

SOCIAL RIGHTS AND THE WELFARE STATE: A NECESSARY
RELATION

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I. INTRODUCTION

Contemporary ideas about social rights have origins within the industrialized world, as well as in notions of the modern state.¹ Even though it is possible to mark remote backgrounds of each social right, their present concept is related to modernity.² It was during the Industrial Revolution when the ideas of social justice and social rights were established,³ and the level of complexity accompanying the state obligations began to develop from that moment forward. The formal recognition of the state's responsibility is seemingly universal for some of those rights. While the right to education is protected even in the United States, where the legal system is openly unsusceptible to the recognition of all other social rights,⁴ the same does not apply, for

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¹ The notion of social justice emerged as an expression of protest against what was perceived as the capitalist exploitation of labour (labor in American English) and as a focal point for the development of measures to improve the human condition. See UNITED NATIONS, *THE INTERNATIONAL FORUM FOR SOCIAL DEVELOPMENT: SOCIAL JUSTICE IN AN OPEN WORLD; THE ROLE OF THE UNITED NATIONS* 11 (2006).

² See BURNS H. WESTON, *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* (Richard P. Claude & Burns H. Weston eds., 2016); Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 *HUMAN RIGHTS Q.* 980, 989 (1999) (Economic, social, and cultural rights find their "origins primarily in the socialist tradition that was foreshadowed among the Saint-Simonians of early nineteenth-century France and variously promoted by revolutionary struggles and welfare movements ever since.").

³ We will use the notion of social rights as synonymous with economic, social, and cultural rights.

⁴ The right to education is guaranteed in all local constitutions. Even though there is not an express recognition in the United States Constitution. Derek W. Black, *The Fundamental Right to Education*, 94 *NOTRE DAME L. REV.* 1059, 1093 (2019). For

instance, to the right to housing or to the right to food and water, which have not yet been recognized at the constitutional level by a large number of states.⁵

The international law of human rights has played an enormous role in producing references for each social right.⁶ Nevertheless, as this article argues, recognition is not a guarantee of fulfillment from a historical perspective. The formula of success behind the generalized fulfillment of social rights in some countries, has consisted of a commitment to the welfare state, a set of economic principles, and a balance among social actors (such as unions, employers, and civil societies).⁷

One of the features of the welfare state in the decades after World War II, was the prominent role of the state as a regulator in the political field, from its economic planning and commitment to income redistribution, to its awareness of the inconveniences behind capitalism and a free market.⁸ The government put special emphasis on the policies of full employment: “the mobilization of labor force during the war had proved that in the real world, full employment could be achieved. Keynesian ideas showed that also theoretically full employment was possible and that deep recessions, such as those appearing between the two world wars, could be avoided.”⁹ Obviously, many circumstances have changed since then. Phenomena such as globalization, post-industrialism, population growth, and changes in the economy provoked the retrenchment of the welfare state.¹⁰

However, not only has the legitimacy of social rights continued to prevail since then, but they are also becoming increasingly

more about social rights in U.S., see Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 AM. J. COMP. L. 561 (2014).

⁵ While the right to education is recognized in 80% of national constitutions, only 22% recognize the right to food and water, and 41% recognize the right to housing. See Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1054 (2014).

⁶ See e.g., MALCOLM LANGFORD, *SOCIAL RIGHTS JURISPRUDENCE. EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (Cambridge University Press 2008).

⁷ The Danish case is a good example of the agreement among actors. See Lars Bo Kaspersen, *The Formation and Development of the Welfare State*, in NATIONAL IDENTITY AND THE VARIETIES OF CAPITALISM 99 (John L. Campbell et al. eds., McGill-Queen’s University Press 2006).

⁸ See GEORGE R. BOYER, *ECONOMIC INSECURITY AND SOCIAL WELFARE POLICY IN BRITAIN* 16 (2019).

⁹ Walter Korpi, *Welfare-State Regress in Western Europe: Politics, Institutions, Globalization, and Europeanization*, 29 ANN. REV. SOC. 589, 594 (2003).

¹⁰ See *id.* at 605.

universal. In the field of international law, social rights are regarded on the same level as other rights.¹¹ In practice, however, the economic decisions of governments are commonly taken to their detriment.¹² This was not always the case, however, for social rights, as we know them today, were born alongside the welfare state.

As such, my intention is to show that in order to comply with the obligation to guarantee social rights, the state must therefore develop a welfare state. This assertion has significant consequences at a time when many state institutions are required to comply with their legal obligations.

In the first section, we will explore the roots of the conceptions of social rights and the parallel rise of the welfare state in Europe and western countries between the nineteenth and twentieth centuries. We will show that the process of industrialization, the recognition of social rights, and the conception of the welfare state were closely related.

In the second section, we will examine the situation after World War II, when a consensus was reached that the regulation of the capitalist system was necessary, in order to address its consequences and protect people from the effects of economic liberalism. We will argue that the welfare state and social rights, from the 1940s to the 1970s, were understood as expressions of the same paradigm. We will further explore the background of the welfare state in the United States as well as in European countries, such as Germany. We advocate the postulates that ensure the possibility and even the necessity of the existence of a welfare state for the protection of a market economy. During the 1970s and 1980s, Western governments opted for an open economy. One of the consequences of this, was the constriction of the welfare state and the growing participation of private capital in social

¹¹ The Universal Declaration of Human Rights by the U.N. in 1948 included in its scope not only traditional civil and political rights, but also economic, social, and cultural rights. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). Human rights are enshrined in two major covenants of the U.N., the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). G.A. Res. 2200A (XXI) (Dec. 16, 1966).

¹² This is the result of the decisions of political power, which is usually the same as economic power. This is explained by Katharine Young in the following way: The Universalism of rights is confronted with the age-old problem of distributive politics: that political power usually corresponds with economic power, and that political disadvantage usually corresponds with economic disadvantage. Katharine G. Young, *Freedom, Want, and Economic and Social Rights: Frame and Law*, 24 *MM. J. INT'L L.* 182, 193 (2009).

services.¹³ Our objective is to show that, beyond the paradigm shift in economic matters, the principles of the welfare state continue to be legitimate.

In the third section, we study the notion of justiciability of social rights.¹⁴ This concept has been very important as related to the search for an effective exercise of rights.¹⁵ However, in this article we analyze the relationship between the fulfillment of social rights and the economic policies of the welfare state. This assertion could allow us to perceive the structural nature of the problem, seek systemic solutions, and likely be useful in emphasizing the responsibility of lawmakers and the government in the fulfillment of human rights.

In the conclusion, we propose solutions to reinforce the state's commitment to social rights that go beyond justiciability. Instead of opting for judicial activism, whose effects will always be reduced and partial,¹⁶ it is preferable to take actions that have a general impact and are recommended by international human rights organizations, such as implementing public policies that promote full employment, progressive taxes, and public budgets with a social perspective.

II. THE END OF CLASSICAL LIBERALISM AND THE RISE OF THE RATIONAL STATE

The concept of social rights is more modern than initially imagined. During the second half of the nineteenth century, the most important social problems were related to the labor standards and fair distribution of land.¹⁷ The social demands in Europe were mainly

¹³ See ANITA CHARIA, *POLITICAL ECONOMY OF THE SENSES. NEOLIBERALISM, REIFICATION, CRITIQUE* (Columbia University Press 2015).

¹⁴ See Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663 (2008). In this field, the studies around the judgments related social rights are fundamental, principally in India and South that Africa that have generated great academic stir during the last decade. See the much-cited article: David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 190 (2012).

¹⁵ See Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 1-44 (2009); see also VICTOR ABRAMOVICH & CHRISTIAN COURTIS, *LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES [SOCIAL RIGHTS AS ENFORCEABLE RIGHTS]* (Editorial Trotta, 2002).

¹⁶ See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L. J. 190, 2016 (2012).

¹⁷ See generally THE LIFEWORK OF A LABOR HISTORIAN: ESSAYS IN HONOR OF MARCEL VAN DER LINDEN (Ulbe Bosma & Karin Hofmeester eds., 2018).

associated with socialist, anarchist, and communist movements.¹⁸ A certain discomfort emerged as a consequence of the social and economic changes that subsequently affected the working class. As Jürgen Kocka explains, during industrial capitalism, the commodification was fully extended into the sphere of work and labor, and into human activities on a grand scale.¹⁹ Work relations were quickly evolving into capitalist ones, which meant that they were becoming dependent on changing market mechanisms, subject to ever-stricter calculation:

At the same time, industrial wealth was accumulated to an unprecedented degree, due to increasing large-scale fixed capital mines, factories, railways, and other institutions of industrial capitalism. As a result wealth differences became more visible, and stricter controls of profitability over time were felt to be needed and were practiced by employers and managers.²⁰

Under the classical conception of the liberal paradigm, the state intervention in the economy should be minimal. In that context, the idea of social rights remained a non-issue. It was understood that providing what was necessary to live, was an individual responsibility. However, dissenting views were developing, principally in Europe. For instance, John Stuart Mill, argued that state institutions have to be designed to eradicate the poverty of the working class.²¹ Mill, following David Ricardo, observed that the “industrial community may be considered as divided into landowners, capitalists, and productive laborers.”²² Mill asserted that “these classes, as such, obtain a share of the [national] produce: no other person or class obtains anything, except by concession from them. The remainder of the community is, in fact, supported at their expense.”²³ Hence, Mill

¹⁸ N. Geoffrey Parker et al., *History of Europe*, ENCYCLOPEDIA BRITANNICA (Feb. 4, 2020), <https://www.britannica.com/topic/history-of-Europe>.

¹⁹ Jan Lucassen, *Workers: New Developments in Labor History Since the 1980s*, in *THE LIFEWORKE OF A LABOR HISTORIAN: ESSAYS IN HONOR OF MARCEL VAN DER LINDEN* 22, 33 (Ulbe Bosma & Karin Hofmeester eds., 2018).

²⁰ Jürgen Kocka, *Capitalism and Its Critics. A Long-Term View*, in *THE LIFEWORKE OF A LABOR HISTORIAN: ESSAYS IN HONOR OF MARCEL VAN DER LINDEN* 71, 81 (Ulbe Bosma & Karin Hofmeester eds., 2018).

²¹ See Hans E. Jensen, *John Stuart Mill's Theories of Wealth and Income Distribution*, 59 (4) *REV. SOC. ECON.* 491, 491 (2001).

²² *Id.* at 497.

²³ *Id.*

dogmatically declared that these “three classes. . . are considered in [his] political economy as those that make up the whole community.”²⁴

We can find defenders of social rights as early as the nineteenth century. For instance, in the field of education, Thomas Jefferson argued that democracy required educated citizens who could employ reason and publicly deliberate about competing ideas to guide the nation.²⁵ To serve this end, Jefferson claimed that the government should provide every “non-slave child” with three years of schooling to ready them for citizenship.²⁶ In Europe, during the nineteenth century, schools were in the hands of churches. However, a growing interest in education generated the idea of free and—in some countries—secular education.²⁷ In England, Stuart Mill proposed the establishment of a state-supported system of “national education” for children and youth, without distinction of sect or social class. Mill held that “universal education” would create new abilities and novel types of behavior for future descendants of the present and different currents of thought that had started to question the principles of economic liberalism.²⁸

There were similar occurrences in the field of health. In England, during the nineteenth century, under the influence of Jeremy Bentham, public health became an institutional concern. The state began considering itself obligated to seek the welfare of the majority.²⁹ The Public Health Act of 1875, represented the culmination of such a new concept. The Act established an obligation on local authorities to provide clean water, dispose of sewage and refuse, and ensure only safe food be sold.³⁰ Although it is true that during the nineteenth century, basic education began to be perceived as transcendent in social life, and that the state began to recognize its responsibility in the protection of certain aspects of health, it is also true that the state was

²⁴ *Id.*

²⁵ Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 Stan. J. C.R. & C.L. 339, 342 (2008).

²⁶ *Id.*

²⁷ For England’s history see, e.g., Jaqueline Batt, *Compulsory and Free Education: A Content Analysis of Nineteenth Century British Opinion*, 6 (2) COMP. EDUC. REV. 93 (1962).

²⁸ See Jensen, *supra* note 21, at 504.

²⁹ F.-X. KAUFMANN, VARIATIONS OF THE WELFARE STATE: GREAT BRITAIN, SWEDEN, FRANCE AND GERMANY BETWEEN CAPITALISM AND SOCIALISM, GERMAN SOCIAL POLICY 95 (Springer-Verlag Berlin Heidelberg ed., 2013).

³⁰ COLIN PALFREY, THE FUTURE FOR HEALTH PROMOTION 33 (Bristol University Press, Policy Press ed. 2018).

not exactly what we would nowadays call “socially right,” since the idea of universality and enforceability of rights was not as precise as it is today.³¹ In any case, the search for a more just society, and the role of the state in achieving this goal, began to germinate. Beyond education and health, the vision of social services was seen as a matter of charity, which was sustained by Christian values. During the twenty-first century, under the perspective of economic liberalism, charity began to be seen as a vice of institutions, with pernicious effects on the economy: if workers were fed for free, they would stop working in factories.³²

A. *The Communist Threat and the Liberal Reaction*

The biggest challenges that liberalism faced were the ideas and the movement brought about by Karl Marx. Marx understood the flaws of the liberal economy and the role that the state played during the first industrialization as protecting capital above the interests of the working class.³³ Additionally, the threat of communism led to a change in the policies related to the working class.³⁴ European governments were aware of the scale of this danger. For that reason, the reaction of the United Kingdom, which was at the core of industrialization, served as a palliative recognition of some social rights, especially those involving the working class.³⁵ Marx however,

³¹ MANFRED NOWAK, HUMAN RIGHTS OR GLOBAL CAPITALISM: THE LIMITS OF PRIVATIZATION 14 (2016).

³² Francisco Monín, *El Surgimiento y Desarrollo del Estado del Bienestar (1883-1980)* [*The Emergence and Development of the Welfare State*] (1883-1980), in SALVADOR SALORTI I VIVES Y RAMIRO MUNOZ HAEDO ED. EL ESTADO DE BIENESTAR EN LA ENCRUCIJADA [THE WELFARE STATE AT THE CROSSROADS] 72 (Universitat d'Alacant / Universidad de Alicante, 2007).

³³ KARL MARX AND FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 15 (Charles H. Kerr & Company eds., 1888, 1910). (“The executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie.”).

³⁴ HAROLD J. LASKI. THE RISE OF EUROPEAN LIBERALISM. AN ESSAY IN INTERPRETATION 241 (George Allen & Unwin Ltd. eds., 1936) (“The conception of progressive taxation in the interest of the masses then became an essential part of the liberal idea. The revolutionary challenge was to be evaded by the gospel, as Mr. Chamberlain termed it, of ‘ransom’, a gospel which, in essence, was the notion that wealth must justify its possessors by paying reasonable amenities for the poor.”).

³⁵ Asa Briggs, *The Welfare State in Historical Perspective*, 2 EUR. J. SOC. 221, 241 (1961). (“It was argued, and has often been argued since, that the successful achievement of a program based on individual ‘palliatives’ would represent a victory for ‘working-class values’ within a capitalist, market society. Marx himself had claimed that the passing of the Ten Hours Act of 1847 was the first great occasion on which ‘in broad daylight the political economy of the middle class’ has

underestimated the ability of capitalist states to absorb and adapt to the demands of the working class.³⁶ In the last quarter of the nineteenth century, the labor law represented a limit for classical contractual freedom. In developed economies, workers were not united in support of revolution, though they did unite in championing trade unions, and other movements that became political forces within increasingly democratic political processes.³⁷ The obligation of companies regarding work conditions was an important wink from the state to the working class. As a result, the demands of Marxism were silent in the United Kingdom, which remained at the core of the industrial world. It is clear that several factors modified the liberal paradigms, particularly the growing power of unions controlled by Fabianism,³⁸ greater education and democracy—with the generalization of suffrage—which increased the collectivist sentiment.³⁹ The workers' situation gradually improved they then integrated into the capitalist system; for the state, it was better to be reformed than to face the threat of a revolution.⁴⁰

In the words of Karl Popper: “The development which led to this intervention started in Marx’s own day, with British factory legislation. It made its first decisive advances with the introduction of the 48-hour week, and later with the introduction of unemployment insurance and other forms of social insurance.”⁴¹ The western world at the time began to recognize the rights of workers.⁴² However, the state continued being a good manager of business interests. This is especially true within the field of land property. During the eighteenth and nineteenth centuries, the industrialization process was

‘succumbed to the political economy of the working class.’ Certainly the ten hours agitation, led by Oastler and supported by Ashley, marked a genuine stage in a process of conversion of values.”).

³⁶ See Chapter 20, in KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (George Routledge & Sons, LTD ed., 1945).

