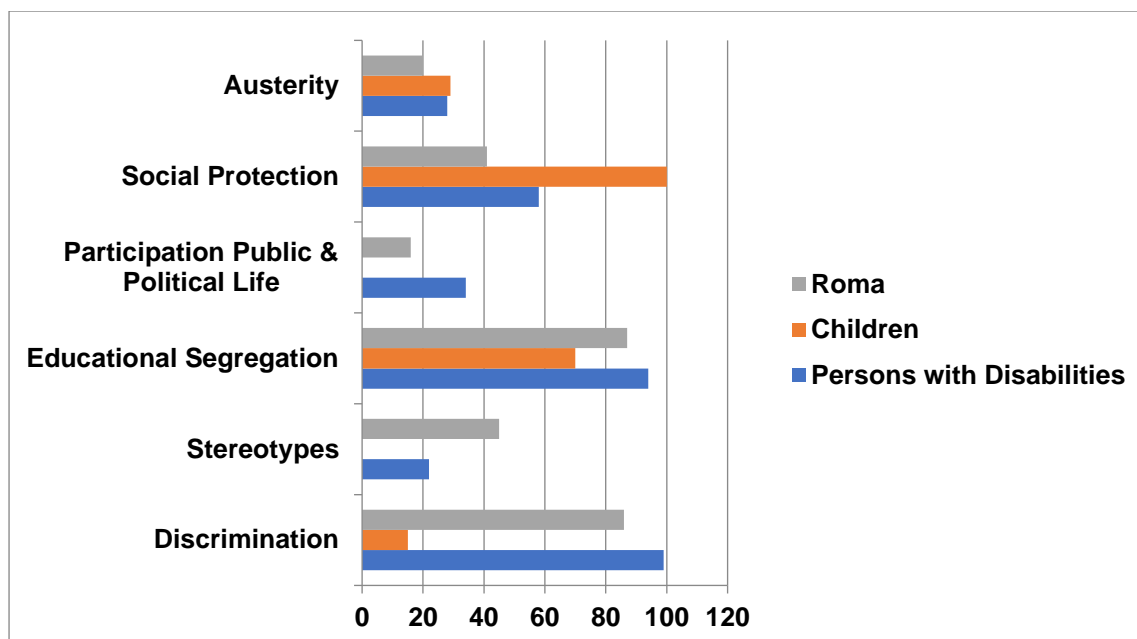


Figure 48. Comparison of the Prevalence of Hindering Conditions for Persons with Disabilities, Children, and Roma

The graph shows that educational segregation is the most serious hindering condition that is affecting Roma children and children with disabilities. Even though social protection gaps are the hindering condition which received the most concerns for children, the lived reality for Roma children and children with disabilities looks different. Hence, without equal opportunities in the realm of education, it will not be possible to realise their right to a social minimum.

4.7 Conclusion

In this chapter, I have discussed the conditions that hinder persons with disabilities, children, and Roma from realising their right to a social minimum. I have shown the fruitfulness of not restricting myself to the analysis of purely legal conditions like domestic application or justiciability. Instead, I have shown that austerity, social protection gaps and patterns of discrimination are some of the most important hindering conditions. In particular, I highlighted the diverging conditions under which EU MS should realise the right to a social minimum. While not every EU MS was affected by external loan conditionality, still the prevalence of cuts and saving measures had a disproportionate impact on disadvantaged groups. At the same time, social protection gaps in the form of inadequate MIPS are putting a serious restraint on the ability to realise the right to a social minimum. In the last subsection I

additionally analysed educational segregation for children with disabilities and Roma children.

I have shown that the preoccupation with justiciability and formal legal means of realisation is not going to bring us forward in the long term. Affirmations of core human rights doctrines arguably have not yet achieved a real change of circumstances and better rights realisation – not even at the most minimal level – for the most disadvantaged and marginalized groups. I have shown that social protection gaps are a key explanatory factor, since extremely wealthy states could still choose not to spend their resources on benefits for the vulnerable. At the same time, patterns of discrimination have continuously been underestimated as a potential hindering condition for realising the right to a social minimum. Stereotypes, negative attitudes, and stubborn deservingness-perceptions when it comes to public spending on minority groups lead to the unfortunate status quo that most disadvantaged and marginalized groups are also the ones most prone to being discriminated against. States have different ways of how to handle these issues, and the strictly legal focus on the formal non-discrimination framework and justiciability is only one tiny piece of this puzzle. In this chapter, I have proposed that it is time for human rights lawyers to move beyond the narrow legal emphasis on justiciability and formal implementation of human rights norms by acknowledging and confronting the practical conditions and constraints under which states parties are operating.

By bridging the gap between human rights and social policy, I have addressed the widespread lack of cross-fertilization of ideas between comparative welfare state scholars measuring differences in institutional design and welfare outcomes and human rights scholars focusing on the enforcement of socio-economic rights. As a practical recommendation, the HRTBs should widen their scope beyond state-by-state reporting to a truly cross-national comparison which would enable policymakers to learn from the problems and good practices in other countries from a human rights perspective. Additionally, it would allow legal human rights scholars to benefit from a wider view on what hinders the realisation of the right a social minimum for persons with disabilities, children, and Roma across the EU MS.

Chapter 5: Why the Lack of Disaggregated Statistics Hinders the Realisation of the Right to a Social Minimum

5.1 Introduction

In the previous chapter, I argued that austerity, social protection gaps and patterns of discrimination are the three over-arching conditions that hinder persons with disabilities, children, and Roma from realising their right to a social minimum. In this chapter, I argue that the realisation of the right to a social minimum requires the collection of disaggregated data. In other words, without disaggregated data, disadvantaged and marginalized groups cannot realise their right to a social minimum. The availability of disaggregated data varies greatly between groups. For some groups, disaggregated data does either not exist at all, or only on a very small scale. For other groups, disaggregated data does exist, but not in a format that would allow cross-national comparisons. Across the EU MS, disaggregated data on children and persons with disabilities are generally easier to obtain than for Roma. For groups that experience any form of intersectional discrimination, e.g., children with disabilities or Roma children, the disaggregated data is almost impossible to obtain. The official statistical data produced by Eurostat – in particular the EU-SILC survey - falls short of the data collection and disaggregation requirements needed to realise the right to a social minimum for the most vulnerable. Since the EU-SILC is the underlying data source of most official statistics on income and poverty across the EU, it is concerning to see that some of the most disadvantaged and marginalized groups are by default not included in the survey design.

The lack of disaggregated statistical data poses a serious problem to EU MS, since they are under an obligation of international human rights law to realise the right to a social minimum by providing *non-discriminatory access* to minimum essential levels of subsistence. This definition anchors the non-discrimination obligation as an integral component of the minimum core doctrine. From a human rights perspective, it is therefore not enough to establish one-size-fits-all strategies for the general population. Rather, access to minimum essential levels of subsistence should be non-discriminatory. The requirement of non-discrimination is not only a negative obligation, but also includes the positive obligation to prioritise disadvantaged or marginalized groups. Yet, EU MS can only prioritise the realisation of the social minimum once they

know which groups are disadvantaged and marginalized, and in which ways. Hence, the lack of disaggregated statistics is a systemic problem that hinders EU MS from realising the right to a social minimum for disadvantaged or marginalized groups. This chapter addresses data disaggregation challenges for my three case studies: children, persons with disabilities and Roma. In order to address intersectionality, I consider the same two intersectional constellations, namely children with disabilities and Roma children.

The chapter is structured in the following way: Section 5.2 gives evidence to the human rights obligation to collect disaggregated statistical data, as firmly anchored in the HRTBs' Concluding Observations to the EU MS from 2009-2019. The next sections assess the particular challenges in accessing disaggregated data for my three case studies, namely persons with disabilities (section 5.3), children (section 5.4) and Roma (section 5.5). In section 5.6, I address intersectionality and the challenge to access disaggregated data for children with disabilities and Roma children. In Section 5.7 I argue that EU-SILC, the source on all official poverty and social exclusion statistics across the EU MS, largely fails to include these marginalized and disadvantaged groups, but it nevertheless remains the most comprehensive, cross-national statistical survey on poverty and social exclusion. Section 5.8 concludes.

5.2 The Collection of Disaggregated Data as a Human Rights Obligation

The collection of disaggregated data is an obligation under international human rights law. This section gives evidence to this obligation. I show how each of the analysed HRTBs (CESCR, CRPD, CRC, CERD and CEDAW) specifies the obligation to collect disaggregated data through their GCs, GRs, and Reporting Guidelines. Furthermore, I analyse the HRTB's jurisprudence for evidence of concerns regarding the lack of disaggregated data and statistics. I show that the HRTBs are continuously concerned about the lack of disaggregated data in its COs to the EU MS from 2009-2019.

5.2.1 CESCR and Disaggregated Data

In 1981, CESCR adopted GC 1 on reporting by states parties. The Committee argues that states parties must regularly monitor the 'the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its

jurisdiction'.⁹⁹⁴ In order to do that, the 'preparation of aggregate national statistics or estimates' is not enough. Rather, CESCR emphasizes that 'particularly vulnerable or disadvantaged' groups must be given 'special attention'.⁹⁹⁵ The first time that CESCR mentioned the word 'disaggregated' occurred in GC 13 on the right to education in 1999, where CESCR urged states parties that 'educational data should be disaggregated by the prohibited grounds of discrimination'.⁹⁹⁶ In its GC 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3 of the International Covenant on Economic, Social and Cultural Rights), the Committee specified that 'disaggregated statistics, provided within specific time frames, are necessary to measure the progressive realization of economic, social and economic rights (...).'⁹⁹⁷ Slowly but surely, the focus on disaggregation spread through CESCR's GCs on specific rights, for example GC 19 on the right to social security,⁹⁹⁸ or GC 23 on the right to just and favourable conditions of work.⁹⁹⁹ Apart from including the principle of disaggregation in its GCs on specific rights, CESCR reiterated in its GC 20 on non-discrimination in economic, social and cultural rights (Art 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) that disaggregated statistics are not an end in themselves. Rather, 'national strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination'.¹⁰⁰⁰ Only with strategies, policies and plans that take disaggregation seriously will it be possible to assess whether or not states parties are complying with their obligations under international human rights law.

CESCR voiced concerns about disaggregated data and statistics in each and every CO that it issued to EU MS from 2009-2019 (compare Figure 49 below).¹⁰⁰¹

⁹⁹⁴ CESCR, 'GC 1: Reporting by States Parties' (n 328) para 2.

⁹⁹⁵ *ibid.*

⁹⁹⁶ CESCR, 'GC 13: The Right to Education' (n 329) para 37.

⁹⁹⁷ CESCR, 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3)' (2005) UN Doc E/C.12/2005/4 para 39.

⁹⁹⁸ CESCR, 'GC 19: The Right to Social Security' (n 44) para 75.

⁹⁹⁹ CESCR, 'GC 23: The Right to Just and Favourable Conditions of Work' (n 44) para 47 (d).

¹⁰⁰⁰ CESCR, 'GC 20: Non-Discrimination' (n 333) para 41.

¹⁰⁰¹ CESCR, COs to AT 2013, paras 9, 20; COs to BE 2013, para 12; COs to BG 2019, para 54; COs to CY 2016, paras 19-20, 37-38, 48; COs to CZ 2013, para 14; COs to DE 2018, paras 54-55, 64; COs to DK 2019, paras 10-11; COs to EE 2019, paras 38-39, 57; COs to EL 2015, paras 2, 9-10, 23-24, 25-26, 31-32, 39-40; COs to ES 2018, para 53; COs to FI 2014, paras 13, 28; COs to FR 2016, paras 16-17; COs to IE 2015, paras 6, 16; COs to IT 2015, paras 58-59; COs to LT 2015, para 13; COs to NL 2017, paras 27-28, 37-38, 52-53, 59; COs to PL 2015, paras 41-42, 63; COs to PT 2014, paras 7, 15, 21; COs to RO 2014, paras 9, 26; COs to SE 2016, paras 37-38, 51; COs to SI 2014, para 6; COs to SK 2019, paras 30-31, 64; COs to UK 2016, paras 40-41, 71.

However, the contexts in which CESCR addresses its concerns differ. In nine EU MS, CESCR connects the state parties' problems with data collection directly to the prohibition of non-discrimination under Art 2 (2) ICESCR.¹⁰⁰² In connection with the right to a social minimum, CESCR expresses discontent about the states parties' data collection and disaggregation efforts in 56 instances.

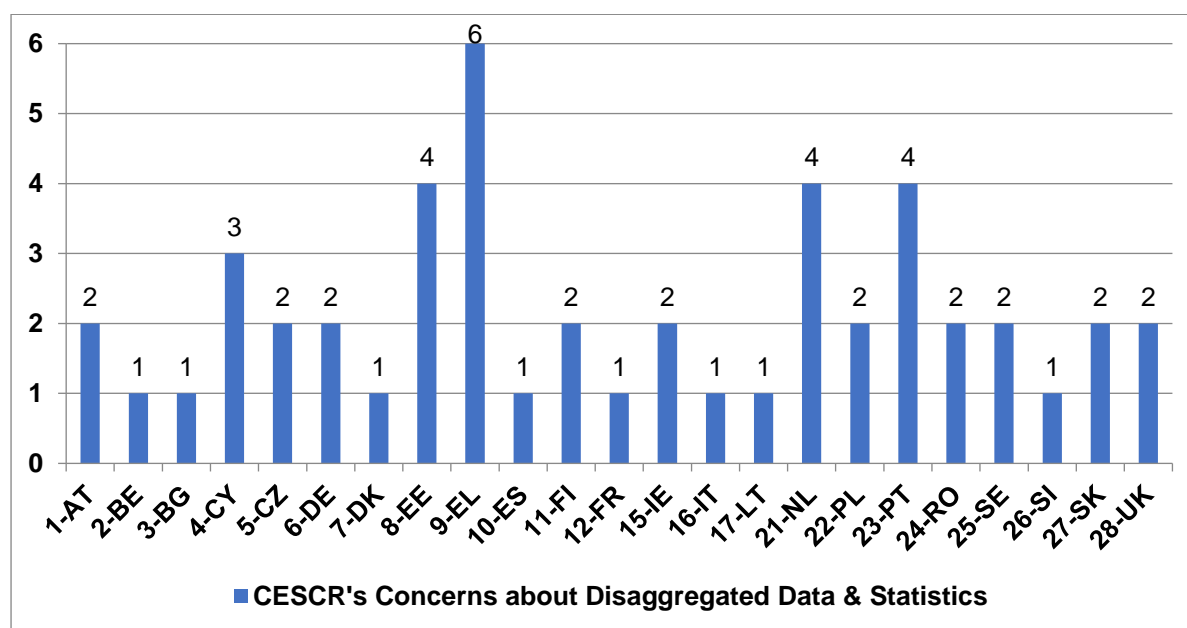


Figure 49. CESCR's Concerns about Disaggregated Data and Statistics

To sum up, whereas the ICESCR does not contain a specific Article on disaggregation, CESCR has nevertheless been concerned about insufficient disaggregated data in many instances. The group specific HRTBs followed on this trajectory and continuously point out the need for states parties to collect disaggregated data.

5.2.2 The CRPD Committee and Disaggregated Data

The CRPD is the first and so far, only, international human rights treaty which contains a direct obligation on statistics and data collection. All states parties to the CRPD are bound by Article 31 on Statistics and Data Collection, requiring them to 'collect appropriate information, including statistical and research data, to enable them to

¹⁰⁰² CESCR, COs to AT 2013, paras 9, 20 (no heading); COs to EL 2015, paras 9-10 (heading: 'non-discrimination'); COs to FI 2014, paras 9-19 (heading: 'persons with disabilities'), COs to FR 2016, paras 16-17 (heading: 'discrimination and disaggregated statistics'); COs to NL 2017, paras 27-28 (heading: 'right to work for persons with disabilities'); COs to PT 2014, paras 7-8 (heading: 'discrimination against Roma'), paras 15-16 (heading: 'Access to adequate and affordable housing for Roma'); COs to RO 2014, paras 9-10 (heading: 'Social exclusion and discrimination against the Roma'); COs to SK 2019, paras 30-31 (heading: 'right to adequate housing').

formulate and implement policies to give effect to the present Convention'.¹⁰⁰³ This provision is embedded in the wider context on Art 31, which is also the very first international human rights provision in the text of the treaty itself containing a direct obligation on statistics and data collection.¹⁰⁰⁴

In its GCs, the CRPD Committee has also been on the forefront of addressing data disaggregation challenges when it comes to issues of intersectionality. For example, in its GC 3 on women and girls with disabilities, the CRPD reinforces that women and girls with disabilities face multiple disadvantages, which 'requires targeted measures to be taken with respect to disaggregated data collection'.¹⁰⁰⁵ In particular, the CRPD Committee advises states parties to 'combat multiple discrimination by (...) improving data collection systems for adequate monitoring and evaluation'.¹⁰⁰⁶ In a subsequent GC on non-discrimination and equality, the CRPD Committee reiterates this focus on intersectionality by urging states parties to 'collect and analyse data, which must be disaggregated on the basis of disability and of intersectional categories'.¹⁰⁰⁷

Despite this obligation, most state party reports do not rely on appropriate and comparable disaggregated statistical data, but rather on anecdotal evidence. As a response, the Committee has routinely voiced its concerns about the lack of compliance with Art 31 in all COs addressed to the EU MS between 2009-2019 (see Figure 50 below).¹⁰⁰⁸

¹⁰⁰³ Pedersen (n 335).

¹⁰⁰⁴ *ibid.*

¹⁰⁰⁵ CRPD Committee, 'General Comment No. 3 on Women and Girls with Disabilities' (2016) UN Doc CRPD/C/GC/3 para 63.

¹⁰⁰⁶ *ibid.*

¹⁰⁰⁷ CRPD Committee, 'General Comment No. 6 on Equality and Non-Discrimination' (n 336) para 71.

¹⁰⁰⁸ See CRPD Committee, COs to EU 2015, paras 72-73; AT 2013, paras 50-51; BE 2014, paras 42-45; BG 2018, paras 67-68; CY 2017, paras 61-62; DE 2015, paras 15-16, 57-58; DK 2014, paras 64-65; EL 2019, paras 46-47; ES 2019, paras 58-59; HR 2015, paras 9-10, 49-50; HU 2012, paras 47-50; IT 2016, paras 77-78; LT 2016, paras 63-64; LU 2017, paras 54-55; LV 2017, paras 52-53; MT 2018, paras 45-46; PL 2018, paras 50-51; PT 2016, paras 59-61; SE 2014, paras 55-56; SI 2018, paras 53-54; SK 2016, paras 83-84; UK 2017, paras 64-65.

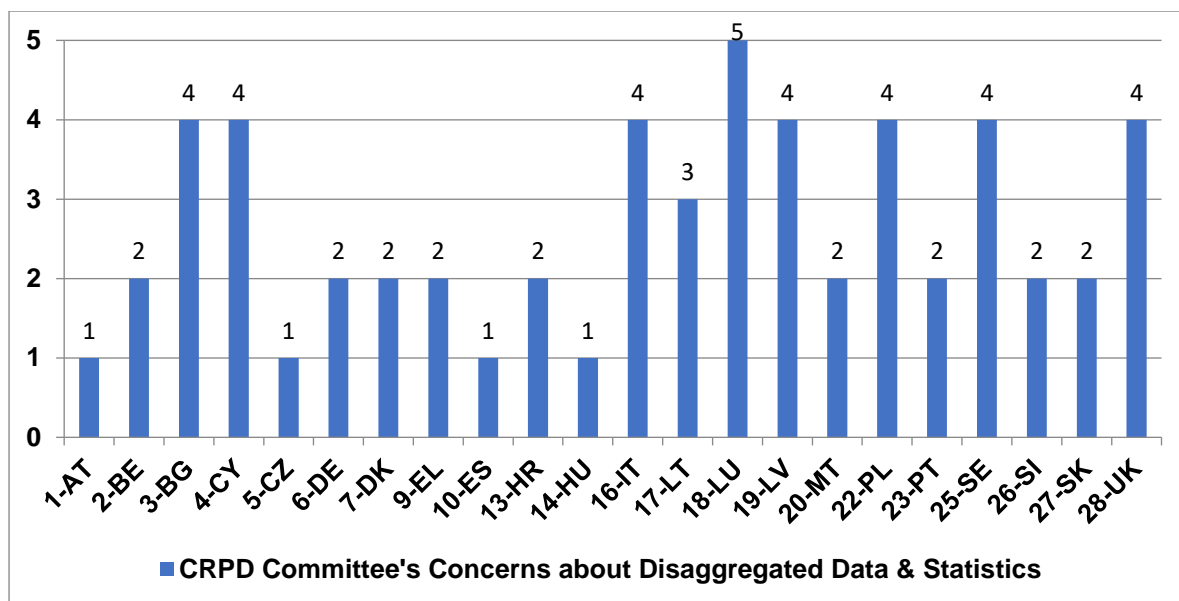


Figure 50. CRPD Committee's Concerns about Disaggregated Data and Statistics

5.2.3 The CRC Committee and Disaggregated Data

While the International Convention on the Rights of the Child (CRC) does not contain a specific Article on data disaggregation, according to Art 2 CRC, states parties are obliged to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. In its GC 5 on general measures of implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6), the CRC Committee emphasizes that the 'collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation'.¹⁰⁰⁹ Just like the CRPD Committee, the CRC Committee has voiced its concern about disaggregation and statistics in every single one of its COs addressed to EU Member States from 2009-2019 (see Figure 51 below).

¹⁰⁰⁹ CRC Committee, 'General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6)' (2003) UN Doc CRC/GC/2003/5 para 47.

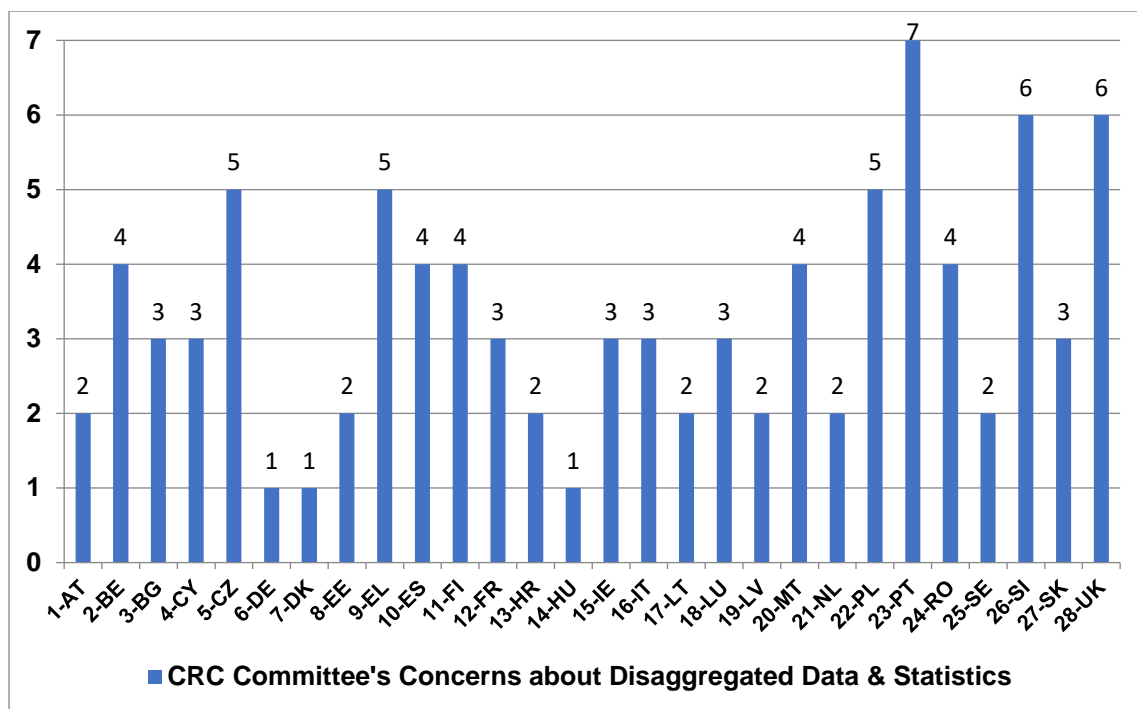


Figure 51. CRC Committee's Concerns about Disaggregated Data and Statistics

5.2.4 The CERD Committee and Disaggregated Data

In 1973, the CERD Committee adopted GR IV concerning reporting by States parties and made clear that states parties must provide ‘relevant information on the demographic composition of the population referred to in the provisions of article 1 of the Convention’.¹⁰¹⁰ According to Art 1 CERD, the Convention applies to all persons who belong to different races, national or ethnic groups or to indigenous peoples. Hence, states parties have an obligation to identify which groups exist on their territory. In its GR XXIV on this Article, the CERD Committee notes that states parties must provide ‘information on the presence within their territory of such groups.’¹⁰¹¹ The Committee is particularly concerned that ‘some States parties fail to collect data on the ethnic or national origin of their citizens or of other persons living on their territory’.¹⁰¹² This data is to be used as an empirical basis to make sure that all groups can enjoy their human rights on an equal basis with others. Furthermore, the CERD Committee has referred to the need for disaggregated data in the context of special measures. In particular, in its GR 32, it stated that the ‘need for special measures

¹⁰¹⁰ CERD Committee, ‘General Recommendation IV Concerning Reporting by States Parties (Art. 1 of the Convention)’ (1973) UN Doc A/90/18.

¹⁰¹¹ CERD Committee, ‘General Recommendation XXIV Concerning Article 1 of the Convention’ (1999) UN Doc A/45/18 para 1.

¹⁰¹² *ibid* 3.

should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective'.¹⁰¹³ According to the revised reporting guidelines issued by the CERD Committee in 2007, states parties must report on their collection efforts regarding disaggregated data.¹⁰¹⁴ The CERD Committee issued concerns on data disaggregation and statistics in the majority of its COs addressed to EU MS from 2009-2019 (see Figure 52).¹⁰¹⁵ The graph shows that only Belgium, Denmark, Estonia and the Netherlands did not receive any concern about disaggregated data and statistics. In many EU MS, the CERD Committee was specifically concerned about the lack of disaggregated data by ethnicity.¹⁰¹⁶ In eight EU MS, the lack of data on the Roma was a particular concern.¹⁰¹⁷

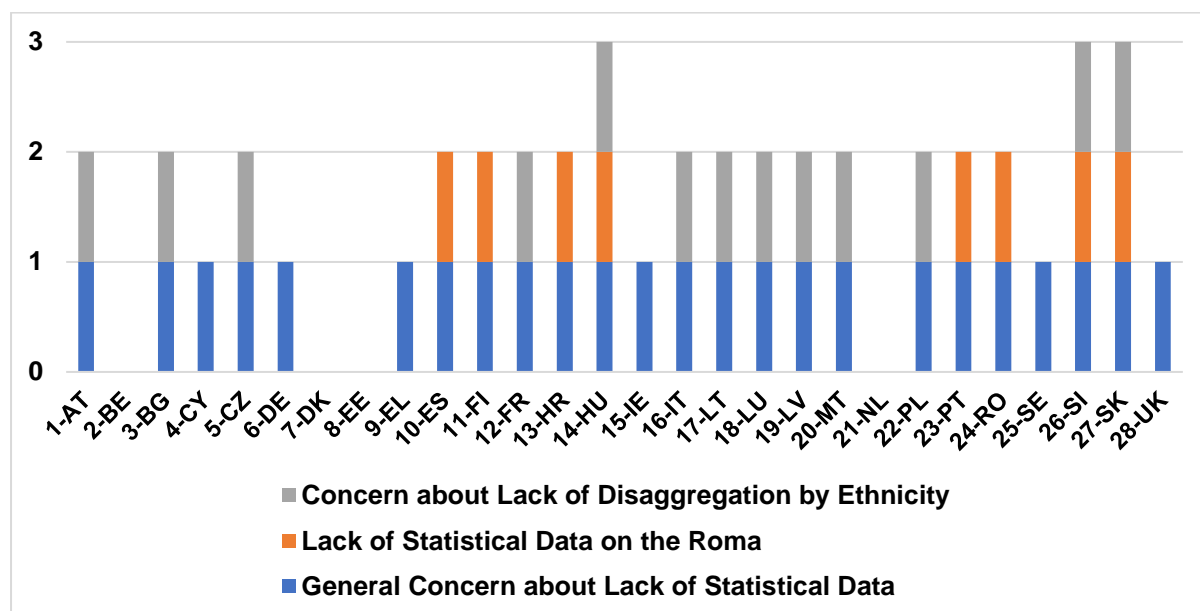


Figure 52. CERD Committee's Concerns about Disaggregated Data and Statistics

¹⁰¹³ CERD Committee, 'General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination' (2009) UN Doc CERD/C/GC/32 para 17.

¹⁰¹⁴ CERD Committee, 'Guidelines for the CERD-Specific Document to Be Submitted by States Parties under Article 9, Paragraph 1, of the Convention' (2008) UN Doc CERD/C/2007/1 paras 10–12.

¹⁰¹⁵ Only four EU MS did not receive a concern on disaggregated data by the CERD Committee: Belgium, Denmark, Estonia and the Netherlands.

¹⁰¹⁶ Austria, Bulgaria, Czechia, Finland, Hungary, Italy, Lithuania, Luxembourg, Latvia, Malta, Poland, Slovenia, Slovakia.

¹⁰¹⁷ Spain, Finland, Croatia, Hungary, Portugal, Romania, Slovenia, Slovakia.

5.2.5 The CEDAW Committee and Disaggregated Data

The CEDAW Committee first mentioned the necessity of disaggregated statistics in its GR 9 on statistical data concerning the situation of women.¹⁰¹⁸ The main message of this General Recommendation is that states parties must be sensitive to their obligations under international human rights in their data collection. In particular, states parties should ‘formulate their questionnaires in such a way that data can be disaggregated according to gender’.¹⁰¹⁹ In its GR 28 on core obligations, the CEDAW Committee specifies that states parties must ‘create and continuously improve statistical databases’.¹⁰²⁰ Besides statistical databases, states parties must also adopt national policies to eliminate discrimination against women, which ‘should provide for mechanisms to collect relevant sex-disaggregated data’.¹⁰²¹ In its COs from 2009-2019, the CEDAW Committee was generally concerned about the lack of disaggregated data in the majority of EU MS, with only Austria, Germany, Italy, the Netherlands, Portugal and Sweden not receiving such a CO. Figure 53 shows that the CEDAW Committee was not only concerned about the lack of disaggregation by sex (grey bars), but also by age (light blue bars), ethnicity (yellow bars) and disability status (orange bars).¹⁰²² This shows that the CEDAW Committee is well aware of intersectionality and multiple discrimination and the importance that disaggregated data play in this regard.

¹⁰¹⁸ CEDAW Committee (n 334).

¹⁰¹⁹ *ibid.*

¹⁰²⁰ CEDAW Committee, ‘General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women’ (2010) UN Doc CEDAW/C/GC/28 para 10.

¹⁰²¹ *ibid.* 28.

¹⁰²² Please note that for better readability of the graph, I excluded the EU MS that did not receive any CO on disaggregation or statistics.

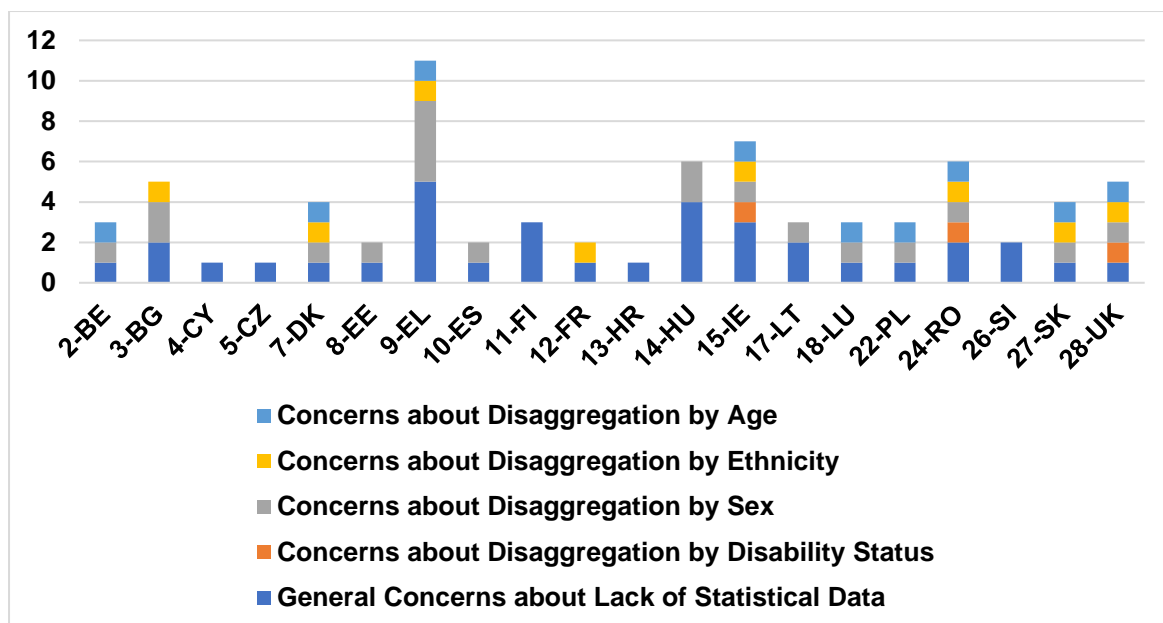


Figure 53. CEDAW Committee's Concerns about Disaggregated Data and Statistics

5.2.6 Comparative Analysis

My analysis of the HRTBs' engagement with the obligation to collect disaggregated data has shown that it is a major concern. This is also in line with a OHCHR report that was published in 2018. In it, disaggregation was emphasised as one of the central principles of a human rights approach to data.¹⁰²³ Table 15 below summarizes my analysis and compares the concerns about statistical data and disaggregation across the HRTBs.

Table 15. Lack of Disaggregated Data and Statistics across the HRTBs

	CESCR	CRPD	CRC	CERD	CEDAW
Statistical Data	23	22	28	24	21
"Disaggregated by"	9	19	22	13	17
GCs / GRs	8	21	11	8	4
<u>Total</u>	<u>23</u>	<u>22</u>	<u>28</u>	<u>28</u>	<u>26</u>

¹⁰²³ OHCHR, 'A Human Rights Based Approach to Data - Leaving No One Behind in the 2030 Agenda for Sustainable Development' (n 119).

The row 'statistical data' shows that that CESCR, the CRPD and the CRC Committees are concerned about statistical data in every single CO, which were issued to EU MS from 2009-2019. The other two HRTBs are concerned in 24 out of 28 cases (CERD) and 21 out of 26 cases (CEDAW). The row 'disaggregated by' illustrates how of the HRTBs are concerned about the specific issue of data disaggregation by a specific ground of discrimination (like age, ethnicity, or disability status). The row 'GCs / GRs' exemplifies how often the HRTBs refer back to the specific GC or GR that established the obligation to collect disaggregated data. The CRPD Committee is an exception, since the obligation is contained directly in the text of the treaty (Art 31); and it refers back to this provision in 21 out of 22 of its COs to EU MS.

5.3 Persons with Disabilities

The HRTBs' COs do not provide sufficient empirical evidence for wider cross-national comparisons for how the right to a social minimum is being realised for people with disabilities across the EU MS. In this section, I analyse poverty and employment gaps between people without and people with disabilities. I do that by analysing EU-SILC data as the official statistical source of information for almost all information on poverty and living conditions across the EU MS. Hereby, the primary challenge is to find comparable data across very diverse EU MS, with different disability definitions, labour markets, and benefit systems.

Traditional human rights monitoring does not need to consider issues of comparability, since it focuses on the compliance with the same universally defined rights, of one state party at one point in time. To do so, HRTBs like the CRPD Committee assess the human rights performance of one state party over time. Cross-national comparisons work differently since they compare different states instead of comparing one state with its past commitments. Official statistics are not based on human rights and often lack the possibility of data disaggregation that the HRTBs continuously demand.¹⁰²⁴ In the next sections, I will first discuss the issues around disability definitions and assessments (5.3.1) before moving on to the poverty and employment gaps for persons with disabilities (5.3.2). Next, I assess the varying

¹⁰²⁴ Mark Priestley and Stefanos Grammenos, 'How Useful Are Equality Indicators? The Expressive Function of "Stat Imperfecta" in Disability Rights Advocacy' (2021) 17 Evidence & Policy: A Journal of Research, Debate and Practice 209.

disability benefits systems across the EU MS (5.3.3) and finally claim that the population of high-quality disability indicators remains a challenge (5.3.4).

5.3.1 Contested Disability Definitions and Assessments

Disability definitions are contested. In the last 40 years, the medical model of disability, which only considers the medical impairments that persons with disabilities face, was slowly replaced by the social model of disability. Advocates for the social model have long argued that it is not the medical impairments per se, but rather the disabling and non-inclusive societal features that hinder persons from disabilities from full participation in society. In parallel, as an add-on to the social model, a specific human rights model of disability has developed due to the CRPD's increasing influence in the disability policy sphere. While some argue that the CRPD follows the social model of disability, others emphasize a separate human rights model that stresses the inherent dignity of the person.¹⁰²⁵ According to Art 1 CRPD, 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. This definition clarifies that it is the social barriers that people with disabilities face that hinder participation, not the disability itself. In other words, if society was fully inclusive, people with disabilities would also be able to fully participate.

When it comes to the classification of disability, the WHO's International Classification of Functioning, Disability and Health (ICF) has become a standard reference.¹⁰²⁶ Here, disability is understood as encompassing not only impairments, but also activity limitations and participation restrictions. Hence, it utilizes the social model of disability by emphasizing the interaction between impairments and social factors. To operationalize the ICF classification, the Global Activity Limitation Instrument (GALI) has become the norm for the official collection of disability statistics.

¹⁰²⁵ Maria Berghs and others, 'Do Disabled People Need a Stronger Social Model: A Social Model of Human Rights?' (2019) 34 *Disability & Society* 1034; Anna Lawson and Angharad E Beckett, 'The Social and Human Rights Models of Disability: Towards a Complementarity Thesis' (2021) 25 *The International Journal of Human Rights* 348; Theresia Degener, 'A New Human Rights Model of Disability' in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing 2017).

¹⁰²⁶ World Health Organization, *International Classification of Functioning, Disability and Health (ICF)* (WHO Library 2001) <apps.who.int/iris/bitstream/10665/42407/1/9241545429.pdf> accessed 26 December 2022.

In Europe, GALI was developed by the Euro-REVES 2 project, which established a common standard to measure limitations due to health problems in activities people usually do.¹⁰²⁷ In most reviews, GALI scores very well on statistical quality parameter like validity and reliability.¹⁰²⁸ According to GALI, the health limitation must have persisted for at least the past six months, with three possible answer categories: 'severely limited', 'limited but not severely' or 'not limited at all'. In the EU-SILC survey, the GALI question is worded in this exact way: 'For at least the past 6 months, to what extent have you been limited because of a health problem in activities people usually do? Would you say you have been ...severely limited / limited but not severely or / not limited at all?'¹⁰²⁹

From 2009-2019, the EU Commission has funded research on how to better mainstream disability indicators into EU policymaking. The so-called ANED-network was an interdisciplinary group of researchers (lawyers, social scientists, disability experts) that aimed at highlighting how people with disabilities are often-times still invisible in standard EU statistics. In an article summarising the network's activities over 10 years, the authors claim that even though official EU statistics are not perfect, this should not be a reason to disregard them completely. Rather, imperfect statistics can still serve as a useful advocacy tool that supports the lived experience of persons with disabilities.¹⁰³⁰ While ANED's funding ended in 2019, the EU has signed a contract for a project called 'European Disability Expertise' (EDE), which aims to follow in the footsteps of ANED and assess 'data on disability across the EU'.¹⁰³¹

The GALI-question has also been included in some other official EU surveys, besides EU-SILC. For example, the inclusion of the GALI-question in the Labour Force Survey (LFS) will give a more reliable picture on how persons with disabilities fare on the labour market. Nevertheless, the EU has done too little to make disaggregated statistics available to the ordinary researcher. Applying for the EU-SILC micro-data is difficult and, without the support of a well-funded network like ANED, it

¹⁰²⁷ Jean-Marie Robine, Carol Jagger, and The Euro-Reves Group, 'Creating a Coherent Set of Indicators to Monitor Health across Europe: The Euro-REVES 2 Project' (2003) 13 *European Journal of Public Health* 6.

