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**EUROPEAN MASTER'S DEGREE IN HUMAN RIGHTS AND
DEMOCRATISATION 2012/2013**

CRISIS AND SOCIAL RIGHTS IN EUROPE

Retrogressive Measures versus Protection Mechanisms

Author Paula García Pedraza

E.MA national director and supervisor Dr. Markku Suksi

Åbo Akademi, Finland

Second Supervisor: Dr. Alessandra Sarelin

Åbo Akademi, Finland

Abstract

The austerity measures that are being adopted to counteract the current economic and financial crisis are challenging the enjoyment and the protection of economic and social rights. In Europe, as in other countries of the world, these measures have become a primary choice for reducing the deficit and the public debt. Nonetheless, this choice has not been exempt from controversy. As a matter of fact, this option has been strongly criticised due to the impact that it is having on the enjoyment of acquired economic and social rights. In fact, all the governments' that have implemented austerity measures in Europe have been defeated through democratic elections. Moreover, social protest against this policy has risen and spread to different countries.

Ireland and Spain are two of the five countries most affected by austerity. For this reason, they have been selected as case studies to determine whether austerity is having a retrogressive impact on economic and social rights and whether or not it is necessary to reinforce protection mechanisms.

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Abbreviations

CCP	Collective Complaints Protocol
CESR	Centre for Economic and Social Rights
EC	European Commission
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
ESC	European Social Charter
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IMF	International Monetary Found
INGOs	International Non-Governmental Organisations
NGOs	Non-Governmental Organisations
TEU	Consolidated version of the Treaty on the EU
TFEU	Consolidated version on the Treaty on the Functioning of the EU
UN	United Nations

1. Introduction

1.1 Economic and Social Rights in the context of austerity

Economic, social and cultural rights are at the core of the welfare or social state, which is the pillar of a social and democratic European Union (hereinafter the EU). The welfare state or social state is a step forward from formal equality to material equality.¹ The achievement of material equality requires an active role of the state as the guarantor of rights. Thus the state becomes a “manager” that has to provide adequate public services such as health care, social benefits, education, housing and employment, with the aim of reducing inequalities.² The enjoyment and fulfilment of these public services provides stability, increases democracy and promotes solidarity.

The economic crisis that started in 2008 has affected Europe and other countries in the world in different ways. In Europe, one of the political choices that has been made to counteract the effects of the economic crisis is the implementation of austerity measures, which are having a serious impact on economic and social rights and therefore on the life of many ordinary persons.³ The challenge of this thesis will be to determine if austerity measures may lead to an accelerating dismantling of social and economic rights and how should these rights be protected. So the main question is what impact is austerity having on economic and social rights?

From the beginning, economic and social rights have always been at centre of an ideological debate. For this reason, two different international covenants were drafted in 1966, the European Convention on Human Rights (hereinafter the ECHR) does not contain economic and social rights and under the Charter of Fundamental Rights of the European Union of 2000 (hereinafter the EU Charter), it is not clear which economic

¹ Bárcena, 2011, p. 126.

² Kelly, 2007, pp. 285-286: “The premise of the welfare state –the sprawling network of programs for transferring wealth from taxpayers to recipients– is that the world does owe us a living. If someone is unable or unwilling to support himself, the government will provide food stamps, housing subsidies, and possibly cash assistance as well... [...] The welfare state... rests on an idea. The thinkers and activist who built it insisted that the social provision of goods be treated as a right possessed by all people as citizens, rather than as an act of charity of noblesse oblige, a gift from some to others...”

³ Since governments started introducing austerity programmes there have been more than “10,000 additional suicides and up to a million extra cases of depression” across Europe and the United States, see Henley, 2013, p. 2, also see interview with David Stuckler by Bayo.

and social rights are considered as rights and which as principles.⁴ Although the Vienna World Conference on Human Rights in 1993 provided the opportunity to overcome this historical disagreement, the ideological debate has not ended. On the contrary, it has resurged strongly due to austerity. Accordingly, some knowledge of the historical background is needed in order to understand why the crisis is currently affecting economic and social rights more than civil and political rights. Regarding this, it is impossible not to mention the closing of Greek public television and radio on 11 June 2013 - a day to keep in mind.⁵ The question is, then, to what extent has the ideological debate had a biased effect on the status of economic and social rights, influencing their current situation in Europe?

The implementation of austerity measures has been the main political option in dealing with the existing crisis in Europe, although not without controversy and criticism. In fact, Arirang G. Pillay, the Chairperson of the Committee on Economic, Social and Cultural Rights (hereinafter ESCR Committee or the Committee) on behalf of the Committee wrote an open letter to all the state parties to the International Covenant on Economic Social and Cultural Rights (hereinafter the ICESCR) manifesting the Committees' concern with the negative effects that the austerity measures are having on economic and social rights protected by the ICESCR. She has referred to the fact that many States Parties have adopted austerity programs and has emphasized that these measures cannot cause any retrogression in the enjoyment of those rights and that State Parties should comply with their obligations to respect, fulfil and protect economic and social rights even in times of economic recession.⁶

As has been established by the ESCR Committee, the States Parties to the ICESCR are legally obligated to achieve the progressive implementation of economic and social

⁴ See Prisis, 2010, p. 154.

⁵ In Spain the "austerity package" intended to introduce court fees that might affect equal access to justice, see Ragucci, 2013 interview with the judge Carlos Preciado member of the association *Jueces para la Democracia* (Judges for democracy), how also explains how the government pretends to adopt measures that will affect judicial independence. Furthermore, to repress the protest against austerity the government is drafting a set of modifications for the Criminal Code that will impact the right to hold opinions without interference or right to peaceful assembly, see Díez, 2013 and Díez and Sáez 2013. Also see Centre for Economic and Social Rights, 2009, 2-3

⁶ 'Letter by the Chairperson of the Committee on austerity measures', 2012, pp. 1-2

rights. However, according to the data provided by different relevant trade unions, INGOs and NGOs, economic and social rights are being seriously affected by austerity measures. The Committee Statement and the data provided generate two interrelated questions: to what extent are the austerity measures dismantling the welfare state and lowering the levels of allowances and to what extent can the austerity measures be considered retrogressive measures prohibited by the Committee?

Austerity is also affecting social and political stability and creating the need to demand accountability. While the European governments that more drastically applied these measures have been defeated, a new social movement demanding the maintenance of public services and social rights, one that uses human rights language, has emerged. Social protests, demonstrations and strikes are becoming a regular practice and there is a growing gap between individuals and institutions.

In the current scenario, it is important to demand equal protection for civil and political rights and for economic and social rights. At the European level, the ECHR does not contain economic and social rights and the EU Charter does not give them all the status of rights. The same situation can be found at the national level. For example, in the Spanish and Irish constitutions, with the exception of the right to education, no other economic and social right is considered more than a principle.⁷ Accordingly, how can accountability be sought? Should the legal instruments mentioned be amended to provide social and economic rights and civil and political rights an equal status? Could a declaration of justiciability of social rights fill part of the existing gap between citizens' claims and the law?

1.2 Methodology and thesis structure

The main international, regional and national legal instruments will be compared from a vertical approach. Primary and secondary sources of legal information obtained through library research, such as official sources significant to the topic, case law, advisory opinions and general comments and recommendations of judicial and treaty bodies will be used. In order to assess how economic and social rights are being affected, the

⁷ See concluding observations of the Committee on Spain E/C.12/ESP/CO/5, 2012, p. 2, paragraph 6.

research methodology also requires collecting and analysing related data contained in reports published by the UN, governmental institutions, INGOs, NGOs, trade unions, associations, and other sources that may be important for the research. Moreover, appropriate published sources, journal articles, websites, newspapers and other pertinent open secondary sources will also be used. All these sources of information will be examined from a horizontal approach, using Ireland and Spain as case studies. Furthermore, interviews aimed at obtaining additional related information will be conducted.

Chapter two is dedicated to establishing the background needed for better understanding the subsequent chapters explaining the ideological bias that lead to the establishment of two sets of rights and to the causes of the current crisis. Chapter three assesses the states' responsibilities under the ICESCR, paying particular attention to the non-retrogression prohibition. Chapter four will primarily assess how, when and why austerity measures have been implemented, while chapter five will evaluate the impact of austerity on economic and social rights. The main aim of these two chapters will be to determine whether these decisions are in compliance with the non-retrogression prohibition. Finally, chapter six will examine the social response against austerity, suggesting the need to reinforce the existing protecting mechanisms in order to better seek accountability.

2. From the origins of social rights to the economic and financial crisis

2.1 Origins of economic and social rights in Europe

To understand the current situation of economic and social rights in Europe it is important to dedicate a portion of this thesis to the historical background of the welfare or social state, economic and social rights and the ideological debate that has traditionally affected the status of these set of rights.

References to economic and social rights that can be found in the current international, regional and national legal instruments can be rooted in different periods and cultures.⁸ Nevertheless, the early notions of economic and social rights emerged during the nineteenth century.

Throughout the seventeenth and eighteenth centuries, the ancient regime declined, while new understandings of the nation-state, economy and individual freedoms started to emerge. The appearance of a middle class willing to break with the ancient regime and the monarchies set up the roots for the British, American and French Revolutions.⁹ During this period, the new bourgeois struggled for the right to freedom of religion and opinion, right to life and right to property. Moreover, the Enlightenment philosophers laid the foundation for the development of human rights that became the basis for French Declaration of the Rights of Man and Citizen of 1789.¹⁰

Subsequently, during the nineteenth century, socialist and non-socialist movements emerged to confront the inequalities generated by the capitalist economic model.¹¹ All through this period, socialist claims for the declaration of economic and social rights,

⁸ Ishay, 2004, p. 35- 40 she asserted that “calls for economic justice originated in ancient times” and can be rooted in the Hammurabi’s Code, early Islamic thought, Plato’s vision of economic redistribution and in Aristotle’s defense of property. For the author these events provide “the stage for the tempestuous debates and struggles of the past three centuries”.

⁹ Ishay, 2004, p. 64-65, “feudal authoritarianism grounded on divine inspiration yielded to the modern concept of the nation-state, justified by its protection of natural and individual rights. The monopolistic feudal economy give way to mercantilism and later to free markets based on the individual’s right to private property [...] current human rights debates can be better understood as an extension of Enlightenment arguments that date back to the seventeenth and eighteenth centuries”.

¹⁰ See Bielefeldt, 2012, p. 14 and. Hutn, 2008, p. 17.

¹¹ Ishay, 2004, p. 120.

such as the right to a free education for children, right to work, right to safe working conditions or right to public health were presented. Additionally, they also made claims for political rights such as the universal suffrage and equality for women.

As in the era of the Enlightenment, France was to play a relevant role in this period, because the struggle for social rights during the nineteenth century that spread to most of Europe began in France with the French insurgency in 1848 and the Paris Commune in 1871. Nonetheless, in England as well, workers began to demand social rights, mainly fair employment conditions, and political rights. They eventually succeeded in some of their demands, when, for example, daily working hours for women, children and men were limited.¹²

Socialist pressures led to the first steps towards the welfare state that was to be mainly developed during the first part of the twentieth century in Europe and the United States. In Germany, Otto von Bismarck was the first to lead the way to this model by supporting social welfare, sickness insurance for workers, pensions for the elderly and disabled and health care.

Consequently, references to social and economic rights can be rooted in ancient times, but they emerged during the nineteenth century. In this sense, it has been stated that while the Enlightenment is considered as the time of the emergence of liberal ideas and the declaration of civil and political rights, the Industrial Age is regarded as the era of the emergence of economic and social rights.¹³

2.2 Internationalisation in competition with ideology

At the end of the First World War, the Peace Conference was held in Paris. As a result, the League of Nations was created in 1919. This event is considered an important precedent of the internationalisation of human rights.¹⁴ Although there were no explicit references to social rights in the articles of the Covenant of the League of Nations,

¹² Ishay, 2004, p. 125 the author explained that the Communards “demanded rights for the working hours, free public education for all children, professional education for young workers, and housing rights [...] May defended women’s right to equal pay for equal work. Legislation subsidizing single mothers and day nurseries for their children was passed.”

¹³ Ssenyonjo, 2009, p. 9-10.

¹⁴ Gómez, 2009, pp. 22-24

article 23 established the basis for the creation of the International Labour Organisation (hereinafter ILO) in 1919. The main goal of the League of Nations was to build political and military peace, and the main goal of the ILO was to build social peace by protecting workers' rights.¹⁵

During this period, when the Second International socialist organisation was created, the spread of liberal democracy and economic liberalism prevailed. However, the negative effects of the Great Depression in 1929, the first global crisis of capitalism,¹⁶ challenged the non-interventionist role of the state. In fact, different European countries and the United States decided to implement the New Deal, a welfare state model, as a way to counteract the negative consequences of liberal economy.¹⁷ In 1936, Frankling Roosevelt declared that “business, financial monopoly, speculation, reckless banking and class antagonism” were enemies of peace that considered the government “a mere appendage of their own affairs”.¹⁸ Henceforth, following the Otto Bismarck model, the states began to adopt social measures, to declare labour rights, to implement control mechanisms over their national economies and take the control over national resources and the railroad, shipping and armament industries.¹⁹

The idea that lies behind the welfare state is to establish a balance between state intervention and the market, incorporating some of the economic and socialist vindications. Hence, “thanks to a corporate alliance of government, business, and workers, the welfare state was born”.²⁰ Moulrier has explained that the welfare state was the great innovation of the 1940s, an alliance between capitalism and the state. However, he asserts that after the Great Depression, the state became the

¹⁵ Swebston, 2012, p. 354 who concluded that the need for the ILO “found its expression in an evocative phrase from the ILO constitution: ‘There can be no lasting peace without social justice’. This was based on the perception that the war grew out of economic deprivation and exploitation at least as much as it did from purely political causes.”

¹⁶ Moulrier, pp. 66-67.

¹⁷ Ishay, 2004, pp. 179-181.

¹⁸ Frankling Roosevelt quoted in George, 2010, p. 20.

¹⁹ Ishay, 2004, p. 209.

²⁰ Ishay, 2004, p. 208.

“representative” of capitalism and that this alliance was a success until the late sixties, in what has been called the “*Treinta Gloriosos*”.²¹

Nevertheless, as Santos notes, “if we look at the history of human rights in the post-war period, it is not difficult to conclude that human rights policies by and large have been at the service of the economic and geo-political interest of the hegemonic capitalist states.”²² In the same vein, George explained that even before the Great Depression and the Second World War, the aim of the wealthy “was to transform the redistributive culture of the welfare state” and spread the self-regulating market ideology.²³ Moreover, notwithstanding that the welfare state is based on two main pillars, market and social well-being, if one of these pillars fails, the welfare state disappears.

After the end of the Second World War, the San Francisco Conference was held. As a result, the United Nations Charter (hereinafter the UN Charter) was approved in 1945. During the conference only the Latin American countries were in favour of including a Bill of Rights among the articles of the Charter. Furthermore, Panama proposed the inclusion of a declaration of rights that would include civil and political rights and economic and social rights in the same document. These proposals were rejected by the United States, the United Kingdom, the Soviet Union and France. Finally the UN Charter was signed without a Bill of Rights.²⁴

The ideological discrepancies between the so called “Superpowers”²⁵, socialist and capitalist, arose during the San Francisco Conference, and announced the beginning of the Cold War, in a way that affected the drafting process of the Universal Declaration of Human Rights (hereinafter UDHR) and the two International Covenants on Civil and Political Rights (hereinafter ICCPR) and the ICESCR.²⁶

²¹ Moulrier, pp. 69-76.

²² Santos, 2009, p. 105.

²³ George, 2010, p. 20-25.

²⁴ Gómez, 2009, pp. 30-37. Despite the fact that no Bill of Rights was included in the UN Charter, its article 1 included among the purposes of the UN to solve problems of an economic, social and cultural character. Also see, Ssenyonjo, 2009, p. 7.

²⁵ This term is used to refer to the United States, European countries and the Soviet Union, what was known as the Western Block and the Socialist Block. The term is used for instance by Gómez, 2009.

²⁶ Ishay, 2004, pp. 222-229.

The socialists were influenced by the notion of social and economic rights that can be traced to the European socialist struggles of the nineteenth and the early twentieth century. The capitalists were influenced by ideas that arose during the bourgeois revolutions of the eighteenth century.²⁷

On the one hand, the so-called socialist bloc held that social and economic rights were more important than civil and political rights. They argued that the latter were individualistic rights that could impede economic development, while the first were collective rights and thus more important.²⁸ Social and economic rights were related to positive freedom, which requires state intervention²⁹

On the other hand, the United States and its Western allies, mainly France and Great Britain, argued that priority should be given to civil and political rights, which represent “the classic freedoms of Western democracies”.³⁰ They proclaimed that civil and political rights were of immediate implementation, while social and economic rights were of progressive implementation, “cost-free” and non-justiciable or substantive rights.³¹ Civil and political rights were associated with negative freedom, which implies that the state must refrain from interfering.³² As a consequence of the ideological discrepancies mentioned, the UDHR was finally approved in 1948 with the abstentions of the socialist bloc countries,³³ South Africa and Saudi Arabia, declaring both categories of rights: civil and political and economic and social.

Meanwhile, in Europe, the Council of Europe was set up in 1949 and the ECHR was adopted in 1950. In the preamble of the Statute of the Council of Europe the member States reaffirm “their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and

²⁷ Oraá, 2009, p. 170.

²⁸ Raes, 2002, p. 43.

²⁹ Raes, 2002, p. 43-44.

³⁰ Oraá, 2009, p. 166.

³¹ Ishay, 2004, p. 223 and Coomans, 2009, p. 294.

³² Raes, 2002, p. 43-44.

³³ As enumerated by Oraá, 2009, p. 169, the countries of the so called socialist block were: the Soviet Socialist Republic of Belarus, Czechoslovakia, Poland, Yugoslavia, the Soviet Socialist Republic of Ukraine, and the Union of Soviet Republics.

the rule of law, principles which form the basis of all genuine democracy”.³⁴ Although in a subsequent paragraph there is a reference to economic and social progress, there is no mention or reference to social and economic rights. Furthermore, in contrast to the UDHR, the ECHR does not contain any references to economic and social rights. The quoted preamble, and the fact that the ECHR only declared civil and political rights, is a reflection of the predominant European values at that time, a clear reference to the ideals of the eighteenth century revolutions, and reflects the liberal notion of rights that was defended by the Western countries.

In the 1950s, during the drafting process of the ICCPR and the ICESCR, the tension between socialists and capitalists and the debate over the nature of economic and social rights continued. In this context, discussions about the nature of the two sets of rights were held in the UN Commission on Human Rights, the Economic and Social Council and the General Assembly.

Parallel to the preparatory work of the two covenants, the Council of Europe approved its first Optional Protocol to the ECHR in 1952 and the European Social Charter (hereinafter ESC) in 1961, among other documents. Both documents were of great importance for the declaration of economic and social rights. The First Protocol declared under article 2 the right to education while the ESC was an important step for the enforcement of the welfare state and for the construction of a social Europe. Nevertheless, it has been stated that the ESC was “the result of a conscious and excluding political will by those who drafted the ECHR” who decided that only civil and political rights were accepted by all member states.³⁵ As a matter of fact, economic and social rights were not given the same status and protection as civil and political rights. Thus, the idea of two different categories of rights and a liberal notion of rights prevailed.

Finally, in 1966 the ICESCR and the ICCPR were adopted at the international level, although they did not enter into force until 1976. Paradoxically, while two different covenants were approved, in 1968 the Proclamation of Teheran proclaimed that the

³⁴ Council of Europe Statute, paragraph 3.

³⁵ Bonet, 2009, p. 692.

“human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible”.³⁶

The ratification of the two covenants coincides with the oil crisis of the 1970s, which is considered the second grand crisis of capitalism, the governments of Margaret Thatcher in the United Kingdom and Ronald Reagan in the United States and the beginning of one of the darkest historical periods in Latin America. After the 1970's, state intervention began to be designed in order to support the interest of private capital through deregulation and non-intervention,³⁷ and the economic policies launched by Margaret Thatcher and Ronald Reagan became the “leading models”.³⁸ Moulrier refers to this period that lasted from 1975 to 2005 as the “*Treinta Penosos*”.³⁹

In this period, the International Monetary Fund (hereinafter the IMF) “created a new concessional loan program called the Structural Adjustment Facility”,⁴⁰ which includes austerity measures. This program was supported in Latin America by “repressive and punitive regimes”,⁴¹ and was implemented in the region to counteract the effects of the debt crisis during the decade of the 1970s-1980s.⁴²

As a result of the mentioned measures, economic growth in the region was “consistently weak during the 1990s at an annual rate of 2 per cent, then fell to 0.3 per cent per year from 1998 to 2002, followed by a weak recovery in 2003. Worse than this, poverty rates shot up during the ‘lost decade’, from 40 per cent to almost 50 per cent, while the absolute number of poor rose by twenty million in the last half-decade of 1998-2002”.⁴³ So, in this occasion austerity measures “failed to realise expectations on economic growth, which was low and volatile and exacerbated poverty and inequality across the

³⁶ Proclamation of Teheran, paragraph 13.

