Human Rights on trial.

The protection of economic, social and cultural rights from a diachronic and comparative perspective: A Study of five European countries

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Foreword and acknowledgements

This piece of work was primarily conceived as the translation of one of the preparatory contributions to the seventh FOESSA report which was launched with big success in October 2014. The contents and the perspective it entailed made it recommendable to make it accessible to English speaking audiences. Francisco Lorenzo, chief editor of the FOESSA report believed in this idea and my first thanks are to him and to the FOESSA Foundation.

The initial purpose of the work, however, was modified by the facts. It became clear that the potential readers of this document would find it more useful if the contents were more accurately adapted to the reality of each of the countries. A big effort was made to adapt and update the facts and figures with the great help of academics who took their time to revise it and make suggestions. Special gratitude is due to Hugh McLaughlin whose inspiring suggestions were particularly useful. Thanks also to Ian Cummins who suggested the title.

This book is dedicated to all who believe in Human Rights and practice them in their everyday life. Particularly present in my reminding is Fernando Casas for his coherence in the defence and promotion of Human Rights

Last but not least, I would like to thank my family for their support during all this process. Thank you Jaime, Berta Li and Teresa
1. Introduction: conceptual premises underlying the present work and its structure.

The presence of economic, social and cultural rights (also known as ESCRs), acknowledged as such in the legislation of states and, more operationally, in the development of social welfare systems, represents when existing, an undeniable factor of ethical-juridical legitimacy for governments, a guarantee of legal certainty for citizens and a powerful wall against possible dismantling temptations coming from institutional actors who are entrusted with their safekeeping (e.g. national states particularly in times of economic crisis).

However, for this presence to be a tangible reality, three conditions need to be met. First, the consideration of ESCR as Human Rights by States, treated in an equal matter and on the same footing as civil and political rights. Secondly, the existence of a legal, administrative and juridical structure that enables their development and protection, and lastly, but not least, a citizenry truly concerned about their rights, committed to their exercise and well informed about the ways in which they may be enforced.

The aim of the present work is to analyze to which extent ESCRs are effectively present in five European countries which are representative of the different types of social welfare as identified by Esping Andersen’s classification (1990, 1996, 2002). To this purpose three assumptions have been considered. First, nation states are primarily responsible for ensuring compliance with economic, social and cultural rights from the very moment they are constituted as parties of the ICESCR. (International Convenant of Economic, Social and Cultural Rights). Such responsibility entails the duties to respect, protect and fulfill these rights in their respective territories and to extend them not only to their citizens but also to all persons living in the territories under their jurisdiction. Secondly, all Human Rights are universal, indivisible, interdependent and interrelated, as established in the Vienna Declaration and Programme of Action. Thirdly, markets are not neutral actors when intervening and neither are they when given the opportunity to act in the field of social welfare. This has repercussions on the behaviour and attitudes of citizens, as it will be explained below.

The time span considered for this paper is the period comprising the two latest concluding observation reports issued by the United Nations ESCR Committee for each of the countries of the study: During which two important events occurred, the introduction of the Lisbon Treaty and the current economic crisis initiated in 2007 and still “in force” at the time of writing this article.

This paper is divided into three sections. The first section will focus on the reasons why ESCRs have traditionally been, and still are considered second-class rights in relation to civil and political rights, and the consequences this entails for the development of social citizenship and a welfare society.

The second section will analyze to which extent ESCRs are a tangible reality in five countries: the United Kingdom (reference point of the liberal model), Belgium (reference of the continental model) Denmark and Norway (references of Social Democratic model) and Spain (Mediterranean or familist model), Esping Andersen (2012), Shaw (2013)

The article’s conclusion will provide a critical reflection on the relationship between ESCRs, active citizenship and the postindustrial welfare state in environments marked by liberal capitalism.

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1 This statement is established in section 5 of the document resulting from the World Conference on Human Rights held from 14 to 25 June 1993 in Vienna and approved by consensus by 171 States.

2 As established in Article 16.1 of the PIDESC.

3 Although Norway is not a member state of the European Union, it is of the European Economic Area and finds itself influenced by the trends related to the welfare state.
2. ESCR: Human Rights against headwinds

Economic, Social and Cultural rights have been traditionally regarded by nation states with suspicion and caution from the very first moment of their ‘birth’ as Human Rights to the present day. The manner in which this distrust has been made visible has ranged from contempt to voluntary ignorance, by the same states that, as signatories of Human Rights Treaties, committed themselves to their respect, protection and fulfillment. The ways of expressing contempt vary from the most direct and undermining - where governments declare that they do not consider ESCRs as rights at all,- to the more subtle ones where their acknowledgement of ESCRs as human rights is assumed in theory, but there is no transposition of these rights into the domestic law so that it is not possible to invoke them before the nation state’s courts.

Why have states failed to fully recognize and exercise of ESCR as Human Rights? Three main factors may explain this: Firstly the lack of an acknowledged “basic foundational fact” for universal social rights. Secondly, the way in which these rights have been defined in comparison with civil and political rights and lastly, the lack of a tradition of the individual exercise of social rights before courts. We will go through these factors in the following sections.

2.1. The lack of a “legitimizing record” for social rights

The first factor to take into consideration is the lack of a “basic foundational fact” which could be universally acknowledged as the milestone for social rights. This idea, as explained by Sánchez (2001: 135-) considers that “the social state lacks a self-legitimizing record”, or “that its theoretical conception has been constructed without the existence of a specific foundational fact” in contrast to what allegedly happened to civil and political rights, for which the British Glorious Revolution and the American and French Revolutions would be the events that laid the paradigmatic foundations of the new liberal State, and with it, a whole set of individually enforceable rights.

In the case of ESCRs, according to Sánchez (2001), there would be no equivalent to these events, although significant historical moments could be identified as important milestones, such as the 1848 Revolutions, the Paris Commune or the Bolshevik Revolution. However their impact, although, unable to crystallize a collective and individual consciousness of social rights, had at least served to achieve substantial improvements in the living conditions of the population through welfare states that, in the opinion of Offe (1982) represented “the bailout” that the liberal state had to pay to maintain their power base in rather adverse contexts. Marshall considered in “Citizenship and Social Class (1950) that ‘Social rights imply an invasion of contract by status, the subordination of market place to social justice, the replacement of the free bargain by the declaration of rights’.

2.2. A confusing definition, contrasting with those given to civic and political rights

The book by Mary Ann Glendon (2001) entitled A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights, which details the entire process of drafting the Declaration, makes reference to the discussion on Social Rights as the issue that raised the most significant debates and took the most time of the members of the commission in charge of preparing the draft text.

It is possible to have access to country specific information on the status and ratification of the different human rights bodies in this website:
http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx
The second explanatory factor is the difficulty for ESCRs becoming established in the texts of the United Nations and regional Human Rights systems to be implemented either through the direct application of treaties (monism) or by their transposition into the domestic laws of States (dualism). Furthermore, there is little awareness of use of the ESCRs as rights among the citizenry of the countries, but also among civil servants and paradoxically, among the judicial bodies responsible for their interpretation and application. This difficulty is primarily due to the declared opposition, the omission or – in the best of cases – the insufficient diligence of nation states upon positivizing certain rights, to whose protection and defense they have committed themselves, at least theoretically.

This issue however is not new. Quite the contrary, it was rooted in the very process of drafting the text of the Universal Declaration of Human Rights, as evidenced by the fact that intense debates on social rights were elicited within the commission in charge of its preparation, in such a way that the French representative René Cassin characterized the discussions as the bitterest and most emotional of the whole process of redaction (Glendon 2002 24). The debates dealt primarily with two issues: Firstly, whether the satisfaction of social rights should be made through centralized planning, whereby the nation is the sole agent or, on the contrary, whether room should be made for market intervention. Secondly, whether there is any limit in terms of resources and time to ensure full compliance with these rights. In other words, is there an obligation for all nation states to reach the same level of development of rights at the same time? This controversy transcended the ideological divide to become a power struggle between the two blocs that were being configured at the beginning of the Cold War and paved the way to the identification (simplistic but extremely functional) of the “Western bloc” with the defence and promotion of civil and political rights and the “Eastern bloc” with the promotion of economic, social and cultural rights. The discord was resolved thanks to two articles of commitment (known as “umbrella items”) of the Universal Declaration of Human Rights: Article 22, which took into account the organisation, whether through planning or through the market, and resources of each state towards the satisfaction of social rights, and article 28 which called for the establishment of an international order that could comply with these rights and in which solidarity between nation states had a relevant role to play.

But, what was not in the minds and the heads of the members of the commission was that the people entitled to these rights could claim their fulfilment by the states in which they lived. This was definitely unimaginable for the countries under the soviet influence, which, in a theoretical way, defended these rights but did not conceive nations as actors working towards the “empowerment” of its citizens to demand them (which could then be interpreted as a capitulation to the ‘Western’ bloc). But neither for the countries of “Western sphere”, which did not want “to get their fingers caught” by recognizing the individual’s right to claim something as “allegedly” expensive at a time when doing so could be interpreted as a “concession” to the Communist bloc. Social rights were thus born, formally caught between “two fires” and the “burden” of being of a lower order than civil rights.6

2.3. The absence of a culture of individual exercise of social rights

There is no tradition of individuals claiming social rights as part of a wider citizenship concept which includes the possibility of its invocation before administrative and/or judicial institutions in

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6 This reflection is backed by the reading of Articles 2.1, 2.3 and 4 of the ICESCR and the comparison of Article 2.1 of the ICCPR with Article 2 of the ICESCR. It should be noted also that the Optional Protocol to the ICESCR which allows the exercise of individual actions entered into force 38 years after the Optional Protocol to the ICCPR.
case of violation. Such a concept of citizenship would transcend the Marshallian approach, which considered that the State had the obligation to provide services and benefits of a collective nature to the entire population but hardly contemplated that these benefits could be claimed and/or exercised individually by citizens.\(^7\)

Dwyer, (2010:48) cites Roche (1992), Giddens(1994) and Selbourne (1993) as authors that consider that Marshall’s vision on citizenship promotes passivity at the expense of participation. However, in their perspective participation does not include the possibility of making social rights enforceable. Similarly, Powell (2000,2012) considered that the welfare model established in the United Kingdom until the 1980’s (following Beveridge and Marshall patterns) generated a welfare state without citizens, as social rights were conceived as deriving from the welfare system rather than as human rights. This perspective is one shared by the majority of welfare state models.