³⁷ R. J. Ormerod, *The History and Ideas of Marxism: The Relevance for OR*, 59 (12) J. OPERATIONAL RES. SOC’Y. 1573, 1581 (2008).

³⁸ See Ronald J. Yalem, *British Fabianism*, 38 SOC. SCI. 35 (1963) (“[T]he Fabian Society, composed of leading British intellectuals, produced vigorous and articulate proposals for reform that permeated many areas of British society and reached fruition in the legislation introduced between 1945 and 1951 by the Labor Party.”).

³⁹ Francisco Monín, *supra* note 32, at 80.

⁴⁰ *Id.* at 82.

⁴¹ POPPER, *supra* note 36 at 129.

⁴² *Id.* at 177 (“There are countries, for instance the Scandinavian democracies, Czechoslovakia, Canada, Australia, New Zealand, to say nothing of the United States, in which a democratic interventionism secured the workers with a high standard of living, in spite of the fact that colonial exploitation had no influence there, or was at any rate far too unimportant to support the hypothesis.”).

significantly related to land.⁴³ The concentration of land property was a generalized phenomenon all over the world. To help solve the problem, in as early as 1795, Thomas Paine suggested a plan, which combined land and social policy.⁴⁴ Moreover, the roles of the governments were, in many cases, to serve as the protectors of the landowners. Franz Oppenheimer (1864-1943) defended the idea that a land monopoly is not natural, but artificial.⁴⁵ He blamed the defects of capitalism on the fact that monopolies associated freedom and welfare with real competition in a monopoly-free set-up.⁴⁶ Property institutions, rather than resource scarcity, excluded most people from owning land, asserted Oppenheimer. “The entitlement approach applies a similar idea to explain the relationship between poverty and famines.”⁴⁷ In the first decades of the twentieth century, the question of land continued to be a topic of concern. The recognition implied a change in the classical perspective of the state’s role. It is not a coincidence that the first social revolutions of the twentieth century (i.e., the Mexican Revolution of 1910 and the Russian Revolution of 1917) had important agrarian components.⁴⁸ Similar occurrences were taking place simultaneously in Germany and Ireland.⁴⁹

B. *The German Welfare State*

The adjustments to laissez-faire capitalism in continental Europe began in Bismarck’s Germany.⁵⁰ The idea of social assistance was developed under the influence of Lorenz von Stein’s thought, who,

⁴³ See Rafael Calduch Cervera, *La Estructura Económica Internacional del Siglo XIX [The International Economic Structure of the 19th Century]*, 8 ESTUDIOS INTERNACIONALES COMPLUTENSE 43 (2006).

⁴⁴ Lutz Leisering, Benjamin Davy & Ulrike Davy, *The Politics of Recognition: Changing Understandings of Human Rights, Social Development and Land Rights as Normative Foundation of Global Social Policy*, 18 MAX PLANCK Y.B. UNITED NATIONS L. 565, 592 (2014).

⁴⁵ *Id.* at 592.

⁴⁶ Oppenheimer “defines monopoly as a position of economic power which makes exchange differently urgent for the partners, thus violating the equivalence of exchange essential for a free society.” Eduard Heimann, *Franz Oppenheimer’s Economic Ideas*, 11 SOC. RES. 27, 33 (1944).

⁴⁷ Leisering, *supra* note 44, at 592.

⁴⁸ ALAN KNIGHT, *THE MEXICAN REVOLUTION, VOL. 1. PORFIRIANS, LIBERALS AND PEASANTS* 79 (University of Nebraska Press, Lincoln and London, 1990).

⁴⁹ See Thomas Murray, *Socio-Economic Rights Versus Social Revolution? Constitution Making in Germany, Mexico and Ireland, 1917-1923*, 24 SOC. & LEGAL STUDY 487 (2015).

⁵⁰ Joachim Singelmann & Peter Singelmann, *Lorenz von Stein and the Paradigmatic Bifurcation of Social Theory in the Nineteenth Century*, 37 BRIT. J. SOC. 431, 444 (1986).

besides advocating for the improvement of living conditions of the working class, proposed an alternative to the violent solution of social problems, for which Marx had been advocating.⁵¹ Lorenz, a student of Hegel who had rejected the idealistic approach of his teacher, “anticipated the major arguments of historical materialism; but, unlike Marx, he did not postulate an inexorable proletarian revolution which would ultimately resolve societal contradictions.”⁵²

As a reaction to the social context, in 1883, compulsory health insurance was established for workers financed by employers and by the workers themselves. Benefits are generally determined by the contributions of both. In 1884, a law was established which regulated work accident insurance, in 1889, one which regulated disability insurance and, finally, in 1891, one that regulated old-age insurance upon reaching seventy years of age.⁵³ Social reforms continued, and in 1899, laws were passed limiting hours of the working day; labor inspection was improved, and the first labor courts were created. It was during the Weimar Republic (1918-1933) when the social state was constitutionalized. In its title relative to “social justice,” it traces the economic principles of the social state.⁵⁴

The social state implies a qualitative leap that involves questioning the capitalist system of production based on the assumption that substantial reforms are needed so as not to violate the dignity of the person.⁵⁵ The idea that capitalism is incompatible with human dignity is one of the foundational ideas of nineteenth century socialism, which is articulated in Title V of the Constitution of Weimar, outlining a just socio-economic order.⁵⁶ The weak validity of the Weimar Constitution made the realization of its postulates impossible. It was in Sweden where the social democratic model was brought to its fullest expression.⁵⁷ Under the government of Nils Eden, universal suffrage was granted to all persons over eighteen years of age: “The conquest of universal suffrage, the first and most substantial

⁵¹ *Id.*

⁵² *Id.* at 431.

⁵³ *Id.* at 431. Social reforms continued, and in 1899, laws that limited the working day were passed; During the Weimar Republic (1918-1933), the labor inspection was improved, and the first labor courts were created.

⁵⁴ See David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25, 25 (1994).

⁵⁵ IGNACIO SOTELO, EL ESTADO SOCIAL. ANTECEDENTES, ORIGEN, DESARROLLO Y DECLIVE [THE SOCIAL STATE. BACKGROUND, ORIGIN, DEVELOPMENT AND DECLINE], 197 (Trotta ed., 2010).

⁵⁶ *Id.*

⁵⁷ *Id.* at 203.

of the workers' demands, highlights the reforming capacity of the labor movement."⁵⁸

C. *International Concern Regarding Social Issues*

The development of labor law in the national field and the situation after the First World War, engendered the idea of protecting labor rights in the international arena. The International Labor Organization (ILO) was not only a reaction against exploitation, but was also intended to quell worker's unrest.⁵⁹ The first General Director of this establishment stated: "Economic and social questions are indissolubly linked and economic reconstruction can only be sound and enduring if it is based on social justice (ILO, 1919)."⁶⁰ Phelan, the civil servant who wrote the preparatory papers on labor matters for the British delegation to the Paris Peace Conference, had witnessed the dire conditions of the working class, while working on surveys for the Board of Trade.⁶¹ He had been in St. Petersburg in the early months of 1918 and had seen firsthand the substantial deprivation and social turmoil caused by the Bolshevik Revolution.⁶²

Labor unions played a significant role in the constitution of the ILO in 1919. The ILO was (and still is) constituted on a tripartite basis: four delegates represent each country with one vote each. Two of whom represent the current national labor ministry and two who represent the trade unions and the employers' organization, respectively. Kaufmann observes that this pattern of representation, unusual in international organizations, emphasizes the representatives of capital and labor recognizing co-responsibility towards social problems related to labor and employment.⁶³ As Janice Bellace notes, "in its formative years, the ILO did not distinguish between standards, decent work and human rights."⁶⁴ These conventions were seen as instruments, which were to serve to protect the dignity of the workers and as a means of achieving social justice.⁶⁵

⁵⁸ *Id.*

⁵⁹ Janice R. Bellace, *Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work*, 15 EMP. RTS. & EMP. POL'Y J. 5, 8 (2011).

⁶⁰ Rene Huyser & Paul Smit, *A Social Justice Score Card for Dismissal Protection*, 51 IND. J. INDUS. REL. 187, 191 (2015).

⁶¹ Janice R. Bellace, *Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work*, 15 EMP. RTS. & EMP. POL'Y J. 5, 8 (2011).

⁶² *Id.*

⁶³ Franz-Xaver Kaufmann, *The Idea of Social Policy in Western Societies: Origins and Diversity*, 3 INT'L J. SOC. QUALITY 16, 25 (2013).

⁶⁴ Bellace, *supra* note 59, at 11.

⁶⁵ *Id.*

As described by Guy Standing, “every period of economic reconstruction, associated with major technological changes and the renewed pursuit of flexibility, has eventually induced a countermovement to provide new systems of social protection compatible with new structures and processes.”⁶⁶ The reaction to the effects of the Great Depression serves as a good example of that. In 1932 the Swedish government established a public works program and increased government borrowing in order to undertake a countercyclical fiscal policy.⁶⁷ In addition, the government hoped to introduce a public unemployment insurance system, in addition to establishing a series of important changes to the administration of labor market programs.⁶⁸

D. Welfare in England and Beyond

According to Daniel J. Whelan and Jack Donnelly, the true beginning of the British welfare state is likely dated between 1905-1909, during the tenure of the new Poor Laws Commission.⁶⁹ The Minority Report, drafted by Beatrice and Sydney Webb, provided the first clear, semi-official conceptualization of welfare as an issue of industrial organization, suggesting that the distinctive threats to human dignity posed by an industrial economy required a new system of social provision.⁷⁰

The term “Welfare State” was coined by William Temple in 1941 as a result of the differences between the Welfare State of the German

⁶⁶ Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL’Y J. 29, 32-33 (2007).

⁶⁷ JOHANNES LINDVALL, POLITICS AND POLICIES IN TWO ECONOMIC CRISES: THE NORDIC COUNTRIES, IN COPING WITH CRISIS, 246 (Bermeo & Pon-tusson eds., 2012).

⁶⁸ *Id.* at 247 (“Most economists and economic historians consequently believe that fiscal policy had a relatively minor impact on Sweden’s economic recovery in the mid- to late 1930s.”).

⁶⁹ Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 Hum. Rts. Q. 908, 923 (2007).

⁷⁰ *Id.* (“The period 1905-1911 also saw a flurry of social legislation that began to point towards a welfare state. The 1905 Unemployed Workman Act, for all its inadequacies, clearly established the principle of national responsibility. Lloyd George’s Peoples’ Budget of 1909 transformed the parameters of British political debate. And the 1911 National Insurance Act was the first big step towards the post-World War II welfare state.”).

National Socialism and the British society Welfare State.⁷¹ The English version is committed to achieving full employment and guaranteeing a subsidy that ensures a decent life for all and in all circumstances, without a time limit, thus eradicating poverty.⁷² In order to achieve the above, there is a clear and extended scheme of the transfer and mechanism of redistribution of the national wealth, which seeks to reduce economic and social inequality among the population. The 1942 Social Security Report by William Beveridge played a fundamental role in the configuration of the welfare state.⁷³ The report reviews the state of the British social security system and grants recommendations to improve it with the aim of achieving universal protection. The report begins by praising the social security system, qualifying it as one of the world's best, but later concludes that it does not encompass an important part of the working class, who lived below the poverty line.⁷⁴ In 1944, Beveridge published a second report entitled "Full Employment in a Free Society," in which he recommended seeking full employment without eliminating private initiative and the market economy (in order to avoid the Soviet model).⁷⁵ The development of Welfare was one in which an individual sought full employment without sacrificing private property, economic freedom or the market. Without those features, personal and political freedom would disappear.⁷⁶

The new social functions of the State, which include the expenses related to education, were developing in all the countries that were in the process of industrialization or democratization at the time, or that had a high per capita income.⁷⁷ In general, European governments increased public spending to maintain full employment policy and guaranteed agricultural prices, as well as the generalization of unemployment insurance.⁷⁸ Public health and education plans generalized access to these public services for the bulk of the population. This was possible with an increase in a progressive

⁷¹ Schulz-Forberg, Hagen, *Welfare State*, ENCYCLOPEDIA OF GLOBAL STUDIES (Helmut K. Anheier, Mark Juergensmeyer, and Victor Faessel, eds., 2012) <https://sk.sagepub.com/reference/download/globalstudies/n562.pdf>.

⁷² See Sotelo, *supra* note 55, at 247.

⁷³ *Id.* at 221.

⁷⁴ *Id.* at 222.

⁷⁵ *Id.* at 227.

⁷⁶ *Id.*

⁷⁷ F.-X. Kaufmann, *Variations of the Welfare State: Great Britain, Sweden, France and Germany between Capitalism and Socialism*, in GERMAN SOCIAL POLICY 29 (Springer-Verlag Berlin Heidelberg ed., 2013).

⁷⁸ *Id.* at 60.

taxation on higher incomes.⁷⁹ For example, in France, the state transformed the agrarian society of the nineteenth century into a competitive and prospering industrial economy.⁸⁰ Germans, similarly, returned to the bank-centered financial system that had helped drive industrialization from the mid-to-late nineteenth century.⁸¹ After 1945, the banks again assumed their role as the motor of economic development, but now, within the context of a stable democracy and an export-driven economy. All of this was upheld by an extensive welfare state.⁸²

E. The Welfare State in the United States

The recognition of social rights in modern societies has been related to a constraint of actions to limit the abuse of so-called economic freedom, even in the United States.⁸³ However, this change occurred gradually and was not always peaceful. Gary Vause explains that during the nineteenth century, there was little effort made by Congress to consolidate or codify a set of legal principles applicable to the new relationships being developed between organized labor and employers.⁸⁴ In the late nineteenth and early twentieth centuries, courts very often favored the employers, who held great political and economic power.⁸⁵ The idea of a welfare state was introduced in the United States later than in Europe and with a greater reliance on market regulation in relation to direct state provision.⁸⁶ During the time of Franklin D. Roosevelt's presidency, the general idea was that the industrial market economy needed to reconsider traditional liberties, and that economic and social rights were, and are, no less central to the functioning and legitimacy in the United States, just as they are than in Europe.⁸⁷ The conditions of the working class in the United States started to improve from the implementation of the New

⁷⁹ See Robert J. Lampman, *Recent Thought on Egalitarianism*, 2 THE Q. J. OF ECON. 234 (1957).

⁸⁰ See MARK I. VAIL, *RECASTING WELFARE CAPITALISM, ECONOMIC ADJUSTMENT IN CONTEMPORARY FRANCE AND GERMANY* 34 (Temp. Univ. Press 2010).

⁸¹ *Id.*

⁸² *Id.* at 35.

⁸³ W. Gary Vause, *Laissez-Faire and Free Market Themes in Labor Law - A Comparative View of the American Experience*, 1 TILBURG FOREIGN L. REV. 227, 229 (1992).

⁸⁴ *Id.* at 230.

⁸⁵ *Id.*

⁸⁶ See Whelan and Donnelly, *supra* note 69, at 924.

⁸⁷ *Id.*

Deal.⁸⁸ President Roosevelt promoted programs and projects aimed to defeat the Great Depression, in addition to laws that limited traditional principles of voluntarism, anti-statism, and noninterventionism.⁸⁹ The new legislation introduced fundamental changes that affected the balance between the ruling class and the working class. One of those laws was the historic *1935 National Labor Relations Act*.⁹⁰ It argues that the minimum wage is the most important factor against the freedom of contract, used to de-commodify the salary, as it should not be subject to the rules of the market, but determined by rational parameters: the wage should be adequate to live a decent life. It was precisely in those years when the Supreme Court abandoned old doctrines; the right to private property and freedom of contract started to lose its definite value, while social rights began to gain more importance.⁹¹

III. THE STATE AS A REGULATOR OF THE ECONOMY

It is generally accepted that the universalization of human rights began to spread after World War II. At the same time, the rhetoric surrounding social justice was gradually modified and the outdated reference to the right to land ownership consequently collapsed.⁹² In this spirit, Lutz Leisering from the Organization for Economic Cooperation and Development (OECD) points out: “[T]he introduction of the welfare state decoupled the land question from the social question. Contribution-based and tax-based social security is financed through jobs, salaries, and income or sales taxes. Moreover, in post-World War II, in Europe, land reform was increasingly associated with communism and thereby discredited.”⁹³

⁸⁸The New Deal comprehends a series of programs and projects instituted during the Great Depression by President Franklin D. Roosevelt that aimed to restore prosperity to Americans.

⁸⁹ See generally Gary M. Fink, *The Rejection of Voluntarism*, 26 ILR REV. 805-819, (1973).

⁹⁰ Vause, *supra* note 83, at 231 (“A highly useful historical antecedent for national collective bargaining legislation was the Railway Labor Act of 1926 . . .”).