³⁷ Ishay, 2004, p. 314 and George, 2010, p. 9.

³⁸ Ishay, 2004, p. 341. About Margaret Thatcher policies see Hill, 2013 and Ball, 2013.

³⁹ Moulrier, 2010, p. 76-102.

⁴⁰ Information available at <http://www.imf.org/external/about/histend.htm> last accessed 5 April 2013.

⁴¹ See Ishay, 2004, p. 261.

⁴² For more information read Miranda, 2010, and Intermón OXFAM, 2012.

⁴³ Miranda, 2010, p. 1.

region”.⁴⁴ This crisis and the measures that were adopted to neutralize it resulted in a ‘lost decade’.⁴⁵ Therefore, Europe should learn a lesson from Latin America, otherwise Spain, Ireland and other European countries affected by the austerity measures will also have a ‘lost decade’.

In summary, through the post-war period human rights “were at the mercy of the great ideological battle”⁴⁶ between socialists and capitalists, and the capitalist ideas, basically market fundamentalism or self-regulating market ideology, prevailed at that time and afterwards.

2.3 Overcoming the ideological debate?

The ideological tension described above led to the adoption of two different covenants and to the approval of two different legal instruments in Europe - the ECHR and the Social Charter. Moreover, as mentioned, the main reason why economic and social rights cannot be considered real rights relies on an “ideological bias”.⁴⁷ What is more, the same ideology that biased the status of the mentioned rights is the very ideology that laid the foundation for the current crisis. As will be explained in the following sections, the ideological debate around economic and social rights is far from over.

In 1987, the UN Economic and Social Council adopted the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter Limburg Principles). These principles declared that economic and social rights are an integral part of international human rights law,⁴⁸ and that “equal attention and urgent consideration should be given to the implementation, promotion and protection of civil and political, and economic, social and cultural rights”.⁴⁹ These principles were revised in 1997 by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter the Maastricht Guidelines).

⁴⁴ Miranda, 2010, p. 4.

⁴⁵ The term ‘lost decade’ is used in this document refer to the generation affected by the financial crisis in Latin America. The term has been used by Miranda, 2010 and Intermón OXFAM among others.

⁴⁶ Oraá, 2009, p. 169.

⁴⁷ O’Connell, 2012, p. 10.

⁴⁸ Limburg Principles, p. 1, paragraph 1.

⁴⁹ Limburg Principles, p. 1, paragraph 3.

In 1989, the fall of the Berlin Wall marked the end of the Cold War and the beginning of the globalisation era. For some authors these two historical events represent the victory of liberalism and the global free market, and the “end of history” and ideologies.⁵⁰ But for others, those events were also the beginning of a “broader conception of human rights as a set of tools to advance social justice on a global scale”.⁵¹ Others believe that the end of the Cold War, along with globalisation, accelerated the debilitation of state sovereignty, the decline of the welfare state, the weakening of democracy in favour of economic fundamentalism and the free movement of capital. In consequence, on the one hand, the state became incapable of or unwelcome to, interfere in the economic sphere while unable to make decisions that affect the wellbeing of its citizens. On the other hand, investors preferred to establish their businesses in states with lower levels of regulation over the labour market, taxes or environment, thus, over issues concerning economic and social rights.⁵²

However, as professor Pikalo has maintained globalisation it is not a “non-actor driven project” and “therefore not manageable”.⁵³ The states are exercising their sovereignty to decide to participate in this process and how to do so. They can decide to promote an economic globalisation based on the neoliberal doctrine or to promote a sustainable and ethical globalisation based on the respect for human rights. Furthermore, they can decide to reinforce the indivisibility, interdependency and interrelation of civil and political rights and economic and social rights. They can also elect to prioritize the individuals’ needs over the markets’ needs.⁵⁴ What is more, the states can decide on the role they want to play; it is a political choice that depends on political will.

At the international level, in 1993 the universality, indivisibility, interdependency and interrelation of human rights, was once again proclaimed in the Vienna Declaration and Programme of Action (hereinafter the Vienna Declaration).⁵⁵ Hence, as has been explained by de Feyter, it became clear that the “the UN approach to human rights is

⁵⁰ Fukuyama, 2006, Introduction.

⁵¹ de Feyter, 2007, p. 2.

⁵² Tajadura, 2011, pp.148-149 and George, 2010, pp. 29-30.

⁵³ Pikalo, 2007, pp. 23-28.

⁵⁴ Tajadura, 2011, pp. 148-146.

⁵⁵ Vienna Declaration, 1993, paragraph 5.

based on a commitment to the indivisibility and interdependence of civil, cultural, economic, political and social rights”.⁵⁶

But that has not been the case at the European level. Although some advances have been made, the debate about the nature of economic and social rights has not been overcome and they have not been given equal status or protection as to civil and political rights.⁵⁷

At the level mentioned, in 1995 and 1966 the Council of Europe approved a revised version of the Social Charter (hereinafter the Revised ESC) and an Additional Protocol to the European Charter Providing for a System of Collective Complaints (hereinafter CCP).⁵⁸ However, as stated by the Committee, civil and political rights and social and economic rights remain in two different legal instruments and they have not achieved the same degree of “justiciability and enforceability as civil and political rights”.⁵⁹

In 2000, the European Parliament approved the Charter of Fundamental Rights of the European Union (hereinafter the EU Charter), but it was not given legally binding force until 2010, when it was incorporated to the consolidated version of the Treaty on the European Union (hereinafter TEU).⁶⁰ Nevertheless, the EU Charter will not be legally binding for all EU member states, because the United Kingdom and Poland are not bound by it.⁶¹

The adoption of the EU Charter was regarded by some member states as proof that the EU is not only interested in economic matters. In fact, the preambles of the EU Charter and the TEU contain several references to the common values of the EU, such as human dignity, freedom, democracy, equality, the rule of law and solidarity or the protection of fundamental rights in the light of changes in society. All these values are related with

⁵⁶ de Feyter, 2007, p. 2.

⁵⁷ Koch, 2009, pp. 5-9 explained how the historical background, the ideologies that surround these rights and their different normative structure and the classic perception of these rights has an impact on how these rights have been regulated and protected.

⁵⁸ The Revised ESC is considered an “international treaty autonomous but complementary to the ESC”, see Bonet, 2009, p. 728.

⁵⁹ ‘Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a EU Charter of Fundamental Rights of the European Union’, 2000, paragraph 3.

⁶⁰ Pérez de Nanclares, 2009, pp. 779-790. The Charter was given legally binding force in 2010 through article 6 of the TEU that declared that it shall have the same legal value as the Treaties.

⁶¹ Pérez de Nanclares, 2009, pp. 799-800. See “Protocol in the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom”.

the protection of economic and social rights. However, although the EU Charter contains rights with a social dimension it is not clear which of them are considered justiciable rights and which are not.⁶²

Furthermore, although most European constitutions declare social rights, the number of economic and social rights enshrined and the legal status they are given is not homogeneous.⁶³ Some of them declare a large list of economic and social rights, others only on one or two and others do not declare them as substantive rights.⁶⁴ For instance, in Spain and Ireland social rights are declared as principles and not as justiciable rights.

Already, in 2001, the Committee expressed its concern with the status and the level of protection given to social and economic rights in Europe. The Committee stated that in the EU, all human rights should be fully justiciable,⁶⁵ and that as economic and monetary policies, economic and social rights should be a step for integration.⁶⁶ The Committee also pointed out that if economic and social rights were not to be integrated in the EU Charter on equal footing with civil and political rights, such a negative regional signal would have to be regarded as a retrogressive step for the full realisation of social rights. Furthermore, it could be considered a violation of the obligation of the progressive full realisation of these rights. Finally, the Committee reminded all States of “their obligation to domestically apply the rights” of the ICESCR.⁶⁷ After the statement of the Committee, the EU Charter has been given legally binding status, but the dichotomy between rights remains.

Finally, at the international level on 5 May 2013 the Optional Protocol to the ICESCR (hereinafter Optional Protocol) entered into force, establishing new protections mechanisms that will be examined in section 3.2.

⁶² Rosas, 2002, p. 155.

⁶³ European constitutions are available at <http://www.ecln.net/national-constitutions.html> last accessed 24 May 2013.

⁶⁴ See Fabre, 2005, pp. 17-21.

⁶⁵ ‘Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a Charter of Fundamental Rights of the European Union’, 2000, paragraph 1.

⁶⁶ ‘Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a Charter of Fundamental Rights of the European Union’, 2000, paragraph 3.

⁶⁷ ‘Statement of the Committee on Economic, Social and Cultural Rights to the Convention to draft a Charter of Fundamental Rights of the European Union’, paragraph 4.

In summary, at least in the legal sphere and at international level the dichotomy between civil and political rights and economic and social rights has been overcome. However, this is not the situation at the European level. In Europe social rights are given lower status. As Cascajo explains, this situation is the result of an ideological choice.⁶⁸

2.4 The financial and economic crisis

In 2008, the global financial and economic crisis (hereinafter the crisis) erupted as a consequence of the burst of the so-called housing bubble and the “subprime crisis” that began in 2007 in the United States.⁶⁹ In Ireland and Spain, the way the crisis began is similar. Both countries were severely affected by the burst of the housing bubble and the banking sector crisis that led to a subsequent financial crisis.⁷⁰ For George this was a foreseeable crisis built over decades of deregulation, privatisation and non-intervention.⁷¹

The crisis is considered the third global crisis of capitalism and is affecting developed and developing economies, and not only economic and social rights but also civil and political rights. In contrast to what happened in the 1929, this crisis has not led to the intervention of the state in order to balance the negative effects of the free market.⁷² Moreover, due to the lack of proper intervention this crisis is rapidly turning into a human rights crisis.⁷³

The crisis is disproportionately affecting economic and social rights, vulnerable groups and developing countries.⁷⁴ Due to the food crisis that occurred between 2005 and 2008

⁶⁸ Cascajo, 2012, p. 23.

⁶⁹ More information about this issue can be found in Fernández, 2006, Bianco, 2008, Moulier 2012, George, 2010 and Observatorio Metropolitano 2011 (a).

⁷⁰ For more information about the burst of the housing bubble in Ireland see CESR, 2012, pp. 8-10, and in Spain see López and Rodríguez, 2010, pp. 265-311 and 372-432.

⁷¹ George, 2010, pp. 18-19 and pp. 29-34.

⁷² Torres, 2011, pp. 47-48, since 2008 the State has intervened to nationalize banks and enterprises, to rescue the economic system not to change it and to cut public budgets in order to counteract the national debt minimizing the social pillar of the welfare state. Also see Felice, 2010, p. 257 who asserts that today a Global New Deal is needed.

⁷³ Sáiz, 2009, p. 279. About the effects of the financial crisis on human rights at a global scale see Centre for Economic and Social Rights, 2009 or visit the web page <http://www.cesr.org/>.

⁷⁴ The impact of the crisis on vulnerable groups has been analysed by different agencies of the UN, for instance UNICEF, UNCTAD, UNDP, UNAIDS and FAO. Furthermore, in 2009, a UN Conference on the World Financial and Economic Crisis and Its Impact on Development was held, information available at

it is estimated that between 160 and 200 million people fell into poverty. Due to the current crisis it is estimated that up to 90 million more persons will be pushed into poverty.⁷⁵ In some European countries, the middle class is losing purchasing capacity and has entered into a process of impoverishment that has been described as a “decline of the middle class”.⁷⁶

In 1998, the Committee already alerted about the impact of globalisation on the enjoyment of economic and social rights.⁷⁷ The Committee indicated that globalisation and the free market economy may have a negative impact on economic and social rights, when certain economic options are prioritised. Among those options the Committee listed “an increasing reliance upon the free market”; the “growth in the influence of international financial markets and institutions in determining the viability of national policy priorities”; an intensification of the role of private actors and a reduction in the role of the state and the “size of its budget”; the privatisation of functions “previously considered to be the exclusive domain of the state”; or the deregulation of a range of activities to facilitate investment and individual initiative.⁷⁸ In the statement the Committee also mentioned that appropriate policies could counteract the risk associated with economic globalisation.⁷⁹ The Centre for Economic and Social Rights (hereinafter CESR) argues that the causes of the crisis are to be found in the market fundamentalism doctrine that has dominated international economic policy making during the last decades.⁸⁰

<http://www.un.org/ga/econcrisissummit/> last accessed 3 May 2013. Also see, Berman, 2009, p. 1, “the global downturn has taken a disproportionately higher toll on the most vulnerable sectors: the huge armies of the poorly paid, under-educated, resourceless workers that constitute the overcrowded lower depths of the world economy”.

⁷⁵ Data provided by the WB, 2009, quoted in Centre for Economic and Social Rights, 2009, p. 2.

⁷⁶ See Gil, 2013 and Observatorio Metropolitano, 2011 (b), pp. 70-78 analyses how unemployment and high mortgage debts have led to the impoverishment of the Spanish middle class whose enrichment during the 1990s and the early 2000s was based on the housing market.

⁷⁷ ‘Globalization and Economic, Social and Cultural Rights’, 1998.

⁷⁸ ‘Globalization and Economic, Social and Cultural Rights’, 1998, paragraph 2.

⁷⁹ ‘Globalization and Economic, Social and Cultural Rights’, 1998, paragraph 4.

⁸⁰ CESR, 2009, pp. 4-6.

In Europe, the crisis has challenged the future of European integration, the future of the euro, the future of the middle class and the future of the welfare state.⁸¹ In May 2012 Viviane Reding, the Vice-President of the European Commission (hereinafter the EC), EU Justice Commissioner, emphasised that the monetary union was irrevocable and irreversible and that all politics exist for the European citizens.⁸² The realisation of these statements should require policy responses based on a human rights approach and complete compliance with the duties that arise from the ICESCR. However, by the time the crisis started in Europe, the level of legal protection of economic and social rights was low and the policy responses to the crisis did not take into consideration human rights principles.⁸³

⁸¹ Many articles have been written about this issue, among other see, McNamara, 2013, Derviş, 2012, Krugman, 2011 and Gil, 2013 also see <http://www.friendsofeurope.org> last accessed 24 June 2013.

⁸² Reding, 2012, pp. 2-3.

⁸³ Sáiz, 2009, p. 280.

3. State responsibilities under the ICESCR, also in times of crisis

3.1 States responsibilities in the context of the crisis

In May 2012, the Committee assessed the States Parties obligations and the protection of the rights declared in the ICESCR in the context of the current crisis.⁸⁴ In this statement the Committee emphasised that the States Parties should at all times avoid making decisions that might be contrary to the enjoyment of economic, social and cultural rights, all decisions taken in this direction would be contrary to the obligations embraced under the ICESCR. It also stressed that although the States Parties have a margin of appreciation on the implementation of policies in order to respect, fulfil and protect economic and social rights, they have to follow the guidepost provided by the ICESCR. Furthermore, the States Parties cannot breach their obligations under the covenant even in times of crisis.

In addition, the Committee established four requirements that should be followed by the State Parties when proposing any policy, change or adjustment in the context of the crisis:

1. The policy adopted should be of temporal nature and should be undertaken only until the crisis is over.
2. The policy has to be necessary and proportionate.
3. The policy cannot be discriminatory and it should comprise all possible measures, such as, tax measures in order to mitigate inequality and protect vulnerable groups that cannot be disproportionately affected.
4. The policy should identify a minimum core content that should be protected.

Any policy contrary to the listed requirements will be considered to mean non-compliance with the ICESCR.

⁸⁴ 'Letter by the Chairperson of the Committee on austerity measures', 2012, p. 1.

3.2 The Optional Protocol new monitoring mechanisms new opportunities

At the international level, the Committee is responsible for monitoring state compliance with the ICESR. Hitherto, the state reporting procedure was the only monitoring mechanism, but Optional Protocol has introduced new procedures. This protocol entered into force at a time when it was needed more than ever.

According to the state reporting procedure, the State Parties of the ICESCR have to submit periodic reports before the Committee, which issues its recommendations to the concerning state. However, although these recommendations are an important assessment of the situation of economic and social rights, they are not legally binding.

In addition to the reporting procedure mentioned, under the Optional Protocol, the Committee will be able to receive individual and collective complaints.⁸⁵ These communications can be submitted to the Committee in cases of violations of the rights set out in the ICESCR. But it will be necessary to exhaust all domestic remedies, when possible, and to prove that there is a situation of clear disadvantage.⁸⁶ When there is a risk of irreparable harm to the victims, the Committee can adopt interim measures.⁸⁷ Once the Committee has reached its decision on the case, the Optional Protocol establishes a follow-up system to control the implementation of the recommendations issued as a result of the complaint procedure.⁸⁸ However, it is not clear whether these recommendations are binding. In addition to this procedure, the Optional Protocol also establishes a friendly settlement procedure and interstate communications.⁸⁹

Notwithstanding the fact that the real impact of these new procedures will soon be evaluated, as noted by Kratochvil, it cannot be denied that the Optional Protocol “establishes the first comprehensive and universal procedure for individual complaints regarding violations of all aspects of social rights”.⁹⁰ Moreover, as emphasised by

⁸⁵ Optional Protocol, art. 2.

⁸⁶ Optional Protocol, arts. 2, 3 and 4.

⁸⁷ Optional Protocol, art. 5.

⁸⁸ Optional Protocol, art. 9.

⁸⁹ Optional Protocol, arts. 5, 7 and 10.

⁹⁰ Kratochvil, 2009, p. 31.

O’Connell, it also reinforces the Committee’s traditional position that economic and social rights “can and should be adjudicated on, preferably in court and on a par with civil and political rights”.⁹¹

The new monitoring procedures will offer an unprecedented opportunity to the groups and individuals affected by austerity to bring their cases before the Committee. However, they will have to allege that there is a violation of the ICESCR, so it is necessary to determine what States Parties obligations under the ICESCR are, especially in times of crisis.

3.3 States obligations and the non-retrogression prohibition

Due to the economic crisis, the current key issue in Europe is how to maintain the level of enjoyment of hard-fought rights. For this reason, more emphasis should be placed on the non-retrogression prohibition.

Under article 2 of the ICESCR, the states are considered the main duty bearers and, so, they are legally obliged to take steps in order to achieve a progressive and full realisation of economic and social rights, by all appropriate means and to the maximum of their available resources. The nature of these obligations has been interpreted in the Limburg Principles, the Maastricht Guidelines, and through several General Comments emitted by the Committee.⁹²

Under the ICESCR the states have a tripartite duty.⁹³ In the first place, the states have the duty to respect, which means that they cannot interfere with the enjoyment of economic and social rights.⁹⁴ It has been shown that liberalisation, deregulation and privatisation measures, taken by the states have indeed interfered with the enjoyment of these rights in a negative manner.⁹⁵ In the second place, the states have the duty to

⁹¹ O’Connell, 2012, p. 44.

⁹² There is a vast literature about this topic among others see Coomans, 2009, pp. 304-309, Chapman and Russell, 2002, pp. 4-18, Baderin and McCorquodale, 2007, pp. 9-19 or Sepúlveda, 2003, this book is entirely dedicated to analysing the nature of State obligations under the covenant.

⁹³ O’Connell, 2012, p. 14.

⁹⁴ Maastricht Guidelines, paragraph 6.

⁹⁵ CESR, 2009, p. 8.

protect, thus they have to prevent violations of economic and social rights.⁹⁶ Therefore, they have to play an important “role in regulation, control and oversight of the financial industry”.⁹⁷ In the third place, they have a duty to fulfil, which means that they have to take appropriate budgetary, legislative, administrative, judicial or any other measure towards the full realisation of economic and social rights.⁹⁸ Thus, they must take positive actions also in times of crisis to guarantee the enjoyment of these rights.

According to the mentioned tripartite duty, the states have obligations of conduct and result.⁹⁹ So they have to take steps towards the realisation of the rights established under the ICESCR and they have to achieve specific goals. In this sense, on the one hand, they have to immediately take deliberate, concrete, targeted and appropriate measures without discrimination on any ground,¹⁰⁰ showing that they consider them to be the most appropriate under the specific circumstances.¹⁰¹ Among these measures the states will have to provide for adequate legislation and judicial remedies.¹⁰² On the other hand, they have to move expeditiously and effectively towards a progressive implementation of economic and social rights.¹⁰³

Additionally, although it is not expressly declared in article 2, the Committee has interpreted that the obligation of progressive realisation conveys the prohibition of non-retrogression. The interpretation of this prohibition has evolved during the pass decades, and what was considered a principle has become a prohibition under the ICESCR.