The abovementioned three factors paint a picture in which it seems difficult to imagine citizens as being aware of their social rights and committed to their exercise. However, some steps have been taken in the doctrinal and legal fields that make increasingly difficult for nation states to disregard and deny social rights as Human Rights. A clear example of this is the Vienna Declaration and Programme of Action (1993), which in its point 5 proclaimed that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis” More and Foremost, the existence of a doctrinal body constituted by the general comments issued by the Committee on Economic, Social and Cultural Rights of the United Nations provides states and citizens with interpretative elements for a full implementation of these rights and identifies the standards to which States are accountable for, in their periodic reports. Also, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) paves the way to the justiciability of these rights by allowing for individual claims. Currently a total of 21 states are parties to the Optional Protocol to The ICESCR whilst 6 others have signed but not ratified it.

\(^7\) In his own words, “Social rights are not designed for the exercise of power at all, they concern Individuals as consumers, not as citizens”Marshall (1981,140)
3. ESCR in the new paradigm of the Welfare State: a diachronic and comparative analysis of four models in five countries

Different types of welfare state developed in the Western European democracies after the Second World War (1939-1945), especially during the so called ‘thirty glorious years’ (50’s, 60’s and 70’s) of the 20th century. These were categorized by Taylor Gooby and Esping Andersen as “industrial welfare states” (Taylor-Gooby 2005). During these years the growth of national economies with a strong presence of the industrial-manufacturing sector guaranteed full employment and stable wages for families of a nuclear-patriarchal type in which men assumed mostly the role of generating resources and women the reproductive care role, raising children and taking care of the elderly. In this context, welfare states universally covered needs that by their very nature should not, and could not-at least completely- have been met by the market (such as pensions and unemployment benefits), as well as others that due to its importance and value fell outside the scope of the nation state (e.g. healthcare and education).

In the case of social services, the situation varied enormously between States depending on whether they developed familialist models e.g. in Spain; Greece or Italy in which intervention took place only subsidiarily to family action Guillen (2011), or if they were characterized by decommodification and defamiliarization which was the norm in continental and Scandinavian welfare models.

In general, welfare models enjoyed a high degree of support by their populations and that was the main reason why political parties were in principle so reluctant to introduce amendments which could result in worsening the levels of social protection delivered by the state, mainly for fear of the electoral costs that this would entail. This attitude did not last much though. The economic crisis of 1993 contributed to breaking this taboo and paved the way to the introduction of new concepts such as conditionality or flexicurity. In that same year, a document issued by the European Commission entitled “Growth, Competitiveness and Employment: the Challenges and Ways Forward into the Twenty-first Century” - COM (93) 700 - included the first references to the need to combine security and flexibility in welfare systems. The European Councils of Essen (1994) and Florence (1996) or the ‘Green Paper on Partnership for a New Organization of Work’ prepared by the European Commission – COM (97) 128 final - insisted on these proposals.

Within academic circles many authors highlighted the new risks involved in the shift from an industrial society to a post-industrial society, and how such risks put pressure on some models that were allegedly stagnant and inefficient. In 1999, the Belgian government coined the concept, ‘Active Welfare State’ that involved the combination of three elements: in the first place, a state of active people (active citizens); secondly: welfare structures that should be maintained to cover the need of the population to be ‘activated’ or that due to age and/or illness could no longer be so; and thirdly, an intelligently active State that can smartly manage resources on a suitable basis for risk prevention and control. The purpose of the three elements is to fulfill the goal of ‘sustainable’ social justice.

The European Council of Lisbon in March 2000 defined the new EU strategic priorities for the following decade, one of which was the union of the knowledge economy that would make the EU the most competitive market in the world with increased employed, better quality employment and greater social cohesion. To this purpose, it was necessary to develop a social welfare state

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8 The concept ‘Active welfare state’ was inspired by the Belgian minister of pensions: Frank Vanderbroucke as a response to the problems the traditional welfare system was facing. It is possible to access to his speech through this link: http://www.canonsocialwerk.eu/1999_actieve_welvaartstaat/1999Vandenbrouckeactievewelvaartstaat.pdf
as active and dynamic as possible, in which employment (through ‘active policies’) would play a
central role and social policies would remain subordinate to it to promote and ensure
‘employability’ under the least rigid regulatory frameworks possible. In this context, training – both
aimed at those who enter the workforce for the first time and those who go in and out of it under
a model of continuous recycling during ever longer working lives – was essential.

In the same vein, a discourse allegedly aimed at preventing the poverty traps that were
characterized as inevitable under traditional models of social welfare resulting in many people
living at the expense of taxpayers started to take root. More efficient social services, better
management of resources and professionals oriented to exercise control and preventing misuse
of benefits were the main elements of this discourse. The question that arose at that time was
obvious: how could people be convinced to accept cutbacks in benefits that had often been
consolidated over almost thirty years? Certainly, the lack of a culture of individuals exercising
their social rights, coupled with a general lack of awareness of the possibility of claiming as rights
many of the benefits received as welfare from the State, paved the way for assuming cutbacks
were both right and inevitable. However, there was a feeling established over the years among
citizens that existing social achievements were ‘to stay’, and the welfare state was proving more
resilient to changes than expected (Pierson 1996: 144). It was therefore necessary to ‘sell’ the
product at the lowest possible electoral cost. Strategies based on the avoidance of guilt through
the dispersion of responsibilities, ‘passing the buck’ or attributing responsibility to others through
scapegoating, began to be used recurrently. All these strategies had an unexpected ally: the

We will analyze below how the social rights of citizens have been affected in five countries where
many transformations have taken place in their welfare states during the period under study.

3.1. The protection of ESCR in the United Kingdom

3.1.1. From consensual welfare to conditional welfare: chronicle of a U-turn

In order to understand the evolution of ESCR in the United Kingdom, it is essential to refer to the
‘Marshallian’ concept of social citizenship coined in the early stages of the ‘Post-War welfare
settlement’ where it was understood that the State had an obligation to provide services and
benefits of a collective nature to the entire British population. However, in no case could such
benefits and services be claimed and/or exercised as an individual right by citizens, who were
basically expected to act with passivity and as clients. Marshall himself stated: ‘Social rights are
not designed for the exercise of power at all, they concern individuals as consumers, not as
citizens’ (Marshall 1981: 140). It is along these lines that the expansion of the British welfare
model took place during the so-called ‘Glorious Thirty’ (the post-war economic boom).

The rupture of the welfare settlement occurred from 1979 and over eighteen years of
 uninterrupted Conservative governments, which undertook reforms aimed at reducing the State’s
role as the main provider of welfare. These reforms included a significant reduction in social
spending, questioning the authority of the professionals involved in intervention, and the
introduction of elements of conditionality in programmes related to unemployment and

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9 By postwar welfare settlement, we mean the agreement between the Conservative and Labour parties not
to reduce but rather expand the British welfare state that emerged following the Beveridge report.
10 The “Glorious Thirty” is known as the period from the mid-1940s to the mid-1970s, in which the classic
welfare state underwent a rapid expansion.
housing. All these changes highlighted the paradigm shift away from the previously dominant model. A change that took hold, paradoxically, under the ‘New Labour’ governments of Blair-Brown (1997-2010), where it was determined that the primary role of the State would be to promote training for insertion and retraining in order to promote the inclusion of inactive persons into the labour market. Citizens were expected to take advantage of the opportunities provided and would be responsible for their own welfare, particularly with regard to pensions.

Consequently, the ‘activation’ of all recipients of social benefits able to work was promoted, imposing a series of new requirements that ought to be met as a precondition for any claims. A thorough examination of the responsible use of benefits not subjected to conditionality was also made, with a view to penalizing any suspected lax or irresponsible behaviour. This contributed to spreading the idea that welfare benefits were no longer universal but rather subjected to conditionality. Such conditionality was applied to the unemployed who rejected alternative employment options offered to them, to single parents with children under eighteen years old, to unemployment benefit claimants who rejected a mandatory employment-oriented interview as well as to those applicants for housing assistance who did not demonstrate appropriate behavior, amongst other numerous conditionalities. As Dwyer argues accurately: ‘New Labour used its welfare agenda in an instrumental manner to persuade citizens of the superiority of one model of citizenship that emphasized notions of individual and mutual responsibility rather than individual rights’ (Dwyer, 2010: 75). The transition towards a model of markedly individualistic welfare was thus concluded, with protection of a residual character being focused on ‘vulnerable classes’. All that was made compatible with a greater role of the market in covering the needs of the ‘normalized’ population. What did not change from the previous model was the non-existent role of citizens in defending their social rights.

The arrival to power of the Conservative and Liberal Party coalition following the elections of 6th May 2010 and the context of economic crisis which led the United Kingdom into the deepest recession of its history (to the point that it took 25 quarters to regain its 2008 GDP level) have also meant an increase in the inequality of the population. A recent study published by the High Pay Center think tank concludes, on the basis of OECD reports, that the United Kingdom is at present the seventh most unequal country in the OECD, and that since the 1960s, it has gone from being a country comparable to Sweden in terms of social inequality to becoming one of the most unequal countries in the developed world.