⁹¹ Between 1937 and 1941, the president appointed the nine judges that make up the Supreme Court of the United States, in an unprecedented event since the integration of the Supreme Court of President Washington. MIGUEL BELTRÁN DE FELIPE & JULIO V. GONZÁLEZ GARCÍA, *LAS SENTENCIAS BÁSICAS DEL TRIBUNAL SUPREMO DE LOS ESTADOS UNIDOS DE AMÉRICA [THE BASIC JUDGMENTS OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA]* 221 (2005) (Spain); David Currie, *The Constitution in the Supreme Court, The New Deal, 1931-1940*, 54 U. CHI. L. REV. 506, 507 (1987).

⁹² Leisering, *supra* note 44, at 592.

⁹³ *Id.*

The concept of social rights provided the state a different role in the face of social inequality. The self-concept of the state after World War II was transformed.⁹⁴ Beyond the regulation on labor, which continued to be fundamental, the role of the state in the realization of the minimum standard of welfare became evident.⁹⁵ The idea of the state's responsibility regarding socio-economic and cultural rights started to be apparent, at least in a formal way, with the signing of the United Nations Charter (1945), whose articles 55 and 56 recognized the importance of social rights.⁹⁶ A new vision of the role of the state concerning the market was partially extended to the international economy in the 1940s and 1950s as "the shared legitimacy of a set of social objectives to which the [Western] industrial world had moved, unevenly but 'as a single entity.'"⁹⁷

The confluence of historical events which gave birth to the United Nations at the end of the World War II, as well as human rights claims, including social rights, attracted more concerted political attention from governments than ever before.⁹⁸ Simultaneously, social rights were being recognized both nationally and internationally. The political and economic climate facilitated consensus in both arenas. The economic concern was due to Keynesian's paradigm, which had prevailed for about three decades on both sides of the ocean after the World War II.⁹⁹ We will briefly explain the relationship between state social policies, the recognition of social rights at the international level, and the creation of the social state of law.

⁹⁴ *Id.* at 573.

⁹⁵ Asa Briggs, *The Welfare State in Historical Perspective*, 2 EUR. J. SOC. 221, 231 (1961).

⁹⁶ U.N. Charter art. 55-56 ("Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 56. All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.").

⁹⁷ Whelan & Donnelly, *supra* note 69, at 940.

⁹⁸ See Leisering, *supra* note 44.

⁹⁹ Alfred H. Bornemann. *The Keynesian Paradigm and Economic Policy*, 35 AM. J. ECON. SOC. 125 (1976) ("Keynesian theory, emphasizing government fiscal policy and deficit spending as counter-depression, full-employment, and economic growth measures, became the generally accepted paradigm in economics and public finance.").

A. International Recognition: United Nations

In the course of the discussions concerning the Universal Declaration of Human Rights (UDHR), all states agreed upon the fact that economic and social rights were essential for the development of nations and were equal to all other rights (civil and political rights).¹⁰⁰ It should be emphasized that the UDHR was drafted precisely at a time when the belief in the concept of the welfare state was increasingly spreading. It contains five articles (22 to 27) related to economic, social and cultural rights, and these rights served as the basis for the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰¹ These articles recognize the rights to work, social security, health, food, water, sanitation, and adequate housing and considers these rights to be human rights.

It is important to keep in mind how the liberal economies supported the economic policy of the time and the social rights contained in the ICESCR and understand how they imagined that they would comply with ICESCR. In the fall of 1940, “the English press began to debate the need for an ‘economic bill of rights’ in order to defeat Hitlerism spreading around the world by establishing a minimum standard of housing, food, education, and medical care, along with free speech, free press and free worship.”¹⁰² In his State of the Union speech of 1941, former U.S. President Franklin D. Roosevelt outlined his vision of the future based on a sustained, ethically motivated, multilateral foreign policy that famously articulated the four freedoms.¹⁰³ The first is freedom of speech and expression; the second is freedom of every person to worship God in his own way; the third is freedom from want, “which, translated into world terms, means economic understanding which will secure to every nation a healthy peacetime life for its inhabitants,” and the fourth is freedom from fear.¹⁰⁴

In December of 1942, the Advisory Committee’s Special Subcommittee on Legal Problems¹⁰⁵ developed a brief, but forceful, statement of fundamental human rights principles, including

¹⁰⁰ Whelan & Donnelly, *supra* note 69, at 911.

¹⁰¹ See Lucy Richardson, *Economic, Social and Cultural Rights (and beyond) in the UN Human Rights Council*, 15 HUM. RTS. L. REV. 409 (2015).

¹⁰² Whelan & Donnelly, *supra* note 69, at 911.

¹⁰³ Franklin D. Roosevelt, U.S. President, The Annual Message to Congress on the State of the Union (Jan. 6, 1941).

¹⁰⁴ *Id.*

¹⁰⁵ This Subcommittee was part of the Advisory Committee of Post-War Foreign Relations of 1941.

traditional civil and political rights as well as social rights, and basic principles of social and economic justice. Their “Draft Constitution of International Organization,” which served as the basis for US negotiators at the August 1944 Dumbarton Oaks conference,¹⁰⁶ included a proposed bill of human rights in order to facilitate the universal attainment of the Four Freedoms: “All persons who are willing to work, as well as all persons who through no fault of their own are unable to work, have the right to enjoy such minimum standards of economic, social and cultural well-being as the resources of the country, effectively used, are capable of sustaining.”¹⁰⁷

As Daniel J. Whelan and Jack Donnelly have proved, the US and all other Western countries, supported economic and social rights throughout the drafting process of the UDHR: “Not a single Western state pressed for a Declaration without economic and social rights. Quite the contrary, all insisted that economic and social rights were essential to the Declaration, which was drafted precisely at the time of the flowering of the Western welfare state.”¹⁰⁸ At the same time, something similar occurred via the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 1950, the General Assembly decided that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” and instructed the Commission on Human Rights to include in the draft covenant “a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the draft Covenant.”¹⁰⁹ Although the two groups of rights were deemed interrelated, the decision was made to subsequently embody them into two covenants rather than one. Several doubts were expressed about the importance of recognizing the economic and social rights in an international treaty; the issue of concern was to determine the mechanisms to bind the states into their fulfillment. “Most Western governments did see an important qualitative difference between civil and political rights and economic, social, and cultural rights; only the former were immediately

¹⁰⁶ The Dumbarton Oaks Conference constituted the first important step taken to carry out paragraph 4 of the Moscow Declaration of 1943, which recognized the need for a postwar international organization to succeed the League of Nations.

¹⁰⁷ Whelan & Donnelly *supra* note 69, at 914 (quoting HARLEY A. NOTTER, POSTWAR FOREIGN POLICY PREPARATION 1939–1945 483 (1949)).

¹⁰⁸ *Id.* at 917.

¹⁰⁹ M. G. Kaladharan Nayar, *Human Rights and Economic Development: The Legal Foundations*, UNIVERSAL HUM. RTS. 55, 67 (1980). G.A. Res. 421E (V), Suppl. 20, 42, 43 (A/1775) (Dec. 4, 1950).

‘justiciable,’ meaning capable of being formulated to impose strict, judicially enforceable obligations in national law.”¹¹⁰

B. *The Welfare State in Constitutions*

Since the nineteenth century, the passivity of the state in economic matters began to be questioned. Additionally, in the first decades of the twentieth century, the need for a more proactive economic state seemed increasingly evident, as the call to consider the government as a regulator of the economy and a guarantor of the social rights of the majority, became a global trend. The first changes originated in less industrialized economies, where the accumulation of land ownership made a dent among the peasants. As expected, this did not happen peacefully. It was not a coincidence that the revolutionary movements of the twentieth century claimed agrarian issues, nor is it fortuitous that the social constitutions in the first half of the last century established limits on the right to land ownership.¹¹¹ The Mexican Constitution of 1917, established an agrarian reform that involved dissolving large properties.¹¹² The Weimar constitution of 1919, in article 155, recognized the duty of the state to control the distribution and use of soil.¹¹³ It was clear that the concentration of

¹¹⁰ Whelan & Donnelly, *supra* note 69, at 932–33; see also Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories*, 24 MD. J. INT'L L., 209 (2009).

¹¹¹ See generally Thomas Murray, *Socio-Economic Rights versus Social Revolution: Constitution Making in Germany, Mexico and Ireland, 1917-1923*, 24 SOC. & LEGAL STUD. 487 (2015).

¹¹² Constitución Política de los Estados Unidos Mexicanos, Art. 27, Diario Oficial de la Federación [DOF] 05-02-1917 (Mex.) (“The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth. For this purpose, necessary measures shall be taken to divide up large landed estates; to develop small landed holdings; to establish new centers of rural population with such lands and waters as may be indispensable to them; to encourage agriculture and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Settlements, hamlets on private property and communes which lack lands or water or do not possess them in sufficient quantities for the needs, shall be right to provided with them from the adjoining properties, always having due regard for small landed holding.”). English translation, in *Mexican constitution of 1917*, LIBRARY OF CONGRESS (March 1917), <https://www.loc.gov/item/17021628>.

¹¹³ DIE VERFASSUNG DES DEUTSCHEN REICHS [The Constitution of the German Empire], (Ger.) art. 155 (“The distribution and use of the land shall be supervised by the state in a way to avoid abuse and with the aim to secure to every German a healthful habitation and to all German families, according to their needs, especially those with many children, a homestead for dwelling and economic purposes. Those

land ownership in a few hands inevitably involved concentration of wealth and power.

However, the World War II suspended the new social pact that began to take shape in some Western countries. It was only after the war, that Europe began to take the role of the State seriously as the rector of the economy and social development.¹¹⁴ The compromise with human rights in general and with social rights in particular, started to be a state commitment.¹¹⁵ The State stopped seeing itself as an entity exclusively limited to protecting negative freedoms; it was conceived as an entity capable of transforming social reality.¹¹⁶

This new paradigm was soon reflected in the European constitutions of the postwar period. New constitutions were promulgated in Italy (1947), Germany (1949) and France (1946 and 1958), which helped shape the drafting of many European constitutions in the 1970s. The constitutions of Greece (1975),¹¹⁷ Portugal (1976),¹¹⁸ and Spain (1978)¹¹⁹ include provisions related to social rights, as well as explicit clauses that recognize the social character of the state. In the constitutions of Italy, Germany and France, we found express recognition of the welfare state:

Italy: Article 2.

The republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups

who have taken part in war are especially to be considered in the homestead law which is to be enacted.”). English version available at: https://www.constituteproject.org/constitution/Germany_1919.pdf?lang=en

¹¹⁴ George R. Boyer, *The Winding Road to the Welfare State. Economic Insecurity and Social Welfare Policy, in BRITAIN* (Princeton University Press ed., 2019) (“During the World War II, the common sacrifices made by Britons on the battlefield and in the bombed cities led to an increased affinity of the middle for the working class, and to a call for the creation of a postwar New Jerusalem or New Britain.”).

¹¹⁵ See Courtney Jung et al., *Economic and Social Rights Across Time, Regions, and Legal Traditions*, 30 *NORDIC J. HUM. RTS.* 372 (2012).

¹¹⁶ *Id.* at 389.

¹¹⁷ 1975 SYNTAGMA [SYN.] [CONSTITUTION] 4 (Greece) (“The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof.”).

¹¹⁸ CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], (Port.) (English translation available at <https://dre.pt/constitution-of-the-portuguese-republic>).

¹¹⁹ C.E., B.O.E. art.1 (Spain) (“Spain is hereby established as a social and democratic state, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as the highest values of its legal system.”) (English version available at <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>).

where human personality is expressed. The republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.¹²⁰

Italy: Article 3.

It is the duty of the republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.¹²¹

Germany: Article 20.1.

The Federal Republic of Germany is a democratic and social federal state.¹²²

France: Article 1.

France shall be an indivisible, secular, democratic and social republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.¹²³

It is important to underline that the express recognition of a welfare model in a constitution is not always synonymous with an authentic welfare system. Conversely, some countries whose constitutions do not contain any clause related to the welfare state, have developed important welfare systems.¹²⁴ In fact, the most developed type of welfare state, is represented by the Scandinavian countries, whose constitutions contain only certain constitutional norms where the welfare system is expressly recognized.¹²⁵ The Scandinavian model, as explained by George S. Katrougalos, emerged

¹²⁰ Costituzione [Cost.] (It.). (English translation of the document available at <https://www.loc.gov/law/help/guide/nations/italy.php#constitution>).

¹²¹ *Id.*

¹²² Grundgesetz für die Bundesrepublik Deutschland [G.B.D.] (Ger.), (English translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf).

¹²³ 1958 CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE [C.R.F.] CONST. (Fr.) (English translation available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000571356/2019-07-01/>).

¹²⁴ See Courtney Jung, *supra* note 115.

¹²⁵ George S. Katrougalos, *The Implementation of Social Rights, in Europe*, 2 COLUM. J. EUR. L. 277, 293 (1996).

in the 1920s, when the ascendance of the Social Democratic parties ensured the establishment of Ministries of Social Affairs and the institutional reorganization of social welfare systems:

The main features of the new template were a universalist approach to the provision of public social services and a commitment to social solidarity and citizenship. The disbursement of general and equal allowances regardless of need was not only intended to avoid stigmatizing welfare recipients, but was also believed to be necessary to assimilate social rights into civil ones, and to clearly differentiate them from charity. The clearest example of this rationale is reflected in flat-rate pensions and family allowances. The child of a millionaire gets the same allowance as the child of a worker.¹²⁶

However, the constitutional protection provided by many welfare states may seem deficient in comparison to the role that Scandinavian states provide in protecting their citizens and the approach utilized to guarantee social rights in those countries. “The Nordic Constitutions retain the liberal character of the time of their adoption, which was the first half of the nineteenth century. They contain neither a welfare clause, nor an exhaustive bill of social rights, although they include explicit references to some of them, principally, the right to work.”¹²⁷ The difference between the Scandinavian system and the one employed by Germany, which expressly recognizes the role of the state in the economy and the bill of social rights in the constitution, is

¹²⁶ *Id.*

¹²⁷ *Id.* at 294. See also THE CONSTITUTION OF THE KINGDOM OF NORWAY art. 110 (1954) (declaring that it is incumbent on the authorities of the state to create conditions so that every person has work) (English translation of the document available at <https://lovdata.no/dokument/NLE/lov/1814-05-17>); THE DANISH CONST. OF 1849 art. 75(2), 76 (protecting the right to public assistance and the right to free primary education (Article 90, now Article 76)); (English translation of the document available at https://www.thedanishparliament.dk/-/media/pdf/publikationer/english/the_constitutional_act_of_denmark_2013,-d-.pdf.ashx) THE FINNISH CONST. OF 1919 art. 6(2), 77-82, 80(2) (containing provisions for the protection of work, the right to education, and especially the right to free elementary education) (English translation of the document available at <https://finlex.fi/en/laki/kaannokset/1999/en19990731>) THE SWEDISH INSTRUMENT OF GOVERNMENT (1974) (including references to the right to work, to shelter and to a satisfactory living environment, although in a form closer to statements of policy than to legally binding rules). (English translation of the document available at <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>).

related to the legal mechanisms of the protection of rights: Germany, France, Italy, Spain, and Portugal have constitutional courts.¹²⁸ In all of these countries, judicial review of legislation has had a more important role in protecting social rights than in the Nordic countries. Nevertheless, as we will show in the next section, the problem is that courts may not be in a good institutional position to protect those constitutional rights against the legislature.¹²⁹

C. *Justification and the Concept of the Welfare State*

As we have described, the idea of the welfare state appears to parallel industrialization. Therefore, it can be seen as an answer to the effects of modern capitalism and as a product of the consensus between the capital and the working class. It was possible thanks in part to democratization, that is, the political representation of previously excluded sectors, as well as the exercise of freedom of association, which allowed unions to be formed as power groups.¹³⁰ In developed economies, this led to an expansion of the role of the state, which now regulates the economy and redistributes income.¹³¹

In a broad sense, a concept of the welfare state could be described as the one that seeks redistribution.¹³² In a stricter sense, we can characterize the welfare state as the government of the economy and the population in the interest of security, stability, and welfare, which utilizes the tools of insurance, economic management, and comprehensive social provision together with the taxes, legal regulations and forms of expertise required for their operation. In this sense, the classification of the types of welfare states is relevant. According to the Esping-Andersen's classification, the "liberal" type is found mainly in countries of English political heritage and is designed to relieve poverty, while preserving and protecting the capitalist labor market.¹³³ The second type is the "corporatist" welfare state, found mainly in Germany, and the third is the "social

¹²⁸ Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT'L J. CONST. L. 461, 462 (2004).

¹²⁹ *Id.* at 490.

