

**THE ROLE OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS IN THE COUNTERMOVEMENTS AGAINST
ECONOMIC LIBERALISM**

BY

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Abstract

In recent years, revisionist studies of the history of economic, social and cultural rights have deemed that the International Covenant on Economic, Social and Cultural Rights (ICESCR) is a failed instrument. My thesis explores the extent to which that assessment is accurate and concludes that, although the ICESCR's drafters did imbue the treaty with a strong purpose of resistance against the detrimental impacts of economic liberalism, the instrument's ties to its historical roots might be too strong for it to serve an effective purpose in present and future efforts to push back against excessive marketisation.

In order to fully understand both the ICESCR's shortcomings and its unfulfilled potential, it is helpful to analyse the treaty's content and purpose from the perspective of Karl Polanyi's theory of the double movement. This theory, presented by Polanyi in his 1944 monograph *The Great Transformation*, established that the 19th century was defined by a struggle between those who advocated for economic liberalism and those who protected society from that economic model through a "countermovement" that promoted mechanisms of "social protection". A current wave of neo-Polanyian scholarship has reinterpreted the double movement as a pendulum that has continued to swing between economic liberalism and social protection, explaining the rise of neoliberal practices in the second half of the 20th century and contemporary efforts to limit the influence of the market over society.

From a neo-Polanyian viewpoint, the ICESCR was a product of the second countermovement – a series of actions taken by governments all around the world during the mid-20th century to mitigate the harmful effects of the market on people's wellbeing. After conducting a detailed examination of the ICESCR's *travaux préparatoires*, I determine that the members of the United Nations Commission on Human Rights consciously shaped the treaty according to six principles that I identify as underlying the second countermovement.

This thesis argues that such an intimate connection with those principles, which at first might seem benign, is the source of the ICESCR's current limitations. Because the instrument is a product of the second countermovement, it is now out of place in an era where economic liberalism presents different challenges than it did in the mid-20th century. That dilemma is illustrated by the contrast between the tentative approach of the Committee on Economic, Social and Cultural Rights – bound by the constraints of the ICESCR – and the confrontational tone of the Special Rapporteur on extreme poverty and human rights, which has taken

advantage of its wider mandate to endorse practices of an emerging third countermovement that directly address the specific challenges of this era. Therefore, while the ICESCR has been used by those bodies to resist neoliberal ambitions, the treaty might become less relevant the further we move away – both chronologically and socio-politically – from the second countermovement.

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List of Abbreviations

Commission: United Nations Commission on Human Rights.

Committee ESCR: Committee on Economic, Social and Cultural Rights.

ECOSOC: United Nations Economic and Social Council.

FDR: Franklin Delano Roosevelt.

GATT: General Agreement on Tariffs and Trade.

GFC: the 2007-2008 global financial crisis.

ICCPR: International Covenant on Civil and Political Rights.

ICESCR: International Covenant on Economic, Social and Cultural Rights.

ILO: International Labour Organization.

IMF: International Monetary Fund.

IPCC: Intergovernmental Panel on Climate Change.

Special Rapporteur: United Nations Special Rapporteur on Extreme Poverty and Human Rights.

UBI: universal basic income

UDHR: Universal Declaration of Human Rights.

UN: United Nations.

UNESCO: United Nations Educational, Scientific and Cultural Organization.

USSR: Union of Soviet Socialist Republics.

VCLT: Vienna Convention on the Law of Treaties.

I Introduction

A Research Question and Topic

The International Covenant on Economic and Social Rights (ICESCR) has not fulfilled the promises of its drafters. The treaty establishes a series of economic, social and cultural rights aimed at guaranteeing individuals' equal access to the material conditions they require for their wellbeing, regardless of their cost in the market. Nevertheless, in the more than 45 years since it entered into force,¹ the ICESCR has not become an effective tool in efforts against inequality and poverty. On the contrary, as some scholars have noted, economic, social and cultural rights have been appropriated by market actors for their own interests and some human rights organisations have been complicit in the rise of extreme inequality during the neoliberal era.²

This thesis is part of a body of scholarship that tries to understand why that has occurred. It takes the view that understanding the reasons the ICESCR has failed requires a clear comprehension of its purpose and that this cannot be done without carefully examining the treaty's socio-political roots. In the aftermath of the Great Depression and the Second World War, the United Nations (UN) Economic and Social Council (ECOSOC) charged the Commission on Human Rights (the Commission) with the elaboration of an international human rights system that could shield humanity from the suffering caused by those types of cataclysmic events. At the time, a global backlash against market ideology was taking place both in individual states and internationally. The Commission, inspired by that trend to limit the market's influence over society, understood that it could not fulfil its mandate unless it recognised that states should, as a matter of legal obligation, protect individuals from the excessive commodification of the resources and services they need to participate equally in society. That is the ICESCR's purpose.

If that purpose was so clearly embedded in the ICESCR, why has the treaty failed to deliver on the promise that we would never again surrender to the market's self-interested motivations? First, because by the time the treaty entered into force in 1976, it was already too

¹ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].

² See Jessica Whyte *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, London and New York, 2019); Samuel Moyn *Not Enough: Human Rights in an Unequal World* (Harvard University Press, Cambridge (Mass), 2018); JR Slaughter *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (Fordham University Press, New York, 2007).

late. Governments were abandoning the socialist welfare project of the mid-20th century to instead give market actors more freedom under neoliberal doctrine, hoping those actors' gains would trickle down to the rest of society. There was little room for economic, social and cultural rights in a world dominated by neoliberal thought.³ Second, because while some individuals, groups and international human rights bodies have fought back against neoliberal practices, their proposals have not always corresponded with the ICESCR's mid-20th century framework. This has rendered the treaty somewhat ineffective in their struggle against excessive marketisation.

Yet, the ICESCR's potential to contribute to material equality and wellbeing should not be underestimated. The instrument has been ratified by 171 states,⁴ representing approximately 94 per cent of the global population.⁵ Furthermore, current socio-political trends point towards a revival of the principles that were embedded in the ICESCR. The Global Financial Crisis of 2007–2008 (GFC) and the Covid-19 pandemic have shone a light on the fragility of the institutions that are meant to protect individuals from the voids left by the market and that have been neglected by governments for too long.⁶ Governments have started to shun the neoliberal ideas that dominated public governance for decades, to instead strengthen and modernise institutions of social protection.⁷ While those efforts coincide with the ICESCR's purpose, the treaty might be too closely tied to its historical roots to make a significant contribution. Because the ICESCR is the main treaty pursuing that purpose, its failures might represent a dangerous gap in international human rights law.

³ See Whyte, above n 2; Moyn, above n 2; and Slaughter, above n 2.

⁴ "Status of Ratification Interactive Dashboard" (9 February 2021) United Nations Office of the High Commissioner on Human Rights (OHCHR) <<https://indicators.ohchr.org/>> at International Covenant on Economic, Social and Cultural Rights.

⁵ Of the remaining 6 per cent of the global population, 4 per cent is in the United States. Figures calculated with data (population by country as of 2019) provided in Our World in Data "Population growth per country" <<https://ourworldindata.org/world-population-growth#population-growth-by-country>>.

⁶ Thomas Piketty *Capital in the Twenty-First Century* (Arthur Goldhammer (translator), Harvard University Press, Cambridge (Mass), 2017) at 599-601; Briefing "A new era of economics" *The Economist* (online ed, London, 25 July 2020) at 14.

⁷ See "Coronavirus: How can society thrive post-pandemic?" BBC <www.bbc.com/worklife/article/20201118-coronavirus-how-will-it-affect-inequalities-mental-health>; "Coronavirus Will Change the World Permanently. Here's How." *Politico* (online ed, Virginia, 19 March 2020); Thomas Piketty *Capital and Ideology* (Arthur Goldhammer (translator), Harvard University Press, Cambridge (Mass), 2020) at 837-838.

B Theoretical and Methodological Framework

In the last two decades, since Martti Koskenniemi published *The Gentle Civilizer of Nations*, the study of international law has taken a “turn to history”.⁸ I am hardly the first writer to explore the historical evolution of economic and social rights. Several authors point, as I will do in this thesis, to an intrinsic connection between economic and social rights and the mid-20th century model of governance known as the welfare state. Most recently, Samuel Moyn confirmed the view, expressed by others before him,⁹ that economic and social rights in the Universal Declaration of Human Rights (UDHR) reflect the practices of the “national welfare state”, a model of governance that became the norm in the late 1940s due to an amplified popular claim for material sufficiency and equality.¹⁰ Other authors have preferred to focus on the link between economic and social rights and the international, rather than domestic, efforts to produce welfare states – what they call “welfare internationalism”.¹¹

Another group of scholars has opted to give more relevance to the role of mid-20th century socialism, especially from the smaller Latin American and Eastern European states, in the recognition of economic and social rights in the UDHR.¹² Johannes Morsink, for example, ascribes the rights to decent working hours, paid holidays, rest and leisure and social security to the socialist idea that labour is not merchandise or a commodity that can be bargained with.¹³

Several authors have also explored the impact of neoliberal practices on the implementation of economic and social rights. Moyn argues that the UDHR’s drafters failed to include an explicit obligation to promote social equality through an interventionist state, instead

⁸ Anne Orford “International Law and the Limits of History” in Wouter Werner, Marieke de Hoon and Alexis Galán (eds) *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, Cambridge, 2017) 297 at 297; also see Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2001).

⁹ See Stephen James *Universal Human Rights: Origins and Development* (LFB Scholarly Publishing, New York, 2007) at 81; DJ Whelan *Indivisible Human Rights: A History* (University of Pennsylvania Press, Philadelphia, 2010) at 24-30; Jack Donnelly *Universal Human Rights in Theory and Practice* (3rd ed, Cornell University Press, New York, 2013) at 236-237, 239-241; Matthew Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1995) at 8; HJ Steiner, Philip Alston and Ryan Goodman *International Human Rights in Context: Law, Politics, Morals* (3rd ed, Oxford University Press, Oxford, 2008) at 269; Jens Steffek and Leonie Holthaus “The social democratic roots of global governance: Welfare internationalism from the 19th century to the United Nations” (2018) 24 EJIR 106.