3.1.2. The Coalition welfare agenda and its impact on social rights

Immediately after taking power following its victory in the elections of 6 May 2010, the Cameron-Clegg coalition government elaborated a multi-year package of measures with spending forecast to fight the crisis called, ‘Spending review 2010’, whose wording offers few doubts regarding the new executive’s perception of welfare and its ideas on how social benefits should be accessed. In its introduction, it thus declares:

‘The Spending Review makes choices. Particular focus has been given to reducing welfare costs and wasteful spending’ (Spending Review, page 5).

14 Translation from author’s translation.
16 HPC, What would the neighbours say: How inequality means the UK is poorer what we think, p.3.
In the section relating to the welfare state, the document states its opposition to those who “live” of benefits and are caught in the “poverty trap”.

‘The government is also reforming the welfare system itself. The existing system too often traps people in dependency’ (Spending Review, page 28).

‘The measures announced in the Spending Review will radically change the welfare system, ensuring that it promotes work and personal responsibility while controlling expenditure’ (Spending Review, page 28).

Such approaches have led to a series of actions designed to simplify the welfare system and ‘making work pay’, and which form the basis of the reform of the 2012 British Welfare Reform Act.18 To synthesize, the following actions have been undertaken:19

- The proposed introduction in 2013 of a single unified delivery model called ‘Universal Credit’ substituting six pre-existing benefits.20
- The introduction of the ‘Personal Independence Payment (PIP)’ aimed at young people and adults (16 to 64 years of age) with mobility problems and substituting another benefit termed ‘Disability Living Allowance (DLA)’. This new benefit is based more - on ‘how the condition of disability can affect the individual than on the evidence of disability itself’
- The introduction of the ‘Jobseeker’s allowance claimant commitment’, a new requirement for claimants of unemployment benefits linked to the ‘Universal Credit’, by which claimants are subjected to a number of conditions supervised by a “coach” of the employment office, while also receiving advice on the best opportunities to seek employment as well as warnings regarding the penalties imposed for not being sufficiently diligent in their job search.
- The introduction of a ceiling on the maximum amount of social benefits that a person of working age can receive (‘benefit cap’) which will never be higher than those received by working persons.
- The review of all records of recipients of temporary or permanent disability benefits (Employment and Support allowance) via the inclusion of new evaluation criteria aimed at new applicants.
- The revision of the criteria for obtaining assistance in matters of social housing, including sanctions for those tenants who have unoccupied beds in their homes (‘bedroom tax’).
- The increase of penalties for individuals who have obtained benefits fraudulently.

Other measures have been launched alongside the former, such as the increase in the retirement age to 66 years in 2026 and 67 years in 2028, or the inclusion of new models of work contract known as ‘Zero Hour Contracts’,21 which enhances labour flexibility. At the same time it also

19 Detailed information on these actions can be accessed on the website of the British government's Department for Work and Pensions: https://www.gov.uk/government/topics/welfare (retrieved on 12 June 2014).
20 Specifically: Income-based jobseeker’s allowance, income-related employment and support allowance, income support, child tax credits, working tax credits and housing benefits.
21 The “Zero Hours Contract” is a form of contract “on demand”, by which workers come only to work when there is demand on the part of employers, and are paid only for the work that they carry out. These contracts do not provide any guarantee of the number of working hours nor any entitlement to holidays or sick leave. A recent report by the British National Statistics Office warns of the tendency of large retailing and hospitality companies to apply such contracts, which are in high demand among young persons or persons over 65. Reference is available at: http://www.ons.gov.uk/ons/dcp171776_361578.pdf (retrieved 14 march 2016).
increases the precariousness of working conditions and that, according to Figures from the Office for National Statistics (ONS) employed 801,000 workers were on Zero Hour Contracts (2.5% of the employed UK workforce) in the quarter to December 2015. Which meant a rise by 15% or 697,000 from the same period of 2014. These workers were mainly young people or people over 60 years old in the catering industry (food chains), sportswear franchises or even in Buckingham Palace itself.

3.1.3. Loyalty of the British towards the Welfare State

The whole process of transformation of the British welfare model has been accompanied by the decline of citizens’ attachment to it. The 2013 edition of the report ‘British Social Attitudes Survey’ reveals that, with the exception of the National Health System, the support of citizens to its welfare system has weakened quite significantly over the last thirty years, and may imply a breakdown of the feeling of solidarity of the middle classes towards the most vulnerable groups. It is significant in this regard that while in 1993, 27% of respondents felt that many unemployed persons could find work if they really wanted to, that percentage rose to 68% in 2008, and that by 2011, 84% of respondents considered that many people claiming assistance distorted their reality, compared to 65% in 1989. However, more significantly the feeling of detachment from the social welfare system has increased further in proportional terms among young people, the working classes and Labour Party voters.

The latest edition (2015) of the report ‘British social attitudes survey’ confirms the tendency of the long-term decline of public support for welfare spending. According to the report:

‘It is clear that the public remains relatively unsympathetic to spending on benefits for those of working age, included not least, the unemployed. The predominant view (Shared by 52% of the public) is still that benefits for the unemployed are too high and discouragement work’ (BSA report pages 6 and 7)

The ‘commodification’ of social awareness generated by the growing trend towards individualism in meeting social needs is also reflected in the growing support of the electorate towards coercive discourses advocating tax cuts and social divestitures. This also includes stigmatizing those ‘irresponsible’ persons who have failed to provide an answer to their own needs and have had to seek assistance from social welfare services that we ‘all pay for together’. It is no coincidence that the Chancellor of the Exchequer George Osborne, declared at the Conservative Party Annual Convention of 2013:

‘We’ve capped benefits and our work programme is getting people to jobs.’

‘What about the long-term unemployed? Let us pledge here we will not abandon them, as previous governments did. Today I can tell you about a new approach, we call it ‘help to work’. For the first time, all long-term unemployed people who are capable of work we will be required to do something in return for their benefits and to help them find work. They will do useful work, putting something back into their community: making meals for the elderly, clearing up litter, working for a local charity. Others will be made to attend the job centre every working day. […] No one will be ignored or left without help. But no one will get something for nothing. Help to work and in return work for the dole, because a fair welfare system is fair to those who need it, and fair to those who pay for it too.’

A very similar message was sent by the Health Secretary Jeremy Hunt who, coinciding with the 2015 autumn convention of the Conservative Party (The first after the May 2015 elections which

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22 The contents of the report, including tables, is available at: http://www.bsa-30.natcen.ac.uk/
were won by absolute majority by the Conservatives avoiding the need for any coalition) declared that tax credit cuts would encourage people to work harder.

‘I don’t want to pretend to be very challenging but I do believe that moving to a culture where work pays and we are trying to help people to be independent and stand on their two feet is the most important thing we can do for people on low incomes’.

Serge Halimi, quoted in Bauman (2005: 90), explains in a very lucid manner the process of stigmatization that is linked to the dismantling of welfare models:

‘It begins by denying the middle classes equal access to specific collective benefits. Then, these benefits appear to be associated to the poorest, the only ones that go on to benefit from them, and the amounts assigned to social benefits decrease more and more, according to the rule that (in the American expression) ‘programmes for the poor are poor programmes’. Sooner or later, cases of ‘fraud, deceit and abuse’ are discovered. A mother, generally black, who uses her coupons to buy vodka: the poor are irresponsible and have children only to enjoy public benefits, etc. The last step is fulfilled when, once the popularity of state benefits has evaporated, the middle classes, which are no longer interested in continuity, accept the abolition of the welfare state’.

3.1.4. The United Kingdom and its stance on Economic, Social and Cultural Rights

The United Kingdom, in spite of having ratified the International Covenant on Economic, Social and Cultural Rights as well as the European Social Charter, and of being among the 171 signatories of the Declaration and Programme of Action of Vienna, has always maintained rather unfavorable posture towards the recognition of ESCR as human rights.

In the framework of the Council of Europe, the United Kingdom signed the European Social Charter but not the revised version of the same, nor the 1995 optional protocol allowing NGOs to submit collective complaints. The articles of the Charter are not directly applicable on the British territory but rather need its transposition into national law.

Within its obligations as a signatory to the European Social Charter, the United Kingdom has submitted 35 reports since it ratified its accession. On 28/5/2015, the UK submitted its latest report concerned the accepted provisions related to Employment, training and equal opportunities. Its conclusions will be made public in January 2017.

However there exist conclusions to previous reports. In regard to the report 34, which was submitted on 4/12/2014 and concerned the provisions relating to Children, Family and Migrants. Its conclusions, made public on 27th January 2016, the European Committee of Social Rights

23 These declarations were reflected in the chronicles of the convention issued by the main newspapers as the guardian: http://www.theguardian.com/politics/2015/oct/05/hunt-tax-credit-cuts-make-britons-work-like-chinese-or-americans


26 The document-technical file entitled “The United Kingdom and the European Social Charter” published by the Council of Europe includes up to date information on all activities of the UK in relation to this text. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/UK_en.pdf (retrieved 14/02/2016).

27 The United Kingdom applies the so-called “dual system” to transpose the provisions of international legislation it has ratified. The last human rights text transposed into British domestic law is the European Convention on Human Rights and Fundamental Freedoms, through the Human Rights Act 1998.

stated that the UK did not comply with some articles of the Charter. In particular they highlighted the rights of migrant workers and their families to protection and assistance, right of mother and children to social and economic protection and right of employed women to protection.

With regard to the United Nations framework, The United Kingdom submitted its fourth and fifth reports to the United Nations Committee on Economic, Social and Cultural Rights, 2002 and 2009, having filed its status report on 17 July 2014 for the sixth Universal Periodic Review that started in 2015. It is noteworthy that while the first two refer to the period of the Labour government, the last one refers to the years of the coalition government.

For the purposes of the present study this article focuses on the concluding observations made by the Committee to the United Kingdom on the occasion of its last two periodic reviews, brief reference will also be made to the UK’s most recent report: The written concluding observations of the Committee (E.C. 12/1/Add 79) for the fourth report (2002) highlighted the suitability of the United Kingdom for implementing the covenant in its territory, as stated in item 1 of the document:

‘Based on the information submitted by the State party, the Committee does not find any factors or particular difficulties that impede the full implementation of the Covenant in the United Kingdom’.