In fact, in General Comment N° 3 the Committee stated that any deliberate retrogressive measure “would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.¹⁰⁴ By the time this

⁹⁶ Maastricht Guidelines, paragraph 6.

⁹⁷ CESR, 2009, p. 9.

⁹⁸ Maastricht Guidelines, paragraph 6.

⁹⁹ General Comment N° 3 on the nature of states parties obligations, paragraph 1 and Maastricht Guidelines, paragraph 7.

¹⁰⁰ General Comment N° 3 on the nature of states parties obligations, paragraph 1, 2 and 3.

¹⁰¹ General Comment N° 3 on the nature of states parties obligations, paragraph 4.

¹⁰² General Comment N° 3 on the nature of states parties obligations, paragraph 5.

¹⁰³ General Comment N° 3 on the nature of states parties obligations, paragraph 9.

¹⁰⁴ General Comment N° 3 on the nature of states parties obligations, paragraph 9.

comment was drafted non-retrogression was not declared clearly as a prohibition but more as a guiding principle.

However, since the end of 1999, in subsequent General Comments, the Committee has clearly stated that retrogression is prohibited under the ICESCR.¹⁰⁵ This interpretation reflects the will of the Committee to improve and reinforce the protection of the rights declared under the ICESCR. So retrogression should be considered not a guiding principle, but rather, a clear prohibition and a violation of all economic and social rights. Moreover, the Committee has also stated that when there is a presumption of retrogression the burden of proof of whether a certain measure was taken in compliance with the covenant or not is on the State.

O’Connell has noted that the principle of non-retrogression implies that “any back-peddalling, as it were, with regard to the progressive realisation of socio-economic rights, will be presumptively invalid”.¹⁰⁶ The QUB Budget Analysis Project has suggested that retrogression is “any measure which implies a step back in the level of protection accorded to the rights in ICESCR as a consequence of an intentional decision by the State. This includes unjustified reduction in public expenditures [...] this provision is especially important during times of crisis where states must do all they can to avert retrogression in the realisation of [economic and social rights]”.¹⁰⁷

On the basis of the General Comments and the Maastricht Guidelines, it is possible to identify the relevant elements for the existence of a retrogressive measure prohibited under the ICESCR.

¹⁰⁵ See General Comment No. 19, on social security, paragraphs 42 and 64, General Comment N° 18 on the right to work, paragraph 21 and 34, General Comment N° 14 on the right to health, paragraph 32 and 48 or General Comment on the right to education N° 13, paragraph 45, General Comment N° 15 on the right to water, paragraph 19. There are other comments, as for instance, General Comment N° 12 on the right to food or General Comment N° 4 on the right to housing, that do not refer to this prohibition. These two comments were drafted before the end on 1999, after that date the prohibition of non-retrogression has been declared in all subsequent comments that has interpreted a concrete economic and social right. So it can be concluded that since the end of 1999 non-retrogression is clearly prohibited under the ICESCR and should be applicable to all economic and social rights.

¹⁰⁶ O’Connell, 2012, p. 36.

¹⁰⁷ QUB Budget Analysis Project, 2010, p 22.

The indicators that should be taken into account to establish if a retrogressive measure is prohibited under the ICESCR could be the following:

- a. Deliberate choice. This first requisite is related to the margin of appreciation that states have when deciding how to implement economic and social rights and with state policies.¹⁰⁸ In this sense the state cannot pursue a state policy or choice using this margin as an excuse for non-compliance. Besides, a deliberate choice can embrace acts of commission or omission; for instance, the state can deliberately decide to intervene or not intervene.¹⁰⁹
- b. Careless and non-comprehensible consideration of all alternatives in the context of the full use of the maximum available resources. Before adopting a retrogressive measure the state must consider less drastic alternatives. In this regard, it should be distinguished whether there is an inability or an unwillingness to comply.¹¹⁰
- c. Unreasonable justification in the context of the full use of the maximum available resources.¹¹¹ The measure has to be duly justified “by reference to the totality of the rights provided for in the Covenant”.¹¹²
- d. Non-participation of affected groups. When adopting a retrogressive measure there must be a “genuine participation of the affected groups in examining the proposed measures and alternatives”.¹¹³
- e. Direct or indirect discriminatory effect. A retrogressive measure will violate the ICESCR if it can be considered directly or indirectly discriminatory.
- f. Sustained impact on the realisation of the economic and social right.
- g. Unreasonable impact on the enjoyment of an acquired economic and social right.
- h. Deprivation of a minimum essential level on the enjoyment of an economic and social right.¹¹⁴
- i. Inexistence of an independent review of the measures at the national level.

¹⁰⁸ Maastricht Guidelines, paragraphs 7 and 8.

¹⁰⁹ Maastricht Guidelines, paragraphs 14 and 15.

¹¹⁰ Maastricht Guidelines, paragraph 13.

¹¹¹ Maastricht Guidelines, paragraph 10.

¹¹² General Comment N° 19 on the right to social security, paragraph 42.

¹¹³ General Comment N° 19 on the right to social security, paragraph 42

¹¹⁴ Maastricht Guidelines, paragraph 9.

If any of these requirements is fulfilled the state will have the burden of proving that it has acted in compliance with the ICESCR and there will be a strong presumption of impermissibility.¹¹⁵ The following sections will examine whether these requirements have been fulfilled with the adoption of austerity measures.

In the next two sections, austerity measures will be examined under the scope of the ICESCR for two main reasons. First, until today, the ICESCR is the only one under which retrogression is clearly prohibited. Second, it is the only instrument legally binding for all states members of the EU and the Council of Europe (with the exception of Andorra) that clearly declares economic and social rights as real rights. In fact, as will be explained below under the EU Charter and the constitutions of Ireland and Spain, the vast majority of social and economic rights are considered guiding principles, and on the top of that, Spain has ratified the ICESCR and its Optional Protocol, but has not yet ratified the Revised ESC nor the CCP.

¹¹⁵ General Comment N° 13 on the Right to education, paragraph 45.

4. Austerity Measures: what, when, how, why?

4.1 Different definitions of austerity

According to the Financial Times Lexicon, austerity measures are “official actions taken by the government, during a period of adverse economic conditions, to reduce its budget deficit using a combination of spending cuts or tax rises”.¹¹⁶ Hence, fiscal austerity, such as drastic cuts in social allowances, structural adjustments, such as labour reforms, and budgetary cuts on public spending, in sectors such as health or education, are part of the austerity package.

However, from a completely different perspective, austerity has also been defined as “an attack on every measure that has been passed before and since the World War II to give ordinary people, workers, ill people, children and old people the benefits that they fought for and won over the last fifty to a hundred years”.¹¹⁷

The second definition reflects that the history of social rights is not linear. It is a history of steps forward and steps backs.¹¹⁸ For this reason, it is important to bear in mind that the rights individuals are entitled to today, were conquered after many years of struggle. Due to the crisis, but mainly due to austerity, this moment of history in Europe could be considered as a step-back period, after which social and economic rights will have to be reconquered.

4.2 The shift to austerity and the lack of human rights approach

In Europe austerity was not the first reaction taken by states to counteract the crisis; the shift towards austerity took place in late 2009 and early 2010. During the first stages of the crisis the European governments reacted in three ways.

¹¹⁶ Definition at <http://lexicon.ft.com/Term?term=austerity-measures>, last accessed 24 April 2013. An interesting analysis of austerity in Europe can be found in the Financial Times web page, <http://www.ft.com/intl/indepth/austerity-in-europe>, last accessed 24 April 2013.

¹¹⁷ George, 2012, interview for the Transitional Institute. A similar definition was held by the interviewees Luis González and Iñaki Alonso.

¹¹⁸ Cascajo, 2012, p. 23, argues that the history of social rights is complicated and one cannot forget that on many occasions they have been proclaimed as a result of a social conflict. The history of social rights is a history of steps-forward and steps-back that is reflected in the legal instruments.

Firstly, they increased public spending and subsidized private consumption, with the aim of maintaining economic activity. For instance, in 2009 in Spain the former Government promoted the private acquisition of cars and public spending in certain sectors.¹¹⁹

Secondly, part of social spending was used to mitigate the “social effects of the crisis”.¹²⁰ According to data provided by Eurostat in 2008 and 2009 social public spending in Spain increased considerably from 22.1 % of GDP to 25.2 % of GDP, but this trend ended in 2010 when it only increased up to 25.7 % of GDP and different allowances began to be reduced or cancelled. Similar situations can be found in other European countries such as Ireland.¹²¹

Lastly, in order to re-establish the flow of credit some European States such as Spain and Ireland injected money into their own banking systems. For instance, in December 2008 the Irish Government announced an initial capital injection to the Allied Irish Banks (AIB), the Bank of Ireland and the Anglo Irish Bank. In Spain it is estimated that the banks have received aid for 8.4 % of its GDP since the crisis started.¹²² In 2012 public intervention, mainly in the form of bank recapitalisation, increased government deficits in some EU Member States, and this growth was particularly large in Spain.¹²³

¹¹⁹ Information about the fifteen measures promoted by the socialist government to counteract the crisis can be found at <http://www.elpais.com/directos/debate-estado-nacion/analisis.html> last accessed 24 April 2013.

¹²⁰ Observatorio Metropolitano, 2011 (a), p. 16.

¹²¹ Eurostat, ‘Expenditure on social protection’, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00098> last accessed 12 May 2013.

¹²² See George, 2010, pp. 15-14, Honohan, 2012, p. 3, Governor of the Central Bank of Ireland, explained that in 2008 the initial Government capital injection was €2 billion into the AIB and Bank of Ireland and €1.5 billion into Anglo Bank. In 2009 the Anglo Irish Bank had to be nationalised and the initial recapitalisations for AIB and Bank of Ireland were increased “before they were actually concluded”. He also analyses the subsequent capital injections to the Irish banks and how they have increased between 2008 and 2011. For the case of Spain see Europa Press, 2013, as referred in the article, according to the EC the Spanish government gave to the banks 2,330€millions in 2008, 56,740€millions in 2009 and 87,150€millions in 2010. In 2009 Shalil Shetty, director of the UN Campaign to achieve the Millennium Development Goals, expressed her concern with the money that has been given to the banks, she noted that “the massive bailouts we have seen for the financial industry have shown us that the real issue we face in addressing this global crisis is not the availability of money, but the availability of political will. The amount of money needed annually to achieve the Millenium Development Goals is a minuscule fraction of the estimated 5\$ trillion of public money mobilized for the bank bailouts”, CESR, 2009, p. 5.

¹²³ Baciulis, 2013, p. 1-3.

After this period, the economic strategies to neutralise the crisis changed and the so-called “age of austerity” began.¹²⁴ Since then, the measures to counteract the crisis have been mainly focused in the capitalisation of the bank system, the recapitalisation and restructalisation of the financial system, severe spending cuts in the public budget and the implementation of structural reforms of labour relations.¹²⁵ Those are four parallel and interrelated processes. However, spending cuts have been absolutely prioritised over the others and presented as an irremediable alternative.

In 2010, Greece, Ireland and Portugal received rescue aid conditioned on the implementation of unprecedented structural reforms and rigorous austerity plans. The main aim was to control government deficits and to implement budgetary discipline in accordance with the excessive deficit procedure established under article 126 of the Consolidated version of the Treaty on the Functioning of the EU (hereinafter TFEU),¹²⁶ which was later reinforced with the adoption of the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (hereinafter the Treaty on Stability), adopted in February 2012.¹²⁷ As of 29 May 2013 there is an ongoing procedure for 20 EU Member States, and the deadline for Spain to put an end to the present deficit situation has been extended until 2016.¹²⁸

In the case of Ireland, the government requested financial assistance from the EU on 21 November 2010. Hence, an Economic Adjustment Programme was formally agreed with the EC, the IMF and the European Central Bank (hereinafter ECB) and a loan agreement was signed.¹²⁹ The programme mentioned included a joint financing package

¹²⁴ O’Connell, 2012, p. 1.

¹²⁵ For instance, read the EC, ‘European Financial Stability and Integration’, 2011.

¹²⁶ According to this procedure when a EU State Member does not fulfil the requirements of budgetary discipline the Commission prepares a report, then the Economic and Financial Committee formulates an opinion on this report, then the Commission address an opinion to the State concerned and inform the Council. Then the Council decides whether an excessive deficit exists and if that is the case it makes recommendations to the State concerned. These recommendations will only become public if the State concerned does not follow them.

¹²⁷ Through the ratification of the Treaty on Stability, the States accept rules “intended to foster budgetary discipline”, see art. 1 and the obligation to reduce the general government debt, see art. 4. See also Protocol (No 12) On the Excessive Deficit Procedure.

¹²⁸ EC Memo/13/463, 29 May 2013.

¹²⁹ A loan agreement by definition does not have the same legal nature or value as a treaty, it is a contract between two parties signed to regulate the terms of a loan.

of 85 billion euros,¹³⁰ and stated that the “funding from the programme partners is conditional on speedy action to clean up Ireland's financial sector, to put the public finances on a sustainable path and to implement a structural reform package”.¹³¹ The programme prioritises restoring the investors’ confidence in the banking sector, fiscal sustainability, an adequate capitalisation of the banks and competitiveness over reinforcement of the public sector. Moreover, among other adjustments it aims to produce “cuts in public service pensions and reductions in social welfare spending which showed very strong in the years to 2010”.¹³²

Ireland has adopted several austerity budgets. In 2011, €760 million were cut from the social protection budget and €475 more in the 2012 budget and it is estimated that €1.5 billion more will be cut in 2013-2014.¹³³ In November 2010, the Irish Government published the National Recovery Plan 2011-2014 that set up severe cuts in the public sphere, in fact as mentioned by the Special Rapporteur on Extreme Poverty and Human Rights (hereinafter Special Rapporteur on extreme poverty), two-thirds of the budgetary adjustments were reductions in public expenditure and only one-third was comprised of tax and revenue measures.¹³⁴ Among other measures the plan led to around €10 billion in expenditure cuts,¹³⁵ through €1.2 billion in savings in the public service pay bill, €2.8 billion in savings in social protection expenditure, €3 billion in savings among “other programme expenditure” and the reduction of over 24,750 civil servants.¹³⁶

The subsequent government adopted a new Programme of Government and National Recovery 2011-2016, presenting new initiatives and retaining others.¹³⁷ It declares a policy commitment with progressive taxation and limits the top rate of Value Added

¹³⁰ Information about this agreement can be found in the EC web page, http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm last accessed in 24 April 2013. Information about the new capitalisation can be found at http://europa.eu/rapid/press-release_IP-11-854_en.htm#PR_metaPressRelease_bottom last accessed in 24 April 2013.

¹³¹ EC, Economic Adjustment Programme for Ireland, 2011, p. 5.

¹³² EC, Economic Adjustment Programme for Ireland 2011, p. 26 and pp. 19-28.

¹³³ See EC, Economic Adjustment Programme for Ireland, 2011, p. 1. For a detailed analysis of the Ireland’s austerity budgets see Special Rapporteur on extreme poverty, 2012, p. 20 paragraph 101 and CESR, 2012, pp. 12-13.

¹³⁴ Special Rapporteur on extreme poverty, 2011, p. 7, paragraph 19.

¹³⁵ Data provided by the CESR, 2012, p. 11.

¹³⁶ See National Recovery Plan, 2011-2014, p. 61-80.

¹³⁷ Special Rapporteur on extreme poverty, 2011, p. 7, paragraph 20. Also see Programme for Government and National Recovery 2011-2016, pp. 2-4.

Tax to 23 %.¹³⁸ Among other adjustments it establishes the reduction of the “total number of public employees by between 18,000 and 21,000 by 2014” and a further reduction of 4,000 by 2015.¹³⁹

In the case of Spain, drastic cuts in social spending have been adopted since 2010. In May 2010 the government announced adjustments, cuts and the suppression of allowances. The measures include reductions and a freeze of public employee salaries, eradication of economic allowances upon the birth or adoption of a child, reduction in pharmaceutical expenditures and cuts in expenditures for disabled persons. The first austerity measures were implemented by the former government in 2010,¹⁴⁰ although austerity was also to be one of the electoral commitments of the subsequent government in 2011.¹⁴¹ It is worth highlighting that both governments have adopted a majority of the austerity and structural measures through Royal Decree-Law, thus, with no parliamentary debate.¹⁴² For example, on 17 May 2012 four Royal Decree-Laws declaring severe cuts on public spending, such as €10,000 million on education and health, were ratified with no debate.¹⁴³

In June 2012 Spain requested financial assistance from the EU. The conditions for the assistance of up to €100 billion euros were negotiated between the EC, in liaison with the ECB and the European Banking Authority and with the technical assistance of the IMF. The aid was conditioned on the restructuring of the banks and the development of structural adjustments in the financial sector.¹⁴⁴ Additionally, severe cuts were taken during 2012 and further cuts have been accorded for 2013 as explained in the successive

¹³⁸ Programme for Government and National Recovery 2011-2016, p. 16.

¹³⁹ Programme for Government and National Recovery 2011-2016, p. 28.

¹⁴⁰ Baylos and Trillo, 2013, p. 10, contain a list of “the main anti-crisis measures adopted during 2010-2011” the majority of them were adopted before the general elections in 20 of November 2011.

¹⁴¹ See summary of the Partido Popular political programme 2011.

¹⁴² The Royal Decree-Law is a special procedure established in the Spanish Constitution article 86. This special procedure can be used by the executive power to adopt laws in situations of urgency or special necessity. Once the Royal-Law is adopted by the executive power, it must be ratified or derogated by the legislative power, but there will be no parliamentary debate on the substantive content of the norm. For this reason a Royal-Law should not regulate on the basic organisation of the State institutions, rights, duties and freedoms of the citizens and the autonomous community system.

¹⁴³ *Diario de Sesiones del congreso de los Diputados*, 17 May 2012, pp. 6-56, also see Garea, 2012.

¹⁴⁴ Joint Submission to the Committee, 2012 and EC, ‘The Financial Sector Adjustment for Spain’, 2012 and Rituerto, 2012. Information about the financial adjustment for Spain is also available at http://ec.europa.eu/economy_finance/assistance_eu_ms/spain/index_en.htm last accessed 24 April 2013.

*Programa Nacional de Reformas del Reino de España, Actualization del Programa de Estabilidad and the Presupuestos Generales del Estado.*¹⁴⁵

Accordingly, the new government has adopted measures, such as an extension of the reduction in the salary of public employees, an increase in working day hours, a freeze in the national the national minimum wage to €641.40, one of the lowest in Europe, a moratorium on the inclusion of new beneficiaries for dependency allowances, tax modifications, anti-fraud actions, reduction of local administrations, prepaid medicines, reduction in dismissal costs, cuts in allowances for disabled people, more severe cuts in education and public health and on-going privatisations of public services. As explained by Allendesalazar,¹⁴⁶ austerity has been the main priority, not because it was considered to be a reasonable alternative but because it was considered the faster way to bring the deficit below 3 % of the GDP.

At the invitation of the Irish government, the Special Rapporteur on extreme poverty visited the country in 2011. As a result of the visit the Rapporteur recommended that the government review the National Recovery Plan to ensure the compliance with human rights principles, as the obligation to not take retrogressive measures, and to review “those measures which will disproportionately impact on the most vulnerable and excluded, particularly reductions in social protection payments and funding to public services.”¹⁴⁷ In 2012, the Rapporteur reiterated that Ireland should “undertake a human rights review of the budget and recovery plan to ensure its compliance with the international human rights obligations [...] incorporating meaningful and effective participation of civil society and members of the public”¹⁴⁸ and the implementation of “human rights impact assessment for budgetary adjustments policies.”¹⁴⁹

¹⁴⁵ See *Programa Nacional de Reformas del Reino de España 2012* and *Programa Nacional de Reformas del Reino de España 2013*. Also Tremlett, 2013 and a chronogram of the anti-crisis measures taken by the Spanish government during 2012 can be found in <http://elpais.com/especiales/2013/recortes-del-gobierno/> last accessed 3 May 2013.

¹⁴⁶ Interviewee Pablo Allendesalazar.

¹⁴⁷ Special Rapporteur on extreme poverty, 2011, p. 22, paragraph 96.

¹⁴⁸ Special Rapporteur on extreme poverty, 2012, p. 19, paragraph 98.

¹⁴⁹ Special Rapporteur on extreme poverty, 2012, p. 19, paragraph 99.