¹⁰ Moyn, above n 2, at 44-57.

¹¹ See Franz-Xaver Kaufmann “Welfare Internationalism before the Welfare State: The Emergence of Human Social Rights” in Franz-Xaver Kaufmann *European Foundations of the Welfare State* (Berghahn Books, New York, 2012) at 96; Steffek and Holthaus, above n 9.

¹² Johannes Morsink *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (University of Philadelphia Press, Philadelphia, 1999) at 157, 161, 181-190; Ulrike Davy “The Rise of the ‘Global South’: Origins and Transformations of Social Rights under UN Human Rights Law” (2013) 3(2) IASQ 41 at 44-47.

¹³ At 181-182, 188, 200.

choosing to establish an obligation to guarantee a “social minimum”.¹⁴ Therefore, it was easy for promoters of neoliberal policies to take the UDHR out of context, idealise the instrument and create a false sense that human rights and excessive accumulation of capital were not incompatible.¹⁵ Largely based on articles 22 to 27 of the UDHR, he argues, the ICESCR’s implementation is affected by the same issue.¹⁶ Jessica Whyte follows a similar line, arguing that the laxity of the UDHR’s provisions on economic and social rights led to the instrument being compatible with the neoliberal approach to poverty: means-tested poverty relief that does not interfere with societal inequalities.¹⁷ Joseph Slaughter suggests that human rights have been “commodified by nation-states” to fit into the “(neo)imperial” model of governance adopted by most of them during the neoliberal era.¹⁸

All these assessments, while provoking contributions to the study of the ICESCR’s historical role in combatting poverty and inequality, are still too narrowly focused. The ICESCR, I will argue, is a tool of “the countermovement” – a concept coined by Karl Polanyi in his 1944 monograph *The Great Transformation: the political and economic origins of our times*. Polanyi, a socialist academic born in the Austro-Hungarian Empire but exiled on multiple occasions, studied the rise of economic liberalism and the backlashes against it in the period between the Industrial Revolution and the Second World War.¹⁹

He argued that the 19th century was defined by a double movement. This movement took place between “two organizing principles in society, each of them setting itself institutional aims, having the support of definite social forces and using its own distinctive methods”. In one corner was “the principle of economic liberalism”, embodied by the trading or middle classes, guided exclusively by their faith in profits, attempting to edify a self-regulating market through laissez-faire institutions and free trade. In the other corner was “the principle of social protection”, personified by the working class and landowners, aiming to protect society, nature and production by advocating for social legislation and other forms of state intervention.²⁰

¹⁴ Moyn, above n 2, at 60.

¹⁵ At 57-61, 67, ch 7.

¹⁶ At 111-112.

¹⁷ Whyte, above n 2, at 101-114.

¹⁸ Slaughter, above n 2, at 36.

¹⁹ Karl Polanyi *The Great Transformation: the political and economic origins of our time* (Beacon Press, Boston, 1957). For a biographical account of Polanyi, see Gareth Dale *Karl Polanyi: A Life on the Left* (Columbia University Press, New York, 2016).

²⁰ At 132.

Those mechanisms of social protection became necessary, according to Polanyi, due to the ascendancy of the market economy. This consisted of a self-regulated economic system where every form of production has a price, is for sale and creates an income. The price of goods and services was called a “commodity price” and formed the income of whoever sold a good or service. Wages were the price for labour and represented the income of workers. Money lenders gained their income through interest – the price of the use of money. Finally, land was priced through rent and formed the income of landowners. Thus, all incomes came from sales on the market and, according to the law of supply and demand, all incomes would be enough to buy all the goods in the market. These prices, incomes, supply and demand were not regulated by the state, whose function was instead merely to guarantee the conditions for the market to self-regulate and dominate the economy.²¹

The big problem with this logic, argued Polanyi, was that land, labour and money are “obviously *not* commodities”.²² They are not “objects produced for sale on the market”; they are not produced at all or are produced for reasons other than to be sold. As “fictitious commodities”, the only reason they were considered commodities in a market economy was so they could be bought and sold for industrial purposes.²³ Polanyi claimed that, if left unchecked, the commodification of labour, land and money could only lead to a doomsday scenario where people would lose the essential characteristics that make them human, the natural environment would be exploited until we would no longer be able to produce food and raw materials, and business would be guided exclusively by purchasing power.²⁴

For Polanyi, society in the 19th century was only saved from that “satanic mill”²⁵ by the actors of “the countermovement”. This movement consisted of a “network of measures and policies [that] was integrated into powerful institutions” by interventionist states from the 1860s onwards to resist the expansion of the market economy and instead transact with “genuine commodities”.²⁶ Some concrete actions taken during this countermovement were legislation related to wages, workplace safety and inspections, social insurance, limits on child labour, enforced vaccinations and other public health programmes, taxation, and public libraries, among others.²⁷ Towards the end of *The Great Transformation*, Polanyi claimed that

²¹ At 69.

²² At 73.

²³ At 72, 75.

²⁴ At 73.

²⁵ At 73.

²⁶ At 76, 130.

²⁷ At 145-146, 154.

the countermovement had been successful in vanquishing economic liberalism forever by the start of the 1930s.²⁸

While Polanyi's work has multiple flaws, it has become a vital framework for the contemporary analysis of political economic trends. Critiques of *The Great Transformation*, date back to the 1940s when the book was first published,²⁹ and, throughout the more than 75 years since.³⁰ Polanyi has been considered "too sociological for historians, too historical for economists, or too political for an academic".³¹ Furthermore, Polanyi erred when he predicted that the market economy had been eradicated. This fault, however, does not render his ideas obsolete. The critiques of Polanyi's work, which often come from his closest followers, have allowed Polanyi's work to be reinterpreted in ways that fit the 21st century, keeping his legacy alive.³² This is what Holmes refers to as a "post-Polanyian" and others refer to as a "neo-Polanyian" approach.³³ Today, *The Great Transformation* is recognised as "one of the major works of twentieth-century social science"³⁴ and Polanyi is thought of as "one of the most important thinkers of the twentieth century".³⁵ Mendell, Aulenbacher and Novy speak of a

²⁸ At 251.

²⁹ See AM Sievers *Has Market Capitalism Collapsed? A Critique of Karl Polanyi's New Economics* (Columbia University Press, New York, 1949); Tim Rogan "Karl Polanyi at the Margins of English Socialism, 1934-1974" (2013) 10 *MIH* 317.

³⁰ See generally Gareth Dale *Karl Polanyi: The Limits of the Market* (Polity Press, Cambridge, 2010) at 73-88; Christopher Holmes *Polanyi in Times of Populism: Vision and Contradiction in the History of Economic Ideas* (Routledge, London, 2018) at 8-9; Nancy Fraser "Can society be commodities all the way down? Post-Polanyian reflections on capitalist crisis" (2014) 43 *Economy and Society* 541 at 544, 547-548; GM Hodgson "Karl Polanyi on economy and society: a critical analysis of core concepts" (2017) 75 *Review of Social Economy* 1 at 3-6, 11-13; Greta Krippner, Mark Granovetter and Fred Block "Opening remarks on embeddedness" in Greta Krippner and others "Polanyi Symposium: a conversation on embeddedness" (2004) 2 *Socio-Economic Review* 109 at 110-119; Claus Thomasberger and Michael Brie "Karl Polanyi's Search for Freedom in a Complex Society" (2019) 44 *ÖZS* 169 at 176-177.

In relation to Speenhamland, see Fred Block and Margaret Somers "In the Shadow of Speenhamland: Social Policy and the Old Poor Law" in Fred Block and MR Somers *The Power of Market Fundamentalism: Karl Polanyi's Critique* (Harvard University Press, Cambridge (Mass), 2014) 114. In relation to markets in ancient civilisations, see DN McCloskey "Polanyi was Right and Wrong" (1997) 23 *EEJ* 483 at 484. In relation to the omission of Marxist theory, see See Richard Walker "The two Karls, or reflections on Karl Polanyi's *The Great Transformation*" (2013) 45 *EPA* 1662; Hannes Lacher "Karl Polanyi, the 'always-embedded market economy,' and the re-writing of *The Great Transformation*" (2019) 48 *Theory and Society* 671; and Gareth Dale *Reconstructing Karl Polanyi: Excavation and Critique* (Pluto Press, London, 2016) at ch 3.

³¹ Brigitte Aulenbacher, Richard Bärthaler and Andreas Novy "Karl Polanyi, *The Great Transformation*, and Contemporary Capitalism" 44 *ÖZS* 105 at 111.

³² Christopher Holmes "Problems and opportunities in Polanyian analysis today" (2012) 41 *Economy and Society* 468 at 471.

³³ At 481; Fred Block "Understanding the Diverging Trajectories of the United States and Western Europe: A Neo-Polanyian Analysis" (2007) 35 *PAS* 3 at 4.

³⁴ Fred Block "Karl Polanyi and the writing of *The Great Transformation*" (2003) 32 *Theory and Society* 275 at 275.

³⁵ Margaret Somers and Fred Block "The Return of Karl Polanyi" (2014) 61 *Dissent* 30 at 30.

