

The protection of social rights in Australia and Canada: national and international enforcement*

La protección de los derechos sociales en Australia y Canadá: aplicación nacional e internacional

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SUMMARY. I. Introduction. II. Brief analysis of the possible domestic implementations of an international covenant. III. International obligations and national fulfilments. IV. National courts and social rights enforcement. V. Conclusions.

ABSTRACT: This study examines the protection of social rights in Australia and Canada. Starting from the assumption that both States do not consider social rights as fundamental rights (but rather as policies), a problem arise regarding their effective enforcement. This topic is specifically relevant as we consider the international obligation that both Australia and Canada assumed when they subscribed treaties such as the International Covenant on Economic Social and Cultural Rights.

RESUMEN: El presente artículo examina la protección de los derechos sociales en Australia y Canadá. Tomando en cuenta el hecho que ambos los Estados no consideran los derechos sociales como derechos fundamentales (sino, mas bien, como políticas), se pone el problema de su efectiva aplicación. Este tema resulta de peculiar interés en cuanto se consideren las obligaciones internacionales que tanto Australia como Canadá asumieron cuando adhirieron a tratados como el Convenio Internacional sobre Derechos Económicos, Sociales y Culturales.

KEYWORDS: *social rights, ICESCR, international obligations, Australia, Canada.*

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PALABRAS CLAVE: *derechos sociales, Convenio DESC, obligaciones internacionales, Australia, Canadá.*

I. INTRODUCTION

Social rights represent a problematic category within the world of rights. Many are the challenges connected to their guarantee: from the interpretative point of view, for example, there is a huge interest on the criteria that can be used to implement them, such as right's minimum core and proportionality (Bernal-Pulido forthcoming). Moreover, after more than half a century since they were internationally recognised –think of the International Labour Organization (ILO), founded in 1919, and the Universal Declaration on Human Rights (UNDHR)– scholars are still trying to figure if social rights amount to fundamental rights¹.

There are also huge differences in the way states have decided to enforce these rights: some countries included social rights in their Constitution in a pretty extensive way (e.g. Italy, Spain and South Africa), while others preferred to enforce them through general or less developed references (e.g. the Federal Republic of Germany is defined as a democratic and social federal state, and Belgium's Constitution includes only a few social rights), or to protect only a specific subset of them, like s 23 of the *Canadian Charter of Rights and Freedoms* 1982 (the Charter), which guarantees minority language education rights. Finally, some constitutions simply don't include social rights at all (e.g. Australia). Also, some countries consider them as constitutional-fundamental rights (especially in civil law systems), while others (especially in the common law ones), consider them as policies. The main consequence of this second approach is that social rights are not directly justiciable, as their breach does not give rise to a recognized cause of action.

¹ King (2012) makes an interesting reconstruction of the arguments against and in favour of social rights' fundamental nature and also endorses this second conceptualization. On the contrary, among those contrary to human rights fundamental nature there is Allan (2014, among his many other publications).

Still, even if it is uncertain whether social rights are fundamental rights, it is also undeniable that some of them –or at least some of their expression– have a fundamental value, at least to the extent to which they are deeply connected to civil and political rights and even facilitate them. Consider, for example, the connection between the right to work and freedom of assembly (a typical civil right) in the context of the right to form or join a union, or the right to bargain collectively. Basically, this simple example shows two different things. First, it is not correct to affirm that social rights always require public expenditure for their enforcement (as in the case of collective bargaining). Rather, it is more accurate to say that they have a positive as well as a negative dimension, as they require the state to both take some positive action and abstain to intervene depending on the issues at stake.² Second, social rights form part of the universality of human rights, as it is also recognized by the UNDHR and the Bill on Human Rights.³ Most of the states (especially the *western* ones) had endorsed such concept, at least through the subscription and ratification of some important international treaties. ICESCR goes in this direction, as it aims to protect a social rights minimum standard and, at the same time, declares that the states themselves are bound to promote universal respect for human rights and freedoms.⁴ However, even if social rights form part of this universal matter, when social rights are not believed to be ‘fundamental’, and it isn’t possible to directly enforce

² This is not to mention that civil and political rights can also have both a positive and a negative dimension. Consider, for example, the right to vote, which –to be properly exercised– demands that the state organize proper elections.