In regard to Spain, all the persons who have been interviewed for this thesis coincide in underscoring the fact that there has been no participation of the affected groups in the decision making processes. Several examples confirm these assertions. For example, the Spanish Federation of Parents of Students has strongly criticized cuts in the education budget that in their opinion are “dismantling the public school system” and they have submitted a complaint before the EC.¹⁵⁰ The *Defensor del Médico del Colegio Oficial de Médicos de Madrid* (Doctor Defender of the Doctors College in Madrid) has denounced the practice that doctors are being treated as goods of a mercantilist and profiteering system that it is destroying without justification a public health system that works are being treated as mere goods in a mercantilist and profiteering system that is unjustifiably destroying a public health system that works.¹⁵¹ Another example is the position of the *Consejo General del Trabajo Social* (General Council of Social Work), which alongside with the International Federation of Social Workers, is demanding a relevant voice in the decision making processes.¹⁵²

Thus, austerity has been implemented without considering procedural and substantive human rights principles.¹⁵³

4.3 Illegality, critics and alternatives

In the last few years, some austerity measures have been considered illegal, severe criticism has begun to emerge and several alternatives to austerity have been presented.

In 2012, the European Committee on Economic and Social Rights (hereinafter ECSR), concluded in five different procedures that modifications of the pensioners’ social protection agreed between the Greece Government, the EC, the ECB and the IMF in 2010, were a violation of the right to social security under article 12.3 of the ESC. Among other arguments the ECSR held that on taking these urgent decisions “the

¹⁵⁰ Joint Submission to the Committee, 2012, p. 11, more information at <http://www.ceapa.es/web/guest>, see press releases 17/06/13, 17/01/13, 9/06/12, 8/05/12, 9/04/12 and 4/04/12, and <http://www.escuelapublica.org/> last accessed 20 June 2013.

¹⁵¹ Information available at <http://www.icomem.es/informacion.aspx?tipo=noticias&lang=esES&Id=42&p=4&o=4&eq=0&docId=7464> last accessed 13 May 2013.

¹⁵² Information available at <http://www.cgtrabajosocial.com> and <http://ifsw.org> last accessed 7 June 2013.

¹⁵³ CESR, 2012, p. 11, and CESR and *Observatorio*, 2011, p. 3.

Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue.”¹⁵⁴

Likewise, in April 2013, the Portuguese Constitutional Court declared unconstitutional four of the nine austerity measures adopted in the State Budget Law for 2013, the suspension of civil servants’ holiday pay, a tax on unemployment and sickness benefits and cuts over pensions and teachers’ salaries. These measures were adopted to meet the demands made by the EC, the ECB and the IMF in 2011.¹⁵⁵

In May 2012, the Spanish central government approved Royal Decree-Law 16/2012 curtailing certain rights in the area of health, such as accessibility to medical assistance for illegal immigrants. In June 2012, the Basque Government approved Decree 114/2012, maintaining some of the rights curtailed by the central government such as access to the health care system for irregular immigrants. On 12 December 2012, the decision of the Basque Government was supported by the Constitutional Court, which held that the right to health and the right to physical integrity cannot be curtailed for the purpose of an eventual economic saving that cannot be concrete.¹⁵⁶

Finally, in June 2013, the *Asociación de Facultativos Especialistas de Madrid* (Association of Physicians Specialists from Madrid), submitted a criminal complaint for suspected irregularities in the privatisation processes of three public hospitals in the

¹⁵⁴ Complaints’ procedures No. 80/2012, No. 79/2012, No. 78/2012, No. 77/2012 and No. 76/2012, all of them concerning the same facts. In the decision on the merits concerning the complaint procedure No. 80/2012 the ECSR held that, see paragraphs 73 to 77, “the cumulative effect of the restrictions [...] is bound to bring about a significant degradation of the standard of living and the living conditions of many pensioners concerned”, the ECSR concluded that “the Government has not established, [...] that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population, as has been observed by various international organisations”.

¹⁵⁵ *Acórdão* Nº 187/2013.

¹⁵⁶ Auto 239/2012, 12 December 2012.

Autonomous Community of Madrid. The case is being investigated in the Instruction Court N° 4 of Madrid.¹⁵⁷

Apart from the aforementioned reports drafted by the Special Rapporteur on extreme poverty, the UN independent expert on foreign debt and human rights has warned that some austerity measures and privatisations are undermining human rights in Greece.¹⁵⁸ Additionally, according to the UN World Economic Situation and Prospects 2013, austerity and the sovereign debt crisis are the two main forces depressing growth in the region.¹⁵⁹

Furthermore, two reports published by the European Economic and Social Committee (hereinafter the EESC), have also been very critical about the effectiveness of the austerity measures taken by Ireland and Spain. However, these critics seemed to have little or no impact in the policy making processes. In regard to Ireland, Rigney has maintained that those measures are not creating economic growth. Instead they have “put the domestic economy on a life support machine”.¹⁶⁰ In the case of Spain, Baylos and Trillo have stated that the measures taken have focused almost solely on the objective of reducing the public deficit and they are destroying employment, creating social conflict and increasing inequality.¹⁶¹

In the same vein, the Platform of European Social NGOs, has announced that the “Country Specific Recommendations and National Reform Programmes do not translate to a more social orientation, but contribute to the weakening of the welfare states and the European Social Model” and that “austerity policies have been a failure of the poorest”.¹⁶²

¹⁵⁷ Information available at <http://www.asociacionfacultativos.com/indexi.shtml> and at http://ccaa.elpais.com/ccaa/2013/06/06/madrid/1370513783_950485.html last accessed 7 June 2013.

¹⁵⁸ Statement available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13281&LangID=E> last accessed 15 May 2013, more information available at UN News Centre, 2013. <http://www.un.org/apps/news/story.asp?NewsID=44802&Cr=greece&Cr1=#.UYUCqrWpV-2> last accessed 4 May 2013.

¹⁵⁹ UN Development Policy and Analysis Division, 2013, press release.

¹⁶⁰ Rigney, 2013, p. 7.

¹⁶¹ Baylos and Trillo, 2013, p. 9.

¹⁶² Social Platform, 2013, pp. 1-2.

On top of that, on 5 June 2013, the IMF published a report evaluating the austerity measures adopted in Greece, concluding that they have not created economic growth.¹⁶³ Also in June 2013, the IMF published its state report on Ireland, explaining that economic growth has been very low.¹⁶⁴

In opposition to the policies set by the EU, the IMF and the ECB, it has been argued that austerity is not the only choice to counteract the crisis. In this sense it has been assessed that in times of financial crisis, “policies that result in increased progressive taxation and social spending are crucial for rebuilding the social capital”.¹⁶⁵ Moreover, due to the crisis the need to protect, fulfil and respect economic and social rights should be emphasised.¹⁶⁶ It would be also possible to strengthen social protection systems and increase “budget allocations for social protection”.¹⁶⁷ Finally, as stated by the Special Rapporteur on extreme poverty, human rights could be placed at the heart of the recovery and in the centre of the policy responses to the crisis.¹⁶⁸ Moreover, a human rights approach in the policy making processes could represent an opportunity to “bridge the gap between legal justiciability and political accountability”.¹⁶⁹

Several alternatives to austerity that might increase the maximum of available resources in a more equitable manner have been proposed. These measures include a more progressive revenue system, the reduction of income inequality and the fight against tax evasion, shadow economy and corruption. For instance, George and Felice have proposed several alternatives towards the protection of the welfare system in a global scale.¹⁷⁰

In Ireland, TACS have proposed several alternatives for a human rights-based approach to the general budget.¹⁷¹ In the same vein, regarding Spain, Navarro, Torres and Garzón, in 2011 proposed 115 concrete measures, including long term structural reforms and

¹⁶³ IMF Country Report No. 13/156, June 2013, p. 11.

¹⁶⁴ IMF Country Report No. 13/163, June 2013.

¹⁶⁵ Miranda, 2010, p. 4.

¹⁶⁶ George, 2010, p. 2.

¹⁶⁷ Euzéby, 2010, pp. 71-76.

¹⁶⁸ Special Rapporteur on extreme poverty, 2011, p. 22, paragraph 95.

¹⁶⁹ Sáiz, 2009, pp. 279-281.

¹⁷⁰ George, 2010, pp. 194-267 and Felice, 2010, pp. 257-287.

¹⁷¹ Go to <http://www.tascnet.ie/showPage.php?ID=2531> last accessed 12 June 2013.

immediate actions, including an audit of the debt, reducing of the military budget by 35 % during three years, increasing the number of public employees or reinforcing democracy and accountability at the European institutions.¹⁷² In 2012, the same authors presented an alternative plan to the austerity budget approved by the Spanish government.¹⁷³ Furthermore, in April 2013, health care professionals from the *Consejos Generales de Médicos y Enfermeros* (Doctors and Nurse General Councils) submitted an alternative savings plan to back up the Spanish public health system by maintaining the quality and the basic principles of the public service.¹⁷⁴

In regard to the tax revenue system in Spain, although some adjustments have been made, the system is not being modified to be more progressive and redistributive.¹⁷⁵ It also has to be taken into account that, in spite of the adjustments mentioned, Spain has one of the lowest top rates of personal income tax in the EU-15, in fact, the income revenue dropped from 56 % of GDP in 1995 to 45 % of GDP in 2011. Another problem that decreases the amount of available resources is tax evasion. In 2010, Spain had an estimated tax loss of €8 billion due to this problem. It is estimated that 72 % of tax fraud is committed by large companies and wealthy individuals. Furthermore, it is estimated that the shadow economy comprises 23.3 % of annual GDP.¹⁷⁶

Despite of the compromise established in the Programme for Government and National Recovery to ensure progressive taxation, Ireland has also one of the lowest tax economies in the EU; the total tax revenue represents only 28 % of the GDP, while the EU average is 36 % of the GDP, and it is estimated that it will drop to 26 % of the GDP by 2015. The value added tax represents approximately 41 % of all revenue, as compared to the 34 % EU average. Although Ireland has taken steps against tax evasion, it is estimated that €7, 64 billion are lost due to this practice.¹⁷⁷

¹⁷² Navarro, 2011, pp. 209-221.

¹⁷³ See, Navarro, 2012.

¹⁷⁴ Information available at <http://www.medicosypacientes.com/articulos/85sns.html> last accessed 13 May 2013.

¹⁷⁵ As explained by the interviewee Pablo Allendesalazar.

¹⁷⁶ Data from Eurostat and GESTHA analysed in the Joint Submission to the Committee, 2012, p. 2.

¹⁷⁷ Data provided by the CESR, 2012, p. 14-16.

The Special Rapporteur on extreme poverty recommended the State re-evaluate the budgetary adjustments and adopts taxation policies that “adequately reflect the need to harness all available resources towards the fulfilment of its economic, social and cultural rights obligations”.¹⁷⁸ She also manifested her concerns with the increase in the Value Added Tax from 21 % to 23 %, highlighting that “such taxes are regressive, representing a considerably larger burden for lower income households”.¹⁷⁹

To sum up, there are serious doubts about whether all alternatives have been carefully and comprehensibly considered and about whether there is a reasonable justification for the implementation of certain austerity measures.

4.4 Austerity as a deliberate ideological choice

It has often been asserted that austerity measures are the only way out of the crisis. Consequently, it is necessary to cut public spending because “we have lived beyond our means”.¹⁸⁰ It has also been stated that it is necessary to share the pain and the responsibility and to make painful sacrifices.¹⁸¹ As mentioned by Krugman “for three years, the turn to austerity has been presented not as a choice but as a necessity”.¹⁸² However, austerity might not be the only possible way out of the crisis, but rather an ideological political choice. In this sense, it has been argued that the crisis is serving as an excuse or hidden agenda to justify the enforcement of neoliberalism and that austerity will never lead to economic recovery or growth.¹⁸³ In fact, if alternatives to austerity have been presented but not considered and there is no reasonable justification, the stance that ideology is playing an important role gains strength.

Austerity is a global phenomenon and it is not only affecting Europe, Spain or Ireland. It is also being implemented in other countries affected by the crisis, the United States

¹⁷⁸ Special Rapporteur on extreme poverty, 2012, p. 19, paragraph 96.

¹⁷⁹ Special Rapporteur on extreme poverty, 2012, p. 19, paragraph 97.

¹⁸⁰ Sánchez, 2010, p. 199, explained that this is the phrase that has been repeated as a *mantra* to justify austerity and blame the citizens for the crisis. See also George, 2012, interview for the Transitional Institute.

¹⁸¹ *Presidencia del Gobierno*, 2013, in this speech the Spanish president argued that during 2012 the main priority was to overcome the debt crisis and the “painful” measures adopted were the only solution and he insisted that the responsibility for the crisis lies in everybody's hands.

¹⁸² Krugman, 2013, p. 2 and Misir, 2011, p. 8.

¹⁸³ Mitchell, 2011, pp. 1-5, defends this idea and goes even further arguing that austerity is built on a lie and will only worsen the crisis.

for example. Hence, the debate “austerity versus economic growth” is a global debate.¹⁸⁴ For O’Connell “the push for austerity on a global scale represents a third phase in the embedding of neoliberal capitalism”.¹⁸⁵ Therefore, the discussions around austerity have again positioned social and economic rights in the centre of an ideological debate.

In his report about Ireland Rigney refers to the fundamentalist neoliberal ideology of the EU and ECB representatives.¹⁸⁶ Furthermore, Misir has defined this policy as “neoliberal austerity”.¹⁸⁷ O’Connell has also emphasized that what has been presented as the only objective choice is not “value neutral” it is an ideological choice. For the association *economistas frente a la crisis* (economist against the crisis), austerity is not economy but ideology.¹⁸⁸

Moreover, Radice has held that there are mainly two reasons for the cuts. The first is that the ruling classes “were obliged in 2008 to summon the interventionist state back onto the state to avoid a total collapse of global finance, and now want to banish it once more to a merely supportive role”.¹⁸⁹ The second is that cuts in public spending and increases in taxes are being used to “transfer income and wealth from the working people to the rich and powerful”.¹⁹⁰

Therefore, austerity is not an impartial economic necessity, but rather a deliberate political choice, a neoliberal and ideologically driven project that is disproportionately affecting the enjoyment by ordinary people of economic and social rights and will lead to a reduction of the welfare state.¹⁹¹

¹⁸⁴ For discussions of the austerity versus growth debate see Lipton, 2012. For more information about austerity at a global scale see Sáiz, 2009 p. 280.

¹⁸⁵ O’Connell, 2012, p.8.

¹⁸⁶ Rigney, 2013, p. 7.

¹⁸⁷ Misir, 2011, p. 2.

¹⁸⁸ See economist against the crisis at <http://www.economistasfrentealacrisis.com/> last accessed 4 May 2013.

¹⁸⁹ Racie, 2011, p. 126.

¹⁹⁰ Racie, 2011, p. 126.

¹⁹¹ O’Connell, 2012, p. 4-13.

5. The impact of austerity on economic and social rights

5.1 Initial Remarks

As explained in the previous sections, from 2010 severe austerity measures have been implemented in Ireland and Spain. Those measures are having a retrogressive and disproportionate impact on economic and social rights, progressively dismantling the welfare state and lowering the levels of allowances. However, the consequences of austerity are just beginning to arise. Consequently, at present, the total impact of austerity is difficult to quantify.

By June 2013, only five official reports about the impact of austerity in Ireland and Spain have been found, one from the Committee regarding Spain, two from the Special Rapporteur on extreme poverty regarding Ireland and two published by the EESC.¹⁹² Nevertheless, relevant INGOs and NGOs have published a great amount of literature concerning this matter. Due to that and to the fact that this is an on-going issue, only some relevant examples will be provided in this section.

The Committee expressed its concerns about austerity in the previously mentioned open letter in 16 May 2012. Less than one month later, in 6 June 2012 the ECSR Committee filed its Concluding observations in the case of Spain,¹⁹³ emphasizing the negative impact of austerity on the enjoyment of economic and social rights. Although Ireland has already submitted its state report to the Committee, the session about Ireland has not been scheduled yet.¹⁹⁴ Nevertheless, on account of the fact that the situation in Ireland is very similar to the one in Spain, it can be inferred that the Committee would probably arrive at similar conclusions.

In regard to Ireland, the Special Rapporteur on extreme poverty has emphasised that deliberate retrogressive measures are a violation of the ICESCR and has indicated that drastic budgetary reductions have “the potential to significantly undermine the effective

¹⁹² It is worth mentioning that none of the latest reports of the ECSR in regard to Ireland and Spain, assessed the impact of any anti-crisis measures on economic and social rights.

¹⁹³ Concluding observations of the Committee on Spain, 2012.

¹⁹⁴ Ireland `Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant`.

and efficient functioning of health and education services and the social protection system.”¹⁹⁵

5.2 Inequality between regions and individuals

5.2.1 Inequality between regions

Because of austerity, inequality is not only growing among individuals but also between different regions. Spain is an example of increasing inequality between the different autonomous communities.¹⁹⁶

Spain is a decentralized state, with 17 autonomous communities and 2 autonomous cities. Each of these communities has many competences for the regulation of social rights, revenue and spending.¹⁹⁷ In fact, the Spanish public sector is one of the most decentralized in Europe.¹⁹⁸ Due to decentralisation, in some communities social rights are more protected than in than others.¹⁹⁹ For these reasons, a large part of the public deficit has been incurred at the autonomous level and the strategies to counteract the crisis have been different in each community. In consequence, the impact of austerity in the different communities is different and is creating inequalities in the “quality, accessibility and availability of public social services and goods”.²⁰⁰ In 2012, the Committee expressed its concern with the disparities in the enjoyment of economic and social rights in the different autonomous communities that might lead to inequitable or discriminatory enjoyment of these rights.²⁰¹

As a matter of fact, the same thought and statement could be applied to Europe. The reason for this is that austerity is mainly or solely affecting Spain, Ireland, Portugal, Greece and Italy, that is, different countries with different levels of public spending.

¹⁹⁵ Special Rapporteur on extreme poverty, 2011, p. 8-9, paragraph 30.

¹⁹⁶ See *Instituto Valenciano de Investigaciones Económicas*, 2012.

¹⁹⁷ The legal basis for this composition of the state is established in the Spanish Constitution articles 2 and 137 to 158 and in the Status of Autonomy of each Autonomous Community adopted between 1982 and 1995 that were amended after 2006 incorporating list of rights, duties and guiding principles to be applied in each community.

¹⁹⁸ Baylos and Trillo, 2013, p. 2.

¹⁹⁹ Serramalera, 2011, pp. 80-101, explained that in some communities the level of regulation of economic and social is four times higher than in others. See also Terol, 2012, pp.67-70 and pp. 84-85.

²⁰⁰ See Joint Submission to the Committee, 2012, p. 2, Spanish Ombudsman report for the Committee, 2012, and *Instituto de Valenciano de Investigaciones Económicas*, 2012.

²⁰¹ Concluding observations of the Committee on Spain, 2012, p. 3, paragraph 9.

Due to austerity, not all European citizens will have equal enjoyment of economic and social rights. Thus, inequality and discrimination are also rising among European countries as a result of increasing disparities in the enjoyment of economic and social rights. The states parties to the ICESCR which are state members of the EU could be held responsible for this increasing inequality.

5.2.2 Inequality between individuals

Before the crisis Ireland and Spain already had one of the highest rates of inequality income distribution in EU-27 and that rate has been dramatically rising since 2007.

Meanwhile, in other European countries such as Finland the inequality rate has remained more or less same since in 2007, around 3.7 %. In Ireland, inequality has increased from 4.8 % in 2007 to 5.3 % in 2011.²⁰² Moreover, the ratio between the highest and lowest income quintiles increased by around a 30 % from 2009 to 2010.²⁰³

In Spain the average net annual monetary income per household has decreased 1, 9 % from 2011 to 2012,²⁰⁴ while income inequality has increased from 5.3 % in 2007 to 6.8 % in 2011.²⁰⁵ Additionally, the percentage of households with economic difficulties has increased.²⁰⁶ According to data provided by FOESA, since the crisis began the Gini coefficient has increased by 10 %, while income inequality in percentiles 80 and 20 has increased by 30 %. This indicates that inequality among the highest and lowest incomes has increased by 30 %. In fact, this is the highest inequality level ever registered in Spain since data about household income became available. So since the crisis began, the richest have become richer and the poorest have become poorer.²⁰⁷

²⁰²

Eurostat,
<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc260&plugin=1>
last accessed 5 May 2013.

²⁰³ CESR, 2012, p. 18 and O'Grady, 2012, p. 20.

²⁰⁴ *Instituto Nacional de Estadística*, 'Living Conditions Survey (LCS)' 2012, p. 1. The net average annual income per person by autonomous community is also available in the report, p. 6.

²⁰⁵

Eurostat,
<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc260&plugin=1>
last accessed 5 May 2013.

²⁰⁶ *Instituto Nacional de Estadística*, 'Living Conditions Survey (LCS)' 2012, p.7.

²⁰⁷ *Cáritas Española*, 2013, p. 7-8.