¹⁰²⁸ Herman van Oyen and others, 'Measuring Disability: A Systematic Review of the Validity and Reliability of the Global Activity Limitations Indicator (GALI)' (2018) 76 *Archives of Public Health* 25.

¹⁰²⁹ PH030 variable of the EU-SILC.

¹⁰³⁰ Priestley and Grammenos (n 1021).

¹⁰³¹ European Commission, 'European Disability Expertise' (*Employment, Social Affairs & Inclusion*) <<https://ec.europa.eu/social/main.jsp?catId=1532&langId=en>> accessed 30 December 2022.

can be almost impossible to find reliable data on persons with disabilities that can be disaggregated by further common characteristics such as age or sex.

To justify the use of GALI as the definition of disability in official European statistics, both the social and the human rights models of disability have been cited. For example, the opening paragraph of Eurostat's glossary on disability refers back to the very definition of disability that is contained in Art1 CRPD.¹⁰³² However, GALI focuses on activity limitations rather than on the interaction between impairments and social factors. Hence, GALI alone does not ensure human rights-compliance in the sense of the CRPD. One needs to go one step further and consider whether EU MS approach disability assessments from a human rights perspective or a medical approach only.

As Waddington and Priestly argue, it is insufficient to base disability assessments solely on categories of functioning whilst not taking socio-cultural barriers into account.¹⁰³³ Their analysis of the CRPD Committee's Concluding Observations on 34 European countries reveals that states parties often neglect the 'social and relational dimension of disability', in particular the specific barriers that persons with disabilities face.¹⁰³⁴ Being part of the ANED-network, the authors utilised the comparative evidence of 190 disability assessment mechanisms, analysing how disability status is defined (including the particular assessment methodologies used) and whether those that are assigned disability status have access to disability benefits. As a result of their analysis, they sketch a CRPD-compatible approach to disability assessments that consists of the following four elements: 'assessing disability as human need in context', 'involving disabled people and their organizations', 'reducing complexity and promoting consistency of approach' and 'increasing quality, transparency, and accountability'.¹⁰³⁵ However, their analysis misses the lack of alignment between national disability assessments and their respective distribution of benefits on the one hand, and the self-assessed GALI as EU-wide official disability definition on the other. Official statistics that address the so-called 'disability gaps' in terms of employment or at-risk-of-poverty status would be much more relevant if they

¹⁰³² Eurostat: Statistics Explained, 'Glossary: Disability' <<https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Disability>> accessed 29 December 2022.

¹⁰³³ Lisa Waddington and Mark Priestley, 'A Human Rights Approach to Disability Assessment' (2021) 37 *Journal of International and Comparative Social Policy* 1.

¹⁰³⁴ *ibid* 6.

¹⁰³⁵ *ibid* 7–9.

also addressed the question of whether that person was officially assessed as having a disability under national disability assessments. In the next section, I address these disability gaps.

5.3.2 Poverty and Employment Gaps for Persons with Disabilities

The right to a social minimum for persons with disabilities is realised if they enjoy non-discriminatory access to adequate means of subsistence equally as persons without disabilities. Generally, since people tend to earn their living either through paid work or by accessing social benefits, the most relevant articles in the CRPD are Art 27 (concerning the right to work) and Art 28 (concerning the right to an adequate standard of living and social protection). To operationalise non-discriminatory access to minimum essential levels of subsistence, it is useful to consider the so-called poverty and employment-gaps between persons with disabilities and persons without disabilities. Existing research points at both employment and poverty gaps, noting that people with disabilities face higher poverty rates¹⁰³⁶ and lower employment rates.¹⁰³⁷

Across the EU-28, around 118 million people (22%) were at risk of poverty or social exclusion (AROPE) in 2013.¹⁰³⁸ As already discussed in chapter 2, the AROPE-indicator means that people are either income poor (after social transfers), severely materially deprived, or living in households with very low work intensity. However, for persons with disabilities the situation is much worse, as Figure 54 below illustrates.¹⁰³⁹ The graph shows that, overall, people with disabilities (self-perceived activity limitations) fare worse than people without disabilities (without self-perceived activity limitations).

¹⁰³⁶ Cambois, Solé-Auró and Robine (n 127); Watson and others (n 937).

¹⁰³⁷ Kuznetsova, Yalcin and Priestley (n 938).

¹⁰³⁸ See Eurostat code [ilc_peps01].

¹⁰³⁹ Please note that the Figure shows percentages, but for better readability, it was cut off at 70%.

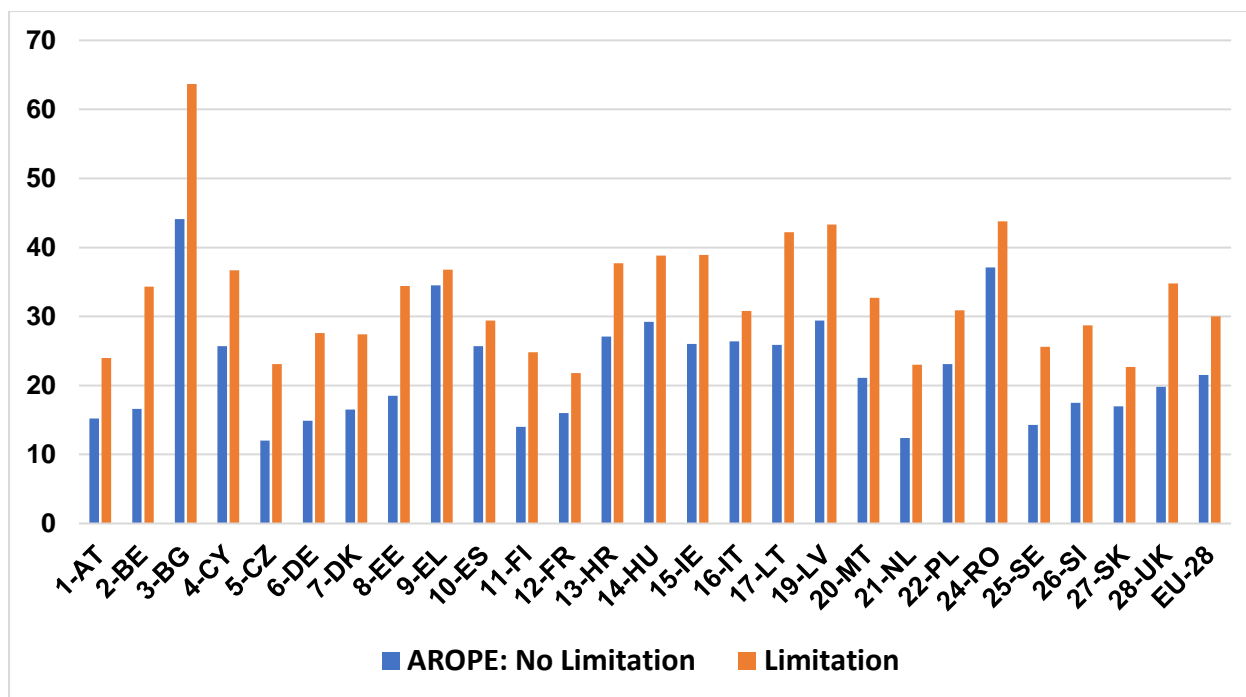


Figure 54. AROPE-Indicator for Persons with Disabilities (Self-Perceived Activity Limitations) Compared to Persons without Disabilities, Eurostat 2013

When looking at the three AROPE-sub-indicators (at-risk-of-poverty, severe material deprivation and low work intensity), a similar picture emerges. The at-risk-of-poverty-rate (AROP) is an indirect poverty measure, since it is an income-indicator which measures the percentage of the population that has access to less than 60% of the national median GDP. As such, the at-risk-of-poverty rate does not measure absolute, but relative poverty, highly dependent on the living standards in the particular country. Existing research (mostly using EU-SILC) has consistently pointed that people with disabilities face higher poverty rates.¹⁰⁴⁰ For persons with disabilities, the AROP-indicator was 19% in 2013, compared to 15% for persons without disabilities (see Figure 55 below).¹⁰⁴¹

¹⁰⁴⁰ Cambois, Solé-Auró and Robine (n 127); Watson and others (n 937).

¹⁰⁴¹ Please note that the Figure shows percentages, but for better readability I have cut it off at 35% in the graph.

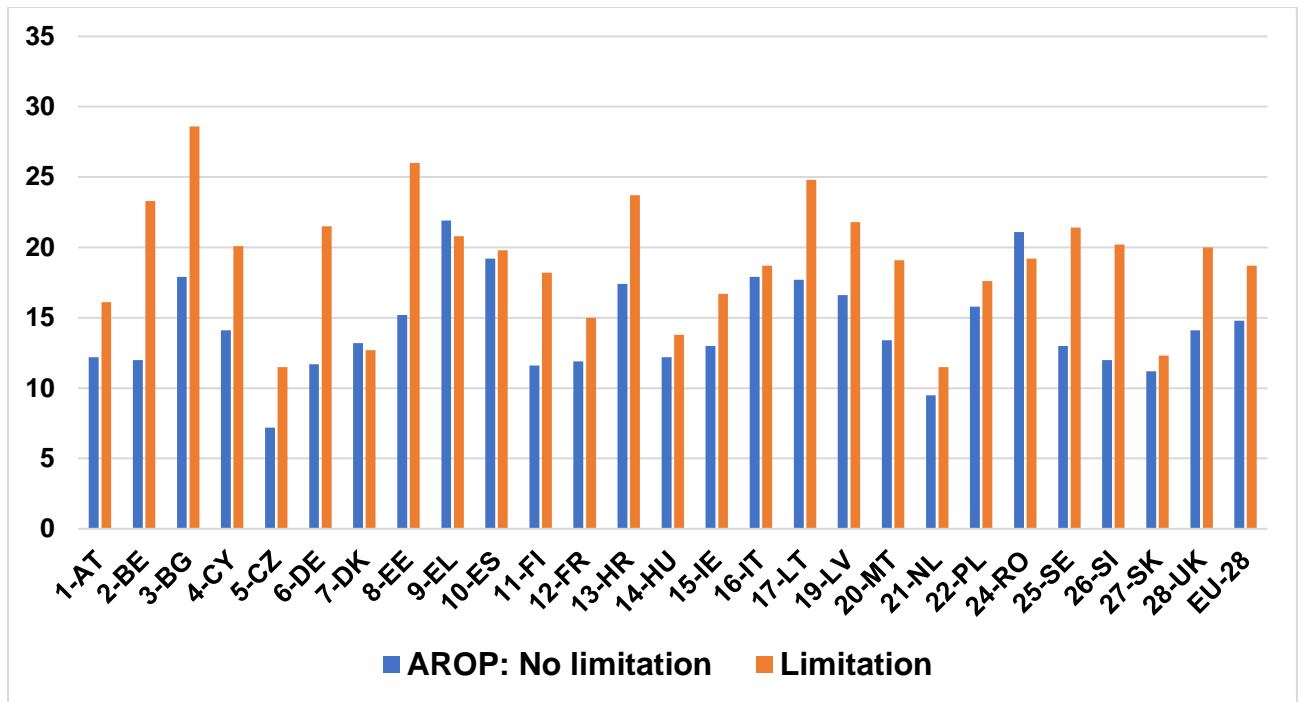


Figure 55. AROP-Indicator for Persons with Disabilities (Self-Perceived Activity Limitations) Compared to Persons without Disabilities, Eurostat 2013

The severe material deprivation rate measures whether people have access to at least four out of nine essential items (such as food, heating, clothes). In 2013, the severe material deprivation rate for persons with disabilities was 13%, compared to 8% for people without disabilities. Figure 56 below presents a summary of these findings.¹⁰⁴²

¹⁰⁴² Please note that the Figure shows percentages, but for better readability I have cut it off at 60%% in the graph.

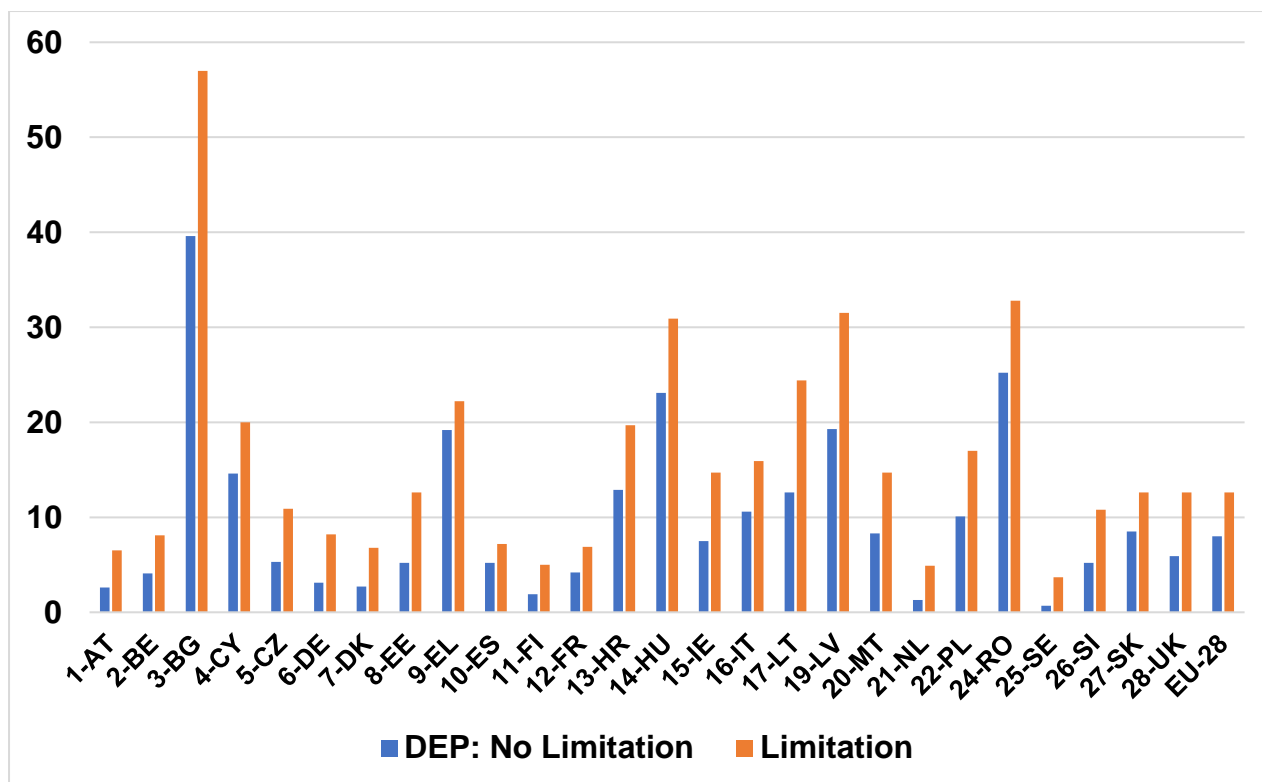


Figure 56. Severe Material Deprivation Indicator of Persons with Disabilities (Self-Perceived Activity Limitations) Compared to Persons without Disabilities, Eurostat 2013

One of the sub-indicators of the severe material deprivation measure is a question about one's inability to afford a meal with meat, chicken, fish (or vegetarian equivalent) every second day.¹⁰⁴³ Figure 57 below is sorted by the size of the gap between persons with disabilities and persons without disabilities.¹⁰⁴⁴ Some EU MS report that fewer than 5% of the general population report such an inability to afford food, but even in those EU MS, the situation is worse for persons with disabilities. Bulgaria stands out in the graph as the EU MS where 29% of the general population report an inability to afford a meal with meat, chicken, fish (or vegetarian equivalent) every second day. Yet, for persons with disabilities, this inability rises to 44%, which equals a gap of 15 percentage points.

¹⁰⁴³ See Eurostat Code [hlth_dm030].

¹⁰⁴⁴ Please note that the Figure shows percentages, but for better readability I have cut it off at 50% in the graph.

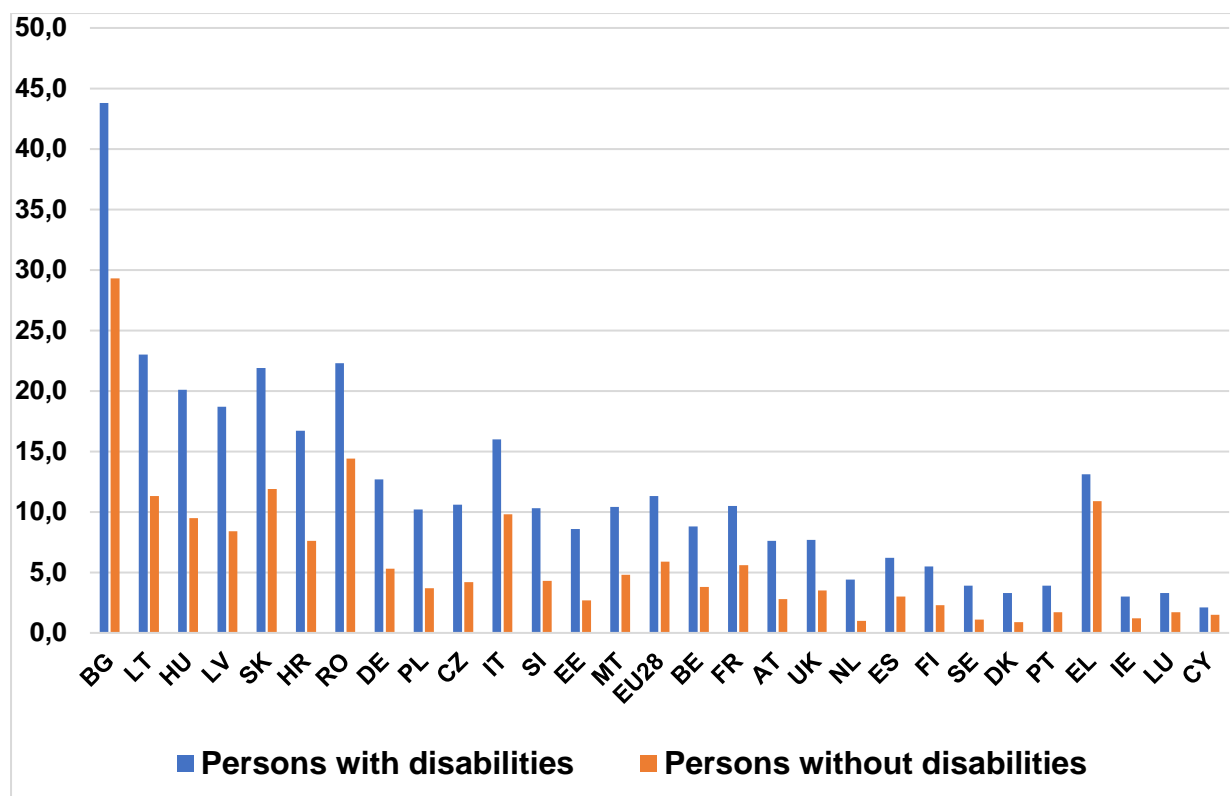


Figure 57. Inability to Afford a Meal with Meat, Chicken, Fish or Vegetarian Equivalent Every Second Day, Eurostat 2018

While this graph points towards the general dire picture of a significant gap between persons with disabilities and persons without disabilities, it is not possible to disaggregate the publicly available data further. As mentioned above, EU-SILC only applies to people living in private households, hence excluding a whole range of persons with disabilities living in communal structures or residential accommodation. Further, the publicly available data only applies to persons aged 16 or older, as such excluding children with disabilities. In order to overcome this challenge, I set out to analyse the microdata that I gained access to.¹⁰⁴⁵ However, I found that there were overall only very observations of people not being able to afford meat or fish every second day. Sometimes there were less than 30 respondents, and in smaller countries like Austria this number dropped to less than 10. Hence, I was not able to disaggregate further due to the lack of observations for people experiencing malnutrition as one of the most severe forms of material deprivation.

This example shows that even the EU-SILC microdata (that is disaggregated by definition) is only collected in sufficient quantities for the ‘general’ population that is neither poor nor a woman nor a child nor is a person with a disability. This is a

¹⁰⁴⁵ Project RPP 387/2018, also compare section 1.3.3.

particularly serious problem, since access to food is a basic human right that applies to all persons, not only persons without disabilities. Nevertheless, it is a sad reality that persons with disability are much more likely to report restraints in their access to food than persons without disabilities.¹⁰⁴⁶ This critique can stretch even further when attempting to uncover all the other ‘uncounted poor’ that EU-SILC conveniently ignores, such as people without an address, travellers, or people living in flat shares.¹⁰⁴⁷

Finally, the last component of the AROPE indicator is concerned with the social exclusion element, measuring households with very low work intensity (LWI). This is defined as a measure of the combined work-intensity of less than 20% of all adult-members of the households in working age (<60 years old). For persons with disabilities, this is the defining component of the AROPE indicator, since the gap is very high: In 2013, almost a quarter of persons with disabilities lived in households with very low work intensity (24%), as compared to only 8% for persons without disabilities.¹⁰⁴⁸ The EU-wide data is pictured in Figure 58 below.¹⁰⁴⁹

¹⁰⁴⁶ Compare Mitzi Waltz and others, ‘Disability, Access to Food and the UN CRPD: Navigating Discourses of Human Rights in the Netherlands’ (2018) 6 Social Inclusion 51; for a literature overview see Naomi Schwartz, Ron Buliung and Kathi Wilson, ‘Disability and Food Access and Insecurity: A Scoping Review of the Literature’ (2019) 57 Health & Place 107.

¹⁰⁴⁷ Nicaise, Schockaert and Bircan (n 303).

¹⁰⁴⁸ See Eurostat codes [hlth_ dpe010], [hlth_ dpe020], [hlth_ dpe040].

¹⁰⁴⁹ Please note that the Figure shows percentages, but for better readability I have cut the figure off at 50%.

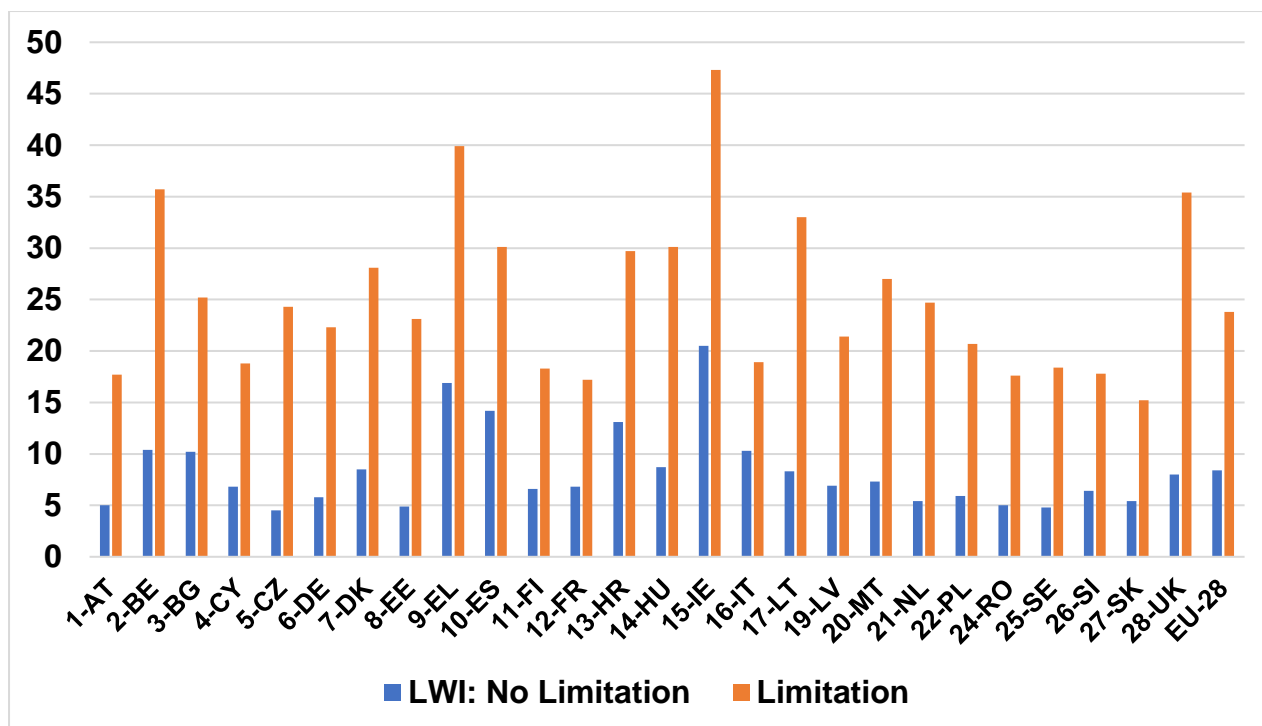


Figure 58. Indicator Measuring Very Low Work Intensity (LWI) for Persons with Disabilities (Self-Perceived Activity Limitation) Compared to Persons without Disabilities, Eurostat 2013

The graph clearly shows that the disability employment gap is even more pronounced than the at-risk-of-poverty or the severe material deprivation rate. While disability employment gaps vary between EU MS, the issue is pronounced in every single one of them, as evidenced also in the literature.¹⁰⁵⁰ In this section, I have demonstrated that the poverty and employment gaps for persons with disabilities severely restrain their realisation of the right to a social minimum. Hence, this data-informed human rights approach to the social minimum for persons with disabilities provides empirical evidence that enriches my CO-analysis of the three dimensions of the right to a social minimum: poverty, material deprivation and work. By streamlining the dimensions with AROPE's three sub-indicators (AROP, DEP and LWI), the concerns issued by the HRTBs are given empirical teeth, so that my analysis will be especially useful for social policy scholars that are normally well aware of the AROPE-indicator but might have

¹⁰⁵⁰ Ben Baumberg Geiger, Kjetil A van der Wel and Anne Grete Tøge, 'Success and Failure in Narrowing the Disability Employment Gap: Comparing Levels and Trends across Europe 2002–2014' (2017) 17 *BMC Public Health* 928; Ben Baumberg, Melanie Jones and Victoria Wass, 'Disability Prevalence and Disability-Related Employment Gaps in the UK 1998–2012: Different Trends in Different Surveys?' (2015) 141 *Social Science & Medicine* 72; Roy Sainsbury, 'Labour Market Participation of Persons with Disabilities - How Can Europe Close the Disability Employment Gap?' in Gudrun Wansing, Felix Welti and Markus Schäfers (eds), *The Right to Work for Persons with Disabilities: International perspectives* (Nomos 2018).

never considered the added value of the HRTB's COs. In the next section, I will go one step further and show the importance of comparable, disaggregated data on disability benefits to improve access to the right of a social minimum for persons with disabilities.

5.3.3 Disability Benefits

While the EU uses GALI to determine who is counted as somebody with a disability, the reality across the EU MS is very different. In order to qualify for disability benefits, EU MS rely on lengthy medical procedures that vary from country to country. Germany, for example, has a system based on percentage points of disability, where higher points give access to higher benefits and better services. An additional distinction is made between persons with disabilities and persons with severe disabilities, with the latter qualifying for free parking spots or the free use of public transport. Often, these disability assessments are highly contested. It is a sad reality that people are often classified with a lower percentage point of disability than what they would need to participate fully in society.

According to Eurostat's glossary on disability, a 'disability pension' consists of 'periodic payments intended to maintain or support the income of someone below the legal or standard retirement age (...) who suffers from a disability which impairs his or her ability to work (...)'.¹⁰⁵¹ The last part of this definition ('impairs his or her ability to work') is where the many complications and complexities in terms of national disability assessments stem from.¹⁰⁵² How exactly should it be decided to what extent somebody's ability to work is impaired? Which criteria should be taken into consideration? There is no generally agreed upon "best system", even though both the social model and the human rights model of disability clearly demand that disability assessment should move away from a purely medical approach, and rather consider take societal constraints that hinder persons with disabilities from fully participating in society.

How do EU MS fare in terms of disability assessments? As discussed above, EU-SILC does not collect data on disability assessments but rather uses the GALI in order to let persons with disabilities self-define themselves. While the self-definition of

¹⁰⁵¹ Eurostat: Statistics Explained, 'Glossary' (n 1029).

¹⁰⁵² For a comparative overview on disability assessments see Geiger et al 2017: Assessing work disability for social security benefits: international models for the direct assessment of work capacity.

disadvantaged or marginalized groups is a key criterion in international human rights law, here it poses a serious problem. Are the above discussed poverty and employment disability gaps due to disability assessment systems that might make it unnecessarily difficult to apply for disability benefits? Or are they due to having a very inflexible disability benefits system where benefits might be low but at the same time working might not be allowed if one does not want to lose access to one's disability benefits? In order to shed some light on these issues, the EU's Mutual Information System on Social Protection (MISSOC) is helpful.¹⁰⁵³ MISSOC is a qualitative database that assesses the various legal bases establishing the disability assessment systems across EU MS.¹⁰⁵⁴ MISSOC allows for a comparative analysis of the set-up of the disability benefits systems across EU MS. Figure 59 below shows the accessible information for comparison.¹⁰⁵⁵

¹⁰⁵³ MISSOC, 'Comparative Tables' <<https://www.missoc.org/missoc-database/comparative-tables/>> accessed 9 January 2023.

¹⁰⁵⁴ Please note that MISSOC continues to use the historical term 'invalidity' to describe disability, even though it is no longer in use.

¹⁰⁵⁵ MISSOC (n 1050).

- V. Invalidity
 - Applicable statutory basis
 - Basic principles
 - Risk covered: Definition
 - Field of application
 - Exemptions from compulsory insurance
 - > Conditions
 - > Assessment
 - Benefits
 - 1. Calculation method or pension formula
 - 2. Reference earnings or calculation basis
 - 3. Minimum and maximum benefits **i**
 - 4. Periods credited or taken into consideration **i**
 - 5. Supplements for dependants
 - Other benefits
 - > Return to active working life
 - Indexation **i**
 - Cumulation with other social security benefits
 - Cumulation with earnings from work
 - > Taxation and social contributions

Figure 59. Available Comparative Information on Disability in MISSOC

In order to compare the qualifying conditions for disability benefits between different EU countries, one can tick the little arrow left next to the word ‘conditions’. A pop-down menu will open with three additional categories: the qualifying period, the assessment criteria, and categories of capacity/incapacity for work and the period for which benefits are payable (compare Figure 60 below).

- Conditions
 - 1. Qualifying period **i**
 - 2. Assessment criteria and categories of capacity/incapacity for work
 - 3. Period for which benefits are payable

Figure 60. Available Information on ‘Conditions’ in MISSOC

When comparing the EU MS according to the information contained in MISSOC, the complexities and difficulties that are inherent in disability assessments to establish eligibility to benefits become clear. All EU MS distinguish between a total incapacity to

work and a partial incapacity to work, often with several different steps. Whereas most EU MS express the capacity to work in percentages, some also use the ability to work a certain number of hours per day,¹⁰⁵⁶ or the lack of ability to earn an income above a certain amount.¹⁰⁵⁷ In Finland and Sweden the minimum reduction of working capacity is specified as 3/5 and 1/4 respectively. Five EU MS do not specify a minimum level at all, but even these distinguish between full or partial incapacity to work.¹⁰⁵⁸

At the same time, other exclusionary criteria are being applied. For example, Denmark specifies that in order for 18- to 39-year-olds to qualify for disability benefits, it must be “absolutely evident that they will never be able to work”, which is quite a drastic condition for entitlement to benefits. In Ireland, the person must have been fully incapable of working for at least 12 months, coupled with a medical assessment that the condition will last for at least another 12 months. In terms of percentages, most EU MS specify a minimum reduction of earning capacity of less than 50%.¹⁰⁵⁹ In five EU MS it is exactly 50%,¹⁰⁶⁰ whereas in three EU MS, the minimum reduction of earning capacity is even 66%.¹⁰⁶¹ Appendix 6 displays the exact wording in MISSOC regarding the assessment criteria and categories of capacity/incapacity to work.

Since EU-SILC does not collect data on the different systems of disability assessments across EU MS, the available data in MISSOC cannot easily be cross-referenced to the income and employment data available in EU-SILC. Hence, it is impossible to find out whether people that answer the GALI-question in EU-SILC as being “severely limited” in every-day activities are also classified as having a more severe disability under their national disability assessment system. It is also impossible to find out whether all those that answer positively the EU-SILC’s GALI question are included in the EU MS’ disability benefits systems.

How much EU MS spend on disability benefits is sometimes taken as an independent variable to explain the employment or poverty disability gaps. The publicly available information on Eurostat allows for a comparative analysis of

¹⁰⁵⁶ For example, Germany specifies total incapacity as being unable to work for less than 3 hours per day, whereas partial incapacity is defined as being able to work between 3 and 6 hours per day.

¹⁰⁵⁷ CY and EL specify that incapacity is defined as not being able to earn an income above one third of average earning capacity. In FR, the loss of earning capacity must be at least 66%.

¹⁰⁵⁸ DK, EE, IE, PL, SI.

¹⁰⁵⁹ MT (20%), LV (25%), LU (30%), ES (33%), CZ (35%), NL (35%), HU (40%), SK (41%), LT (45%).

¹⁰⁶⁰ AT, BG, EL, HR, RO.

¹⁰⁶¹ BE, IT, PT.

disability benefits spending across EU MS.¹⁰⁶² For a more detailed understanding of spending on disability benefits, one can examine the so-called European System of Integrated Social Protection Statistics (ESSPROS), which is the underlying data-source of Eurostat's public data.¹⁰⁶³ However, even a close analysis of ESSPROS does not allow one to match the survey results of EU-SILC's GALI question with the respective data on disability benefits, which makes the HRTBs' quest for disaggregated data in this regard almost impossible to fulfil.

5.3.4 Why Populating Indicators with Disaggregated Data Remains a Challenge for Persons with Disabilities

In this section, I address the question of how to populate human rights indicators with disaggregated data. While the human rights literature often focuses on how to build human rights-compliant indicators,¹⁰⁶⁴ the issue of how to populate these indicators with disaggregated data is far less often discussed. One challenge is the issue of cross-national comparison, which is far more common in social policy studies than in human rights studies. Among legal human rights scholars, one suggestion has been to engage in so-called 'concurrent multinational monitoring', in addition to the 'consecutive' reporting cycles of the HRTBs.¹⁰⁶⁵ Whereas the HRTBs examine one state party at one moment in time with the goal of assessing progress over time (consecutive monitoring), the goal of concurrent multinational monitoring is to compare several states at one moment in time. The DOTCOM database is one novel example

¹⁰⁶² Eurostat, 'How Much Is Spent on Disability Benefits in the EU?' (3 December 2020) <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20201203-1>> accessed 9 January 2023.

¹⁰⁶³ Eurostat, 'Social Protection (ESSPROS) - Overview' <<https://ec.europa.eu/eurostat/web/social-protection>> accessed 9 January 2023.

¹⁰⁶⁴ Green (n 320); Phillip French, *Human Rights Indicators for People with Disability: A Resource for Disability Activists and Policy Makers* (Queensland Advocacy Incorporated 2008); FRA, 'The Right to Political Participation for Persons with Disabilities' (n 345); FRA, 'Human Rights Indicators on Article 19 CRPD' (2015) <<http://fra.europa.eu/en/project/2014/rights-persons-disabilities-right-independent-living/indicators>> accessed 29 December 2022; The Danish Institute for Human Rights, 'Gold Indicators - Measuring the Progress of the Implementation of the UN Convention on the Rights of Persons with Disabilities' (2015) <<https://www.humanrights.dk/publications/gold-indicators>> accessed 27 December 2022; Heymann, McNeill and Raub (n 345); Hadi Strømmen Lile, 'Lost in Operationalisation: Developing Legally Relevant Indicators, Questions and Benchmarks' (2017) 21 *The International Journal of Human Rights* 1378; Nicole Strelau, 'Developing Bottom-up Indicators for Human Rights' (2019) 23 *The International Journal of Human Rights* 1378.

¹⁰⁶⁵ Anna Lawson and Mark Priestley, 'Potential, Principle and Pragmatism in Concurrent Multinational Monitoring: Disability Rights in the European Union' (2013) 17 *The International Journal of Human Rights* 739; Anna Lawson and Mark Priestley, 'Concurrent Multinational Monitoring of Disability Rights in the European Union: Potential, Principle, and Pragmatism' in Marcia H Rioux, Pinto, Paula C., and Parekh, Gillian (eds), *Disability, Rights Monitoring, and Social Change: Building Power out of Evidence* (Canadian Scholars' Press 2015).

of how to turn 'concurrent' monitoring practices in the international disability rights fields into practice.¹⁰⁶⁶ DOTCOM is essentially a comparative database containing searchable summaries on various disability-related policies in 35 countries, developed by country experts of the Academic Network on European Disability Experts (ANED).¹⁰⁶⁷ The DOTCOM database is structured similarly as the MISSOC database, in the sense that it allows for a detailed comparison of qualitative information between EU MS. Figure 61 below shows which information is available in the database.

¹⁰⁶⁶ M Priestley and A Lawson, 'Mapping Disability Policies in Europe: Introducing the Disability Online Tool of the Commission (DOTCOM)' (2015) 9 ALTER - European Journal of Disability Research 75.

¹⁰⁶⁷ The database can be accessed here: <<https://www.disability-europe.net/dotcom>> accessed 29 January 2019.

Search the database

Countries

([Select all](#) | [Clear all](#))

- United Nations
- European Union
- EU Member States** [expand](#)
- Candidate / Acceding countries** [expand](#)
- Other European countries** [expand](#)

Themes

([Select all](#) | [Clear all](#))

- A. UN Convention status** [expand](#)
- B. General legal framework** [expand](#)
- C. Accessibility** [expand](#)
- D. Independent living** [expand](#)
- E. Education** [expand](#)
- F. Employment** [expand](#)
- G. Statistics and data collection** [expand](#)
- H. Awareness and external action** [expand](#)

Figure 61. Available Information in the DOTCOM Database

Whereas MISSOC is only focused on the social policy analysis, DOTCOM is explicitly rooted in international human rights law. It allows for a detailed comparison of the UN Convention status, which does not only cover ratification, but also focal points and shadow reporting (see Figure 62 below).

A. UN Convention status [collapse](#)
 (Select all | Clear all)

- A1. Ratification or conclusion of the UN Convention
- A2. Ratification or accession to the Optional Protocol
- A3. Declarations, Reservations and Objections
- A4. Comprehensive review
- A5. Focal point
- A6. Coordination mechanism
- A7. Independent mechanism
- A8. Official reporting
- A9. Shadow reporting

Figure 62. Available Information on UN Convention Status in the DOTCOM Database

Under the heading “Statistics and Data collection”, DOTCOM allows for a comparative analysis of official research, census data, the Labour Force Survey and disability equality indicators (see Figure 63 below).

G. Statistics and data collection [collapse](#)
 (Select all | Clear all)

- G1. Official research
- G2. Census data
- G3. Labour Force Survey
- G4. Disability equality indicators

Figure 63. Available Information on Statistics and Data Collection in the DOTCOM Database

When comparing the available data on disability equality indicators across EU MS, a very mixed picture emerges (for a full overview see Appendix 7). 14 EU MS mention that no disability equality indicators populated from official statistics are available.¹⁰⁶⁸ Even when some statistics do exist, such as the unemployment rate of persons with disabilities, they are not necessarily linked to the obligation under international human rights law to collect disaggregated data on persons with disabilities.