³ The UNDHR was followed by two other treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These documents, together with the ICCPR Optional Protocols, form part of the International Bill of Human Rights.

⁴ One clear example is given by the ICESCR. Its Preamble states that economic, social and cultural rights derive from “the inherent dignity of the human person”, recognizes that –according to the UNDHR (1948)– the “ideal of free human beings ... can only be achieved ... whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”, and also admits the existence of “the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human

them in a courtroom, their protection depends on government's programmes and decisions.

Australia and Canada undoubtedly represent a very interesting case study, due to both their similarities and differences. If we consider the similarities, it's worth recalling that both countries are members of the Commonwealth of Nations, both have a common law system, both are federal states, and both are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵, but decided not to sign the ICESCR Optional protocol.⁶ Moreover, they both have a dualist system⁷ and decided not to incorporate the Covenant in their domestic system. Another analogy is the fact that neither of them recognizes social rights at a constitutional level (with the exception of s 23 of Canada's Charter, mentioned above), preferring instead to protect and enforce them through policies. At the same time, it is also possible to identify the most relevant difference between these two countries: Australia doesn't have a Bill of Rights, while Canada has a Charter of Rights and Freedoms, entrenched in its Constitution⁸.

The aim of this article is to consider these two broadly similar countries to see how UN authorities responded to the shortage of ICESCR incorporation, and how Canada and Australia cope –at a

rights and freedoms.' William F. Felice (2010) synthetically recalls the debate that took place when the states parties of the UN had to decide how to enforce and develop the UNDHR, especially if it was better to do so through one or two covenants, as well as if the second option would have violated or undermined the human rights universality principle. Such decision was approved in General Assembly Resolution 543 (VI), 5 February 1952.

⁵ Australia signed the ICESCR in 1972 and ratified it in 1975; while Canada ratified it in 1976.

⁶ It establishes a mechanism that let individuals (who have exhausted the domestic remedies) to file complaints in front of the Committee on Economic, Social and Cultural Rights

⁷ There is to say that an international treaty needs to be ratified and incorporated into the domestic system to be directly enforceable inside the state itself.

⁸ Two Australian states adopted a bill of rights (namely Victoria and Australian Capital Territory), as well as the province of Quebec did in Canada; however, this article will focus only on the national dimension of social rights in these two countries.

domestic level– with their international obligations. Considering social rights’ structural weakness due to the lack of direct justiciability, the behaviour of the two states will be analysed, both from the legislative and the judicial point of view, to see if there is a way to give a stronger recognition to a non-incorporated Covenant and to determine whether the existence of a Bill or Rights (even if it doesn’t guarantee social rights) can make any significant difference.

II. BRIEF ANALYSIS OF THE POSSIBLE DOMESTIC IMPLEMENTATIONS OF AN INTERNATIONAL COVENANT

Before analysing in a deeper way the relationship between the IC-ESCR and the two countries, let’s briefly examine the context and the juridical tools that can be used to implement an international Covenant. As mentioned above, the easiest way to implement international Covenants is to recognize them as directly enforceable within the domestic system. This could be done, in dualist system countries like Australia and Canada, through the incorporation of the covenant. However, as mentioned, neither country embraced this option.

Otto and Wiseman (2001) identify three other options to enforce a treaty. The first is to insert inside the national Constitution most of the rights and freedoms protected by an international covenant. An example of such implementation can be found in the Canadian Charter, which, through its protections of civil and political rights, indirectly enforces also the International Covenant on Civil and Political Rights (ICCPR).

The second option is to provide legislative recognition of rights and freedoms. Such mechanism could be enacted using alternatively two tools: one is the introduction of a Bill of Rights, and here we can recall the *New Zealand Bill of Rights Act 1990*; the other is the introduction of some specific statutory law or Act that aims at developing a certain area, such as the *Canada Health Act 1984* or

the Australian *Social Security Act 1991* (Cth) and *Social Security Administration Act 1999* (Cth), just to give a few examples.

The third way implies a kind of weak and not binding recognition of a Covenant through the activity of an *ad hoc* institution. The two authors mentioned specifically the Australian Human Rights Commission (AHRC), which is supposed to receive complaints concerning human rights, which would then be discussed by a (non-judicial) conciliation body and, in certain cases, addressed to the Commonwealth Attorney General. However the ICESCR is not among the international treaties or covenants that have been ratified by Australia and that the AHRC is allowed to apply.