5.3 Necessary reference to the right to work and the right to housing

Although they are being only indirectly affected by austerity policies, it is necessary to assess the impact of the crisis on the right to work and the right to housing which are protected under articles 6, 7 and 11 of the ICESCR. Due to the fact that all rights are interdependent and interrelated, the impact of the crisis on these rights is having a windfall effect on the enjoyment of other rights. In fact, the Committee has stated that the right to work is not only an inherent and inseparable part of human dignity but is also “essential for the realisation of other human rights”.²⁰⁸ Similarly, the links between the right to housing and the right to education, the right to health and right to an adequate standard of living have been stressed by Koch.²⁰⁹

Ireland and Spain are among the countries with a higher level of unemployment than the EU-27 average. In 2013, the unemployment rate in Ireland rose to 14.1 % and in Spain 26.7 %, the highest of Europe.²¹⁰ In Spain, 27.2 % of the unemployment affects females and 26.0 % males, but the situation is different in Ireland, where 10.8 % of the unemployment affects females and 16.8 % males.²¹¹

In Ireland, total unemployment increased from 131.0 in June 2008 to 323.0 in June 2012.²¹² According to the seasonally adjusted standardized unemployment rates the annual average of unemployment has increased from 6.4 % in 2008 to 14.7 % in 2013.²¹³

²⁰⁸ General Comment N° 18 on the right to work, 2005, p. 2, paragraph 1.

²⁰⁹ Koch, 2009, p. 143.

²¹⁰ Eurostat, unemployment rates corresponding to 2013 M03, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=teilm020> last accessed 6 May 2013.

²¹¹ Eurostat, unemployment rates by sex corresponding to 2013 M03, data about males is available at <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=teilm020&language=en> last accessed 6 May 2013 and for females is available at <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=teilm020&language=en> last accessed 6 May 2013.

²¹² Central Statistics Office, Employment and Unemployment (ILO) '000s available at <http://www.cso.ie/en/statistics/labourmarket/principalstatistics/> last accessed 6 May 2013.

²¹³ Central Statistics Office, Employment and Unemployment, available at <http://www.cso.ie/en/statistics/labourmarket/principalstatistics/seasonallyadjustedstandardisedunemploymententratessur/> last accessed 6 May 2013. See Rigney, 2013, pp. 3-4 and the CESR, 2012, pp. 17-18.

In Spain, in the first quarter of 2013 the number of unemployed climbed to 6,202,700 while youth unemployment rose to 57.2 %, ²¹⁴ the highest since 1976. As a result of the austerity measures, 71,400 public employees have lost their jobs. Moreover, the number of households in which none member is working increased by 72,400 rising to 1,906,100 households. The private sector shed 251,000 jobs. Long term unemployed rose to 515,700 persons, already in 2012 the percentage increased to 55 %. ²¹⁵ Unemployment levels are different in each autonomous community. ²¹⁶ Due to the high unemployment rate, the number of beneficiaries of unemployment allowances, such as the “unemployment subsidy” or the “active insertion income”, the amount of which is €426 month has increased. ²¹⁷ From 2011 to 2012 the beneficiaries of the active insertion increased with 45 %. ²¹⁸ According to data provided by the statistics office of the *Consejo General del Poder Judicial* (General Council of the Judiciary) in 2012, 147,404 dismissal demands were submitted before the courts, 25.3 % more than in 2011. Compared to the period 2003-2008 dismissals had rose up to 87.5 % in the period 2008-2012. ²¹⁹

In Ireland the situation faced by ordinary people with forced evictions has been denounced by different organisations such as Anti-Eviction Taskforce, Freedom from all Debt, the Defend Our Homes League and Joan Collins of the United Left Alliance. The CESR has also denounced that demand for social housing has risen by 75 % after 2008 while the housing budget was reduced by 36 % in 2011. ²²⁰

²¹⁴ General Comment N° 18 on the Right to work, p.2, 2005, p. 5, paragraph 14, the access to a first job “constitutes an opportunity for economic self-reliance and in many cases a means to escape poverty”.

²¹⁵ *Cáritas Española*, 2013, p. 9.

²¹⁶ Data provided by the *Instituto Nacional de Estadística* (national statistics institute), available at http://www.ine.es/en/daco/daco42/daco4211/epa0113_en.pdf last accessed 6 May 2013. Additional information can be found at http://elpais.com/elpais/2013/04/25/inenglish/1366887359_592584.html last accessed 6 May 2013 and at http://elpais.com/elpais/2013/04/25/media/1366878313_750528.html last accessed 6 May 2013.

²¹⁷ Information about the amount of the active insertion income is available at http://www.seg-social.es/Internet_1/Trabajadores/Trabajadoresdelmar/EmpleoyDesempleo/Desempleo/RentaActivadeIns_erc49698/index.htm last accessed 12 May 2013.

²¹⁸ Joint Submission to the Committee on Economic, 2012, p. 6.

²¹⁹ *Consejo General del Poder Judicial*, 2013, p. 3.

²²⁰ CESR, 2012, p. 19.

In Spain the only official data available on forced evictions is from the *Consejo General del Poder Judicial* (General Council of the Judiciary).²²¹ According to it, the comparison between the period 2008-2012 and the period 2003-2007 shows that the number of initiated foreclosures has increased up to 368.7 %, with an annual average of 73.7 %, the number of executed foreclosures has increased 199.5 %, with an annual average of 39.9 % and the number of foreclosures that were in process has increased 482.9 %, with an annual average of 96.6 %. In addition, 101,034 forced evictions were executed in 2012.²²² Since 2007, around 100,000 forced evictions have been executed per year.

Meanwhile, in 2011 the government approved Royal Decree-Law 20/2011, canceling the basic emancipation allowance for young people for future beneficiaries.²²³ In 2012, it approved Royal Decree-Law 20/2012 reducing the amount of this allowance from €10 to €147.²²⁴ In 2013, it approved Law 4/2013 cancelling allowances for the acquisition of social housing.²²⁵

5.4 Whose rights?

Economic and social rights protect the most vulnerable groups, and therefore, it is not a surprise that when rights such as education, health, housing, work and an adequate standard of living are undermined, there will be a sustained impact on the realisation of these rights for vulnerable populations, who are the most affected and suffer the most.

In May 2012, the Committee stated that the denial or infringement of economic and social rights apart from being contrary to the Covenant have “significant negative impacts, in particular, on disadvantaged and marginalised individuals and groups, such as the poor, women, children, persons with disabilities, older persons, people with HIV/AIDS, indigenous peoples, ethnic minorities, migrants and refugees”.²²⁶

²²¹ *Consejo General del Poder Judicial*, 2013, p. 2.

²²² *Consejo General del Poder Judicial (b)*, 2013, p. 6.

²²³ Royal-Decree Law 20/2011, derogation provision first.

²²⁴ Royal-Decree Law 20/2012, article 36.1.

²²⁵ Law 4/2013, second additional provision.

²²⁶ Letter by the Chairperson of the Committee, 2012, p. 1.

In 2012 and 2013, UNICEF stressed that austerity is affecting the rights of children in countries such as Ireland and Spain.²²⁷ According to the Convention on the Rights of the Child (hereinafter CRC) “the best interests of the child shall be a primary consideration” in any policy decision-making process and economic and social rights of the child should be protected.²²⁸

In Ireland one of five children is in risk of poverty and child allowances have been reduced, resulting in the fact that “children are the most vulnerable to poverty”,²²⁹ with child deprivation rising from 23.5 % in 2009 to 30.2 % in 2010.²³⁰ Maternity leave benefits and provisions for maternal and reproductive health are being undermined with disproportionately negative effects on reproductive and sexual rights. In fact, an increase in the number of women who are unable to afford sexual and reproductive health services has taken place. In the same way, as children, women are disproportionately affected by deprivation.²³¹

Furthermore, the budgetary support for gender programmes and for women advancement has been reduced.²³² The poverty rate among single parents is very high and that affects children too. Due to consecutive reductions in the social welfare payment and the high level of unemployment they are quickly losing income.²³³ Successive cuts in disability allowances and educational support for people with disabilities have disproportionately affected this group.²³⁴ Older persons make up another group that has been disproportionately affected by austerity, because the level of welfare obtained by this group between 2001 and 2009 will probably decline due to cuts in welfare payments, health services and reductions in public sector pensions.²³⁵ The

²²⁷ UNICEF, 2012, p. 4, and 2013, p. 1.

²²⁸ CRC articles 3 and 4.

²²⁹ Special Rapporteur on extreme poverty, 2011, p. 14, paragraphs 56-62.

²³⁰ UNICEF, 2012, p. 4.

²³¹ Central Statistics Office, ‘Survey on Income and Living Conditions provided by the Irelands’, 2013, p. 5. Almost 24.5% of the population suffered two or more types of enforced deprivation. Those more affected by deprivation are people living in accommodation that was rented below the market rate or rent free (52.0%), unemployed (42.4%), females (26.0%) and those with highest level of educational attainment among others.

²³² CESR, 2012, p. 22.

²³³ Special Rapporteur on extreme poverty, 2011, p. 17, paragraphs 70-74.

²³⁴ Special Rapporteur on extreme poverty, 2011, p. 16, paragraphs 66-69.

²³⁵ Special Rapporteur on extreme poverty, 2011, p. 15, paragraphs 63-65.

budget cut in the Irish Naturalization and Immigration Services have affected immigrants and asylum seekers.²³⁶ Homeless and persons living in substandard housing conditions are also among the more affected vulnerable groups. Waiting lists for social-housing support that were already high have increased, while the allocation for this service has decreased by 36 %.²³⁷ Finally, austerity is disproportionately affecting the Irish Traveller community, which already suffers from structural discrimination.²³⁸

In June 2012, in its considerations about Spain, the Committee expressed its concern that levels of protection of economic and social rights have been reduced as a result of the austerity measures adopted in this country. The Committee stated that austerity measures “disproportionately curtailed the enjoyment of their rights by disadvantaged and marginalised individuals and groups, especially the poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies, migrants and asylum seekers.”²³⁹ Budget cuts have affected the support services for women victims of domestic violence and gender-based violence.²⁴⁰ Family benefit payments have been drastically cut or eradicated.²⁴¹ According to Save the Children, already in 2012, 27.2 % of minors were living below the poverty line and they only received a proper meal at school.²⁴² In spite of this situation, on 11 June 2013 the government announced a moratorium on the implementation of the national plan against child poverty.²⁴³ Older persons and women who receive widows’ pensions are at risk of poverty due to austerity measures adopted over pensions.²⁴⁴ Retrogressive measures that increase university tuition fees jeopardize access to university for marginalised and disadvantaged individuals and groups.²⁴⁵ The right to health of immigrants has also

²³⁶ CESR, 2012, pp. 21-24.

²³⁷ Special Rapporteur on extreme poverty, 2011, p. 19-20, paragraphs 83-88.

²³⁸ Special Rapporteur on extreme poverty, 2011, p. 17-18, paragraphs 75-80.

²³⁹ Concluding observations of the Committee on Spain, 2012, pp. 2-3, paragraph 8.

²⁴⁰ Concluding observations of the Committee on Spain, 2012, p. 4, paragraph 15.

²⁴¹ Concluding observations of the Committee on Spain, 2012, p. 5, paragraph 17.

²⁴² Save the Children, 2012, p. 4.

²⁴³ *Diario de Sesiones del Congreso de los Diputados*, 11 June 2013, pp. 31-40.

²⁴⁴ Concluding observations of the Committee on Spain, 2012, p. 5, paragraph 20.

²⁴⁵ Concluding observations of the Committee on Spain, 2012, p. 7, paragraph 28.

been curtailed, hence, it is estimated that more than 150,000 immigrants in an irregular situation would not have access to basic health care.²⁴⁶

Against this background, it seems clear that austerity is diminishing the enjoyment of economic and social rights of vulnerable, marginalised and disadvantaged individuals and groups. What is more, although austerity policy and the law that implements it are value-neutral, there is a certain risk of indirect discrimination that should be assessed case by case.²⁴⁷

Another effect of austerity for vulnerable groups is the cuts to human rights institutions that play a key role for their protection and assistance inside and outside borders. For instance, in Spain they have affected allocations to civil society groups that work with HIV/AIDS prevention and sexual rights.²⁴⁸ Due to severe cuts on development programmes and international cooperation vulnerable groups in foreign countries are also being affected.²⁴⁹ The Committee expressed its concern about the reduction in official development assistance of Spain.²⁵⁰ The Special Rapporteur on extreme poverty evaluated that in Ireland, funding cuts to community and voluntary organisations is in some cases up to 100 %, in at a time when there is more need to protect the most disempowered sector.²⁵¹ The Committee has highlighted the potential and crucial role that these institutions play for the realisation of economic and social rights and the promotion of indivisibility and interdependence of all human rights.²⁵²

5.5 What rights?

5.5.1 Right to social security and social protection

This right is protected under article 9 of the ICESCR. As stated in General Comment No. 19, the social security system should be considered a social good and should

²⁴⁶ Concluding observations of the Committee on Spain, 2012, p. 5, paragraph 18. Data available at <http://www.medicosdelmundo.org> last accessed 5 May 2013.

²⁴⁷ See General Comment N° 20 on non-discrimination, p. 4, paragraph 10 and article 2 paragraph 2 of the ICESCR.

²⁴⁸ Joint Submission to the Committee on Economic, 2012, p. 10.

²⁴⁹ *Informe Conjunto*, 2012, p. 8-9.

²⁵⁰ Concluding observations of the Committee on Spain, 2012, p. 3, paragraph 9-10.

²⁵¹ Special Rapporteur on extreme poverty, 2012, p. 19, paragraph 99 and 2011, p. 5, paragraph 11.

²⁵² General Comment N° 10 on the role of human rights institutions, p. 2, paragraph 1-3.

provide adequate access to health services, benefits to old persons and unemployed, support for families and children and protection of maternity and disabled.²⁵³ However, as explained above individuals who belong to any of these groups are being the most affected by the social spending cuts.

It is important to highlight that the right to social security is of a redistributive character. Thus, it plays a very important role “in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion”,²⁵⁴ and in that it also encompasses the right to “access and maintain benefits”.²⁵⁵ Hence, cuts in social spending might be contrary to the maintenance of social security benefits (some of these cuts have already been explained in section 5.4).

Moreover, in paragraphs 52 to 58,²⁵⁶ the Committee emphasises that States parties should refrain from interfering directly or indirectly with the enjoyment of this right in other countries, should facilitate the realisation of this right in other countries and should ensure that this right is taken into account in the lending policies, credit agreements or other international measures, carried out by organisations, such as the IMF. These statements should be applied to Ireland and Spain and the economic policies promoted by the EU, the IMF and the ECB.

For the reasons mentioned, the Special Rapporteur on extreme poverty cautioned the Irish government against reductions in public service funding and cuts to social protection benefits. Moreover, she emphasised that cuts provided in the Budget 2012, such as €475 million from the social protection budget, “will damage the effectiveness and accessibility for social protection benefits and public services”.²⁵⁷ Furthermore, according to its report, “reductions and/or changes to eligibility criteria for the Child Benefit, the One Parent Family Payment, the Back to School Clothing and Footwear

²⁵³ General Comment, N° 19 the right to social security, p. 4-7, paragraphs 10-21.

²⁵⁴ General Comment, N° 19 the right to social security, p. 2, paragraph 3.

²⁵⁵ General Comment, N° 19 the right to social security, p. 2, paragraph 2.

²⁵⁶ General Comment, N° 19 the right to social security, p. 15, paragraph 52-58.

²⁵⁷ Special Rapporteur on extreme poverty, 2012, p. 20, paragraph 101.

Allowance and the Fuel Allowance” will make it more difficult for some vulnerable groups “to access the assistance to which they are entitled”.²⁵⁸

The impact of budget cuts on access to social services has been also analysed by the CESR. According to the report, the first cuts in 2011 “were transfer payment to confront poverty”²⁵⁹ and €760 was cut from social protection. In 2012, €475 more million were cut and it is estimated that €1.5 billion more will be cut between 2013 and 2014.²⁶⁰

In the case of Spain, before the crisis the country already had a lower level of social spending than other European countries and it dedicated a lesser amount of the public budget to social protection than the EU-16 average.²⁶¹ For instance, in 2008 the GDP per capita was almost the same as the EU-16 average but the total expenditure on social protection was only 59 % of the EU-16 average.²⁶² After 2010, the users of social aid have increased due to long-term unemployment, but the budget has not been increased in the same proportion and different social allowances have been reduced or cancelled.

For instance, austerity has had a negative impact on the implementation of the Law for the Promotion of Personal Autonomy and Care for Dependent Persons. In 2012, “budget cuts to social benefits have resulted in a moratorium of one year being placed on coverage to new beneficiaries”.²⁶³ What is more, the *Asociación Estatal de Directores Gerentes en Servicios Sociales* (State Association of Social Services Directors and Managers), denounced that around 250,000 dependent persons who are entitled to the right to receive social aid and assistance would not receive any of them.²⁶⁴ Moreover, in 2012 €305.6 mill were cut in social aid for dependent people.²⁶⁵ On the top of that, the same Association has denounced that €500 mill have been curtailed from the social services budget in the Autonomous Community.

²⁵⁸ Special Rapporteur on extreme poverty, 2012, p. 20, paragraph 101.

²⁵⁹ CESR, 2012, p. 12.

²⁶⁰ CESR, 2012, pp. 12-13, has stated in the report “Ireland’s most vulnerable should not have to bear the cost of a crisis they had little hand in creating”.

²⁶¹ According to Baylos and Trillo, 2013 and the Joint Submission to the Committee on Economic, 2012, p. 2, in 2007 Spanish public spending was lower than the EU-25 average.

²⁶² CESR and *Observatori*, 2011, p. 16.

²⁶³ Joint Submission to the Committee on Economic, 2012, p. 6.

²⁶⁴ *Asociación Estatal de Directores Gerentes en Servicios Sociales*, 2012, p. 19.

²⁶⁵ *Asociación Estatal de Directores Gerentes en Servicios Sociales*, 2012, p. 5.

In 2011, pensions were frozen and in 2012 they were increased only by 1 %, while the retirement age has increased from 65 to 67 years and the number of years of contribution to receive 100 % of pension has increased from 35 to 37 years.²⁶⁶ According to the measures adopted through the Law 27/2011, the retirement age will increase gradually in the incoming years. Moreover, in 2013 new reforms are being prepared that will affect the purchasing power of pensioners curtailing the whole pension system.

5.5.2 Right to health

This right is protected under article 12 of the ICESCR. According to General Comment No. 14, the right to health contains freedoms, such as the control of one's health and body, to be free from interference, sexual and reproductive freedom, and entitlements such as, "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".²⁶⁷ It has to be understood as a right to enjoy facilities, goods, services and conditions.²⁶⁸ As with other economic and social rights, the essential elements are related to availability, accessibility, acceptability and quality. Accessibility means that everyone should have access to health without discrimination, should have physical and economic accessibility.²⁶⁹ States have to undertake immediate measures to guarantee that the right can be exercised without discrimination.²⁷⁰ Furthermore, in times of severe strains on resources, "the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes".²⁷¹

States have to create basic conditions to protect the health of individuals. First, States cannot hinder individuals or groups from their access to available resources. This is one of the core obligations of the right to health. Second, States have the obligation protect the right to health by taking measures to assure that people have equal access to health services. Finally, the States have the obligation to fulfil, by adopting a national health

²⁶⁶ Joint Submission to the Committee on Economic, 2012, p. 6.

²⁶⁷ General Comment N° 14 on the right to health, p. 3, paragraph 8.

²⁶⁸ General Comment N° 14 on the right to health, p. 3, paragraph 9.

²⁶⁹ General Comment N° 14 on the right to health, p. 4-5, paragraph 12.

²⁷⁰ General Comment N° 14 on the right to health, p. 9, paragraph 30.

²⁷¹ General Comment N° 14 on the right to health, p. 6, paragraph 18.

policy and devoting a sufficient percentage of the available budget to health and creating conditions that allow individuals to have adequate and sufficient access to health.²⁷²

In Ireland, according to the Revised Health Sector Action Plan 2012-2013, the government has set out to achieve a €1 billion reduction in 2013,²⁷³ since 2010 the staff from the health service has been reduced by over 7, while 5,000 staff members retired in February alone.²⁷⁴ According to data provided in the National Service Plan 2013, since 2008 the health budget has been reduced by €3.3 billion, or 22 %, €721 million will be cut in 2013, and the staff levels have reduced by over 11,268 since September 2007, all these “cost reductions have been achieved by reducing pay and staff numbers as well as savings in the cost of community drug schemes and procurement”.²⁷⁵ For O’Grady, these cuts have reduced access to health care in a context of increasing suicide rates and alcohol-related deaths associated with unemployment. In fact, budget cuts have resulted in ward closures, services reductions, the closure of five hundred beds in public Nursing Homes and a 24 % increase in hospital treatment waiting time between 2011 and 2012. Moreover, austerity has been the perfect excuse to accelerate the privatisation process of public health promoting for-profit private services that will undermine universal public health and the quality of health services.²⁷⁶

In Spain, the budget cuts on health have been described as “arbitrary and indiscriminate”,²⁷⁷ and have led to “longer waiting lists, cuts to staff salaries, reduction in personnel, the introduction of user fees and reduced hours of operation”.²⁷⁸ Between 2010 and 2013, health spending has dropped by 10.6 %.²⁷⁹ According to official data

²⁷² Toebes, in Eide, 2001, pp. 181-180 and General Comment N° 14 on the right to health, p. 10-11, paragraphs 34-37.