Among the EU MS that do report on disability equality indicators, the Gold Indicators developed by the Danish Institute for Human Rights serve as a best practice

¹⁰⁶⁸ BG, CY, CZ, FI, HU, HR, IT, LU, LT, MT, PL, RO, SI, SK.

example.¹⁰⁶⁹ The Gold indicators were developed directly from the CRPD, in a second step populated with available data sources and in a third step displayed in a so-called disability barometer that is updated every four years. By not only providing the indicators but by also populating and displaying them, the Gold Indicators are considered one of the best good practice examples when it comes to disability equality indicators. Sometimes, the disability equality indicators are directly linked to national disability strategies, and then connected to respective indicators, as is the case in Austria. Germany uses Structure-Process-Outcome-indicators that are based on international human rights law but admits that the available equality indicators have solely focused on outcome indicators in the past. Budget issues are often cited as one of the core problems when it comes to populating indicators with disaggregated data.

One key difference between MISSOC and DOTCOM is that the latter does allow for a comparative analysis of poverty and social protection indicators. Specifically, ANED collected information on Art 28 CRPD in 2016, which produced individual country reports¹⁰⁷⁰ and a synthesis report.¹⁰⁷¹ This was accompanied by a report on statistical indicators on adequate standard of living and social protection, using EU-SILC's microdata.¹⁰⁷² Hence, ANED provided a state-of-play analysis for the year 2016, which analysed in depth which data exists across EU MS. However, even ANED did not achieve to populate indicators in the form of a user-friendly searchable database that would together the various information sources. It is indeed almost impossible to find publicly accessible databases which that would allow one to populate these very indicators. As a recent paper comparing available disability indicators across 35 states concludes, 'there appear to be no examples of the comprehensive statistical production envisaged in Article 31 CRPD'.¹⁰⁷³ Fruitful cross-fertilization between legal human rights scholars' calls for better disaggregated data and statisticians that work in national and supranational statistical offices, where human rights considerations are not usually considered as relevant, is urgently

¹⁰⁶⁹ The Danish Institute for Human Rights (n 1061).

¹⁰⁷⁰ ANED, 'Social Protection' <<https://www.disability-europe.net/theme/social-protection>> accessed 9 January 2023.

¹⁰⁷¹ Roy Sainsbury, Anna Lawson and Mark Priestley, 'Social Protection for Disabled People in Europe: Synthesis Report' (2017) ANED <<https://www.disability-europe.net/theme/social-protection?country=european-union>> accessed 27 December 2022.

¹⁰⁷² Grammenos (n 949).

¹⁰⁷³ Mark Priestley and Agustín Huete-García, 'Developing Disability Equality Indicators: National and Transnational Technologies of Governance' (2022) 26 *The International Journal of Human Rights* 929, 941.

needed. Human rights scholars must gain experience in searching for available data, cleaning datasets and negotiating with statistical authorities about data access for research purposes. Only then will it be possible to move from the urge to create better and more comprehensive human rights indicators to a feasible strategy about how these indicators could be populated with accessible, disaggregated data.

5.4 Children

The previous section has analysed the reasons why populating indicators with disaggregated data remains a challenge for persons with disabilities. In this section, I focus on the challenge of disaggregated data for children, with a particular focus on child poverty. The story of scholarly attention to child poverty has been described as one of ‘disciplinary disconnects’.¹⁰⁷⁴ While editors and funding bodies are continuously calling for interdisciplinary and multidisciplinary approaches, doing so is anything but easy. Legal analysis from non-legal scholars is often ‘too superficial or uncritical’, whereas for lawyers, data analysis is often ‘inadequately explained or limitations ignored’.¹⁰⁷⁵ One general challenge of inter- and multidisciplinary work in the intersection of child poverty and child rights is the huge difference in epistemological and methodological approach.¹⁰⁷⁶ In other words, child poverty research rooted in economics or social policy does not ‘share the same aims, terminology, theoretical or methodological approaches as child rights academics’.¹⁰⁷⁷

Nevertheless, if interdisciplinary research is done well, it has the potential of broadening research horizons and widening one’s audience. By doing so, it will be possible to reach beyond the legal-academic sphere and achieve greater impact towards policy makers and politicians that typically do not consider human rights arguments as their first priority.¹⁰⁷⁸ In this section, I do interdisciplinary research by bringing the international human rights law perspective together with the social policy perspective, by focusing on the data limitations in the fight against child poverty in Europe.

¹⁰⁷⁴ Nolan and Pells (n 538) 111.

¹⁰⁷⁵ Helen Stalford and Laura Lundy, ‘Editorial: The Field of Children’s Rights: Taking Stock, Travelling Forward’ (2020) 28 *The International Journal of Children’s Rights* 1, 10.

¹⁰⁷⁶ Zoe Moody and Frédéric Darbellay, ‘Studying Childhood, Children, and Their Rights: The Challenge of Interdisciplinarity’ (2019) 26 *Childhood* 8.

¹⁰⁷⁷ Nolan and Pells (n 538) 117.

¹⁰⁷⁸ Stalford and Lundy (n 1072) 7.

In order to give some background to the scholarly debate on child poverty, I am first going to discuss the disconnect between the social policy and human rights perspectives in section 5.4.1. As a next step, I explain how the EU's policy space on child poverty has developed in section 5.4.2. In section 5.4.3 I turn to the availability of empirical data on child poverty across the EU MS, before analysing child poverty according to the EU-SILC in section 5.4.4. Finally, I show why populating indicators with disaggregated data for children remains a challenge in section 5.4.5.

5.4.1 The Disconnect of Child Poverty as a Human Rights or Social Policy Issue

Child poverty in Europe has received increased scholarly attention in recent years. Partly sparked through the aftermath of the economic crisis of 2007/2008, many reports and scholarly works addressed the disproportionate impact of austerity measures on children.¹⁰⁷⁹ In particular, scholars warned of the drastic long-term effects of child poverty later in life, such as overall worse health, worse education, and worse employment opportunities.¹⁰⁸⁰ Child poverty scholarship most often originates in disciplines other than law, in particular economics and social policy. In those disciplines, debates on concepts, definitions and measurement of child poverty have a very long tradition.

Recently, there has been a clear focus on child poverty as a multidimensional concept. For example, Sustainable Development Goal 1 refers to 'ending poverty in all its forms'.¹⁰⁸¹ In recent years, child wellbeing has been promoted as a way to capture multidimensional poverty ideas.¹⁰⁸² At the same time, various new multidimensional poverty measurements have been specifically proposed for

¹⁰⁷⁹ Chzhen (n 942); Cantillon and others (n 30).

¹⁰⁸⁰ Martha S Hill and Jodi R Sandfort, 'Effects of Childhood Poverty on Productivity Later in Life: Implications for Public Policy' (1995) 17 *Children and Youth Services Review* 91; Pamela Attree, 'The Social Costs of Child Poverty: A Systematic Review of the Qualitative Evidence' (2006) 20 *Children & Society* 54; Patrice Engle and Maureen Black, 'The Effect of Poverty on Child Development and Educational Outcomes' (2008) 1136 *Annals of the New York Academy of Sciences* 243; Dennis Raphael, 'Poverty in Childhood and Adverse Health Outcomes in Adulthood' (2011) 69 *Maturitas* 22.

¹⁰⁸¹ United Nations Development Programme, 'Goal 1: No Poverty' (*Sustainable Development Goals*, 2015) <<https://www.undp.org/sustainable-development-goals>> accessed 27 December 2022.

¹⁰⁸² See for example UNICEF, 'Child Well-Being in Rich Countries: A Comparative Overview' (UNICEF Innocenti Research Centre 2013) Innocenti Report Card 11; Gill Main, 'Child Poverty and Subjective Well-Being: The Impact of Children's Perceptions of Fairness and Involvement in Intra-Household Sharing' (2019) 97 *Children and Youth Services Review* 49; Gottfried Schweiger and Gunter Graf, 'Child Poverty, Well-Being and Social Justice', *Justice for Children and Families: A Developmental Perspective* (Cambridge University Press 2018).

children.¹⁰⁸³ The EU has also followed this proposition by introducing a module on child specific deprivation in the EU-SILC survey from 2021, to be utilised every three years.¹⁰⁸⁴

Disciplines other than law often do not value a human rights-based approach to child poverty. Critics argue that the multidimensional dimension of child poverty 'sits uneasily with the individualized and single-issue approach that children's rights tend to take'.¹⁰⁸⁵ But are human rights and child poverty really an 'uneasy fit'?¹⁰⁸⁶ This criticism fails to understand that human rights in general – and children's rights in particular – are multidimensional as well. While legal human rights scholars often focus on one particular right at one particular time, this does not mean that they cannot speak to multidimensional child poverty measures. In Alderson's words, 'ignorance about rights underlies much of the opposition to them.'¹⁰⁸⁷ On child poverty specifically, Nolan and Pells note that there is an 'ongoing failure on the part of child poverty scholarship to really come to terms with the complexities of child rights in terms of the implications of such for the definition and measurement of child poverty'.¹⁰⁸⁸ For example, Pemberton's reliance on the CRC in discussing child survival rate is shallow at best,¹⁰⁸⁹ while Grugel's contribution discusses the particular issue of how to reconcile the claims of human rights with social policy's welfare agendas.¹⁰⁹⁰ A deeper engagement with the normative content of children's rights is evidenced in Byrne and Lundy's piece on a children's rights-based approaches policy,¹⁰⁹¹ which offers a framework that 'translates' the abstract concepts derived from the CRC to a policy

¹⁰⁸³ Yekaterina Chzhen, David Gordon and Sudhanshu Handa, 'Measuring Multidimensional Child Poverty in the Era of the Sustainable Development Goals' (2018) 11 *Child Indicators Research* 707; Yekaterina Chzhen and others, 'Child Poverty in the European Union: The Multiple Overlapping Deprivation Analysis Approach (EU-MODA)' (2016) 9 *Child Indicators Research* 335; Anne-Catherine Guio and others, 'Towards an EU Measure of Child Deprivation' (2018) 11 *Child Indicators Research* 835.

¹⁰⁸⁴ Eurostat, 'Legal Framework from 2021' (*Income and Living conditions: Legislation*) <<https://ec.europa.eu/eurostat/web/income-and-living-conditions/legislation>> accessed 30 December 2022.

¹⁰⁸⁵ Wouter Vandenhoe, 'Child Poverty and Children's Rights: An Uneasy Fit?' (2013) 22 *Michigan State International Law Review* 609, 636.

¹⁰⁸⁶ *ibid.*

¹⁰⁸⁷ Priscilla Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' (2017) 25 *The International Journal of Children's Rights* 307, 309.

¹⁰⁸⁸ Nolan and Pells (n 538) 113.

¹⁰⁸⁹ Simon Pemberton and others, 'Child Rights and Child Poverty: Can the International Framework of Children's Rights Be Used to Improve Child Survival Rates?' (2007) 4 *PLoS Medicine* e307.

¹⁰⁹⁰ Jean Grugel, 'Children's Rights and Children's Welfare after the Convention on the Rights of the Child' (2013) 13 *Progress in Development Studies* 19.

¹⁰⁹¹ Bronagh Byrne and Laura Lundy, 'Children's Rights-Based Childhood Policy: A Six-P Framework' (2019) 23 *The International Journal of Human Rights* 357.

audience. Research like this is very much needed to improve the cross-fertilization between legal human rights scholars and social policy scholars that are both invested in the best interest of the child.

Besides the difficulty of convincing non-legal scholars of the value of children's rights when addressing child poverty, the other side of the coin is under-appreciation of socio-economic rights in general, and child poverty in particular.¹⁰⁹² In other words, in the vast jungle of social science research on child poverty, not much is written from a child rights' perspective, and in the scant legal literature on socio-economic rights, little work is concerned with child poverty.

How could child poverty be framed in a rights-compliant way? One paper rooted in the legal discipline paved the way for a truly interdisciplinary approach to this problem – firmly grounded in the CRC and at the same time wrestling with the definitions, measurements, and indicators of poverty research in the social sciences.¹⁰⁹³ Nolan and Pells' recent go a step further in discussing the core research around child poverty and child rights from both legal and social science perspectives.¹⁰⁹⁴ At the UN level, various special rapporteurs on extreme poverty and human rights have published reports on poverty and human rights, with Sepúlveda Carmona's report having specific implications for child poverty.¹⁰⁹⁵ In its 2018 Report on Child Poverty, the EU's Fundamental Rights Agency (FRA) took a clear stance by framing child poverty as a violation of children's fundamental and human rights.¹⁰⁹⁶

Hence, I pursue a double goal: First, to 'translate' the human rights approach on child poverty for the social policy approach to child poverty. Secondly, to explain in detail how the HRTB's continuous quest for better and more disaggregated data on child poverty could be realized in the present social policy space on child poverty in Europe. To do so, I will analyse the EU's social policy space on child poverty in the next section. This provides the necessary background to build my argument why the lack of disaggregated data on children continues to be a hindering factor for realising the right to a social minimum.

¹⁰⁹² Nolan and Pells (n 538) 117.

¹⁰⁹³ Gerry Redmond, 'Child Poverty and Child Rights: Edging towards a Definition' (2008) 14 *Journal of Children and Poverty* 63.

¹⁰⁹⁴ Nolan and Pells (n 538).

¹⁰⁹⁵ Sepúlveda Carmona (n 262).

¹⁰⁹⁶ FRA, 'Combating Child Poverty: An Issue of Fundamental Rights' (2018) <<https://fra.europa.eu/en/publication/2018/combating-child-poverty-issue-fundamental-rights>> accessed 30 December 2022.

5.4.2 A Short History of the EU's Policy Space on Child Poverty

In this section, I show that the EU mostly does not value a human rights perspective on child poverty, which is one of the main reasons why the human rights obligation to collect disaggregated data on children is generally not seen as a policy priority. I have already argued in chapter 3 that the HRTBs in general and the CRC in particular serve as a universal normative guide sticks when it comes to states parties' obligations to realising children's right to a social minimum. Even though all EU MS are states parties to the CRC and thus must fulfil their obligations under the CRC, they are not doing so in a policy vacuum. Instead, the CRC plays a rather minor role in the EU policy space on child poverty. In contrast to the CRPD, the EU itself is not a party to the CRC.¹⁰⁹⁷ This does not mean, however, that the EU does not care about children's rights at all. On the contrary, the EU has received a clear mandate to 'promote (...) protection of the rights of the child' (Art 3 (3) TEU). This reference to the protection of children's rights is contained in the same Article 3 that also mandates the EU to fight against social exclusion more broadly. Whereas the Commission had already expressed its policy aim of fighting against social exclusion in a Communication from 1992,¹⁰⁹⁸ it was not until the Lisbon European Council of March 2000 that child poverty was put firmly on the agenda.¹⁰⁹⁹ Since the Lisbon Council, a clear connection between social exclusion and the protection of children's rights was made and the EU 'quickly acknowledged that poverty was at the root of most social exclusion: by tackling the causes of poverty, the EU could make significant inroads into addressing unemployment and achieving greater social cohesion'.¹¹⁰⁰ Since children were particularly affected by poverty, the path was paved to pay greater attention to child poverty.

In 2008, the EU's Social Protection Committee published a report on the empirical reality of child poverty in the EU.¹¹⁰¹ This was another push to firmly establish child poverty on the EU agenda. In 2010, the EU committed itself to reducing child poverty

¹⁰⁹⁷ Under general principles of EU law, the EU is nevertheless bound to adhere to the CRC, in matters that fall under EU competence. However, social rights fall almost exclusively under MS competence.

¹⁰⁹⁸ European Commission, 'Towards a Europe of solidarity. Intensifying the Fight Against Social Exclusion, Fostering Integration' (1992) COM(92) 542 final

¹⁰⁹⁹ Lisbon European Council of March 2000

¹¹⁰⁰ Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012), 55.

¹¹⁰¹ Social Protection Committee, 'Child Poverty and Well-Being in the EU: Current Status and Way Forward' (European Communities 2008)

by 20 million people by 2020.¹¹⁰² Known as the Europe 2020 Agenda, this ambitious goal was one of the most important policy developments regarding child poverty in the EU, with social inclusion and poverty reduction among the core targets.

The Europe 2020 Agenda is governed by the so-called 'Open Method of Coordination' (OMC). The policy cycle begins in November, when all EU MS need to submit draft budgetary plans for the following year in the context of the European Semester. For these draft budgetary plans, they must consider the Country-Specific Recommendations (CSR), which they received from the Commission in the previous policy cycle.¹¹⁰³ In February of every year, the Commission publishes the country reports which underline any progress and hindering circumstances regarding the CSRs. In May, the Commission publishes the new CSRs that EU MS need to consider for the next policy cycle starting again in November. While the European Semester is historically more an instrument of economic governance than an instrument to combat child poverty, a certain progress on social issues can be observed. For example, in 2011 only three EU MS received CSRs on poverty,¹¹⁰⁴ whereas this number increased considerably over the next decade.¹¹⁰⁵ Nevertheless, these CSRs issued on child poverty are solely concerned about the Europe 2020 Agenda and are not rooted in international human rights law, such as EU MS' obligations under the CRC.

Besides the overarching poverty reduction goal of the Europe 2020 Agenda, in the time period studied in this thesis (2009-2019), several EU policy initiatives were (partly) concerned with the issue of child poverty. For example, in 2011, the Committee of Ministers issued a Recommendation on children's rights and social services friendly to children and families.¹¹⁰⁶ In the same year, the EU Agenda on the Rights of the Child bolstered the EU's commitment to the CRC,¹¹⁰⁷ but this commitment served more as a political statement than as having legal force.¹¹⁰⁸ At the same time, the EU

¹¹⁰² European Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (2010) COM(2010) 2020 final.

¹¹⁰³ For the 2019 European Semester see European Commission, '2019 European Semester: Country Specific Recommendations' <https://commission.europa.eu/publications/2019-european-semester-country-specific-recommendations-commission-recommendations_en> accessed 10 January 2023.

¹¹⁰⁴ Sabato and others (n 213) 21.

¹¹⁰⁵ Rayan Al-Kadi and Stefan Clauwaert, 'Socialising the European Semester? Measuring Member States' Implementation of Country-Specific Recommendations in the Social Policy Field' (2019) ETUI Research Paper.

¹¹⁰⁶ Committee of Ministers, 'Recommendation on Children's Rights and Social Services Friendly to Children and Families' (2011) CM/Rec(2011)12.

¹¹⁰⁷ European Commission, 'An EU Agenda for the Rights of the Child' (2011) COM(2011) 60 final.

¹¹⁰⁸ This is mostly due to the lack of EU competence, as explained above.

has always been known to prefer its own fundamental rights framework as expressed in the Charter of Fundamental Rights of the European Union over and above the legal order of international human rights law. As an illustration, the EU Agenda on the Rights of the Child refers to children's rights in the Charter 22 times, whereas it does not refer to any substantive rights protected under the CRC.

In 2013, the European Commission published the recommendation on 'Investing in Children: Breaking the Cycle of Disadvantage'.¹¹⁰⁹ As part of the social investment package, the Recommendation focuses on three main issues, namely access to adequate resources, access to affordable quality services, and children's rights to participate. EU MS are monitoring the Recommendation with the help of a tool called 'The European Platform for Investing in Children' (EPIC).¹¹¹⁰ In 2015, the European Parliament issued a resolution with a focus on child poverty.¹¹¹¹ In 2015, the Sustainable Development Goals (SDGs) were adopted. All EU MS have committed themselves to 'end poverty in all its forms everywhere' (Goal 1).¹¹¹² In concrete terms, according to Target 1.2, states are required to reduce the proportion of people living in poverty by half by 2030. As the FRA's Fundamental Rights Report 2019 notes, at EU level, 'this would mean reducing the number of children living in poverty from 27.1% (25.5 million) in 2015, to 13.5% (12.7 million) by 2030'.¹¹¹³

Finally, in 2017, the European Pillar of Social Rights (EPSR) links the issue of child poverty with the language of human rights. In Principle 11 it states that children have the right to protection from poverty.¹¹¹⁴ While the EPSR is not legally binding, it consists of a strong policy statement that states clearly that children have the 'right to protection from poverty'. The EPSR is also a very valuable tool in the policy space around child poverty due to its monitoring tool, namely the 'Social Scoreboard of Indicators'.¹¹¹⁵ Contrary to the rather vague references to child poverty in the European Semester's CSR, this Scoreboard explicitly links data on children to the

¹¹⁰⁹ European Commission, 'Investing in Children: Breaking the Cycle of Disadvantage' (2013/112/EU), O J L 59.

¹¹¹⁰ European Commission, 'European Platform for Investing in Children (EPIC)' (*Employment, Social Affairs & Inclusion*) <<https://ec.europa.eu/social/main.jsp?catId=1246&langId=en>> accessed 10 January 2023.

¹¹¹¹ European Parliament Resolution of 24 November 2015, 2014/2237(INI).

¹¹¹² United Nations Development Programme (n 1078).

¹¹¹³ FRA, 'Fundamental Rights Report 2019' (2019) 182 <<https://fra.europa.eu/en/publication/2019/fundamental-rights-report-2019>> accessed 10 January 2023.

¹¹¹⁴ European Commission, 'The European Pillar of Social Rights in 20 Principles' (n 11).

¹¹¹⁵ Eurostat, 'European Pillar of Social Rights - Social Scoreboard Indicators' (n 11).

policy commitment of poverty reduction. As a result, comparable data on child poverty in Europe is becoming more accessible. The disaggregation of poverty statistics for particular age ranges of children, e.g., ‘from 6 to 11 years’, is particularly welcome.¹¹¹⁶ This is a major improvement from Eurostat’s publicly available EU-SILC data in the form of Eurostat tables, where disaggregation by age only allows the bracket of 15 years or less. However, further disaggregation, e.g., by disability status, remains impossible even with the Social Scoreboard tool.

In 2018, the European Commission launched a ‘Feasibility Study for a Child Guarantee’, recognising the need for special protection of particularly vulnerable groups of children.¹¹¹⁷ This feasibility study was a response to the European Parliament’s calls for a child guarantee which should include decent housing and adequate nutrition for every child in Europe. After the inception report,¹¹¹⁸ and the intermediate report,¹¹¹⁹ the European Child Guarantee was finally established in 2021.¹¹²⁰ In addition, several reports of the consultation stage, such as online consultations with children themselves, are available.¹¹²¹ One major innovation of the European Child Guarantee is its focus on children in need, which includes children at risk of poverty or social exclusion.¹¹²² To define which children are considered to be at risk of poverty or social exclusion, the European Child Guarantee utilizes the underlying AROPE-indicator stemming from EU-SILC. Next to children at risk of poverty or social exclusion, the European Child Guarantee emphasizes homeless children, children with disabilities, children with a migrant background, children with a minority racial or ethnic background, children in alternative care, children in precarious family situations. As such, the Commission is consciously promoting an intersectional

¹¹¹⁶ Eurostat, ‘European Pillar of Social Rights Indicators: Main Tables’ <<https://ec.europa.eu/eurostat/web/european-pillar-of-social-rights/indicators/main-tables>> accessed 10 January 2023.

¹¹¹⁷ European Commission, ‘Feasibility Study for a Child Guarantee: Inception Report’ (2018) <<https://ec.europa.eu/social/main.jsp?catId=1428&langId=en&moreDocuments=yes>> accessed 10 January 2023.

¹¹¹⁸ *ibid.*

¹¹¹⁹ European Commission, ‘Feasibility Study for a Child Guarantee: Intermediate Report’ (2020) <<https://ec.europa.eu/social/main.jsp?catId=1428&langId=en&moreDocuments=yes>> accessed 10 January 2023.

¹¹²⁰ Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee 2021 [OJ L 223].

¹¹²¹ European Commission, ‘Feasibility Study for a Child Guarantee: Report on the Online Consultation’ (2019) <<https://ec.europa.eu/social/main.jsp?catId=1428&langId=en&moreDocuments=yes>> accessed 10 January 2023.

¹¹²² European Commission, ‘Commission Staff Working Document Accompanying the European Child Guarantee’ (2021) SWD(2021) 62 final.

approach, which is in line with the obligations under the CRC. Hence, the EU's Child Guarantee is a major step in the right direction. Nevertheless, critics still point out the mismatch between the EU MS' international human rights obligations under the CRC and the EU's child strategies, which fail to adopt a human rights-compliant approach.¹¹²³ Even though their main criticism concerns issues of participation and political agency more than substantive rights, their argument of a mismatch is transferrable to the realm of realising a social minimum for children.

5.4.3 The EU-SILC and Available Empirical Data on Child Poverty in the EU

In this section, I discuss cross-national surveys on child poverty. I argue that the EU-SILC is a useful tool to comparatively measure the realisation of the right to a social minimum for children across Europe, even though it is not human rights-oriented. In contrast to persons with disabilities, the definition of a child is not as contested. Nevertheless, some divergences between human rights approaches and statistical approaches exist. According to Art 1 CRC, a child is defined as a "human being below the age of eighteen years". The only exception is if adulthood is attained earlier under the applicable law of the state party. Under EU-SILC, data is collected from individuals aged 16 and over that are living in a household. This means that 16- and 17-year-olds are treated as adults according to official statistics, even though they should be treated as children under the CRC.¹¹²⁴ Data collection under the EU-SILC is carried out by surveying one member of the household as main respondent, who then provides information on the other household members. As such, the material living conditions of children are captured only indirectly, assuming an equal sharing of resources in the household.

As discussed previously, the official poverty and social exclusion statistics at EU-level are based on EU-SILC, and more specifically on the AROPE-indicator. However, the AROPE rate does not fully capture the lived reality of children across the EU, since children have different needs than adults. It is debatable whether the list of 9 'essential items' used to calculate the severe material deprivation rate (DEP) of households is really the best suitable tool to capture the material deprivation of

¹¹²³ Aida Kisunaite and Simone Delicati, 'The European Union and the United Nations Convention on the Rights of the Child: Towards a Fully-Fledged European Union Child Rights Strategy', *Global Reflections on Children's Rights and the Law* (Routledge 2021).

¹¹²⁴ Even though the CRC allows for the possibility of classifying adolescents below the age of 18 as adults if the applicable law provides for this, none of the EU MS classify 16- or 17-year-olds as adults.

children. In 2018, the EU adopted a new child deprivation indicator for subsequent surveys.¹¹²⁵ Under this new indicator, children are counted as deprived if they cannot afford at least three out of 17 items, such as ‘two pairs of shoes’, ‘suitable books’ or ‘school trips’.¹¹²⁶ From 2021, this specific child deprivation module will be carried out every three years.

According to the CRC, children should participate in all matters that affect them. Therefore, it is problematic that most information on children in the EU is obtained from household-surveys, instead of asking children directly. Exceptions are initiatives such as the Europe Kids Want Survey,¹¹²⁷ and surveys employing child-centred data collection, such as the survey on health behaviour in school-aged children (HBSC), with information on health and wellbeing.¹¹²⁸ Other surveys provide more indirect information on child poverty. The Labour Force Survey (LFS) has a measure on in-work poverty of households.¹¹²⁹ The European Quality of Life Survey (EQLS) provides information on childcare,¹¹³⁰ and the European Working Conditions Survey (EWCS) provides information on households’ work intensity.¹¹³¹ The European Health Interview Survey (EHIS) includes measures on the health-status and socio-economic background of households.¹¹³² The Generations & Gender Programme (GGP) has been running a survey with information on childcare, fertility and wellbeing from 2004-2011, with a new round of data collection in the planning stages.¹¹³³ Other surveys provide information on attitudes, in particular the European Social Survey (ESS),¹¹³⁴

¹¹²⁵ Eurostat, ‘Legal Framework from 2021’ (n 1081).

¹¹²⁶ Anne-Catherine Guio and others, ‘Towards an EU Measure of Child Deprivation’ (2018) 11 Child Indicators Research 835.

¹¹²⁷ Child Rights Manifesto, ‘Europe Kids Want’ <<https://www.childrightsmanifesto.eu/europe-kids-want/>> accessed 10 January 2023.

¹¹²⁸ HBSC, ‘Health Behaviour in School-Aged Children: Data’ <<https://hbsc.org/data/>> accessed 10 January 2023.

¹¹²⁹ Eurostat, ‘What Is the EU Labour Force Survey?’ (n 301).

¹¹³⁰ Eurofound, ‘European Quality of Life Surveys (EQLS)’ <<https://www.eurofound.europa.eu/surveys/european-quality-of-life-surveys>> accessed 10 January 2023.

¹¹³¹ Eurofound, ‘European Working Conditions Surveys (EWCS)’ <<https://www.eurofound.europa.eu/surveys/european-working-conditions-surveys-ewcs>> accessed 10 January 2023.

¹¹³² Eurostat, ‘European Health Interview Survey (EHIS)’ (n 301).

¹¹³³ GGP, ‘Generations & Gender Programme: Data’ <<https://www.ggp-i.org/data/methodology/>> accessed 10 January 2023.

¹¹³⁴ ESS, ‘European Social Survey’ <<https://www.europeansocialsurvey.org/>> accessed 10 January 2023.

and the Eurobarometer (EB).¹¹³⁵ The EU-SILC only interviews persons from age 16, while the LFS, EWCS and EB survey people aged 15 and over. Table 16 below summarises the available surveys covering several aspects of child poverty in the EU.

¹¹³⁵ European Union, 'Eurobarometer: Public Opinion in the European Union' <<https://europa.eu/eurobarometer/screen/home#p=1&instruments=STANDARD>> accessed 10 January 2023.

Table 16. Selected Surveys Collecting Data on Children Living in the EU

Survey	Info on children	Household / Direct Survey	Age of Respondent	Coverage (Geo)	How often?
EU-SILC	Income & Living Conditions	Household	16+	All EU MS	Yearly
LFS	In-work poverty	Household	15+	All EU MS	Yearly
EQLS	Childcare	Household	18+	All EU MS	2003, 2007, 2012, 2016
EWCS	Working intensity	Household	15+	All EU MS	2005, 2010, 2015
ESS	Attitudes	Household	15+	All EU MS	2002, 2004, 2006, 2008, 2010, 2012, 2014, 2016
EB	Attitudes	Household	15+	All EU MS	Yearly for general EB
GGP	Childcare, Fertility, Wellbeing	Household	18+	Wave 1: 14 EU MS; Wave 2: 9 EU MS	2004-2011, update planned (Wave 2)
EHIS	Health status, Socio-economic background	Household	15+	All EU MS	2013-2015 (EHIS 2)
HBSC	Health and well-being	Direct	11, 13, 15-year-old pupils	All EU MS	2001/2002, 2005/2006, 2009/2010, 2013/2014

As can be seen in the table, the EU-SILC is the underlying survey for any statistics on income and poverty across the EU. The other surveys can be useful for complementary information, such as the EQLS' information on childcare. Since I identified the availability and affordability of childcare as one of the conditions that explains the (lack of) realisation of the right to a social minimum for children, for future research it will be very rewarding to cross-examine the evidence provided by the HRTBs' with statistical evidence. In the next section, I use EU-SILC data to provide an analysis of child poverty across the EU MS. While the ECSR has often made use of EU-SILC data, the UN HRTBs do not normally engage with information not brought up in the state party reports or shadow reports by NGOs. I will show that EU-SILC data

can indeed be very useful in any analysis of child poverty as a human rights issue. Its biggest strength is the coverage of all EU MS and its yearly repetition, which allows for the identification of trends over time and across countries. Hence, the advantages of EU-SILC outweigh the disadvantages, which is why I chose to focus on EU-SILC in my analysis of child poverty across the EU MS.

5.4.4 Child Poverty across the EU MS according to EU-SILC

In 2018, almost 25 million children (21.8%) across the EU were at risk of poverty or social exclusion.¹¹³⁶ Figure 61 below illustrates that in most EU MS, the child poverty rate exceeds those of adults.¹¹³⁷

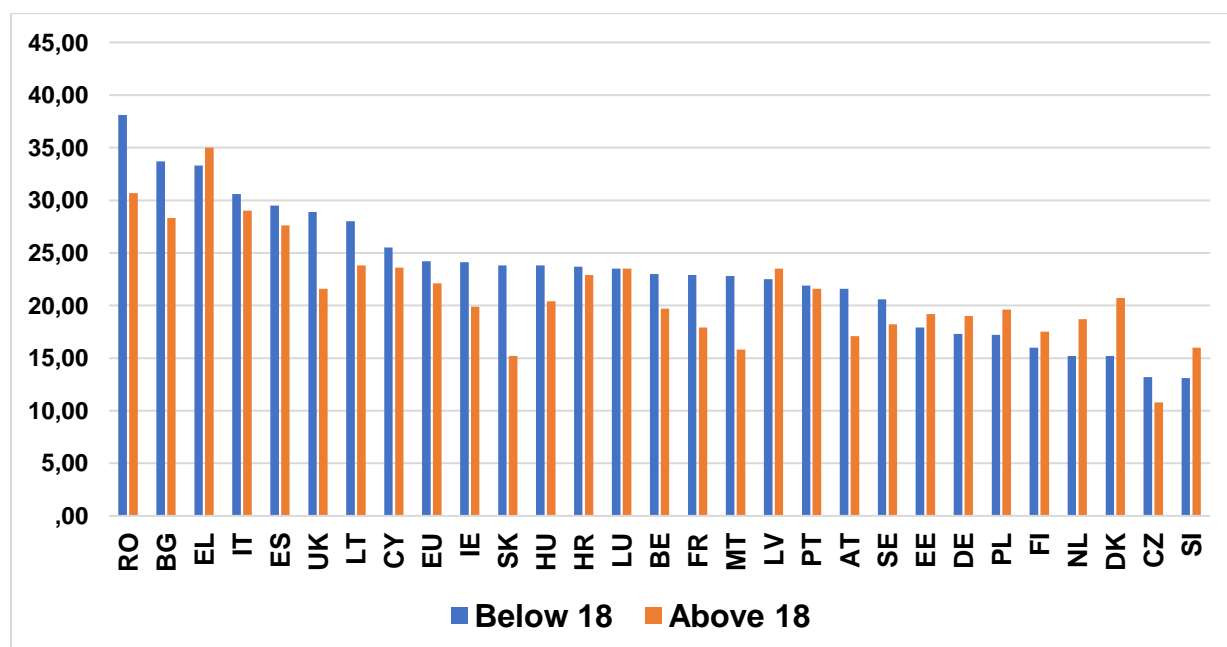


Figure 61. AROPE by Age in Percentages, Eurostat, 2018

The situation is even more drastic for certain household types. For example, Figure 62 below shows that in all EU MS one-parent households with children were more

¹¹³⁶ For children, the AROPE indicators consists of the same three sub-indicators as for adults: Children living in households that are at-risk-of-poverty (AROP: set at 60% of the national median equivalised disposable income after social transfers), children living in households that are severely materially deprived (inability to pay for at least four out of a list of nine items: rent, mortgage or utility bills; keeping their home adequately warm; unexpected expenses; eating meat or proteins regularly; going on holiday; a television set; a washing machine; a car; a telephone), and children living in households with very low work intensity (the ratio of the total number of months that all working-age household members have worked during the income reference year and the total number of months the same household members theoretically could have worked – for very low work intensity, the threshold is set at 0.2). See Eurostat code [ilc_peps01], data from 2018.

¹¹³⁷ See Eurostat code [ilc_peps01], data from 2018, sorted by highest to lowest child poverty rate.

likely to be at-risk-of poverty or social exclusion than households without children.¹¹³⁸ In eight EU MS at least half of all one-adult-households with dependent children were at-risk-of-poverty or social exclusion,¹¹³⁹ and only five EU MS managed to keep their AROPE rate for single parent households below 40%.¹¹⁴⁰

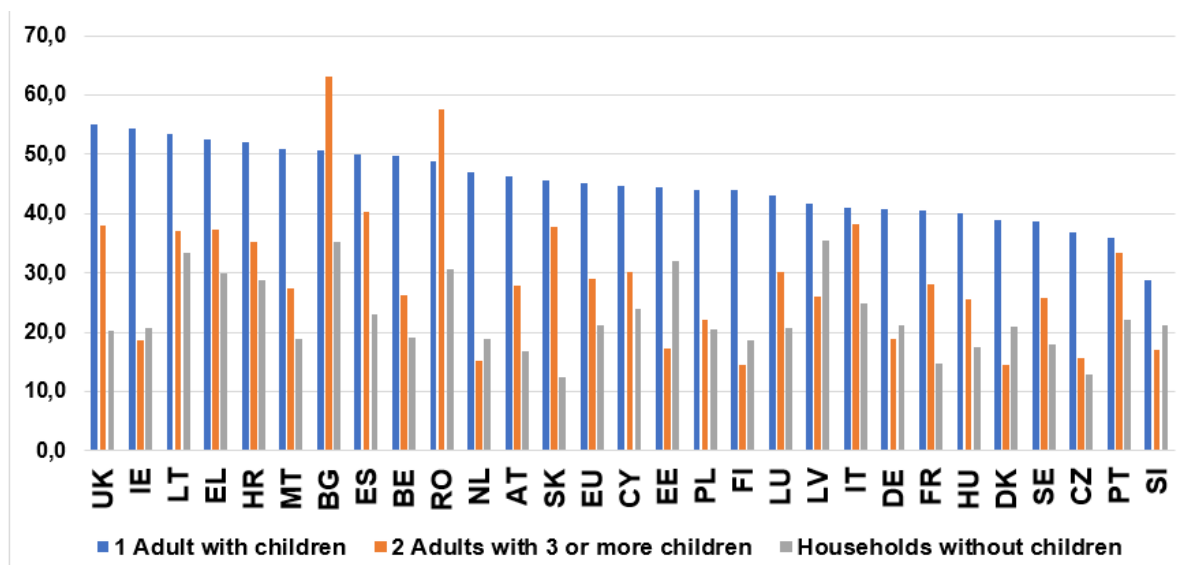


Figure 62. AROPE by Household Type in Percentages, Eurostat, 2018

When taking a closer look at the three sub-indicators of AROPE, it is possible to display the intersections between them by EU MS and age class. Figure 63 below shows that children are on average more affected by what could be labelled extreme poverty or social exclusion – living in households that are at the same time at-risk-of-poverty, severely materially deprived and have low work intensity.¹¹⁴¹

¹¹³⁸ See Eurostat code [ilc_peps03], data from 2018, sorted from highest to lowest AROPE rate for household type '1 Adult with children'.

¹¹³⁹ UK, IE, LT, EL, HR, MT, BG, and ES.

¹¹⁴⁰ DK, SE, CZ, PT, and SI.

¹¹⁴¹ See Eurostat code [ilc_pees01], data from 2018, sorted from highest to lowest values.