Another authority that we can probably include in this category is the Parliamentary Joint Committee on Human Rights (PJCHR), whose structure, purpose and functions were inspired by the analogous United Kingdom Joint Committee on Human Rights. Established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (HR(Ps)A), it started its activities in 2012 and its purpose, as established in s 7 of HR(Ps)A, is mainly to examine Bills,⁹ Acts and other legislative instruments (like policies), as well to inquire into any related matter that is referred by the Attorney General to verify the compatibility of such objects with human rights.¹⁰ Interestingly, PJCHR differs from the AHRC in that it is allowed to use ICESCR and, as shown recently by Campbell and Morris (2015), has often used the Covenant in its analysis. Even if some authors underlined the many positive effects PJCHR could have for the enforcement of human rights (Kinley and Ernst 2012; Dixon 2012), its effectiveness is unclear, as it expresses itself through reports that are not binding upon Parliament, nor on the courts. Some scholars, including Phillips (2015) conclude that the Committee has not yet

⁹ When a Bill is submitted to the Parliament, the proponent has to submit as well a Statement of Compatibility to explain if and how the Bill itself respect human rights; such Statement is then analysed by PJCHR.

¹⁰ According to s 3(1) of the HR(Ps)A, the human rights are those protected by seven international treaties signed by Australia, including the ICCPR and the ICESCR.

had a major impact on the Australian government. On the one hand, it is true that such a system can promote a better dialogue among institutions and a deeper concern –and knowledge– about human (and social) rights, but on the other hand the reports' lack of enforceability could undermine the *persuasive power* of PJCHR, as the influence of the analysis made by the Committee could be conditioned by political majorities, rather than by the accuracy of the juridical reasoning developed in such documents. Another concern that has been expressed regarding PJCHR's reporting role is connected to the possible influence that such documents could have on the courts, which –according to some scholars– could undermine Parliament's legislative powers and boost judicial activism (Horrigan 2012), or even lead the Committee (and Parliament) to somehow outsource the interpretation of the human rights protected by the covenants to adhere to the one provided by the international bodies (Allan 2010).

From a general perspective, we can argue that neither Canada nor Australia have shown a particular propensity to implement the ICESCR. Mostly, its enforcement relies on policies and specific acts, but none of them seems to be made to fulfil the specific international duties created by the Covenant. In a certain sense, the creation of PJCHR represents an exception, as its aim is to verify the compatibility of certain norms with the ICESCR, but –as we said before– its efficacy is still unclear.

III. INTERNATIONAL OBLIGATIONS AND NATIONAL FULFILMENTS

Australia and Canada have never incorporated the ICESCR inside their domestic law, but, at the same time –as state parties of an international treaty– they still have the duty to abide by the obligations created by the Covenant and by the UN body made to

supervise ICESCR proper fulfilment: the Committee on Economic, Social and Cultural Rights (CESCR).

It isn't possible to recount here all the rights protected by the Covenant, but –as Otto and Wiseman (2001) observe– the recognition of each of those rights create four types of objectives for the states to achieve: the duty to respect, to protect, to promote and to fulfil. At a more general level each Party “undertakes to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means [...]” (Art 2.1). Moreover, according to Art 16 of ICESCR, state parties are supposed to provide reports describing the current national situation and the measures taken to fulfil the Covenant's obligations: the CESCR will analyse such reports and is allowed to ask for more information, which will be included a document called List of Issues. Once the state responds, the CESCR publishes its Concluding Observations (Co), which underlines the positive efforts made by the state party, identify the subjects of concern and includes suggestions and recommendations that the country is supposed to (try to) implement by the date by which the next report is expected.

The last documents addressing the CESCR Concluding Observations were issued in 2000 and 2009 for Australia and in 1998 and 2006 for Canada, while the next state party's reports were expected in June 2014 (Australia) and June 2010 (Canada)¹¹.