Reading through the following statement of observations, the harsh tone used by the Committee regarding the attitude of the United Kingdom in relation to ESCR catches the attention:

‘The Committee deeply regrets that while the State party has enacted some laws in the field of ESCR, the Covenant has not yet been incorporated into the regulations and the State party does not aim to incorporate it in the near future’ (Item 11).

‘The Committee reiterates its concern regarding the position of the State party, according to which the provisions of the Covenant, except minor exceptions, constitute principles and programmatic objectives rather than legal obligations that must be included in the legal system and therefore cannot be given direct legislative effect’ (Item 12).

‘The Committee expresses its concern at the fact that, with regard to education in matters of Human Rights provided in the State party to schoolchildren, the members of the judiciary, prosecutors, public officials and persons responsible for applying the covenant, due attention is not given to economic, social and cultural rights’ (Item 13).

Both items 12 and 13 are consistent with the approach of a welfare model such as the British, which does not consider that social benefits are a right claimable by citizens, but rather to conjuncture and paradigmatic consensus. This model guaranteed universal benefits through the welfare model in force during the post-war consensus, but has become a model of duty that must be obtained by the “responsible” citizen.

The observations of the Committee (2009) in response to the Fifth periodic report submitted by the United Kingdom (E/C/12/GBR/CO.5), the Committee again drew attention to the failure to transpose ESCR into domestic law:

‘The Committee reiterates the concern it expressed in its previous concluding observations that, despite the adoption of a wide range of laws with regard to economic, social and cultural rights, the Covenant has still not been incorporated into the domestic legal order of the State party and cannot be directly invoked before the courts. It also regrets the statement made by the State party’s delegation that economic, social and cultural rights are mere principles and values and that most of the rights contained in the Covenant are not justiciable’ (Item 13).
The latter point raised controversy in the British government, which in a later written statement did not acknowledge making any statement to that effect and stated that it did not argue the fact that ESCRs were as important and indivisible as civil and political rights, but that this in no case meant that all human rights were to be addressed in the same way for their fulfilment.

With regards to the recommendation linked to the item in which:

‘The Committee urges the State party to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights. The Committee reiterates its recommendation that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under a legal obligation to comply with such an instrument and to give it full effect in its domestic legal order’.

There was also a response by the British government in its observations statement:

‘The Government does not dispute that economic, social and cultural rights are as important as and indivisible from civil and political rights. However, this does not mean that all human rights require identical approaches [...] The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. [...] the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide’.

In the latest UK’s report submitted in June 2014 for the sixth universal periodic report, this opinion is again clearly restated:

‘There is no provision in the ICESCR that requires States parties to incorporate the Covenant into domestic law or to accord to it a specific status in domestic law. The UK Government therefore continues to consider that its method of implementation of the ICESCR, through appropriate legislation and administrative measures, ensures the fulfilment of its obligations under the Covenant’ (Item 11 of State party’s report for the 6th Universal Periodic Report).

The issue of the scant awareness of the ESCR among citizens is again raised by the Committee in Item 15 of its observation:

‘The Committee is concerned about the current low level of awareness of the ESCR, not only among the general population, but especially among judges, public officials, police and law enforcement officials, doctors and other health professionals, despite assurances to the contrary given by the State Party’ (Item 15).

This recommendations suggests that the UK government has failed to adopt effective measures to increase the degree of awareness of ESCRs amongst its population.

‘The Committee recommends that the State party take effective measures to raise awareness on ESCR among the general population and among public officials, police and law enforcement officials, doctors and other health professionals, including by providing the necessary support to civil society and Human Rights institutions in their role of increasing awareness. It also recommends that the State party take steps to disseminate the concept that the rights contained


in the Covenant are justiciable rights and not just mere rights derived from the ‘Welfare State’ (Recommendation concerning item 15).

This recommendation is particularly important because it tackles a situation (the lack of awareness of the ontology of social rights as individually claimable rights). It is no coincidence, but a conscious approach from the state itself, which spread the idea over many years that social benefits (whether universal or residual) derived from the Welfare State. From this perspective, the role of public employees responsible for its implementation was interpreted either as public charity with strong paternalistic undertones, or as repressive inquiry where the user, client, beneficiary could not exercise their rights. However, in the section of the latest State party’s report dedicated to responding to the concluding observations, the British government responds as follows:

‘Human rights promotion, including of economic, social and cultural rights, is largely carried out by the National Human Rights Institutions31 as part of their statutory duties. The Joint Committee on Human Rights (JCHR) of the UK Parliament also plays a significant role in raising awareness of specific human rights issues in Parliament’ (Item 13 of State party’s report).

‘The UK Government regularly updates information on its reporting status under the ICESCR on the website of the Ministry of Justice. In preparing this periodic report, the UK Government also engaged the National Human Rights Institutions and several civil society organizations at stakeholder events in London, Edinburgh (hosted by the Scottish Government), Cardiff (hosted by the Welsh Government), and Belfast. An online submission system was also opened to allow the wider public to submit comments on the preparation of the ICESCR periodic report’ (Item 14 of State party’s report).

‘The ICESCR is not directly enforceable (or “justiciable”) in UK courts, though the rights it contains are given effect in the UK through appropriate legislation and administrative measures. It would therefore be inaccurate, for the purpose of raising awareness of the Covenant, to represent the ICESCR as a set of free-standing “justiciable” human rights’ (Item 15 of State party’s report).

3.1.5. The sixth State party’s report submitted by the United Kingdom

State party’s report submitted by the United Kingdom for consideration before the Committee in 2015 includes a section dedicated to explaining its welfare reform, in which it is stated that:

‘The UK Government’s rationale for reforming the welfare system is to make the system simpler and to increase the incentives to encourage people on benefits to start paid work (or to increase their hours of paid work). Amongst the measures being introduced is Universal Credit, a new single system of means-tested support for working-age people who are in or out of work. Support for housing costs, children and childcare costs are integrated in the new benefit. It also provides additions for people with disabilities and for carers. Since 8 April 2013, a Personal Independence Payment (PIP) is progressively being introduced to support disabled people; PIP is a non-means-tested, non-taxable cash benefit that claimants can spend in a way that best suits them, and is payable to people whether they are in or out of work. The Government’s Social Justice Strategy focuses on tackling the causes of poverty’ (State Party’s report item 116, page 30.

To the 6th Universal Periodic Report, more than 25 “Shadow reports” from Civil Society Organisations with consultative status were issued. Never in the history of the UK Universal

31 National Human Rights Institutions are quasi-government bodies (quangos) enjoying statutory independence, which the central government and the governments of Scotland and Northern Ireland have tasked with preparing reports and disseminating information in matters of human rights. In concrete terms, they include the EHRC (Equality and Human Rights Commission), the SHRC (Scottish Human Rights Commission) and the NIHRC (Northern Ireland Human Rights Commission).
Periodic Reports have seen such a high number of reports. On November 2nd 2015, a list of 32 issues was published by the Committee to be responded to by the UK government. The reply came in a report issued as of the 18th of April 2016. In the answers, it could be acknowledged that the UK position regarding justiciability of ESCR had not changed:

‘The UK government does not consider that the ICESCR contains a legal obligation to incorporate The Covenant in the domestic law’. (item1).

‘Covenant rights have been invoked before domestic courts, but the ICESCR has not been incorporated into domestic law, so is not directly enforceable in legal proceedings’ (item5)

The concluding observations to the report issued as of July 2016 reaffirm the concerns of the previous conclusive reports in the terms of urging the United Kingdom to:

‘Fully incorporate the Covenant Rights into its domestic legal order and ensure that victims of violations of economic, social and cultural rights have full access to effective legal remedies’ (item6)

With regard to the announcement made by the British Government to replace the Human Rights Act of 1998 with the new British bill of rights that lowers the status of international and human rights standards, including on economic, social and cultural rights, the Committee recommends that:

‘The State party undertake a broad public consultation on its plan to repeal the Human Rights Act 1998 as well as on the proposal for a new bill of rights. It also recommends that the State Party take all necessary measures to ensure that any new legislation in this regard is aimed at enhancing the status of Human Rights including economic, social and cultural rights in the domestic legal order and that it provide effective protection to these rights across all jurisdictions of the State party’ (item 10)

Concerning the effects of austerity measures, the Committee recommends

‘That the State party review his policies and programmes introduced since 2010 and conduct a comprehensive assessment of the cumulative impact of these measures on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups, in particular women, children and persons with disabilities that is recognized by all stakeholders’ (item 19)

3.1.6. Conclusion

The exercise of social, economic and cultural rights in the UK is very limited. This maybe because it pushes against a welfare model which does not allow it to be claimable due to the role played by the State (led by governments of different political orientations). The latter has, from the outset, attributed to itself both the power to grant and restrict social rights and the power to determine how recipients may enjoy them, assigning a series of human and material resources to this end.

Moreover, the growing presence of conditionality in the exercise of welfare benefits provided by public authorities coupled with disinvestment in protection policies and the entry of private players

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configure a new model of citizenship oriented to the middle classes, and whose content consists precisely in not claiming social rights but rather in purchasing them on the market.

3.2. The protection of ESCR in Denmark and Norway

Norway and Denmark are part of the so-called Social democratic or Scandinavian welfare model, characterized by being underpinned by a strong State that guarantees benefits of a universal character financed through taxation, and which has very much taken into account gender equality.

Although the predominance of social democratic parties has been essential in configuring the model in the five Nordic countries, in general the political parties of different orientations show their commitment to maintaining the model (Nygard: 2006) and exhibit the progress made in matters of social protection with some pride. Impressively, the values of the Scandinavian model: universality, equality and prevention of all discrimination, are widely shared by citizens and form part of their identity. This entails, for example, that the State is not perceived by citizens as a hostile entity or a burden, but as the primary actor intervening in society to reduce poverty, improve educational levels or promote training and employment. For this reason, citizens also have perfectly assimilated the need to pay their taxes to sustain the system.