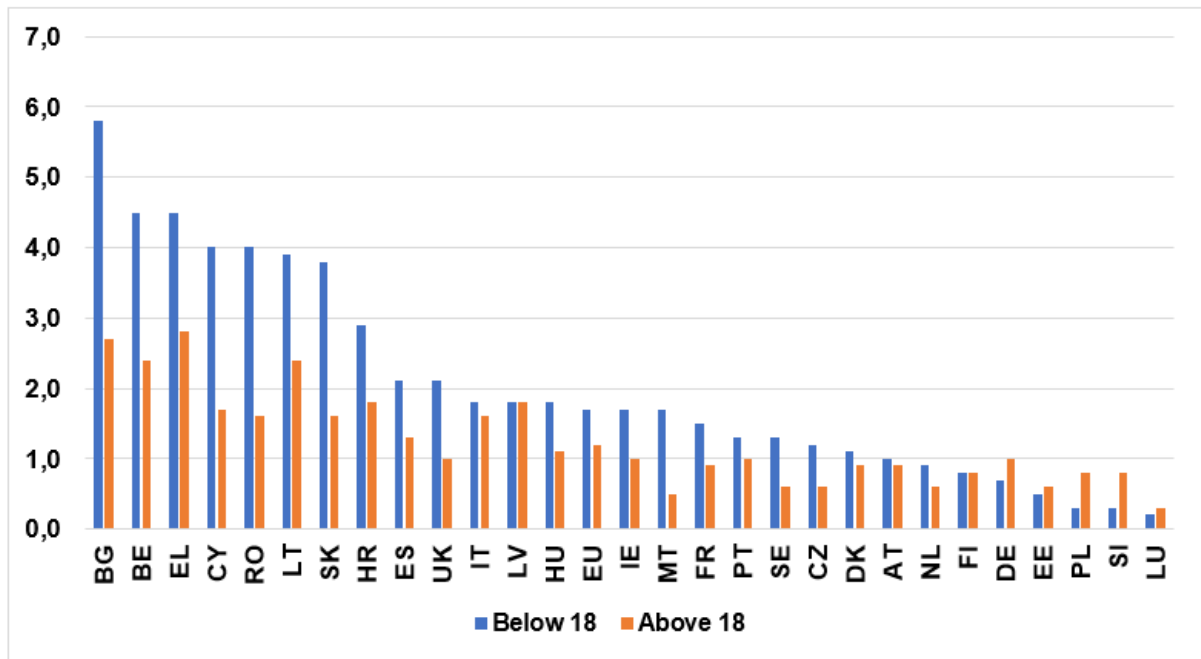


Figure 63. Intersections of AROPE by Age, Eurostat, 2018

This graph shows that it is not only the poorer or more Eastern EU MS with a high number of children living in households that are at the same time at-risk of poverty, severely materially deprived and living in households with low work intensity. Indeed, Belgium follows right after Bulgaria with 4.5% of children experiencing this extreme poverty and social exclusion.

The evidence provided by EU-SILC has shown that children are disproportionately affected by poverty across the EU MS, even though there are important differences. Even though the EU-SILC does allow disaggregation by age for most of the survey questions, the survey design does not foresee that children themselves are interviewed. At the same time, EU-SILC assumes that resources are shared equally between household members. This means that the previous figures only provide an incomplete picture on how the right to a social minimum is realised for children across the EU MS. However, with the new child specific deprivation module that will be added to EU-SILC every three years, the availability of disaggregated data for children will become more of a reality.

5.4.5 Why Populating Indicators with Disaggregated Data Remains a Challenge for Children

As argued previously, human rights indicators bridge gaps between human rights approaches and those more attuned to social policy by giving concrete evidence about

which hindering conditions might hamper rights' realisation. A 2010 Report by the FRA utilised the structure-process-outcome (S-P-O) framework to develop indicators on the rights of the child in the EU.¹¹⁴² One of the thematic areas of the indicator framework is children's right to an adequate standard of living, outlining relevant outcome indicators for child poverty. Since then, several different indicator frameworks have been developed, but none of them has strictly adopted the S-P-O framework. As the FRA mentions in its Child Poverty report, several players are 'strongly involved or interested in the development of measurement frameworks or indicator sets that allow the measurement and monitoring of child poverty overtime.'¹¹⁴³ In particular, the FRA names the European Commission, UNICEF, OECD, the Indicator Subcommittee, the Council of Europe, NGOs or civil society organisations, and certain national institutions as important players for indicator development.

For example, the Commission Recommendation 'Investing in Children' recommends a specific indicator approach towards child poverty that is rooted more in the social investment literature than in human rights indicators.¹¹⁴⁴ Similarly, the InGRID (Integrating expertise in inclusive growth) project has allowed researchers to utilise data from research infrastructure with expertise in transnational visits.¹¹⁴⁵ However, most child poverty measurement indexes developed by social scientists are not based on human rights-based indicators. Rather, their attention is on how to measure and conceptualise child poverty across countries and over time most accurately. In 2007, a famous social policy scholar working on child poverty, Jonathan Bradshaw, developed a comparative index for child well-being in the European Union.¹¹⁴⁶ For his index, he utilises 51 indicators including material resources and housing, ranking countries across all the different indicators. While this study was (and still is) very influential among social policy scholars,¹¹⁴⁷ and even produced a second,

¹¹⁴² FRA, 'Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union' (2010) <<https://fra.europa.eu/en/publication/2012/developing-indicators-protection-respect-and-promotion-rights-child-european-union>> accessed 10 January 2023.

¹¹⁴³ FRA, 'Combating Child Poverty' (n 1093).

¹¹⁴⁴ European Commission, 'Investing in Children: Breaking the Cycle of Disadvantage' (2013/112/EU), O J L 59.

¹¹⁴⁵ InGRID, 'Supporting Expertise in Inclusive Growth: Integrating Research Infrastructures for European Expertise on Inclusive Growth from Data to Policy' <<https://www.inclusivegrowth.eu/>> accessed 29 December 2022.

¹¹⁴⁶ Jonathan Bradshaw, Petra Hoelscher and Dominic Richardson, 'An Index of Child Well-Being in the European Union' (2007) 80 Social Indicators Research 133.

¹¹⁴⁷ According to Google Scholar, the study was cited 725 time on 13 December 2022.

updated index in 2009,¹¹⁴⁸ there has been almost no cross-fertilization between legal human rights scholars publishing papers on the construction of children's rights indicators and policy scholars like Bradshaw who have spent their whole careers on developing ever more sophisticated ways to measure child poverty accurately and comparatively.

However, some initiatives do cite the CRC as valuable normative guidance. For example, UNICEF's 'Bristol Approach' in their Global Study on Child Poverty consists of seven dimensions that are connected to Articles of the CRC.¹¹⁴⁹ General indices like the multidimensional poverty index (MPI) were not developed specifically for children. Yet, a child-specific MPI has been developed by the Oxford Poverty and Development Initiative.¹¹⁵⁰ Another recent initiative aims to measure the complexity of child poverty through a Multiple Overlapping Deprivations Analysis (MODA).¹¹⁵¹ At the EU-level, this has led to increased policy awareness of how to make Eurostat's general poverty and living standards statistics more child-relevant.¹¹⁵²

Above, I have discussed the EU's new Child Guarantee as a major step in the right direction towards improving access to disaggregated data on child poverty. Yet, a user-friendly database is lacking which would help researchers to populate indicators on children with comparable, disaggregated data. While Annex A of the Commission Staff Working Document lists some of the available data on the different subcategories of children, data disaggregation is only allowed in very few circumstances. For example, the available data on children at risk of poverty or social exclusion simply lists a table of the AROPE sub-indicator. However, those sub-indicators come with the well-known pitfalls of EU-SILC, such as the lack of children as direct respondents, the assumption that households share their resources equally, or the lack of inclusion of residential and shared accommodation. Even though the Child Guarantee has at its heart the inclusion of children in vulnerable situations, it does not manage to include them statistically. There is no new funding to collect data

¹¹⁴⁸ Jonathan Bradshaw and Dominic Richardson, 'An Index of Child Well-Being in Europe' (2009) 2 Child Indicators Research 319.

¹¹⁴⁹ UNICEF, 'Global Study on Child Poverty and Disparities 2007-2008 Guide' (2007) Global Policy Section Division of Policy and Planning.

¹¹⁵⁰ Sabina Alkire, José Manuel Roche and Ana Vaz, 'Changes Over Time in Multidimensional Poverty: Methodology and Results for 34 Countries' (2017) 94 World Development 232.

¹¹⁵¹ Yekaterina Chzhen and others, 'Child Poverty in the European Union: The Multiple Overlapping Deprivation Analysis Approach (EU-MODA)' (2016) 9 Child Indicators Research 335.

¹¹⁵² Anne-Catherine Guio and others, 'Towards an EU Measure of Child Deprivation' (2018) 11 Child Indicators Research 835.

on homeless children, children with disabilities, children with a migrant background, children with a minority racial or ethnic background, children in alternative care or children in precarious family situations. However, Annex A of the EU's Child Guarantee might help researchers that are new to EU-SILC. It can also help them get to a quick overview of which data is available. However, it does not help to overcome the widespread lack of disaggregated data with which one could populate human rights indicators. Hence, despite children's rights indicators existing in abundance, it is very difficult to populate them with disaggregated data. It remains the sad reality that comparable disaggregated statistical data across the EU is very difficult to find. If surveys do collect socio-demographic variables on poverty and living conditions, it is almost never possible to disaggregate them further by age, ethnicity, migrant status, or disability.

This last section has demonstrated the fruitfulness of comparing the available evidence on the legal reality of child poverty with the statistical reality of child poverty for the EU MS. Previous sections have set out what information is available and made clear how this information is very often not human-rights-oriented. Available data is almost never framed in human rights substantive terms. Further, there are numerous data gaps and surveys that are not designed to interviewing children themselves. Nevertheless, this section has shown how, despite all these shortfalls and limits, we can still usefully enhance our understanding of both human rights and social policy by relating the data we have to the human right to a social minimum for children.

5.5 Roma

The previous sections have shown that disaggregated data is neither easily available neither for persons with disabilities nor for children, albeit for different reasons. Whereas for persons with disabilities, the main problem is the statistical difficulty of dealing with non-comparable disability definitions and disability assessment methods, the main problem for children is the disconnect between social policy and human rights, especially in the context of child poverty. In this section, I show that disaggregated data for Roma is even less available than for children or for persons with disabilities. To do so, I first discuss who the Roma are and how to count them (section 5.5.1). Further, I examine the claim that official EU-wide comparable statistics on Roma cannot exist due to the difficulties with collecting statistics that has been disaggregated by ethnicity (section 5.5.2). Next, I use publicly available data to show

that Roma continue to live in social exclusion (section 5.5.3). A particular emphasis lies on FRA's data collection on the Roma, which proves that it is indeed possible to produce disaggregated data by ethnicity, which is comparable across countries. As such, the collection of ethnic data is no longer an unsurmountable obstacle, but rather one that could and should be overcome with enough political will and by giving due importance to it. Hence, I argue that EU MS should realise the Roma's right to a social minimum for the Roma by prioritising the development and collection of statistical data, allowing for disaggregation by ethnicity (section 5.5.4).

5.5.1 Who are the Roma and how many Roma are there?

In order to collect disaggregated data on the Roma, one of the first steps is to determine of who exactly the Roma are and who is counted as Roma. It is common knowledge that the Roma are the EU's largest ethnic minority. However, questions concerning the exact definition of 'Roma' and who should be counted as Roma are far from settled. Indeed, the ambiguity of the term Roma is so intertwined with data collection challenges that it is impossible to discuss the one issue without taking account of the other issue.

5.5.1.1 Who are the Roma? Tensions between Self-identification and External Identification

Definitions, classifications, and identification are usually distinguished. Whereas definitions concern the generic level, classifications are connected to the group level and identification is the individual level.¹¹⁵³ On the level of definitions, official EU policy documents use the umbrella term 'Roma', which 'encompasses diverse groups, including Roma, Sinti, Kale, Romanichels, Boyash/Rudari, Ashkali, Egyptians, Yenish, Dom, Lom, Rom and Abdal, as well as Traveller populations'.¹¹⁵⁴ The Council of Europe justifies their use of the umbrella term when it specifies that the term includes 'the wide diversity of the groups concerned'.¹¹⁵⁵ The EU's choice of the umbrella term

¹¹⁵³ Timo Makkonen, *Measuring Discrimination: Data Collection and EU Equality Law* (Office for Official Publications of the European Communities 2006) 73.

¹¹⁵⁴ European Commission, 'Roma People in the EU' (*Roma Equality, Inclusion and participation in the EU*, 2022) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/roma-eu/roma-equality-inclusion-and-participation-eu_en> accessed 30 December 2022.

¹¹⁵⁵ Council of Europe, 'Descriptive Glossary of Terms Relating to Roma Issues' (2012) <<http://a.cs.coe.int/team20/cahrom/documents/Glossary%20Roma%20EN%20version%2018%20May%202012.pdf>> accessed 30 December 2022; FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (n 34).

can be traced back to the very beginnings of its policy efforts for Roma inclusion. In 2011, the Commission published its framework for national Roma integration strategies up to 2020.¹¹⁵⁶ In the very first paragraph of this document, the Commission justifies its use of the umbrella term, by claiming that these groups of people 'have more or less similar cultural characteristics'.¹¹⁵⁷ In its 2020 follow-up framework that will be in force until 2030, the Commission no longer refers to culture but simply states that the umbrella term 'encompasses a wide range of different people of Romani origin'.¹¹⁵⁸ As an official EU agency, the FRA also follows the Council of Europe definition in using the umbrella term 'Roma' to cover the 'wide diversity of the groups concerned'.¹¹⁵⁹ Yet, the explanation goes one step further than the one given by the Commission, with its addition that the umbrella term 'Roma' that is utilised throughout the survey refers to 'persons who self-identify as 'Roma' or as one of the other groups that the term 'Roma' covers'.¹¹⁶⁰ In one particular survey, the FRA explicitly excludes any Roma that have moved from the EU MS where the survey is being carried out to another EU MS, but only counts to so-called 'autochthonous' Roma.¹¹⁶¹

Using such a broad term comes with advantages and disadvantages. Whereas a key benefit is the inclusion of as many people and groups as possible, this very inclusion is also a serious drawback. The term assumes a non-existent homogeneity among the different groups, that speak different languages, employ very diverse cultural practices, and live under different socio-economic conditions.¹¹⁶² Even though the umbrella term 'Roma' is a politically correct term that aims at uniting such diversity in language and culture, this very term also risks reinforcing harmful stereotypes. When somebody hears the word 'Roma', he or she most likely thinks about poverty, begging children and caravans. One is less likely to appreciate the wide diversity in

¹¹⁵⁶ European Commission, 'An EU Framework for National Roma Integration Strategies up to 2020' (2011) COM(2011) 173 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1444910104414&uri=CELEX:52011DC0173>> accessed 30 December 2022.

¹¹⁵⁷ *ibid.* 2.

¹¹⁵⁸ European Commission, 'A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation' (2020) COM/2020/620 final 1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0620&qid=1615293880380>> accessed 30 December 2022, see footnote 2.

¹¹⁵⁹ FRA, 'Second European Union Minorities and Discrimination Survey - Technical Report' (2017) 33 <<https://fra.europa.eu/en/publication/2017/eumidis-ii-technical-report>> accessed 29 December 2022.

¹¹⁶⁰ *ibid.*

¹¹⁶¹ *ibid.*

¹¹⁶² Andrey Ivanov, Jaroslav Kling and J Kagin, 'Integrated Household Surveys among Roma Populations: One Possible Approach to Sampling Used in the UNDP-World Bank-EC Regional Roma Survey 2011' (UNDP 2012) Roma Inclusion Working Papers.

life experiences, with a well-established Roma elite, that lives in relative affluence, publishes books and on many levels might very well lead a typical middle-class life.

In order to determine who is included in the umbrella term 'Roma', one can either rely on self-identification or external identification. The CERD Committee explicitly requests the use of self-identification,¹¹⁶³ and it is also the preferred approach according to a more general human rights approach.¹¹⁶⁴ Indeed, the CERD Committee constantly calls upon EU MS to adopt the principle of self-identification when it comes to data collection on Roma.¹¹⁶⁵ Self-identification means that Roma themselves should determine whether they want to be included in this term. Self-identification is often seen as the gold standard in survey research, which is being taught in classical statistical handbooks.¹¹⁶⁶ Most official surveys also make use of self-identification, since it prevents the interviewers from interfering with the survey results.

However, self-identification of the Roma comes with its specific set of challenges. Due to historical marginalization, discrimination and persecution, the Roma tend to be cautious about identifying themselves in official censuses.¹¹⁶⁷ Since the Roma holocaust was possible partly due to detailed census data and police registers that specified where Roma lived, this hesitation is not unfounded.¹¹⁶⁸ This reluctance to self-identify sometimes leads to Roma choosing to identify themselves with the majority ethnic group rather than with being Roma.¹¹⁶⁹ However, it is not possible to determine the size of this 'reluctance error', or to know with certainty how

¹¹⁶³ CERD Committee, 'General Recommendation VIII Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention' (1990) UN Doc A/45/18.

¹¹⁶⁴ OHCHR, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (1992) General Assembly Resolution 47/135, Art. 3; CESCR, 'GC 20: Non-Discrimination' (n 333) para 16.

¹¹⁶⁵ CERD Committee; COs to FR 2010, para 12; HU 2019, para 6; LU 2014, para 9; MT 2011, para 6; PL 2019, para 5; SI 2016, para 4; SK 2018, para 5.

¹¹⁶⁶ Floyd J Fowler, *Survey Research Methods* (5th edn, SAGE Publications 2014).

¹¹⁶⁷ For a discussion on Romania see László Fosztó and Anăstăsoaie Marian-Viorel, 'Romania: Representations, Public Policies and Political Projects' in Will Guy (ed), *Between Past and Future: The Roma of Central and Eastern Europe* (University of Hertfordshire Press 2001); see also Cosima Rughiniș, 'The Forest behind the Bar Charts: Bridging Quantitative and Qualitative Research on Roma/Țigani in Contemporary Romania' (2010) 44 *Patterns of Prejudice* 337 who gives a detailed but brief summary of the extent of persecution of the Roma in Romania.

¹¹⁶⁸ William Seltzer and Margo Anderson, 'The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses' (2001) 68 *Social Research* 481, 487, 503; Jozefien van Caeneghem, 'Challenges to Collecting Ethnic Data on the Roma Minority in Europe', *Legal Aspects of Ethnic Data Collection and Positive Action: The Roma Minority in Europe* (Springer International Publishing 2019) 344.

¹¹⁶⁹ Ioana Bunescu, *Roma in Europe: The Politics of Collective Identity Formation* (Ashgate 2014); Zsombor Csata, Roman Hlatky and Amy H Liu, 'How to Head Count Ethnic Minorities: Validity of Census Surveys versus Other Identification Strategies' (2021) 37 *East European Politics* 572.

much it varies cross-nationally or over time.¹¹⁷⁰ At the same time, it has been claimed that some also choose to identify themselves as Roma purely to receive some sort welfare benefits that are only accessible to the Roma.¹¹⁷¹ Contrastingly, somebody might not want to identify themselves with the umbrella term 'Roma' but would prefer a narrower, more specific term that better reflects his or her identity.¹¹⁷² In these cases, the interviewer might try to explain the reasoning behind the use of such a broad umbrella term, but interviewees might still refuse to self-identify as Roma. If Roma choose not to identify themselves as Roma, this leads to under-reporting and consequently a higher rate of unreliability in the data.¹¹⁷³ Hence, the success of the self-identification approach for any Roma survey is to a large extent dependent on the interviewees' willingness to self-identify themselves.¹¹⁷⁴

In order to overcome the challenges with self-identification for the Roma, external identification is the logical alternative. This means that rather than relying on the Roma to decide themselves on whether they want to identify themselves as Roma, this decision is being taken by others. This external identification is sometimes done through asking the neighbours on whether they agree that their neighbours are Roma, or if the neighbourhood is a Roma neighbourhood.¹¹⁷⁵ Sometimes, proxies like language or culture are being used.

Sometimes, self-identification and external identification are combined to arrive at more reliable results. The FRA's 2011 survey utilized census data from six EU MS, where Roma ethnicity was mostly determined by self-identification, either through direct questions on ethnicity or proxies like languages spoken at home.¹¹⁷⁶ However, the FRA considered that in the Czech Republic and Slovakia sources other than the census were more reliable. At the same time, due to the outdated nature of the census data, it was reviewed and updated by relying on the expertise of municipalities and NGOs (through external identification). Mostly, the expert data showed that the

¹¹⁷⁰ Rughiniş (n 1164) 351.

¹¹⁷¹ Csata, Hlatky and Liu (n 1166) 576.

¹¹⁷² Mihai Surdu, 'Why the "Real" Numbers on Roma Are Fictitious: Revisiting Practices of Ethnic Quantification' (2019) 19 *Ethnicities* 486, 12.

¹¹⁷³ Timo Makkonen, *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Thereto in Europe* (Martinus Nijhoff Publishers 2012) 236.

¹¹⁷⁴ Jozefien van Caeneghem, 'Ethnic Data Collection: Benefits, Risks, Data Sources and Methods', *Legal Aspects of Ethnic Data Collection and Positive Action: The Roma Minority in Europe* (Springer International Publishing 2019) 312.

¹¹⁷⁵ Andrey Ivanov, 'Quantifying the Unquantifiable: Defining Roma Populations in Quantitative Surveys' (2012) 3–4 *Население* 79.

¹¹⁷⁶ BG, CZ, HU, PL, RO, SK.

number of Roma increased since the latest census, except for Poland where the numbers decreased, mostly due to emigration.¹¹⁷⁷ Triangulating census data with other data sources has also been the approach of a recent study carried out in Romania, which found that the census data matched the expert data in 25% of the municipalities.¹¹⁷⁸ While this might not sound like much at first sight, the result is astonishing: given the chronic claim that census data are unreliable, this study proves that they are not unreliable in all circumstances.

Summing up, it has been established that the Roma are a very heterogeneous group, whose identity is complex and multidimensional.¹¹⁷⁹ It is very common that Roma simultaneously identify with the majority group (e.g., as a Romanian when living in Romania) and with the label 'Roma'.¹¹⁸⁰ Indeed, it is very common that Roma identify with mixed or multiple identities.¹¹⁸¹ Hence, forcing Roma to choose one identity over another on official census forms or through surveys often does not lead to reliable results. In the Hungarian and Romanian censuses of 2011, the option to select more than one ethnic identity has led to a stark increase in Roma self-identification.¹¹⁸² For future censuses, this should be considered as a best practice approach.

5.5.1.2 How many Roma are there?

Both the European Commission and the FRA frequently claim early on in their official publications that the Roma are Europe's largest minority.¹¹⁸³ But how many Roma are there? According to the European Commission's 2011 Framework, an estimate of ten to twelve million Roma live across the whole European continent, of which six million are found in the EU MS.¹¹⁸⁴ Regrettably, no sources or explanations are being provided for how they arrived at this number. In the 2020 framework, the Commission

¹¹⁷⁷ FRA, 'Roma Pilot Survey – Technical Report: Methodology, Sampling and Fieldwork' (2014) 6 <<https://fra.europa.eu/en/publication/2014/roma-pilot-survey-technical-report-methodology-sampling-and-fieldwork>> accessed 29 December 2022.

¹¹⁷⁸ Csata, Hlatky and Liu (n 1166) 573.

¹¹⁷⁹ Ian Law and Martin Kovats, 'Roma Identity and Diversity' in Ian Law and Martin Kovats (eds), *Rethinking Roma: Identities, Politicisation and New Agendas* (Palgrave Macmillan 2018); Messing (n 124); Ivanov (n 1172).

¹¹⁸⁰ Cosima Rughiniş, 'Quantitative Tales of Ethnic Differentiation: Measuring and Using Roma/Gypsy Ethnicity in Statistical Analyses' (2011) 34 *Ethnic and Racial Studies* 594, 814.

¹¹⁸¹ Messing (n 124).

¹¹⁸² Rughiniş (n 1164); van Caeneghem, 'Challenges to Collecting Ethnic Data on the Roma Minority in Europe' (n 1165).

¹¹⁸³ European Commission, 'Roma People in the EU' (n 1151); FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (n 34) 7.

¹¹⁸⁴ European Commission, 'Roma People in the EU' (n 1151).

uses the very same numbers and now also provides a source: the footnote links to an Excel table that was put together by the Council of Europe in 2012.¹¹⁸⁵ Table 17 below shows an excerpt of these estimates, only displaying EU MS. The table distinguishes between official numbers that are taken from census data (columns 3 and 4), that are contrasted with minimum and maximum estimates (columns 5 and 6), that starkly exceed the official numbers. The Council of Europe uses the average between the minimum and maximum estimates (column 7).

¹¹⁸⁵ European Commission, 'A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation' (n 1155) 1, footnote 3.

Table 17. Estimates of the Roma Population across the EU MS, Council of Europe (2012)

EU MS	Total population (World Bank 2010)	Official number (self-declared)	Year of the Census	Minimum estimate	Maximum estimate	CoE estimate (average)	Average estimate as% of total population
AT	8.384.745	6.273	2001	20.000	50.000	35.000	0,42%
BE	10.879.159	No data available		20.000	40.000	30.000	0,28%
BG	7.543.325	325.343	2011	700.000	800.000	750.000	9,94%
CY	1.103.647	502	1960	1.000	1.500	1.250	0,11%
CZ	10.525.090	11.718	2001	150.000	250.000	200.000	1,90%
DE	81.702.329	No data available		70.000	140.000	105.000	0,13%
DK	5.544.139	No data available		1.000	4.000	2.500	0,05%
EE	1.339.646	584	2009	600	1.500	1.050	0,08%
EL	11.319.048	No data available		50.000	300.000	175.000	1,55%
ES	46.081.574	No data available		500.000	1.000.000	750.000	1,63%
FI	5.363.624	No data available		10.000	12.000	11.000	0,21%
FR	64.876.618	No data available		300.000	500.000	400.000	0,62%
HR	4.424.161	9.463	2001	30.000	40.000	35.000	0,79%
HU	10.008.703	190.046	2001	500.000	1.000.000	750.000	7,49%
IE	4.481.430	22.435	2006	32.000	43.000	37.500	0,84%
IT	60.483.521	No data available		120.000	180.000	150.000	0,25%
LT	3.320.656	2.571	2001	2.000	4.000	3.000	0,09%
LU	505.831	No data available		100	500	300	0,06%
LV	2.242.916	8.517	2011	9.000	16.000	12.500	0,56%
MT	412.961	No data available		0	0	0	0,00%
NL	16.612.213	No data available		32.000	48.000	40.000	0,24%
PL	38.187.488	12.731	2002	15.000	50.000	32.500	0,09%
PT	10.642.841	No data available		34.000	70.000	52.000	0,49%
RO	21.442.012	619.007	2011	1.200.000	2.500.000	1.850.000	8,63%
SE	9.379.116	No data available		35.000	65.000	50.000	0,53%

EU MS	Total population (World Bank 2010)	Official number (self-declared)	Year of the Census	Minimum estimate	Maximum estimate	CoE estimate (average)	Average estimate as% of total population
SI	2.052.821	3.246	2002	7.000	10.000	8.500	0,41%
SK	5.433.456	89.920	2001	380.000	600.000	490.000	9,02%
UK	62.218.761	No data available		150.000	300.000	225.000	0,36%
EU average	446.028.310			4.248.700	7.845.500	6.047.100	1,18%

Figure 64 below displays the Council of Europe’s average estimates of the total Roma population across the EU MS. The graph shows that Romania has by far the highest Roma population with a total number of 1.85 million. Other EU MS follow quite far behind (e.g., Bulgaria, Spain, and Hungary with 750.000 each).

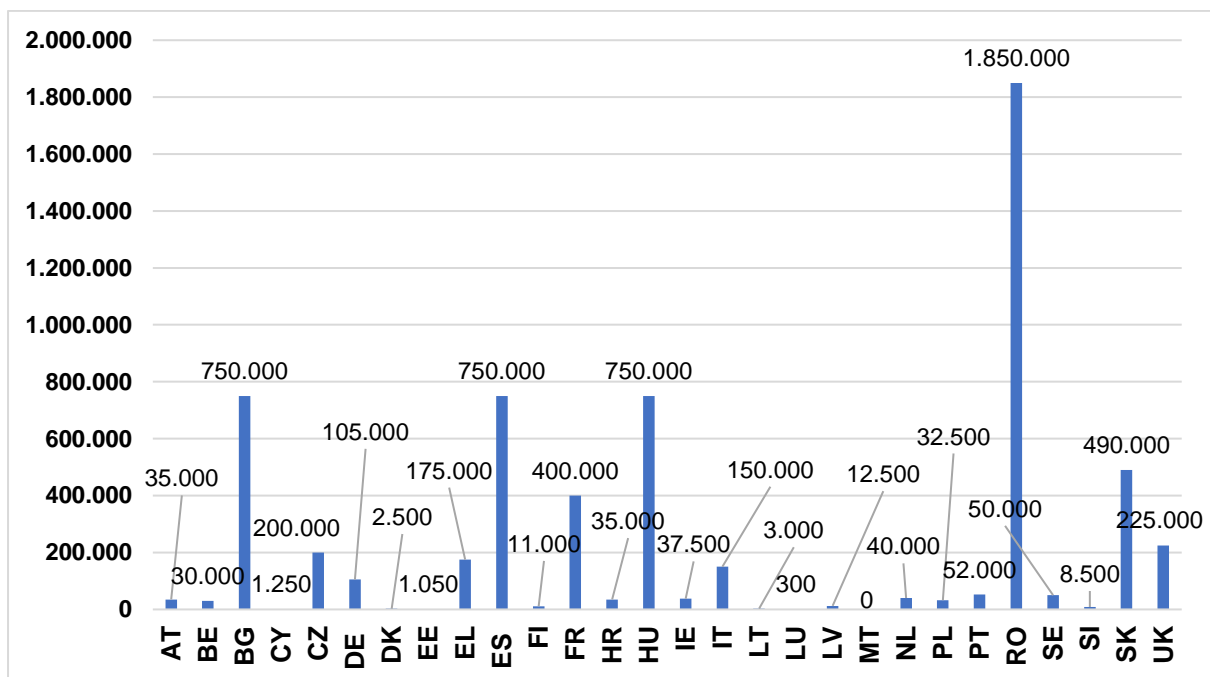


Figure 64. Average Estimates of the Total Roma Population, Council of Europe, 2012

What is disappointing about these numbers is that there are several sources of varying quality that were used to establish the minimum and maximum estimates. Some of them stem from ‘minimum’ and ‘maximum’ estimates published by Minority Rights Group International in 1995, even though the CoE tends to provide a higher maximum

estimate.¹¹⁸⁶ For example, for Austria the minimum estimate (20.000) is the same, but the maximum estimate provided by Minority Rights Group International stands at 25.000, whereas the CoE puts the maximum at 50.000. Similarly, for France the minimum estimate from Minority Rights Group International is 280.000 (CoE: 300.000), whereas the maximum is given at 340.000 (CoE: 500.000). For Romania, where Europe's highest Roma population lives, the CoE minimum estimate (1.2 million) is lower than that of Minority Rights Group International (1.8 million), whereas both sources put the maximum estimate at 2.5 million.

Unfortunately, these numbers published by Minority Rights Group International do not come with a clear methodology or sources either. Rather, the authors refer the numbers back to the 'Gypsy Research Centre, René Descartes University, Paris, 1994'. However, I have not been able to locate this source since no title of the publication was provided. According to Law and Kovats, when discussing the question about how many Roma are living in Europe, these numbers stem from 'a variety of official records, activist and academic estimates'.¹¹⁸⁷ However, they do not comment on the Minority Rights Group International claim that gives the 'Gypsy Research Centre' as original source. Instead, they discuss the maximum estimate provided for Romania in rather anecdotic manner. According to them, one of the authors of the Minority Rights Group International's report, Nicolae Gheorge, acknowledged through 'personal communication at at Bucharest PAKIV conference 2012' that the maximum estimate for Romania (2.5 million) stemmed from a 'secret policeman's fantasy just one year before the violent overthrow of the paranoid and nationalistic Ceausescu regime', since the number was taken from a Securitate source, dated 1988.¹¹⁸⁸ According to Gheorge, the number of Roma living in Romania is only around one million (although no source for this estimate was provided either).¹¹⁸⁹

According to the second author of the Minority Rights Group International's report, Jean-Pierre Liégeois, these estimates by the CoE have been produced since 1983.¹¹⁹⁰ At the same time, these numbers do not seem to change: if the estimates were linked to a 'real' population that increases or decreases over time, how is it

¹¹⁸⁶ compare Table 3 in Jean Pierre Liégeois and N Gheorge, *Roma/Gypsies: A European Minority* (Minority Rights Group International 1995) 7 <<https://minorityrights.org/publications/romagypsies-a-european-minority-october-1995/>> accessed 28 December 2022.

¹¹⁸⁷ Law and Kovats (n 1176) 45.

¹¹⁸⁸ *ibid.*

¹¹⁸⁹ *ibid.*

¹¹⁹⁰ Jean Pierre Liégeois, *Gypsies: An Illustrated History* (Al Saqi Books 1986).

possible that they remain more or less the same over 30+ years?¹¹⁹¹ However, the CoE and the Commission were not the first to rely on estimated numbers. In fact, the practice of estimating the number of Roma living across Europe can be traced back to the 18th century.¹¹⁹² In the words of Surdu, the ‘numbers on Roma were never based on solid empirical evidence but always on estimates’.¹¹⁹³

Given that no clear methodologies and sources for these minimum and maximum estimates exist, it is somewhat surprising that the European Commission, and due to its authority researchers, activists and public policy makers alike, continue to use these numbers without much discussion or critical review. In fact, the claim that around ten to twelve million Roma (‘Europe’s largest minority’) live dispersed across the European continent continues to be used as an eye-catching first phrase in most publications that concern Roma inclusion.¹¹⁹⁴ There seems to be an overall agreement that no better numbers exist, which is why these numbers continue to be seen as an authoritative source for how many Roma live across the European continent.

5.5.2 From Census Data to Sampling Frames: Unavailability and Unreliability

In this section, I examine the claim that official EU-wide comparable statistics on Roma cannot exist due to the difficulties with disaggregation by ethnicity. I show that collecting data on ethnicity is indeed a very sensitive issue, but not one that is impossible to achieve. As mentioned above, the EU-SILC does not allow for disaggregation by ethnicity. The reasons for this are manifold, but one key problem is that some EU MS prohibit the collection of any ethnicity data.¹¹⁹⁵ Nevertheless, a large number of reports and books has been published on the issue of ‘hard-to-reach’-groups in general, and disaggregation by ethnicity in particular, with a special

¹¹⁹¹ For a similar argument compare Surdu (n 1169) 491.

¹¹⁹² *ibid* 490, who cites Grellmann and Raper (1787), Kogalnitchan (1837), Vaillant (1857) and Popp Serboianu (1930).

¹¹⁹³ *ibid* 491.

¹¹⁹⁴ European Commission, ‘An EU Framework for National Roma Integration Strategies up to 2020’ (n 1153); FRA, ‘Poverty and Employment: The Situation of Roma in 11 EU Member States’ (n 33); FRA, ‘Second European Union Minorities and Discrimination Survey: Roma – Selected Findings’ (n 34); Anikó Bernát and Vera Messing, ‘Methodological and Data Infrastructure Report on Roma Population in the EU’ (2016) INGRID Milestone 20.3

<<https://zenodo.org/record/1306644#.Y7AMkRXMK00>> accessed 31 December 2022; Jozefien van Caeneghem, ‘Introduction’, *Legal Aspects of Ethnic Data Collection and Positive Action: The Roma Minority in Europe* (Springer International Publishing 2019); European Commission, ‘A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation’ (n 1155); European Commission, ‘Roma People in the EU’ (n 1151).

¹¹⁹⁵ Farkas (n 122).

emphasis on Roma.¹¹⁹⁶ How then would comparable, disaggregated data on the Roma look like?

In the previous section, I have laid out the difficulties with defining, classifying, and identifying. These difficulties culminate in the fact that the total number of Roma living across the EU MS is disputed and impossible to know with certainty. This poses a serious problem for any data collection efforts on the Roma. Whenever one sets out to collect data on any group, the very first step is to clearly define the total population (also called the universe). Only when the universe is well defined can one start with the so-called sampling process, which means employing statistical methods to decide about which segments of people one needs to interview out of this total population (the universe) in order to arrive at a representative result. The sampling process relies on a sampling frame, which is a precise list of who exactly is included in this population.¹¹⁹⁷ For example, if the population of interest was current PhD researchers at the EUI, an acceptable sampling frame would be a list of names of all PhD researchers with a current affiliation with the EUI.

Defining the population and building a sampling frame are crucial steps to be able to draw a representative sample. As an example, in any beginners' course in statistics, students might well hear the claim that in order to arrive at representativeness of any given population, one needs to conduct 1000 interviews. If one wanted to find out whether Belgians approve of the monarchy, one might be tempted to simply ask 1000 randomly selected people in a well-crowded area, like a pedestrian precinct or in public transport. For instance, one might decide to ask 1000 people that use the metro line 6 in Brussels whether they approve of the monarchy. However, these answers would not be representative of the Belgian population. Instead, they would be representative of the universe of people using the Brussels metro line 6. There would be a very high probability that out of these 1000 people interviewed in the metro, only around half of them would be Belgian. If one wanted to know whether Belgians agree with the monarchy, one would have had to add a screening question to determine whether the respondent is indeed Belgian. At the

¹¹⁹⁶ Messing (n 124); Willis and others (n 124); Tourangeau and others (n 124); Tremlett and McGarry (n 124); van Caeneghem, 'Challenges to Collecting Ethnic Data on the Roma Minority in Europe' (n 1165); Firchow and Mac Ginty (n 124).

¹¹⁹⁷ Statistics How To, 'Sampling Frame: Definition, Examples' <<https://www.statisticshowto.com/probability-and-statistics/statistics-definitions/sampling-frame/>> accessed 3 January 2023.

same time, several segments of the Belgian population would be excluded in the metro experiment, for example those that are not using public transport and everybody who is not living in Brussels. If one wanted to arrive at a representative result for whether Belgians approve of the monarchy, this would mean that one would need to ask 1000 randomly selected Belgians from all geographical regions and, walks of life.

Hence, in order to reach a representative statistical result, it is not sufficient to ask as many random people as possible the same question. Rather, to achieve representativeness, one needs to carefully determine the universe of the population in question (“Belgians”) and then design a strategy in making sure that one reaches a representative proportion of this population. Most general population surveys like EU-SILC rely on census data to determine the universe of the population and establish sampling frames.¹¹⁹⁸ These sampling frames ensure that everybody has a chance to be randomly selected in the survey. Unfortunately, minorities and certain disadvantaged and vulnerable groups have a much lesser chance of being randomly selected. This is either due to the census itself or due to the sampling frames that do not include these groups.

A census means that the whole population is being counted. This is usually done every ten years. However, half of the EU MS do not include questions on ethnicity in the census, which means that no data on Roma is available. Table 18 below shows the number of Roma counted in the latest census, being one of the sources for the 2012 CoE estimates.¹¹⁹⁹ I have marked all those EU MS where no census data on Roma is available in grey. It should also be noted that the census data for Cyprus is extremely outdated (1960), so it is questionable whether one can really speak about ‘available data’ here.

¹¹⁹⁸ Eurostat, ‘Income and Living Conditions - Methodology’ <<https://ec.europa.eu/eurostat/web/income-and-living-conditions/methodology>> accessed 30 December 2022.

¹¹⁹⁹ See CoE estimates (2012).

Table 18. Number of Roma according to Census Data Used for the CoE Estimate of 2012

EU MS	Number of Roma (date of the census)
AT	6.273 (2001)
BE	No data available
BG	325.343 (2011)
CY	502 (1960)
CZ	11.718 (2001)
DE	No data available
DK	No data available
EE	584 (2009)
EL	No data available
ES	No data available
FI	No data available
FR	No data available
HR	9.463 (2001)
HU	190.046 (2001)
IE	22.435 (2006)
IT	No data available
LT	2.571 (2001)
LU	No data available
LV	8.517 (2011)
MT	No data available
NL	No data available
PL	12.731 (2002)
PT	No data available
RO	619.007 (2011)
SE	No data available
SI	3.246 (2002)
SK	89.920 (2001)
UK	No data available

In 2002, the UNDP published the results of a survey among 5034 Roma respondents in Bulgaria, the Czech Republic, Hungary, Romania, and Slovak Republic.¹²⁰⁰ This report has become the standard reference for subsequent Roma surveys. In its methodological annex, the report simply states that sampling ‘was based on data provided by the last formal census’.¹²⁰¹ Table 19 below gives an overview of the EU MS that were included in all these major cross-national Roma surveys in Europe. The Table also shows that in several EU MS there was no census data available on which

¹²⁰⁰ Andrey Ivanov and others, ‘Avoiding the Dependency Trap: The Roma in Central and Eastern Europe’ (United Nations Development Programme 2002) United Nations Development Programme <<https://hdr.undp.org/content/avoiding-dependency-trap>> accessed 28 December 2022.