If we look at Co issued by the CESCR, there are, interestingly, quite a few analogies between Canada and Australia. Even if there are necessarily many differences between Australia and Canada, still many of the objects of concern are similar: the most recurring ones involve lack of protection of Aborigines (in relation to health, education, violence, discrimination), right to and adequate

¹¹ Canada issued its Sixth Report on April 2013 (it was published on April 2014), but the CESCR hasn't published its List of Issues to date. Australia hasn't released its report yet either.

standard of life and shelter (especially when related to homelessness and food), right to work (including right to strike, collective bargaining and wage related issues), gender equality and domestic violence, discrimination, health, social security and social assistance policies. Another similarity between Canada and Australia is the decision not to establish an official poverty line: according to the Committee, this represents a problem, as it makes it more difficult both for the state to protect people in need, and for the CESCR to verify the steps taken by the country in that field.

Another analogy between Canada and Australia is that there isn't a significant evolution from the previous Co to the next one (that is to say between the Australia 2000 and 2009 Co, and among the Canada 1998 and 2006 Co), which is a sign of the poor improvement made by both countries in the field of social rights, at least according the point of view of the UN Committee.

The CESCR concludes its Co by making recommendations and suggestions to the state party. Most of the time the Committee only recommends taking *appropriate measures* or to *adopt a national strategy* to solve a certain issue, while on other occasions it asks – more specifically– for a legislative intervention (e.g. Australia 2009 Co, paras 11 and 14), or directly states the kind (and basic content) of the measures that should be taken. Among those last ones, it's interesting to notice that –even if the CESCR doesn't get to explicitly recommend the adoption of a certain economic model– at the same time roused some concerns connected to free-market economic policies, especially considering that they are capable of undermining the protection of social rights. This issue emerges in the concluding paragraph of the article by Otto and Wiseman (2000) on the 2000 Co on Australia, but it can be identified in other concluding observations documents released by the CESCR. For example, in the 2006 Canadian Co (para 68) the Committee mentions the good potential of trade liberalization, but also warns that such liberalization doesn't necessarily produce positive effects for the realization of social, eco-

conomic and cultural rights; for this reason it recommends that the state party considers how it could guarantee the fulfilment of ICESCR in any case. Moreover, in the 1998 Co (para 54) the Committee “recommends that a greater proportion of federal, provincial and territorial budgets be directed specifically to measures to address women’s poverty and the poverty of their children”. This kind of recommendation is even more specific in the case of Australia. One clear example is made by the 2009 Co where it is stated that:

“[...] the Committee regrets that in 2008-2009 the state party has devoted only 0.32 percent of its gross national income (GNI) to official development assistance (ODA), whereas the United Nations target for ODA is 0.7 percent of GDP for developed countries.

The Committee recommends that the state party increase its official development assistance to 0.7 percent of its GDP” (para 12).”

The relationship between economic models and social rights is not new and it has been the object of various studies, such as those conducted by Esping-Anderson (1990) and Goodin *et al.* (1999). However, King argues that “recognising social human rights does not commit us to a particular type of welfare state [...]. Neither it should be forgotten that each model may fail in elements of detail” (King 2012: 41).

Considering the Cos at a more general level –leaving aside the specific subjects of concern of the CDESCR– another similarity emerges: the Committee regrets that the ICESCR hadn’t been incorporated within the states’ domestic law, and also regrets the lack of comprehensive legislation to give effect to economic, social and cultural rights, as well as the absence of effective enforcement mechanisms for these rights (see for Australia: Co 2000 paras 14 and 24, Co 2009 paras 11; for Canada: Co 1998 paras 15 and 59, Co 2006 paras 11, 13, 35, 40, 42 and 43).

Even if it’s true that the lack of incorporation of the ICESCR allows the states to discipline some aspect of social rights through

tools like programmes or policies (whose advantages include greater flexibility, adaptability to the specific needs of a certain area, as well as the ease with which they can be introduced)¹², at the same time it loosens the bond created by the Covenant itself, lowering the pressure on the states parties to live up to their international obligations, especially as courts are not entitled to verify the compatibility of domestic law with the international treaties.