The above elements suggest that ESCRs are likely to be widely protected in these countries, but, does that mean that the citizens can enforce their ESCRs if they are restricted?

3.2.1. ESCR protection in Denmark.

Denmark ratified the ICESCR in 6th January 1972. Since then, it has submitted six universal periodic reports,\(^34\) the last two of which were submitted in 2003 and 2010 (the respective statements of concluding observations of the Committee were published in 2004 and 2013). Also, as a member of the Council of Europe, it ratified the European Social Charter in its original version, but not the revised one. On this basis, it has submitted 35 reports to the European Committee of Social Rights, the last one on 20/01/2016 regarding the rights related to employment, training and legal opportunities’. The conclusions report will be issued by January 2017. However, the latest conclusions report published on 4/12/2015 relating to families, children and migrants stated that Denmark did not comply with some provisions of articles 16 and 17 of the charter. However, the Covenant on Economic, Social and Cultural Rights response received by Denmark from the Committee in relation to the protection of social rights was largely positive and the concluding observations of the fourth periodic report (December 14, 2004) asserted that:

\[\text{The Committee notes with appreciation the continuing efforts of the State party to comply with its obligations under the Covenant, as well as the protection afforded to ESCR in Denmark’}.\]

In November 2012 the Danish government established a group of experts to study how to incorporate several human rights instruments (including the ICESCR) into national law. An earlier committee had expressed a negative opinion towards such incorporation. This included the idea that the content of some of the articles of the Covenant could not be interpreted by the courts that no procedure for individual complaints existed in the text of the Covenant (at that time it was not drafted in the Optional Protocol), and that the sources of interpretation were limited.

The truth of the matter is that Denmark has not incorporated the ICESCR into domestic law, and social rights are neither claimed by individuals nor employed by judicial bodies in their rulings. Moreover, the Danish Supreme Court has recently held that treaties not incorporated into domestic law had no direct effects on the national legal system. In this sense, the only human rights treaty that has been incorporated into domestic law is the European Convention on Human Rights (as is the case of the United Kingdom). In Item 4 of its Statement of concluding observations to Denmark on the occasion of the presentation of its fifth universal periodic report (E/C.12/DNK/CO/5), the Committee states:

‘The Committee reiterates its concern that the State party has still not incorporated the International Covenant on Economic, Social and Cultural Rights into its domestic legislation: The Committee is also concerned that, despite the State’s party statement that the Covenant is applied by the Danish courts, case law shows that international human rights treaties are rarely applied by the courts or invoked by parties to a case and that the Supreme Court has ruled that non-incorporated treaties do not have no direct effect on the domestic legal order’.

‘The Committee recommends that the State party incorporate the International Covenant on Economic, Social and Cultural Rights into its domestic legislation and improve the awareness and knowledge of the Covenant through human rights education and training programmes, including for the judiciary. The Committee draws attention to its general comment No. 9 (1998) on the domestic application of the Covenant’.

With regard to the ratification of the Optional Protocol to the ICESCR, the Danish government seems quite reluctant, as it considers that given the vagueness of the wording of the articles of the ICESCR, the act of signing the Optional Protocol would put in the hands of the Committee decisions that should be taken by the State in relation to its sovereignty.

Therefore, although citizens living in Denmark (especially of Danish nationality) enjoy a high level of protection, they are very limited when it comes to effectively invoking their social rights before the courts of the country, since the distrust shown by the government combines with a specific mandate of the Danish Supreme Court to apply only those rights that have been transposed. This also comes at a time when small but significant cutbacks are taking place in several social welfare areas, including the gradual increase in the retirement age from 65 to 67 years, the reduction by a year of accommodation and subsistence allowances for university students, and its equalization with the amount received by those under 30 years old who cannot find work. The maximum period for receiving unemployment benefits has decreased from four to two years.

The new incoming Government in cabinet after the 2015 elections (formed by a coalition of conservatives, liberals and right wing parties) announced additional cuts in childcare, development aid, secondary and higher education and research-government funded funds which were strongly rejected by the population. Together with this, a very controversial measure known as ‘jewellery law’ gave Danish police the authority to confiscate cash and valuables above 10.000 danish crowns (130.000 euro) from arriving asylum seekers as a way of helping offset the costs of their time in Denmark.

Consequently, the impossibility to raise claims against decreases in the content of the rights leaves many citizens unprotected if the cutbacks are consolidated as it seems to happen.
3.2.2. ESCR in Norway

Norway ratified the International Covenant on Economic, Social and Cultural Rights on 13th September 1972 and has since submitted five universal periodic reports, the last two in 2004 and 2010. The Statement of concluding observations of the Committee on the latest report was published in 2013. In the framework of the Council of Europe, Norway ratified the European Social Charter both in its original version and its revised version of 1996, and even ratified the additional protocol providing for a system of collective complaints which enabled NGOs to submit them but has not yet made any declaration enabling them to do so.

Currently Norway has submitted 22 State party reports in relation to the original version of the Social Charter (1.961) and 13 in relation to the revised version (the last two on 27 March 2015 and 9th November 2015)

Since 2009, the Norwegian Parliament has been involved in a process of constitutional reform that aims to incorporate certain provisions relating to human rights in its Constitution. It is not the first time this has happened and many civil rights and political rights, as well as some social rights (the right to a healthy environment) are in fact included within it. However, this is the first time that the Norwegian constitution has been subject to such a review process. In the midst of this process, there are voices speaking out against the incorporation of more social rights in the new constitution. They claim that many of the social rights are defined in a vague and imprecise manner and have a declarative character more akin to the diplomatic language of the international treaties than to a constitutional text (this would apply for example to the right to the highest attainable standard of physical and mental health) or the risk that exists regarding the interpretation of this right differently at the national and international levels. This reluctant approach to the implementation of ESCR is shared to a large extent by the Norwegian Government.

The fact that the Commission in charge of constitutional reform established the creation of two working groups, one on civil and political rights and the other on ESCR, is not without controversy because it is contrary to Article 5 of the Vienna Declaration which states the indivisibility, interrelatedness and equality in ranking rights.

According to the shadow report elaborated by the Norwegian Institute of Human Rights in September 2013 in relation to the last universal periodic report to the CESC submitted by Norway, there is resistance to the ratification of international instruments which allow the launch of individual complaints mechanisms to Human Rights monitoring bodies. In fact, whilst on the one hand the Norwegian authorities have a very positive and proactive stance on human rights in foreign policy, it is not the case domestically, particularly in relation to ESCRs, where there is a wide debate centered on the level of legitimacy and the role of Human Rights monitoring bodies. Their concern is that the decisions of these bodies prevail over others that have been enacted by democratically elected institutions, such as the Government and Parliament (especially in such sensitive matters that also involve the allocation of social resources).

On the other hand, although the ICESCR has already been incorporated into Norwegian law through the Human Rights Act of 1999 and therefore such rights would be fully justiciable, only three cases have invoked the ICESCR in court. Twice in 2001 and once in 2011, and in the latter case the Supreme Court held that the alleged articles (6.7 and 11) were confusing and thus had questionable applicability in the courts. This figure contrasts with the more than 800 occasions when the European Convention on Human Rights has been invoked since 1999 and the

numerous times that the Covenant on Civil and Political Rights has also been appealed to. In this regard the shadow report presented by seven organizations pertaining to the Norwegian NGO Forum for Human Rights is of particular relevance, asserting on the occasion of the Fifth report:

'It seems that the State Party means that it is sufficient for it to incorporate the Covenant into Norwegian legislation only by repeating the Covenants and to simply declare that the Covenant rights are justiciable There is still no example of court cases in which the courts have seriously considered the rights of ICESCR, although the plaintiffs of the private parties several times have pleaded arguments deriving from these rights'.

In a later paragraph, it reflects on the causes of this:

'The reason for this lack of judgements considering the rights of ICESCR may not derive from a lack of willingness by the courts, but the lack of Statutes, which have been reasoned by ICESCR, or in which ICESCR have been significant. We think therefore that an important reason is the lack of implementation of the treaty rights into concrete justiciable rights in Statutes and Regulations by the State Party'.

Regarding the non-ratification of the Optional Protocol to the ICESCR by Norway, organized civil society has a very critical stance towards the government because of the lack of dialogue and transparency of the latter throughout the process. On the one hand, the government never took it into account when submitting contributions to the numerous drafts that were elaborated over several years until the conclusion of the final text. Furthermore, the Government was never receptive to the campaigns carried out by entities such as Amnesty International, FIAN Norway and others to raise public awareness of the importance of the Protocol, opting instead to hire an expert for the preparation of a report and to invite NGOs to provide input on it, leading seventeen organizations to refuse to participate.

The report, prepared by renowned Norwegian jurist Henning Harborg, together with an assessment report prepared by an expert group on Cooperation and Development named Scanteam (both funded by the Norwegian Ministry of Foreign Affairs) and a working paper by Professor Malcolm Langford sponsored by the Norwegian Centre for Human Rights of the University of Oslo, constitute the set of advisory reports employed by the Norwegian government. Importantly, whilst the former does not express an opinion on it (Haborg), the other two recommend the ratification of the Optional Protocol.