¹³⁰ Christian Joppke, *The Crisis of the Welfare State, Collective Consumption, and the Rise of New Social Actors*, 32 BERKELEY J. SOC. 237, 244 (1987).

¹³¹ Wonik Kim, *Social Insurance Expansion and Political Regime Dynamics in Europe, 1880-1945*, 88 SOC. SCI. Q. 494 (2007).

¹³² See Francisco Conín, *supra* note 32, at 68.

¹³³ GÖSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 20 (1990).

democratic” welfare state of the Scandinavian countries.¹³⁴ According to David Garland, contemporary welfare states have five institutional sectors:

Social insurance. Generally comprehensive, compulsory scheme designed to protect workers and their families against the risk of loss of earnings due to injury, illness, old age, disability or unemployment.¹³⁵

Social assistance. An insurance program, non-contributory income support program created to provide a “safety net” for anyone who falls outside the system of insurance or whose income from employment is insufficient for their basic needs.¹³⁶

Public services and social rights. The welfare state’s publicly funded social services provide “de-commodified” access to essential goods such as education and vocational training, healthcare and social care, housing, transportation, legal aid, and so on.¹³⁷

Personal social services. As well as contributory benefits, transfer payments, and public services, welfare states provide personalized social services such as social work and children’s services; social care for the elderly and the disabled; community care for the mentally ill, among others.¹³⁸

Government of the economy. Welfare state programs co-exist with, and depend upon, the operation of wider government controls on economic life. Fiscal and monetary policies, labor law and labor market policies, corporatist agreements between management, labor and government, prices and income policies, farming and food subsidies—all of these are features of welfare state government.¹³⁹

¹³⁴ Sheila Shaver, *Body Rights, Social Rights and the Liberal Welfare State*, 13 *CRITICAL SOC. POL’Y* 66, 68 (1994); see also Pekka Kosonen, *European Welfare State Models: Converging Trends*, 25 *INT. J. SOC.* 81 (1995).

¹³⁵ Garland, *infra* note 140.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

Governments in developed nations have assumed responsibility for assuring economic growth, controlling inflation, curbing booms and slumps, and keeping unemployment within acceptable levels, and they also use a variety of free trade, protectionist, *Keynesian*, monetarist, supply-side, or neoliberal policy instruments in pursuit of these goals.¹⁴⁰

D. From the 1970s to the Crisis of the Welfare State

It is commonly believed that throughout the 1970s the political arrangement regarding the welfare state was completed and Western economies reacted via their economic policies.¹⁴¹ As many studies have concluded, the most important change occurred in their employment policies.¹⁴²

Following the first OPEC [The Organization of the Petroleum Exporting Countries] oil price hike in 1974, which led to accelerating inflation in most countries, there was a resurgence of pre-Keynesian thinking. Inflationary impulses associated with the Vietnam War had earlier provided neoliberal economists with opportunities to attack the activist macroeconomic policies in the United States. Governments around the world reacted with contractionary policies to quell inflation and unemployment rose, giving birth to the era of stagflation.¹⁴³

As Korpi Walter points out, the reduction of the welfare state could be explained in terms of the post-industrial phenomenon, and demographic changes.¹⁴⁴ National economies seem to declare

¹⁴⁰ Cf., David Garland, *The Welfare State: A Fundamental Dimension of Modern Government*, 55(3) EUR. J. OF SOC. 327-44.

¹⁴¹ David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the New Europe*, 42 AM. J. COMP. L. 25, 69 (1994). ("By the late 1970s, however, interest in ordoliberal ideas had revived, and the return of the CDU to political power in the 1980s helped translate this interest into a renewed influence of ordoliberal ideas on economic policy.")

¹⁴² The Keynesian notion of full employment is "a situation where there are at least as many job openings as there are persons seeking employment" was abandoned as policy makers progressively adopted the natural rate of unemployment approach. William Vickrey, *Today's Task for Economists*, 83(1), AM. ECON. REV. 1, 10 (1993).

¹⁴³ WILLIAM MITCHELL & JOAN MUYSKEN, FULL EMPLOYMENT ABANDONED: SHIFTING SANDS AND POLICY FAILURES 12 (Edward Elgar ed., 2008).

¹⁴⁴ Walter Korpi, *supra* note 9, at 589.

themselves in permanent austerity and, therefore, drive the reduction of the welfare state: “thus since 1975 in a handful of European countries citizenship rights in three main social insurance programs have changed in ways that must be described as major retrenchment.”¹⁴⁵ Liberal economists insisted that services such as housing, healthcare, education, and pension plans could be more efficiently supplied by the market than by the state.¹⁴⁶ However, they knew that it was difficult to abolish the welfare state and return to unregulated management markets. For that reason, their solution was to restructure welfare institutions in ways that made them behave more like market actors.¹⁴⁷ Governments in Britain, the United States and elsewhere, took steps to make labor markets more “flexible,” which generally meant more precariousness for workers.¹⁴⁸ Neoliberalism succeeded in modifying welfare states and restructuring the programs into more market-oriented forms all around the globe. However, “neoliberalism neither displaced nor dismantled the fundamental institutions of welfare state government nor has it diminished their continuing.”¹⁴⁹

Since the 1970s, the economic matters at the international level have been changing: private investment is prioritized and state expenditure is viewed with suspicion, even in the field of public services.¹⁵⁰ The *coup de grace* to this situation came at the end of the Cold War. The left wing saw itself exhausted and ran out of arguments after the collapse of the Soviet Union.¹⁵¹ In the words of Michael Freeman, professor at the University of Essex in England: “despite the controversies caused by the introduction of neoliberal policies, neoliberalism was given further credibility for some by the collapse of the Soviet system of state socialism and by the adoption of a turn towards market economics by the government of China.”¹⁵²

From then on, economic policies and social rights were divided into two discourses that seem irreconcilable. From the point of view

¹⁴⁵ *Id.* at 605.

¹⁴⁶ See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (University of Chicago Press ed., 1962).

¹⁴⁷ DAVID GARLAND, *THE WELFARE STATE, A VERY SHORT INTRODUCTION* 109 (2016).

¹⁴⁸ *Cf.*, Garland, *supra* note 140, at 327-42.

¹⁴⁹ DAVID GARLAND, *supra* note 147, at 112.

¹⁵⁰ *Cf.*, Garland, *supra* note 140, 327-48.

¹⁵¹ Michael Freeman, *Neoliberal Policies and Human Rights*, 17 *DOKUZ EYLUL UNIVERSITESI HUKUK FAKULTESI DERGISI* 141, 148 (2015).

¹⁵² *Id.*

of economists of great influence in the 1980s,¹⁵³ it was not the state that was to provide people with basic services; the key to their guarantee was economic development.

However, there was no change of discourse in the field of social rights; that is, the idea of the responsibility of the state to fulfill its obligation to guarantee social rights remained immutable. Although it is true that the activity of certain international organizations of a social nature—such as the ILO—was slowed down the United Nations continued to recommend that states guarantee social rights.¹⁵⁴

1. *Economic Purposes Against Rights*

The privatization,¹⁵⁵ deregulation,¹⁵⁶ and globalization processes,¹⁵⁷ had different effects in each of the countries in which the new economic policies were implemented. Indeed, governments opted for very different approaches, although all of them reduced public sector involvement in the economy.¹⁵⁸ Anglo-Saxon countries, with the United States in the lead, opted for more radical measures: deregulating wages within the labor market, combined with a certain degree of welfare state erosion. On the other hand, France, Germany and Italy, among others have favored a strategy of induced labor supply reduction. All three strategies were intimately related to the

¹⁵³ *Id.* at 147 (“The most influential theorist of this new economic liberalism -that is, of neoliberalism- was Milton Friedman, professor of economics at the University of Chicago. Friedman had considerable influence on political decision-makers, especially President Ronald Reagan in the USA (1981-1989) and Prime Minister Margaret Thatcher in the United Kingdom (1979-1990).”).

¹⁵⁴ Janice R. Bellace, *supra* note 59, at 13. Some conventions which had been adopted since the early 1970s had a very low number of ratifications. Some asserted that the ILO was engaged in the meaningless activity of churning out new conventions.

¹⁵⁵ *Stricto sensu*, privatization occurs only when state responsibility disappears completely. In a broad sense, privatization involves the transfer of a function, activity, or organization from the public to the private sector. Jose Luis Montes, *Hasta dónde puede llegar la privatización*, in *TEORÍA Y POLÍTICA DE PRIVATIZACIONES, SU CONTRIBUCIÓN A LA MODERNIZACIÓN ECONÓMICA: ANÁLISIS DEL CASO ESPAÑOL* [HOW FAR CAN PRIVATIZATION GO? THEORY AND POLITICS OF PRIVATIZATIONS, THEIR CONTRIBUTION TO ECONOMIC MODERNIZATION: ANALYSIS OF THE SPANISH CASE] 219, (Fundación SEPI eds., 2004).

¹⁵⁶ Deregulation is the reduction or elimination of government power in a business or in a particular industry.

¹⁵⁷ The term globalization comes from English, as does the base of the word “globalization,” which refers to the emerging of an international network, belonging to an economic and social system.

¹⁵⁸ Frederick MacDonald & James Midgley, *Introduction: Globalization, Social Justice, and Social Welfare*, 34 *J. SOC. & SOC. WELFARE* 9 (2007).

nature of their welfare states.¹⁵⁹ The Nordic policies were driven by the opening of their markets to the global economy.¹⁶⁰

The Scandinavian social democratic model, which is much more extensive, universalist, and generous in social benefits than the one implemented in Germany or the Netherlands, has been adjusted, particularly under conservative governments in Denmark in the 1990s.¹⁶¹ In regard to the provision of public services, there is an increasing tendency to invite the private sector to participate. However, it included a commodification: “All providers remain subject to centrally defined, stringent norms and the reform appears to be much more motivated by efficiency criteria and by an interest in allowing services to vary more in accordance with differentiated client demands.”¹⁶² These marginal adjustments were not due to a paradigm shift of the basic universal and egalitarian principles of the welfare state. Rather, the role of the welfare state, as an insurer of employment, was strengthened: the “active labor market” policy is intensified, especially with regard to training and employment provision.¹⁶³

On the other hand, most of the developing countries implemented changes in their economic policies in the 1980s and 1990s.¹⁶⁴ Latin America, Argentina, Chile, and Mexico followed the American neoliberal model. Some countries, such as Brazil and Costa Rica, which had opted for the provision of public services with a universalist tendency, seemingly applied a neoliberal policy in the 1980s and 1990s under the influence of the World Bank and the International Monetary Fund (IMF). As well as the East Asian countries, which

¹⁵⁹ See Gosta Esping-Anderson, *After the Golden Age: The Future of the Welfare State in the New Global Order*, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT 9 (1994).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 10.

¹⁶² *Id.* at 11.

¹⁶³ *Id.* The OECD defines active labor market policies as follows: “Active labor market programs include all social expenditure (other than education), which is aimed at the improvement of the beneficiaries’ prospect of finding gainful employment or to otherwise increase their earnings capacity. This category includes spending on public employment services and administration, labor market training, special programs for youth when in transition from school to work, labor market programs to provide or promote employment for unemployed and other persons (excluding young and disabled persons) and special programs for the disabled.” See also, *An Interpretative Guide to the OECD Social Expenditure Database (SOCX)*, OECD 15 (2018), <https://www.oecd.org/social/expenditure.html>.

¹⁶⁴ Paul Starr, *The Meaning of Privatization*, in SHEILA B. KAMERMAN, ALFRED J. KAHN, PRIVATIZATION AND THE WELFARE STATE 39 (1989). See Nancy Brune et al., *The International Monetary Fund and the Global Spread of Privatization*, 51(2) IMF STAFF PAPERS 195-97 (2004).

coincided with Europe in economic development, but lagged behind in social policy.¹⁶⁵

It cannot be claimed that private participation in the provision of public services is beneficial or harmful per se. Its success or failure depends on multiple economic, legal, and social factors. In any case, there are certain sensitive areas. Various studies have shown that there is a decline in the enjoyment of social rights of certain policies in which the state ceases to participate as a benefactor of services.¹⁶⁶

As we will see the circumstances of each social right are singular. We can assume that the role of the state has tended to be different in each of them. Our interest is to emphasize the fact that the current experience of privatization and liberalization is very different from the one in the 1980s, when it was thought that companies would make social services more efficient.¹⁶⁷ It was argued then that the exercise of rights would be more effective and would protect a larger population. Today we have enough information to understand how past methods did not function and how the state, by reducing or, in certain cases, abandoning its role as a public service provider, affected the exercise of rights.¹⁶⁸

2. Education

It is generally understood that providing education is one of the undisputed functions of the State. Concerning the argument about the lack of public resources to provide quality education, many governments have opted for some form of privatization of education, which has almost always elicited terrible results.¹⁶⁹ For example, there was a great boost towards the privatization of the school system in the United States in the 1990s, led by Edison Schools, with more than a hundred schools in dozens of states; however, Edison could not keep

¹⁶⁵ Gosta Esping-Anderson, *supra* note 159, at 2.

¹⁶⁶ The case of the liberalization of the Mexican economy is a clear example. See Michelle Dion, *Globalization, Democracy, and Mexican Welfare, 1988–2006*, 42 COMP. POL. 1, 63 (2009).

¹⁶⁷ See JOHN QUIGGIN, ZOMBIE ECONOMICS. HOW DEAD IDEAS STILL WALK AMONG US 181 (2010).

¹⁶⁸ See generally Ansgar Belke, Frank Baumgärtner, et al., *The Different Extent of Privatization Proceeds in OECD Countries: A Preliminary Explanation Using a Public-Choice Approach*, 63 PUB. FIN. ANALYSIS 2, (2007).

¹⁶⁹ *Id.* at 211.

his promises and is now largely out of the school management business.¹⁷⁰

Today, there is private intervention in the education sector in most Western countries, including non-governmental organizations and religious groups.¹⁷¹ However, as emphasized by the United Nations Children's Fund, only the state can collect the components into a coherent education system. According to the OECD, this has excluded the right to basic education.¹⁷² As previously mentioned, there is great consensus about the role that the state has in providing compulsory education, therefore, the discussion revolves around its quality and universality. For instance, in the United States, the demands are not only aimed at exercising the right to education, but also at seeking a minimum standard of quality, as well as eliminating inequality of opportunities.¹⁷³ In addition to providing education, which is clearly expressed or implied in the educational clauses of the state constitutions, protection of the right has been mainly transmitted through judicial interpretations of such clauses and often, due to language deduction, obligations of quality of education have been described as: "exhaustive," "efficient," "adequate," "general," and "uniform."¹⁷⁴

3. Health

It is difficult to imagine how the state could reach the highest standards in terms of access to health in a system where public health services are largely privatized.¹⁷⁵ As the cost of medical care may become unaffordable for most people, the only reasonably fair medical care plan should be based on a public state-sponsored universal health system.¹⁷⁶ For private insurance systems to comply with human rights

¹⁷⁰ Kathy Abrams, *Three Faces of Privatization*, in *PRIVATIZATION AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE* 12 (Martha Albertson & Ulrika Andersson eds., 2012).

¹⁷¹ JOHN QUIGGIN, *supra* note 167, at 199.

¹⁷² UNICEF, *The State of the World's Children* (1999) (available at <https://www.unicef.org/media/84771/file/SOWC-1999.pdf>).

¹⁷³ See Julia Ann Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 *STAN. J. CIV. RTS. & CIV. LIBERTIES* 83 (2010).

¹⁷⁴ Joshua E. Weishart, *Reconstituting the Right to Education*, 67 *ALA. L. REV.* 915 (2016).

¹⁷⁵ MANFRED NOWAK, *HUMAN RIGHTS OR GLOBAL CAPITALISM: THE LIMITS OF PRIVATIZATION* 74 (2016).

¹⁷⁶ *Id.* at 71. ("Under international human rights law, states are the main duty bearers to ensure that all people under their respective jurisdiction can enjoy the right to the highest attainable standard of health by taking the necessary steps, to the

standards, they must be regulated and it is the State that must ensure that the system does not discriminate against or exclude certain groups of the population.¹⁷⁷ A clear example of this is the North American insurance system. Until the Affordable Care Act, many women were denied coverage in the individual market because of pregnancy, which some providers classified as a “pre-existing condition.”¹⁷⁸ In fact, only 12% of individual market plans covered maternity care.¹⁷⁹ As a result of such exclusion, the State must seek the universalization of medical care to comply with human rights standards.