¹²⁰¹ *ibid* 86.

to base the sampling design. In these EU MS, the sampling design had to rely on various expert sources instead.

Table 19. Census- or Experts-Based Roma Surveys across the EU MS

EU MS	UNDP (2002)	EU-MIDIS I (FRA, 2008)	Regional Roma Survey (UNDP 2011)	Roma Pilot Survey (FRA, 2011)	EU-MIDIS II (FRA, 2016)	Roma Survey (FRA, 2019)
BE						Experts
BG	Census	Census	Census	Census	Census	
CZ	Census	Census	Census	Census & Experts	Census	
EL		Experts		Experts	Experts	
ES				Experts	Experts	
FR				Experts		Experts
HR					Census	
HU	Census	Census	Census	Census	Census	
IE						Experts
IT				Experts		
NL						Experts
PL		Census		Census		
PT				Experts	Experts	
RO	Census	Census	Census	Census	Census	
SE						Experts
SK	Census	Census	Census	Experts	Census	
UK						Census

In 2008, the FRA surveyed Roma in eight EU MS in its first EU Minorities and Discrimination Survey (EU-MIDIS I).¹²⁰² In order to interview 500 Roma respondents in each EU MS, mostly census data was used. The exception was Greece where experts (i.e., ‘minority organisations, academic experts, municipal offices, and (...) FRA’s RAXEN network’) were consulted instead.¹²⁰³ In 2011, the UNDP, the World Bank and the FRA cooperated in designing two separate Roma surveys, but with the same underlying methodology. The UNDP/World-Bank survey focused on socio-

¹²⁰² Roma respondents were surveyed in BG, CZ, EL, HU, PL, RO, SK. See FRA, ‘EU-MIDIS at a Glance - Introduction to the FRA’s EU-Wide Discrimination Survey’ (2009) <<https://fra.europa.eu/en/publication/2011/eu-midis-glance-introduction-fras-eu-wide-discrimination-survey>> accessed 29 December 2022; FRA, ‘European Union Minorities and Discrimination Survey: Technical Report’ (2011) <<https://fra.europa.eu/en/project/2011/european-union-minorities-and-discrimination-survey>> accessed 29 December 2022; FRA, ‘EU-MIDIS Data in Focus Report 1: The Roma’ (2009) <<https://fra.europa.eu/en/publication/2009/eu-midis-data-focus-report-1-roma>> accessed 29 December 2022.

¹²⁰³ FRA, ‘European Union Minorities and Discrimination Survey: Technical Report’ (n 1199) 19.

economic aspects and was carried out in only five EU MS.¹²⁰⁴ The FRA Roma pilot survey focused on the fulfilment of fundamental rights and the experiences of discrimination and interviewed Roma respondents from 11 EU MS.¹²⁰⁵ The FRA's survey was called a 'pilot' survey, since it included France, Italy, Portugal and Spain as EU MS where no cross-national, comparative Roma survey has ever been attempted before.¹²⁰⁶ In its second EU-MIDIS survey (2016), the FRA surveyed Roma in nine EU MS.¹²⁰⁷ In 2019, the FRA published the results of a new Roma survey, with respondents from six Western EU MS.¹²⁰⁸ This survey followed in the footsteps of the FRA's 2011 pilot survey that for the first time ever focused on EU MS where no census data on Roma exists.

Using official census data for the Roma comes with several disadvantages, such as the issue that the number of Roma tends to be undercounted due to the reluctance to self-identify, as discussed above. At the same time, there is wide national variation in this hesitation, with Roma in some EU MS being more reluctant to reveal their identity than in others. Therefore, the FRA has used mostly an implicit consent-approach in their Roma surveys. The respondents are not asked directly whether they identify themselves as Roma, but the interviewer rather states that they are conducting a survey about the Roma. The willingness to participate in the survey is then seen as implicit consent to be identified as Roma.

Another disadvantage is that census data becomes outdated very fast. Indeed,

¹²⁰⁴ Ivanov, Kling and Kagin (n 1159) 6.

¹²⁰⁵ BG, CZ, EL, ES, FR, HU, IT, PL, PT, RO, SK.

¹²⁰⁶ FRA, 'Roma Pilot Survey – Technical Report' (n 1174) 6.

¹²⁰⁷ Roma were interviewed in BG, CZ, EL, ES, HR, HU, PT, RO, SK. See FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (n 34).

¹²⁰⁸ BE, FR, IE, NL, SE, UK. See FRA, 'Roma and Travellers in Six Countries' (2019)

<<https://fra.europa.eu/en/publication/2020/roma-travellers-survey>> accessed 29 December 2022.

Table 17 above shows that the census data for Cyprus, which was used as a source for the official CoE estimates (2012), stemmed from 1960. Surely, such census data that is more than half a century old, does not provide any accuracy or reference point to the actual number of Roma living in the Czech Republic in 2012. For FRA's 2011 Roma survey, the most recent census data stemmed from 2001. A delay of just over a decade is surely an improvement from half a century, but populations tend to be very dynamic and often change even with the course of a year due to births, deaths, emigration, and immigration.

To draw a representative sample of the Roma from a given population, one needs a reliable sampling frame. These sampling frames are held by the national statistical offices that are responsible for carrying out the official censuses. Yet, for half of the EU MS, no census data on the Roma is available. This means that there are also no sampling frames from which one could draw a representative sample. Further, for those EU MS where census data on the Roma is available, one needs to negotiate access with the national statistical offices. Unfortunately, this is not something that individual academic researchers can achieve easily. In fact, even for the very experienced and well-funded FRA, the negotiation procedure with national statistical offices caused major delays in the EU-MIDIS II survey.¹²⁰⁹

Once sampling frames have been obtained, the actual sampling process can begin. While simple random sampling where each respondent has an equal selection probability is often seen as the gold standard in statistics, the reality is that very few surveys operate this way. Due to cost restraints and efficiency considerations, different unequal sampling procedures are usually employed. As the FRA explains in the Technical Report of its Roma Pilot Survey, the sample is usually stratified, and interviews are being clustered. The resulting differences in the selection probabilities are corrected through weighting.¹²¹⁰

As discussed before, the Roma are a heterogeneous group population that is difficult to define or to count. Due to the unavailability and/or unreliability of official census data, the corresponding sampling frames usually do not achieve representativeness. One reason for this is the difficulty of determining where exactly

¹²⁰⁹ FRA, 'Second European Union Minorities and Discrimination Survey - Technical Report' (n 1156) 39.

¹²¹⁰ FRA, 'Roma Pilot Survey – Technical Report' (n 1174) 6.

the Roma live in the EU MS, which makes it a very common sampling difficulty.¹²¹¹ In the major Roma surveys carried out in Europe, this hindrance has been overcome by focusing on communities where Roma are overrepresented. In the UNDP/FRA survey of 2011, this approach was justified as the ‘second best option’, due to the difficulties in defining and counting the Roma.¹²¹² In the subsequent EU-MIDIS II survey, a similar approach was used, since the sampling was done according to ‘geographic or administrative units with density of Roma population higher than 10%’.¹²¹³ In their official publications, the FRA advertises its methodology by claiming to be representative of up to 80% of the Roma living in the nine EU MS that were included in the survey.¹²¹⁴ However, this number is misleading. Since the sampling design only focuses on neighbourhoods with a high density of Roma, the Roma that do not live in these neighbourhoods are not represented at all. Hence, the survey does not represent 80% of *all* the Roma living in these nine EU MS, but rather only those that live in segregated neighbourhoods. There, they typically suffer higher rates of marginalization and social exclusion than Roma living in neighbourhoods where they are not overrepresented. In other words, the survey does not allow any conclusions on middle-class Roma living in non-segregated neighbourhoods.

5.5.3 Roma Poverty and Social Exclusion

Most publications and reports on the Roma mention their very high levels of poverty and social exclusion. This is a pattern that is not only evident in the official reports of the major Roma surveys (see Table 19),¹²¹⁵ but also in the Roma chapters that form part of the FRA’s annual Fundamental Rights Reports.¹²¹⁶ Indeed, Roma poverty and social exclusion is a typical narrative that is not only found in official EU publications, but also in academic literature, NGO reports and international human rights

¹²¹¹ *ibid.*

¹²¹² Ivanov, Kling and Kagin (n 1159) 8.

¹²¹³ FRA, ‘Second European Union Minorities and Discrimination Survey: Roma – Selected Findings’ (n 34) 8.

¹²¹⁴ *ibid.*

¹²¹⁵ Ivanov and others (n 1197); FRA, ‘EU-MIDIS Data in Focus Report 1’ (n 1199); FRA, ‘Poverty and Employment: The Situation of Roma in 11 EU Member States’ (n 33); FRA, ‘Second European Union Minorities and Discrimination Survey: Roma – Selected Findings’ (n 34); FRA, ‘Roma and Travellers in Six Countries’ (n 1205).

¹²¹⁶ See for example FRA, ‘Fundamental Rights Report 2018’ (2018) <<https://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018>> accessed 29 December 2022; FRA, ‘Fundamental Rights Report 2019’ (n 1110); FRA, ‘Fundamental Rights Report 2020’ (2020) <<https://fra.europa.eu/en/publication/2020/fundamental-rights-report-2020>> accessed 29 December 2022.

documents.¹²¹⁷ In this section, I discuss some of the evidence for this claim, focusing mainly on the results of FRA's EU-MIDIS II survey (2016).¹²¹⁸

According to the 2016 survey, over 80% of Roma in nine EU MS lived below their country's poverty thresholds in 2016.¹²¹⁹ This is a difference of 10 percentage points when comparing the numbers with FRA's 2011 survey, which found that over 90% of the Roma surveyed across the eleven EU member states found themselves below the national at-risk-of-poverty-thresholds.¹²²⁰ However, these numbers are not fully comparable, simply due to the fact that the two surveys did not cover the same EU MS (see Table 19 above on which EU MS are covered by which survey). Figure 65 below shows the at-risk-of-poverty rate for Roma according to EU-MIDIS II-data (2016).¹²²¹ The numbers are staggering: In Spain, Greece and Croatia, the at-risk-of-poverty rate of the Roma is over 90%, hence they have an income below the national at-risk-of-poverty threshold. Even in Czechia, the EU MS with the lowest number,¹²²² over half of the Roma respondents live at-risk-of-poverty. In general, therefore, there does not seem to have been much progress in narrowing the poverty gap for the Roma between 2011 and 2016.

¹²¹⁷ Ana Revenga, Dena Ringold and William Martín Tracy, *Poverty and Ethnicity: A Cross-Country Study of Roma Poverty in Central Europe* (World Bank Publications 2002); World Bank and others, 'Poverty and Welfare of Roma in the Slovak Republic' (World Bank 2002) <<https://openknowledge.worldbank.org/handle/10986/15200>> accessed 26 December 2022; Dena Ringold, Mitchell Alexander Orenstein and Erika Wilkens, *Roma in an Expanding Europe: Breaking the Poverty Cycle* (World Bank Publications 2005); Cristina Raț, 'Romanian Roma, State Transfers, and Poverty: A Study of Relative Disadvantage' (2005) 35 *International Journal of Sociology* 85; Andrey Ivanov, 'Roma Poverty in Bulgaria: How to Understand It and What to Do about It?' (2013) 5–6 *Население* 31; Andrey Ivanov and J Kagin, 'Roma Poverty from a Human Development Perspective' (UNDP 2014) Roma Inclusion Working Papers; Andrey Ivanov, Sheena Keller and Ursula Till-Tentschert, 'Roma Poverty and Deprivation: The Need for Multidimensional Anti-Poverty Measures' [2015] OPHI Working Paper No. 96 41; Natalija Perišić and Jelena Vidojević, 'Divided by Poverty and Social Exclusion - Roma and Persons with Disabilities in Serbia' (2015) 52 *Politička misao: časopis za politologiju* 142; Daniel Klimovský, 'Roma Settlements and Poverty in Slovakia: Different Policy Approaches of the State, Local Governments, and NGOs' (2016) 22 *Anthropological Notebooks* 23; Margareta Matache and Simona Barbu, 'Assessing Racialized Poverty: The Case of Romani People in the European Union', *Research Handbook on Human Rights and Poverty* (Edward Elgar Publishing 2021).

¹²¹⁸ FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (n 34).

¹²¹⁹ *ibid.*

¹²²⁰ FRA, 'Poverty and Employment: The Situation of Roma in 11 EU Member States' (n 33).

¹²²¹ The aggregated EU-MIDIS II data is publicly available via the Data Explorer, see FRA, 'Survey on Minorities and Discrimination in EU' <<https://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-second-eu-minorities-discrimination-survey>> accessed 10 January 2023.

¹²²² The sample for Portugal was too small due to many missing values, which is why the FRA does not include the results for Portugal for this question.

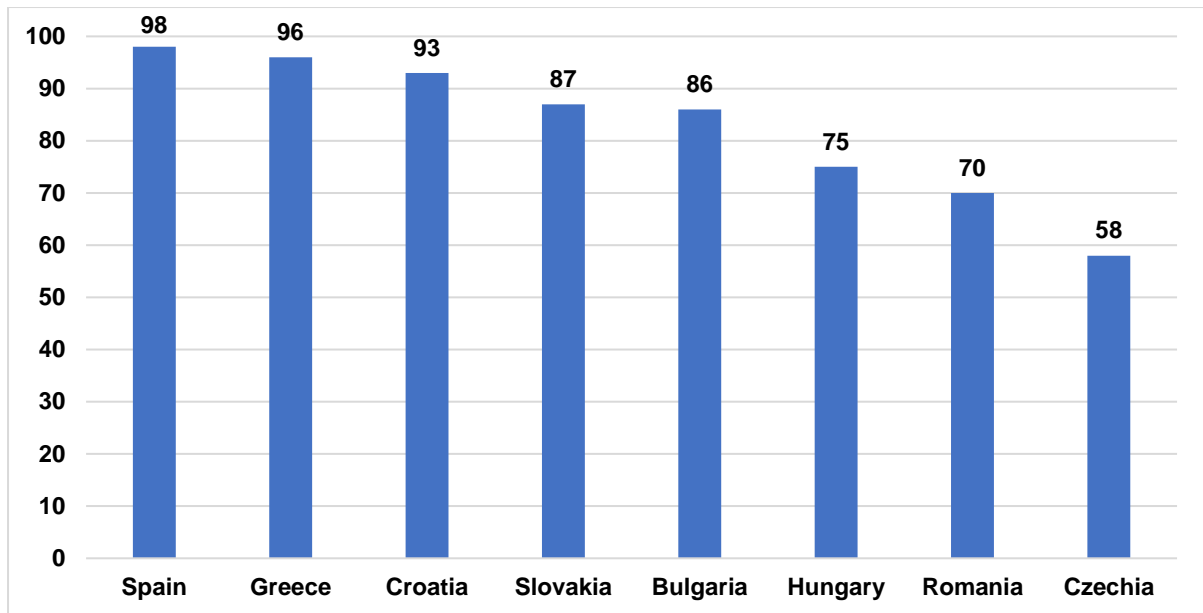


Figure 65. At-Risk-of-Poverty Rate for Roma in Percentages, EU-MIDIS II, 2016

Another way to measure poverty is to ask Roma respondents about their subjective assessment whether the household is able to make ends meet. Figure 66 below shows that in all nine EU MS more than 50% of the Roma report (great) difficulty in making ends meet.¹²²³ In Greece, Portugal, Spain, Croatia, Hungary and Slovakia, the numbers even range from 76% in Slovakia to 90% in Greece. When comparing the results of Figure 66 with those of Figure 65, there are some divergences, which most likely have to do with the more subjective nature of the question on making ends meet, compared with the calculating efforts of the national at-risk-of-poverty rates.

¹²²³ For Greece and Portugal, there was a small sample size for the answer “(very) easily”, which means that these numbers are not fully representative.

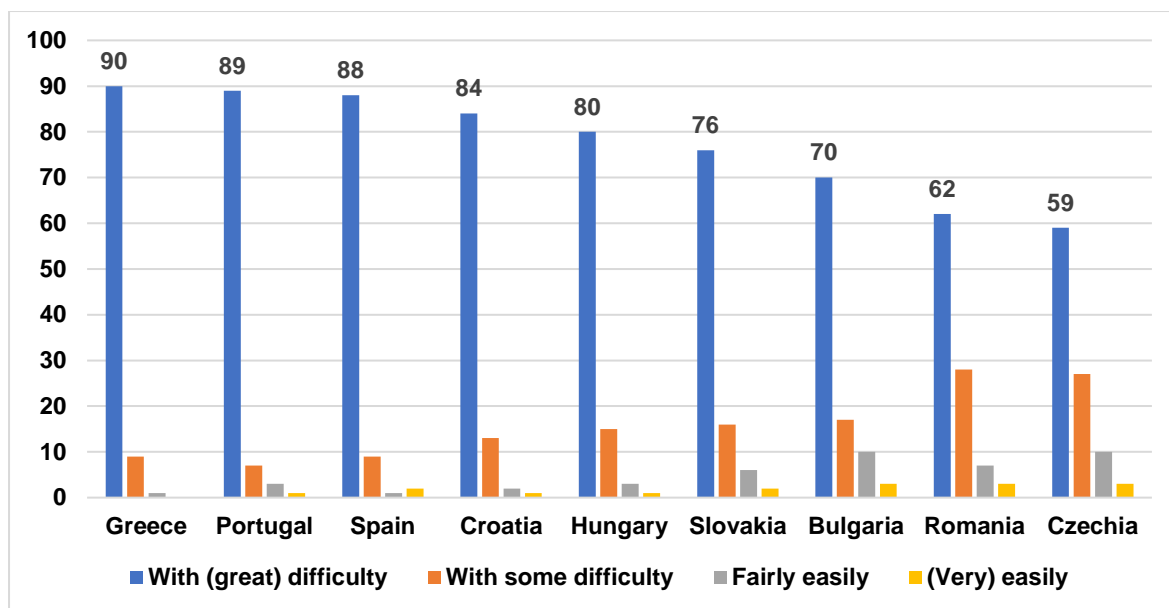


Figure 66. Roma's Ability to Make Ends Meet when Thinking of the Household's Total Income, EU-MIDIS II, 2016

In chapter 3, I have shown that the HRTBs are continuously concerned about the difficulties in realising the Roma's right to a social minimum, in particular the material deprivation dimension.¹²²⁴ To realise their right to a social minimum, EU MS must make sure to prioritise the material deprivation dimension. The following graphs provide a little snippet of the extent of this lack. Figure 67 below depicts the percentage of Roma not having access to an indoor (flushing) toilet in their accommodation. The numbers vary widely between the EU MS. Whereas in Spain almost everybody has access to an indoor (flushing) toilet, 81% of the Roma surveyed in Romania do not.

¹²²⁴ See section 3.4.3.

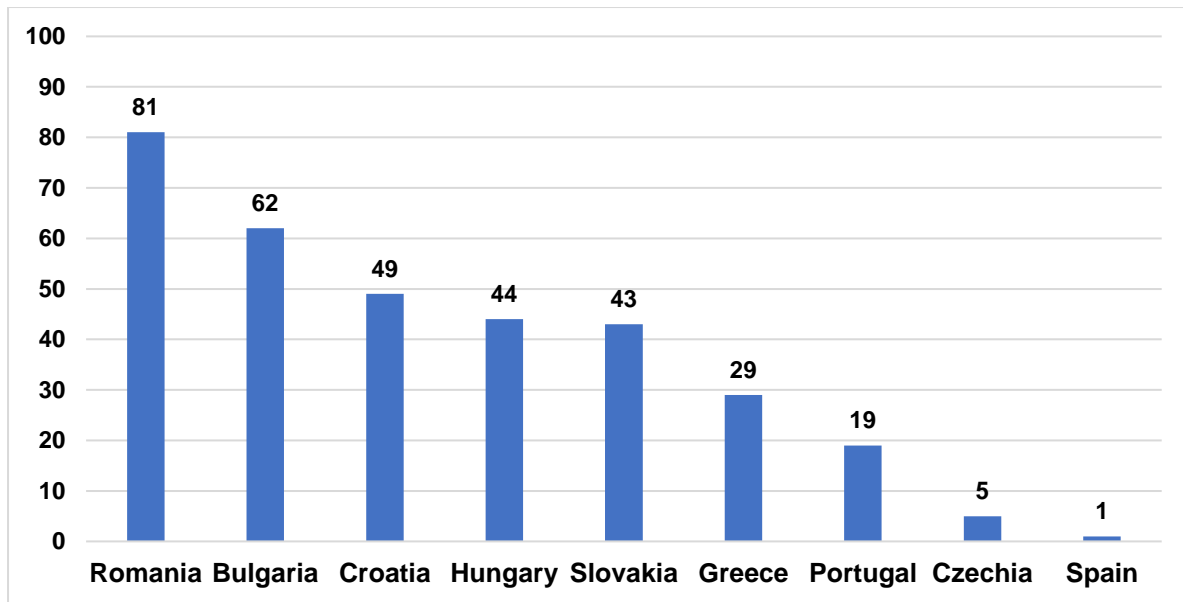


Figure 67. Percentage of Roma Not Having Access to an Indoor (Flushing) Toilet in Their Accommodation, EU-MIDIS II, 2016

Figure 68 illustrates that between 63 and 92% of Roma live in overcrowded accommodation, which means that the household does not have the minimum number of rooms according to the Eurostat definition of overcrowding.

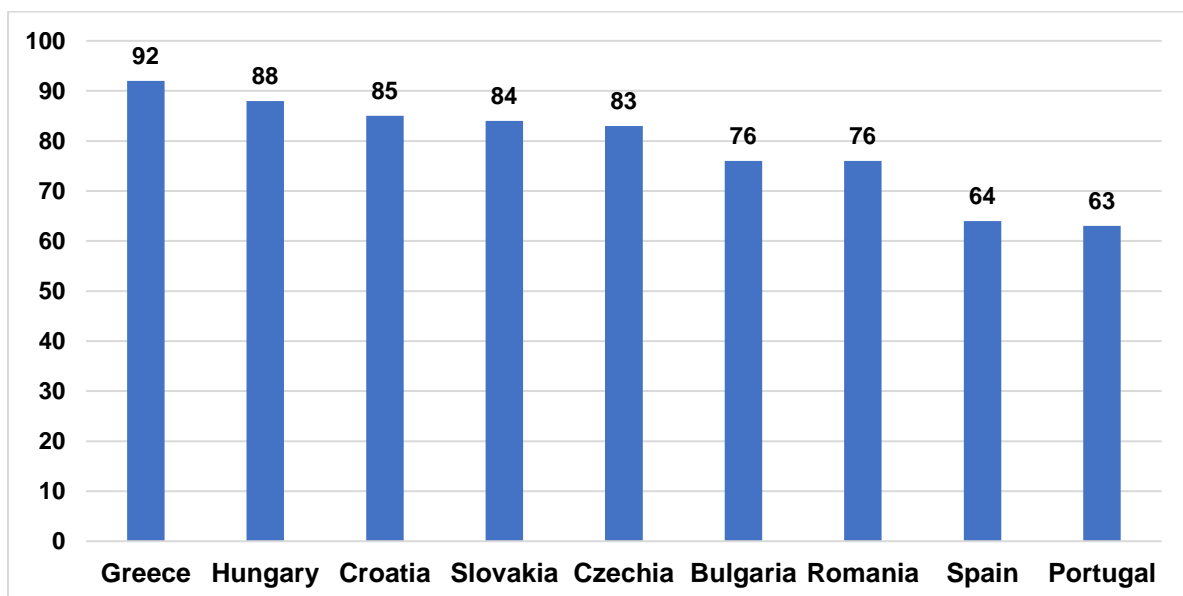


Figure 68. Percentage of Households that Live in Overcrowded Accommodations, EU-MIDIS II, 2016

Another core component of the material deprivation dimension of the right to a social minimum is the right to food. As established before, EU-SILC uses the proxy question of whether the household is able to afford a meal eating meat, chicken, or fish every second day (or the vegetarian equivalent). EU-MIDIS II follows the EU-SILC in the

wording of this question, which allows for comparability. Figure 69 below shows the percentage of Roma households not able to afford a meal eating meat, chicken or fish or the vegetarian equivalent every second day. Whereas the numbers for the general population (EU-SILC data) are very low, the opposite is true for the Roma population. In Hungary, 71% of Roma households report that they are not able to afford it, while the numbers still exceed 50% in Romania, Bulgaria, Slovakia, Croatia, and Greece. In other words, more than half of the surveyed Roma households are not able to fully realise their right to food.

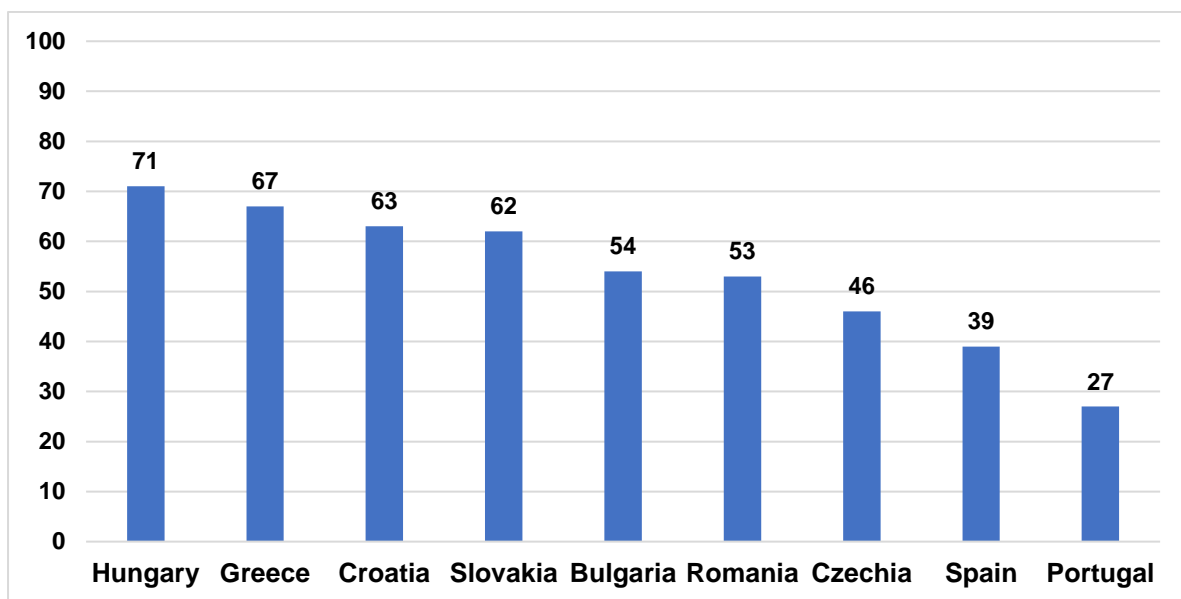


Figure 69. Percentage of Roma Households Not Able to Afford a Meal Eating Meat, Chicken or Fish or a Vegetarian Equivalent Every Second Day, EU-MIDIS II, 2016

Besides the poverty and the material deprivation dimensions, the work dimension of the right to a social minimum is also very difficult to realise for the Roma. Figure 70 illustrates the percentage of Roma respondents of working age population (20-64 years old) that were not in paid work in the last four weeks. The numbers range from 79% of Roma households not in paid work in Croatia to 48% in Hungary.

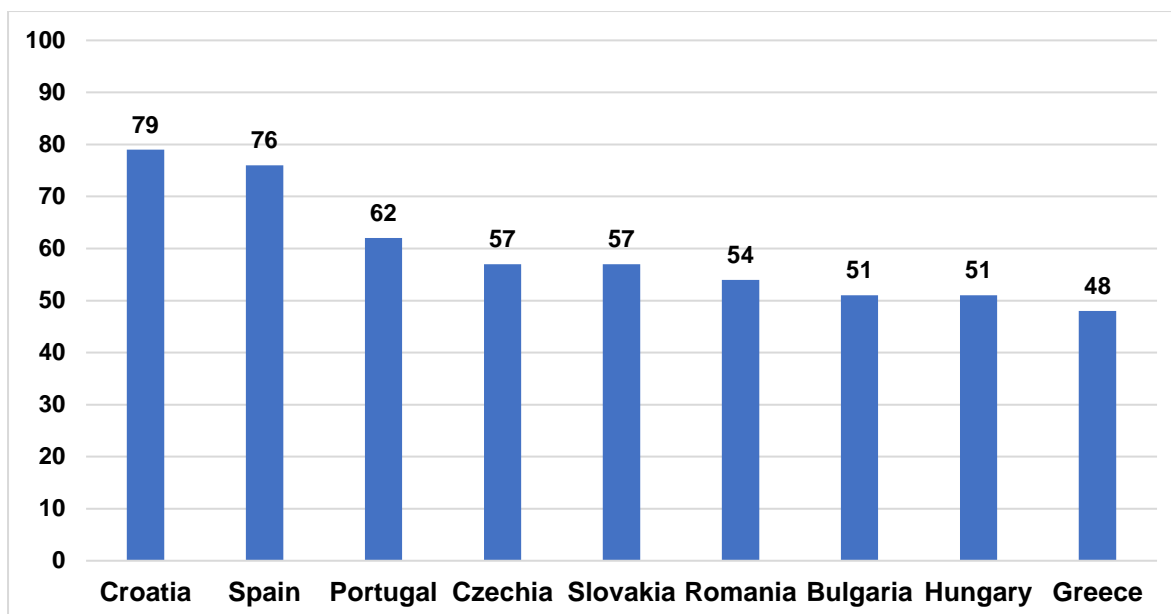


Figure 70. Percentage of Roma Respondents of the Working Age Population (20-64 years old) Not in Paid Work, EU-MIDIS II, 2016

A more detailed assessment of the Roma's realisation of the work dimension is found in Figure 71. Data labels are only provided for the 'unemployed'-category, sorted from highest to lowest percentage of 'unemployed'.

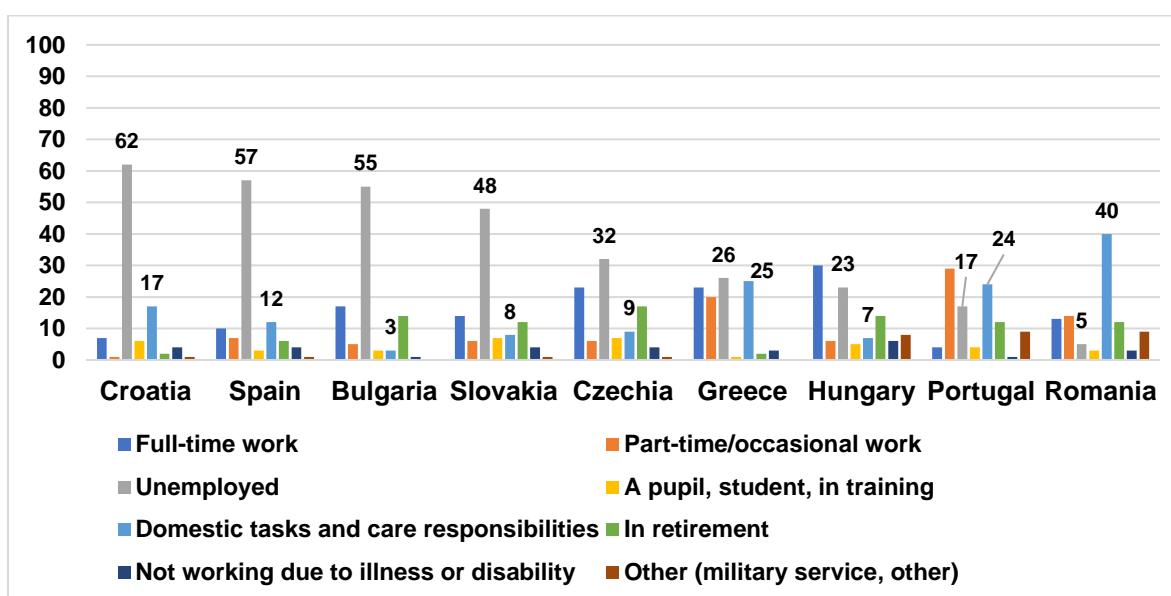


Figure 71. Current Job Situation of Roma Households in Percentages, EU-MIDIS II, 2016

For better readability of the percentage points, I also provide the data in Table 20 below.

Table 20. Current Job Situation of Roma Households, EU-MIDIS II, 2016

EU MS	Full-time work	Part-time/ occasional work	Unemployed	A pupil, student, in training	Domestic tasks and care responsibilities	In retirement	Not working due to illness or disability	Other (military service, other)
BG	17	5	55	3	3	14	1	0
CZ	23	6	32	7	9	17	4	1
EL	23	20	26	1	25	2	3	0
ES	10	7	57	3	12	6	4	1
HR	7	1	62	6	17	2	4	1
HU	30	6	23	5	7	14	6	8
PT	4	29	17	4	24	12	1	9
RO	13	14	5	3	40	12	3	9
SK	14	6	48	7	8	12	4	1

Roma respondents were asked to choose the response that best describes their current job situation. Eight different answers were possible: Besides full-time work, part-time/ occasional work, training, domestic responsibilities, retirement, Roma also had the option to choose ‘not working due to illness or disability’, an ‘other’-category and finally ‘unemployed’. Due to these details, this question allows a better overview over the different dimensions of the labour market.

Whereas the majority of Roma respondents in Croatia, Spain and Bulgaria still chooses the category “unemployed” as the most fitting box, the numbers are lower than those in Figure 70 had suggested. In particular, for Croatia the difference is more than 15 percentage points. Whereas according to the evidence of Figure 70, 79% of Roma respondents in Croatia were not in paid work in the last four weeks, according to Figure 71 only 62% report being unemployed. One of the most surprising results of Figure 71 are the numbers for Romania. Here, only 5% of respondents report that they are unemployed, compared to 54% of respondents that had answered of not having been in paid work in the last four weeks according to Figure 70. This stark difference can partially be explained due to Romania showing the largest number of respondents for the ‘domestic tasks and care responsibilities’-category (40%) in Figure 71. However, this does not mean that these 40% of people are unemployed in the mainstream sense of the word. Rather, Romania still has a high percentage of people

engaging in subsistence farming, which would most likely fall under this 'domestic tasks and care responsibilities'-category.

Summing up, the data from FRA's EU-MIDIS II-survey shows the staggering extent to which Roma are not able to realise their right to a social minimum. However, it must never be forgotten that the sampling strategy favours these results. By intentionally sampling Roma respondents in neighbourhoods with higher Roma density, the survey results do not provide a representative picture of all the Roma living in these EU MS. Hence, these results contribute to the already well-established narrative and stereotyping of Roma living in poverty, being lazy and not willing to integrate into mainstream society. This, however, should not be the case. Instead, one should always interpret these results with caution.

5.5.4 Why Populating Indicators with Disaggregated Data remains a Challenge for Roma

The previous sections have shown why data disaggregation is a particular challenge for the Roma. Given the issues of wide umbrella terms, unclear definitions, and hesitation to self-identify in official censuses, it is almost impossible to arrive at a sample that would be representative of the whole Roma population in any given EU MS. The issue of the legality of ethnic data collection is yet another issue that is central to any analysis of data disaggregation for the Roma. Indeed, in several EU MS ethnic data collection is deemed illegal,¹²²⁵ which is why they continuously refuse to collect data on ethnicity in their national censuses. Closely connected to the debate on the legality of ethnic data collection is the fact that no general population survey like EU-SILC includes data on ethnicity. To make real progress in collecting disaggregated data on the Roma, it is of paramount importance to not only engage in Roma-specific surveys, but also to include them in general population surveys. Below, I discuss the specific challenges of this approach, in particular the large sample size that would be required.

On the first issue, namely the question of whether the collection of ethnic data is prohibited, practices and standpoints vary widely between EU MS. Whereas several EU MS do collect ethnic data through their official censuses, others have rendered the

¹²²⁵ For a comparative overview, see Farkas (n 122); van Caeneghem, 'Challenges to Collecting Ethnic Data on the Roma Minority in Europe' (n 1165).

practice strictly illegal.¹²²⁶ One core issue regarding the collection of ethnic data is the EU's strict data protection regime under the GDPR.¹²²⁷ The GDPR generally prohibits the processing of sensitive data, which includes 'personal data revealing racial or ethnic origin'.¹²²⁸ However, Art 9 (2) gives a long list of exceptions to this general prohibition, as such constituting lawful grounds for processing of sensitive data. One first possibility for processing is if the data subject consents to the processing, the conditions for consent under Art 7 GDPR are fulfilled, and domestic law does not explicitly prohibit this possibility.¹²²⁹ Under Art 9 (2) (g), processing is possible when it is 'necessary for reasons of substantial public interest on the basis of Union or Member State law'. This law must be 'proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject'. Many EU MS interpret Art 9 GDPR rather strictly and simply refuse to collect any ethnic data. Even before the GDPR entered into force, a shadow report by the European Network Against Racism was very concerned that many EU MS interpreted data protection rules so strictly as to inhibit any collection of ethnic data.¹²³⁰ While fear of the high fines under the GDPR are understandable, the good practice example of EU MS like the UK that have lawfully collected ethnic data for decades shows that it is not impossible to collect ethnic data while staying in full compliance with the GDPR.

Regarding the second issue, the question is whether it would be feasible to include ethnic categories in large-scale general population surveys like EU-SILC. This is the approach championed by Messing, who claims that including ethnic categories in EU-SILC 'would resolve dilemmas of sampling, indicator construction and comparativeness of the data simultaneously'.¹²³¹ However, this rather optimistic assessment fails to acknowledge the need for a very large sample size to catch a

¹²²⁶ *ibid.*

¹²²⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) 2016 [OJ L 119].

¹²²⁸ Art 9 (1) GDPR.

¹²²⁹ See Art 9 (2) (a) GDPR. Under Art 8 (2) (a) GDPR, EU MS can exclude consent as a ground of lawful processing of sensitive data when such operations pose unusual risks for data subjects.

¹²³⁰ Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain; see M Lamberts, Arend Ode and B Witkamp, 'Racism and Discrimination in Employment in Europe' (European Network Against Racism 2012) ENAR Shadow Report 2012-2013 11.

¹²³¹ Messing (n 124) 825.

sufficient number of Roma to achieve representativeness. For example, an analysis of the census data on the Roma in Romania (with the highest number of Roma across the whole EU) shows that for every 1,500 people in the national sample, only 35 Roma would be captured.¹²³² Hence, one would need a huge sample, which will be impossible to achieve due to cost-efficiency reasons.

FRA's longstanding experience with data collection on the Roma proves that it is possible to produce disaggregated data by ethnicity, which is also comparable across countries. As mentioned above, one must be cautious not to confuse the results of Roma living in neighbourhoods with high Roma density as being representative of all the Roma, but if one takes this caveat into account, the collection of ethnic data is no longer an unsurmountable obstacle. A good practice example regarding the political will to collect disaggregated data on the Roma is Bulgaria. During my time as a Study Visitor at the FRA in 2019, I witnessed the establishment of a pilot project carried out by the National Statistical Institute of Bulgaria, implemented by the FRA and with financial support from the EEA/Norwegian Financial Mechanism. The goal of the project was the implementation of a large-scale representative survey on the Roma and other disadvantaged groups, which would allow a direct comparison of living conditions and other indicators.¹²³³ This project shows that the challenge of collecting ethnic data could be overcome with enough political will and in particular by giving enough salience to highlighting the need for it. In sum, I argue that EU MS should realise the right to a social minimum for the Roma by prioritising the development and collection of statistical data, which allows for disaggregation by ethnicity.