According to some authors (Macklem 2007; Lamarche 2010) this is particularly true for Canada, which –in spite of signing to the ICESCR in 1976– *de facto* has lowered its standards in fields like social security or public assistance. By reading the analysis made by Macklem (2007), it is possible to deduce that during a period of general wealth both the federal government and the Provinces guaranteed a high level protection of social rights (e.g., the right to work, to join a union, to enjoy social security and a good standard of living – including health, food, and shelter). But when an economic crisis approached, the rights once guaranteed were weakened by many reforms. According to Jackman (2006: 73) this evolution appears to have gotten worse after Canada's *Charter of Rights and Freedoms* was adopted in 1982: 'since the coming into force of the Charter's equality guarantees, elected legislatures have become increasingly insensitive to the needs and basic human rights of the most disadvantaged members of Canadian society'.

Focusing on Australia, it would be interesting to know how the CESCR will consider the introduction of PJCHR. In the Co issued in 2009, the Committee expressed its regret over the lack of incorporation of the ICESCR, and it recommend that Australia

"[...] (b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; (c) establish an effective mechanism to ensure compatibility of domestic law with the Covenant and to guarantee effective

¹² This was one of the objections made in the Government on the 2000 CESCR concluding observation (Otto 2001)

judicial remedies for the protection of economic, social and cultural rights” (para 11).

In the last years, no significant reform on judicial remedies was introduced in Australia for the protection of social rights, but –as mentioned before– the HR(Ps)A introduced PJCHR to verify the compatibility of certain legal instruments with human rights, including those protected by the ICESCR. Even if it is true that the Parliament Joint Committee doesn’t technically fulfil all the requirement mentioned by the CESC (first of all because it doesn’t really incorporate the Covenant into domestic law, and secondly because PJCHR’s reports are not binding), at the same time it represents an important step for a more extensive recognition of the ICESCR and for the diffusion of a deeper commitment to the enforcement of the Covenant.

In conclusion, we can probably argue that the international obligations created by the ICESCR aren’t satisfactorily fulfilled by Australia and Canada, as both countries haven’t incorporated the Covenant, nor have they created effective mechanisms to challenge the state’s fulfilments of its international duties. Also, many of the concerns expressed by the CESC in its Co haven’t been properly addressed by the two countries, as evidenced by the fact that the suggestions and recommendations expressed by the Committee have not varied much over the years. At the same time, however, states parties are not totally immune to the Committee suggestions and they are –maybe slowly– looking for a way to fulfil, at least partially, their international human rights obligations. This seems to be particularly true for Australia and its PJCHR¹³, but at the same time the efficacy of this Parliamentary Committee will be clearer in the next few years.

¹³ In the 2010 Australia’s Human Rights Framework (www.ag.gov.au/Consultations/), which also mentions PJCHR, it is stated the will to engage and accomplish the international human rights obligations (among the others, see p 7 and 10)

IV. NATIONAL COURTS AND SOCIAL RIGHTS ENFORCEMENT

In the previous paragraph emerged that in Australia and Canada the protection of economic, social and cultural rights represent a delicate issue that relies mostly on policies and some legislation, as they are non-justiciable rights. This means that the effectiveness of their protection depends on Governments' decisions and objectives, rather than on specific constitutional obligations. On the one hand, this arrangement guarantees that such decisions are taken according to a democratic model, based both on the analysis of the specific local needs, and on the will of the electorate (Campbell and Morris 2015). On the other hand, however, it also means that –to some extent– it is going to be harder to secure certain rights, especially when they aim mainly to protect vulnerable subjects who are not politically strong, so that “social rights lose their legitimacy as rights claims and become no more than competing policy positions advocated by *interest groups* lacking in political power” (Porter and Jackman 2014: 15).

In any case, it is also true that both Canada and Australia are still bound by some international obligations that must be respected. After considering this topic from the legislative and executive point of view, we can now examine how the judiciary behave and if it has identified any interpretative tool to enforce social rights even where the national Constitution doesn't protect them directly.

Both in Australia and Canada exists a general principle according to which if an international law is not incorporated into domestic law, it cannot be used to ground an action, nor it can be directly enforced by the courts, however the judges may use it as a guide to interpret the law.