Interestingly enough, the United States, the world’s largest economy, has no universal public health system.¹⁸⁰ Its system has favored private health care and has opted for lax regulation that leaves millions of people without access to medical care and services.¹⁸¹ The country’s system proves that relying on a private system will never lead to achieving universal medical coverage. Anand Grover, the Special Rapporteur on the right to health, explicitly stated the risks of privatization in his 2012 report to the General Assembly. In his view, “the global trend towards privatization in health systems poses significant risks to the equitable availability and accessibility of health facilities, goods and services, especially for the poor and other vulnerable and marginalized groups.”¹⁸² The Committee on Economic, Social and Cultural Rights (CESCR) has expressed concern about the privatization process in specific countries on numerous occasions. In 2008, it noted the consequences of the privatization of health services in India: “the quality and availability of health services provided under the scheme have been adversely

maximum of available resources, aimed at the progressive realization of this right... With respect to availability, General Comment 14 reads as follows: “Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party”).

¹⁷⁷ Megan Veith, *The Continuing Gender-Health Divide: A Discussion of Free Choice, Gender Discrimination, and Gender Theory as Applied to the Affordable Care Act*, 21 GEO. J. ON POVERTY L. & POL’Y 341, 346 (2014) (citing NTA’L).

¹⁷⁸ *Id.*

¹⁷⁹ *Women and Health Care Law in the United States*, WOMEN’S LAW CTR. 1 (2013), http://www.nwlc.org/sites/default/files/pdfs/us_healthstateprofiles.pdf.

¹⁸⁰ “The United States, which is not a party to the CESCR and therefore not legally bound to implement the right to health, is the country most advanced in the privatization of its health care system. Since the 1990s, private corporations, such as Columbia/HCA and Tenet, have systematically bought community-based hospitals and drastically reduced costs through rationalization measures.” MANFRED NOWAK, HUMAN RIGHTS OR GLOBAL CAPITALISM: THE LIMITS OF PRIVATIZATION 77 (2016).

¹⁸¹ *Id.*

¹⁸² G.A. Res. 67/302, ¶3 (Aug. 13, 2012).

affected by the large-scale privatization of the health service in the State party, which had a particular impact on the poorest sections” of the population.¹⁸³ Similar assessments have been expressed about Sweden,¹⁸⁴ Poland,¹⁸⁵ and Pakistan,¹⁸⁶ among others.

There is no doubt about the fact that private agents can offer medical services. However, United Nations committees have expressed concern about the consequences that these policies may have, such as the lack of coverage for low-income populations.¹⁸⁷ The social resources available to a state are not limited to those resources over which the state has direct control. As commentators have recognized, “available resources refers to resources available within the society as a whole, from the private sector as well as the public.” The obligation of states is to “mobilize these resources,” to the extent that it is reasonably practicable to do so, for the purpose of securing the right to health.¹⁸⁸

4. Social Security

The main defenders of the privatization of pensions were economists with a neoliberal background, often endorsed by the recommendations of central banks and the ministries of finance and economics.¹⁸⁹ Their general efforts to reduce the state’s participation in the economy, including its movements to privatize pensions, were supported by the IMF, as well as by local interest groups, such as

¹⁸³ *Econ. & Soc. Comm., Consideration of Reports Submitted by States Parties Under Arts. 16 and 17 of the Covenant*, ¶ 38, U.N. Doc. E/C.12/IND/CO/5 (2008).

¹⁸⁴ *Econ. & Soc. Comm., Consideration of Reports Submitted by States Parties Under Arts. 16 and 17 of the Covenant: Sweden*, ¶ 40, UN Doc. E/C.12/1/Add.70 (2001).

¹⁸⁵ *Econ. & Soc. Comm., Consideration of Reports Submitted by States Parties Under Arts. 16 and 17 of the Covenant: Poland*, ¶ 29, UN Doc. E/C.12/POL/CO/5 (2009).

¹⁸⁶ *Comm. On the Elimination of Discrimination against Women, Concluding Observations on the fourth periodic report of Pakistan adopted by the Comm. at its fifty fourth session* (¶ 31, CEDAW/C/PAK/CO/4 (Feb. 11– March 1, 2013).

¹⁸⁷ MANFRED NOWAK, *supra* note 180, at 79 (2016) (“The further privatization of health care providers and insurance involves, however, substantial risks of retrogressive measures. At the very least, states parties to the CESCR who consider such a step are under an obligation to conduct a thorough human rights impact assessment, which must look in particular into the core obligations arising from Article 12 ICESCR, as elaborated by the CESCR Committee, 61 the consequences for poor, marginalized, and discriminated groups and their access to primary health care facilities.”).

¹⁸⁸ JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 231 (2012).

¹⁸⁹ Carmelo Mesa-Lago and Katharina Müller, *The Politics of Pension Reform in Latin America*, 34 J. LAT. AM. STUD. 687, 708 (2002).

businessmen (who also sought to eliminate or reduce their contributions), business organizations and the financial sector (interested in benefiting from these new ventures).¹⁹⁰

Between 1981 and 2014, thirty countries privatized their mandatory public pension systems totally or partially; in 2018, eighteen countries had reversed these privatizations.¹⁹¹ Nowadays, there is sufficient information to recognize the failure of the mandatory private pension systems. They failed to assure income security in old age and performed poorly in terms of coverage, benefit levels, administrative costs, transition costs, and negative social, and fiscal impacts.¹⁹²

The CESCR has been extremely critical of any privatization measure in relation to social security schemes, and in particular, in regards to structural adjustment policies adopted by the IMF and the World Bank.¹⁹³ The CESCR has also expressed concern about the situation in many countries where privatization had an adverse effect on pension plans.¹⁹⁴ For instance, in 2010, CESCR made the following request of the government of Kazakhstan: “the Committee also requests the State party to provide in its next periodic report detailed information on the ongoing privatization of the pension system, in particular its effects on the right to social security of the most disadvantaged and marginalized individuals.”¹⁹⁵ It is evident that

¹⁹⁰ *Id.*

¹⁹¹ Isabel Ortiz & Fabio Durán-Valverde, *La reversión de la privatización de las pensiones: Reconstruyendo los sistemas públicos de pensiones en los países de Europa Oriental y América Latina (2000-2018)*, OIT, 3 (2019) (The reversal of the privatization of pensions: Rebuilding public pension systems in the countries of Eastern Europe and Latin America).

¹⁹² *Id.*

¹⁹³ U.N. Economic & Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, U.N. Doc. E/C.12/1/Add.71 (Nov. 30, 2001) (available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.71&Lang=en) (“The Committee strongly recommends that the State party’s obligations under the Covenant should be taken into account in all its negotiations with international financial institutions, such as the International Monetary Fund, the World Bank and the World Trade Organization, to ensure that economic, social and cultural rights are not undermined.”),

¹⁹⁴ *See, e.g., The Concluding Observations of 2007 to El Salvador*, U.N. Doc. E/C.12/SLV/CO/2, §§ 15–16; *see the references in MANFRED NOWAK, HUMAN RIGHTS OR GLOBAL CAPITALISM: THE LIMITS OF PRIVATIZATION* 91 (2016).

¹⁹⁵ U.N. Econ. & Soc. Council, Committee on Economic, Social and Cultural Rights, *Consideration of Rights Submitted by States Parties Under Articles 16 and 17 of the Covenant*, ¶ 24, U.N. Doc. E/C.12/KAZ/CO/1 (June 7, 2010) (available at

certain groups of the population would be excluded in the privatized systems. The Committee also expressed concern about the inaccessibility of private schemes for certain vulnerable groups of workers, including agricultural or domestic workers and women, and those who cannot contribute, such as the unemployed, the underemployed, the lowest-paid workers, and those within the informal sector.¹⁹⁶

5. *Rights to Housing*

As compared to other rights, the role of the State is more moderate within the field of housing. Except in very specific cases, the State is generally not required to provide people with a home.¹⁹⁷ However, its role as a regulator is extremely important, especially if we are interested in meeting the housing needs of people with fewer resources or facilitating the right to housing for the middle class. In this regard, the proposals of the UN committees are related to finding affordable credit granting housing purchases.¹⁹⁸

It is true that the Committee has not abandoned the protection of the substantive right to housing. According to Lisa Alexander, the UN Committee on Social and Economic and Cultural Rights interprets the right to housing to embody, at the least, seven broad principles, namely: (1) security of tenure; (2) availability of services, materials, facilities, and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy.¹⁹⁹

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/428/62/PDF/G1042862.pdf?OpenElement>).

¹⁹⁶ CESCR, Concluding Observations: Mexico, ¶ 24, U.N. Doc. EC.12/1/Add.41 (Dec. 9, 1999). *See also*, Kathleen Santoro, *Social Security Privatization*, 10 HOLY CROSS J.L. & PUB. POL'Y 47, 62 (2006) (“Social Security privatization would have a detrimental effect on disabled workers and surviving young children. Because privatization will worsen the existing system’s cash flow problem, the money that disabled workers and surviving young children so desperately need would not be there.”).

¹⁹⁷ In the United States of America, for example, “the right to housing is not currently a formal legal or constitutional obligation in America. Thus, in America, federal and state courts and legislators do not play a central role in creating or defining the right to housing.” Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245 (2015).

¹⁹⁸ U.N. Housing Rights Programme, ¶ 332-33, U.N. Doc. E/C.12/1994/20 (2015) (In the case of disadvantaged minorities, discrimination manifests itself, for example, in the difficulty of accessing housing loans. United Nations Housing Rights Programme, “Report N° 7: Indigenous peoples’ right to adequate housing. A global overview.”).

¹⁹⁹ *Id.* at 253.

For example, states must adopt a national housing policy or plan that defines the development objectives of the housing sector and focuses on disadvantaged and marginalized groups; determines the resources available to achieve those objectives; illustrates the most economical way to use them; sets out the responsibilities and deadlines for the implementation of the necessary measures; follows up on the results; and secures adequate remedies for cases of violations.²⁰⁰

6. *Right to Water*

As expressed in the Washington Consensus, under the influence of neoliberal policies, financial institutions became the main factor which drove the global privatization of water systems.²⁰¹ The Special Rapporteur on the right to water and sanitation expressed concern regarding the privatization of drinking water services, and recalled that, when granting concessions to private companies, states are obligated to establish regulations to secure that private or semi-private entities do not violate human rights:

70. The State is ultimately responsible and accountable for ensuring that everyone's human rights are granted. While the State may choose to provide water and sanitation services directly, it is not obligated to do so, but it must create an enabling environment for the enjoyment of these rights, including the necessary legislative and policy measures to govern these sectors.²⁰²

As Manfred Nowak (professor of International Law and Human Rights at the University of Vienna) states, human rights are not "neutral" when it comes to the privatization of water: "Water, essential

²⁰⁰ U.N. HABITAT, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE RIGHT TO ADEQUATE HOUSING, at Ginebra 36 (2010) (available at https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf).

²⁰¹ Since the 1970s, several waves of privatization have swept the world. In 2017, the Privatization Barometer concluded that "the massive global privatization wave that began in 2012 continues unabated." The PB Report 2015/2016, *Two Record Years Herald an Ongoing Privatization Wave*, PRIVATIZATION BAROMETER, http://www.privatizationbarometer.com/PUB/NL/5/9/PB_AR2015-2016.pdf; G.A. Res. A/73/396 ¶ 2 (September 26, 2018) (As the General Assembly of the United Nations said, "That wave has been driven not only by Governments and the private sector, but also by international organizations, especially the International Monetary Fund (IMF), the World Bank and the United Nations.").

²⁰² G.A. Res. A/HRC/15/31 at 1 (July 1, 2010).

for human life and for all life on earth, is part of the global commons and could be said to be the most essential collective resource. It is not a private product that is bought, sold or traded for profit, an exclusive luxury available to few and difficult to reach for many.”²⁰³

The scarcity of public resources, whether real or an excuse to camouflage different ideologies, can exclude people from the exercise of their rights. The market, which considers people as customers and not as citizens, generates inequality by allowing private agents to operate freely.²⁰⁴ For that reason, the regulatory role of the State is paramount.

IV. FULFILLING SOCIAL RIGHTS: BEYOND JUSTICIABILITY

Even though social rights are recognized in international treaties and constitutions, the obstacle lies in the absence of its fulfilment, to a greater or lesser extent, by national governments to do the same.²⁰⁵ This is mainly due to the lack of consensus about the manner in which the State should comply with these rights. To solve this problem, citizens of the United States, as well as European citizens and those of several developing countries, have opted to seek answers in national courts. As Daniel M. Brinks explains, “progressive activists around the world have seized on the judicial enforcement of social and economic rights as a powerful new tool in the politics of social provision,”²⁰⁶ a change that is reflected in the increase of academic interest in the judicialization of social rights. Thus, judges would be responsible for compelling the legislator and the government to guarantee social rights.²⁰⁷ However, there exist objections to this possible exit from the quagmire.

In the field of public policies related to social matters, the principles confer to the legislator and the executive branch a series of

²⁰³ Nowak, *supra* note 175, at 117.

²⁰⁴ *Id.* at 117 (“The general right to water discourse only started when water was beginning to be perceived as a scarce resource and when transnational water corporations, with the assistance of the international financial institutions, made huge profits by exploiting the “water market,” often to the detriment of the poor.”).

²⁰⁵ Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1054 (2014).

²⁰⁶ Daniel M. Brinks & Varun Gauri, *The Law’s Majestic? The Distributive Impact of Judicializing Social and Economic Rights*, 12 AM. POL. SCI. ASS’N 375, 376 (2014).

²⁰⁷ Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977).

discretionary powers that allow the authority to provide services.²⁰⁸ This results in a wide margin of maneuvers in the exercise of their powers.²⁰⁹ The number of resources, the percentage of the budget allocated to each of the items of public services, as well as the development of public policies on social issues are very broad. Freedom has been understood as necessary for democratic branches to govern and respond efficiently to social demands.²¹⁰ It is also true that a government's decision is subject to the democratic control of its decisions. Therefore, since restrictions on social rights can have adverse consequences in elections, governments thoroughly contemplate them before their adoption. Traditionally, the judicial branch has had very little to contribute to such a democratic "game."²¹¹

The tension between the judicial application of fundamental rights and the democratic system has been studied extensively. Scholars have argued that judges have a democratic deficit to override majority decisions made by elected representatives.²¹² This assertion is made even stronger when we refer to questions of social rights, since the courts would be competing with other decision-making institutions about who should have the last word about such rights.²¹³ It is assumed that the judiciary branch should refrain from encroaching upon the power of political bodies to make decisions about social policy issues, such as the appropriate level of public health that should be afforded to citizens.²¹⁴

It is thought that if the constitutional judge reacts against the breach of social rights by other public authorities, "they would cross the limit of functional distinction, acting without democratic legitimation in areas that exceed their technical competence, which intersects with aspects of economic policy and that, ultimately, do not correspond to them constitutionally."²¹⁵ The legitimacy of the courts to decide on social rights is questioned by the alleged lack of two

²⁰⁸ Charles H. Koch Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 479, 480 (1985).

²⁰⁹ Kent Greenawalt, *supra* note 207, at 1046.

²¹⁰ Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. ON HUM. RTS. 383 (2004).

²¹¹ Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1061 (1975).

²¹² *Id.*

²¹³ Katharine G. Young, *Freedom, Want, and Economic and Social Rights: Frame and Law*, 24 MD. J. INT'L L. 182, 205 (2009).

²¹⁴ Anastasia Poulou, *Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation*, 15 GERMAN L.J. 1145, 1169 (2014).

²¹⁵ Juli Ponce Solé, *El derecho y la (ir)reversibilidad limitada de los derechos sociales de los ciudadanos [The right and limited (ir)reversibility of citizens' social rights]*, INSTITUTO NACIONAL DE ADMINISTRACIÓN PÚBLICA 39 (2013).

essential elements: expertise and political responsibility.²¹⁶ First, enforcing social rights implies the discretion of choosing among several public spending policy options. It is said that they do not possess the epistemic qualities to decide on issues that contain issues such as complex budgets.²¹⁷ Second, the lack of accountability of the constitutional courts raises questions of legitimacy.²¹⁸ Judges are careful not to interfere with their decisions in collective social policy: it is more appropriate for economic decisions to be made in politically responsible forums such as parliaments, which are better equipped to consider all of the interests affected.²¹⁹ We consider that these arguments are valid only for certain types of cases. It would seem questionable as to whether the courts have decided on the constitutionality of a large-scale economic policy of governments. We can show this with two kinds of hypothetical cases:

(a) If a government decides to boost the economic development of the automotive industry through fiscal incentives and promoting competitive advantages that pay low wages in a certain area, it is not a matter that can be subject to judicial review.

(b) If a government decides to subrogate dialysis services for patients with kidney disease and, as a result, the quality of the service worsens, the courts could recognize the state's responsibility for the lack of compliance with access to health services of a specific plaintiff who has personally suffered as a result. Nevertheless, few courts would dare to recognize that the cause of all this is the state's decision to subrogate the service.