5.6 Intersectionality and Disaggregated Statistics

The previous section has shown that the HRTB's continued request to provide disaggregated statistics is far from easy to implement. When it comes to multiple disadvantage and discrimination, this is even more the case. Ever since Crenshaw's coined the term intersectionality in 1989, the literature on how to study and measure intersectionality has grown exponentially.¹²³⁴ However, it is rarely discussed how data disaggregation could become meaningful for instances of intersectionality. Figure 72 below reiterates the intersectionality between my three case studies in overlapping

¹²³² Rughiniş (n 1164) 342.

¹²³³ FRA, 'Fundamental Rights Report 2020' (n 1213) 96.

¹²³⁴ Crenshaw (n 563).

circles. The circles illustrate that intersectionality can happen not only between two of the three groups, but also between all three groups, in the form of Roma children with disabilities. When including the gender dimension, it would even be four intersections: a female Roma child with a disability.



Figure 72. Possible Intersections between Persons with Disabilities, Children, and Roma

For that reason, this section explores cases of intersectionality when aiming for disaggregated statistical data for the realisation of the right to a social minimum for children with disabilities (section 5.6.1), Roma children (section 5.6.2) and, for purposes of illustration, the example of a female Roma child with a disability (section 5.6.3).

5.6.1 Children with Disabilities

Under Art 31 (2) CRPD, states parties are specifically required to collect disaggregated data. Under Art 7 CRPD, children with disabilities are protected as a specifically vulnerable group. Reading Art 7 and Art 31 together, states parties are obligated to provide disaggregated statistics for children with disabilities. In its COs to EU MS, the CRPD Committee requested disaggregated statistics on children with disabilities in 7 cases.¹²³⁵ The CERD Committee requested poverty statistics on Roma children in its CO to Hungary.¹²³⁶ Even though the CRC does not include a specific Article on data

¹²³⁵ CRPD Committee, COs to DE 2015, para 16b (girls with disabilities); COs to HU 2012, paras 48-50 (lack of information on Roma children with disabilities); COs to LT 2016, para 17; COs to LU 2017, paras 14-15 (girls with disabilities); COs to LV 2017, paras 10-11 (girls with disabilities); COs to PL 2018, paras 11-12; COs to PT 2016, paras 17-18 (girls with disabilities).

¹²³⁶ CERD Committee, COs to HU 2019, para 20.

collection and statistics, the CRC Committee has issued concerns about the general lack of disaggregated statistics for all 28 EU MS, often more than once.

While the public information on EU-SILC on the Eurostat database allows basic disaggregation by age and by health status, it is not possible to combine the two. As such, it is possible to find poverty statistics for children (indirectly, via the household), and poverty statistics for persons with disabilities, but not for children with disabilities. Since EU-SILC is a household-based survey, children with disabilities living in institutions are not and will not be covered by design of the survey. In fact, no survey exists which would capture the socio-economic demographics of poor children with disabilities living in institutions. Under the framework of the Feasibility Study on an EU Child Guarantee, one specific report focused on children with disabilities,¹²³⁷ and another one on children in precarious family situations.¹²³⁸ This shows that EU does realize the need to put a specific policy priority on children with disabilities, even though it does not immediately help with the scarcity of disaggregated data. Homeless children, and children living in foster families or alternative care are not covered by EU-SILC either. Furthermore, direct poverty experiences of children (where children are surveyed directly) are lacking completely, which is highly problematic from a human rights perspective which demands child participation in all issues that affect them. While there is very valuable qualitative research which gives children with disabilities a voice,¹²³⁹ these studies are not comparable across EU MS.

This lack of disaggregated data for children with disabilities has been pointed out repeatedly.¹²⁴⁰ The CRC Committee is concerned about the lack of disaggregated statistics for children with disabilities in 19 cases.¹²⁴¹ This lack of data on children with disabilities is particularly worrisome given the high policy prevalence and priority of children with disabilities at EU level. Since the EU has ratified the CRPD, it is also

¹²³⁷ Paula Hunt, 'Target Group Discussion Paper on Children with Disabilities' (2019) Feasibility Study for a Child Guarantee (FSCG) <<https://ec.europa.eu/social/main.jsp?catId=1428&langId=en&moreDocuments=yes>> accessed 10 January 2023.

¹²³⁸ JM Fresno, S Meyer and S Bain, 'Target Group Discussion Paper on Children Living in Precarious Family Situations' (European Commission 2019) Feasibility Study for a Child Guarantee (FSCG) <<https://ec.europa.eu/social/main.jsp?catId=1428&langId=en&moreDocuments=yes>> accessed 27 December 2022.

¹²³⁹ C Larkins and others, "'We want to help people see things our way": A rights-based analysis of disabled children's experience living with low income' (Children's Commission for England 2013).

¹²⁴⁰ Helen Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012), 55.

¹²⁴¹ BE-5x, BG-6x, CY-1x, CZ-7x, DE-2x, EL-4x, ES-2x, FI-2x, FR-1x, IT-4x, LV-4x, MT-2x, NL-1x, PL-2x, RO-5x, SE-4x, SI-1x, SK-1x, UK-2x.

bound by the obligation to collect disaggregated in Art 31. While the EU's Disability Strategy of 2010-2020 is officially based on the CRPD, the issue of statistics is only mentioned once, without mentioning the need for disaggregation at all.¹²⁴² On a positive note, a specific question targeting children with disabilities has been included in EU-SILC since 2021.¹²⁴³

5.6.2 Roma Children

The CRC Committee requested statistical information on Roma children in 7 cases.¹²⁴⁴ As discussed above, EU-SILC does not provide disaggregated data by ethnicity. However, due to the FRA's EU-MIDIS II report, which does include Roma children for some questions, it is possible to compare their results with the 'general population' data obtained from EU-SILC data. The FRA published these results in their Roma-specific EU-MIDIS II report,¹²⁴⁵ and in their 2018 report on child poverty.¹²⁴⁶ Figure 73 below is taken from the FRA's Child Poverty Report.¹²⁴⁷ It illustrates the poverty gap between Roma children (EU-MIDIS II data) and children of the general population (EU-SILC data) in 2014. The results are very worrisome. In all eight EU MS, the at-risk-of-poverty rates of Roma children living in neighbourhoods with high Roma density are much more at-risk-of-poverty than non-Roma children.

¹²⁴² European Commission, 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe' (2010) COM(2010) 636 final.

¹²⁴³ The adapted GALI question for children (extended module EU-SILC 2017) reads: Is [child's name] limited because of a health problem in activities most children of the same age usually do? Would you say he/she is severely limited, limited but not severely, or not limited at all?

¹²⁴⁴ BG-1x, CZ-2x, HR-1x, IE-6x, PT-1x, RO-3x, SI-5x.

¹²⁴⁵ FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (n 34).

¹²⁴⁶ FRA, 'Combating Child Poverty' (n 1093).

¹²⁴⁷ *ibid* 19.

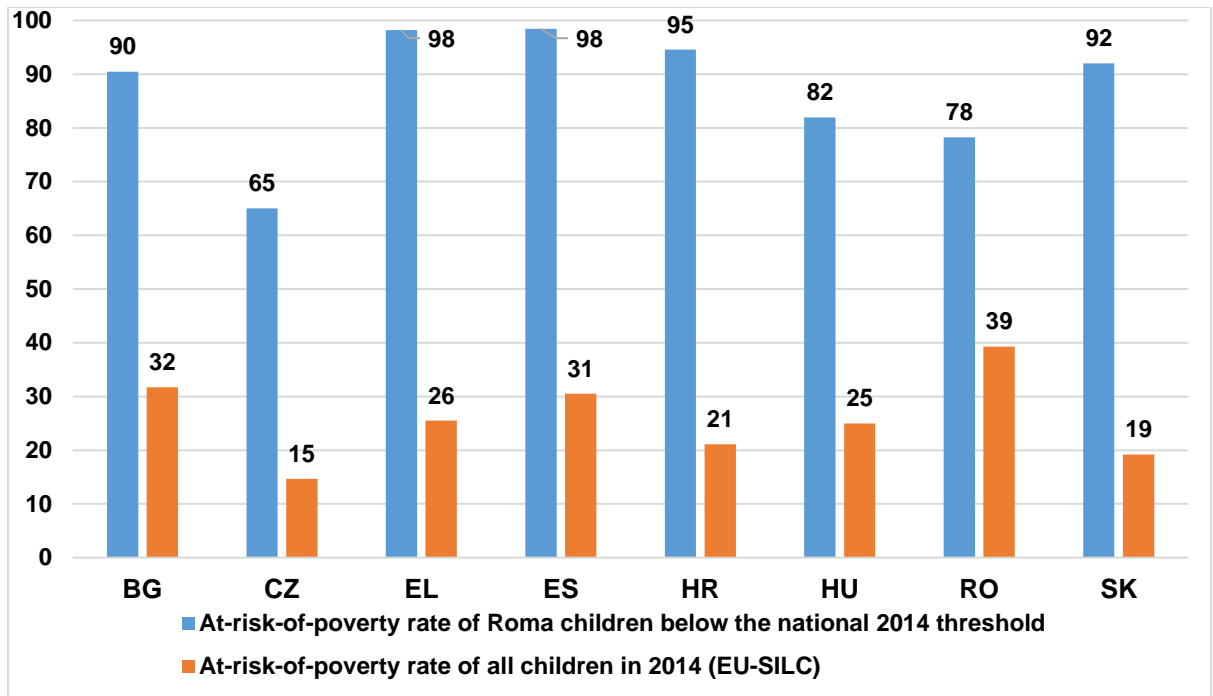


Figure 73. At-Risk-of-Poverty Rate of Roma Children Compared with the Rate for All Children in 2014, FRA Child Poverty Report, 2018

Figure 74 below shows the percentage of Roma children (0-15 years old) going to bed hungry because there was not enough money for food.¹²⁴⁸ While the graph might not look as worrisome as the at-risk-of-poverty rate at first sight, the results are still very concerning. For example, in Greece, almost half of the children (48%) report that they went to bed hungry at least once per month, of which quite a high number responded that it happened a few times (26%) or even several times (14%).

¹²⁴⁸ Exact wording of the question: "In the past month, have you or anyone in the household ever gone to bed hungry because there was not enough money for food? If yes, how often did this happen in the past month?". The graph is sorted from the largest to the smallest percentage for the category 'a few times (2-3)'.

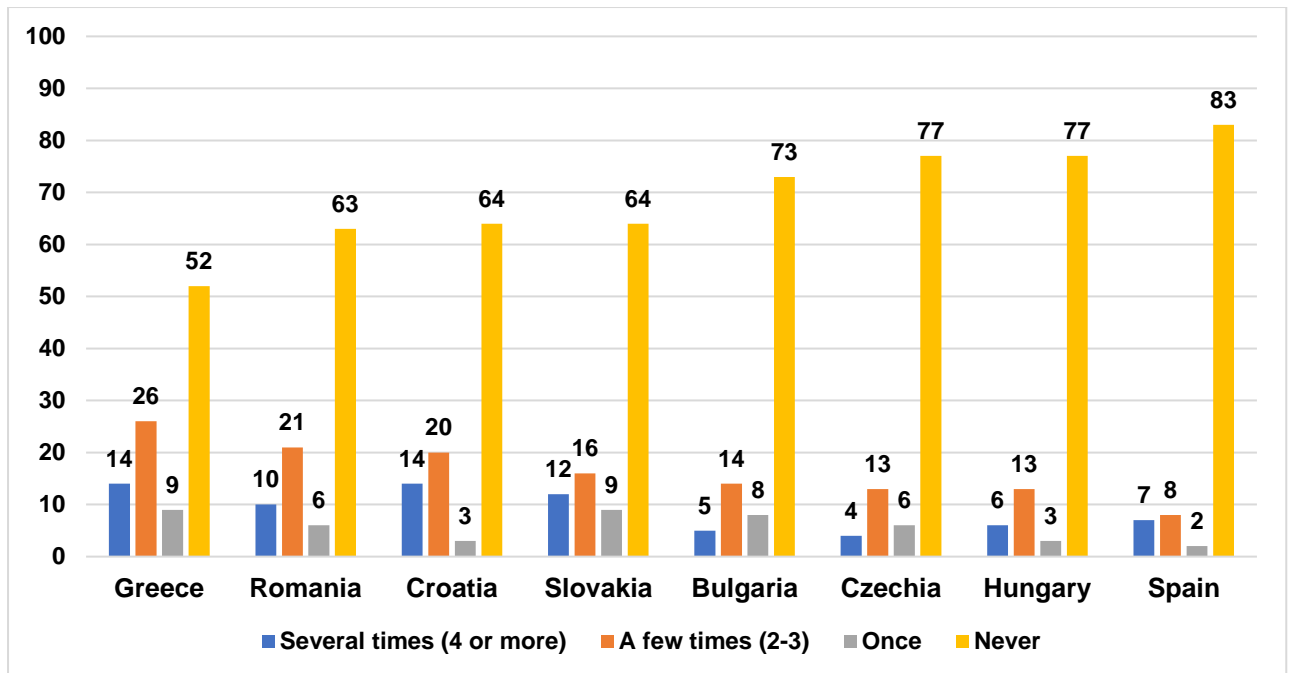


Figure 74. Percentage of Roma Children Going to Bed Hungry because There was Not Enough Money for Food, EU-MIDIS II, 2016

Figure 75 below shows the percentage of Roma children (0-15 years) living in households that cannot afford two pairs of properly fitting shoes for each family member.¹²⁴⁹ In Greece, Croatia, Romania, Hungary, Slovakia, Bulgaria, and Spain more than 60% of Roma children live in households that are not able to afford two pairs of shoes, whereas in Czechia and Portugal it is 38% and 36% respectively.

¹²⁴⁹ Exact wording of the question: “Can your household afford two pairs of properly fitting shoes for each household member (including a pair of all-weather shoes)?”.

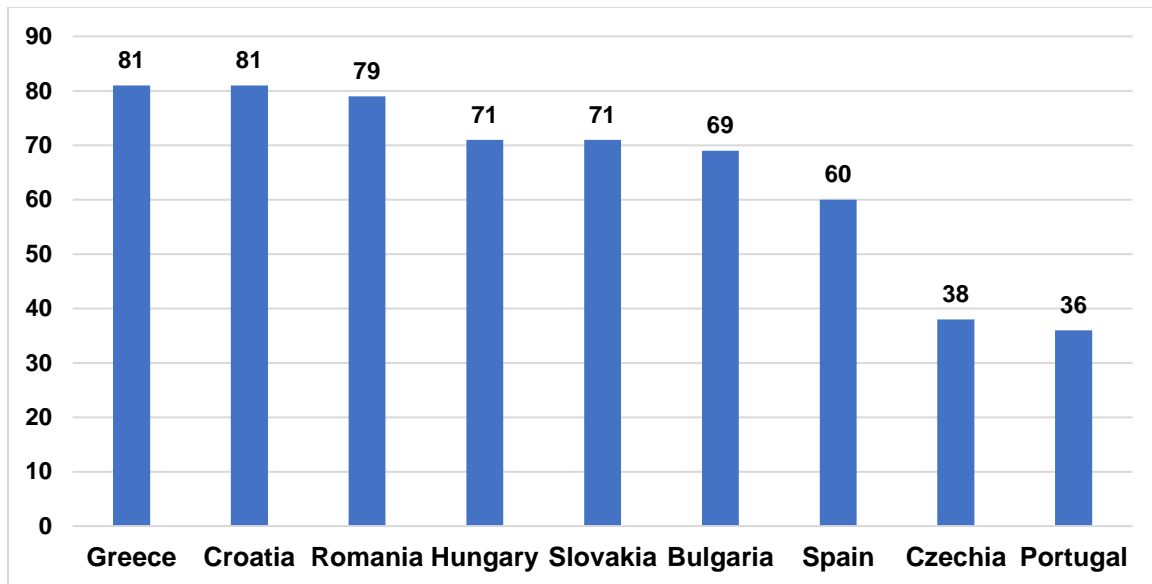


Figure 75. Percentage of Roma Children Living in Households that Cannot Afford Two Pairs of Properly Fitting Shoes for Each Family Member, EU-MIDIS II, 2016

In chapter 4, I have argued that educational segregation is one of the key conditions hindering Roma children from realising their right to a social minimum.¹²⁵⁰ Figure 76 depicts the segregation rate of the neighbourhood. Roma respondents were asked how many of residents in the neighbourhood are of the same ethnic background. Here as well the numbers vary widely across the EU MS. Bulgaria has the highest segregation rate, with 83% answering that all or most of the neighbourhood are of the same ethnic background. The numbers for Greece, Croatia, Hungary, Slovakia, and Romania are quite similar, ranging from a 78% segregation rate in Greece to a 68% segregation rate in Romania. In Spain and Czechia, less than half of the respondents answer that all or most of the neighbourhood is of the same ethnic background.

¹²⁵⁰ See section 4.6.2.

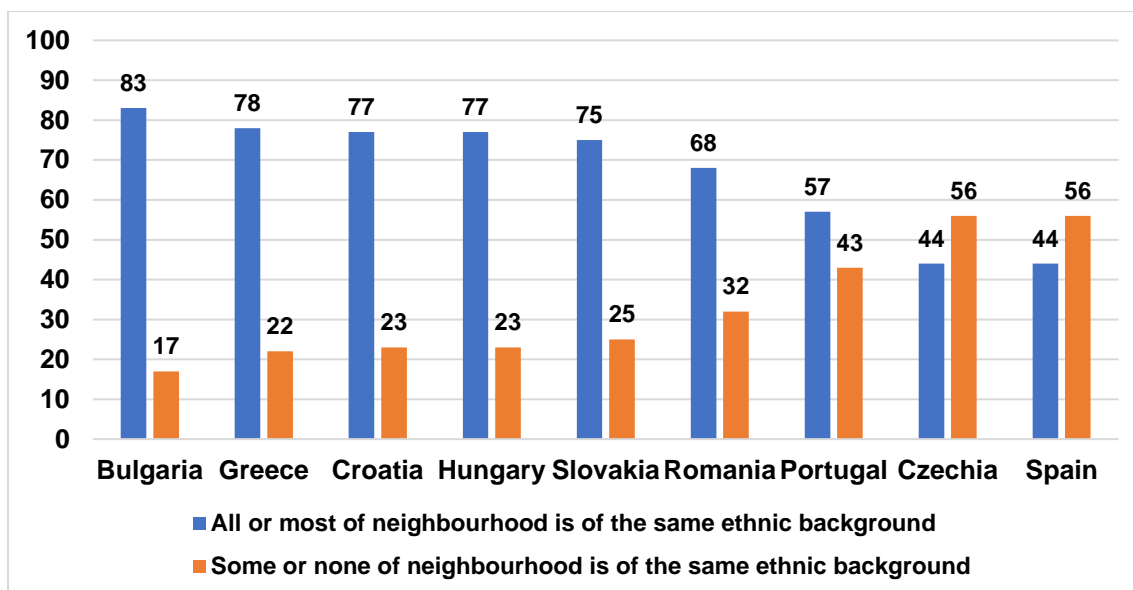


Figure 76. Segregation Rate of the Neighbourhood, EU-MIDIS II, 2016

Without an in-depth analysis of the sampling design, one might be tempted to take these numbers at face-value and conclude that Spain and Czechia could serve as good-practice-examples for making progress in desegregation of neighbourhoods. However, as mentioned above, the sampling design of the EU-MIDIS II survey was built on the premise of interviewing Roma respondents in neighbourhoods with high Roma density. This means that the high segregation numbers for Bulgaria, Greece, Croatia, Hungary, Slovakia, and Romania were purposefully built into the sampling design, claiming that EU-MIDIS II is representative of up to 80% of the Roma populations in the respective EU MS. This also means that the remaining 20% of the Roma populations most likely do not live in as segregated neighbourhoods and might have very different living situations than the previous graphs suggest.

The evidence I presented shows that the EU-MIDIS II-survey is a good starting point when it comes to disaggregated data for Roma children. However, it does come with several caveats, particularly due to the sampling design that focused on Roma neighbourhoods with high Roma density. This means that the evidence should not be presented as being representative of all the Roma living in the respective EU MS. While 'the (un-)availability of data often drives the definitions and conceptualisations of poverty',¹²⁵¹ the issue with Roma children rather is that EU MS' national statistical offices do not see the collection of disaggregated statistics as priority, even though they are required to do so under international human rights law. Hence, the question

¹²⁵¹ Nolan and Pells (n 538) 118.

of how to make the collection of disaggregated data a reality for Roma children, once again depends on sufficient resources, technical expertise and political will to invest in large-scale representative surveys.

5.6.3 The 'Most Intersectional' Case: a Female Roma Child with a Disability

When wanting to include as many dimensions of intersectionality as possible, the most intersectional case out of my three case studies would be a female Roma child with a disability. Unfortunately, no disaggregated data exists for this case. There is a rich literature on Roma's (lack of) access to healthcare.¹²⁵² Much less is written on the prevalence of disability among the Roma population, and even less on Roma children with disabilities. Finding a study that would additionally include the gender dimension can almost be likened to the tale of finding a needle in a haystack. One recent study that compared the prevalence of disability in Roma children with non-Roma children in four Eastern EU MS found that Roma children were twice as likely to have a disability than non-Roma children.¹²⁵³

FRA's EU-MIDIS II survey does include the disability dimension in the form of the GALI-question that is directly comparable with EU-SILC. Figure 77 below shows the percentage of Roma with an activity-limitations due to a longstanding health problem.¹²⁵⁴ However, it is not possible to use the FRA's data explorer to further disaggregate this question by sex or age. Hence, it is not possible to access information on Roma children with disabilities, Roma women with disabilities or Roma girls with disabilities. One exception is the question on the current main activity, which includes 'not working due to illness or disability' as one possible answer category. This question can be disaggregated by sex and has been included in FRA's 2019 report on

¹²⁵² Steve Hajioff and Martin McKee, 'The Health of the Roma People: A Review of the Published Literature' (2000) 54 *Journal of Epidemiology & Community Health* 864; Boika Rechel and others, 'Access to Health Care for Roma Children in Central and Eastern Europe: Findings from a Qualitative Study in Bulgaria' (2009) 8 *International Journal for Equity in Health* 24; Maria Eva Földes and Alina Covaci, 'Research on Roma Health and Access to Healthcare: State of the Art and Future Challenges' (2012) 57 *International Journal of Public Health* 37; Benjamin Cook and others, 'Revisiting the Evidence on Health and Health Care Disparities among the Roma: A Systematic Review 2003–2012' (2013) 58 *International Journal of Public Health* 885; Elisavet Athanasia Alexiadou, 'Ethnic Diversity and Access to Healthcare from a Human Rights Perspective: The Case of the Roma in Europe' (2018) 25 *European Journal of Health Law* 261.

¹²⁵³ Eric Emerson and Gwynnyth Llewellyn, 'The Prevalence of Disability among Roma and Non-Roma Children in Four West Balkan Countries' (2022) 15 *Disability and Health Journal* 101338.

¹²⁵⁴ Exact wording of the question: "For at least the past 6 months, to what extent have you been limited in activities people usually do because of a health problem?"

Roma women.¹²⁵⁵ However, the percentages of Roma women not working due to illness or disability are quite small.¹²⁵⁶ Results for the category “not working due to illness or disability” was answered in the affirmative by 1% of Roma women in Bulgaria (small sample size), 5% in Czechia, 2% in Greece, 3% in Spain, 4% in Croatia, 8% in Hungary, 1% in Portugal (small sample size), 2% in Romania and 4% in Slovakia.

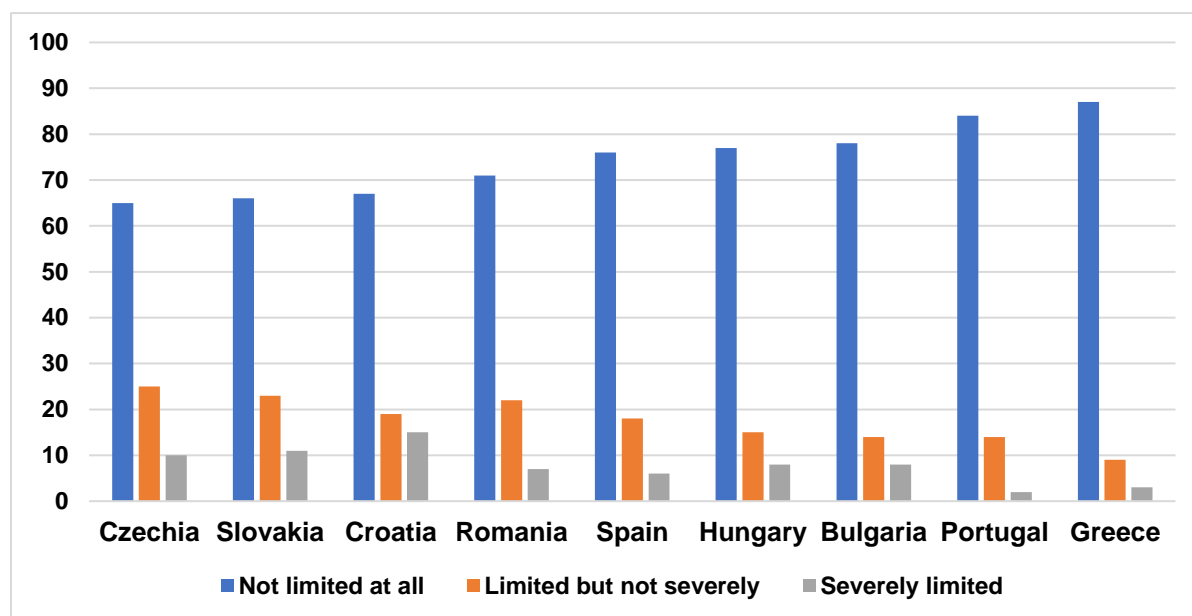


Figure 77. GALI-Question as Proxy for Disability: Percentage of Roma with a Self-Perceived Activity-Limitation due to a Longstanding Health Problem, EU-MIDIS II, 2016

In this section, I have assessed the availability of disaggregated data for the ‘most intersectional’ case of a female Roma child with disabilities, by using an intersectionality approach and the experience of multiple discrimination as an analytical lens. I show that any intersection of discriminations poses problems with data disaggregation, even for comparably ‘easier’ cases such as children with disabilities, Roma children or Roma with disabilities. This is why there is no generalist answer to the question of how EU MS should realise the right to a social minimum for those groups. Rather, in any case of intersectionality, the approach taken should be one that prioritises these groups. While prioritisation is more difficult without the ‘hard facts’ of disaggregated statistical data, it is not impossible or difficult to understand for

¹²⁵⁵ FRA, ‘Roma Women in Nine EU Member States’ (2019) 29 <<https://fra.europa.eu/en/publication/2019/roma-women-nine-eu-member-states>> accessed 29 December 2022, Table 1.
¹²⁵⁶ Exact wording of the question: “Which of these best describes your current job situation?”.

EU MS that any instance of intersectionality magnifies the risks of not being able to realise the right to a social minimum for those groups.

The European Commission's proposal to introduce a Child Guarantee which focuses on disadvantaged and marginalized children goes into the right direction. However, even this proposal does not consider all those cases of intersectionality that are by design hidden from official statistics. It is not enough to only consider those instances of intersectionality where a 'cheap' or 'easy' way to collect more and better disaggregated data exists. For example, creativity is needed to search for innovative ways of how to compare the poverty and material deprivation levels of children that do not live in private households and hence cannot be captured by household-level surveys.

5.7 Excluded by Design: EU-SILC and Disaggregation

I have often emphasized that the EU-SILC survey is the official data source for the AROPE-indicator, which measures poverty and social exclusion across EU MS. Databases that are disaggregated by sex have become somewhat standard. Hence, it is possible to disaggregate by sex for almost all survey questions contained in EU-SILC. However, it is rarely possible to disaggregate by more than one dimension. For example, the public version of EU-SILC does not allow disaggregation by sex, disability status and age at the same time. Nevertheless, this would be necessary to search for comparable cross-national information for female children with disabilities, for example. Another key problem is that the prototype of the able-bodied white man has become so normalized and standardized in the development of almost all statistical databases that women continue to be invisible at best, and seriously harmed at worst, as Criado-Perez has illustrated beautifully in a recent book.¹²⁵⁷

In social policy analyses, the adequacy of MIPS and minimum wages is routinely assessed by comparing benefit levels with the AROP threshold. Yet, the risk of poverty or social exclusion is not distributed equally in society. On the contrary, marginalized, and disadvantaged groups are disproportionately affected. Here, the central problem when assessing poverty and social exclusion rates with the AROPE indicator is the fact that EU-SILC as the underlying data source for this indicator systematically excludes some of the most disadvantaged and marginalized groups

¹²⁵⁷ Caroline Criado-Perez, *Invisible Women: Data Bias in a World Designed for Men* (Abrams Press 2019).

across Europe. The EU-SILC survey only covers people living in private households, as such excluding anybody who lives in any type of institution or collective households. This means that – by design - people living in institutions such as elderly homes, refugee centres, or hospitals are not covered by EU-SILC.

In its GC 6, the CRPD Committee recognizes this exclusion by design in many official sources and calls on states parties to systematically include ‘people living in closed places, such as institutions or psychiatric hospitals’.¹²⁵⁸ However, such ‘systematic’ inclusion is far from easy. Rather, so far, systematic *exclusion* is the norm in EU-SILC. It is a sad fact that no official cross-national comparisons of poverty rates exists on EU-level, which the HRTBs cannot solve by continuously calling for disaggregation without any more sticks or carrots to help bring policy relevance to this crucial issue. There is no cross-European database available which compares the institutionalization rates of persons with disabilities, despite the continuous concerns of the CRPD Committee in this regard. Despite being an official cross-national statistical database that underlies every single statistical report on poverty across the EU MS, the EU-SILC survey fails to capture almost all of the most disadvantaged and marginalized groups that I identified in the HRTBs’ jurisprudence.¹²⁵⁹

By design, the EU-SILC does not collect statistics on the respondents’ ethnicity. This is a particular problem when trying to access comparable data regarding the Roma, the EU’s largest minority. Some EU member states even enforce strict legal prohibitions of the collection of any ethnicity data.¹²⁶⁰ While the issue of ‘hard-to-reach’-groups with a particular emphasis on the Roma has attracted quite a lot of scholarly attention,¹²⁶¹ there are very few attempts to set up a cross-national, comparative survey on the Roma. Anyone without an address is not covered by EU-SILC. This does not only systematically exclude homeless people, but also most Roma and Travellers.¹²⁶² In contrast to this exclusion by design, I have shown in section 5.2 that HRTBs continuously call on states parties to systemically disaggregate by ethnicity. A positive exception to the lack of data on the Roma are the FRA’s EU-MIDIS

¹²⁵⁸ CRPD Committee, ‘General Comment No. 6 on Equality and Non-Discrimination’ (n 336) para 71, regarding Art 31 on statistics and data collection.

¹²⁵⁹ Nicaise, Schockaert and Bircan (n 303).

¹²⁶⁰ Farkas (n 122).

¹²⁶¹ Messing (n 124); Willis and others (n 124); Tourangeau and others (n 124); Tremlett and McGarry (n 124); Firchow and Mac Ginty (n 124).

¹²⁶² Nicaise, Schockaert and Bircan (n 303).

and EU-MIDIS II surveys, assessing the living conditions of Roma and contrasting the results with non-Roma living nearby.¹²⁶³

The EU-SILC is not only the official underlying data source that comparatively assesses living standards across the EU, but it is also one of the most commonly used survey by researchers. However, the EU-SILC is not an easy survey to work with. The publicly available data is accessible via the Eurostat website. With the help of the Data Explorer, everybody can find aggregated summary statistics on most aspects of the AROPE indicator. However, when trying to disaggregate these statistics, things start to become more difficult. For example, one can find poverty statistics of children on the one hand, and poverty statistics for persons with disabilities on the other hand. Yet, it is not possible to combine the two and learn about comparable poverty statistics for children with disabilities across the EU MS. Even though this would be a technical possibility, the very stringent anonymization requirements preclude further disaggregation. Often, the sample size is too small to ensure the anonymity of survey respondents, and privacy concerns do not allow the disaggregation of data. It would also be extremely costly and cumbersome to enlarge the sample size to reach very specific population groups, for example poor female children with disabilities.

In order to overcome some of these problems with the lack of publicly accessible disaggregated data, I gained access to the restricted microdata underlying the publicly available EU-SILC data.¹²⁶⁴ The microdata essentially consists of four large datasets containing information about each household member that was interviewed in a particular survey year. This allowed me to see the data in its most disaggregated form, by seeing the individual-level data. However, even microdata access does not remedy the particular survey design of EU-SILC, which systematically excludes some of the most marginalised groups. Unless the survey design is changed, EU MS will not be able to fulfil their obligations to collect disaggregated data on particularly disadvantaged and marginalized groups.

5.8 Conclusion

In this chapter, I have argued that the widespread unavailability of disaggregated data for persons with disabilities, children and Roma underlies the difficulties EU MS have

¹²⁶³ FRA, 'Second European Union Minorities and Discrimination Survey: Roma – Selected Findings' (n 34).

¹²⁶⁴ Project number RPP 387/2018.

for realising the right to a social minimum for these three groups. Put more simply, my main argument was that the realisation of the right to a social minimum requires the collection of disaggregated data. I established how official statistical data tends to fall short of the data collection and disaggregation requirements under international human rights law. I offered a human rights critique of the EU-SILC survey, which fails to capture almost all the most disadvantaged and marginalized groups as identified through the doctrinal analysis of CESCR and the qualitative content analysis of the group specific HRTBs. Due to the official status of EU-SILC – being the survey which underlies almost all official statistics on and poverty and social exclusion across the EU, the failure to include disadvantaged and marginalized groups poses a serious problem to EU MS.

Indeed, I have argued in previous chapters that EU MS have an obligation under international human rights law to realise the right to a social minimum by providing non-discriminatory access to minimum essential levels of subsistence. Non-discriminatory access cannot be guaranteed without ensuring the availability of disaggregated data. If there is no data collected or no data available to assess which groups might be discriminated in which area of life, it is impossible to design policies to counter these processes. It is a well-known fact that the risks of poverty or social exclusion are not distributed equally in society. Marginalized and disadvantaged groups are affected disproportionately. Hence, disaggregated data is needed to close these poverty and employment gaps.

Whereas HRTBs continuously point out the EU MS' legal obligation to provide these disaggregated statistics, little is being done to achieve it. Across EU MS it is often very difficult, costly, or even illegal to collect disaggregated data. For most of the groups that CESCR identifies as disadvantaged or marginalized, data is either not available at all, or not in disaggregated form. Yet, producing disaggregated data on disadvantaged and marginalized groups is a necessary condition to realise the right to a social minimum. Making this data more freely available to human rights actors and scholars would allow them to hold states parties more fully to account in the context of realising the right to a social minimum. What is needed is more political will, more targeted resources, and more technical know-how of how to make sure that representative data is being collected on persons with disabilities, children, and Roma. In other words, EU MS should realise the right to a social minimum by prioritising intersectionality in the context of data disaggregation efforts.

Chapter 6: Conclusion

In this thesis, I have argued that conceptualising the minimum core doctrine as a substantive right to a social minimum provides the normative foundation upon which all realisation efforts should rest. By defining the right to a social minimum as non-discriminatory access to minimum essential levels of subsistence, I have anchored the non-discrimination obligation as an integral component of the minimum core doctrine. In addition to this theoretical work, I analysed the realisation of the right to a social minimum for three specific disadvantaged and marginalized groups: persons with disabilities, children, and Roma. EU MS can only prioritise the realisation of the right to a social minimum once they know which groups are disadvantaged and marginalized, and in which way(s). It is not enough for EU MS to pledge the fight against poverty *in abstractum*. Rather, they need to prioritise the collection of disaggregated data, so that the right to a social minimum can be realised in a non-discriminatory manner.

In the introduction, I framed my overall research question in the following way: *How should EU MS realise the international human right to a social minimum?* I have answered research question in four building blocks, as summarised in section 6.1 of this conclusion. In section 6.2 I propose a methodological agency and in section 6.3 a social policy agenda.

6.1 How Should EU MS Realise the Right to a Social Minimum?

Figure 78 below depicts the four building blocks that I have utilised in this thesis to answer my overarching research question.



Figure 78. The Four Building Blocks of my Thesis

In building block 1, as developed in chapter 2, I have discussed the conceptualisation and measurement of poverty according to the social policy perspective on the one hand, and the human rights perspective on the other hand. I surveyed the different ways in which social policy scholars conceptualise poverty. I then provided a human rights critique to the narrative of poverty as being a behavioural problem, which is only worthy of social support for ‘deserving’ people. I showed that human dignity is the human rights’ perspective’s most powerful counterfactual to the deservingness-claim of an overly behavioural social policy perspective. Regarding the measurement of poverty, I contrasted the social policy and human rights perspectives. While human rights indicators are at the centre of any human rights approach to the measurement of poverty, they cannot adequately address challenges of data disaggregation without taking into account that any indicator must be populated with disaggregated data.

In building block 2, as developed in chapter 3, I reframed the minimum core doctrine as a substantive right to a social minimum, defined as non-discriminatory access to minimum essential levels of subsistence. I argued that conceptualising the minimum core doctrine as a substantive right makes it more tangible and easier to realise. In order to move beyond the abstract normative content of the right to a social minimum as distilled from CESCR’s GCs, I have analysed CESCR’s COs to the EU MS from 2009-2019 using a hybrid of the classical doctrinal method and qualitative content analysis with MAXQDA. Using this software allowed me to analyse the COs

systematically, using a coding-frame that gave me immediate access to the primary sources in a structured way. Since 'non-discriminatory access' is a crucial sub-component of my definition of the right to a social minimum, I identified three particularly disadvantaged groups as my case studies, namely persons with disabilities, children, and Roma. To distil the normative content of the right to a social minimum for my three groups, I widened my primary sources beyond CESCR to include the COs of four additional group specific HRTBs (CRPD, CRC, CERD, CEDAW).

After identifying the poverty, material deprivation and work dimensions to the right to a social minimum, I fleshed out important differences and similarities between the three groups, the EU MS and the HRTBs. While for persons with disabilities, the work dimension is prevalent, for children it is the poverty dimension and for Roma the material deprivation dimension. However, this simple conclusion does not hold true when taking intersectionality into account. Hence, I argued that EU MS need to not only be aware of the differences between groups, but also of the crucial importance of considering intersectionality. This allows the EU MS to realise the right to a social minimum not only for the general population, but also for specific disadvantaged and marginalized groups. In sum, chapter 3 served as the normative foundation for the rest of the thesis, analysing the hindering conditions under which EU MS fail to realise the right to a social minimum for the populations concerned by my three case studies. In particular, I demonstrated that my conceptualisation of the right to a social minimum can help to turn international human rights law into a useful normative framework for the future of social policy making in the EU.

In building block 3, as developed in chapter 4, I argued that austerity, social protection gaps and patterns of discrimination are the three explanatory conditions that hinder persons with disabilities, children, and Roma most from realising their right to a social minimum. I showed the fruitfulness of not restricting myself to the analysis of formal legal means in the form of domestic application and justiciability. Affirmations of core human rights doctrines arguably have not yet achieved a real change of circumstances and better rights realisation – not even at the most minimal level – for the most disadvantaged and marginalized groups. Instead, I showed that austerity is a key explanatory factor. While not every EU MS was affected by loan conditionality, the prevalence of cuts and saving measures still had a disproportionate impact on disadvantaged groups. At the same time, social protection gaps in the form of

inadequate MIPS are putting a serious restraint on the ability to realise the right to a social minimum. Even extremely wealthy states could still choose not to spend their resources on benefits for the vulnerable. Finally, patterns of discrimination have continuously been underestimated as a potential hindering condition for realising the right to a social minimum. Stereotypes, negative attitudes, and the perception that certain groups are less deserving when it comes to public spending, play a major role. Indeed, many disadvantaged and marginalized groups are also the ones most prone to being discriminated against. I additionally identified educational segregation for children with disabilities and Roma children as a key explanatory condition that takes intersectionality seriously.