In Canada there is a principle according to which domestic law is presumed to comply with international law: unless the national norms expressly contradict an international covenant (to which the state is a party) such norms must be interpreted in harmony

with the covenant itself (Scott 1999). In Australia, Kirby J (1999) refers to an analogous principle as part of the *Bangalore Principles* and specifies that a judge may use international law (as accepted by the community of nations) to fill a gap inside the common law only in case of uncertainty and ambiguity. Such a principle has been applied in various legal cases: in *Mabo and Others vs. Queensland* it was used to reject for the first time the *terra nullius* doctrine, in favour of the doctrine of the Aboriginal title (Kirby 1999). Another example is offered by *Ferdinands vs. Commissioner for Public Employment*, a case that involved the termination of a police officer who was convicted of assault; he challenged the termination of his appointment as, under the *Police Act 1998* (SA), he could not obtain a merits review of his case and he alleged that such denial was against ILO's Termination of Employment Convention (Mapulanga-Hulston and Harpur 2009). However, as underlined by Beck (2013), this interpretative principle hasn't been always welcomed by the High Court's Justices. For example, McHugh J described it as *heretical* (McHugh J in *Al-Kateb vs. Godwin*, 2004: 63). Moreover, when the High Court had to rule on a case connected to the right to work, corporations power and industrial arbitration –namely the *New South Wales vs. Commonwealth*, known as the *Work Choices Case* (Aroney 2008)– the judges made few references to international principles and norms (most of them were made by Kirby J in his dissenting opinion) and none of them considered the obligations derived by ICESCR or ICCPR.

Interestingly, Australia's High Court tried to go a little further, using the *legitimate expectation* principle in a case connected to social rights. It was used in the 1995 case *Minister for Immigration vs. Teoh*, where the plaintiff was denied a residency permit and tried to challenge this decision on the grounds that he was the sole source of support for his Australian born children. In this case, the High Court recognised that while international covenants don't generate rights or freedoms that can be directly exercised by individuals, they do imply that public institutions have obligations to make ad-

ministrative decisions that take into account the existence of those covenants (Roberts 1995, Groves 2010). In other words, the legitimate expectation was something more than a simple interpretative principle for the judges (as it was directed to the administrative authorities), but something less than the direct recognition of the entitlement to rights and freedoms stated by international treaties. This principle was welcomed by the CESCR (which in the 2000 Australian Co stated that “the Committee encourages the state party to follow the High Court’s position concerning *legitimate expectations* arising from the ratification of the Covenant” (para 24)), but at the same time it has been strongly opposed and negated by the Government,¹⁴ as well as by the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (or simply the *Lam* case), where the legitimate expectation theory was considered to be ill-founded and “with limited utility in light of the wider evolution of natural justice” (Groves 2010: 331).

The Canadian jurisprudence, on the contrary, seems to be more open to the influence of international treaties, and to the recognition of social rights. Probably the most important case that goes in this direction is the 1998 Supreme Court of Canada decision in *Canadian Egg Marketing Agency vs. Richardson*, whose object was the workers’ mobility right to let them relocate among Provinces and Territories. Here the presumption of compliance with international law was not used to interpret a simple statutory law, but rather the Canadian Charter itself. More precisely, s 6 of the Charter was interpreted in the light of a few international treaties, including Art 6.1 of the ICESCR, that protects the right to work (Macklem 2007). Another interesting case concerning the Supreme Court of Canada is *Baker vs. Canada*, similar to the Australian cases of *Teoh* and *Lam*, where a woman illegally resident in the country was ordered deported but filed an appeal due to the fact that she was the

¹⁴ See the joint statement issued by the Minister for Foreign Affairs and the Attorney-General on May 1995, followed few days later (28 June) by the *Administrative Decision (Effect of International Instruments) Bill 1995* (Cth), which was never passed.

single-mother of four Canadian-born dependent children. Here, the presumption of compliance principle was confirmed and –it is maybe possible to say– expanded, like Australia’s High Court tried to do in *Teoh*. In fact, the Canadian Supreme Court stated that, when examining the applicant’s case, the relevant administrative authority should have considered the statutory law (namely the *Immigration Act 1985*) in the light of the treaties signed (even when not incorporated) by Canada, presuming the domestic law to be in compliance with international human rights law.

The Supreme Court of Canada in the 1999 case *R vs. Ewanchuk* expressly stated that economic and social rights can be enforced via the combined protection of s 7 (right to life, liberty and security of the person) and s 15 (equality right). However, as authors like Caroline Hodes (2006 195) observed, this principle is useful, but it only has a limited efficacy, as the existence of a policy to provide access to services is not able *per se* to guarantee an effective protection of the basic needs (and the fulfilment of international obligations) if there aren’t specific legal remedies to challenge such policies. In those cases, we can probably add that the chance of effectively challenging a policy depends largely on the courts’ awareness of social rights and international obligations.