The concluding observations report on the 5th report of Norway, insist on this same aspect when saying that:

'The Committee is concerned that the provisions of the Covenant are essentially seen as too general to provide the basis for the jurisprudence of the ordinary courts, which has led to the situation in which the Covenant has been invoked only in three cases before the Supreme Court. It is also concerned that the constitutional review initiated by Parliament aiming at incorporating the central provisions of international human rights norms has led to separate proposals

36 United Nations Economic and Social Committee: Responses of Norwegian Government to the issues raised by the Committee E/C NOR/Q/5. Add.1
37 Alternative Report to the UN Committee on Economic, Social and Cultural Rights regarding Norway’s six periodic report under the international Covenant on Economic, Social and Cultural Rights submitted in April 2013 by Food First, International Commission of Jurist, Juss-Buss, Legal Aid for Women, Red Cross Norway, Save the Children Norway and the Norwegian Centre Against Racism.
concerning civil and political rights and economic, social and cultural rights, with the latter being seen as having more of a declarative character\(^39\) (Item 4)

‘The Committee encourages the State party to consider ratifying the Optional Protocol to the Covenant’.

Consequently, Norway recognizes the importance of ESCRs, and has declared their justiciability in the country so that, in principle, the courts may apply them. However, they undermine this by alleging the ‘vagueness’ of the writing of articles of the Covenant, the insufficiency of interpretative criteria and the role of the Committee. The Government shares this opinion and is therefore reluctant to be proactive in the process of constitutional reform and the ratification of the optional protocol. The strength of the human rights organizations is key in the timid advances that have occurred to this point. On the other hand, the fact that there have been no cuts in Norway’s welfare model prevents the population from being aware of the usefulness of the Covenant and the Protocol in the defense of their rights given the trust in the role of the State existing in Nordic countries (Halvorsen et al 2015:3)

This situation, however, has begun to change since the September 2013 elections in which right-wing parties (Conservative Party and Progress Party) won the general elections on a platform of tax cuts, an “iron fist” against immigrants and the elimination of restrictions on the governments’ use of more than 4% of oil revenues to balance their budgets. Some pillars are likely to be affected by the new welfare reform initiatives which aim at increasing labour supplies through benefit cuts and restructuring social insurance, active labour market policies and major pension reforms (Dolvic et al 2015, 91)

Norway has thus initiated a significant ideological shift that may impact on the welfare model, after eight years of rule by the center-left coalition of Stoltenberg, under which the country had strengthened its social protection system in the context of the economic crisis.

3.3. The evolution of ESCR in Belgium

Belgium has an adequate formal regulatory framework that allows it – in principle – to develop internally the social rights listed in the ICESCR. This was emphasized by the Committee in its observations statement on the third report issued in 2008:

‘The Committee notes the absence of significant factors or difficulties preventing the effective implementation of the Covenant in Belgium’.\(^40\)

Belgium is indeed a ‘model’ country in that sense. Not only has it been a member of the Covenant since 1983, but it also signed the European Social Charter in both its original and revised versions,\(^41\) having also fulfilled the obligation to submit periodic reports to the respective committees of both treaties.

In 2003, Belgium signed the optional protocol to the European Social Charter that allowed the reception of collective complaints from NGOs but, like Norway, the issuance of the formal declaration allowing such intervention remains pending. In June 2015 Belgium accepted to be


bound by 4 additional provisions related to articles 26.1, 27.1 and 2 and 28 of the revised version of the European Social charter. Also, on 20 May 2014, it ratified the Optional Protocol to the ICESCR in totality, thus becoming the fifth country in the European Union to ratify the Covenant after Spain, Slovakia, Portugal and Finland.

The incorporation of international treaties into Belgian law takes place automatically on the basis of Article 167 of the Constitution and without there being, in general, some form of ‘ad hoc’ adaptation to domestic law, thereby creating practical difficulties in the application of rights. The ESCR Committee noted in items 11 and 12 of the 2008 statement of observations:

‘The Committee reiterates its concerns […] relating to the lack of appropriate and effective mechanisms to ensure compliance, at the federal, regional and community levels, with the State party’s obligations under the Covenant’ (Item 11 of concluding observations to the 3rd report).

‘The Committee notes with concern that the vast majority of the Covenant provisions, as well as some of the provisions of article 23 of the Constitution of the State party, which enumerates a number of economic, social and cultural rights but leaves it to national legislation regarding its implementation, do not have direct legal effect under national law, and are therefore rarely invoked separately before, and directly enforced by, national courts and other tribunals or administrative authorities’ (Item 12 of concluding observations to the 3rd report).

The reality, therefore, is that in the case of Belgium, the existence of an enabling legal framework is not sufficient for the exercise of social rights by the population. When Belgium presented its Fourth State Party Report to the Committee, it sought to explain the reason for the lack of effective implementation in this regard by asserting:

‘Two conditions must be met in order for a provision of international law to be directly applicable under Belgian law and thus able to be invoked before the Belgian courts. Firstly, the intention of the parties must have been to create rights for private individuals. Secondly, the provision must be sufficiently precise and comprehensive to be directly applicable in the domestic legal order without any need for an enforcement measure. These issues are generally addressed in case law’ (Item 9 of Fourth State Party Report).

‘An examination of Belgian case law shows that Belgian courts rarely apply the provisions of the Covenant. In the absence of any case law and in view of doctrinal disagreements, it is difficult to assess whether Covenant provisions are directly applicable under Belgian law. Those provisions are in fact formulated in a rather programmatic way: they commit States to taking measures but do not directly declare subjective individual rights’ (Item 10 of Fourth State Party Report).

It follows from these arguments that neither the administrative authorities nor the judicial bodies are implementing ESCRs. They are not giving effect to the invocations that are made on their behalf in one field or another, on the basis that the content of the treaties is more programmatic than operative, more oriented to enforcement by the states than to being claimed by individuals.

The other argument alluded to is that the wording and content of the rights defined is not sufficiently precise to be applied. The fact that the content of rights has not been transposed into national laws through concrete provisions has undoubtedly had repercussions in this regard.

Both positions are important concerns expressed by the ESCR committee in its concluding observations to the 4th state party report.

42 Ratification also took place with the declaration by the Kingdom of Belgium that it accepts the Committee’s competence, both to receive notifications from other member states on alleged rights violations, and to carry out investigations if it is informed by other states of violations of these rights.

Human Rights on trial

The Committee regrets that the Covenant and its provisions are not all directly applicable in Belgian Law and are only rarely invoked before the State party’s courts and tribunals and even then from an ancillary or secondary perspective. The Committee also regrets the position taken by the State Party whereby all the provisions of the Covenant do not directly declare subjective individual rights, thus making it difficult to determine their direct effect in Belgian Law’ (Item 7)

In the context of the European Social Charter, between 1992 and 2015, Belgium submitted 12 reports on the application of the social charter (original version) and 9 on the revised charter, and although the conclusions of the European Committee of Social Rights related to the different groups of rights\(^{44}\) show that Belgium meets, in general, the commitments of the renewed European Social Charter. The truth however, is that a decline in the quality of enjoyment of rights is taking place, mostly due to the greater rigidity and application of regressive criteria in the access to social benefits. Examples of this include ‘activation’ measures aimed at reducing unemployment amongst the youth and unemployed, together with the introduction of restrictive measures in the access to free justice for the vulnerable people by the implementation of the called “moderating ticket” (ticket moderateur) represent retrenchment policies implemented by the cabinets of Di Rupo (2011-2014) and Michel (2014 onwards)

These cutbacks have triggered strong resistance on the part of organized civil society, which has warned of the rise of the number of people finding themselves in situations of poverty and of the risk of increased flows of people from unemployment offices to social services centres, with stigmatizing implications.

However, platforms such as the Belgian Minimum Income Network (BMIN) developed in a joint memorandum of recommendations\(^{45}\) to the country’s government with a view to halting the rise of poverty, including suggestions such as Increasing all social benefits above the poverty threshold, fight against precarious employment, promote a European minimum wage at the European Union level, remove the time limits for receiving active insertion income and promote a generous interpretation of access to social benefits

With regard to Belgium’s ratification of the Optional Protocol to the ICESCR, it is definitely good news because it constitutes an important opportunity to halt the curtailment of social rights that is part of a systematic trend in all countries and all fields under examination. However, it would be desirable for this step in favour of strengthening rights to be completed with a formal declaration by the Belgian government allowing citizens to submit collective complaints under the European Social Charter.

3.4. The protection of ESCR in Spain

3.4.1 A cultural and normative straightjacket for some rights

- In Spain, the ESCR defined, both by the European Social Charter and the ICESCR- with the exception of the right to education- do not enjoy the same protection as civil and political rights. Their situation in the constitutional text leaves most of them outside the

\(^{44}\) Following a decision taken from the Committee of Ministers in 2006 the provisions of the Charter have been divided into four thematic groups (Thematic group 1: “employment, training and equal opportunities”; Thematic group 2: “health, social security and protection”; Thematic 3“Labour rights”; Thematic group 4: “children, families and migrants”), consequently each provision of the charter is reported on once every four years

set of rights that deserve guarantees. Some of them are hence generally located under the title ‘The rights and duties of citizens’ (right to work, to collective bargaining and to collective action) which are binding on all public authorities, and for which there is legal reserve and the possibility of judicial protection before the Constitutional Court. Others – the majority of rights – are framed within the title ‘Guiding principles of Social and economic Policy’, whose respect, recognition and protection takes place through positive legislation, judicial practice and the actions of the public authorities, since it is stated that these principles should “inform” the latter (i.e. form a part thereof). But ‘They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them’ (Article 53.3).

This differential treatment, established by the Spanish Constitution, justifies different and unequal levels of opportunity for citizens wishing to defend their human rights, whether they are civil and political or economic, social and cultural. This is despite the fact that international treaties ratified by Spain (including the ICESCR, the European Social Charter and the Charter of Fundamental Rights of the European Union), form part of Spain’s domestic law from the moment of their publication in the Official Gazette, as required by Article 96.1 of the Constitution.

We are therefore faced with the paradox that ESCRs become domestic law upon their publication in the Official Gazette of the Government and therefore can and must be invoked before the courts in case of a violation. However, as they are considered as ‘second rate’ rights in relation to civil and political rights, their effective exercise is hindered and limited to the provisions explicitly stated in the legislation.