²⁷³ Revised Health Sector Action Plan 2012-2013, p. 2.

²⁷⁴ Revised Health Sector Action Plan 2012-2013, p. 5.

²⁷⁵ National Service Plan 2013, p. 2.

²⁷⁶ O’ Grady, 2012, pp. 13-18.

²⁷⁷ Joint Submission to the Committee on Economic, 2012, p. 9.

²⁷⁸ Joint Submission to the Committee on Economic, 2012, p. 9.

²⁷⁹ Sauquillo, 2013. More information about budgets cuts in public health is also available at <http://www.attac.es/category/sspp/sanidad-sspp/> last accessed 13 May 2013.

the consolidated total public health spending at the national level decreased from €70.506 mill, 6.6 % of the GDP, in 2009 to €67.689 mill, 6.4 % of the GDP, in 2011.²⁸⁰

Austerity is leading to co-payments of medical treatments, privatisations longer waiting lists, less surgical procedures and cutbacks in emergency services.²⁸¹ For instance, in Cataluña, budget cuts in the healthcare system are mainly affecting primary health care, a service that is used by 73.4 % of the population. In Madrid cuts can also be seen in an accelerated process of privatisation.²⁸² In fact, in 2013, budgets for private health care have increased while they have decreased by 7 % for public health,²⁸³ six public hospitals are going to be privatized and on 30 April 2013 700 doctors were forced into retirement.²⁸⁴

According to research published in *BMJ* the mentioned cuts could lead to the effective dismantling of a large part of the Spanish public health system.²⁸⁵ Moreover, they have coincided with increased demands on the health system, due to the increases in depression, alcohol disorders and suicides, all of which are disorders associated with unemployment.²⁸⁶ On the top of that, they are putting lives at risk and there is a certain threat of increases in HIV and tuberculosis, rise in drug resistance and spread of disease.²⁸⁷

In 2012, the government approved the Royal Decree-Law No. 16/2012, introducing structural reforms in the health care system. This decree has been strongly criticised by *Médicos del Mundo* because, due to the non-renewal of the health card and the

²⁸⁰ Ministry of Health, Social Policy and Equality, 2013, p. 4.

²⁸¹ Information available at http://www.sciencecodex.com/austerity_cuts_to_spanish_healthcare_system_are_putting_lives_at_risk-113990 last accessed 13 June 2013.

²⁸² For a detailed analysis of the public health privatisation, see Lister, 2010.

²⁸³ *Informe Conjunto*, expanded Spanish version, 2012, p. 38-39. For more Information about the cuts in the *Comunidad de Madrid* budget and the privatisation of six public hospitals also see <http://www.casmadrid.org> last accessed 13 May 2013, more than 900.000 firms have been collected against the process of privatisation.

²⁸⁴ These retirements were criticized by Dr. Pedro Ruiz Barnes, *Defensor del Médico del Colegio Oficial de Médicos de Madrid* (Doctors Defender of the Doctors College in Madrid).

²⁸⁵ Legido-Quigley, 2013, p. 1.

²⁸⁶ Legido-Quigley, 2013, p. 2.

²⁸⁷ Declarations of Dr. José Martín-Moreno and Dra. Helena Legido-Quigley available at http://www.sciencecodex.com/austerity_cuts_to_spanish_healthcare_system_are_putting_lives_at_risk-113990 last accessed 13 June 2013.

implementation of new accessibility criterias, more than 150,000 -500,000 according to Legido-Quigley-²⁸⁸ undocumented immigrants have lost access to primary health care.²⁸⁹ Six months after the law entered into force, the same organisation announced that the right to health of children, victims of domestic violence and patients with chronic diseases was also being curtailed.²⁹⁰ Moreover, sexual and reproductive rights of immigrant women have been breached, because they do not have access to gynaecological assistance.²⁹¹ Finally, in May 2013 an illegal immigrant who could not have access to medical assistance, died of tuberculosis in Mallorca.²⁹²

5.5.3 Right to education

This right is protected under article 13 of the ICESCR. In the opinion of the Committee, as stated in General Comment No. 13, education is considered one of the “best financial investments that a state can make”.²⁹³ As with other economic and social rights, in regard to the right to education the States have the obligation to respect, protect and fulfil the availability, accessibility, acceptability and adaptability of the rights. That means among other things that the State has to make education accessible to everyone, everyone without discrimination on any prohibited ground and that education has to be affordable to all. In this regard the progressive implementation of the right required States to progressively introduce free secondary and higher education.²⁹⁴ Furthermore, the ICESCR required that the “material conditions of teaching staff shall be continuously improved”.²⁹⁵ In 2011, Androulla Vassiliou, Member of the EC

²⁸⁸ Legido-Quigley, 2013, p. 2.

²⁸⁹ *Médicos del Mundo*, at <http://www.medicosdelmundo.org> last accessed 5 May 2013. This organisation initiated a conscientious objection movement, so doctors and personal of the public health services will not apply the Royal Decree mentioned because it is against the right to health. As denounced by the organisation, in regard to the new accessibility criteria the president of Extremadura, José Antonio Monago, declared that it was a matter of budget and not humanity.

²⁹⁰ *Médicos del Mundo*, at <http://www.medicosdelmundo.org> last accessed 5 May 2013.

²⁹¹ The situation of immigrant women has been denounced by the *Federación de Planificación Familiar* (Family Planning Federation) <http://www.fpfe.org/> last accessed 5 May 2013.

²⁹² *El País* http://sociedad.elpais.com/sociedad/2013/05/07/actualidad/1367931406_135224.html, and <http://www.medicosdelmundo.org>. A criminal complaint has been submitted against the health counselor and the case is being investigated by the Ombudsman.

²⁹³ General Comment N° 13 on the right to education, p. 1, paragraph 1.

²⁹⁴ General Comment N° 13 on the right to education, p. 3, paragraph 6.

²⁹⁵ ICESCR art. 13, 2, e and General Comment N° 13 on the right to education, p. 7, paragraph 27.

responsible for Education, Culture, Multilingualism and Youth, called on Member States to maintain or increase education budgets even in times of economic crisis.²⁹⁶

In Ireland, public expenditure on education increased until 2009.²⁹⁷ Since then, €90 million in cuts were announced in 2010, €170 million in 2011 and €132 million in 2012, alongside cuts in grants, reductions in the number of teachers and increased student fees.²⁹⁸

In 2010, Spain was among the countries with lower public expenditure on education in terms of the EU-27 average.²⁹⁹ In this context, education has suffered some of the greatest budget cuts resulting from austerity policies. In 2012, the central state budget for education was reduced by 21.9 %, funds for scholarships were reduced by 11.6 % and funds for university scholarships was reduced by 62.5 %.³⁰⁰ Also in 2012, the government approved the Royal Decree-Law 14/2012, establishing increasing teaching hours, larger class sizes and rises in student fees. These measures have led to staff reductions of up to 62,000 jobs in this sector.³⁰¹

According to the CCOO trade union, budget cuts in education have been different in each autonomous community. In 11 communities the budget has been reduced 11 %, while in other communities the budget has been reduced by 15 % or 25 %.³⁰² For instance, in the autonomous community of Madrid student fees have increased 38 % in 2013, for this reason it is estimated that 7,000 university students will not be able to afford to pay the registration fee for the course 2013-2014. At the national level it is estimated that around 30,000 students run the risk of being expelled from university

²⁹⁶ Vassiliou, 2011.

²⁹⁷ Data available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc510&plugin=1> last accessed 17 June 2013.

²⁹⁸ CESR, 2012, p. 21.

²⁹⁹ Data available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc510&plugin=1> last accessed 17 June 2013.

³⁰⁰ Navarro, 2012, p. 138.

³⁰¹ Data provided by the Secretary General, Education Division of the CCOO, Francisco García in April 2013, information available at <http://www.publico.es/453267/los-recortes-en-educacion-con-wert-a-la-cabeza-provocan-el-despido-de-62-000-trabajadores> last accessed 17 June 2017.

³⁰² CCOO, 2013, p. 35.

because they will not be able to afford the new student feeds.³⁰³ This situation has forced universities to create extraordinary aid funds for students.³⁰⁴

5.5.4 Right to an adequate standard of living

This right is protected under article 11 of the ICESCR which recognizes the right to “the continuous improvement of living conditions”. As stated before, the violation of or retrogression in the enjoyment of one economic and social right creates a windfall effect on the enjoyment of other rights. Therefore, increased unemployment, forced evictions, cuts in social spending,³⁰⁵ health and education will, almost inevitably, work to the detriment of the enjoyment of an adequate standard of living.

There is no General Comment by the Committee on the right to an adequate standard of living. However, it has been stated that the fulfilment of it includes access to basic necessities such as food, clothing, housing, medical care and necessary social services. How much of these necessities are required will have to be established according to the cultural conditions of the society concerned. Moreover, it requires “living above the poverty line of the society concerned”.³⁰⁶

In Ireland, according to Eurostat the percentage of total population at risk of poverty increased from 25.7 % in 2009 to 29.4 % in 2011.³⁰⁷ According to the Survey on Income and Living Conditions provided by the Ireland Central Statistics Office, the “at risk of poverty rate”, the “deprivation rate” and the “consistent poverty rate” that decreased between 2005 and 2008 have increased after 2009, once the austerity measures were adopted.

³⁰³ See Silió and Vallespín, 2013.

³⁰⁴ Information available at http://sociedad.elpais.com/sociedad/2013/06/02/actualidad/1370200145_388557.html last accessed 17 June 2013.

³⁰⁵ In fact the Committee highlighted the important role that social security plays in supporting the realisation of many of the rights declared in the ICESCR, see General Comment, N° 19 the right to social security, p. 9, paragraph 28.

³⁰⁶ Eide, 2001, p. 133.

³⁰⁷ Data available at http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do;jsessionid=9ea7d07e30da7ac0c8ae80324c058e35f57565d508c5.e34MbxSahmMa40LbNiMbxMbNaPe0?tab=table&plugin=0&pcode=t2020_50&language=en last accessed 7 May 2013.

The three indicators shown in the data started increasing gradually, but the deprivation rate has increased substantially and has seen growth close to 10 % compared to 2005 and 2011. In 2009 the “at risk of poverty rate” was 14.1 %, the “deprivation rate” was 17.1 % and the “consistent poverty rate” was 5.5 %. While in 2011, the first rose to 16.0 %, the second to 24.5 % and the third to 6.9 %.³⁰⁸ . It is worth highlighting that the percentage of individuals without heating at some stage increased from 7.3 % in 2009 to 12.2 % in 2011,³⁰⁹ and that among the groups that presented an important variation in their risk of poverty rate were males, those aged 18-64, students and those with the highest level of educational attainment of higher secondary.

In Ireland the social spending cuts are affecting the right to an adequate standard of living. According to the Central Statistics Office there is an increasing dependence of individuals on social transfers to remain above the poverty line.³¹⁰ The CESR stated that between the years 2004 and 2008 social welfare transfers, such as unemployment and retired, played a very important role in dropping the levels of poverty, and other social spending such as education and health also reduced poverty. The continued prevalence of poverty has been attributed to the austerity cutbacks. Cuts on child benefit payments or the state pension freeze until 2015, will disproportionately affect children and older persons. It is estimated that 35,000 children have fallen into poverty since 2007 and that 88 % of older people will fall into poverty in the years to come in the absence of social welfare provisions.³¹¹

In Spain according to Eurostat the percentage of population at risk of poverty or social exclusion increased from 23.4 % in 2009 to 27.0 % in 2011.³¹² The rate of child poverty

³⁰⁸ Central Statistics Office, ‘Survey on Income and Living Conditions’, 2013, p. 1 available at http://www.cso.ie/en/media/csoie/releasespublications/documents/silc/2011/silc_2011.pdf last accessed 6 May 2013.

³⁰⁹ These are some of the indicators provided by the Central Statistics Office, ‘Survey on Income and Living Conditions’, 2013, p. 14, only some indicators have been selected for this thesis, to see the complete table go to the survey.

³¹⁰ Central Statistics Office, ‘Survey on Income and Living Conditions provided by the Irelands’, 2013, p. 3-4.

³¹¹ CESR, 2012, p. 18.

³¹² Data available at Eurostat http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?sessionId=9ea7d07e30da7ac0c8ae80324c058e35f57565d508c5.e34MbxSahmMa40LbNiMbxMbNaPe0?tab=table&plugin=0&pcode=t2020_50&language=en last accessed 7 May 2013.

is one of the highest in the EU-27, with one in four minors under the age of 16 living in households under the poverty line.³¹³ In 2012, according to official data, 21.1 % of the resident population in Spain was below the “at risk of poverty rate”, so according to official data, this rate decreased 0.7 % as compared with the 21.8 % recorded in 2011.³¹⁴ However, this is a striking piece of data that throws some doubts about the accuracy of official information, considering that the poverty rate has dramatically increased since 2009 and that, as mentioned before, unemployment has also increased.

Nonetheless, the total percentage of “at risk of poverty rate” of individuals without imputed income increased from 20.7 % in 2010 to 21.1 % in 2012 and of individuals with imputed income increased from 17.1 % in 2010 to 18.4 % in 2012.³¹⁵ In both cases the population under 16 years old is the one that is most at risk of poverty, up to 25.9 % in 2012 for those without imputed rent and 25.0 % for those with imputed rent.³¹⁶ In regard to the type of household, in 2011, 38.9 % of the persons living in houses comprising one adult with dependent children, 35.8 % unemployed persons and 49.2 % of persons from outside the EU, without imputed rent were at risk of poverty.³¹⁷

As stated by FOESSA and *Cáritas Española* the progressive impoverishment and growing economic insecurity in Spanish homes has reached levels that will be very difficult to reverse.³¹⁸ Different factors such as incomes decreases, unemployment rate reductions, the decision to upgrade pensions below the consumer price index, plus prices and tax revenue rises will eroded the purchasing power of middle and lower incomes.³¹⁹

³¹³ Joint Submission to the Committee on Economic, 2012, p. 7.

³¹⁴ *Instituto Nacional de Estadística*, ‘Living Conditions Survey (LCS)’ 2012, p. 2. The data provided in this report mismatch the one provided by Eurostat and is less detailed than the data provided by the Irish Central Statistics Office.

³¹⁵ According to *Cáritas Española*, 2013, p. 13, “without imputed rent” means households without labour incomes nor unemployment or social benefits.

³¹⁶ *Instituto Nacional de Estadística*, ‘Living Conditions Survey (LCS)’ 2012, p. 2-3.

³¹⁷ *Instituto Nacional de Estadística*, ‘Living Conditions Survey (LCS)’ 2012, p. 3-5. The household economic situation is different from one autonomous community to another, pp. 7-9.

³¹⁸ *Cáritas Española*, 2013, p. 1.

³¹⁹ *Cáritas Española*, 2013, p. 6.

6. The need to reinforce protection mechanisms in times of crisis

6.1 Accountability, democracy and social movements

From what it has been explained in the preceding sections, the way austerity is being implemented and austerity itself could be considered as contrary to the prohibition of non-retrogression. The procedure to assess accountability under the Optional Protocol is clear. The aim would now be to analyse the citizen response to austerity and the need to reinforce the existing protection mechanisms in Europe.

In the first place, austerity has highlighted the importance of, and the issues relating to accountability. The relation between representation and accountability is a core democratic value.³²⁰ In this sense, democratic elections are a way of assessing accountability, so when citizens are not satisfied with the political responses to their problems they will express their dissatisfaction through formal democratic elections and social mobilisations, which are another manifestation of democratic freedoms.

Since 2011, the countries most affected by economic recession in the EU have had a change in government. In Spain, the government called for elections four months earlier than scheduled, and in November 2011, the PSOE received its worst results since the democratic period began. The same year in Ireland, the Fianna Fáil party also lost the general elections and the Fine Gael entered into a government coalition with the Labour party. The same situation occurred in Portugal where the Socialist Party was defeated by the Social Democratic Party in June 2011, in Greece, when in June 2012 SYRIZA Party was defeated by New Democracy and in Italy, when in February 2013 the Italy Common Good led by the Democratic Party won the general elections.

Although it would be hasty to assert that there is causality between the implementation of austerity measures and the political changes mentioned, it is a fact that all governments that have applied them have been defeated through formal democratic

³²⁰ Olsen, 2013, p. 447 “representation and accountability are core democratic values and the idea that representative government requires accountability to the general public is an important part of the democratic creed.”

elections. What is more, in the case of Spain the former and current governments implemented austerity measures and they are both rapidly losing voting intention.³²¹

Nonetheless, what is more striking is that wherever left-wing parties have defeated right-wing parties or vice versa, there have been no significant changes in economic policies.³²² All the governments mentioned are implementing the same economic policy, following the “road map” laid out by the EC, the IMF and the ECB.³²³ However, the heads of the just mentioned institutions are not democratically elected and the policy decision making process carried out therein is not submitted to democratic control, so individuals cannot exert any influence on them.³²⁴ As explained by Carney, the current “crisis has exposed the need for democratic systems to ensure that citizens can influence macroeconomic governance”.³²⁵

In the second place, austerity has created a gap between individuals and institutions.³²⁶ In fact, since 2011, civil society³²⁷ has mobilized in Europe and in other Western countries against austerity. Although this movement can be rooted in the anti-globalisation movement it “officially” began on 15 May 2011, when around 25,000

³²¹ In May 2013, in Spain, voter intention for the former and current governments is decreasing, while it is increasing in favour of other political parties that have never reached the government, see *Centro de Investigaciones Sociológicas*, http://www.cis.es/cis/opencms/EN/11_barometros/Indicadores_PI/electorales.html and <http://www.electometro.es> last accessed 20 May 2013.

³²² O’Grady, 2012, pp. 20-21, explained how in the last thirteen years “many countries governed by social-democratic parties have implemented neoliberal policies”.

³²³ See Halimi, 2013, pp. 7-8.

³²⁴ George, 2010, p. 14.

³²⁵ Carney, 2012, p. 329.

³²⁶ For instance, in 2011 the *Centro de Estudios Sociológicos*, published a research study about the political culture of young between 15 to 29 years in Spain, the results saw that 40.6% mistrust politics, that the most valued institutions are NGOs, and when they were asked which were the most powerful institutions in the country, 31.7% believe that banks, 20.9% believe that the Government and only 0.9% believe that the Parliament.

³²⁷ The WB has defined civil society as “the wide array of non-governmental and not-for-profit organisations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.” Go to <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20101499~menuPK:244752~pagePK:220503~piPK:220476~theSitePK:228717,00.html>, last accessed 4 April 2013. For the reason that, the term civil society is very wide it may include groups that fight for human rights but also groups that are against them. In fact, as a consequence of the crisis, part of the civil society has evolved negatively and the rise of fascism is becoming a problem in some European countries. For instance, the Golden Dawn is rising up in Greece. About the positive and negative paths of civil society see Ishay, 2004, p. 345.

persons arrived to the *Puerta del Sol* in Madrid. Two days later 10,000 persons held a popular assembly and decided “we have no home; we will stay in the square”.³²⁸ After that, this movement rapidly spread to other cities and countries and become a global movement. For instance, in Ireland, occupy encampments “met a surprising degree of popular support”.³²⁹ Other examples are the so-called Occupy Wall Street Movement in the United States and the Global Protest carried on 15 October 2011 or the one carried out on 1 June 2013.³³⁰

What characterizes the mobilisations that have emerged since 2011 is that they do not make up a movement led by any trade unions or political parties. It is an independent movement, broad and inclusive, that incorporates neighbourhood associations, trade union activists, feminists, ecologists, NGOs, persons affected by forced evictions, the so-called *indignados* (indignants), precarious, unemployed and so on.³³¹ It is a movement composed of coordinated actors that are cooperating and collaborating from a bottom-up approach, using a human rights language and perhaps giving new meaning or reinventing the significance of economic and social human rights.³³² Moreover, they are demanding accountability from a human rights-approach.³³³

On the one hand, this movement demands the protection of public services against austerity measures and privatisations and for “more democracy”, highlighting that there is a democratic deficit, given that politicians are supporting the interests of the economic elite and not of the democratic majority.³³⁴ Torrija has demonstrated, through econometric analysis, that these claims are accurate and that in 2009 the policies implemented by different governments “maximize the happiness of the economic

³²⁸ Observatorio Metropolitano, 2011 (a), p. 61.