Canada has showed a greater awareness –compared to Australia– in addressing social rights from a judicial perspective. Still, it is possible to propose some categorization in the way the Canadian Supreme Court dealt with this topic. First of all, it seems that the Court has been more keen on recognizing social rights when they do not need a consistent public expenditure to be enforced. For example in *Canadian Egg Marketing Agency*, mentioned above, where workers were recognized as having mobility rights to circulate inside Canadian provinces and territories. It is also possible to mention *Dunmore vs. Ontario* (in 2001), through which the Supreme Court recognized certain collective bargaining rights to agricultural workers, or the 2005 case of *Chaoulli vs. Quebec*, related to the right to health, where it was declared that individuals

have the right to buy medical services provided by structures that are not included in their insurance policy.

In contrast, when the Supreme Court of Canada was asked to judge cases involving social rights that need public expenditure to be enforced, it seemed to adopt a narrower approach. Also, if in the past the Court seemed to be more keen on protecting *expensive* social rights, we can observe that in more recent times it adopted a new, more restrictive approach. In the field of social security, we can mention *Irwin Toy Ltd vs. Quebec*¹⁵, where the Supreme Court in 1989 stated on the one hand that the right to security protected by s 7 applies only to individuals and not to corporations, and –on the other hand– that it would have been precipitous to deny that individuals’ security needs include rights with an economic component. In other words, the Supreme Court here didn’t state which social-economic rights were protected by the Charter, but it left the door open to future clarifications and inclusions. However, a few years later, in 2002, the same Court in *Gosselin vs. Quebec* decided to interpret s 7 with a narrow approach when a woman complained for the huge distress (including social isolation, cold, threats of violence, harassment, hunger) she suffered because she could only receive a reduced provincial welfare rate due to the fact she was under 30 years-old. Here the Supreme Court stated that the “right to security of the person does not include a right to a minimum level of social security” (Macklem 2007: 237). The differential welfare rates based on age were not found to be discriminatory under s 15 of the Charter. More importantly, in *Gosselin* the Canadian Supreme Court had the chance to clarify the matter left open in *Irwin Toy*, that is to say to address the issue of the protection of social rights –as guaranteed by ICESCR– under s 7 of the Charter, but it avoided directly answering this question (Porter and Jackman 2014).

¹⁵ This case scrutinized advertising for kids under 13 and the main issue addressed was freedom of expression. Still, in its par VIII important statements on social rights were made.

Another example, this time connected to the right to health, is the case of *Eldridge vs. British Columbia*: in 1997 the Supreme Court of Canada ruled in favour of a hearing-impaired woman who complained about lacking access to a sign language interpreter while giving birth in a hospital, and therefore being unable to understand the instructions that the medical staff was giving her. According to the judges, it was the hospital's duty to provide the patient with such a service, as it was included in those components of the right to health protected by s 7 of the Charter (right to security of the person). By contrast, seven years later, in *Auton vs. British Columbia* the Court stated that the right to health protected by s 7 didn't include the supply of public therapies for children with autism.

In other words, keeping in mind that social rights can't be defined only as those rights that create a positive obligation (and the need for public expenditure) on the part of the state, the Supreme Court of Canada seems to be open to guaranteeing the negative dimension of social rights, while it has adopted an increasingly narrower approach when it was asked to protect the positive dimension of the same rights.

Interestingly, not all the judgments mentioned above relate to international human rights law. Further, it is possible to find a reference to ICESCR in only two of them (namely, *Canadian Egg Marketing Agency* and *Gosselin*), which seems to show a Canadian awareness of social issues, even when adopting a perspective not necessarily connected to the state's international obligations. Moreover, the CESCR encouraged Canadian courts to adopt an interpretative approach more keen on social rights: in the 1998 *Co*, the Committee expressed concern at the fact that provincial courts usually preferred to interpret the Charter without taking ICESCR into account (paras 14 and 15); it also recommended the state party to provide all judges with a copy of the Committee's concluding observations and "to encourage training for judges on Canada's

obligations under the Covenant” (para 57). In the 2006 Co, the Committee stated that: “[...] within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the state party’s conduct is consistent with its obligations under the Covenant” (para 36).