Additionally, it is worth mentioning that in the history of social protection in Spain, responses to social needs (at least until the advent of modern democracy) have been provided basically by the Church and the State, from a perspective that intermingled elements of assistance-care and repression. Within this mix the religious component was prevalent, whereby the recipient, usually subject to a high level of stigmatization, assumed an essentially passive and grateful role.
At present some of the aforementioned elements are still present (although in some cases not explicitly) in the way that a response is ‘given’ and “received” from the Spanish model of welfare. Also, the way services are provided affect the possibilities for citizens to exercise their rights from a system that insists on providing, restricting or eliminating them in quasi-patronizing way according to the political, economic and often electoral priorities of the incumbent Government.

However, this situation is changing and examples of legislative initiatives are appearing (mainly in the areas of competence of regions) expressly setting forth ‘subjective rights of citizens’ and even including in some cases the possibility of bringing individual claims to enforce social rights. A pioneering example is the 2015 Basque Housing Act which included a justiciability clause that enabled citizens to claim their rights in courts. The paragraphs below reflect how it is possible to substantiate social legislation from the perspective of human rights, thereby facilitating their exercise.

‘The right to enjoy housing is a vital necessity for human beings, as it affects the enjoyment of other basic rights such as having a job, exercising the right to vote, accessing benefits and public services, providing schooling for children, enjoying culture and an adequate environment, sharing experiences with friends and family, and myriad others repeatedly highlighted by the most authoritative doctrine and by the courts themselves’ (this paragraph reflects the spirit of Article 5 of the Vienna Declaration, which refers to the interdependence of all human rights).

‘Explicit recognition is made of the right to stable legal occupation of housing as a subjective right, for those who, lacking decent and adequate housing in the aforementioned sense, lack the economic resources needed to access it. It is therefore recognized as a right (...) Furthermore, as a right and together with the public action established in matters of housing to achieve the broadest legitimacy possible in demanding respect for the rule of law, its holders are attributed the recourse to the appropriate courts to enforce the same, wherever it is unfulfilled by the accountable public authorities, in an unprecedented provision in the Spanish legislation to this moment’.

Another relevant piece of legislation is the 2011 Act by which the Spanish legislation on equal opportunities and outlawing of discrimination of the disabled people was adapted to the UN Convention on the Rights of Persons with disabilities. In its preamble it declares:

‘Disabled people are thus, considered subjects of rights and not mere recipients of social assistance’

And in article 1 refers to judiciary measures to defend these subjective rights

Two consequences arise from the former paragraphs: Firstly, it would suffice to include in the social legislation the possibility of bringing actions before the courts to dramatically strengthen the defense of social rights. Secondly, it is at the regional level – as regions hold competences in welfare provision – that the greatest (though limited) advances in the recognition of social rights are taking place. However, such modest progress collides with a welfare context characterized by a reduction in public spending and retrenchment policies which has downsized the sector and is increasingly limiting their universal and unconditional nature. This process, which began in the early years of the 1990s, has intensified its impact with the recession from 2007 and especially from May 2010, when central and regional governments implemented numerous cutbacks that have directly affected the rights of citizens in the fields of employment, healthcare, housing, pensions, disability and social services, as explained below.

46 Ley 3/2015 de 18 de junio, de vivienda (BOE nº166 de 13 de julio de 2016)
47 Ley 26/2011 de 1 de agosto de adaptación normativa a la Convención sobre los derechos de las personas con discapacidad de la Ley 51/2003 de 2 de diciembre de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad. (BOE de 2 de agosto de 2011)
48 Change is usually considered to have coincided with the economic crisis of 1993.
With regard to labour rights, substantial reforms made by the government in 2011 and 2012 entailed the reduction of compensation for unfair dismissals, the extension of the grounds for dismissal and the termination of the prevalence of permanent contracts in collective agreements. These reforms have also affected unemployment benefits by reducing them from 60% to 50% of the amount due from the sixth month of unemployment. In his speech to the Spanish Parliament of 11 July 2012, Prime Minister Mariano Rajoy stated that:

‘We will proceed with a review of the model of unemployment benefits, ensuring that the latter do not create disincentives to job search, following the example of some countries in the EU’.

‘The maximum duration of the benefit, of 24 months, will not be modified, and the current amount will be maintained during the first six months thereof. However, in order to encourage active job search, the new recipients of the benefit will see it reduced from 60% to 50% of the regulatory base from the sixth month of reception’.

It was therefore manifest that the Spanish government, like other European governments, applied the criterion of activation through employment as the primary measure to overcome poverty.

Some other rights were also affected by the retrenchment policies:

**In the field of housing rights**, the government adopted a code of good banking practices in 2012 with a very limited impact, achieving merely the inclusion of 10% of mortgaged families. In 2013, the reform of the Mortgage Law passed by the government (Law 1/2013 of 14 May) did not incorporate assets in lieu of payment on a universal and retroactive basis, a measure that had previously been claimed through a Popular Legislative Initiative supported by nearly one and a half million signatures. Further still, the central government appealed the Andalusian law allowing the suspension of evictions to the Constitutional Court. According to data from the General Council of the Judiciary, some 308,191 evictions took place between 2008 and 2013.

**In the field of healthcare**, the approval of Royal Decree-Law 16/2012 of 20 April and of Royal Decree 1192/2012 of 3 August contributed decisively to undermining the universality of access to healthcare. In the first place, by distinguishing between insured, beneficiary and excluded; and secondly, by depriving thousands of people from accessing the system, most of them immigrants in an irregular situation. To this, we must add the setting of a percentage payment for medicines based on income and the fact that pensioners must cover part of the payment of medicines for the first time.

**With regard to pensions**, the reforms established by Act 27/2011 of 1 August and Act23/2013 of 23 December have induced the gradual increase in the retirement age from 65 to 67 years old, and affected the calculation of pensions updates by linking them to the income and expenditures of the system, updating them by 0.25% in situations of deficit and establishing a 0.25% inflation ceiling in situations of surplus.

**In the field of dependence**, the approval of Royal Decree-Law 20/2013 of 13 July on measures to ensure fiscal stability and the promotion of competitiveness has brought about a new rating system that eliminates the structure of dependency levels and reduces payments to family caregivers of dependents by 15%. This, according to the Association of directors and managers of social services, has affected over 400,000 people by reducing the benefits they received by an average of 55 euros per month. On the other hand, and according to the same source, the

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49 The full speech is available at: http://www.lamoncloa.gob.es/presidente/intervenciones/Paginas/2012/prsp20120711.aspx (retrieved 10 May 2014).

revision of the model of non-professional contributions in family households has meant that 146,000 women have ceased to contribute to social security.

Finally, in the area of social services, lower allocations for social care programmes, which have led to the termination of numerous instruments and the layoff of thousands of professionals — with the consequent degradation of the quality of the provision of services —, are compounded by the effects of the new law of sustainability and rationalization of local government (Law 27/2013 of 27 December) on the care provided by social services, severely affecting its accessibility and proximity.

The intensity of cutbacks and the serious deterioration of the quality of services have led important sectors of the population to become aware of the violation of their social rights and to mobilize in their defense. Paradoxically, the greatest awareness-raising efforts in this area have not been the result of information and awareness-raising campaigns, but precisely as a reaction to the dismantling of services by the State. Key actors raising social awareness against cuts include the Plataforma de Afectados por la Hipoteca (‘Platform of the Affected by Mortgagees’) (in defense of the right to housing), Yo Sí Sanidad Universal (‘I say Yes to Universal Health’) (in defense of the right to health), and the different coloured “tides” that brought to light the fragile situation of the welfare subsystems.

At the same time, entities of organized civil society, some of them enjoying consultative status in the Economic and Social Council of the United Nations (ECOSOC), have spoken out and denounced the cutbacks. This has been done through awareness-raising campaigns on the Spanish territory and through their presence in the Committee on Economic, Social and Cultural Rights of the United Nations where, on the occasion of the presentation by Spain of its Fifth Universal Periodic Report, they presented their ‘shadow reports’.

3.4.2. Spain and its international obligations related to the protection of ESCR

In the framework of the United Nations, the Spanish state has been ‘examined’ on five occasions in relation to its implementation of the ICESCR. The last two reports to the CESCR were presented in 2002 and 2009, although the concluding observations are respectively of 2004 and 2012. Note that in the case of the Fourth report, not a single NGO presented a shadow report, while on the occasion of the Fifth report, three reports were submitted in addition to that of the Office of the Ombudsman.

The statements of concluding observations of the Committee on these reports include the following elements:

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51 Figures of State contributions to the Concerted Plan of Social Benefits and Services (which aims to ensure equal access thereto) show a decline from 94,892,360 billion euros in 2007 to 27,593 billion euros in 2013. Available at: https://www.msssi.gob.es/ssi/familiasInfancia/inclusionSocial/serviciosSociales/planConcertado/home.htm

52 Examples include the campaigns: “Derecho a curar” (‘Right to cure’) or “Nadie desechado” (‘Nobody rejected’) of Médecins Sans Frontières or “Demand dignity” of Amnesty International.

53 A detailed study of the process of presentation by Spain of the Fifth Universal Periodic Report to the Committee on ESCR can be found in Gomez Ciriano, E.J. (2012) “España se examina...y suspende en Derechos Sociales: El Estado español ante el Comité de Derechos Económicos, Sociales y Culturales de las Naciones Unidas” (“Spain is examined... and fails on Social Rights: The Spanish State before the Committee on Economic, Social and Cultural Rights of the United Nations”), Documentación Social nº164 (pp.189-211).
‘The Committee notes the absence of any significant factors or difficulties preventing the effective implementation of the Covenant in Spain’ (Item 6 of Statement of Concluding Observations on Spain’s Fourth Report).