“Polanyi-hype” since the 1990s, especially after the GFC.³⁶ In Gräser’s words, “Karl Polanyi has finally become popular.”³⁷

Although Polanyi described the double movement as a phenomenon that pertained to the 19th century exclusively, neo-Polanyian scholars have re-adopted the double movement framework to explain the rise of neoliberal ideas in the late 20th century and contemporary efforts to resist those ideas.³⁸ They construe the double movement as a continuous back-and-forth rather than a specific period. There is a constant tension – a dialectic – between the principles of economic liberalism and social protection that is always present, no matter which of the sides has more control at a particular time.³⁹ Some of the possible outcomes of the struggle between the two principles are the repression of countermovements, periods of political stalemate between the two sides where neither manages to exert enough power for institutions to function effectively, or periods of balance where social protection creates an environment for sustainable economic growth.⁴⁰

There are various interpretations of this dialectic within neo-Polanyian scholarship. Dale claims that, in periods when neither economic liberalism nor social protection have a definite advantage, the double movement can be represented as a pendulum between commodifying and regulating trends.⁴¹ Palumbo and Scott claim that instead of a single double movement, it is more accurate to speak of “various double movements [that] follow one another, and where countermovements are never sufficiently successful to derail the market-building partnership between the dominant economic and political forces”.⁴² Every time a countermovement begins to fail, the “pro-market coalition” redefines itself to take advantage of the new circumstances.⁴³ Burawoy prefers to use the notion of “waves of marketization”.⁴⁴

³⁶ Marguerite Mendell, Brigitte Aulenbacher and Andreas Novy “Karl Polanyi and the Global Network Inspired by His Work: Marguerite Mendell interviewed by Brigitte Aulenbacher and Andreas Novy” (2019) 44 ÖZS 143 at 147.

³⁷ Marcus Gräser “Historicizing Karl Polanyi” (2019) 44 ÖZS 129 at 130.

³⁸ See Kari Polanyi Levitt *From the Great Transformation to the Great Financialization: On Karl Polanyi and Other Essays* (Zed Books, New York, 2013) at 101-102.

³⁹ Roland Atzmüller and others *Capitalism in Transformation: Movements and Countermovements in the 21st Century* (Edward Elgar Publishing, Cheltenham, 2019) at 4-5.

⁴⁰ Block, above n 33, at 7.

⁴¹ Holmes, above n 30, at 22.

⁴² Antonino Palumbo and Alan Scott *Remaking Market Society: A Critique of Social Theory and Political Economy in Neoliberal Times* (Routledge, London, 2018) at 28.

⁴³ At 28, 167-168.

⁴⁴ Michael Burawoy “Facing an unequal world” (2015) 63 *Current Sociology* 5 at 18.

These waves are created by a multitude of factors, including the hegemony of a particular country in international relations or technological breakthroughs.⁴⁵

I adopt the neo-Polanyian concept of the double movement to analyse the ICESCR's purpose and to assess the current and future obstacles to its implementation. I will argue that the treaty was a product of the countermovement to the second wave of marketisation that took place between the end of the First World War in 1918 and the Great Depression of 1929. The countermovement that followed, which I will refer to as the *second countermovement*, consisted of a series of market regulations and state interventions that consolidated after the Second World War.⁴⁶

Today, however, the ICESCR is operating within the context of the third wave of marketisation led by neoliberal theory. Neo-Polanyian theorists argue that the regulation and protectionist movements of the post-war era strangled profit, so in the 1980s and the 1990s the pendulum swung back, leading to excessive marketisation and poverty.⁴⁷ The current wave of marketisation began with the energy crisis of 1973 and was driven by the Washington Consensus, the Reagan and Thatcher administrations, the demise of state socialism, and the structural adjustment programmes promoted by the World Bank and the International Monetary Fund (IMF). It has been characterised by “a renewed assault on labor”, the “recommodification of money with the ascendancy of finance”, as well as “the deepening commodification of nature, that is of air, land and water” that represents an existential threat for humanity.⁴⁸ A series of national and global social movements, proposing transformative legislative reforms, have begun to resist the current wave of marketisation, especially in the aftermath of the GFC.⁴⁹ These actions point towards an incipient *third countermovement* that could swing the pendulum of the double movement back towards the principle of social protection.

This thesis will argue that this potential third countermovement has not crystallised because it has not met the conditions of a Polanyian countermovement. Following Polanyi's description of the struggle against economic liberalism in the 19th century, I argue that the first requirement of a countermovement is that it is composed of influences from different ideologies, social groups and locations. In other words, a countermovement is formed when

⁴⁵ At 26-27; also see BJ Silver and Giovanni Arrighi “Polanyi's ‘Double Movement’: The *Belle Époques* of British and U.S. Hegemony Compared” (2003) 31 PAS 325; Ernest Mandel *Long Waves of Capitalist Development: The Marxist interpretation* (Cambridge University Press, Cambridge, 1995).

⁴⁶ Burawoy, above n 44, at 23.

⁴⁷ Dale, above n 30, at 227; Holmes, above n 30, at 22.

⁴⁸ Burawoy, above n 44, at 23-24.

⁴⁹ At 12-16, 24.

people from different backgrounds and affinities agree that it is necessary to put a limit on the influence of the market over society. The second countermovement met with this requirement because it was a combination of the ideas and practices of socialism, the welfare state and the New Deal. It was not merely a “socialist movement” or a “welfarist movement”. Neither of those, by itself, would constitute a second countermovement. It is still too early to identify whether a third countermovement will follow multiple ideologies and models of public governance.

The second requirement of a countermovement is that it successfully swings the pendulum of the double movement back towards the principle of social protection, or at least towards a balance between social protection and economic liberalism. Both the 19th century countermovement described by Polanyi and the second countermovement of the mid-20th century were effective in, at least temporarily, re-establishing the dominance of social protection. As a third countermovement is only starting to rise, it is still far from accomplishing that objective.

One advantage of adopting a neo-Polanyian framework is that it allows me to assess the extent to which the ICESCR can pursue its drafters’ intention to promote social welfare by limiting the market’s influence over society. Although present efforts to resist neoliberal practices have similar objectives to those made by policymakers during the second countermovement, neoliberalism presents different challenges compared to previous manifestations of economic liberalism. Therefore, even if those in charge of implementing the ICESCR attempt to fulfil the treaty’s purpose by prioritising social protection over market interests, they might be too constrained by the practices and ideas of the second countermovement embedded in the treaty’s articles. They might not be able to adjust the ICESCR to the particular circumstances of a third countermovement.

A neo-Polanyian perspective, instead of a Marxist one, also enables me to carry out a longer-term evaluation of the ICESCR’s relevance. From a Marxist perspective, the consequence of capital accumulation is that capitalism must end, either because the rate of return on capital diminishes, leading to a self-destructing conflict among capitalists, or because capital keeps accumulating until the working class finds it intolerable and revolts.⁵⁰ Rather than insist on the inevitability of a doomsday scenario, the neo-Polanyian double movement implies

⁵⁰ Karl Marx *Capital: A Critique of Political Economy* (Friedrich Engels (ed), Samuel Moore and Edward Aveling (translators), Lawrence & Wishart, London, 1970) vol 1 at 763.

that capitalism survives because it is subjected to norms of social protection, leading to a continuum in which the market and state interventionism coexist. The ICESCR has a larger role to play within the theoretical framework of that continuum, if it adapts to the challenges presented by economic liberalism in the present and future, than in a Marxist scenario where human rights will always be ineffective because the bourgeois state will be superimposing capitalist rules over those rights until the day the workers' revolution takes place.⁵¹

Very few authors have used a neo-Polanyian framework to address legal questions.⁵² This is surprising, considering that Polanyi, as a lawyer by training,⁵³ paid significant attention to the role of legal norms in his account of the countermovement.⁵⁴ Some human rights academics have started to apply a neo-Polanyian lens, some of them as their main theoretical framework⁵⁵ and others just in passing.⁵⁶ Of those, only a handful have done so in relation to the history of economic and social rights and in ways that differ from my approach in this thesis. In her broad history of human rights, Micheline Ishay cites Polanyi's claim that the New Poor Law of 1834 was the start of modern capitalism as support of her criticism of that piece of legislation.⁵⁷ While I do not necessarily disagree with her, my account of the ICESCR's history begins much later, in the mid-20th century. In his history of the conflict between property rights and social rights, Gaston Rimlinger briefly states that the social legislation that formed the basis of the first versions of a welfare state in Britain and in Germany can be considered an effort of social protection under Polanyi's thesis.⁵⁸ My thesis will expand on that

⁵¹ BS Chimni "An outline of a Marxist course on public international law" in Susan Marks *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, Cambridge, 2008) at 82-84.

⁵² Most of these contributions are found in Christian Joerges and Josef Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing, Oxford, 2011). For neo-Polanyian contributions in the field of economic sociology of law, see Amanda Perry-Kessaris "Reading the story of law and embeddedness through a community lens: a Polanyi-meets-Cotterrell economic sociology of law" (2011) 62 NILQ 401 at 409-411; Somers and Block, above n 35, at 31.

⁵³ Dale, above n 19, at 41. For "a lawyer's reading of Polanyi's thesis", see Lorenzo Cotula "The New Enclosures? Polanyi, international investment law and the global land rush" (2013) 34 TWQ 1605 at 1607-1610.

⁵⁴ Polanyi, above n 19, at 128-129, 225-226.

⁵⁵ See Cotula, above n 53; Perry-Kessaris, above n 52, at 412; Michael Fakhri *Sugar and the Making of International Law* (Cambridge University Press, Cambridge, 2014); RE Howard-Hassmann "The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization" (2005) 27 HRW 1 at 3; Claire Methven O'Brien "The UN Special Representative on Business and Human Rights: Re-embedding or Dis-embedding Transnational Markets" in Joerges and Falke, above n 52, 323; Josef Falke "WTO and ILO: Can Social Responsibility be Maintained in International Trade" in Joerges and Falke, above n 52, 279.

⁵⁶ Michael Kolocek *The Human Right to Housing in the Face of Land Policy and Social Citizenship* (Palgrave Macmillan, Cham (Switzerland), 2017) at 4-5, 115-116; MR Somers and CNJ Roberts "Towards a New Sociology of Rights: A Genealogy of 'Buried Rights' of Citizenship and Human Rights" (2008) 4 Annu Rev Law Soc Sci 385 at 413; Kate Nash "The cultural politics of human rights and neoliberalism" (2019) 18 Journal of Human Rights 490 at 498-499; Alexander Seran "Market Intervention and Human Rights" (2018) 19 Prajñā Vihāra 21.