It is time for human rights lawyers to move beyond the narrow legal emphasis on justiciability and formal implementation of human rights norms by acknowledging and confronting the practical conditions and constraints under which states are operating. I also addressed the widespread lack of cross-fertilization of ideas between comparative welfare state scholars measuring differences in institutional design and welfare outcomes and human rights scholars focusing on the enforcement of socio-economic rights. As a practical recommendation, the HRTBs should widen their scope beyond state-by-state reporting to a truly cross-national comparison that would enable policymakers to learn from the problems and good practices in other countries from a human rights perspective. Additionally, it would allow legal human rights scholars to benefit from a wider view on what hinders the realisation of the right a social minimum for persons with disabilities, children, and Roma across the EU MS.

In building block 4, as developed in chapter 5, I have argued that the widespread unavailability of disaggregated data for persons with disabilities, children and Roma underlies the difficulties EU MS have in realising the right to a social minimum for these three groups. The realisation of the right to a social minimum requires the collection of disaggregated data. I showed how official statistical data tends to fall short of the data collection and disaggregation requirements under international human rights law. I further offered a human rights critique of the EU-SILC survey, which fails to capture many disadvantaged and marginalized groups. Due to the official status of EU-SILC – being the survey underlying almost all official statistics on and poverty and social exclusion across the EU – its failure to include disadvantaged and marginalized groups poses a serious problem to EU MS. EU MS have an obligation under international human rights law to realise the right to a social

minimum by providing *non-discriminatory access* to minimum essential levels of subsistence.

Non-discriminatory access cannot be guaranteed without ensuring the availability of disaggregated data. Hence, producing disaggregated data on disadvantaged and marginalized groups is a necessary condition to realise the right to a social minimum. Making this data more freely available to human rights actors and scholars would allow them to hold states parties more fully to account in the context of realising the right to a social minimum. Political will, more targeted resources, and more technical know-how are needed to make sure that representative data is being collected on persons with disabilities, children, and Roma. Summing up, EU MS should realise the right to a social minimum by prioritising intersectionality in the context of data disaggregation efforts.

6.2 A Methodological Agenda: The Promises of Qualitative Comparative Analysis for Comparative Research on the Realisation of Human Rights

In my thesis, I showed the added value of my explicitly socio-legal, interdisciplinary, and comparative methodological approach. By combining classical doctrinal analysis with systematic quantitative content analysis, I applied abstract normative standards to a particular time and place. The mass analysis of the COs of five HRTBs across the EU MS from 2009-2019 provided a comprehensive picture of how international human rights law envisages that the right to a social minimum should be realised. I also used a human rights lens to interrogate the EU's official statistics on poverty and social exclusion to show how EU MS fail to realise the right to a social minimum in practice, in particular for disadvantaged and marginalised groups. However, this is not an end in itself. For future research, I therefore propose Qualitative Comparative Analysis (QCA) as a particularly promising approach and methodology to bridge the gap between human rights and social policy.

QCA is a comparative, set-theoretic method, which was originally developed by Ragin to bridge qualitative and quantitative approaches.¹²⁶⁵ Since then, the method has developed considerably, with many applications and studies in comparative

¹²⁶⁵ Charles C Ragin, *The Comparative Method: Moving beyond Qualitative and Quantitative Strategies* (University of California Press 1987).

welfare research.¹²⁶⁶ However, while QCA has been proposed as a promising method for human rights research,¹²⁶⁷ to my knowledge it has not been applied yet. In this section, I propose QCA as a promising method for future interdisciplinary and comparative research on the realisation of human rights.

My thesis has shown that austerity, social protection gaps, and patterns of discrimination are some of the most important explanatory conditions for why EU MS fail to realise the right to a social minimum for persons with disabilities, children, and Roma. However, my thesis has not been able to show exactly which combination of conditions has the most explanatory power for which EU MS and which group. In future research, QCA would be able to shed a light on exactly this.

The added value of using QCA as an approach and overarching methodology for a future methodological research agenda is manifold. First of all, QCA enables careful normative engagement with legal sources while not neglecting the importance of an in-depth understanding of each case. Secondly, QCA allows for causal complexity not only in its holistic understanding of conditions, but also by explicitly accounting for different pathways of conditions leading to the same outcome. Hence, using QCA would go even one step further in bridging the gap between human rights law and social policy research. Such an analysis would be valuable for legal human rights scholars working on socio-economic rights, no matter whether they are proponents or opponents of justiciability.

In my thesis, I have already done the groundwork of calibration by clarifying the core obligations of international socio-economic by helping specify how abstract concepts like the 'minimum core' are filled with rich normative content when taking the non-discrimination obligation seriously. This normative groundwork could be 'translated' into fuzzy scores, so that a further analysis of explanatory pathways becomes possible. The insights of which combinations of hindering conditions are most pronounced for which group in which EU MS would provide even more valuable insights into why EU MS largely fail to realise the right to a social minimum for the most disadvantaged and marginalized and how to overcome this. In sum, QCA

¹²⁶⁶ Patrick Emmenegger, Jon Kvist and Svend-erik Skaaning, 'Making the Most of Configurational Comparative Analysis: An Assessment of QCA Applications in Comparative Welfare-State Research' (2013) 66 *Political Research Quarterly* 185.

¹²⁶⁷ Axel Marx and Jadir Soares, 'Applying New Methodological Tools in Human Rights Research. The Case of Qualitative Comparative Analysis' (2016) 20 *The International Journal of Human Rights* 365.

promises to be a valuable approach and methodology for a future methodological research agenda, which would build further bridges between human rights and social policy scholars.

6.3 A Policy Agenda: Embedding the Right to a Social minimum in the EU Infrastructure

The ability of EU MS to realise the right to a social minimum does not only depend on the EU MS itself, but also on EU infrastructure regarding the availability of disaggregated data, the survey-design of EU-SILC underlying official poverty measurements, and macroeconomic governance in the aftermath of financial crises. This means that even though EU MS are states parties to international human rights treaties, they are to a certain extent dependent on the EU when it comes to fulfilling their international human rights obligations. At the same time, the EU has not given the same level of attention, political will, and resources to social policy issues, compared to economic governance and macroeconomic convergence. Indeed, the EU's handling of the 2007-2008 economic crisis, which led to heavy austerity measures and consequently to unemployment, poverty, and social exclusion, has been heavily criticised.

The area of MIPS is particularly tricky. While the EU does not have formal legislative competence on social assistance or similar last resort schemes, the EU does have considerable influence on EU MS in this area. One area is the CJEU's jurisprudence on mobile but economically inactive citizens that decide to move from one EU MS to another and claim social assistance benefits. This line of case law has become more and more restrictive in recent years, with some even questioning whether the idea of European citizenship has any value for economically inactive citizens.¹²⁶⁸ Another area of EU influence is the power of ideas like 'social investment' or 'active labour market policies' that had originally been coined as a way to modernize MIPS in such a way as to actively support people to get back into work, rather than passively provide them with an income without incentives to get back into work. However, in the context of the economic crisis and without paying special attention to

¹²⁶⁸ Dion Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 Cambridge Yearbook of European Legal Studies 270; Herwig Verschueren, 'The Right to Social Assistance for Migrating Union Citizens: A Step Forward in the Case Law of the Court of Justice This Time' (2021) 23 European Journal of Migration and Law 202.

disadvantaged and marginalized groups, these ideas quickly backfired and arguably caused more poverty, unemployment, and social exclusion, rather than more work.

Hence, in recent years, the EU has made several attempts to re-balance the economic with the social. In 2017, it proclaimed the European Pillar of Social Rights (EPSR).¹²⁶⁹ While the Pillar is not legally binding, to aid its implementation the Commission first adopted a Social Scoreboard¹²⁷⁰ and then followed up with an Action Plan, which sets headline targets to be reached by 2030.¹²⁷¹ Hence, this Action Plan is comparable to previous initiatives in the social realm, like the Europe 2020 agenda. Even though the EPSR does not have the same ‘teeth’, as EU tools for macroeconomic governance, it did put the social realm higher on the EU’s agenda.¹²⁷²

One area of the social realm, where the EU has shown recent legislative initiative is Directive 2022/2041 on adequate minimum wages in the European Union on minimum wages,¹²⁷³ which was adopted after several calls for EU action in this area.¹²⁷⁴ It is in line with Principle 6 EPSR, which reads:

Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented.

While the EU does not have competence to set a common European minimum wage, the Directive aims at improving the adequacy of minimum wages and at closing gaps in the coverage of minimum wage protection by setting a framework for minimum standard. Hence, it is definitely a step in the right direction to put the aspirational Pillar of Social Rights into legislative action.

¹²⁶⁹ European Commission, ‘Proposal for an Interinstitutional Proclamation of the European Pillar of Social Rights’ (n 10).

¹²⁷⁰ Eurostat, ‘European Pillar of Social Rights - Social Scoreboard Indicators’ (n 11).

¹²⁷¹ European Commission, ‘European Pillar of Social Rights Action Plan’ (n 11).

¹²⁷² Garben, Kilpatrick and Muir (n 13); Aranguiz (n 13); Patrik Vesan and Francesco Corti, ‘New Tensions over Social Europe? The European Pillar of Social Rights and the Debate within the European Parliament’ (2019) 57 *Journal of Common Market Studies* 977; Alexandris Polomarkakis (n 13).

¹²⁷³ Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on Adequate Minimum Wages in the European Union (n 16).

¹²⁷⁴ Francesco Costamagna, ‘Minimum Wage in EU Law Between Public Procurement and Posted Workers: Anything New Under the Sun After the RegioPost Case?’ (2017) 1 *European Law Review* 101; Ane Aranguiz and Sacha Garben, ‘Confronting the Competence Conundrum of an EU Directive on Minimum Wages: In Search of a Legal Basis’ (2019) #9.19 *College of Europe Policy Brief*; Sarah Marchal, ‘An EU Minimum Wage Target for Adequate In-Work Incomes?’ (2020) 22 *European Journal of Social Security* 452; Ane Aranguiz and Sacha Garben, ‘Combating Income Inequality in the EU: A Legal Assessment of a Potential EU Minimum Wage Directive’ (2021) 46 *European Law Review* 156.

In a similar vein, academic calls for a European framework directive on MIPS have become increasingly louder.¹²⁷⁵ The importance of adequate MIPS has been established by several aspirational EU documents, most importantly Principle 14 of the European Pillar of Social Rights which states:

Everyone lacking sufficient resources has the right to adequate minimum income benefits ensuring a life in dignity at all stages of life, and effective access to enabling goods and services. For those who can work, minimum income benefits should be combined with incentives to (re)integrate into the labour market.

The current EU framework on MIPS can be traced back to the Council Recommendation 92/441/EEC (1992).¹²⁷⁶ In it, the Council recommends EU MS ‘to recognize the basic *right* of a person to sufficient resources and social assistance to live in a manner compatible with human dignity’ (emphasis added).¹²⁷⁷ Hence, the *language* of rights and human dignity has been recognized from the very beginning, even though no legally binding framework to enforce this right existed in 1992. With the Commission Recommendation 2008/867/EC (2008),¹²⁷⁸ the policy idea of active inclusion was introduced. While Recital 1 of the Recommendation does refer back to human dignity as a ‘founding principle of the European Union’ and cites Art. 34 CFR which establishes the ‘right to social and housing assistance’, the remainder of the text is not fully committed to a dignity- and rights-based approach. Instead, there is a heavy emphasis on ‘active availability for work’,¹²⁷⁹ which indeed became the defining feature of MIPS in the years to come. As a counter-narrative, an own-initiative European Parliament Resolution of 2017 highlighted the role of MIPS as ‘a tool for fighting poverty’.¹²⁸⁰ In particular, the Parliament stressed that the ‘right to social assistance is a fundamental right and that adequate minimum income schemes help people to live

¹²⁷⁵ Anne van Lancker, ‘Working Document on a Framework Directive on Minimum Income’ [2010] EAPN Working Paper <<https://www.eapn.eu/wp-content/uploads/Working-Paper-on-a-Framework-Directive-EN-FINAL.pdf>> accessed 26 December 2022; Aranguiz (n 891); van Lancker, Aranguiz and Verschueren (n 275).

¹²⁷⁶ Council Recommendation of 24 June 1992 on Common Criteria Concerning Sufficient Resources and Social Assistance in Social Protection Systems 1992 [92/441/EEC, OJ L 245/46].

¹²⁷⁷ *ibid* A.

¹²⁷⁸ Commission Recommendation of 3 October 2008 on the Active Inclusion of People Excluded from the Labour Market 2008 [2008/867/EC, OJ L 307/11].

¹²⁷⁹ *ibid*, see for example para 4 (a) (i).

¹²⁸⁰ European Parliament Resolution of 24 October 2017 on Minimum Income Policies as a Tool for Fighting Poverty 2017 [2016/2270(INI)].

a life in dignity',¹²⁸¹ as such coming full circle to the dignity- and rights-based approach of the 1992 Council Recommendation.

In the autumn of 2020, at the height of the COVID pandemic, the Council adopted Conclusions on 'Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond'.¹²⁸² To assess the MIPS of the EU MS, accessibility, adequacy, and enabling aspects are used as the three main principles. Adequacy is defined in the following way:

Based on the principle of a life in dignity, basic needs should be covered by minimum income benefits in an adequate manner taking account of living standards and price levels or national poverty lines in the Member State concerned. Needs should be assessed through the application of consistent and transparent methods; adjustment of benefits should be regular and linked to appropriate indicators. Adequate consideration should be given to household composition and specific individual needs, for instance disability, childcare or long-term care.¹²⁸³

This definition of adequacy contains several promising formulations that come close to my assessment of the realisation of the right to a social minimum. For example, the explicit reference to a 'life in dignity' is closely related to the human rights approach that I have advocated for. The statement that 'basic needs should be covered by minimum income benefits' is a step in the right direction, even though I have shown in this thesis that, in almost every EU MS, MIPS are designed in such a way as to keep people under the official at-risk-of-poverty or social exclusion rate.

Finally, the Council Conclusions even explicitly refer to the issue of disaggregated data.¹²⁸⁴ However, they fall short of the importance to collect disaggregated data for particularly disadvantaged and marginalized groups. Instead, the paragraph only refers to disaggregation 'by sex', which is not enough to satisfy international human rights law obligations. Indeed, this is probably the most serious shortcoming of these Council Conclusions, given that the comparative social policy analysis of MIPS is overwhelmingly built on so-called model family approaches. These model families are supposed to be seen as standard families, against which the adequacy of MIPS can be measured. For example, one could measure how much benefits a single man, a family with two children or a lone parent would be entitled to.

¹²⁸¹ *ibid* 1.

¹²⁸² Council Conclusions on Strengthening Minimum Income Protection to Combat Poverty and Social Exclusion in the COVID-19 Pandemic and Beyond 2020 [11721/2/20 REV 2].

¹²⁸³ *ibid* 9b.

¹²⁸⁴ *ibid* 17.

The problem with this approach is that it completely neglects families with more than two children and marginalized groups. When one takes the non-discrimination obligation under international human rights law seriously, the use of disaggregated data must go beyond disaggregation by sex and move beyond standardized model family approaches.¹²⁸⁵

In September 2022, the Commission adopted a Proposal for a Council Recommendation on adequate minimum income ensuring active inclusion.¹²⁸⁶ The explicit goal of the proposal is to reduce poverty and social exclusion in Europe. In particular, EU MS are supposed to improve the adequacy, coverage, and take-up of MIPS. One novelty is that the proposal is accommodated by EUROMOD simulations for all 27 EU MS on their current MIPS, accompanied by tailor-made proposals for future reforms.¹²⁸⁷ While this Proposal for a Council Recommendation is a step in the right direction, it falls short of considering international human rights law as a normative force to help EU MS realise the right to a social minimum. In order to make real progress on the realisation of the right to a social minimum, the EU must step up in the social realm. This is not only supported by academics,¹²⁸⁸ but also by many civil society initiatives that have all called upon the EU to act.¹²⁸⁹ Once the EU considers

¹²⁸⁵ A Andreassen, 'Comparative Analyses of Human Rights Performance' in Bård-Anders Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017); Dimitrina Petrova, 'Researching Discrimination' in Bård-Anders Andreassen, Hans-Otto Sano and Siobhán McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017); Linda Hooper, 'Leaving No One behind: Data Disaggregation' (UN Department of Economic and Social Affairs: Statistics Division 2016) Expert Group Meeting on Data Disaggregation, 27-29 June 2016, New York, UN Doc ESA/STAT/AC.320/3.

¹²⁸⁶ European Commission Proposal for a Council Recommendation on Adequate Minimum Income Ensuring Active Inclusion (n 14).

¹²⁸⁷ Vanda Almeida, Silvia de Poli and Adrián Hernández, 'The Effectiveness of Minimum Income Schemes in the EU' (2022) JRC Working Papers on Taxation and Structural Reforms No 09/2022 <https://joint-research-centre.ec.europa.eu/publications/effectiveness-minimum-income-schemes-eu_en> accessed 1 January 2023.

¹²⁸⁸ Bea Cantillon and Sarah Marchal, 'Decent Incomes for the Poor: Which Role for Europe?' (2017) 55 *Journal of Common Market Studies* 240; Ane Aranguiz and Herwig Verschueren, 'Discussing Strategies for Social Europe: The Potential Role of EU Law in Contributing to the Union's Policy Objective of Fighting Poverty and Social Exclusion' (2020) 22 *European Journal of Social Security* 367.

¹²⁸⁹ Eurodiaconia, 'Joint Statement: Sign-on for a Framework Directive on Minimum Income' (12 November 2020) <<https://www.eurodiaconia.org/2020/11/joint-statement-sign-on-for-a-framework-directive-on-minimum-income/>> accessed 2 January 2023; Social Platform, 'Council Adopts Conclusions on "Strengthening Minimum Income Protection in the COVID-19 Pandemic and Beyond"' (12 October 2020) <<https://www.socialplatform.org/news/council-adopts-conclusions-on-strengthening-minimum-income-protection-in-the-covid-19-pandemic-and-beyond/>> accessed 2 January 2023; Caritas, 'The Time for EU Action Is Now' (27 November 2020) <<https://www.caritas.eu/the-time-for-eu-action-is-now/>> accessed 2 January 2023; EAPN, 'Joint

the relevance of international human rights law will it be possible to make real progress in the realisation of the right to a social minimum.

For legal human rights scholars, my framing of the minimum core doctrine as a practical substantive right to a social minimum is a key innovation. I brought the often-separate realms and research strands of non-discrimination lawyers on the one hand together with international human rights lawyers on the other hand. I proposed a practical way for EU MS to realise the right to a social minimum, in particular for disadvantaged and marginalized groups. At the same time, I demonstrated to legal human rights scholars that a critical interrogation of the official EU statistics on poverty and social exclusion is a necessary precondition to finding out which practical barriers prevent EU MS from realising the right to a social minimum. To that end, the toolbox of the social sciences is useful to achieve a more practical (and relevant) framing of core human rights doctrines. I also showed that an intensive reading of core international human rights standards challenges the standard social policy approaches prevalent across Europe, which do not account for human rights.

Since my thesis has developed an innovative way of how to think about the realisation of the right to a social minimum, my results emphasise the need for more comprehensive indicators and benchmarks for realisation. My explicitly socio-legal, interdisciplinary, and comparative methodological approach bridges the gap between human rights law and social policy. My methodological choices should be particularly attractive to the academic community interested in interdisciplinary debates and socio-legal research. By addressing the widespread lack of cross-fertilization of ideas between comparative welfare state scholars with their focus on measurement, and legal human rights scholars with their focus on enforcement of socio-economic rights, my thesis has provided a practical bridge between the disciplines.

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Appendix 1. CESC's Most Recent Reporting Cycles Addressing the EU MS (2009-2019)¹²⁹⁰

EU MS	Cycle	Session	SPR due	SPR received	SPR filed	LOI	RLOI	COs	Next SPR due
1-AT	4 th	51 st	30-Jun-10	28-Jul-10 (L)	29-Oct-12	13-Jun-13	30-Oct-13	13-Dec-13	30-Nov-18 (L)
2-BE	4 th	51 st	30-Jun-10	09-Jul-10 (L)	18-Jun-12	06-Jun-13	28-Oct-13 (FR)	23-Dec-13	30-Nov-18 (L)
3-BG	6 th	65 th	30-Nov-17	06-Feb-18 (L)	30-Jan-19	22-Mar-16 (LOIPR)		29-Mar-19	31-Mar-24
4-CY	6 th	59 th	30-Jun-14	15-Oct-14 (L)	29-Apr-15	12-Apr-16	28-Jul-16	28-Oct-16	31-Oct-21
5-CZ	2 nd	52 nd	30-Jun-07	30-Nov-10 (L)	16-Jan-12	19-Dec-13	10-Apr-14	23-Jun-14	30-May-19 (L)
6-DE	6 th	64 th	30-Jun-16	21-Feb-17 (L)	16-Mar-17	13-Oct-17	26-Jul-18	27-Nov-18	31-Oct-23
7-DK	6 th	66 th	31-May-18	31-May-18	15-Nov-18	14-Nov-18	06-Aug-19	12-Nov-19	31-Oct-24
8-EE	3 rd	65 th	02-Dec-16	15-Aug-17 (L)	29-Sep-17	25-Apr-18	Missing	27-Mar-19	31-Mar-24
9-EL	2 nd	56 th	30-Jun-09	31-Aug-12 (L)	16-Dec-13	01-Apr-15	06-Aug-15	27-Oct-15	31-Oct-20
10-ES	6 th	63 rd	18-May-17	09-Sept-17 (L)	31-Oct-17	18-Mar-16 (LOIPR)		25-Apr-18	31-Mar-23
11-FI	6 th	53 rd	30-Jun-10	15-Jul-11 (L)	14-Mar-13	19-Dec-13	09-Sep-14	17-Dec-14	30-Nov-19 (L)
12-FR	4 th	58 th	30-Jun-11	23-May-13 (L)	20-Mar-14	30-Mar-15	07-Apr-16	13-Jul-16	30-Jun-21
13-HR	1 st	27 th	01-Jan-93	04-Jul-00 (L)				05-Dec-01	30-Jun-06 (L)
14-HU	3 rd	38 th	01-Jan-93	28-Sep-05 (L)				16-Jan-08	30-Jun-09 (L)
15-IE	3 rd	55 th	30-Jun-07	07-May-12 (L)	08-Nov-13	17-Dec-14	08-Apr-15	08-Jul-15	30-Jun-20
16-IT	5 th	56 th	30-Jun-09	09-Aug-12 (L)	10-Oct-13	07-Apr-15	30-Sep-15	28-Oct-15	31-Oct-20
17-LT	2 nd	52 nd	30-Jun-09	01-Feb-10 (L)	22-Dec-11	21-Dec-12	17-Apr-14	24-Jun-14	30-May-19 (L)
18-LU	3 rd	30 th	Missing	13-Jul-01				26-Jun-03	30-Jun-08 (L)
19-LV	1 st	38 th	01-Jan-93	12-Aug-05 (L)				07-Jan-08	30-Jun-09 (L)
20-MT	1 st	33 rd	01-Jan-91	07-Feb-03 (L)				14-Dec-04	30-Jun-09 (L)
21-NL	6 th	61 st	30-Jun-15	15-Apr-16 (L)	20-May-16	14-Oct-16	23-Mar-17	06-Jul-17	30-Jun-22
22-PL	6 th	59 th	30-Jun-14	08-Jan-15 (L)	08-May-15	26-Apr-16	29-Jul-16	26-Oct-16	31-Oct-21
23-PT	4 th	53 rd	30-Jun-05	28-Jan-11 (L)	08-Mar-13	18-Dec-13	30-Sep-14	08-Dec-14	30-Nov-19 (L)
24-RO	3-5 th	53 rd	01-Jan-94	15-Jun-11 (L)	09-Apr-13	20-Jun-14	30-Oct-14	09-Dec-14	30-Nov-19 (L)
25-SE	6 th	58 th	30-Jun-13	26-Jul-13 (L)	16-Mar-15	04-Nov-15	06-Apr-16	14-Jul-16	30-Jun-21
26-SI	2 nd	53 rd	30-Jun-10	22-Jun-11 (L)	26-Jun-13	24-Jun-14	31-Oct-14	15-Dec-14	30-Nov-19 (L)
27-SK	3 rd	66 th	18-May-17	30-Jun-17 (L)	10-Aug-17	19-Apr-18	11-Jul-19	14-Nov-19	31-Oct-24
28-UK	6 th	58 th	30-Jun-14	17-Jun-14	25-Sep-14	03-Nov-15	18-Apr-16	14-Jul-16	30-Jun-21

¹²⁹⁰ The background colour yellow with the additional 'L' in brackets signifies late submission; the background colour blue signifies that the report is either missing or not available in English; the background colour orange signifies that CESC has not adopted COs to that EU MS between 2009-2019. Abbreviations: SPR = State Party report, LOI = List of Issues, RLOI = Reply to the List of Issues, LOIPR = List of Issues Prior to Reporting. In this case, the state party does not follow with RLOI, but with the SPR under LOIPR, hence the column SPR will be dated after the date for the LOIPR.

Appendix 2. The CRPD Committee's Most Recent Reporting Cycles Addressing the EU MS (2009-2019)¹²⁹¹

EU MS	Signature	Ratification/ Accession	Cycle	SPR Received	SPR Filed	LOI	RLOI	CO	Next SPR Due	LOIPR for next cycle
1-AT	2007	2008	1 st	02-Nov-2010	10-Oct-2011	19-Apr-2013	missing	30-Sept-2013	26-Oct-2018	12-Oct-2018
2-BE	2007	2009	1 st	28-Jul-2011	13-Mar-2013	17-Apr-2014	22-Jul-2014	28-Oct-2014	02-Aug-2019	30-Apr-2019
3-BG	2007	2012	1 st	23-Jul-2014	29-Oct-2015	08-Sep-2017	29-May-2018	22-Oct-2018	23-Apr-2026	n/a
4-CY	2007	2011	1 st	02-Aug-2013	27-Feb-2015	09-Sep-2016	15-Dec-2016	08-May-2017	27-July-2021	n/a
5-CZ	2007	2009	1 st	01-Nov-2011	27-Jun-2013	10-Oct-2014	16-Dec-2014	15-May-2015	28-Oct-2019	29-Apr-2019
6-DE	2007	2009	1 st	19-Sep-2011	07-May-2013	17-Apr-2014	29-Aug-2014	13-May-2015	24-Mar-2019	21-Sept-2018
7-DK	2007	2009	1 st	24-Aug-2011	07-May-2013	17-Apr-2014	30-Jun-2014	30-Oct-2014	24-Aug-2019	30-Apr-2019
8-EE	2007	2012	1 st	04-Dec-2015	03-Oct-2017	10-May-2019	10-Dec-2019	01-Apr-2021	30-Jun-2026	n/a
9-EL	2007	2012	1 st	01-June-2015	24-Nov-2015	07-May-2019	30-Jul-2019	29-Oct-2019	30-Jun-2026	n/a
10-ES	2007	2007	2 nd – 3 rd	03-May-2018	18-Dec-2018	12-Apr 2017 (LOIPR)		13-May-2019	02-Jan-2025	n/a
11-FI	2007	2016	1 st	09-Aug-2019	24-Apr-2020	n/a	n/a	n/a	n/a	n/a
12-FR	2007	2010	1 st	08-Mai-2016	16-Oct-2017	30-Oct-2019	30-Sep-2020	04-Oct-2021	18-Mar-2028	n/a
13-HR	2007	2007	1 st	27-Oct-2011	07-May-2013	10-Oct-2014	16-Dec-2014	15-May-2015	15-Sept-2021	03-Apr-2020
14-HU	2007	2007	1 st	14-Oct-2010	28-Jun-2011	16-May-2012	n/a	22-Oct-2012	Aug-2014	01-May-2017
15-IE	2007	2018	1 st	08-Nov-2021	n/a	n/a	n/a	n/a	n/a	n/a
16-IT	2007	2009	1 st	21-Jan-2013	06-Mar-2015	24-May-2016	02-Jun-2016	06-Oct-2016	11-May-2023	n/a
17-LT	2007	2010	1 st	18-Sept-2012	02-Dec-2014	11-Sep-2015	19-Nov-2015	11-May-2016	18-Sept-2020	n/a
18-LU	2007	2011	1 st	04-Mar-2014	07-Sep-2015	20-Mar-2017	31-May-2017	10-Oct-2017	26-Oct-2021	n/a
19-LV	2008	2010	1 st	03-Apr-2014	29-Oct-2015	20-Mar-2017	06-Jun-2017	10-Oct-2017	01-Apr-2020	n/a

¹²⁹¹ The background colour orange signifies that the CRPD Committee has not adopted COs to that EU MS between 2009-2019. Abbreviations: SPR = State Party report, LOI = List of Issues, RLOI = Reply to the List of Issues, LOIPR = List of Issues Prior to Reporting. In this case, the state party does not follow with RLOI, but with the SPR under LOIPR, hence the column SPR will be dated after the date for the LOIPR.

EU MS	Signature	Ratification/ Accession	Cycle	SPR Received	SPR Filed	LOI	RLOI	CO	Next SPR Due	LOIPR for next cycle
20-MT	2007	2012	1 st	10-Nov-2014	11-Nov-2015	14-Mar-2018	04-Jun-2018	17-Oct-2018	10-Nov-2026	n/a
21-NL	2007	2016	1 st	13-Jul-2018	06-Mar-2019	01-Apr-2022	n/a	n/a	n/a	n/a
22-PL	2007	2012	1 st	24-Sep-2014	03-Nov-2015	14-Mar-2018	31-May- 2018	21-Sept-2018	25-Sept-2026	n/a
23-PT	2007	2009	1 st	08-Aug-2012	10-Sep-2014	11-Sep-2015	10-Dec-2015	20-May-2016	23-Nov-2023	n/a
24-RO	2007	2011	1 st	03-Mar-2022	n/a	n/a	n/a	n/a	n/a	n/a
25-SE	2007	2008	1 st	07-Feb-2011	18-Sep-2012	30-Sep-2013	18-Dec-2013	12-May-2014	15-Jan-2019	12-Oct-2018
26-SI	2007	2008	1 st	18-Jul-2014	30-Oct-2015	29-Sep-2017	15-Nov-2017	16-Apr-2018	24-May-2022	n/a
27-SK	2007	2010	1 st	26-Jun-2012	24-Sep-2014	11-Sep-2015	27-Nov-2015	17-May-2016	26-June-2020	27-Sep-2019
28-UK	2007	2009	1 st	24-Nov-2011	03-Jul-2013	20-Mar-2017	05-Jul-2017	03-Oct-2017	08-July-2023	n/a

Appendix 3. The CRC Committee's Most Recent Reporting Cycles Addressing the EU MS (2009-2019)¹²⁹²

EU MS	Cycle	Session	SPR Received	SPR Filed	LOI	RLOI	CO	Next SPR Due
1-AT	3 rd – 4 th	61 st	29-Sep-2009	16-Nov-2011	24-Jul-2012	24-Jul-2012	03-Dec-2012	04-Mar-2018
2-BE	5 th – 6 th	80 th	20-Jul-2017	16-Mar-2016	08-Jun-2018	14-Nov-2018	28-Feb-2019	14-Jan-2024
3-BG	3 rd – 5 th	72 nd	08-Apr-2014	04-May-2015	09-Oct-2015	18-Apr-2016	21-Nov-2016	02-Jan-2022
4-CY	3 rd – 4 th	60 th	03-Aug-2009	14-Sep-2011	16-Nov-2011	15-May-2012	24-Sep-2012	08-Mar-2018
5-CZ	3 rd – 4 th	57 th	04-Nov-2008	20-Apr-2010	14-Mar-2011	17-May-2011	04-Aug-2011	30-Jun-2018
6-DE	3 rd – 4 th	65 th	20-Oct-2010	11-Sep-2012	10-Jul-2013	01-Nov-2013	25-Feb-2014	04-Apr-2019
7-DK	5 th	76 th	01-Mar-2016	14-Oct-2016	10-Feb-2017	07-Jun-2017	26-Oct-2017	17-Aug-2023
8-EE	2 nd – 4 th	74 th	30-Apr-2013	30-Apr-2015	05-Feb-2016	20-Jul-2016	08-Mar-2017	19-Nov-2022
9-EL	2 nd – 3 rd	60 th	06-Jul-2009	11-Apr-2011	13-Jul-2011	03-May-2012	13-Aug-2012	09-Dec-2017
10-ES	5 th – 6 th	77 th	13-Mar-2016	07-Mar-2017	09-Jun-2017	20-Oct-2017	05-Mar-2018	04-Jan-2023
11-FI	4 th	57 th	24-Nov-2008	26-May-2010	14-Mar-2011	16-May-2011	03-Aug-2011	19-Jul-2017
12-FR	5 th	75 th	08-Oct-2012	28-Jan-2015	23-Jul-2015	11-Nov-2015	23-Feb-2016	05-Mar-2021
13-HR	3 rd – 4 th	77 th	27-Jul-2011	25-Oct-2013	06-Mar-2014	18-Aug-2014	13-Oct-2014	07-Oct-2019
14-HU	3 rd – 5 th	76 th	08-Aug-2012	06-Dec-2013	05-Mar-2014	22-Jul-2014	14-Oct-2014	05-Nov-2019
15-IE	3 rd – 4 th	71 st	13-Aug-2013	26-Jan-2015	23-Jun-2015	16-Nov-2015	01-Mar-2016	27-Oct-2021
16-IT	5 th – 6 th	80 th	05-Jul-2017	16-Mar-2018	08-Jun-2018	11-Oct-2018	28-Feb-2019	04-Oct-2023
17-LT	3 rd – 4 th	64 th	25-Feb-2010	01-Mar-2012	19-Nov-2012	08-Jul-2013	30-Oct-2013	28-Feb-2019
18-LU	3 rd – 4 th	64 th	28-Jun-2010	12-Nov-2012	21-May-2013	16-Jul-2013	29-Oct-2013	05-Oct-2019
19-LV	3 rd – 5 th	71 st	23-Oct-2013	21-Nov-2014	10-Mar-2015	16-Oct-2015	14-Mar-2016	13-May-2021
20-MT	3 rd – 6 th	81 st	23-Nov-2017	04-Sep-2018	12-Oct-2018	29-Apr-2019	26-Jun-2019	29-Oct-2024
21-NL	4 th	69 th	22-Nov-2013	19-Sep-2014	26-Sep-2014	14-Apr-2015	16-Jul-2015	06-Sep-2020
22-PL	3 rd – 4 th	70 th	29-Oct-2012	15-Dec-2014	27-Mar-2015	27-Aug-2015	30-Oct-2015	06-Jan-2020
23-PT	3 rd – 4 th	65 th	05-Aug-2011	12-Nov-2012	09-Jul-2013	25-Nov-2013	25-Feb-2014	20-Oct-2017
24-RO	5 th	75 th	09-Jun-2015	13-Sep-2016	07-Oct-2016	17-Mar-2017	13-Jul-2017	27-Oct-2022
25-SE	5 th	68 th	31-Aug-2012	05-May-2014	18-Jul-2014	17-Nov-2014	06-Mar-2015	01-Mar-2021
26-SI	3 rd – 4 th	63 rd	19-May-2010	17-Apr-2012	19-Nov-2012	Not available	08-Jul-2013	24-Jun-2018
27-SK	3 rd – 5 th	72 nd	14-Oct-2013	16-Sep-2015	09-Oct-2015	15-Apr-2016	20-Jul-2016	30-Jun-2020
28-UK	5 th	72 nd	27-May-2014	06-Mar-2015	11-Nov-2015	02-May-2016	12-Jul-2016	14-Jan-2022

¹²⁹² Abbreviations: SPR = State Party report, LOI = List of Issues, RLOI = Reply to the List of Issues.

Appendix 4. The CERD Committee's Most Recent Reporting Cycles Addressing the EU MS (2009-2019)¹²⁹³

EU MS	Cycle	Session	SPR Received	SPR Filed	LOT	CO	Next SPR Due
1-AT	18 th – 20 th	81 st	22-Dec-2011	17-Apr-2012	18-Jul-2012	23-Oct-2012	08-Jun-2015
2-BE	16 th – 19 th	84 th	02-Oct-2012	27-May-2013	02-Dec-2013	14-Mar-2014	06-Sep-2018
3-BG	20 th – 22 nd	92 nd	11-Jan-2016	21-Mar-2016	09-Mar-2017	31-May-2017	04-Jan-2020
4-CY	23 rd – 24 th	92 nd	23-Dec-2015	27-Jan-2016	09-Mar-2017	02-Jun-2017	04-Jan-2020
5-CZ	12 th – 13 th	99 th	30-Apr-2018	31-Aug-2018	06-Jun-2019	19-Sep-2019	24-Mar-2022
6-DE	19 th – 22 nd	86 th	08-Apr-2013	18-Oct-2013	02-Mar-2015	30-Jun-2015	15-Jun-2018
7-DK ¹²⁹⁴	18 th – 19 th	77 th	07-Jul-2009	31-Aug-2009	20-Jul-2010	20-Sep-2010	08-Jan-2013
8-EE	10 th – 11 th	85 th	11-Jan-2013	23-May-2013	05-Jun-2014	22-Sep-2014	29-Aug-2018
9-EL	20 th – 22 nd	90 th	20-Sep-2015	27-Nov-2015	07-Jun-2016	03-Oct-2016	18-Jul-2019
10-ES	21 st – 23 rd	89 th	05-Aug-2014	28-Nov-2014	07-Mar-2016	21-Jun-2016	04-Jan-2020
11-FI	23 rd	92 nd	23-Sep-2015	17-Feb-2016	09-Mar-2017	08-Jun-2017	13-Aug-2021
12-FR	17 th – 19 th	77 th	11-Mar-2009	22-Jul-2010	08-Jul-2010	23-Sep-2010	27-Aug-2012
13-HR	6 th – 8 th	74 th	15-Nov-2007	27-Feb-2008	Not available	24-Mar-2009	12-Oct-2011
14-HU	18 th – 25 th	98 th	22-Aug-2018	12-Nov-2018	06-Mar-2019	06-Jun-2019	04-Jun-2022
15-IE	3 rd – 4 th	78 th	21-Dec-2009	23-Sep-2010	20-Jan-2011	04-Apr-2011	28-Jan-2014
16-IT	19 th – 20 th	91 st	06-Feb-2015	18-May-2015	30-Sep-2016	17-Feb-2017	04-Feb-2019
17-LT	9 th – 10 th	98 th	08-Feb-2018	23-May-2018	18-Feb-2019	07-Jun-2019	09-Jan-2023
18-LU	14 th – 17 th	84 th	17-Dec-2012	29-May-2013	18-Nov-2013	13-Mar-2014	31-May-2017
19-LV	6 th – 12 th	96 th	12-Oct-2017	10-Nov-2017	20-Jun-2018	25-Sep-2018	14-May-2021
20-MT	15 th – 20 th	79 th	06-Jul-2010	07-Dec-2010	25-Jul-2011	14-Sep-2011	26-Jun-2014
21-NL	19 th – 21 st	87 th	09-Jan-2013	18-Nov-2013	15-Jun-2015	24-Sep-2015	09-Jun-2019
22-PL	22 nd – 24 th	99 th	09-Mar-2018	22-Aug-2018	12-Jul-2019	29-Aug-2019	04-Jan-2022
23-PT	15 th – 17 th	91 st	05-Oct-2015	16-Nov-2015	23-Sep-2016	31-Jan-2017	23-Sep-2019
24-RO	16 th – 19 th	77 th	29-Jul-2008	22-Jun-2009	08-Jul-2010	13-Sep-2010	15-Oct-2013
25-SE	22 nd – 23 rd	95 th	11-Jan-2017	01-Feb-2017	07-Mar-2018	06-Jun-2018	05-Jan-2023
26-SI	8 th – 11 th	88 th	11-Jun-2018	22-Sep-2014	25-Sep-2015	11-Jan-2016	06-Jul-2019
27-SK	11 th – 12 th	94 th	18-Jul-2016	11-Aug-2016	26-Sep-2017	12-Jan-2018	01-Jan-2020
28-UK	21 st – 23 rd	90 th	26-Mar-2015	16-Jul-2015	14-Jun-2016	03-Oct-2016	06-Apr-2020

¹²⁹³ Abbreviations: SPR = State Party report, LOT = List of Themes. Under the reporting procedure for the CERD Committee, the LOIs are called 'List of Themes'. They do not require written replies.