³²⁹ Cox, 2012, pp. 5-6.

³³⁰ The 15 October 2011 global protest that was held in more than 951 cities in 82 countries, among others: Spain, Italy, Portugal, Greece, Germany, United Kingdom, Ireland, Cyprus, Finland, Hungary, Slovenia, Chile, Canada and the United States, information available at <http://www.guardian.co.uk/world/occupy-movement>. Also see, Della Porta, 2012, pp. 274-277.

³³¹ Observatorio Metropolitano, 2011 (a), pp. 36-59.

³³² Ife, 2010, pp. 157-171, explained that how social and economic rights are defined will vary significantly according to context.

³³³ Sarelin, 2012, pp. 220-222, she explained how accountability, participation and empowerment have more transformative potential from a human rights-based approach.

³³⁴ Halimi, 2013, p. 1, maintained that democracy is submitted to the tyranny of the 1%.

elite”.³³⁵ On the other hand, Misir has stated that this movement is strengthening the project of a more social and democratic EU, encouraging europeanisation from below, empowering new and existing actors, building solidarity and raising issues, such as growing inequality, lack of transparency, accountability and proposing new alternatives.³³⁶

However, although democracy and social protest are two ways of assessing accountability, neither the changes of government nor the claims of social movements have had any significant impact on economic policies. Moreover, as mentioned in section 4.2, there has been no participation of the affected groups in the decision-making process for the implementation of austerity measures. This situation has created a gap between individuals, governments and institutions. For all these reasons, it is necessary to reinforce accountability and the right to substantive participation that “implies the right and opportunity of individuals to effectively and directly engage in the conduct of public affairs”,³³⁷ this right is embedded in the right to take part in public affairs protected under article 25 of the ICCPR and interpreted in General Comment No 25.³³⁸

6.2 Accountability and protection mechanisms

6.2.1 Equal legal status and protection

In conjunction with the forms of accountability mentioned, there are others ways to assess liability. Hence, the purpose of these final sections will be to determine if the existing legal mechanisms are adequate to assess accountability. This question is intrinsically related to the issues concerning justiciability and invisibility of human rights. Austerity in Europe has revealed a need to reinforce the existence protections

³³⁵ Torrija, 2013, p. 1, “politicians in OECD countries maximize the happiness of the economic elite. In 2009 centre-right parties maximized the happiness of the 100th-98th richest percentile and centre-left parties the 100th-95th richest percentile”.

³³⁶ Misir, 2011, pp. 8-9.

³³⁷ Riekkinen, 2013, p. 325.

³³⁸ General Comment No 25, 1996.

mechanisms and to overcome the dichotomy between economic and social rights and civil and political rights.³³⁹

Nowadays in Europe, economic and social rights have a lower level of protection than civil and political rights, because they are often not considered substantive and justiciable rights. The current situation shows once more that the EU focuses more on economic integration and growth, than on the protection of economic and social rights. However, the problem is not economic integration per se, but rather the adoption of a neoliberal economic model. In fact, the protection mechanisms seem relatively weak when confronted by retrogressive measures and economic liberalization.³⁴⁰

In the first place, there has been a traditional reluctance to use a language of rights in the context of economic and social rights.³⁴¹ Moreover, even though in certain provisions of the ESC, the Revised ESC, the EU Charter and some European constitutions they are proclaimed as rights, in practice they are considered guiding principles, and therefore, non-justiciable and non-substantive. For instance, under the Spanish Constitution, the right to health protection is declared using the term “right”, but it is considered a guiding principle.³⁴²

In the second place, the monitoring and protection mechanisms established for economic and social rights are of a different nature than those established for civil and political rights. For instance, while the acceptance of the quasi-judicial collective complaint procedure regulated under the CCP is optional, all Member States of the Council of Europe are under the jurisdiction of the ECtHR.

³³⁹ Has explained by Steiner, 2007, p. 264, breaches of economic and social rights tend to be more tolerated than breaches of civil and political rights.

³⁴⁰ See Búrca, 2005, p. 12, when assessing the relationship between the EU and the ESC he notes that “the relative weakness of the European social model, when confronted by the legal and political commitments to economic liberalisation at the EU level, has been cause for much debate and contestation.”

³⁴¹ See Fabre, 2005, pp. 19-20

³⁴² See Spanish Constitution, art. 43, inserted in Chapter 3 dedicated to the Principles Governing Economic and Social Policy.

The discussion surrounding justiciability of economic and social rights is not new.³⁴³ Traditionally those who have defended that these rights are not to be justiciable, have argued that they are progressive in nature, they are vague and imprecise so they cannot be subject to judicial determination, they simply cannot be considered real rights, they require economic intervention from the States and that the judicial enforcement of these rights will undermine the separation of powers because courts cannot be involved with decisions which are a government's competence.³⁴⁴

However, as maintained by Churchill and Khaliq, some of the mentioned arguments are an over-simplification, for the reason that some of these rights are sufficiently precise and that methodological problems can be overcome.³⁴⁵ Moreover, as O'Connell notes there are numerous arguments in favour of declaring economic and social rights justiciable and giving them constitutional status. First, it will prevent social benefits from being conferred on a discretionary basis. Second, economic and social rights will be given the fundamental respect they warrant. Third, countries with constitutional entrenchment of these rights and with solid powers of judicial review allocate more of their national wealth towards their implementation. Fourth, it will give real meaning to the indivisibility principle. Fifth, the argument against justiciability is grounded on an ideological bias.³⁴⁶ In fact, the same ideology that led to the crisis and that supports the implementation of austerity measures has biased the nature of economic and social rights.

Finally, against the assumption that judicial enforcement of social and economic rights might undermine the separation of powers, it can be argued that not only will it not have that effect, but rather will strengthen accountability against the executive and legislative powers. The division of powers does not mean that the decisions made by the executive power or the laws adopted by the legislative power should be left out of judicial control. Moreover, when other forms of accountability fail, access to justice is likely to be a last

³⁴³ See among others, Alemahu, 2007, pp. 60-100, Koch, 2009, 254-289, Coomans, 2009, pp. 310-312 and 200-201, Scheinin, 2001, pp. 29-54 and Fabre, 2005, pp. 21-23.

³⁴⁴ See, O'Connell, 2012, pp. 6-18.

³⁴⁵ Churchill and Khaliq, 2007, pp. 196-198.

³⁴⁶ See, O'Connell, 2012, pp. 6-18.

resort. In this sense, judges are and should be considered as a barrier between individuals and unfair or illegal acts or policies.

For instance, as explained in section 3.6, some of the provisions adopted to implement austerity have been declared unconstitutional or against human rights. Moreover, despite the fact that the governments of the five countries most affected by austerity were defeated when civil society rose up seeking for economic and social rights, austerity policy has continued. It is also significant that since 2009, the collective complaint mechanism established in the CCP is being increasingly used, while the number of individual recommendations has dropped nearly to zero.³⁴⁷ These situations point to a need to reinforce the existing protection mechanisms. As referred to by Alemahu, the lack of adequate mechanisms might leave potentially justiciable claims outside of adjudicatory organs and procedures.³⁴⁸

6.2.2 The Council of Europe

As explained in the first chapter, when the Council of Europe was created, due to the political context, civil and political rights were declared in the ECHR and economic and social rights were declared in the ESC and the Revised ESC.

For Churchill and Khaliq, the ESC is the counterpart of the ECHR.³⁴⁹ In addition, Brillat has maintained that the ESC has become one of the most important treaties of the Council of Europe and reinforces the general acceptance of the indivisibility and interdependence of human rights.³⁵⁰ In the same vein, Bonet has indicated that the ESC is an instrument for economic and social progress and a significant advance for the protection of social and economic rights.³⁵¹ However, he has also maintained that there

³⁴⁷ From 1998 to 2008, 54 complaints and states procedures were registered, from 2009 to 2013, there were 46, so the ECSR has received in the last four years almost the same number of complaints that it received in ten years. The list of complaints updated to 22 May 2013 can be consulted at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.pdf last accessed 24 May 2013. About the individual recommendation see European Trade Union Confederation, 2011, p. 3.

³⁴⁸ Alemahu, 2011, p.62-63.

³⁴⁹ Churchill and Khalid, 2007, p. 194.

³⁵⁰ Brillat, 2005, p. 31.

³⁵¹ Bonet, 2009, p. 689-690.

is no “symmetric parallelism” between the ECHR and the ESC.³⁵² For Búrca the ESC has always had a significantly lower profile than the ECHR.³⁵³

As a matter of fact, on the one hand, all the State Members of the Council of Europe have ratified the ECHR; they are bound by all the provisions contained in it and they have accepted the jurisdiction of the ECtHR.³⁵⁴ Moreover, they cannot make reservations that are contrary to the object and purpose of the Convention.³⁵⁵ The ECtHR can receive inter-state complains and applications from any person, NGOs or groups of individuals, which claim to be victims of a violation of any of the rights declared in the ECHR.³⁵⁶ What is more, the judgments of the ECtHR are binding on the parties and enforceable in the domestic jurisdictions.³⁵⁷ Therefore, the rights declared under the ECHR are justiciable and enforceable before a court.³⁵⁸

On the other hand, in contrast, not all Member States of the Council of Europe have ratified the ESC or the Revised ESC. At the time of this writing, two Member States have signed and ten have ratified the ESC, and forty-five have signed and only thirty-three have ratified the Revised ESC.³⁵⁹ Furthermore, when a state ratifies the ESC or the Revised ESC it may decide which provisions to undertake.³⁶⁰

³⁵² Bonet, 2009, p. 692.

³⁵³ Búrca, 2005, p. 11.

³⁵⁴ ECHR, arts. 19 and 32.

³⁵⁵ ECHR, art. 57 reservations can be made when a particular provision of the ECHR is not in conformity with a domestic law in force. However, the ECtHR affirmed in the *Belilos vs. Switzerland* case that reservations that are invalid if it can be considered contrary to the ECHR see Carrillo, 2009, p. 642-644.

³⁵⁶ ECHR, arts. 34 and 33.

³⁵⁷ ECHR, art. 46.

³⁵⁸ Violations of economic and social rights cannot be alleged independently before the ECtHR. Nevertheless, the inter-relation between both categories of rights and a teleological and progressive interpretation of the ECHR has allowed the Court to pronounce judgements on economic and social rights. See Carrillo, 2009, pp. 668-675, Cascajo, 2012, p. 41 and Koch, 2009, pp. 9, 10-11 and 60- 253, the ECtHR has protected “aspects of the right to health, housing, education, social cash benefits and certain work-related issues”.

³⁵⁹ Information on the ratifications updated to March 2013 is available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatificationsMarch2013_en.pdf last accessed 22 May 2013.

³⁶⁰ ESC, Part I and art. 20 and Revised ESC, Part I and art. A. States have to accept at least five out of the seven core provisions, ten out of the nineteen regular provisions or forty five out of seventy two paragraphs establish in Part II and to accept to pursue the conditions for the effective realisation of the rights and principles established in part I. However, as explained by Bonet, 2009, pp. 696-698, the ESC is a dynamic and flexible legal instrument, that allows states to choose “*à la carte* those statutory provisions

The provisions declared in the ESC and the Revised ESC, are monitored by the ECSR through a periodical report and a collective complaint procedure.³⁶¹ It has been maintained that that the ECSR acts as a judicial body.³⁶² It has also been sustained that the collective complaints procedure is a quasi-judicial procedure that illustrates how social and economic rights could be justiciable and how a ‘violations approach’ could be adopted.³⁶³ However, none of the mechanisms mentioned is considered to be very efficient.³⁶⁴

One of the biggest weaknesses of the collective complaint procedure is that it is optional. By June 2013, only fifteen Member States have decided to be bound by it.³⁶⁵ Another major constraint is that the number of organisations that can submit a complaint is very limited. For these reasons, international and national NGOs, social movements and other groups of individuals are left out of the process. For instance, only Finland has granted NGOs the right to submit complaints.³⁶⁶ Moreover, if individuals are entitled to the rights declared in the ESC they should have the legitimacy to access the monitoring procedure.

they accept”, a technique that can be an obstacle for the “legal homogenisation and harmonisation that the creation of a common legal space entails.” Also see, de Schutter, 2010, p. 16.

³⁶¹ ESR arts. 21 and 22, Revised ESR arts. C and D. and CCP, arts. 5 to 8. The ECSR is referred in the CCP as the Committee of Independent Experts. About the monitoring mechanisms of the ESC and the Revised ESC see de Schutter, 2010, pp. 15-26 and Alston, 2005, pp. 46-67. The latest maintain that civil society and NGOs should be given a stake or a more direct role in the reporting procedure and in the ECSR.

³⁶² Brillat, 2005, p. 34- 37 and Akandji-Kombé, 2005, p. 89.

³⁶³ See de Schutter, 2010, pp. 25-26.

³⁶⁴ Bonet, 2009, p. 720, noted that the reporting mechanism is relatively efficient for the reason that “the lack of positive response of a State to the recommendations of the Committee of Ministers does not have an effect”. In the same vein see Alston, 2005, p. 67 and European Trade Union Confederation, 2011, p. 3-6, analyses the efficiency of the ESC and its monitoring mechanisms and proposes some initiatives in order to improve it.

³⁶⁵ A list of the States that have ratified the CCP so far, is available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignaturesRatificationsMarch2013_en.pdf last accessed 22 May 2013.

³⁶⁶ CCP, arts. 1, 2 and 3. Only the organisation listed in these articles can submit complaints, furthermore only International NGOs (hereinafter INGOs) that hold participatory status before the Council of Europe and are registered during a four renewable period of years are able to do so. See, Alston, 2005, p. 66 and Churchill and Khaliq, 2007, pp. 201-207, noted that if the aim was to exclude “badly prepared or propagandistic complaints” they should have done it through admissibility criterias. The list of organisations can be consulted at http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp last accessed 23 May 2013.

Moreover, the term “violation” is not included in the CCP, but rather, the expression “unsatisfactory application”.³⁶⁷ So, when the applicants submit a complaint they have to allege an “unsatisfactory application” of the ESC or the Revised ESR. If the ECSR decided that there has been an unsatisfactory application it will file a report to the Committee of Ministers and a recommendation will be addressed to the party concerned.³⁶⁸ Since 2011, before or after the decision on the merits, the CESR is able to suggest to the parties that they adopt any immediate measure if there is a risk serious irreparable injury.³⁶⁹ Finally, if the State concerned does not indicate its intention to act in conformity with the decision, the Committee of Ministers will issue a recommendation. The recommendation has to be respected by the state but it is not legally binding, is not enforceable in the domestic jurisdiction and there is no sanction against disobedient states. Moreover, the Committee of Ministers is a political and not a judicial body. The impact of this procedure is, therefore, quite low.³⁷⁰

Consequently, the scope of protection of the ESC and the Revised ECS and the CCP is still limited compared to one provided by the ECHR. In the first place, the States Members can decide whether or not to sign or ratify the charters and the CCP and are not bound by the results of the procedure. In the second place, they have a broad margin to choose which provisions undertake. Lastly, they can decide whether national NGOs are able or not to lodge complaints against them. For instance, by the time of drafting, Ireland has ratified the ESC, the Revised ESC, accepting 92 of the 98 paragraphs of the later, and the CCP and has not enabled national NGOs to submit collective complaints.³⁷¹ Spain has ratified the ESC, accepting all the 72 paragraphs, but it has not ratified the Revised ESC and it has not signed or ratified the CCP.³⁷²

³⁶⁷ CCP, art. 4.

³⁶⁸ CCP, art. 7, 8 y 9.

³⁶⁹ Rules of the ECSR, rule 36.

³⁷⁰ Churchill and Khaliq, 2007, pp. 220 and 237-240. In p. 238, they explained that the Committee of Ministers has addressed a recommendation to the defendant state only once. Furthermore, in many cases it has decided “either not to pursue the matter further or it has adopted an interpretation of the Charter quite different from that of the ECSR.”

³⁷¹ See ‘Ireland and the European Social Charter’, 2012, p. 1.

³⁷² See ‘Spain and the European Social Charter’, 2012, p. 1. Torres, 2011, p. 47, explains that Spain has not ratified the mentioned legal instruments for the reason that the notion of social Europe has not ended

6.2.3 The European Union

As explained in the introduction, in recent years there have been three advances in the protection of human rights within the EU, namely the adoption of the EU Charter, the decision to grant it full treaty status,³⁷³ and the agreement on the accession of the EU to the ECHR.³⁷⁴ The Member States of the EU have, nevertheless, made it very clear that neither the provisions of the EU Charter nor the accession to the ECHR will extend, change or affect the competences, characteristics or the powers of the EU and its institutions. Moreover, an accession to the ESC has not been adopted.

Pérez de Nanclares has maintained that the adoption of the EU Charter and the accession of the EU to the ECHR can be regarded as achieving an adequate level of protection for human rights.³⁷⁵ In regard to economic and social rights there are, however, still some steps that should be taken. In the first place, even though the EU would finally access the ECHR, this Convention does not declare economic and social rights and the EU has always been reluctant to access the ESC or the Revised ESC. In the second place, in the EU Charter economic and social rights are not given equal legal status as to civil and political rights.

With respect to the first issue, the discussions on the accession of the EU to the ECHR and the ESC or the Revised ESC have gone on for quite a long time. Finally, the EU has decided not to agree to the accession to the ESC. This matter was foreshadowed for the first time in 1983. Twenty years later, the EU – the Community at that moment – was formally invited to access not only the ECHR but also the ESC.³⁷⁶ However, the EU has always refused to access the ESC. Actually, instead of doing so, the option was to adopt the Community Charter of fundamental Social Rights of Workers (hereinafter

yet materialized in Spain. Terol and Jimena, 2011, p. 16, maintain that although the ESCR decisions are not applicable in Spain, Spanish judges could use them as an interpretative guide.

³⁷³ TEU, art. 6.

³⁷⁴ TEU, art. 6, 2 and 3, and Protocol No 8 relating the accession of the EU to the ECHR.

³⁷⁵ Pérez de Nanclares, 2009, p. 800.

³⁷⁶ De Shutter, 2005, pp. 117- 120, explains the discussions on the accession of the EU to the ESC.

Community Charter)³⁷⁷ and to consider the ESC as an inspiring instrument for EU social policies.

Indeed, the ESC and the Community Charter have inspired many provisions of the EU Charter. Nevertheless, the latter does not replicate all the provisions of the ESC, in the same manner that it does with the provisions declared in the ECHR and its protocols. Furthermore, whereas under article 52.3 of the EU Charter can be inferred that those of its provisions that correspond to the ECHR should be interpreted according to the decisions of the ECtHR, there is no similar instruction with regard to the decisions of the ECSR.³⁷⁸

Regarding the second matter, the EU Charter has served to give legally binding force to some of the economic and social provisions declared in the ESC and the Community Charter. However, the problem now will be to determine which of them are rights and which principles.

De Schutter has suggested that the EU Charter recognize the constitutional status of economic and social rights.³⁷⁹ Meanwhile, Piris has noted the difficulties in identifying which of the approximately fifty rights, freedoms and principles are indeed, rights, freedoms or principles.³⁸⁰ The EU Charter uses the term “rights” in the majority of its articles. However, a number of member States of the EU do not support that social and economic are substantive rights. In fact, they do not defend that they should be given the same status as civil and political rights.

³⁷⁷ The Community Charter is not legally binding, is a mere declaration that proclaims principles that should be followed by the Member States. In order to implement the Community Charter the EC adopted the Social Action Programme, which is also only of declaratory character. After that, during the 1990s several directives relating working rights were adopted. The Community Charter was not incorporated to the first versions of the TEU or the TFEU. However, it was an interpretative guide for the European Court of Justice in cases concerned with social and labour rights and it has inspired the EU Charter. All these information is available at <http://www.eurofound.europa.eu> last accessed 27 May 2013.

³⁷⁸ European Trade Union Confederation, 2011, p. 4 and de Schutter, 2005, p. 120, the latest maintained that the discussions that preceded the adoption of the EU Charter “illustrated the tendency to relegate the ESC to the category of instruments destined to remain outside the legal order of the Union itself”. Moreover, the EU Charter established that their provisions should be read in accordance with the jurisprudence of the ECtHR, but it does not establish the same in regard to the decisions of the ECSR.

³⁷⁹ De Schutter, 2005, p. 129-130.

³⁸⁰ Piris, 2010, p. 149.