⁵⁷ MR Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, Berkeley (California), 2008) at 137.

⁵⁸ GV Rimlinger "Capitalism and Human Rights" (1983) 112 Daedalus 51 at 58.

assertion, providing a much richer story of the formation of the welfare state under the second countermovement.

Lastly, Richard Siegel cites the *The Great Transformation* to provide evidence that socialism was not the main inspiration for economic and social rights. The passages he uses to justify his argument refer to Polanyi's idea that the United Kingdom's early 19th century poverty relief laws – also referred to as the Speenhamland system – recognised a “right to live” but was not based on socialism.⁵⁹ Additionally, Siegel makes reference to Polanyi's idea that very diverse models of public governance, like syndicalism, capitalism, socialism and anarchism had an “almost indistinguishable approach” to poverty relief.⁶⁰ Contrary to Siegel's position, this thesis will argue that the principles of the second countermovement, which formed the basis for the ICESCR, were largely inspired by socialist theory.

On the conflicts between the ICESCR and neoliberal practices, Anna Chadwick's recent analysis of the relationship between the law and global hunger from a neo-Polanyian perspective comes closest to my own line of argument. Chadwick sees efforts to strengthen financial regulation and the human right to adequate food, one of the rights in the ICESCR, as manifestations of the role that the law has to play in combatting market excesses within the double movement.⁶¹ However, she also points to the emergence of a “[n]eoliberal economic constitution” in which market rights are more inviolable than social rights. In her opinion, the more powerful legal regimes that favour market excesses – like property law, contract law, international investment law and the WTO's dispute settlement procedure – have to be dealt with before the legal instruments that could serve as mechanisms of social protection – like international human rights instruments – can succeed.⁶²

While Chadwick's position aligns with my own position that the ICESCR is a tool of social protection, her analysis is not rooted in a historical exploration of the treaty. She highlights the obstacles created by other legal regimes in the current countermovement but does not explore the internal challenges presented by the ICESCR's own historical attachment to the second countermovement. On the other hand, the authors who explore the ICESCR's history from a neo-Polanyian perspective focus specifically on the genesis of economic and

⁵⁹ Polanyi, above n 19, at ch 7.

⁶⁰ RL Siegel “Socioeconomic Human Rights: Past and Future” (1985) 7 HRQ 255 at 261-262; Polanyi, above n 19, at 78, 108.

⁶¹ Anna Chadwick *Law and the Political Economy of Hunger* (Oxford University Press, Oxford, 2019) at 17, 166-176.

⁶² At 201-202, 176-191.

social rights, rather than their evolution through time or their current application. My thesis is innovative in that it uses the neo-Polanyian framework to discuss the history, evolution and prospects of the ICESCR in a single document.

Besides my neo-Polanyian framework, another important difference between this thesis and previous contributions to the evolution of the ICESCR lies in my choice of primary sources. In addition to the ICESCR itself, I use the ICESCR's *travaux préparatoires* to identify the interdependence between the ICESCR and the second countermovement and the treaty's purpose. A treaty's *travaux préparatoires* are helpful to identify the common intention (or in the terms used by the Vienna Convention on the Law of Treaties (VCLT), the "purpose")⁶³ of the parties, especially when the evidence found in them coincides with other relevant evidence of the parties' intentions.⁶⁴ Therefore, carrying out an interpretation that combines contextual references to the individuals, events and practices that influenced the treaty's elaboration with a careful examination of the ICESCR's *travaux* allows me to accurately identify the instrument's purpose. While some authors do employ the *travaux préparatoires* to interpret specific clauses in the text,⁶⁵ none of them use those working papers to shine a light on the way the ICESCR was modelled after mid-20th century socio-political institutions which aimed at pushing back against economic liberalism.

Furthermore, I analyse the decisions of relevant international human rights bodies – the Committee on Economic, Social and Cultural Rights (the Committee ESCR) and the Special Rapporteur on Extreme Poverty and Human Rights (the Special Rapporteur) – in two ways. The first is to examine how far elements of the second countermovement persist in current interpretations of the ICESCR. The second is to study the compatibility between the ICESCR and the ideas of an incipient third countermovement. The decisions of these bodies are only mentioned in passing by one author, Moyn.⁶⁶ He, as well as Whyte, prefer to instead focus on how some NGOs – largely irrelevant from a legal perspective – have endorsed neoliberal ideas. As a result, they have neglected the international human rights bodies' substantial efforts to promote the principles of the second countermovement embedded in the ICESCR.

⁶³ Vienna Convention on the Law of Treaties [VCLT] 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), arts 31(1), 32.

⁶⁴ Eirik Bjorge *The Evolutionary Interpretation of Treaties* (Oxford University Press, Oxford, 2014) at 60-61.

⁶⁵ See Craven, above n 9; Ben Saul, David Kinley and Jacqueline Mowbray *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, Oxford, 2014).

⁶⁶ See Moyn, above n 2, at 196, 200.

C *Argument and Summary*

Having outlined the neo-Polanyian framework of this thesis, I can now explain my argument more precisely. I will argue that the ICESCR was designed by its drafters as an instrument of the second countermovement. Nevertheless, by the time the ICESCR was adopted by the UN General Assembly, enough countries had ratified it for it to enter into force, and the main entity in charge of its supervision – the Committee ESCR – had come into action, the second countermovement was already passing and neoliberal doctrine was starting to take over the public governance agenda. This left the actors in charge of implementing the ICESCR in the uncomfortable position of having to apply mechanisms of the second countermovement to problems for which it was not designed. While the principle of social protection of the first and second countermovements remains the same, the mechanisms of social protection under a third countermovement might be different. The actors in charge of implementing the ICESCR have to resolve this dilemma for the treaty to continue being an effective tool of the countermovement.

I will present the argument of this thesis in three parts. The first part, consisting of the second and third chapters, shows that the ICESCR is a product of the second countermovement and is therefore intrinsically connected to that social, political and economic moment. Chapter II begins by identifying the first countermovement within Polanyi's *The Great Transformation* and then identifies the second countermovement as a distinct phenomenon. Although both moments entailed governmental responses to a similar manifestation of economic liberalism centred around free trade and the gold standard, they are different in several ways. First, they addressed the effects of two discrete waves of marketisation, the first in the 19th century and the second in the aftermath of the First World War. Second, the second countermovement was much more ambitious than the first, as governments that introduced social reforms had a strong backing from electorates that had recently suffered the crises of the Great Depression and the Second World War. Third, because of that political moment, the actors of the second countermovement were able to achieve a compromise between economic liberalism and social protection that could last for several decades. Fourth, but perhaps most pertinent to this thesis, the second countermovement incorporated social rights that the first countermovement had not.

Having made these distinctions, the chapter moves on to describe the second countermovement in detail, showing that it consisted of a series of transformational policies put in place by governments all around the world in the mid-20th century to hold back the

influence of the market economy over society. I start by introducing the main ideological background to the second countermovement: socialism. I identify four socialist traditions – utopian, Marxist, social democratic and Christian – which had a significant impact on the political movements and individuals who constructed the welfare state. I then demonstrate how ideas from all those socialist traditions were put in practice by socialist governments during the mid-20th century, focusing on countries that later had a very active voice in the ICESCR’s drafting – the United Kingdom, France, Chile and India. I also acknowledge Franklin Delano Roosevelt’s (FDR) reforms in the United States as non-socialist inputs to the second countermovement. As I have outlined above, I will argue that the combination of those socialist and non-socialist influences, from different parts of the world with very distinct histories, are what truly formed a Polanyian countermovement.

I conclude the second chapter by identifying six principles that were common to all those political movements and therefore defined the second countermovement: (i) markets fail in providing high levels of social welfare; (ii) governments should promote material equality; (iii) property with a strong social purpose should be commonly owned; (iv) key services should be decommodified; (v) everyone should have an adequate income, ideally through employment; and (vi) international conflict can be averted through social protection. Synthesising the second countermovement into these six principles allows me to more easily contrast the content of the ICESCR’s *travaux préparatoires* to each of them, instead of attempting to tie the *travaux* to the dozens of policies, movements, ideas and individuals I describe throughout the chapter.

Chapter III ties the principles I have identified as underlying the second countermovement to the ICESCR by studying the intentions of the treaty’s drafters. I show that, even before the ICESCR started being drafted, individuals who had been part of the second countermovement or had been influenced by its principles advanced the international recognition of economic, social and cultural rights. I then provide a short biographical account of those members of the Commission who were most influential in the discussions regarding the ICESCR’s content, highlighting the close connection most of them had to the second countermovement. Once I have provided that background, I will present the results of my analysis of the ICESCR’s *travaux*, giving specific examples of the way the Commission’s delegates perceived the principles of the second countermovement as the basis for the treaty. I will then demonstrate that, despite the delegates’ commitment to all six principles, the ICESCR’s text ultimately reflected some more than others. By the end of the chapter, I will

have demonstrated that, while not all of the ICESCR's content is necessarily explained by the second countermovement, the treaty is primarily an international manifestation of the principles and policies of that countermovement. More widely, I will have shown that the drafters' ultimate purpose was to embed the international human rights system with a clear intention to resist the excessive marketisation caused by economic liberalism.

The second part of my thesis, comprising the fourth and fifth chapters, relates the ICESCR to an emerging third countermovement and identifies the challenges that arise from the conflict between the treaty's intrinsic connection to its historical roots and its need to adapt to the demands of the current movements against the excessive influence of the market over society. Chapter IV gives an account of the theory behind neoliberal practices, how they have been applied in practice and their detrimental effects on society, from their influence on individuals' perspectives on life in society through to the rise of populism and rampant inequality. Then, I explain that even though neoliberal ideas are firmly settled in public governance, there are signs that a third countermovement is starting to form. Although the 1990s anti-globalisation movements and a shift in the United Nation's approach to international development were defined counteractions against neoliberal practices, a potential third countermovement only started to appear when the GFC shook the foundations of neoliberal dominance. Economic policies that had been mostly developed before the GFC but had never received sufficient public backing started to gather support after that crisis. As examples of those policies, I present three economic strategies – universal basic income (UBI), zero-carbon economies and wellbeing economics – that address unique challenges of the neoliberal era. I claim that these three policies represent a significant break from the logic of the second countermovement and therefore give rise to the dilemma of applying the ICESCR – an international treaty developed as an international manifestation of that logic – in the current wave of resistance against neoliberal policies.