¹²⁹⁴ Please note that the COs regarding Denmark's 20th and 21st periodic reports are not available on the UN Treaty Body Database. This is why I analysed the COs of Denmark's 18th and 19th periodic report for my thesis.

Appendix 5. The CEDAW Committee's Most Recent Reporting Cycles Addressing the EU MS (2009-2019)¹²⁹⁵

EU MS	Cycle	Session	SPR Received	SPR Filed	LOI	RLOI	COs	Next SPR Due
1-AT	9 th	73 rd	04-Apr-2017	15-May-2017	20-Nov-2018	25-Mar-2019	30-Jul-2019	Jul-2023
2-BE	7 th	59 th	02-Oct-2012	19-Feb-2013	10-Mar-2014	02-Jun-2014	14-Nov-2014	Nov-2018
3-BG	4 th – 7 th	52 nd	29-Sep-2010	07-Jan-2011	Not available	Not available	07-Aug-2012	Jul-2016
4-CY	8 th	70 th	28-Feb-2017	15-May-2017	24-Nov-2017	16-Feb-2018	25-Jul-2018	Jul-2022
5-CZ	6 th	63 rd	04-Nov-2014	03-Dec-2014	03-Aug-2015	20-Nov-2015	14-Mar-2016	Mar-2020
6-DE	7 th – 8 th	66 th	02-Oct-2015	21-Oct-2015	02-Aug-2016	11-Jan-2017	09-Mar-2017	Mar-2021
7-DK	8 th	60 th	01-Jul-2013	16-Dec-2013	25-Jul-2014	14-Nov-2014	11-Mar-2015	Mar-2019
8-EE	5 th – 6 th	65 th	24-Mar-2015	28-Apr-2015	11-Mar-2016	18-Jul-2016	18-Nov-2016	Nov-2020
9-EL	7 th	54 th	30-Dec-2010	14-Mar-2011	21-Aug-2012	21-Nov-2012	26-Mar-2013	Mar-2017
10-ES	7 th – 8 th	61 st	30-Sep-2013	17-Dec-2013	17-Nov-2014	17-Apr-2015	29-Jul-2015	Jul-2019
11-FI	7 th	57 th	11-May-2012	18-Feb-2013	02-Aug-2013	11-Nov-2013	10-Mar-2014	Feb-2018
12-FR	7 th – 8 th	64 th	14-Feb-2014	20-Mar-2014	27-Nov-2015	14-Apr-2016	25-Jul-2016	Jul-2020
13-HR	4 th – 5 th	61 st	02-Sep-2013	13-Dec-2013	17-Nov-2014	23-Feb-2015	28-Jul-2015	Jul-2019
14-HU	7 th – 8 th	54 th	03-Jun-2011	22-Sep-2011	21-Aug-2012	21-Nov-2012	26-Mar-2013	Mar-2017
15-IE	6 th – 7 th	66 th	16-Sep-2016	30-Sep-2016	16-Mar-2016 (LOIPR)		09-Mar-2017	Feb-2021
16-IT	7 th	67 th	27-Oct-2015	11-Jan-2016	25-Nov-2016	05-May-2017	24-Jul-2017	Jul-2021
17-LT	6 th	74 th	20-Aug-2018	23-Oct-2018	19-Mar-2019	16-May-2019	12-Nov-2019	Nov-2023
18-LU	6 th – 7 th	69 th	16-Oct-2017	02-Nov-2017	06-Mar-2017 (LOIPR)		14-Mar-2018	Mar-2022
19-LV	4 th – 7 th	75 th	10-Dec-2018	24-Jan-2019	26-Jul-2019	09-Dec-2019	10-Mar-2020	Feb-2024
20-MT	4 th	47 th	18-May-2009	04-Jun-2009	12-Apr-2010	29-Jun-2010	09-Nov-2010	Oct-2014
21-NL	6 th	65 th	28-Oct-2014	03-Dec-2014	11-Mar-2016	05-Jul-2016	24-Nov-2016	Nov-2020
22-PL	7 th – 8 th	59 th	21-Nov-2012	11-Mar-2013	10-Mar-2014	19-Jun-2014	14-Nov-2014	Nov-2018
23-PT	8 th – 9 th	62 nd	18-Oct-2013	17-Dec-2013	16-Mar-2015	23-Jun-2015	24-Nov-2015	Nov-2019
24-RO	7 th – 8 th	67 th	06-Feb-2017	16-Feb-2017	25-Jul-2016 (LOIPR)		24-Jul-2017	Jul-2021
25-SE	8 th – 9 th	63 rd	03-Sep-2014	17-Nov-2014	03-Aug-2015	16-Nov-2015	10-Mar-2016	Mar-2020
26-SI	5 th – 6 th	62 nd	19-May-2014	16-Jun-2014	13-Mar-2015	27-Jul-2015	24-Nov-2015	Nov-2019
27-SK	5 th – 6 th	62 nd	10-Jul-2014	14-Jul-2014	16-Mar-2015	12-Jun-2015	25-Nov-2015	Nov-2019
28-UK	8 th	72 nd	16-Nov-2017	18-Dec-2017	31-Jul-2018	16-Nov-2018	14-Mar-2019	Mar-2023

¹²⁹⁵ The background colour orange signifies that the CEDAW Committee has not adopted COs to that EU MS between 2009-2019. Abbreviations: SPR = State Party report, LOI = List of Issues, RLOI = State Party Reply to the List of Issues, LOIPR = List of Issues Prior to Reporting. In this case, the state party does not follow with RLOI, but with the SPR under LOIPR, hence the column SPR will be dated after the date for the LOIPR.

Appendix 6. Disability Assessment Criteria and Categories of Capacity/ Incapacity for Work (MISSOC, 2022)

EU MS	Assessment criteria and categories of capacity/incapacity for work
AT	Reduction in capacity for work of at least 50%. Decisions regarding entitlement or reports in this regard are always made on a case-by-case basis. The decision as to whether the person is deemed incapacitated/incapable of working will be based on a doctor's report detailing the applicant's capacity for performing their job.
BE	Reduction of earning capacity of at least 66%. It is the responsibility of the medical officer to recognise the incapacity of an insured person (see category Covered risk - Definitions).
BG	Benefit entitlement: 50% reduction in working capacity/ degree of disability. Different criteria are used depending on the nature of the disability.
CY	The invalidity pension is payable to insured employees and self-employed persons and to voluntarily insured persons working for a Cypriot employer overseas who have been off work for at least 156 days and who, within that period, demonstrate that they are going to remain be permanently incapable of work i.e. that they are unable to obtain, in the context of an activity which they would in principle be able to perform under normal circumstances, an income above one third of the amount generally earned by a healthy person with the same level of education exercising the same occupation in the same region; or, in the case of people aged from 60 to 63, to those incapable of earning an income greater than half of that amount.
CZ	The assessment of the invalidity focuses on long-term (i.e. more than one year or expected to last more than one year) disability and loss of working ability. To establish the degree of invalidity, the physician assesses the reduction in working capacity, the capacity to resume work and the possibility to follow retraining/education for another type of gainful activity if the person is unable to perform their previous job. Minimum level of reduction in capacity to work: First degree invalidity (<i>První stupeň invalidity</i>): 35% reduction in working capacity.
DE	Partial incapacity (<i>teilweise Erwerbsminderung</i>): Capacity for any work from 3 and up to 6 hours a day, regardless of the person's job prior to claiming the benefit. The usual labour market conditions and requirements are taken as a basis. Total incapacity (<i>volle Erwerbsminderung</i>): Capacity for any work less than 3 hours a day
DK	Disability pension (<i>førtidspension</i>): The capacity for work for a person between 40 and pensionable age must be permanently reduced to an extent that the person cannot assure his/her subsistence, not even by working in a flexi-job in any kind of work. The capacity for work is measured by the municipality and the rehabilitation team in each case. For a person aged between 18 and 39, it must be absolutely evident that they will never be able to work. Senior Pension (<i>seniorpension</i>): The capacity for work is reduced to less than 15 hours a week in the latest job. The capacity for work is measured by the Senior Pension Unit (<i>Seniorpensionsenhed</i>). No official minimum level of capacity for work specified.
EE	No minimum level of work ability (incapacity). The beneficiaries must be assessed as partially able to work or not able to work.

EU MS	Assessment criteria and categories of capacity/incapacity for work
	<p>Work Ability Assessment is based on The International Classification of Functioning, Disability and Health (ICF). During the assessment process a working age person's health status and restrictions arising therefrom that should be taken into consideration in order to facilitate working life participation (finding and keeping job) are clarified.</p> <p>A person's activity capability is assessed in following domains:</p> <ul style="list-style-type: none"> • Moving • Manual performance • Communication • Self-care and consciousness • Learning and applying knowledge/skills • Adaption to changes and perception of safety • Interpersonal interaction <p>The activities being assessed have to be performable repeatedly, safely, in a usual manner (without any disturbing pain). While assessing activity capability it is assumed that the treatment (if possible) to compensate a health disorder is prescribed and that a person is following physician's recommendations.</p>
EL	<p>Assessment criteria:</p> <p>A person is considered to have normal invalidity (<i>ΣΥΝΗΘΗ ΑΝΑΠΗΡΙΑ</i>) when, as a result of illness or physical or mental disability which appeared or worsened after affiliation, he/she cannot earn from work that responds to his/her strengths, skills and education and his/her usual professional employment, more than a third of the normal earnings of a mentally and physically healthy person in the same occupational category and educational level during at least 1 year.</p> <p>A person is considered to have partial invalidity (<i>ΜΕΡΙΚΗ ΑΝΑΠΗΡΙΑ</i>) when, as a result of illness or physical or mental disability which appeared or worsened after affiliation, he/she cannot earn from work that responds to his/her strengths, skills and education and his/her usual professional employment more than half of the normal earnings of a mentally and physically healthy person in the same occupational category and educational level in the same prefecture during at least six months.</p> <p>A person is considered to have severe invalidity (<i>ΒΑΡΙΑ ΑΝΑΠΗΡΙΑ</i>) when, as a result of illness or physical or mental disability which appeared or worsened after affiliation, he/she cannot earn more than a fifth of the normal earnings of a person of the same educational level during at least 1 year.</p> <p>The results of applying these criteria are expressed in percentage:</p> <ul style="list-style-type: none"> • severe invalidity: invalidity of more than 80%; • normal invalidity: invalidity between 67% and 79.99%; • partial invalidity: invalidity between 50% and 66.99%. <p>Minimum level to be eligible to invalidity pension: 50%.</p> <p>For civil servants the criteria used to assess eligibility for invalidity pension depend on the capacity to perform their duties in the civil service. The results are not expressed in percentage.</p>
ES	Permanent invalidity, whatever its determining cause, is classified according to the percentage of reduction of the capacity for work:

EU MS	Assessment criteria and categories of capacity/incapacity for work
	<ul style="list-style-type: none"> • partial permanent incapacity for the usual occupation (<i>incapacidad permanente parcial para la profesión habitual</i>): disability that causes the worker's ability to perform his/her usual profession to be reduced by 33% or more, without keeping the worker from performing the basic tasks of the profession; • total permanent incapacity for the usual occupation (<i>incapacidad permanente total para la profesión habitual</i>): disability that keeps the worker from performing all main tasks in his/her profession, but the worker is able to take up a different profession; • absolute permanent incapacity for all types of work (<i>incapacidad permanente absoluta</i>): disability that prevents the worker from performing any type of work or trade; • severe incapacity (<i>gran invalidez</i>): when the permanently disabled worker requires the assistance of another person to carry out the most basic activities. <p>To be entitled to the invalidity benefits (<i>pensiones de incapacidad</i>), the worker is required to have a reduction of at least 33% in his/her normal ability to perform his/her usual profession.</p>
FI	<p>National pension (<i>Kansaneläke</i>): Disability pension can be granted if the person has illness, injury or defect that prevents from earning a reasonable living. Age, education, professional skills and previous jobs are taken into account when assessing the ability to function. From the age of 60 more lenient criteria are applied to disability pension. Persons under 20 cannot get pension until their rehabilitation prospects have been assessed.</p> <p>Statutory earnings-related pension (<i>Työeläke</i>): The assessment criteria used to assess eligibility are related to the degree of the capacity to perform any kind of work which reflects the ability to earn of the person concerned. Criteria take into account employee's formal training, previous activities, age, residence and other comparable issues.</p> <p>If the working capacity varies, the employee's annual earnings are taken into account. Also the vocational nature of the disability is taken into account for persons who turned 60.</p> <p>According to the remaining working capacity, the following benefits are available:</p> <ul style="list-style-type: none"> • Disability pension (<i>Työkyvyttömyyseläke</i>): No more than 2/5 of working capacity left; • Partial disability pension (<i>Osatyökyvyttömyyseläke</i>): No more than 3/5 of working capacity left. <p>If the ability to work is assessed to be restorable, the person concerned is entitled to a temporary Cash rehabilitation benefit (<i>Kuntoutustuki</i>), i.e. a time-limited disability pension.</p>
FR	<p>Any person suffering from an at least 2/3 (66.66%) loss in capacity to work or earn money is deemed disabled.</p> <p>There are three different levels of invalidity:</p> <ul style="list-style-type: none"> • 1st group: medically able to work; • 2nd group: medically unable to work; • 3rd group: medically unable to work and in need of daily care from a third person.
HU	<p>All applicants are examined by the rehabilitation body of the county government office. Those with a state of health equals to 60% or less are entitled to the benefit.</p> <p>If their state of health is assessed as being below 31%, their self-sufficiency is examined (those who can be employed with permanent assistance are self-sufficient).</p>

EU MS	Assessment criteria and categories of capacity/incapacity for work
	No minimum levels of capacity/incapacity for work specified.
HR	The assessment is carried out on the basis of the Decree on Examination Methodology, which also contains two methods of measuring: a list of the damage to organs and a list form of disability and impairment of functional abilities. In this way, a comprehensive assessment is made of the person concerned, with a unique set of criteria applied for determining their state of disability Minimum level of reduction in work capacity: 50%.
IE	Invalidity Pension is a payment for insured people who are permanently incapable of work because of an illness or incapacity. To qualify the person must have been incapable of work for at least 12 months and be likely to be incapable of work for at least another 12 months, or be permanently incapable of work. Where persons have been in receipt of Illness Benefit (for a minimum of 6 months) or Invalidity Pension and wishes to return to work, they may qualify for Partial Capacity Benefit if their capacity for work is reduced by a medical condition. The restriction on capacity for work must be assessed as moderate, severe, or profound. No minimum level of capacity/incapacity for work specified.
IT	The main criteria used to assess eligibility for invalidity benefits are related to the extent to which a person's ability to function and perform everyday tasks is impaired. Impairment is measured by way of medical assessments carried out by <i>ad hoc</i> commissions within both the Local health authorities and the legal medical department at INPS. The remaining capacity to perform either the previous job or any kind of work is measured against given reference values (e.g. Katz scale, see "Table XII, Long-term care, indicators and categories of need") Invalidity is expressed as a percentage of the normal capacity to work: <ul style="list-style-type: none"> • between 66% and 99% of the capacity to work for the Invalidity allowance (<i>assegno ordinario d'invalidità, AOI</i>); • 100% incapacity for work for the Incapacity pension (<i>pensione di inabilità</i>). The minimum level of reduced capacity to work is 66%.
LU	Invalidity pension (<i>pension d'invalidité</i>): A person is disabled when his/her capacity to work is reduced to the extent that he/she can no longer perform his/her last profession or any other occupation corresponding to his/her strengths and skills. No minimum level of capacity/incapacity to work is specified. Income for the severely disabled people (<i>revenu pour personnes gravement handicapées</i>): <ul style="list-style-type: none"> • the person must present at least a 30% reduced ability to work because of a physical, mental, sensorial or psychological impairment and/or because of psychosocial difficulties aggravating the impairment; • the impairment must have diagnosed before the age of 65; • the person must present a state of health incompatible with any strain of work or have his/her skills reduced to such extent that is impossible to adapt, within the ordinary or sheltered environment, a workstation to his/her needs.
LT	The extent of the work capacity is determined by assessing the medical, functional, professional conditions of the person concerned. The professional conditions are assessed by completing a Personal Activity and Ability Questionnaire, while The personal health information is provided by the treating doctor.

EU MS	Assessment criteria and categories of capacity/incapacity for work
	<p>The loss of capacity is expressed as a percentage of the total incapacity for work. It can be:</p> <ul style="list-style-type: none"> • full if the loss of the loss of capacity to work is between 75-100%; • partial if it is between 45-75%. <p>There is a minimum level of incapacity to work of 45% in order to be entitled the Work incapacity Pension (<i>Neteko darbingumo pensija</i>).</p>
LV	<p>Eligibility to invalidity benefit (<i>Invaliditātes pensija</i>) is related to the degree of incapacity to work. According to Disability Law, people with disabilities aged between 18 and pensionable age are divided into 3 groups according to their limited ability to work:</p> <ul style="list-style-type: none"> • Group I, if the loss of ability to work is 80-100% - very severe disability, • Group II, if the loss of ability to work is 60-79% - severe disability, • Group III, if the loss of ability to work is 25-59% - moderate disability. <p>Minimum reduction in ability to work: 25%.</p>
MT	<p>The main criteria used to assess eligibility for invalidity pension relate to: the extent to which the persons' ability to perform work and everyday tasks is impaired after their condition has been properly and fully treated. The extent of the impairment determines the medical condition of the claimant as:</p> <ul style="list-style-type: none"> • permanent, i.e. it is likely to persist for at least one year after the diagnosis and treatment; • temporary, i.e. either affecting the person for less than one year or not yet diagnosed or treated. <p>Based on these criteria, a percentage of reduced working capacity is determined for each category. The minimum level of reduced working capacity in order to be entitled to the pension is 20%.</p>
NL	<p>WIA/WAO If after two years of illness the earning capacity is still reduced due to invalidity, a doctor and occupational expert of the Employee Insurance Agency (UWV) will carry out an examination to determine the degree of the work incapacity by establishing the so-called wage loss, i.e. the loss of earnings due to the illness or disability in relation to the claimant's previous earnings. In the Netherlands, no distinction is made as to the cause of incapacity (invalidity or employment injury). The examination also considers the steps taken by the employer and the employee to facilitate the return to work (see Table III, "Return to active working life").</p> <p>Wajong before 2015 People were eligible for Wajong when earning capacity was below 70% of the reference person (<i>maatman</i>) (in most cases 70% of minimum wage), and the work incapacity occurred before the age of 18 (or before 30 if studying).</p> <p>Wajong from 2015 To be eligible, invalidity must occur before the age of 18 (or before 30 in the case of study). A doctor and occupational expert of UWV carry out an examination to determine whether the work incapacity is permanent (<i>duurzaam geen arbeidsvermogen</i>), i.e. when someone: cannot perform a task in a work organisation and/or does not have basic employee skills and/or cannot work consecutively for at least one hour and/or is not capable to work for at least four hours a day.</p> <p>Minimum level of reduced working/earning capacity in order to be entitled to benefit:</p> <ul style="list-style-type: none"> • WAO (previous scheme): 15%

EU MS	Assessment criteria and categories of capacity/incapacity for work
	<ul style="list-style-type: none"> • <i>WIA</i> (current scheme): 35% • <i>Wajong</i>: 100%
PL	<p>Eligibility for the invalidity pension is related to the person's total or partial loss of capacity to work due to illness or disability. The criteria to assess the eligibility relate to: the extent of the impairment and the possibility of restoring it through medication and rehabilitation; and the ability to perform current work or another kind of work and the likelihood of occupational retraining (considering also education and age).</p> <p>Incapacity is not defined in percentages or points, but as either "total" or "partial" according to the remaining working capacity:</p> <ul style="list-style-type: none"> • total if the person has lost its capacity to perform any work. This gives entitlement to Permanent Invalidity Pension (<i>Renta stała</i>); • partial if the person has lost – to a considerable degree – the capacity to perform the work corresponding to their qualification. This gives entitlement to partial Invalidity Pension (<i>Renta okresowa</i>). <p>No minimum level of capacity/incapacity for work specified.</p>
PT	<p>The existence of a permanent invalidity is evaluated on the basis of the physical, sensory and mental functioning, the general condition, the age, the professional skills and the remaining capacity to work.</p> <p>An invalidity can be relative or absolute according to the level of incapacity.</p> <p>Relative invalidity: 66.66% reduction of capacity for performing normally the current or previous occupation; the disabled person is not allowed to earn in his/her current occupation more than one third of the salary normally received and is considered as not able to recover within a period of 3 years the capacity to earn more than 50% of the current salary.</p> <p>Absolute invalidity: 100% permanent and definitive incapacity to carry out any working activity; the disabled person is not allowed to return to work, and till he/she turns 65.</p>
RO	<p>Main criteria: loss of at least 50% of the working capacity.</p> <p>The social insurance expert doctor assesses the work capacity on the basis of a scale which indicates the functional loss with repercussions on the performance of tasks according to age, qualification and existing socio-cultural factors.</p> <p>Invalidity categories:</p> <ul style="list-style-type: none"> • Category I – total loss of work capacity and self-sufficiency, • Category II – total loss of work capacity, but preservation of self-sufficiency, • Category III – loss of at least half of work capacity, the person being able to perform a professional activity for at most half of full working time.
SE	<p>Sickness compensation (<i>sjukersättning</i>) or Activity compensation (<i>aktivitetsersättning</i>) can be paid to individuals with fully or partially reduced work capacity due to illness or other impairments to the physical or mental capacity for work.</p> <p>If the person has a partial disability, a reduced benefit is paid at $\frac{3}{4}$, $\frac{1}{2}$ or $\frac{1}{4}$ of the full benefit according to the assessed degree of disability. The reduced capacity to work is expressed as 1/1, $\frac{3}{4}$, $\frac{1}{2}$ and $\frac{1}{4}$. The minimum reduction in capacity to work is $\frac{1}{4}$ (except for Sickness compensation (<i>sjukersättning</i>) for ages 19-29, which is only granted if the capacity to work is 1/1 reduced). The reduced capacity to work is assessed in this manner regardless of whether the benefit will consist of guaranteed compensation (<i>garanti-ersättning</i>), income-related sickness/activity compensation (<i>inkomstrelaterad sjukersättning/aktivitetsersättning</i>) or both.</p>

EU MS	Assessment criteria and categories of capacity/incapacity for work
SI	<p>The main criteria used to assess eligibility for invalidity benefits relate to the degree of the capacity to work. The assessment criteria are based on the reduced capacity to perform professional tasks related to their previous and any kind of job. Based on this, there are three categories of invalidity:</p> <ul style="list-style-type: none"> • Category I: capacity to engage in any gainful employment activity is totally lost; • Category II: capacity for work is reduced by 50% or more; • Category III: capacity to work full-time is impaired, but the person concerned is capable of working in a certain job at least on a part-time basis; or the capacity to work in the occupation for which they have been trained for is reduced by less than 50%; or they can continue to work on a full-time basis but cannot perform the same job they had before. <p>Results of the assessment are expressed as a percentage of the capacity to work. No minimum level of capacity/incapacity for work specified.</p>
SK	<p>Eligibility to invalidity benefit is related to the degree of impairment of the person, i.e. the extent to which long-term adverse health conditions cause a decrease in the ability to perform a gainful activity for at least a year. The reduction in the work capacity is assessed on the basis of the physical and mental conditions of the person by assigning a specific percentage for each type of illness or disability (as indicated in the Annex of the Act). To be entitled to the benefit, the minimum level of reduction in the capacity to work compared to a healthy individual is 41%. If the loss of the capacity is higher than 70%, invalidity is considered as full invalidity (<i>Plná invalidita</i>).</p>
UK	<p>Since the UK is no longer part of the EU, it is no longer included in MISSOC.</p>

Appendix 7. Disability Equality Indicators Across the EU MS (DOTCOM, 2019)

EU MS	Disability Equality Indicators
AT	<p>The National Action Plan on Disability 2012-20 includes indicators in some target areas (the list is not comprehensive):</p> <p><i>Chapter 3: Accessibility – subchapter 6: media</i> Indicator: Percentage of accessible broadcasts in the Austrian Broadcast</p> <p><i>Chapter 4: Education – subchapter 3: accessibility</i> Indicator: Number of accessible teaching materials</p> <p><i>Chapter 5: Employment – subchapter 1: general</i> Indicator: Unemployment rate of people with disabilities Indicator: Number of workplaces in integrated businesses</p> <p><i>Chapter 6: Independent Living – subchapter 1: general</i> Indicator: Number of places in institutions Indicator: Number of places in models for independent living Indicator: Number of supported self-advocacies</p> <p><i>Chapter 7: Health and Rehabilitation – subchapter 3: rehabilitation</i> Indicator: In the context of in-patient psychiatric rehabilitation the waiting period is an indicator. The goal is reached when the waiting period is less than three months</p> <p><i>Chapter 8: Awareness raising and information</i> No indicators listed</p> <p>An advisory group to accompany the implementation of the National Action Plan is mentioned which should develop the indicators. No specific agency is responsible, no data sources or time-tables are specified either.</p> <p>Links</p> <ul style="list-style-type: none"> • National Action Plan on Disability 2012-2020. Strategy of the Austrian Government to implement the UN-CRPD. Inclusion as a human right and a mission
BE	<p>In 2006 the association 'Equal Rights for Every Person with Disability' (GRIP) mapped out the inclusion of persons with a disability in Flanders by the 'Inclusion mirror'. The data has been collected from different research reports to identify whether or not persons with disabilities experience discomfort due to the limitations in their daily life. In 2016 GRIP introduced the new Inclusion Mirror Flanders 2016.</p> <p>Links</p> <ul style="list-style-type: none"> • GRIP Inclusion Mirror Flanders 2016
BG	<p>There are no disability equality indicators established in Bulgaria. Most government disability-related initiatives state results in terms of 'clients served' or 'increase in number' but equality is not measured.</p>
CY	<p>There are no disability equality indicators based on public data sources.</p> <p>Links</p> <ul style="list-style-type: none"> • Republic of Cyprus Statistical Service
CZ	<p>There is no set of disability equality indicators based on public data sources.</p>

DE	<p>According to section 66 Social Code Book IX the German government is legally obliged to publish an official report about the life situations of disabled people in Germany every four years. The development of new disability (equality) indicators was prepared by a conceptual report by Hornberg and Schröttle (2013) for the German Ministry of Labour and Social Affairs in 2011. The first disability report with the revised concept was published in September 2013; the second in 2016. The writing of these reports is accompanied by a scientific advisory board. According to these reports three types of indicators are necessary to outline the life situations of persons with disabilities: structural indicators, process indicators and outcome indicators. The latest disability reports were mainly based on outcome indicators which indicate the state-of-the-art of the UN CRPD implementation at the national level. Structural and process indicators are still missing and their development will be the topic for further surveys and reports.</p> <p>Links</p> <ul style="list-style-type: none"> • 2013 Report on the Situation of Persons with Disabilities submitted by the German Federal Government • 2016 Report on the Situation of Persons with Disabilities submitted by the German Federal Government (German version) • 2011 Conceptual Report for new indicators and structures of disability reporting
DK	<p>The Danish Institute for Human Rights has developed a set of Gold Indicators, covering the ten most important articles of the CRPD, according to which the Institute plans to publish results illustrating the implementation of the CRPD in Denmark. The Gold Indicators make it possible to follow the situation every fourth year. On this basis, they have developed a disability barometer.</p> <p>Links</p> <ul style="list-style-type: none"> • The Gold Indicators • Disability Barometer • Statistics Denmark (disability data)
EE	<p>Statistics Estonia has charted the main aspects of social life of disabled persons in a range of spheres from economic activity to free time usage. The project intends to disseminate the data according to a self-definition of disability (through survey data) and the official status of disability in comparison with the total population. As part of the Statistical Programme for 2011-2015, a special bulletin on 'Social Integration of Disabled Persons' was published in 2014.</p> <p>Statistics about the situation of disabled people is gathered by the Statistics Estonia with the Estonian Social Survey, the Estonian Labour Force Survey, the Working Life Survey and the Household Budget Survey. Data concerning health status, retirement and ageing is gathered with SHARE - Survey on Health, Ageing and Retirement in Europe. In 2014, a large-scale Estonian Health Survey was conducted. Data regarding disabled people (including general statistics, household characteristics, employment, poverty, coping and time use) is available in the special section of Statistics Estonia database. Statistics Estonia prepares regular statistical overviews, keeps a weblog, and annually publishes the Statistical Yearbook of Estonia as well as thematic publications. In December 2014, a collection of articles on the social integration of disabled people was published.</p> <p>Links</p> <ul style="list-style-type: none"> • Data on disabled persons (under Health) • SHARE survey - Estonia website • Statistics Estonia database • The Statistical Yearbook of Estonia for 2014 • Puudega inimeste sotsiaalne lõimumine (Social Integration of Disabled Persons) 2014 • Health surveys at The National Health Development Institute

EL	<p>The disability equality indicators included in the National Disability Observatory reports (2017/2018) are aligned with the EU 2020 Strategy sector indicators, namely: employment rate, unemployment rate, economic activity, early school leaving rate, completion of tertiary or equivalent education, people living in households with very low work intensity, risk of poverty after social transfers, severely materially deprived persons, and population at risk of poverty or exclusion.</p> <p>Links</p> <ul style="list-style-type: none"> • National Disability Observatory (2017) Disability and Risk of Poverty • National Disability Observatory (2018) Employment Indicators and Disability • GSEE and National Disability Observatory (May 2018) Annual Education Report 2017-2018
ES	<p>Equality is a core and cross-sectional principle in Spanish policies. However, there are no specific disability equality indicators in every domain (e.g. communication, health, housing, independent living, justice system, etc.) to measure progress towards disability equality. The main indicators on equality are related to employment and there are monthly reports available on employment that include disabled people. The Government is initiating a project to include the disability indicators.</p> <p>In 2014, there was still a general lack of indicators that disaggregated findings by disability. Yet, several reports (e.g. Olivenza Reports) show the existence of inequalities associated to disability.</p> <p>The Spanish Disability Strategy (2012-2020), in the section on combatting social exclusion and poverty, includes two strategic measures aiming to promote:</p> <ul style="list-style-type: none"> • specific measures to ensure compliance with the general reduction targets of people below the poverty line included in the National Reform Programme 2011 of Spain. • full development of personal autonomy goals of the Law on Personal Autonomy and Care for Dependency. • In December 2018, the Senate approved the inclusion of the disability indicator in statistics on victims of gender-based violence. <p>Links</p> <ul style="list-style-type: none"> • Equality indicators on employment • Report on the Labour Market Situation of Persons with Disabilities 2017 (Data for 2016) • The Spanish Disability Strategy (2012-2020) • The Olivenza 2014 Report on disability in Spain • The Olivenza 2015 Report on disability in Spain • The Olivenza 2016 Report on disability in Spain
FI	<p>There are no specific disability equality indicators available.</p>
FR	<p>The available disability indicators are most often meant to assess whether the objectives set by public policy (especially social and employment policies) have been achieved rather than to monitor the implementation of equality goals. Even if public policy objectives may converge towards or meet equality principles, the approach in setting indicators is different. In consequence, indicators are set by sector of public activity and scattered among various sectors.</p> <p>Another source of disability equality indicators is DARES (Direction of research, studies and statistics of the Ministry of Labour, Employment and Health), which provides indicators of employment and unemployment of disabled persons and compares them with the data concerning the overall population.</p>

	<p>The Observatory for Accessibility and Universal Design created in 2010, which mission is to monitor the developments, to identify the challenges to the implementation of accessibility, to disseminate good practice and to develop monitoring indicators. However, DARES does not provide indicators on its website.</p> <p>A set of disability indicators established by DREES and INSEE in 2009 is intended to follow the evolution of the beneficiaries of public provisions.</p> <p>Links</p> <ul style="list-style-type: none"> • Creation of the Observatory for Accessibility and Universal Design • INSEE data and analyses concerning the labour market • DARES analyses
HU	There are no disability equality indicators based on public data sources.
HR	<p>There are neither national/regional monitoring points for disability equality indicators, nor comprehensive independent monitoring mechanisms. Most indicators are separately presented in annual reports of the Ombudsman, the Ministry of Demography, Family, Youth and Social Policy, the Croatian National Institute of Public Health, as well as education agencies, institutions that are part of the University, and the Croatian employment service.</p> <p>These reports have been supplemented by the gap analysis of the implementation of the UN Convention on the Rights of Persons with Disabilities. The objective is to determine whether national indicators contain Convention indicators and whether the national strategy should be corrected in that sense. The important part of this analysis is the analysis of the standards of equality and discrimination (Article 5 of the Convention).</p> <p>The United Nations Development Programme in Croatia (UNDP) has also implemented a project since 2009 on Support in Applying Monitoring and Evaluation Mechanisms for the Implementation of the National Strategy of Equalisation of Opportunities for Persons with Disabilities 2007-2015.</p> <p>Links</p> <ul style="list-style-type: none"> • UNDP support for introduction of strategy indicators
IE	<p>The National Disability Authority (NDA), the independent statutory body charged with providing expert advice on disability policy, developed a suggested set of indicators designed to measure progress on the five high-level goals of the National Disability Strategy in terms of outcomes for individuals. Among the indicators identified was the Quarterly National Household Survey (QNHS). The QNHS most recent module on Equality is from Q3 2014 and details that 16% of people with a disability compared with 11% of those without a disability said that they felt discriminated against in the two years prior to the survey. The most recent National Disability Survey was completed in 2006 following the census in that year and has not been repeated following the census in 2011 or 2016.</p> <p>Links</p> <ul style="list-style-type: none"> • National Disability Strategy outcome indicators • QNHS Equality Quarter 3 2014 • National Disability Survey 1 • National Disability Survey 2
IT	<p>G4. Disability equality indicators</p> <p>No specific indicators are available on the disability equality.</p>
LU	There are no official disability equality indicators based on public data sources. The Ministry of Education publishes annually the percentages of children with special needs in segregated schools in relation to the whole population of pupils (primary and secondary) the non-inclusion

	<p>rate was under 1%. The Ministry of Labour reports annually the percentage of registered job seekers with disabilities in relation to all registered job seekers.</p> <p>Links</p> <ul style="list-style-type: none"> • The Ministry of Education: Activity Report 2018
LT	We do not yet have information for this item
LV	Latvia does not have any disability equality indicators for measuring progress towards disability equality.
MT	<p>There is no official data regarding disability equality indicators. The study that best establishes such indicators is entitled 'The Quality of Life of Disabled People: Some answers from Census 2005'. This study covers demographics, living conditions, educational status, level and quality of employment, involvement in sports and access to the Internet. For each indicator, in turn, data were analysed as to whether findings varied between disabled and non-disabled people; between disabled men and women; according to age; according to where disabled people lived; by type of impairment.</p> <p>Links</p> <ul style="list-style-type: none"> • The Quality of Life of Disabled People: Some Answers from Census 2005 (2009)
NL	<p>The Netherlands Institute for Human Rights developed, together with representatives of NGOs and research agencies, a limited set of indicators on three themes: independent living, education and work. The Institute then commissioned the Central Bureau of Statistics and the research agency NIVEL to gather data on people with disabilities on the following three themes: education, work and independent living. The results are presented in quantitative monitoring reports called 'Inzicht in Inclusie' (Insight in inclusion) published in 2016 and 2018. These reports are used as the basis for the shadow report on the implementation of the UNCRPD.</p> <p>Links</p> <ul style="list-style-type: none"> • Second Report Inzicht in Inclusie (2018), The Netherlands Institute for Human Rights • Initial report on the implementation by the Netherlands of the UN CRPD • Shadow report CRPD by the Netherlands Institute of Human Rights
PL	Officially recognised disability equality indicators have not been identified.
PT	<p>The National Institute for Rehabilitation (INR, I.P.) is the official body responsible for developing disability equality indicators in Portugal. However, there is no evidence that these data have been developed by this Institute. Starting 2017, the Disability and Human Rights Observatory (ODDH) published two report 'Persons with Disabilities in Portugal – Human Rights Indicators' (in 2017 and 2018). These reports bring together data on the situation of persons with disabilities in Portugal, using national and international data sources to measure the progress made in the fulfilment of the human rights of persons with disabilities in Portugal in areas such as employment, education, and living conditions and social protection.</p> <p>Links</p> <ul style="list-style-type: none"> • National Institute for Rehabilitation (INR, I.P.) • The ODDH Holistic report of the Evaluation study on the rights of people with disabilities in Portugal • ODDH Report 2017 • ODDH Report 2018
RO	In Romania disability equality indicators have not yet been created and are not used. .
SE	The Swedish Agency for Participation gives information on various national surveys where data on people with disabilities are shown and sometimes compared to the population at large.

	<p>Links</p> <ul style="list-style-type: none"> • The Swedish Agency for Participation • Regulation (2014: 134) on responsibilities of the Swedish Agency for Participation
SI	<p>Slovenia does not have systematic statistics on disabled people. There is no register of disabled persons and no disability equality indicators are based on public data sources. No data are segregated according to gender, ethnicity, age, in order to ensure intersectional research on disability.</p>
SK	<p>There is currently no system of indicators based on public data sources to specifically monitor equality for persons with disabilities in employment, education, access to social services, transport and social inclusion. Several ministries collect some data on people with disabilities, especially the Ministry of Labour, Social Affairs and Family, the Ministry of Education, and the Ministry of Construction. The Ministry of Labour, Social Affairs and Family presently monitors the indicators of employment and unemployment for people with disabilities and publishes them in the Annual Report on the Social Situation of the Population in the Slovak Republic.</p> <p>Links</p> <ul style="list-style-type: none"> • The Ministry of Labour, Social Affairs and Family of the Slovak Republic • Annual Report on the Social Situation of the Population in the Slovak Republic
UK	<p>The Office for Disability Issues (ODI) previously published a set of 48 Disability Equality Indicators on its website, linked to themes in Government disability strategy and the UN Convention (prior to ratification in 2009). These included, for example, items on childhood, youth, education, employment, poverty, participation, transport, support for independent living, etc. The indicators were populated from a range of national surveys and datasets (e.g. the Family Resources Survey, Labour Force Survey, public opinion, crime and housing surveys). The presentation of each indicator includes baseline/trends, summary graphs, data definitions and data sources. These are no longer maintained but the revised disability strategy also included an outcome and indicator framework, presented as an Annex and last updated by the previous Government in 2014.</p> <p>Links</p> <ul style="list-style-type: none"> • ODI Disability Equality Indicators [archived] • Fulfilling Potential- Outcomes and Indicators