The government and legislators in the European nations with constitutional courts are free to establish policies and laws in economic matters. Nevertheless, the freedom of legislators has been studied and has taken into account the principles that sustain the social state. For example, the German Federal Constitutional Court (FCC), which is usually a reference point for decisions made in the constitutional courts within the rest of Europe, has expressed that the

²¹⁶ Anastasia Poulou. *supra* note 214, at 1170.

²¹⁷ *Id.* at 1169.

²¹⁸ *Id.* at 1170.

²¹⁹ *Id.*

Fundamental Law is neutral toward economic policy.²²⁰ In a different way than what happened with the Weimar Constitution (Arts. 151), it also does not regulate specific constitutional principles on the configuration of economic life.²²¹ When article 20.1 of the Fundamental Law establishes that the German Federal Republic is a social state, it follows that the state has the duty to guarantee the balance of social contradictions and, therefore, a just social order. It will seek to achieve this goal primarily through legislation.²²² It also orders granting state aid for individuals or groups that, due to their living conditions or difficulties, are unable to develop socially or personally.²²³ Given the social state's lack of specification, the manner in which the legislator fulfills that mandate is his concern.²²⁴ Nevertheless, there is an increasing number of judgments that have been bound to the freedom of legislation. The FCC has recognized that the legislator is bound in areas related to social rights. The fundamental law leaves the legislator, in principle, a broad margin of discretion to adapt the legislation on the public function to the requirements of a free democratic state and its subsequent developments.²²⁵ Notwithstanding, it does not grant absolute regulatory freedom. The above-mentioned traditional principle should be valued as the institution of the public function in a liberal democracy, within the framework of a rule of law and a social state.²²⁶ In 1958, the FCC, in a leading case related to a claim about the insufficient salary of a civil servant, ruled that the assurance of adequate support had to be seen as a particularly indispensable traditional principle, to whose compliance the legislator is bound:

²²⁰ The economic neutrality of the German Charter of 1943 has been defended early by the German Constitutional Court, while tolerating the most liberal or socializing legislative options that do not conflict with the central definition of "social market economy." FERNANDOIS V. ARTURO, DERECHO CONSTITUCIONAL ECONÓMICO I. GARANTÍAS ECONÓMICAS, DOCTRINA Y JURISPRUDENCIA [ECONOMIC CONSTITUTIONAL LAW I. ECONOMIC GUARANTEES, DOCTRINE AND JURISPRUDENCE] 75 n.125 (2nd ed., 2001).

²²¹ See BVerfGE March 1, 1979, 50, 290 MITBESTIMMUNG ¶ 140 (Ger.) (Available at <https://www.servat.unibe.ch/dfr/bv050290.html>).

²²² See BVerfGE July 18, 1967, 22, 180 JUGENDHILFE ¶ 87 (Ger.) (Available at <https://www.servat.unibe.ch/dfr/bv022180.html>).

²²³ See BVerfGE June 22, 1977, 45, 376 UNFALLVERSICHERUNG ¶ 44 (Ger.) (Available at <https://www.servat.unibe.ch/dfr/bv045376.html>).

²²⁴ See BVerfGE Dec. 19, 1951, 1, 97 HINTERBLIEBENENRENTE I ¶ 36 (Ger.) (Available at <https://www.servat.unibe.ch/dfr/bv001097.html#Opinion>).

²²⁵ See BVerfGE October 17, 1957, 7, 155 HAUPTAMTLICHER BÜRGERMEISTER ¶ 30 (Ger.) (Available at <https://www.servat.unibe.ch/dfr/bv007155.html>).

²²⁶ *Id.*

The Federal Constitutional Court is not authorized to determine a salary to the official freely and individually, outside the general legal regulations (Art. 33, paragraph 5 of the constitution). Based on an individual lawsuit, a court cannot supplant the legislator and determine the general regulation it considers necessary on its own impulse (Art. 20, paragraph 3 of the Constitution). However, the Federal Constitutional Court can decide whether the existing law does or does not meet the minimum requirements contemplated in Article 33, paragraph 5 of the Constitution.²²⁷

The FCC establishes that, since it is not empowered to impersonate the legislator, “it must be limited to determining that the Federal legislator, having omitted the modification of the salaries, violated the contemplated right in Art. 33, paragraph 5 of the Fundamental Law.”²²⁸ Recognizing that the FCC cannot supersede the legislator, but that it establishes a boundary to its liberty. This kind of formula is used in other high courts in Europe. For example, the Spanish Constitutional Court in its judgment STC 37/1994, explains that Article 41 of the Spanish Constitution imposes on public authorities the obligation to establish or maintain a protective system that corresponds to the technical characteristics of the coverage mechanisms of a social security system.²²⁹ In other words, the aforementioned precept sets forth a public regime in the form of an institutional guarantee “whose preservation is deemed indispensable to ensure the constitutional principles, establishing. . . a core or redoubt unavailable by the legislator.”²³⁰

In addition to the theoretical arguments concerning the lack of confidence in the technical capacities of the courts, a lack of transforming effects of these types of resolutions are also adduced. Here, we refer to the types of benefit judgments, which obligate the legislator or the public administration to guarantee social rights. For example, in the sphere or social rights the judicial decisions by the

²²⁷ BVerfG June 11, 1958, 8, 1 TEUERUNG SZULAGE ¶ 49 (Ger.) (Available at <https://www.servat.unibe.ch/dfr/bv008001.html#Opinion>).

²²⁸ See *id.* ¶ 50.

²²⁹ S.T.C., B.O.E. 1994, 65 at 3 (Spain). (Available at http://hj.tribunalconstitucional.es/esES/Resolucion/Show/2554#complete_resolucion&completa).

²³⁰ *Id.*

South African courts are considered paradigmatic.²³¹ It is argued that it is difficult for courts to ensure compliance with sentences of this type. However, after generating great expectations, it is evident that the impact of South African courts efforts has been rather modest.²³² It is important to distinguish between the various types of sentences related to social rights. Following the classification by Mark Tushnet (Professor of Law at Harvard Law School), several categories of analysis have been established based on the types of recognition of the right, the type of remedy and follow-up established by the court, and finally its effects.²³³

This classification can be seen in the following table:

Rights	Weak
	Moderate
	Powerful
Court Orders	Weak
	Moderate
	Powerful
Tracing	Weak
	Moderate
	Powerful
Impact	Weak
	Moderate
	Powerful

Source: based on Rodríguez's proposal (2017).²³⁴

²³¹ The discussion triggered by Tushnet's appreciations are proof of this. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008). See, e.g., Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 AM. J. COMP. L. SUPP. 561 (2014).

²³² See Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007).

²³³ Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislatures*, 2 NZJPIL 7 (2004); MARK TUSHNET, *supra* note 231.

²³⁴ Cesar, Rodríguez, *Más allá del cumplimiento: cómo analizar y aumentar el impacto de los tribunales*, in LANGFORD, MALCOLM ET AL. *LA LUCHA POR LOS DERECHOS SOCIALES LOS FALLOS JUDICIALES Y LA DISPUTA POLÍTICA POR SU CUMPLIMIENTO [THE FIGHT FOR SOCIAL RIGHTS, JUDICIAL RULES AND THE POLITICAL DISPUTE FOR THEIR COMPLIANCE]* (2017).

It is true that there are few cases in which courts venture to issue judgments of “strong rights,” that is to say, that there is a clear recognition of the judicial enforceability of the right in question, as well as remedies or “strong court orders” that establish obligations to provide services that involve expenditures or budget modifications.²³⁵ The Colombian system of human rights protection is perhaps the one that has gone further in this regard than most.²³⁶ However, the disadvantage of Colombian judicial power activism, is the lack of general or structural effects of its decisions. For instance, David Landau²³⁷ warns that the effects of the rulings had not been structural and had mainly benefited the Colombian middle and upper class. Landau explains that this is due to the fact that the rulings which obligate the state to provide services have consequences only for the parties of the conflict.²³⁸ These rulings will sometimes declare unconstitutional the norms that limit social rights that have previously been recognized. Landau affirms that the individualized application of social rights tends to disproportionately benefit groups of the middle and upper classes and because of that, its effect on bureaucratic efficacy is, at best, ambiguous.²³⁹

The judgments of the courts have had positive results for higher-income groups, which may use the judicial system to claim the exercise of their rights.²⁴⁰ This phenomenon operates in the area of health, since compliance with judgments that establish budget allocations disproportionately affect the middle and upper classes.²⁴¹ This same phenomenon occurs in Brazil, where, according to Octavio Motta Ferraz,²⁴² litigation in the social field benefits a small minority that is able to use the judicial system in their favor. Additionally, it is common to find difficulties in effectively enforcing the judgments surrounding social rights.

²³⁵ *Id.* at 121.

²³⁶ David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L. J. 190, 203 (2012).

²³⁷ *Id.* at 233.

²³⁸ *Id.* at 230.

²³⁹ *Id.*

²⁴⁰ *Id.* at 234.

²⁴¹ MALCOLM LANGFORD ET AL., LA LUCHA POR LOS DERECHOS SOCIALES. LOS FALLOS JUDICIALES Y LA DISPUTA POLÍTICA POR SU CUMPLIMIENTO [THE STRUGGLE FOR SOCIAL RIGHTS. JUDICIAL MISTAKES AND THE POLITICAL DISPUTE FOR THEIR FULFILMENT], 103 (Dejusticia, 2017).

²⁴² Octavio Luiz Motta, *Harming the Poor through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1662 (2011).

Based on the previously stated, it is crucial that national courts guarantee social rights, as recommended by the Committee. However, it is also important that courts pronounce themselves on the most abstract economic policy issues, without regard to solutions in particular cases. It is true that judging these cases may, on certain occasion, be outside of the court's competence, however, it is always possible to address the legislative and executive powers in order to obtain the necessary evidence to justify the government's actions.²⁴³

A. *The Supranational Protection*

Administrative discretion implies that public authorities have a range of powers that allow them, but do not obligate them, to distribute public goods.²⁴⁴ This principle has been reinterpreted in recent years by supra-state rights protection bodies. In this section, we will explain the arguments that have been used by organizations of the universal human rights system and by international institutions in Europe, such as the European Council and the European Union with regard to specific cases of violations of social rights.

1. *International Systems: The United Nations and Welfare*

The analysis of the United Nations reflects the difficulties of the state representatives in envisaging the methods that would make their social rights obligations effective.²⁴⁵ This issue requires an appropriate approach, since many dissimilar economies and different interpretations of the state freedom of decision-making in economic and development matters are involved.²⁴⁶

The international systems that protect social rights have increasingly emphasized the violation of social rights committed by many states. In some cases, the resolutions contain explicit criticism of the economic decisions that have been made.²⁴⁷ For the purpose of this article, we will emphasize the recommendations that are related to

²⁴³ Gunter Frankenberg, *Why Care - The Trouble with Social Rights*, 17 CARDOZO L. REV. 1365, 1375 (1995).

²⁴⁴ Allison Corkery & Sally-Anne Way, *Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfill Economic, Social and Cultural Rights: The OPERA Framework*, 30 NORDIC J. HUM. RTS. 324, 329 (2012). (“[T]he idea that states enjoy a ‘margin of discretion’ in choosing their policies and in deciding on the level of resources they allocate-although this does not mean that states can evade responsibility for the realization of ESCR.”).

²⁴⁵ *Id.* at 341.

²⁴⁶ *Id.* at 348.

²⁴⁷ *Id.*

the core of the problem: the existing structures that lead to the lack of fulfillment of social rights in specific places. These recommendations are elaborated based upon the arguments that have origins in the welfare state, which is noticeable in its two essential pillars: promotion of full employment and the obligation to guarantee social rights.

2. Full Employment

Although many economists have ceased pursuit of full employment as something that is “achievable,” the CESCR continues linking this objective with the realization of the right to work included in Article 6 of the ICESCR.²⁴⁸

19. The principal obligation of States parties is to ensure the progressive realization of the exercise of the right to work. States parties must, therefore, adopt, as quickly as possible, measures aiming at achieving full employment.²⁴⁹

41. Such a national strategy also imposes a requirement to identify the resources available to State parties for achieving their objectives as well as the most cost-effective ways of using them.²⁵⁰

The most transparent international treaty regarding the full employment goal is the Convention 122 of the ILO, which states the following in Article 1.1: “With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.”²⁵¹ The “quantitative” dimension of work, explained by Vania Brino, which deals with the promotion of full employment and

²⁴⁸ U.N. CESCR, on its Thirty-Fifth Session, U.N. Doc. E/C.12/GC/186, at 19, 41 (Nov. 24, 2005) (Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Ssab0oXTdImnsJZZVQfUKxXVIsd7Dae%2FCu%2B13J25Nha719NlwYZ%2FTmK570%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BIkX8AGQrVyIc>).

²⁴⁹ *Id.* ¶ 19.

²⁵⁰ *Id.* ¶ 41.

²⁵¹ International Labour Conference, Employment Policy Convention, art 1.1, June 17, 1964, No. 122. (Available at https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312267,en:NO).

at the introduction of measures to combat unemployment, combines a more purely “qualitative” dimension considered as the right to freely choose one’s own job and to carry it out in decent conditions. In that sense, “employment is a cross-cutting issue and the result of multi-layered policy interactions” and therefore, “in order to foster the quality and quantity of employment, a wide range of integrated and well-designed policy interventions, cutting across both macro and microeconomic dimensions and addressing both labour demand and supply are required.”²⁵²

These policies do not differ in great extent among European countries. Article 1.1 of the ESC establishes that state parties must achieve and maintain “a level of employment as high and stable as possible, with a view to the attainment of full employment.”²⁵³ The European Committee of Social Rights (ECSR) interpreting this article, said that “article 1§1 is an obligation of conduct rather than of result, which means that failure to achieve full employment, and even the existence of a high rate of unemployment as such, will not be regarded as a breach of the Charter.”²⁵⁴ The equivalent provision in the EU Charter of Fundamental Rights only refers to the freedom of everyone to engage in work (replicating Article 1 para. 2 of the European Social Charter), without implying a duty of the State to aim to provide employment to all: although other provisions of the EU Charter refer to the right of access to placement services free of charge (Article 29) or to the right to protection against unjustified dismissal (Article 31), these are only specific dimensions of the broader set of duties that correspond to the fulfilment of the right to work as a human right.²⁵⁵

²⁵² INTERNATIONAL LABOUR OFFICE, GUIDE FOR THE FORMULATION OF NATIONAL EMPLOYMENT POLICIES (2012) (https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_188048.pdf).

²⁵³ European Social Charter (ESC) Article 1.1. (The art. 14 of the X establish the “[r]ight to benefit from social welfare services. The Contracting Parties undertake: (1) to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment; (2) to encourage the participation of individuals and voluntary or other organizations in the establishment and maintenance of such services.”).

²⁵⁴ Vania Brino, *C122 - ILO Employment Policy Convention, 1964 (No. 122)*, in INTERNATIONAL AND EUROPEAN LABOUR LAW (Edoardo Ales and Mark Bell et al. eds., 2018).

²⁵⁵ Olivier De Schutter, *The European Pillar of Social Rights and The Role of the European Social Charter in the EU Legal Order*, COUNCIL OF EUROPE (NOV. 14, 2018), <https://rm.coe.int/study-on-the-european-pillar-of-social-rights-and-the-role-of-the-esc-/1680903132>.

3. *Obligation to Guarantee Social Rights: Redistribution of Wealth*

One of the most important characteristics of the a modern welfare state is its concern regarding the consequences of economic liberalism without restraint, especially when it comes to the accumulation of wealth and its results: cyclical economic crises and massive unemployment.²⁵⁶ Nevertheless, though the benefits of markets and private ownership were recognized, “both should be made subordinate to conscious social control of private ownership and investment with measures such as redistribution of income through progressive taxation, transfer payments and the provision of public education and public goods.”²⁵⁷ This thought, developed in the nineteenth century, was confirmed during the first half of the twentieth century, and continues to be part of the cornerstone of the welfare state.²⁵⁸ The United Nations, through the expert committees of the different human rights treaties, has insisted on the state’s obligation to guarantee social rights within its social expenses. The following is their interpretation of article 2 of ICESCR:

Article 2.1. Each State Party to the present Covenant agrees to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to progressively endeavor the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁵⁹

As such, the state is obligated to progressively endeavor the full realization of those rights. The question that arises and has not yet been answered, is whether the state should guarantee social rights within its own budget. Even the United Nations respects the freedom of the

²⁵⁶ See JAMES ANGRESANO. FRENCH WELFARE STATE REFORM. IDEALISM VERSUS SWEDISH, NEW ZEALAND AND DUTCH PRAGMATISM 13 (2007). (“Societies adopting such a welfare state would have to be welfare societies, with upper income members supportive of large-scale income redistribution and employment security as a means of increasing the social welfare of less fortunate citizens.”).