Chapter V analyses the work of two international bodies that supervise the ICESCR's implementation – the Committee ESCR and the Special Rapporteur – to examine whether they have interpreted the treaty as an instrument of social protection against the detrimental effects of neoliberal practices. Moreover, I analyse how they have dealt with the transition from the second countermovement to the contemporary resistance against economic liberalism. The results of my research vary between the two bodies. The Committee ESCR has consistently applied most principles of the second countermovement, but only gradually resisted neoliberal practices. During its first years of operation, it hesitated to oppose the neoliberal doctrine

directly, even demonstrating tolerance towards economic liberalism at one point. In the aftermath of the GFC, however, the Committee ESCR more openly criticised neoliberal policies, even advising States Parties to the ICESCR to reverse them. Limited by the ICESCR's rooting in the second countermovement, the Committee ESCR has mostly failed to endorse new ideas that could more effectively address the challenges posed by neoliberal practices.

The Special Rapporteur has actively opposed neoliberal trends since the start of its mandate. Positioning itself as an actor of the emerging third countermovement, the Special Rapporteur has more openly encouraged governments to adopt transformative policies that steer away from the principles of the second countermovement. However, as I discuss, this might be due to the Special Rapporteur's relative freedom, as its mandate is not constrained by the ICESCR's past.

After summarising the main findings of this thesis, the final chapter of this thesis sketches three paths the ICESCR might encounter in the near and distant future. The first path is to follow Samuel Moyn and others' recommendation to abandon the ICESCR as a mechanism that could offer any sort of effective protection against neoliberal influence on society. The second is to reform the ICESCR to meet the challenges of an upcoming third countermovement, eliminating obsolete content and adding new rights that better fit the current challenges of the neoliberal era. The third path is to follow the Committee ESCR's recommendation and conduct an evolving interpretation of the ICESCR, incorporating the emerging mechanisms of a third countermovement into the realm of international human rights law. As I will point out, each of these paths has advantages and disadvantages, and raise questions about the convenience of formulating international treaties in light of specific socio-political circumstances.

II *The Second Countermovement*

International law has always been, and will likely continue to be, an expression of politics.⁶⁷ In the case of human rights, suggests Koskenniemi, they are merely “techniques for justifying one type of rule and one type of behaviour over others”.⁶⁸ If that is the case, what was the type of rule and behaviour that was being justified through the ICESCR? Based on the neo-Polanyian framework described above, the next two chapters will establish that the ICESCR instantiated the mid-20th century social, political and economic moment I refer to as the second countermovement.

In order to make that connection, this chapter will describe and analyse the second countermovement. I will begin by distinguishing it from the first countermovement, explaining how the second countermovement was a reaction to the short but intense wave of marketisation that took place in the interwar period. The chapter continues with a brief exploration of the second countermovement’s socialist intellectual background, and then describes how that socialist inspiration led to the policies associated with the welfare state in the United Kingdom and other countries. However, my account of the second countermovement also encompasses policies that were not directly related to socialism, such as the New Deal in the United States. I will argue that the combination of those socialist and non-socialist influences is what categorises the mid-20th century trend I describe as a true Polanyian countermovement against economic liberalism and not merely a “socialist movement” or a “welfarist movement”. Thus, in the last section of the chapter, I bring together those different influences and identify six principles that define the second countermovement as a whole. Identifying those principles will allow me to then show, in the next chapter of this thesis, how each of them was manifested in the ICESCR.

For the purposes of my argument, I have chosen to focus on expressions of the second countermovement in those countries that had a defining role in the Commission, the body that drafted the ICESCR. Those countries are Chile, France, India, the United Kingdom and the United States. Because of the larger influence of Fabian socialism and the British welfare state

⁶⁷ See Martti Koskenniemi “Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and Then Some” in Jeff Handmaker and Karin Arts (eds) *Mobilising International Law for ‘Global Justice’* (Cambridge University Press, Cambridge, 2018) 22.

⁶⁸ At 37.

on the second countermovement and the ICESCR, I will especially highlight the second countermovement in the United Kingdom.

The Soviet delegation (and other delegations within the Union of Soviet Socialist Republics' (USSR) sphere of influence) actively participated in the discussions that surrounded the adoption of the ICESCR and had some impact on the text of the treaty – article 11(2)(a), for example. Nevertheless, I am excluding those countries from my analysis for three reasons. First, my examination of the ICESCR's *travaux préparatoires* shows there is not enough material to establish a link between the Soviet model of governance and the treaty. Soviet participation in the discussions surrounding the ICESCR's adoption rarely contributed to the treaty's content. Already immersed in the ideological struggle of the Cold War, Soviet interventions were often limited to highlighting the alleged benefits of their economic system over those of Western countries, instead of making substantial contributions to the text of the treaty. Of the substantial proposals they made, very few were actually incorporated in the ICESCR, as they were often based on a type of socialism that was incompatible with private enterprise. As I will show below, because the second countermovement was in part a response to the Overton window⁶⁹ opened by the Great Depression and the Second World War, one of its main characteristics, which later translated into the ICESCR, was its toleration of private property and entrepreneurship. The Soviet model fell outside that Overton Window.

The second reason for excluding the USSR is of a chronological nature. Bolshevism was an element of the first countermovement and not the second. As I will explain in more detail below, the second countermovement began in the interwar period as a response to the second wave of marketisation that took place in the 1920s. In fact, Polanyi believed that the Bolshevik Revolution was the event of the first countermovement that swung the pendulum of the double movement back towards economic liberalism. When the working class, encouraged by the rise of Bolshevism, insisted on resisting the expansion of the market economy in the interwar period, the conservative sectors of Italian and German society responded to the "Bolshevik scare" by electing fascist leaders who would ensure the continuation of the market's

⁶⁹ The Overton window of political possibility is a concept coined by Joseph Overton (Mackinac Center for Public Policy) to describe the range of policy options that are politically feasible for governments to pursue at any given time as a consequence of shifts in societal acceptance of those policy options. See Shyam Gouri Suresh and Scott Jeffrey "The Consequences of Social Pressures on Partisan Opinion Dynamics" (2017) 43 *Eastern Economic Journal* 242; "The Overton Window" (Mackinac Center for Public Policy www.mackinac.org/overtonwindow; Maggie Astor "How the Politically Unthinkable Can Become Mainstream" *The New York Times* (online ed, New York, 26 February 2019).

dominance, even if that meant sacrificing democratic institutions.⁷⁰ Therefore, in the chronology of the double movement, the Bolsheviks' takeover of the Russian government preceded the second countermovement.

Lastly, I am excluding the USSR because, by the time the ICESCR was drafted, the country's model of governance could no longer be counted as a form of social protection that fits into the trends of the second countermovement I identify in this chapter.⁷¹ Indeed, the political experiments of Marxist-Leninist governments can hardly be categorised as socialist. Harrington calls them "authoritarian collectivisms" because, although nationalisation was carried out in those societies, it was a dictatorial political and bureaucratic class that had control over the economy, instead of the working people.⁷² Similar issues were then passed on to developing countries like Cuba and Angola, which adopted a Marxist-Leninist "anti-socialist socialism".⁷³

Even if this form of governance could be called socialism, however, it is important to remember that this chapter takes a neo-Polanyian "bigger picture" approach and tells the story of the second countermovement, not the story of socialism. While it seems counter-intuitive to exclude a model of governance that is often thought of as the primary example of socialism, it is justifiable to focus on forms of socialism that had the most impact on the second countermovement (such as Fabian socialism, which I will describe below) and exclude others that cannot be associated with the principles of that moment. My intention is not to depreciate the relevance of Soviet socialism in the mid-20th century, as it is likely that without its presence the balance of the double movement would have never tilted towards the second countermovement. Additionally, as seen in Chapter III, some of the Soviet delegation's statements in the Commission were not incompatible with the principles of the second countermovement. Indeed, as I have already stated, not all of the ICESCR's content is necessarily explained by its ties to the second countermovement. However, for the reasons presented above, the USSR and other smaller Soviet states will be excluded from my analysis.

⁷⁰ Polanyi, above n 19, at 187-191, 237.

⁷¹ For more on Stalin's dictatorial policies, which resulted in the death of millions, see See RR Abramovitch *The Soviet Revolution: 1917-1939* (International Universities Press, New York, 1962) at 332-338, 347-349, 363.

⁷² Michael Harrington *Socialism: Past and Future* (Arcade Publishing, New York, 1989) at 60-61.

⁷³ At 61-62.

A *The First Countermovement*

In *The Great Transformation*, Polanyi described the double movement as a phenomenon that pertained to the “long 19th century”.⁷⁴ He explained that, before the Industrial Revolution, the sovereign usually had the power to slow down the pace of technological progress and the social dislocation caused by it.⁷⁵ However, this prerogative disappeared during the Industrial Revolution, when the economic leap caused by a new wave of technological progress led to the rise of the market economy. Polanyi described the market economy as an economic system where:⁷⁶

All transactions are turned into money transactions, and these in turn require that a medium of exchange be introduced into every articulation of industrial life. All incomes must derive from the sale of something or other, and whatever the actual source of a person’s income, it must be regarded as resulting from sale. No less is implied in the simple term “market system”, by which we designate the institutional pattern described. But the most startling peculiarity of the system lies in the fact that, once it is established, it must be allowed to function without outside interference. Profits are not any more guaranteed, and the merchant must make his profits on the market. Prices must be allowed to regulate themselves. Such a self-regulating system of markets is what we mean by a market economy.