For instance, the United Kingdom criticised the EU Charter for two reasons. First, because it contains obligations on social matters that could have negative effects on the economy or that could be impossible to properly implement.³⁸¹ Second, because “listing ‘principles’ alongside real subjective ‘rights’ would mislead individuals into believing that ‘principles’ gave them true ‘rights’”.³⁸² Moreover, other states like France, Spain or Portugal, defend the idea of including principles.³⁸³ These positions are reflected in the EU Charter provisions. For example, article 51 when determining the scope of the provision, establishes that the states shall “respect the rights and observe the principles”, and articles 52 and 53 make a distinction between rights and freedoms laid down in the EU Charter.

In order to solve the first problem, de Schutter and Torres have proposed that the EU should access the Revised ESC. Torres has also maintained that this accession would reinforce solidarity and the construction of a social Europe, which is an urgent need in times of crisis.³⁸⁴ As regards the second problem, it will be a task of the Court of Justice to indicate whether social and economic rights declared in the EU Charter are mere principles or substantive rights.³⁸⁵

6.2.4 National Level: Spain and Ireland

As explained by Nolan, in Ireland only the right to education is explicitly included as a socio-economic right. The other socio-economic rights were inserted under article 45 into an “unenforceable” part of the constitution as principles of the State.³⁸⁶

O’Connell has maintained that, due to the fact that economic and social rights are non-cognisable by the courts and that article 45 is little more than a “rhetorical flourish”, claims for these rights have been pursued by other paths, such as, the doctrine of

³⁸¹ Piris, 2010, p. 150.

³⁸² Piris, 2010, p. 153.

³⁸³ Piris, 2010, pp. 153-154.

³⁸⁴ De Schutter, 2005, p. 131, the accession of the EU to the ECHR without any gesture in the direction to access the Revised ESC could be interpreted as a “divorce” of the two main and complementary treaties of the Council of Europe. Also see Torres, 2011, p. 47.

³⁸⁵ TFEU, art. 267.

³⁸⁶ Nolan, 2008, p. 295-296 and Fabre, 2005, p. 22.

unenumerated rights, an amendment to the Constitution and the guarantee of equality proclaimed under article 40.1.³⁸⁷

Firstly, the doctrine of unenumerated personal rights is based on the natural law paradigm or *iusnaturalismo*, and according to it there are rights not specifically declared in the Constitution but which nonetheless could be protected under it. However, this doctrine has been rejected by the Supreme Court.³⁸⁸ Secondly, the amendment to the Constitution has also been rejected, on the basis that economic and social rights are political matters to be discussed by the elected representatives and not by a court, so their recognition and entrenchment would interfere with the separation of powers.³⁸⁹ Thirdly, the Irish courts have always held that the equality guarantee is a limited provision, thus, the use of this provision to enforce economic and social rights is very improbable in the near future.³⁹⁰ Despite these rejections, O’Connell has stated that, although in the foreseeable future there appears to be “little likelihood of socio-economic rights being further recognised and enforced at a constitutional level in Ireland”, the debate on justiciability has not yet been foreclosed.³⁹¹

Since 2008, the Irish Constitution has been amended three times, none of them with the purpose of reinforcing the protection of economic and social rights. In 15 October 2009, the twenty-eighth amendment allowed the State to ratify the Treaty of Lisbon. In 27 June 2012, the thirtieth amendment of the Constitution allowed the State to ratify the Treaty on Stability.

As explained by Alzaga, Balaguer and Pérez,³⁹² inspired by article 45 of the Irish Constitution, the Spanish Constitution also provides *principios rectores de la política social y económica* (principles governing economic and social policy) instead of justiciable economic and social rights. As in Ireland, in Spain only education is proclaimed as a substantive right. Therefore, economic and social rights such as the

³⁸⁷ O’Connell, 2012, p. 142, also Murphy, 1998, p. 163-165 and O’Connell Rory, 2008, p. 345.

³⁸⁸ O’Connell, 2012, pp. 142-144 and 146-147.

³⁸⁹ O’Connell, 2012, pp. 145-146.

³⁹⁰ O’Connell, 2012, pp. 147-148.

³⁹¹ O’Connell, 2012, p. 166-167.

³⁹² Alzaga, 2012, p. 192-195. Also see, Balaguer, 2012, pp. 301-326 and Pérez, 2010, p. 444.

right to health, the right to housing and the right to social security cannot be directly and independently invoked before the Courts, furthermore they have been expressly excluded from constitutional control.

As explained by Fabre,³⁹³ under article 53.2 of the Spanish constitution only “breaches of the rights to equal treatment before the law, civil and political rights, as well as the right to education” are enforceable before the Constitutional Court. By contrast, article 53.3 provides that although the “recognition, respect and protection of the principles governing economic and social policy, should guide legislation, judicial practice and actions by public authorities”, these principles can only be “invoked before the ordinary courts in accordance with the legal provisions implementing them”.³⁹⁴

However, discussions around the enforceability and justiciability of economic and social rights and the interpretation that should be given to article 53 have revived due to the crisis and the effects of the austerity policies.

On the one hand, Terol has explained that social rights are not subjective rights for the reason that they cannot be enforceable as such.³⁹⁵ As assessed by Tenorio, the Constitutional Court has held on several occasions that social rights as guiding principles are mandatory for the public authorities, for example when they elaborate the General State Budget, but they should not be considered justiciable and enforceable before a court.³⁹⁶ For the author, such an acknowledgment would undermine the separation of powers, for the reason that the judicial power would have the capability to

³⁹³ Fabre, 2005, p. 22.

³⁹⁴ See Giménez, 2012, p. 302 and Tenorio, 2012, p. 261. As explained by the latter, the Spanish Constitution makes a distinction between fundamental rights, constitutional rights and principles. Fundamental rights are regulated under articles 14 to 29, which are civil and political rights plus the right to education, protected through the procedure regulated under art. 53. 2 and art. 8. Constitutional rights are regulated under arts. 30 to 38, which are a mix of civil, political, economic and social provisions, protected through the procedure regulated under art. 53.1. Governing principles are regulated under arts. 39 to 52, which are basically economic and social rights, protected through the procedure regulated under art. 53.3.

³⁹⁵ Terol, 2012, p. 56.

³⁹⁶ Giménez, 2012, pp. 304-305 and p. 308. Also see Terol and Jimena, 2011, p. 14-16.

interfere in areas, such as the allocation of public expenditure, which should be an exclusive prerogative of the executive and legislative powers.³⁹⁷

On the other hand, even if social rights are considered binding guiding principles, this does not solve the problem of how to assess accountability when the public authorities do not comply with the obligation to respect, protect or fulfil economic and social rights. In this sense, there are other authors that argue for the justiciability of social rights. Cascajo has maintained that a different and flexible interpretation of article 53.3 is needed, one that would grant civil and political rights and economic and social rights equal constitutional status and protection.³⁹⁸ In the same vein, Marquet has suggested that there is nothing that should prevent the justiciability of rights such as the right to health, right to housing or right to social security.³⁹⁹ Aparicio proposes that it is necessary to reinterpret article 53.3 in accordance to the principles of indivisibility and interdependency of human rights, so that the rights mentioned could be considered fundamental rights.⁴⁰⁰ Finally, Linares notes that under article 10.2 of the Constitution, rights declared in the ICESCR could be directly invoked before the courts.⁴⁰¹

Following the example of Germany and other European countries the Spanish Constitution has been amended, but not to reinforce the protection of social rights. In September 2011 article 135 was fundamentally amended to implement the budgetary discipline directives and the principle of budgetary stability that are declared in article 126 of the TFEU and the EU Treaty on Stability. After this amendment, the government approved the Organic Law 2/2012, according to which any law, disposition or act of any autonomous community that infringes, among other principles, the deficit ceiling and the public debt ceiling, will be under constitutional control.⁴⁰²

³⁹⁷ Tenorio, 2012, pp. 266-275.

³⁹⁸ Cascajo, 2012, pp. 36-44.

³⁹⁹ Marquet, 2011, p. 72.

⁴⁰⁰ Aparicio, 2009, pp. 51-59.

⁴⁰¹ Interviewee Celia Fernández.

⁴⁰² Jiménez and Moret, 2012, pp. 1-5. See Organic Law 2/2012, third additional provision.

7. Conclusions

As mentioned in the introduction, economic and social rights are at the core of the welfare state. For this reason, any negative impact on these rights will irremediably have a negative impact on the latter. In this regard, austerity is a deliberate political and ideological choice that is having an unprecedented, sustained, unreasonable and disproportionate impact on the enjoyment of acquired economic and social rights in some European countries, such as Ireland and Spain. During the last two years the effects of this impact have started to arise. However, it will still take some time to measure the effects that this process will bring in the years to come, because this is an ongoing process.

Economic and social rights have always been at the mercy of an ideological debate that has biased their status, their normative structure and the way they have been regulated and protected. This ideological bias has influenced how these rights are being protected and affected by the crisis in Europe.

The ideological debates about the status of economic and social rights and the role of the state on this matter can be rooted in history, and they have not been overcome, there has only been a change of scenario. These debates were firstly held between a liberal bourgeoisie and a socialist working class, secondly, between the capitalist west and the socialist east, and after that, between the supporters of neoliberalism and the supporters of sustainable globalisation.

Traditionally, the supporters of market fundamentalisms and the neoliberal doctrine have argued for the prevalence of a liberal notion of rights, associated with negative freedoms and non-intervention of the state, arguing that civil and political rights were of immediate implementation, justiciable and cost-free, while economic and social rights were non-justiciable and of progressive implementation because they require positive intervention from the State. They have also defended the reduction of the role of the state, deregulation, privatisation and free market globalisation. In this context, after the fall of the Berlin Wall, globalisation spread neoliberalism and States were considered no longer capable or welcome to interfere in the economic sphere. Since then, the pre-

eminence of neoliberalism has gradually broken the balance between the market and social well-being. This process has culminated in the current crisis which has shown that free market has failed to provide well-being and that it is necessary to restore the mentioned balance.

Nevertheless, globalisation has also been important for the universalisation of human rights and States have not lost all their authority due to this process. For instance, in the first place, at the international level the idea that human rights are indivisible and interdependent has gained strength. Thus human rights are considered the basis for a sustainable globalisation and they are an important tool for counteracting the negative effects of the market. In the second place, in this context, states can exercise their sovereignty to decide whether they want to implement neoliberalism or to promote a more sustainable economy that places the individual and human rights at the centre of the decision making processes. As a matter of fact, States exercise their sovereignty when they make agreements with the EC, ECB and the IMF, and also when they ratify international treaties such as the ICESCR.

Therefore, in order to restore the mentioned balance between market and well-being, states could and should exercise their sovereignty to counteract neoliberalism. Thus, persons and human rights should be placed at the centre of any decision making process in order to advance social justice and overcome the ideological bias over economic and social rights.

However, unfortunately in the current crisis neither human rights nor individuals have been placed at the centre of the decision making processes. Furthermore, austerity measures are having a retrogressive effect on the enjoyment of economic and social rights declared in the ICESCR, for the reason that they are dismantling the welfare state and lowering the levels of allowances. In this context, the Committee has highlighted that it is an obligation of the State-parties to the ICESCR to respect, protect and fulfil their obligations also in times of economic recession and it has manifested concern over the impact of austerity.

The Committee has stated that in spite of the margin of appreciation that states have to set national policies, all decisions made within the present crisis should follow four requirements, which are temporality, necessity and proportionality, non-discrimination and protection of minimum core content. These requirements are very much related with the elements of the non-retrogression prohibition. According to this prohibition states should avoid any decision that implies a step back in the level of protection of economic and social rights. Any measure adopted in this sense should be considered presumptively invalid and the burden of proving compliance with the ICESCR will fall on the State.

Moreover, according to the Committee General Comments, any retrogressive measure should be considered prohibited when one or several of the following requirements applies: deliberate choice, careless and non-comprehensive consideration of all alternatives or unreasonable justification in the context of the full use of the maximum available resources, non-participation of affected groups, direct or indirect discrimination, sustained impact on the realisation of an economic or social right, unreasonable impact on the enjoyment of an acquired economic or social right, deprivation of a minimum essential level of the enjoyment of a social rights and inexistence of an independent review of the measure at the national level.

In Europe, since late 2009 and the early 2010, Member States, the EC, the ECB and the IMF, in order to control the government deficit have prioritized spending cuts over other options. Furthermore, austerity has been presented as an irremediable alternative to overcome the crisis. In the particular cases of Ireland and Spain austerity has been presented and implemented through subsequent austerity programmes, domestic laws and state budgets. Similar measures have been adopted in Greece and Portugal. For this reason, the assertions or critiques that have been made about austerity in each of these countries could be applied to the others.

As has been highlighted by the Committee, the Special Rapporteur on extreme poverty, different trade unions and several national and international non-governmental organisations, austerity is having a negative impact on the enjoyment of economic and

social rights and there is a strong presumption that austerity measures can be considered retrogressive measures.

In the first place, as mentioned above, for three years austerity has been presented as a necessity and it has been prioritized over other choices and alternatives. In fact, several alternatives to austerity that could increase the amount of available resources were proposed, and there are serious doubts that there is a reasonable justification for the implementation of austerity measures. The mantra that has been repeated over and over is that austerity was a necessary evil because “we have been living beyond our needs” and it was a priority to bring the deficit below 3 % of the GDP. But on the contrary, austerity is a deliberate ideological choice that is strengthening neoliberal economy and weakening the welfare state.

In the second place, austerity measures have been adopted without the participation of the affected groups and no human rights-based approach to the economic reform has been implemented so far. In fact, none of the mentioned programmes analyses the structural causes of the crisis or the effects that austerity is having and will have on the enjoyment of economic and social rights. None of them clarify how the level of well-being and enjoyment of economic and social rights would be re-established in the future and the more severe cuts are not of temporal character. Thus, austerity measures have been adopted without taking into account procedural or substantive human rights principles such as transparency, accountability, non-discrimination and primacy of human rights.

In the third place, different austerity measures implemented in Greece, Portugal and Spain were declared contrary to economic and social rights or unconstitutional. The Special Rapporteur on extreme poverty declared that the Irish government should re-evaluate the budgetary adjustments. Two reports published by the EESC evidenced that austerity is not creating economic growth either in Spain or Ireland. The Platform of European Social NGOs criticized that the welfare state is being weakened.

Finally, several relevant organisations and trade unions, the Committee and the Special Rapporteur on extreme poverty, have emphasised that austerity is having a sustained

negative impact on the enjoyment of acquired economic and social rights. Thus, the levels of enjoyment of rights such as an adequate standard of living, education, health and social security have been reduced as a result of austerity. Poverty is growing in Spain and Ireland. In Spain the right to health of illegal immigrants has been curtailed, cuts in social protection have curtailed assistance and allowances for dependent persons and tuitions fees are jeopardizing access to university. In Ireland cuts in the social protection budget have undermined access to assistance to vulnerable groups.

Furthermore, due to austerity, inequality is growing between regions and individuals. For instance, firstly, in the Spanish Autonomous Communities disparities in the quality, accessibility and availability of public social services and goods are increasing. The same phenomenon is occurring between European countries. Secondly, the gap between rich and poor is widening. What is more, austerity is disproportionately affecting vulnerable groups. Moreover, these groups are also being affected by severe funding cuts to human rights institutions and NGOs that provide them protection and assistance. This growing inequality and the disproportionate impact that austerity is having on vulnerable groups can be considered a breach of the non-discrimination prohibition.

Therefore, while austerity is affecting several economic and social rights, it is at the same time undermining the equalising and levelling role of public spending, in a context of high unemployment, numerous forced evictions, rises in indirect and direct taxes, cuts in welfare payments, a decline in the real value of pensions, wage reductions, elimination of allowances, privatisation of public services and so on. What is more, this entire process has taken place in no more than a three year period. So in this context, austerity is contributing to an accelerating dismantling of the welfare state.

The impact that austerity is having on the life of ordinary people has generated a significant social mobilization. In fact, all the political parties who were in power in Ireland, Spain, Greece, Portugal and Italy have been defeated in general elections. Meanwhile new social movements, which are another form of democratic and political participation, have arisen demanding the maintenance of their rights and the social state. The democratic results mentioned and the social protest put forward the existence of a

growing gap between individuals and institutions and the need to assess accountability. However, neither the changes of government mentioned nor the social claims have had any significant impact on economic policies. This situation combined with a relatively weak legal protection of economic and social rights in Europe suggest that there is a need to reinforce protection mechanisms in order to assess accountability and protect the welfare state.

Firstly, it is necessary to reinforce the right to substantive participation. The results of democratic elections and social claims should have an impact on the decision-making processes. Individuals, through democratic processes, should have the chance to influence the decisions made by the IMF, EC or the ECB. Therefore, in order to assess accountability it is important to reinforce democracy and to reinforce the participation of individuals on public affairs.

Secondly, economic and social rights should have equal status and hence equal level of protection than civil and political rights. Since the beginning of the crisis, at the EU level, the EU Charter has been given legally binding force and it has been established that the EU will access the ECHR. However, to reinforce the protection of economic and social rights other measures are also desirable, for instance, the accession of the EU to the ESC and the Revised ESC and the declaration that economic and social rights proclaimed in the EU Charter are justiciable and substantive rights. At the level of the Council of Europe, Ireland should allow national NGOs to lodge complaints under the CCP and Spain should ratify the Revised ESC and the CCP. Moreover, following the example of the Optional Protocol, the CCP should include a system of individual complaints. At the national level, in Ireland and Spain it would be desirable that economic and social rights were declared justiciable rights.

It is clear that strengthening the protection of economic and social rights would not solve the economic crisis. However, in the first place, it would be a step towards the progressive full realisation of economic and social rights and the effective enforcement of the indivisibility principle. Second, if these rights are only declared as principles, it can easily be argued that the obligation to respect, protect and fulfil them is a mere

promise or an act of charity but not a legal obligation or the fulfilment of a right. Third, it would also be an important step to fill the gap between the current social claims and the law. Four, it could represent a shift in the current policies towards a social Europe, owing to the fact that laws are the echo of a political will and the reflection of social demand.

In conclusion, austerity is having a severe retrogressive impact on economic and social rights and so also on the core of the European identity which is the welfare state. For this reason it is urgent and necessary to reinforce the protection mechanisms.

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1948 Universal Declaration of Human Rights

1966 International Covenant on Economic, Social and Cultural Rights

2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

1966 International Covenant on Civil and Political Rights

1990 Convention on the Rights of the Child

Regional Legal Instruments

Europe

1949 Statute of the Council of Europe

1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14

1961 European Social Charter

1988 Additional Protocol to the European Social Charter

1991 Protocol Amending the European Social Charter

1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints

Rules of the European Committee of Social Rights, adopted during the 201st session on 29 March 2004 and revised during the 207th session on 12 May 2005, during the 234th session on 20 February 2009 and during the 250th session on 10 May 2011

1996 Revised European Social Charter

European Union

1989 Community Charter of fundamental Social Rights of Workers

2000 Charter of Fundamental Rights of the European Union

2007 Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

2010 Consolidated Version of the Treaty on the European Union

2010 Consolidated Version of the Treaty on the Functioning of the European Union

2010 Protocol (No 8) Relating to article 6(2) of the Treaty on the European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

2010 Protocol (No 12) On the Excessive Deficit Procedure

2012 Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union

Domestic Legal Instruments

1937 Constitution of Ireland

1978 *Constitución Española* (Constitution of Spain)

Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia (Law 39/2006, of December 14, on the Promotion of Personal Autonomy and Care for Dependent Persons)

Ley 27/2011, de 1 de agosto, sobre actualización, adecuación y modernización del sistema de Seguridad Social (Law 27/2011, of August 1, on updating, adaptation and modernisation of the Social security system)

Real Decreto-ley 20/2011, de 30 de diciembre, de medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público (Royal Decree-Law 20/2011, of December 30, on urgent tax and financial budgetary measures to redress the public déficit)

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Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera (Organic Law, 2/2012, of April 27, on Budgetary Stability and Financial Sustainability)

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Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones (Royal Decree-Law No. 16/2012 of April 20, on urgent measures to guarantee the sustainability of the national health system and improve the quality and safety of its services)

Real Decreto-ley 20/2012, de 13 de julio, de medidas para garantizar la estabilidad presupuestaria y de fomento de la competitividad (Royal Decree-Law No. 20/2012, of 13 July, on measures aimed at assuring budgetary stability and promoting competitiveness)

Ley 4/2013, de 4 de junio, de medidas de flexibilización y fomento del mercado del alquiler de viviendas (Law 4/2013, of June 4, on measures aiming to the flexibilisation and promotion of the rental housing market)

Proclamations and Declarations

1968 Proclamation of Teheran

1993 Vienna Declaration and Programme of Action

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European Committee of Social Rights

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Complaint No. 79/2012, Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece, 7 December 2012

Complaint No. 78/2012, Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v. Greece, 7 December 2012

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

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