²⁵⁷ This was the philosophical conclusion in England in the XIX century following the ideas of Orwell and Stuart Mill. See JAMES ANGRESANO, *supra* note 254, at 10.

²⁵⁸ Robert J. Lampman, *Recent Thought On Egalitarianism*, 71(2) Q. J. ECON., 234, 238 (May, 1957).

²⁵⁹ GA. Res. 2200A (XXI), art 2.1 (1976).
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

states to choose the ways of fulfilling social rights.²⁶⁰ Given the wide margins of maneuvers that states have to fulfill their obligations and to determine measures, the CESCR has declared that the states should implement policies to fulfill rights recognized in the Covenant. Per the UN's perspective, the fulfillment of social rights, has been related to public policies of the states and, of course, the element of timing is crucial: each state has to take steps to implement their commitments as quickly and effectively as possible.²⁶¹

The United Nations has clearly expressed the direct and positive obligation of the states to guarantee certain services with their own resources regarding certain social rights related to specific groups of the population. For instance, in the field of the Human Treatment of Persons Deprived of Their Liberty, the Human Rights Committee has said that: "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party."²⁶² The Committee on the Elimination of Racial Discrimination, in its general recommendation number 27, related to the Discrimination of Roma people, pointed out that the states should: ". . . take the necessary measures, as appropriate, for offering Roma

²⁶⁰ U.N. Committee on Economic, Social, and Cultural Rights, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, at 8, U.N. Doc. E/C.12/2000/13 (January 22-26, 1997) ("As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.") (Available at http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html).

²⁶¹ Econ. & Soc. Council, *Comm. on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, U.N. Doc. E/C.12/GC/18 (2006).

²⁶² General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty, U.N. Human Rights Comm. On its Forty-Fourth Session at ¶ 4, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Apr. 10, 1992).

nomadic groups or travelers camping places for their caravans, with all necessary facilities.”²⁶³ In these cases it is evident that it is the state (and only the state) that is obligated to respond to the demands of social rights. However, the United Nations has made it clear that in order to guarantee social rights, especially when it comes to results, states are free to use the policies they consider appropriate.²⁶⁴ Nonetheless, as we will later show, this freedom cannot be interpreted as mere arbitrariness, because states must demonstrate the reasonableness of their policies.²⁶⁵

Over time, states have tended to recognize their obligation regarding income distribution. After analyzing ICESCR state party reports filed from 1977 through 2011, Davy Ulrike noticed states increasing commitment to ICESCR rights, not only in terms of the recognition of their obligations to guarantee social rights, but also in the form of concrete policies, which focused on the redistribution of wealth, aimed at “economic and social development,” “social development,” or “human development.”²⁶⁶ For instance, the Colombian state addressed the change quite openly.²⁶⁷ According to its 1994 report of Columbia, the new policy addressed “the problem of poverty” and accelerating “economic growth.”²⁶⁸ Similarly, the state of Guyana expressed in its 1995 report, that it was intending to

²⁶³ U.N. Comm. on the Elimination of Racial Discrimination (CERD), on its Fifty-Seventh Session, CERD General Recommendation XXVII on Discrimination Against Roma, ¶ 32, U.N. Doc A/55/18 (Aug. 16, 2020).

²⁶⁴ U.N. Committee on Economic, Social, and Cultural Rights, Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2000/13, at 7 (Jan. 22-26, 1997) (“The obligations to respect, protect and fulfill each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed upon at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.”).

²⁶⁵ G.A. Res. A/RES/63/117 (Dec. 10, 2008).

²⁶⁶ Ulrike Davy, *How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights*, 13 WASH. U. GLOBAL. STUD. L. REV. 201 (2014).

²⁶⁷ *Id.* at 258.

²⁶⁸ *Id.* (citing to Econ. & Soc. Council, Implementation of the ICESCR, Third Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum: Colombia, U.N. Doc. E/1994/104/Add.2, at 126 (Aug. 15, 1994)).

“modify priorities,” and planned to grant more resources to health, education, and housing which were all in a critical state.²⁶⁹

4. *Minimum Core Obligations of Rights Without Regression*

The United Nations has been especially clear in cases related to the fulfillment of social rights in rich countries.²⁷⁰ In the UN Special Rapporteur on the right to food, the debt-to-GDP ratio was discussed in the report on its 2012 country mission:

The Special Rapporteur is concerned that the 2012 federal budget reportedly envisages a reduction of public spending of CAN \$5 billion annually, with a total reduction in spending of CAN \$37 billion over five years, without the implications for the realization of the right to food having been given explicit consideration. Canada has one of the lowest deficit to GDP ratios and debt-to-GDP ratios among industrialized countries, and it is precisely in times of economic and financial crisis that guaranteeing robust social protection measures is most required.²⁷¹

The United Nations made a clear statement about the role states play in their fulfillment of social rights.²⁷² Even though states must fulfill its obligation progressively, they must also take immediate action, irrespective of the resources they have, in five areas: elimination of discrimination; economic, social and cultural rights not subject to progressive realization; obligation to “take steps”; non-retrogressive measures; and minimum core obligations.²⁷³ However, in the depth of the argument, there is an ideological dispute about the

²⁶⁹ *Id.* (citing to Econ. & Soc. Council, Implementation of the ICESCR, Initial Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum: Guyana, ¶ 3 U.N. Doc. E/1990/5/Add.27, at 3 (Aug. 7, 1995)).

²⁷⁰ *See e.g.*, Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights: Australia, ¶28, U.N. Doc. E/C.12/1/Add.50 (2000).

²⁷¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), *Realizing Human Rights Through Government Budgets*, 56, U.N. Doc. HR/PUB/17/3 (New York and Geneva, 2017) (citing Report of the Special Rapporteur on the right to food, ¶ 40, U.N. Doc. A/HRC/22/50/Add.1).

²⁷² U.N. Committee on Economic, Social, and Cultural Rights, *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13, at 4 (Jan. 22-26, 1997) (“It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.”).

²⁷³ G.A. Res. A/RES/63/117 (Dec. 10, 2008).

best way to achieve compliance with international commitments.²⁷⁴ It is evident that the United Nations is using an argument linked to the welfare state and that it has interpreted the notion of progressivity and the availability of resources of the ICESCR.²⁷⁵ For the United Nations, the State must avoid a setback in the tax system by applying progressive taxes:

Non-discrimination means that the impact of the government's revenue-raising schemes must not have a disproportionate and negative impact on certain groups, particularly those in the lowest income brackets. The government should carry out regular tax incidence analyses of the ways it raises revenue to assess the impact on different groups. In particular, government should take measures to ensure that the tax system is progressive, recognizing that regressive taxes, such as user fees, disproportionately affect the poorest.²⁷⁶

The steps taken towards the full realization of the rights in the treaty are taken through public spending of the state.²⁷⁷ The CESCR

²⁷⁴ Louis Henkin, *Economic Rights under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97, 128 (1994). In the United States welfare rights are legislative, not constitutional, and are subject to political, ideological and budgetary restraints. Europe is the birthplace of the welfare state and welfare rights are longer and deeper in the life of every European country.

²⁷⁵ U.N. Committee on Economic, Social, and Cultural Rights, *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13, at 10 (Jan. 22-26, 1997) ("10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights."). Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 121 (2008). ("This standard of obligation, which distinguishes the Covenant from other human rights instruments, gives state parties the latitude to implement rights over time depending upon the availability of necessary resources, rather than requiring them to guarantee rights immediately.")

²⁷⁶ *Realizing Human Right Through Government Budget*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER 87 (2017), <https://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf>.

²⁷⁷ U.N. Committee on Economic, Social, and Cultural Rights, *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13 (Jan. 22-26, 1997). ("Obligations to respect, protect and fulfil. Like

has also said that the obligation of governments to avoid retrogressive measures implies that there should be no unjustified reductions in public expenditure devoted to implementing ESCR in the absence of adequate compensatory measures aimed to protect those who might be affected by the cuts.²⁷⁸

In its general observations, the CESCR has established the concept of an essential core, which has helped to point out actions that are considered “retrogressive.”²⁷⁹ Although the UN agencies have emphasized the care that governments must take in the design and implementation of public policies, while seeking for the exercise of the ESCR to be protected.²⁸⁰ On several occasions, the United Nations committees have recommended that states expand or improve social security, always with a view of making their systems universal.²⁸¹ They have promoted the protection of specific population groups, such

civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.”).

²⁷⁸ See *Committee on Economic, Social and Cultural Rights*, U.N. Doc. E/1991/23, ¶ 9 (1990).

²⁷⁹ Katharine G. Young, *supra* note 273, at 121 (“The Committee has insisted that the “progressive realization” of the Covenant rights requires the taking of “deliberate, concrete and targeted” steps. The minimum core provides an understanding of the direction that the steps should follow and an indication as to when their direction becomes retrogressive.”).

²⁸⁰ *Id.* at 124.

²⁸¹ See *Economic and Social Council*, U.N. Doc. E/C.12/GC/19, ¶ 59 (Feb. 4, 2008) (State parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. This requires the State party: (a) To ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies.

as elderly people,²⁸² children,²⁸³ or migrant workers and members of their families.²⁸⁴ The CESCR has insisted on the importance of tax policies in order to raise resources that allow the state to fulfill its international obligations:

28. The duty to provide obligates State Parties to mobilize resources to provide the goods and services necessary for the complete fulfillment of the Covenant rights, when rights holders are not in a position to provide for themselves for reasons beyond their control. To this end, State parties should raise resources, including by direct taxation of business income.²⁸⁵

B. Europe: From the European Court of Human Rights to the European Committee of Social Rights

In Europe, two systems of human rights protection coexist. The one created by the Council of Europe, founded in 1949 by the Statute of the Council of Europe²⁸⁶ and the system that emerged as an agreement of the member states of the European Union, at the time that the European Economic Community (EEC) was created by the Statute of Rome in 1957.²⁸⁷ The perspective regarding social rights in Europe has been linked with the classical division among the type of rights. It is maintained that the justiciability of these rights cannot be equated with civil and political rights.²⁸⁸

²⁸² *Id.* ¶ 15.

²⁸³ See *Convention on the Rights of the Child*, U.N. Doc. CRC/GC/13, ¶ 43 (Apr. 18, 2011) (“Social measures should reflect governmental commitment to fulfilling child protection rights and provide for basic and targeted services. They can be initiated and implemented by both State and civil society actors under the responsibility of the State.”).

²⁸⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, U.N. Doc. CMW/GC/2, ¶ 28 (Aug. 28, 2013).

²⁸⁵ *Committee on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/60/R.1 (2017).

²⁸⁶ Statute of the Council of Europe (London, 5.V.1949); see BIRTE WASSENBERG, HISTORY OF THE COUNCIL OF EUROPE, COUNCIL OF EUROPE, STRASBOURG (2013).

²⁸⁷ See The Treaty of Rome 25 March 1957, 298 U.N.T.S. 3 (officially the Treaty establishing the European Economic Community, brought about the creation of the European Economic Community (EEC), the best known of the European Communities (EC)).

²⁸⁸ See JEAN-FRANÇOIS AKANDJI-KOMBE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, HUMAN RIGHTS HANDBOOKS 7 (2007).

The traditional argument has been that there is an economic difficulty in fulfilling the positive obligations related to social rights.²⁸⁹ Consequently, the Council of Europe approved two conventions following the classical distinction. The European Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights or Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was adopted by the Council of Europe in Rome on November 4, 1950, and the European Social Charter (ESC), adopted in Turin on October 18, 1961 and was revised in 1996.²⁹⁰

While the ECHR system includes a Court—the European Court of Human Rights—whose decisions have a binding force on States (Article 46 of the ECHR) and a procedure of individual claims, the control body of the ESC is the European Committee of Social Rights (ECSR) and the protection system is based on the submission of reports by the States.²⁹¹ The rejection of the applications related to social rights cases is almost a rule in the ECHR. Nevertheless, the ECHR includes important judgments related to social rights that are especially critical for the concept of “positive obligations” of the state.²⁹² We can assert that the concept of positive obligation is key in requiring the state to guarantee social rights. In other words, rather than merely requiring states to refrain from interfering with individuals’ rights, Courts insist that those states take direct action to protect those rights. Moreover, the criticism behind the possibly false dichotomy between positive and negative rights,²⁹³ has been useful to require the state, in some cases, to ensure respect for some social rights. In the Belgian Linguistic case, the ECHR says:

²⁸⁹ *Id.* at 11.

²⁹⁰ See generally European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Rome, 4.XI.1950 (https://www.echr.coe.int/documents/convention_eng.pdf)

²⁹¹ Anna Maria Maugeri, *Fundamental Rights in the European Legal Order, Both as a Limit on Punitive Power and as a Source of Positive Obligations to Criminalise*, 4 NEW J. EUR. CRIM. L. 374 (2013).

²⁹² Brice Dickson, *Positive Obligations and the European Court of Human Rights*, 61 N. IR. LEGAL Q. 203 (2010) (All rights have correlative obligations, and nothing is added to the truth of this statement by sub-dividing obligations into those that are negative and those that are positive. Negative obligations can easily be restated as positive obligations (and vice versa), and all rights can just, as readily, be described as having correlative obligations that are both positive and negative. This idea can be traced to Wesley Hohfeld). See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1916-1917).

²⁹³ Brice Dickson, *supra* note 290.

The negative formulation indicates, as is confirmed by the “preparatory work” (...), that the Contracting Parties do not recognize such a right to education as would require them to establish at their own expense, or to subsidize, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as it is protected by Article 2 of the Protocol (P1-2). As a “right” does exist, it is secured, by virtue of Article 1 (art. 1) of the Convention, to everyone within the jurisdiction of a Contracting State.²⁹⁴

Nevertheless, the ECHR has been careful in using the concept of positive obligations of the states, especially when the case is related to public spending.²⁹⁵ The ECHR has used this concept to condemn states for a lack of regulation in cases related to social rights. In *Calvelli and Ciglio v. Italia*,²⁹⁶ the Court considered that, under Article 2 of the ECHR, the State was obligated to have established a regulatory framework that forced hospitals, both public and private, to adopt adequate measures to ensure the protection of the lives of their patients.²⁹⁷

When we seek recommendations on how states should guarantee social rights, we encounter a lack of clear regulation. European human rights protections had avoided establishing specific rules on how to comply with social rights, and the protection of those rights was not a priority for the foundation of the European Union, which was created mainly for economic purposes.²⁹⁸ However, the founding treaties

²⁹⁴ Case “Relating to certain aspects of the laws on the use of languages in education in Belg.” v. Belg., App. N°1474/62 Eur. Ct. H.R. (1968).

²⁹⁵ *Pentiacova & Ors. v. Moldova*, (No. 14462/03) Eur. Ct. H.R. (2005) (The plaintiffs had complained about insufficient funding public in the treatment of hemodialysis. Although the Court recognized that the matter could fall within the scope of the right to private and family life of Article 8, the ECHR rejected the application, because it considered that in this matter are the States who must configure the priorities in view of the limitations budgetary.).

²⁹⁶ *Calvelli & Ciglio v Italy*, (No. 32967/96) Eur. Ct. H.R. (2002).

²⁹⁷ *Id.* at 3.

²⁹⁸ F.-X. KAUFMANN, *VARIATIONS OF THE WELFARE STATE: GREAT BRITAIN, SWEDEN, FRANCE AND GERMANY BETWEEN CAPITALISM AND SOCIALISM, IN GERMAN SOCIAL POLICY* 219, 218 (Springer-Verlag Berlin Heidelberg 2013) (“Given the original goal of liberalizing economic relations, social policy did not seem to hold any special role within the framework of European integration. In fact, the concern was repeatedly raised that in view of the persistence of national differences in social policy, the liberalization of economic relations could lead to

referred to the certain fundamental rights of every human being that were to be respected by all authorities, such as an equal pay wage for women and men (the historical article 119 of the European Economic Community Treaty or EEC).²⁹⁹ The Court of Justice of the European Union (CJEU) identified the existence of human rights in the founding treaties.³⁰⁰ The European Council, holding a meeting in the German city of Cologne on June 3 and 4, 1999, made the decision to draft a Charter of Fundamental Rights (The Charter or CFR), which contained social rights that were to be read as a system based on the principles of the welfare state (see features of the welfare state above). The CFR contains the rights of social security and social assistance (art. 34), public services including education and universal health care (arts. 14 and 35),³⁰¹ and access to services of general economic interest (art. 36).³⁰² The European Union is also committed to its role in the economy via the role of their governments. Their commitment to full employment is clearly expressed in art. 3.3 of the Treaty on European Union, as well as through equal opportunities within the labor market and in the treatment of its people at work.³⁰³

“social dumping,” which would compel the states that were more progressive on social policy to lower their standards of social protection.”).