This description coincides with what is more commonly known as liberal economics or as the doctrine of laissez-faire. This theory was first developed by the Classical school of political economy, led by Adam Smith in the late 18th century and later advanced by David Ricardo, Jean-Baptiste Say and Robert Malthus in the early 19th century.⁷⁷ They suggested that a free market enabled the competition necessary to translate individual entrepreneurship to a higher national output and, consequently, more social welfare. At an international level, the theory of comparative advantage (developed by Ricardo) implied that only free trade allowed each country to maximise its outputs by forcing them. Therefore, the government should avoid interfering in the free market through, for example, regulation or protectionism. Additionally, the Classical school believed the economy was composed of three classes: capitalists, workers and landlords. It was in everyone’s interest that the capitalist class gained the largest share of the national income so they would invest and continue generating economic growth.⁷⁸

⁷⁴ The term “long 19th century” refers to the period roughly between 1770 and 1914. See Randall Lesaffer and Inge Van Hulle “Introduction” in Inge Van Hulle and Randall Lesaffer (eds) *International Law in the Long Nineteenth Century (1776-1914): From the Public Law of Europe to Global International Law?* (Brill, Leiden, 2019) 1 at 1.

⁷⁵ At 34-39.

⁷⁶ At 40-42.

⁷⁷ Ha-Joon Chang *Economics: The User’s Guide* (Penguin Books, London, 2014) at 115.

⁷⁸ At 115-117.

From the mid-19th century onwards, the British government (and other European governments following its example) adopted laissez-faire economics. They did this, first, by abandoning the protection of some of their domestic markets and encouraging free trade and, secondly, by adopting the gold standard. This latter instrument, introduced in Britain in 1821, consisted of linking each unit of national currency to a determined gold quantity. Thus, whereas national currencies had previously not been interchangeable, they now were, creating the conditions for stable currency exchange and the expansion of foreign trade.⁷⁹

The brutal transition from earlier forms of economy to the laissez-faire or market economy in Europe is what gives *The Great Transformation* its name. In Polanyi's words, it was a change so profound "that it resemble[d] more the metamorphosis of the caterpillar than any alteration that can be explained in terms of continuous growth and development".⁸⁰ With the market economy, social relations became subordinate to the market. Rather than society establishing the rules for the economic system, the economic system came to be seen as having its own autonomous institutions and rules that society must respect and adapt to – it became "disembedded" from society.⁸¹

The market economy's dominance was met by a "collectivist" countermovement in Europe from the 1860s onwards. This first countermovement consisted of state interference via social legislation related to issues such as labour, social insurance, public health and taxes. These actions were not inspired by socialism, protectionist nationalism, or any particular ideology, argued Polanyi. The countermovement took place simultaneously in countries with very different contexts, like Britain, Prussia, France and the Austro-Hungarian Empire. It was also supported by very diverse sectors – from the advocates of laissez-faire themselves, imperialists and conservatives, to the Catholic Church and socialists. All were driven by "objective reasons of a stringent nature" – the understanding that a self-regulating market would lead to disaster and that the market system and interventionism are not mutually exclusive.⁸²

⁷⁹ IT Berend *An Economic History of Twentieth-Century Europe: Economic Regimes from Laissez-Faire to Globalization* (Cambridge University Press, Cambridge, 2006) at 11-12.

⁸⁰ Polanyi, above n 19, at 42.

⁸¹ At 57, 71.

⁸² At 131, 145-149; see also Michael Stolleis *History of Social Law in Germany* (Springer, Berlin, 2014) at ch 3; Virginia Crossman *Poverty and the Poor Law in Ireland, 1850–1914* (Liverpool University Press, Liverpool, 2013); JF Stone *The Search for Social Peace: Reform Legislation in France, 1890–1914* (SUNY Press, New York, 1985).

Polanyi described the collectivist countermovement in more detail by separating the responses given to the three fictitious commodities: labour, land and money. Regarding the first, he argued that the socialist experiments of Robert Owen, of which consumer cooperatives and trade unions were the most notable, had demonstrated that industry could be run with a social, instead of an economic, approach.⁸³ Additionally, although it eventually failed, the Chartist Movement – which demanded universal suffrage in Britain – stood up for the working class’s right to vote.⁸⁴ In continental Europe, Marx had a greater influence on workers, who became more politically conscious and joined forces as political socialists. Their influence on public governance was facilitated by the processes of state unification in Germany, Italy and the Eastern European countries. Feeling the pressure of the socialist agenda, Bismarck used social legislation as a tool of unification, while the nationalisation of railways had the same role in Italy. Moreover, because industrialisation arrived in Europe half a century after it had developed in Britain, the social movements in the continent were able to use the lessons of the catastrophic Industrial Revolution and the ensuing British methods of social protection in their favour. In both Britain and continental Europe, universal suffrage also led to more social legislation, trade unions, factory laws and unemployment insurance. Overall, the countermovement against the commodification of labour managed to protect the “human character” of work and removed it from the market economy by interrupting its supply and demand.⁸⁵

The countermovement against the commodification of land also came in the form of social legislation. In Britain, statutes were passed to limit the amount of rural land that could be used for industrial purposes, guarantee that tenants had healthier homes, and provide allotments to enable the poor to have time outdoors.⁸⁶ In continental Europe, agricultural protectionism was enacted by governments to slow down the migration from the countryside to urban centres.⁸⁷

Finally, according to Polanyi, protection from the commodification of money was necessary to protect capitalism and productive enterprise against an unrestricted market

⁸³ At 167-172; see also Chris Rogers “Robert Owen, utopian socialism and social transformation” (2018) 54 J Hist Behav Sci 256.

⁸⁴ At 172-173; see also PJ Gurney “The Democratic Idiom: Languages of Democracy in the Chartist Movement” (2014) 86 JMH 566.

⁸⁵ At 174-177; see also Beatrice Scheubel *Bismarck’s Institutions: A Historical Perspective on the Social Security Hypothesis* (Mohr Siebeck, Tübingen, 2013).

⁸⁶ At 182.

⁸⁷ At 185.

economy. Foreign trade was based on the gold standard during the 19th century, meaning that the amount of currency could not be increased rapidly. This led to a fall in prices domestically, which threatened business. Governments' counteraction to this trend was the establishment of central banking systems to manage deflation.⁸⁸ Money was now a question of policy, and not just economics. The gold standard thus lost influence at a national level and money regained its main function as a way to purchase goods instead of being a tool for international trade. The fall of the gold standard, claimed Polanyi, put an end to the market economy.⁸⁹ Nevertheless, contrary to this assessment, the pendulum swung back in favour of economic liberalism and the double movement continued (see Chapter IV).

B The Second Countermovement

This section will tell the story of the wave of mid-20th century reforms that I refer to as the second countermovement and that inspired the elaboration of the ICESCR. I will highlight the social policies that defined the era, from the New Deal to the socialist-inspired welfare state, and identify six principles common to those policies. These will serve as the basis for my analysis of the ICESCR's *travaux préparatoires* in Chapter III. The section will begin by explaining why the second countermovement deserves separate treatment from the first countermovement and how that distinction is helpful in interpreting the ICESCR. It will then move to a brief study of the ideological background to the key strands of the second countermovement – late 19th- to early 20th-century socialism. This will be followed by an account of the main political movements and policies that defined the second countermovement. I will end the chapter by defining the six principles that will act as the framework for my identification of the ICESCR as a tool of the second countermovement.

1 Distinguishing the first and second countermovements

Under a neo-Polanyian interpretation of *The Great Transformation*, Polanyi's account of the double movement can be divided in two.⁹⁰ The first part has already been described above as the first countermovement, which took place in the historical period known as “the

⁸⁸ At 193-195; see also Natalia Chernyshoff, DS Jacks and AM Taylor “Stuck on gold: Real exchange rate volatility and the rise and fall of the gold standard, 1875–1939” (2009) 77 JIE 195.

⁸⁹ At 197-198.

⁹⁰ See Burawoy, above n 44, at 23, 25.

long 19th century” and ended with the First World War. The second part of the account begins with a second wave of marketisation led by the League of Nations’ attempt to restore the market economy in the 1920s. It then moves to the series of actions taken in the United States and the United Kingdom that Polanyi believed put an end to economic liberalism in the 1930s, which constitute the beginning of the period referred to in this thesis as the second countermovement.

Writing in 1944, Polanyi ended *The Great Transformation* with a vision of a future where the Fascists were defeated and the principle of social protection prevailed over the market economy. The three decades following the publication of Polanyi’s monograph in fact bore out his account. The second countermovement continued into the post-war era with transformational policy reforms that set the foundations of welfare states all around the world. This section will focus on that second countermovement.

In the aftermath of the First World War, the League of Nations was created in 1919 with the objective of maintaining peace. As Polanyi explained, the League believed the market economy could act as a “second line of defence for peace” by incentivising free trade based on the gold standard and relying on international financial corporations like JP Morgan and NM Rothschild.⁹¹ This strategy, argued Polanyi, was based on the remnants of the 19th century liberal utopian view that if international relations were based on the market system, profit interests would prevent nations from starting a war that would interrupt free trade.⁹²

The international community’s insistence on reintroducing the gold standard,⁹³ however, destabilised the global order once more. The rigidity of the exchange rate under the gold standard caused a sequence of national currency crises that started in the Balkans, jumped to Western Europe, eventually reached the United States and threw the globe into the Great Depression in 1929.⁹⁴ The need for a stable internal currency to mitigate the effects of the economic crisis led the United Kingdom (in 1931) and the United States (in 1933) to abandon the gold standard altogether. This put an end to the second wave of marketisation and marked the start of the second countermovement against economic liberalism.⁹⁵

Nevertheless, the fragile scenario created by the Great Depression led to the emergence of fascism. The Great Depression led to a clash between industry, represented by employers,

⁹¹ Polanyi, above n 19, at 23, 27-28; also see Berend, above n 79, at 55-61.

⁹² At 29-30, 211-215.