In saying so, the Committee also explicitly mentions the case *Chaoulli vs. Quebec*, mentioned above. An analogous exhortation cannot be found in the Australian 2000 and 2009 Co, as the Committee addressed the courts interpretative activity only once, in 2000, when it encouraged the state party to follow the ‘legitimate expectations’ principle (para 24). We can argue that one of the reasons that could justify the Committee’s decision not to include any recommendation to address the Australian courts’ interpretative habits could be the higher chance that Canadian –rather than Australian– courts will end up adopting ICESCR as an interpretative tool, especially as they can use it (and, indeed, have used it) to interpret a document –the Charter– which is entrenched in the national Constitution, while the same method of judicial reasoning could not be used in Australia.

V. CONCLUSIONS

There are many similarities between the Australian and Canadian approaches to protecting social rights. This is evident not only from the lack of incorporation of the ICESCR, but also from the content of the CESC’s Co, which –in the last two documents issued for each country– identified analogous concerns and similar inadequacies in resolving them. The main issue is to understand how these states react to the non-fulfilment of their international obligations related to social rights, focusing on their attempt to find a way, alternative to the incorporation of the Covenant. In fact, given that non-justiciable social rights are structurally weak,

it is difficult both to control governments compliance to ICESCR obligations, and to count on courts' rulings.

Clearly the existence of a constitutional charter of rights and freedoms in Canada potentially facilitates the adoption of ICESCR through the courts' interpretation activity. By contrast, it is much more difficult to reach a similar result in Australia, where there is a narrower margin for judges to employ analogous interpretative tools. They cannot, for example, count on constitutional provisions that guarantee the right to security, as s 7 of the Canadian Charter does. Nonetheless, the fact that it would be theoretically possible to circumvent (some of) the limits imposed by the lack of incorporation of the Covenant, doesn't necessarily mean that Canadian courts have pursued this objective efficaciously to guarantee better protection of social rights: on the contrary, the Supreme Court adopted a very cautious and even conservative approach in this field, especially when the positive dimension of social rights was at stake. On the one hand, it admitted that at least some social rights are protected by the Charter (*Irwin Toy* case) and it has been favourable on protecting some social rights that didn't need public expenditure to be guaranteed. On the other hand, it adopted a progressively restrictive approach when it came to rule on 'expensive' social rights, essentially following the neo-liberal economical trend implemented by Canada in recent years (Porter and Jackman 2014). More importantly, the Canadian Supreme Court simply avoided answering the main question that lies behind the guarantee of social rights: if it is true that at least some social rights are protected by ss 7 and 15 of the Charter, do governments have a constitutional duty to enforce the positive dimension of these rights, especially when the needs of the most vulnerable are at stake (Jackman and Porter 2008)? This question could have been addressed both in *Irwin Toy* and *Gosselin*, but the Supreme Court both times found a way to avoid taking a stand on this issue.

In the Australian context, there are fewer means of enforcing ICESCR's rights in the domestic system through judicial interpretation. However, Australia recently showed a deeper concern for the fulfilment of its international human rights obligations: even though it hasn't incorporated the ICESCR yet, it introduced PJCHR, which can use the ICESCR, as well as other international covenants, to determine whether certain legislative instruments are consistent with human rights standards. Surely this Committee has some feebleness, including the fact that PJCHR's opinions are not binding, and that its efficacy and its persuasiveness on Parliament legislative activity or courts are still unclear. At the same time PJCHR seems to be an interesting way to find a compromise between, on the one hand, Australia's international obligation regarding social rights and ICESCR, and, on the other hand, the country's will to avoid incorporating the Covenant and to keep a greater legislative autonomy.

In any case, it also seems clear that the effective protection of social rights requires Canada and Australia –like any other state party to the ICESCR– to embrace an economic model where investments related to education, health, adequate standards of living, and the right to shelter constitute a significant percentage of public expenses, and thereby contribute to seeking real and effective social justice. This also seems to be the advice of CESCR, who abstain from advising the states to adopt a specific economic model, but who have been unable to avoid making recommendations more or less explicitly related to the need to invest more in certain areas.

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