²⁹⁹ Treaty of Rome Treaty Establishing the European Economic Community, aty. 119, March 25, 1957, 298 U.N.T.S. 3.

³⁰⁰ See ARACELI MANGAS MARTIN (DIR.). CARTA DE LOS DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA. COMENTARIO ARTÍCULO POR ARTÍCULO [CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION. ARTICLE BY ARTICLE COMMENT] (Fundación BBVA 2008).

³⁰¹ The protection of health is configured by art. 35 as a subjective right of the person, as such recognized universally, without restrictions derived from the condition legal-political (citizenship) or juridical-administrative (stay) legal or irregular, affiliation or not to a national system of Social Security) of the assistance applicant. U.N. Charter art. 35.

³⁰² U.N. Charter art. 36.

³⁰³ Treaty of Rome Treaty Establishing the European Economic Community, art. 3.3, March 25, 1957, 298 U.N.T.S. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced. Treaty on European Union <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008M003>.

C. *Economic Crisis, Social Rights, and the Welfare State*

The economic crisis of 2008 or subprime mortgage crisis in the United States, which was caused by a lack of economic regulation of the banking system, had great global effects.³⁰⁴ Perhaps the most affected country, as a result of its own previous economic weakness, was Greece. The Mediterranean country entered the twenty-first century, enjoying economic growth, however, as Papadopoulos describes, the consequences of the global financial crisis, the deficiency of a balanced development of the economy after entering the Economic and Monetary Union, the failure of the Greek governments to refrain from participating in or tolerating political and economic corruption, and certain tax scandals, led to a dramatic rise in public debt and deficit and placed the country at the point of insolvency by the end of the first decade of this century.³⁰⁵ In 2010, and later in 2012, the Greek government agreed to receive loans of billions of euros from its creditors in exchange for signing two Memoranda of Understanding, in which it was agreed that Greece had to undertake various austerity reforms that would reduce its deficit in the coming years.³⁰⁶

The assistance conditions focused primarily on economic targets regarding public spending but, were simultaneously accompanied by detailed prescriptions for how the measures were to be achieved.³⁰⁷ These were related to minimum wage, decentralization of collective bargaining, cuts in pensions and Social Security benefits, reforms in public healthcare, and education.³⁰⁸ Consequently, several claims were presented to the ECSR. The Committee declared that the differentiated reduction of the minimum wage of persons under the age of twenty-five constituted a violation of Article 4.1 (right to a fair remuneration),³⁰⁹ and that the successive cuts in pensions contravened Article 12.3 of the ESC that enshrines the right to Social Security and obligates signatories “to endeavor to progressively raise the system of

³⁰⁴ See KEN MOAK, *THE 2008 GLOBAL FINANCIAL CRISIS: EFFECTS ON THE GLOBAL ECONOMY*. IN: *DEVELOPED NATIONS AND THE ECONOMIC IMPACT OF GLOBALIZATION*. PALGRAVE MACMILLAN, CHAM (2017).

³⁰⁵ See Nikolaos A. Papadopoulos, *Austerity Measures in Greece and Social Rights Protection under the European Social Charter Comment on GSEE v. Greece case, Complaint No. 111/2014, Vol. 10(1)*, EUROPEAN LABOUR L.J. 85 (2019).

³⁰⁶ *Id.* at 86.

³⁰⁷ Poulou, *supra* note 214, at 1147.

³⁰⁸ *Id.*

³⁰⁹ General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, Complaint, (No. 66/2011), para. 65, 68, 69 (May 23, 2012).

Social Security to a higher level.”³¹⁰ The question that we must formulate is whether the economic measures should prevail over rights. The ECSR’s answer is that:

The state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question. States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, particularly regarding the balance to be struck between the general interest and the interests of a specific group and the choices which must be made in terms of priorities and resources.³¹¹

While governments may adapt their economic policies and budgets to face an economic crisis, there should be evidence that the means to achieve the desired ends are appropriate and do not restrict social rights.³¹² Such evidence could dwell in a case where a similar policy was successfully employed. However, the minimum core of social rights should never be affected³¹³ simply because the economic impact, which can bring long-term benefits for the majority, cannot be sustained by affecting human rights.³¹⁴

D. From Minimum Core Obligations to Reasonableness

Social rights have been recognized as human rights on both a national and international level.³¹⁵ However, the disparity among national standards is quite considerable. It can be assumed that one of the reasons for this difference is related to economic policies rather

³¹⁰ Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Complaint, (No. 76/2012).

³¹¹ European Roma Rights Centre v. Bulgaria, ECSR Complaint, (No. 31/2005), (2006).

³¹² *Id.* ¶ 71.

³¹³ The concept of the “minimum core” in social rights seeks to establish a minimum legal content for the notoriously indeterminate claims of economic and social rights. By recognizing the “minimum essential levels” of the rights to food, health, housing, and education. Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113 (2008).

³¹⁴ David Bilchitz, *Socio-Economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT’L J. CONST. L. 710, 728, (2014) “Governments have often made arguments as to why an austerity package, for instance, of cutting important social benefits will be a crucial measure in order to secure greater benefits for all in the longer term.”

³¹⁵ See Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1054 (2014).

than to the recognition of social rights. There is no economic model that should be used to ensure better protection of social rights.³¹⁶ As stated by Jeff King, “recognizing social human rights does not commit us to a particular type of welfare state, any more than recognizing civil human rights commits us to a particular model of democracy or voting system.”³¹⁷ However, it is evident that certain decisions affect the guarantee of rights in a pernicious way.

It is useful to analyze the core obligation in specific situations when governments comply with the minimum standard of the Convention. The ESRC has used this criterion to analyze the actions implemented by the states. For instance, in relation to the commitments acquired by national governments, in conjunction with the World Bank or the IMF, the ESCRC has said that:

28. State parties that are members of international financial institutions, in particular, the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programs and international measures of these institutions. The strategies, programs and policies adopted by State parties under structural adjustment programs should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and disadvantaged and marginalized individuals and groups.³¹⁸

The idea of a minimum core is found in the ESRC via its reference to the minimum wage.³¹⁹ It is interesting to consider that,

³¹⁶ JEFF KING, *JUDGING SOCIAL RIGHTS*, CAMBRIDGE 54 (2012).

³¹⁷ *Id.*

³¹⁸ U.N. G.A. Res. E/C.12/GC/18 (Feb. 6, 2006).

³¹⁹ The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. International Covenant on Economic, Social and Cultural Rights, *supra* note 11, at art. 7.

according to the Convention, the minimum wage should be used to cover the basic expenses of “decent living.”³²⁰ The idea of the minimum core has also been used to determine basic unavailability of each of the social rights. States often claim a lack of necessary resources to guarantee the rights contained in the Convention. In such case, the Committee has determined that: “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations due to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.”³²¹

The Optional Protocol of the Convention (Option Protocol or OP) has taken steps beyond the notion of the minimum core through the introduction of the criterion of reasonableness.³²² The idea of reasonableness, which has its origins in the jurisprudence of the South African Constitutional Court,³²³ is found in article 8(4). On several occasions the Committee has used the criterion of reasonableness to determine whether the actions of the states comply with the obligations of the ICESCR.³²⁴ The criterion of reasonableness of the OP seeks to find out whether the actions developed by the states imply “clear strategies and plans and (whether they) monitor progress toward identified goals while also meeting immediate obligations commensurate with the available resources and other historical/contextual challenges.”³²⁵ In this sense, the observations of the ESRC’s report in the Republic of the Congo, where the Committee found that the State’s decreased allocation of resources to the social

³²⁰ Economic and Social Council, General Comment No. 23 (2016) on the Right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights) Remuneration that provides all workers with a decent living for themselves and their families, U.N. Doc. E/C.12/GC/23.

³²¹ Economic and Social Council, ¶10, U.N. Doc. E/C.12/GC/18 (Feb. 2006).

³²² G.A. Res. A/RES/63/117, at 10 (Dec. 2008).

³²³ See Brian Griffey, *The Reasonableness Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 275, 302, (2011); Sandra Liebenberg, *Needs, rights and transformation: Adjudicating social rights*, 17 STELL LR 1, 5 (2006).

³²⁴ Lisa Forman, *Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 47 OTTAWA L. REV. 561, 571. See too Brian Griffey, *The Reasonableness Test: Assessing Violations of State Obligations (Si?) under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 275 (2011).

³²⁵ G.A. Res. A/RES/63/117, art. 8. (Dec. 2008).

sector development, combined with increased levels of military spending, resulted in a violation of this Covenant:

35. The Committee notes with concern that in spite of the significant increase in budgetary allocations to the education sector, access to primary schools remains fee-paying and therefore unaffordable for many. The Committee also notes with concern that school enrollment of children, especially girls, remains at an extremely low level and that the low level of birth registration in the State party continues to be a major obstacle to the enjoyment of the right to education. The Committee is further concerned that only a small part of the State budget allocated to education is actually being spent on education, especially in priority areas such as educational infrastructure and decent salaries for teachers.³²⁶

The committee emphasizes the need to prioritize social spending over other expenses unrelated to human rights.³²⁷ In addition, the development of public budgets focused on the notion that human and social rights should be differentiated from the economic policies for development. In this sense, quantitative and qualitative monitoring of compliance with social rights is important.³²⁸

V. CONCLUSION

Throughout these pages, we have tried to examine and determine the historical link between the exercise of social rights and the development of the Welfare State; two expressions of the same paradigm. The shift from the liberal state to a model of a state that protects all of its citizens, particularly socially disadvantaged people, as a modern standard, was a conclusion to which English utilitarian thought was approaching, especially that of Stuart Mill.³²⁹

The nineteenth-century European governments, aware of the threat of Marxism, began to recognize labor rights and their social

³²⁶ U.N. Economic and Social Council, ¶ 17, U.N. Doc. E/C.12/COD/CO/4 (Dec. 16, 2008).

³²⁷ CO ESC Philippines, ¶ 21, U.N. Doc /C.12/1995/7 (June 7, 1995); See JOHN TOBIN JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 228 (2012).

³²⁸ See Allison Corkery & Sally-Anne Way, *Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfill Economic, Social and Cultural Rights: The OPERA Framework*, 30 *NORDIC J. HUM. RTS.* 324 (2012).

³²⁹ Hans E. Jensen, *John Stuart Mill's Theories of Wealth and Income Distribution*, 59(4) *REV. SOC. ECON.* 491, 497 (2001).

benefits.³³⁰ The industry-based economy saw the need to yield to the pressure of the working class and the new century brought forth the recognition of human rights with a universalist vocation for the first time in history (1911, the ILO).³³¹ At the same time, we witnessed a very important paradigm shift in the de-commodification of wages that ended with the freedom of contract, which continues to be highly defended even today.³³² Currently, it is generally agreed that a fair salary should allow for a decent life.³³³ The idea of the economy subordinated to the law has its origin in the agreement reached after World War II.³³⁴

The role given to the State in the domestic sphere to regulate the economy and redistribute wealth was soon reflected at the international level. The anti-cyclical policies aimed at alleviating the damages of the Great Depression and those taken by the post-World War II European governments established a fundamental role of government policy, which related to economic development and welfare. Nonetheless, the role of the regulatory state responsible for the redistribution of wealth has been questioned since the 1970s.³³⁵ As has been argued, the legal protection of social rights has been recognized in most nations. Today, most of the international constitutions recognize them. Internationally, the role of the State as guarantor of these rights has been ratified.³³⁶

It is also true that there has never been a consensus pertaining the economic policies that governments should use in order to ensure the full exercise of social rights by all. Economic crises, mainly those experienced by developing countries since the 1970s, tolerated experimentation of new economic measures based on the

³³⁰ HAROL J. LASKI, *THE RISE OF EUROPEAN LIBERALISM. AN ESSAY IN INTERPRETATION*, GEORGE ALLEN & UNWIN LTD, 237 (1936).

³³¹ OLGA HIDALGO-WEBER, *SOCIAL AND POLITICAL NETWORKS AND THE CREATION OF THE ILO: THE ROLE OF BRITISH ACTORS*, SANDRINE KOTT *GLOBALIZING SOCIAL RIGHTS THE INTERNATIONAL LABOUR ORGANIZATION AND BEYOND* (INTERNATIONAL LABOUR ORGANIZATION (ILO) CENTURY SERIES 2013).

³³² Marianne N. Koorie, *Labor Law - Freedom of Contract and the Duty of Collective Bargaining*, 17 *LOY. L. REV.* 209 (1970).

³³³ See CESCR, General Comment C138 - Minimum Age Convention No. 138 (1973),

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138

³³⁴ Christian Joppke, *The Crisis of the Welfare State, Collective Consumption, And the Rise of New Social Actors*, 32 *BERKELEY J. SOC.* 237, 243 (1987).

³³⁵ Walter Korpi, *supra* note 9, at 589.

³³⁶ Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 *AM. J. COMP. L.* 1043, 1054 (2014).

commodification of public services.³³⁷ These changes in economic arrangements were, in one way or another, imposed by supranational institutions such as the IMF and the World Bank.³³⁸

The response to the global crisis of 2008 forced us to reflect on the viability of liberalism in the era of globalization. The legal response to the crisis has seemingly been more ambivalent than the one after the Great Depression. Thereafter, governments were not responsible for the debacle and did not invest public resources to mitigate the effects of the crisis among the less favored groups. However, both the United Nations and European supranational institutions clearly stated that provided solutions cannot disregard social rights: economic decisions must be subordinated to the constitution and within international law.³³⁹ It is challenging to create mechanisms that would bring these ideas into practice and that would go beyond rhetoric.

In recent years, proposals to guarantee the exercise of social rights have relied on judicialization.³⁴⁰ As a matter of fact, it has been demonstrated that national jurisdictional bodies do not have the capacity to modify erroneous economic policies and their resolutions have effects only in individual cases.³⁴¹ However, it is also true that if judges studied the effects of economic decisions on people's rights, they would be able to recognize the lack of reasonableness in many governmental decisions and the impact that they have on the exercise of social rights. Thus, these effects could be acknowledged in their sentences, which would serve as a limit to the wide range of decisions made by the governments that go beyond specific individual cases.

³³⁷ Christian Joppke, *supra* note 332, at 243.

³³⁸ Nancy Brune et al., *The International Monetary Fund and the Global Spread of Privatization*, 51 (2) IMF STAFF PAPERS 195, 197 (2004).

³³⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (Jan. 22-26, 1997) ("Minimum core obligations 9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant.' Such minimum core obligations apply irrespective of the availability of resources of the country concerned or of any other factors and difficulties.").

³⁴⁰ Deval Desai, *Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights*, 4 INTERDISC. J. HUM. RTS. L. 25, 28 (2009).

³⁴¹ David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L. J. 190, 201 (2012).

Genuine social justice implies guaranteeing the exercise of the right to employment with a remuneration that allows for a decent standard of living.³⁴² This leads to an effective exercise of social rights, but must inevitably be accompanied by de-commodification, as the state should always grant services such as health care, social security, and quality, compulsory education. Therefore, the regulation of the economic sector by the State is extremely important in the endeavor for substantive equality, as it contributes to the reduction of the pernicious consequences of the free market. No reasonable government can evade the regulation of its economy since state intervention is inevitable for the purposes of social policies.³⁴³

As has been argued by the supra-state organizations, the progressivity in the field of social rights is an obligation of the state in order to protect the rights of its citizens.³⁴⁴ If an economic development model that can affect the exercise of existing rights is employed—or if a regression in the exercise of rights is evident—governments must justify it accordingly. In any case, the actions taken by the state should never affect the minimum core of human rights.³⁴⁵

³⁴² G.A. Res. E/C.12/GC/18 (Feb. 6, 2006).

³⁴³ Cf., David Garland, *The Welfare State: A Fundamental Dimension of Modern Government*, *European Journal of Sociology*, 55(3) CRITICAL STUDIES 344.

³⁴⁴ U.N. Commission on Economic, Social, and Cultural Rights, General Comment No. 3, The Nature of States parties' obligations, on its Fifth Session, U.N. Doc. E/1991/23, at annex III, 86, (1990).

³⁴⁵ Allison Corkery; Sally-Anne Way, *Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfill Economic, Social and Cultural Rights: The OPERA Framework*, 30 NORDIC J. HUM. RTS. 324, 328 n. 11 (2012) (“Over the past two decades, the Committee has further defined the minimum core of the Covenant’s rights, to specify food, water, health, housing, and education. Looking ahead, it is possible that concepts from other fields, such as the social protection floor, will increasingly enrich the definition of concepts like the minimum core.”).