⁹³ See Patricia Clavin *Securing the World Economy: The Reinvention of the League of Nations, 1920–1946* (Oxford University Press, Oxford, 2013) at 16-25.

⁹⁴ At ch 2; Polanyi, above n 19, at 24-25; Burawoy, above n 44, at 23.

⁹⁵ Polanyi, above n 19, at 199-200.

and a labour movement that was already inclining towards socialism. Socialism, in Polanyi's view, only sought to subordinate the self-regulating market to a democratic society, without necessarily interfering with private property. However, with the example of the USSR and the chaos generated by the Great Depression, socialism became a symbol of the danger of upsetting the balance between industry and government interventionism. Therefore, when people were faced with the possibility of a complete paralysis of the economic and political systems, they turned to fascism as an easy way out of that scenario.⁹⁶ Thus, fascism was a reaction to the forces of the countermovement that were attempting to re-embed the economy into society.⁹⁷

In the last chapter of *The Great Transformation*, Polanyi offered a prediction of the future. He observed that, in many countries, a transition into a re-embedded economy, where society held control over the economy and not the other way around, was taking place as the fascists were defeated and the Second World War came to an end. Regardless of the avenues taken by each country, he argued, "the outcome is common with them all: the market system will no longer be self-regulating, even in principle, since it will not comprise labor, land, and money".⁹⁸ Labour would no longer be subjected to a competitive market. Instead, working conditions and wages would be set outside the market, and wages would become a secondary aspect of work compared to other motivations. Land would be linked once more to traditional institutions like homesteads, townships, factories, schools, churches, parks, and wildlife conservation areas, and the price of raw materials and essential foods would be set outside of the market too. The growth of income from property ownership would be bound to social needs. Money would be removed from the market through the state's direction of investments and the regulation of interest rates, under a system of "functional finance". Moreover, he envisaged an international order where economic cooperation among friendly nations – beyond just free trade – would be the norm, allowing states the freedom to shape their domestic institutions according to their own inclinations instead of the pattern set by the global economy.⁹⁹

Finally, Polanyi projected that societies would be guided by peace and freedom, instead of profit and warfare. "[O]ld freedoms and civic rights [would] be added to the fund of a new freedom generated by the leisure and security that industrial society offers to all", ensuring both freedom and justice. The only "moral obstacle" for this vision, said Polanyi, was the belief that government intervention was an attack on freedom and that a free society could not exist

⁹⁶ At 234-237.

⁹⁷ At 240.

⁹⁸ At 251.

⁹⁹ At 251-252.

without private ownership and free enterprise.¹⁰⁰ If fascism arose, it was because of the liberals' claim that the state's power is evil. Yet, in a complex society, freedom cannot be achieved without the state's mitigation of the market's devastation.¹⁰¹

Despite this vision, *The Great Transformation* – published in 1944 – contains little acknowledgment of the magnitude of the second wave of social protection taking over Europe and the rest of the world. As I will examine below, in the United States, the move away from the gold standard was just one of the first countermoves of the New Deal, and FDR was proposing a second bill of rights that included economic and social rights. In the United Kingdom, the Beveridge Report was published in 1942. Although its recommendations were not properly enacted until a few years later, it seems unlikely that Polanyi would have missed the mass support it received. At a global level, the Atlantic Charter had been signed in 1941, auguring a new world order based on a balance between human rights and international trade.

The scale of these policies sets the second countermovement apart from the first. While it was also a response to laissez-faire economics,¹⁰² the second countermovement's ambition was much greater. The shocks of the Great Depression and the Second World War brought progressive or socialist governments to power in most regions of the globe, and those governments had a clear mandate from the public to bring forward transformational policies that could restore the economy while promoting material equality and everyone's wellbeing. John Maynard Keynes called for a new economic system in which capital movements were strictly regulated, even arguing that the government should have control over how and when private capital was invested.¹⁰³ This organisation of the economy ensured that, instead of economic depressions, countries would only suffer "mild recessions", leading to a stable growth in standards of living.¹⁰⁴ Thus, the second countermovement was an unprecedented social democratic project aimed at reinstating the primacy of politics over the economy.¹⁰⁵

A second difference between the first and second countermovements is that governments during the second countermovement were able to create a balance between

¹⁰⁰ At 252-256.

¹⁰¹ At 257-258.

¹⁰² David Garland "The Welfare State: A Fundamental Dimension of Modern Government" (2015) 55 *European Journal of Sociology* 327 at 353-354.

¹⁰³ Kari Polanyi Levitt "Keynes and Polanyi: the 1920s and the 1990s" (2006) 13 *RIPE* 152 at 166.

¹⁰⁴ Robert Boyer and JR Hollingsworth "From National Embeddedness to Spatial and Institutional Nestedness" in JR Hollingsworth and Robert Boyer *Contemporary Capitalism: The Embeddedness of Institutions* (Cambridge University Press, Cambridge, 1997) at 435.

¹⁰⁵ Sheri Berman *The Primacy of Politics: Social Democracy and the Making of Europe's Twentieth Century* (Cambridge University Press, Cambridge, 2006) at 5-6.

economic liberalism and social protection that they did not accomplish during the first countermovement. In an influential 1982 article, John Ruggie argued that the post-Second World War economic order differed from the laissez-faire model of economic liberalism that Polanyi described in *The Great Transformation* because, contrary to the period following the First World War, governments did not make the mistake of attempting to reinstall the instruments of the market economy. Instead, under “demands for social protection [that] were very nearly universal”, a global opposition to economic liberalism and “unimpeded multilateralism” everywhere except in the United States, the state reassumed control over the market.¹⁰⁶

Nevertheless, most countries still relied on an international currency system that would facilitate international trade. This led to a compromise between international finance and domestic stability, which Ruggie referred to as “embedded liberalism” – a multilateral international order subjected to domestic interventionism.¹⁰⁷ The compromise was cemented in the General Agreement on Tariffs and Trade (GATT) and the IMF.¹⁰⁸ Therefore, although traces of the 19th century “profit motive” were carried into the second countermovement,¹⁰⁹ the significant steps taken by governments to regulate the market not only define the era as a countermovement but distinguish it from the first.

Lastly, a distinction between the first and second countermovements, which is especially significant in the context of this thesis, is the recognition of social rights. Whereas the first movement was based mostly on labour rights, the actors of the second countermovement went beyond and promoted other rights like social security, education and health care.¹¹⁰ In other words, they recognised the social rights that would become the core of the ICESCR.

For those reasons, the first and second countermovements are treated as separate moments in this thesis. An advantage of this distinction is that it allows me to concentrate my

¹⁰⁶ JG Ruggie “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order” (1982) 36 IO 379 at 386-388, 393.

¹⁰⁷ At 392-393.

¹⁰⁸ At 397-398.

¹⁰⁹ See Hannes Lacher “The Slight Transformation: Contesting the Legacy of Karl Polanyi” in Ayşe Buğra and Kaan Ağartan (eds) *Reading Karl Polanyi for the Twenty-First Century: Market Economy as a Political Project* (Palgrave Macmillan, New York, 2007) 49 at 54-55; Sener Akturk “Between Aristotle and the Welfare State: The Establishment, Enforcement and Transformation of Moral Economy in Karl Polanyi’s ‘The Great Transformation’” 109 *Theoria* 100 at 108; Fraser, above n 30, at 553-554.

¹¹⁰ Burawoy, above n 44, at 23; Garland, above n 102, at 343; also see Walter Korpi “Power, Politics, and State Autonomy in the Development of Social Citizenship: Social Rights During Sickness in Eighteen OECD Countries Since 1930” (1989) 54 *ASR* 309.

attention on the policies of a reduced period – roughly from the early 1930s to the early 1950s – instead of having to analyse and find commonalities between actions that were taken from the moment the first countermovement started (around the 1860s) until the 1950s. Focusing on actions taken in the years immediately preceding the elaboration of the ICESCR also enables me to show that the treaty was deeply influenced by the policies that were taking shape and being set in action as the ICESCR's content was being defined.

2 *The second countermovement's ideological background: socialism*

The second countermovement – just like the first – consisted of a conglomeration of ideas and actions from more than one ideological camp. Nevertheless, as seen above, one of the elements that distinguished the two countermovements was that governments were able to effectively bring the market under their control, at least for three decades, during the second countermovement. I attribute this success to the dominance of socialist ideas over liberal ones in the governments that came to power during that period. Exploring that socialist ideological background can thus lead to a more nuanced understanding of the ICESCR.

In this respect, my account offers a different perspective on the history of economic and social rights, which has traditionally focused on the welfare state.¹¹¹ By exploring the ICESCR's ideological background more fully, this thesis captures the degree to which the instrument was linked at its onset to the purpose of limiting the harmful effects of excessive marketisation on the working class. Nevertheless, as I will argue towards the end of this thesis, those ideological roots might constrain those in charge of implementing the ICESCR today from transcending the socialist focus on labour and considering other ways in which governments could guarantee people's wellbeing.

Because the second countermovement could not have taken place without the influence of socialism on public governance, I will provide a brief overview of the origins and concept of that ideology. I will focus on the ideas of four socialist traditions – utopian, Marxist, social democratic and Christian socialism – that were of most relevance for the formation of the second countermovement and therefore had an impact on the ICESCR's purpose and content. Most of these traditions developed during the period of the first countermovement, which is why I will rely mostly on scholarship from that time to provide a more accurate idea of what

¹¹¹ See Moyn, above n 2.

socialism meant then, rather than today. Nevertheless, socialists only had an indirect impact on public governance at the time, mostly forcing conservative governments to adopt some social policy to please the labour movements (as seen in the case of Bismarck in Germany, highlighted above). Socialists did not come to power and have a direct influence on policy – apart from the USSR, which I have excluded from my analysis for reasons already stated – until the time of the second countermovement. The welfare state of the mid-20th century was, in fact, the politically viable manifestation of socialism. I will show that was the case in the United Kingdom, France, Chile, and India – countries that later had an important role in the elaboration of the ICESCR.