This signifies that the State fulfills the conditions to render effective the provisions of the Covenant on its territory (as already mentioned, Article 96.1 of the Constitution provides that international treaties ratified by Spain are directly applicable from their publication, while Article 53.3 states that the articles of Chapter III shape positive legislation, action by the public authorities and judicial practice. Therefore, even despite being subjected to a different treatment from civil and political rights, the ESCR are applicable in Spain if there is political will on the part of the competent governments to promote, respect and remove obstacles to its implementation. This is possible, as has been shown by the pieces of legislation referred to above.

Secondly, whilst the Committee expresses particular satisfaction with the progress made by the Spanish state in promoting compliance with ESCR in its written concluding observations on the Fourth report, and makes some operational recommendations to that effect, it is not the case in its statement of concluding observations to the Fifth report, in which the tone is critical and unappreciative.

Thus, in relation to the Fourth report, it asserts that:

‘The Committee welcomes the adoption and implementation of a number of measures aimed at strengthening the protection of economic, social and cultural rights in the State party, including the Plan for the Equality of Opportunities between Women and Men 2003-2006, the creation of the General Secretariat of Equality Policies, the establishment of the Ministry for Housing, the establishment within the Ministry of Labour and Social Affairs of a new office to address the issues of migrant workers and the adoption of the Second National Plan of Action for Social Inclusion 2003-2005, which includes, inter alia, initiatives to improve the situation of Roma (Gitano) populations’ (Item 4 of Statement of Concluding Observations on Fourth report).

‘While noting that undocumented immigrants residing in the State party enjoy a number of fundamental rights and freedoms, including the right to basic social services, health care and education, on the condition that they register with their local municipality, the Committee remains concerned about the precarious situation of the large number of those undocumented immigrants who only enjoy a limited protection of their economic, social and cultural rights’ (Item 7 of Statement of Concluding Observations on Fourth report).54

“The Committee urges the State party to take measures to ensure the effective protection of fundamental economic, social and cultural rights of all persons residing within its territory, in accordance with article 2.2 of the Covenant. It further encourages the State party to promote the legalization of undocumented immigrants so as to enable them to enjoy fully their economic, social and cultural rights” (Item 24. Recommendation of Statement of Concluding Observations on Fourth report).

In stark contrast to the former, the Committee takes a very different stance in its Statement of Concluding Observations on the Fifth report55:

“The Committee is concerned that, with the exception of the right to education, which is one of the fundamental rights enshrined in the Constitution, economic, social and cultural rights are considered by the State party only as “guiding principles” of social and economic policy, legislation

55 http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5065b70f2&skip=0&query=economic%20social%20cultural%20rights&coi=ESP (retrieved 28th April 2016)
and judicial practice. The Committee is also concerned that the provisions of the Covenant have rarely been invoked or applied in the courts of the State party” (Item 6 of Statement of Concluding Observations on Fifth report).

In this regard, it makes the following recommendation:

“The Committee urges the State party, in light of the indivisibility, universality and interdependence of human rights, to take the necessary legislative measures to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights. The Committee also recommends that the State party take appropriate measures to ensure that the provisions of the Covenant are fully justiciable and applicable by domestic courts” (Item 6 of Statement of Concluding Observations on Fifth Report).

Another aspect highlighted by the Committee in its latest statement of observations is directly related to the austerity measures taken by the government in the current context of economic crisis and how they are affecting the exercise of social rights, especially among the most vulnerable groups:

‘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 disproportionately curtail the enjoyment of their rights by disadvantaged and marginalized individuals and groups, especially the poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies, migrants and asylum seekers’.

‘The Committee recommends that the State party ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups” (Item 8 of Statement of Concluding Observations on Fifth Report).

A comparison of the two texts allows us to conclude that the Committee on Economic, Social and Cultural Rights identifies a set of risks for the population as a result of decreasing levels of coverage of social rights, which in turn are due to the failure to consider them as rights, to their insufficient application by judges and invocation by citizens, and to austerity policies that, under the cover of economic crisis, are affecting the most vulnerable groups.

3.4.3 Some comments regarding the Sixth Periodic Report.

The Spanish State has the obligation to submit its sixth report on the 18th of May of 2017. It will be the first report after the ratification of the optional protocol. However, the Committee on Economic, Social and Cultural Rights addressed to the Spanish government on March 18th 2016 a list of issues (LOI) prior to submission of the sixth periodic report56 on which it required information on the impact of austerity measures on 25 items including employment, exercise of trade union rights, enjoyment of social security rights, evictions and levels of poverty, as well as some reporting on good practices.

Amnesty International, Some civil society organizations and the Spanish ombudsman also provided information regarding these list of issues and in all of them it was highlighted the lack of compromise of Spain in the protection, promotion and fulfilment of Economic social and cultural rights.

3.4.4 Spain and the European Social Charter

However, the ICESCR is not the only international accountability instrument for the implementation of social rights. The European Social Charter, ratified by Spain on 6 May 1980, also forms part of domestic law and can be invoked by citizens in the courts, just as its principles must inform judicial practice and the actions of public powers. Spain also signed the revised charter on 23/10/2000 but has not ratified it

As a signatory State of the charter, Spain has the obligation to submit reports and since 1982 has submitted 28. The 27th report submitted in October 2014 covered the rights of children, family and migrants, whilst the last one, in October 2015 covered the issues related to employment, training and equal opportunities. The European Committee of Social Rights (homologue of the ESCR Committee) elaborates conclusive reports in response to the ones submitted by the states. In some of the latest showed a very critical position on the way the Spanish government was implementing its austerity policies. This is the case of the report regarding health, social security and social protection (XX-2. 2013) on which it was affirmed that:

‘From this point of view, the Committee considers that this denial of access to health care for adult foreigners (aged over 18 years) present in the country irregularly is contrary to Article 11 of the Charter’.

‘[…] The Committee has held here that the States Parties to the Charter have positive obligations in terms of access to health care for migrants’

‘[…] States must ensure that all individuals have the right of access to health care and that the health system must be accessible to the entire population’.

‘[…] Health care is a prerequisite for the preservation of human dignity and that human dignity is the fundamental value and indeed the core of positive European human rights law’.

3.4.5. The universal justiciability of ESCR. A new path ahead?

The low incidence of the processes of periodic examination and accountability for strengthening social rights in Spain, together with the scarce invocation of the Covenant and the Social Charter, make of mechanisms for justiciability, some of the few alternatives for the defense of those rights. In this regard, the adoption by Spain of the Optional Protocol to the ESCR is good news, as are the recent judgments of the First Chamber of the Court of Justice of the European Union.

In addition, the revised version of the European Social Charter as well as the Optional Protocol thereto of 1995 for the presentation of collective demands by social organizations are potentially interesting instruments for the protection of social rights. This said the Spanish State has not shown particular enthusiasm for its approval.

58 Judgments of the Court of Justice of the European Union in cases C-415/11 (14/03/2013) and C-165/14 (17/07/2014) concerning the application of unfair terms in those foreclosure proceedings that infringe Directive 93/13/EEC.
4. ESCR, postindustrial welfare, and active citizenship: an impossible Trinity? Seven reflections to conclude

The present work has analyzed comparatively and diachronically the situation of ESCRs in five European countries. It has confirmed that cuts in welfare rights have taken place in all cases (to varying degrees) and that cutbacks are oriented towards the same goals: activation for employment, increased conditionality in benefits, and the transformation of universal protection towards compartmentalized protection. All of the former are beginning to have an impact on the response given by citizens to social needs. These difficulties and trends for the effective exercise of ESCRs in the countries under study have resulted in citizens finding themselves in situations of helplessness when faced by cutbacks.

All of the above leads us to the conclusion that social rights are now at their greatest vulnerability of their short history in Europe. This study raises a number of challenging issues for reflection and action. Firstly, ESCRs are a very uncomfortable reality to manage for States, even for those retaining a universal character who value citizen protection.

Secondly, citizens, in general, rarely invoke and exercise social rights. This may be due to one or more of the following factors;

a) a secularly established culture of dependence that expects responses of a “quasi-discretionary” character from the State;

b) Lack of information on the nature of social rights and how and where to claim them;

c) A culture of “customer satisfaction”

d) Undue reliance on the public powers (especially in Nordic countries);

e) Absence, in the laws governing social rights, of mechanisms to make them effective and/or confusion regarding the procedures for this purpose;

f) Misinformation and confusion induced (usually by States) on the figure of “model citizen” and what should be her/his relationship with the welfare system;

g) Fear of being stigmatized by claiming rights that are “for the poor” or “should be satisfied individually through the market”.

Thirdly, civil servants, police officers, teachers, social workers, lawyers, judges, prosecutors, doctors, etc. are not sufficiently trained nor, in general, have sufficient awareness to implement social rights or to inform citizens on how to exercise these rights. In many cases educational programmes or subjects taught at schools such as “Education for citizenship” do not usually treat the issue of social rights.

Fourthly: the reality under study casts several paradoxes, the model citizen of a state is one who does not exercise his/her rights of citizenship. Active Welfare is oriented to creating liabilities for ‘passive’ persons and to making them uncomfortable.

Fifthly, The axiom “The greater the market presence in the management of social welfare programmes, the greater the difficulty in exercising social rights and in monitoring compliance from international bodies” is fulfilled with 100% accuracy.

Sixthly: The combined pressure of a citizenry that demands the restoration of their violated human rights, along with the role played by international instruments of justiciability, can contribute to reversing the trends against social rights.
Seventhly: both the Committee on Economic, Social and Cultural Rights of the United Nations and the European Committee of Social Rights of the Council of Europe need to be professionalized and judicialized so that they can constitute international tribunals setting jurisprudence on the matter.

It is thus time to revise, reframe and reassert social rights. Social rights are part of our Human Rights as endorsed by Vienna Conference and Programme of Action. This is not only a duty of sovereign states but essential for citizens, who instead of being ‘activated’ by the neoliberal paradigm primacy of the market place should be claiming their social rights and actively supporting others to claim their rights if they want to truly realise their citizenship.
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