At its most basic, socialists have historically sought to use the power of the state to reform the institution of private property and create a more egalitarian society.¹¹² In Durkheim’s words, socialists advocate for “the amelioration of the condition of working classes, by introducing greater equality into economic relations”, making socialism “the economic philosophy of the suffering classes”.¹¹³ In 1911, John Martin indicated that political experts could agree at the time that socialism was defined by four goals:¹¹⁴

1. Public ownership of nearly all means of production.
2. Operation of these means of production by public officials.
3. Distribution of the income according to the rules determined by the community.
4. Private ownership of the income so distributed.

Not every form of socialism is Marxist or communist. While communism’s logic is centred around the negative effects of private property, socialism in general is concerned with advancement towards “the good society” or “a better society”.¹¹⁵ Karl Marx, contrary to popular belief, “was neither the first socialist nor the last”.¹¹⁶ Many philosophers were earlier exponents of socialist ideas.¹¹⁷ However, these were just sporadic visions of an ideal society, rather than programmatic theories of social organisation.¹¹⁸

¹¹² Émile Durkheim *Socialism and Saint-Simon* (AW Gouldner ed, Charlotte Sattler translator, Routledge & Kegan Paul, London, 1959) at 29.

¹¹³ At 15.

¹¹⁴ John Martin “An Attempt to Define Socialism” (1911) 1 AER 347 at 349; for other studies on the commonalities between socialist traditions, see AS Rappoport *Dictionary of Socialism* (T Fisher Unwin, London, 1924) at 36-41, 48; RN Berki *Socialism* (JM Dent & Sons, London, 1975) at 25-36.

¹¹⁵ Peter Beilharz *Labour’s Utopia: Bolshevism, Fabianism, Social Democracy* (Routledge, London, 1992) at 2-3.

¹¹⁶ At 1.

¹¹⁷ Durkheim, above n 112, at 29-30, chs 3-4; Harrington, above n 72, at 5, 29.

¹¹⁸ Durkheim, above n 112, at 31.

(a) Utopian socialism

The first socialist tradition was what Marx and Engels would later denominate, in a derogatory way, “utopian” socialism.¹¹⁹ Utopian socialists like Saint-Simon, Owen and Fourier believed that society should substitute the state as far as possible.¹²⁰ Saint-Simon (1760–1825) believed in corporatism – the idea that a citizen’s main responsibility is to be productive, and that once every single person was working, thus avoiding “parasitism”, there would be no further need for the state.¹²¹ He introduced the idea that if industry were completely liberalised instead of subordinated to collective control, it would go into decline and eventually self-destruct.¹²²

Fourier (1772–1837) also believed in a society that could abolish poverty through cooperative social structures instead of the state’s coercion. Contrary to Saint-Simon, however, he did not believe communal property was essential in this utopian society and was cautious in upholding individual rights in case the community ever became tyrannical.¹²³ Robert Owen (1771–1858) was a philanthropic factory-owner who heavily criticised the Poor Law in Great Britain. He argued that the main cause of the workers’ suffering in the period following the Napoleonic wars was the supplanting of men by machines, and the consequent increase in competition among labourers, which resulted in inferior wages. Owen went beyond a theoretical approach to the problem, and conducted socialist experiments concerning factory laws, democratic education, cooperative organisations and trade unions.¹²⁴ The second countermovement’s focus on labour originates in the ideas of these utopian socialists.

(b) Marxism

As an alternative to these “utopian” forms of socialism, Karl Marx and Friedrich Engels’ built their “scientific” approach to socialism from the mid to late 19th century.¹²⁵ They believed the Industrial Revolution had the effect of creating a large working force that was concentrated in urban areas and competed for labour. That competition allowed factory and

¹¹⁹ See Karl Marx and Friedrich Engels *The Communist Manifesto* (Penguin Books, London, 2004) at 47.

¹²⁰ Harrington, above n 72, at 29.

¹²¹ Beilharz, above n 115, at 3–4.

¹²² At 193–194, 197.

¹²³ JR MacDonald *Socialism* (TC & EC Jack, London, 1907) at 24–25.

¹²⁴ At 36–38.

¹²⁵ See Friedrich Engels *Socialism: Utopian and Scientific* (Edward Aveling translator, Greenwood Press, Westport (Connecticut), 1935).

mine owners to exploit workers and offer wages that were as low or even inferior to those of the 18th and previous centuries.¹²⁶ This led to an unprecedented level of urban poverty.¹²⁷

In response, they published *The Communist Manifesto* in 1848. In the *Manifesto*, they described the historical struggle between the oppressing and the oppressed classes, which had evolved into an antagonism between the bourgeoisie (“the modern Capitalists, owners of the means of social production and employers of wage labour”) and the proletariat (“the class of modern wage-labourers who, having no means of production of their own, are reduced to selling their labour power in order to live”).¹²⁸ They believed the proletariat would unite into a single class and political party (the Communist Party), take advantage of the crises created by the bourgeoisie’s lack of control over their own production, and revolt to form a proletarian government.¹²⁹ This government would seize private property and capital and centralise it in the hands of the state to increase production “as rapidly as possible”.¹³⁰ In addition, although specific measures would vary among countries, “the most advanced countries” with a proletarian government would take ten initial actions:¹³¹

1. Abolition of property in land and application of all rents of land to public purposes.
2. *A heavy progressive or graduated income tax.*
3. Abolition of all rights of inheritance.
4. Confiscation of the property of all emigrants and rebels.
5. *Centralization of credit in the hands of the State, by means of a national bank with State capital and an exclusive monopoly.*
6. *Centralization of the means of communication and transport in the hands of the State.*
7. *Extension of factories and instruments of production owned by the State; the bringing into cultivation of wastelands, and the improvement of the soil generally in accordance with a common plan.*
8. Equal liability of all to labour. Establishment of industrial armies, especially for agriculture.
9. Combination of agriculture with manufacturing industries; gradual abolition of the distinction between town and country, by a more equable distribution of the population over the country.
10. *Free education for all children in public schools. Abolition of children’s factory labour in its present form.* Combination of education with industrial production...

Of these objectives, the ones that I have italicised (roughly half) had an immense influence on the second countermovement and they are reflected in the six principles of that

¹²⁶ Piketty, above n 6, at 8-9.

¹²⁷ For a graphic description of urban poverty in England at the time, see Friedrich Engels *The Condition of the Working Class in England in 1844* (FK Wischnewetzky (translator), George Allen & Unwin, London, 1892) at 48-50.

¹²⁸ Marx and Engels, above n 119, at 3-4.

¹²⁹ At ch 1, 21-22.

¹³⁰ At 32.

¹³¹ At 32-33 (emphasis added).

movement I will identify towards the end of this chapter. As I will show in the next chapter, most of them were also incorporated into the ICESCR.

Later, in *Das Kapital* (1867), Marx made at least three claims that would become foundational principles of socialism and also have a great impact on the second countermovement. The first was that, in a capitalist system, labour is bought and sold as a commodity.¹³² Because workers are mortal and need to subsist in order to keep selling their labour, the value of that commodity is at least equivalent to the value of the means of subsistence required to maintain the workers. That value is the minimum wage in a capitalist society.¹³³

The second fundamental claim made by Marx in *Das Kapital* follows from this previous idea. When capitalists produce something, their objective is to sell a commodity with a value greater than the sum of the costs of its production. Capitalists could stop producing at the point at which the value of the product and the means of production are the same, but they choose to create additional value, which Marx calls surplus-value. This labour-process or capitalist process of production is what allows money to be converted into capital.¹³⁴ While labour could be used only to reproduce its own value, it is used by capitalists to produce value way over that mark and increase the rate of surplus-value.¹³⁵ The higher the rate of surplus-value, the higher the exploitation of workers by capitalists.¹³⁶

Finally, one of Marx's most influential ideas was that of accumulation of capital. He considered that once the surplus-value has been converted into capital through the exploitation of the labourer, capitalists use that capital to employ additional labour-power to create additional surplus-value, and thus progressively reproduce their capital.¹³⁷ Eventually, smaller capitals are fused or centralised into larger capitals in fewer and fewer hands, which only accelerates accumulation.¹³⁸ From a Marxist perspective, this trend could only lead to the internal collapse of capitalism or a revolution by the proletariat.¹³⁹

¹³² Marx, above n 50, at 167.

¹³³ At 171-173.

¹³⁴ At 186-195.

¹³⁵ At 208-209, 216-217.

¹³⁶ At 217-218, 585.

¹³⁷ At 581-582, 624-625.

¹³⁸ At 627-628.

¹³⁹ At 763.

(c) Social democracy

Marx's revolutionary aspirations soon led other socialists to veer towards a more conservative position – social democracy. This social democratic tradition is largely attributable to Eduard Bernstein. Bernstein negated the view that capitalism would collapse due to its own internal inconsistencies and claimed that the rise of democracy in most developed nations presented an opportunity to introduce socialist principles into government through parliamentary means and not by revolution. Bernstein also disagreed with the appropriation of all private enterprise, claiming the state was not capable of effectively running a complex industrial economy. He also believed that all interests, not just the proletariat's, should be considered in the formulation of public policy.¹⁴⁰

Bernstein established two preconditions to any form of socialism. The first was “a certain level of capitalist development”, and the second was social democracy; that is, “the exercise of political power by the class party of the workers”.¹⁴¹ Regarding this second prerequisite, Bernstein argued in favour of “the path of parliamentary struggle through exploitation of the franchise and the use of all other legal ways and means”, instead of the use of force.¹⁴² He believed that, in reality, most people who voted for socialist parties did not desire a sudden takeover of private property and industry by the government.¹⁴³ Instead, Bernstein argued that the proletariat's interests could be adequately represented by trade unions in a democracy.¹⁴⁴ A democracy, for Bernstein, was not merely the “government of the people”, as this notion often led to a suppression of minorities by a majority. Instead, he understood democracy to be “the absence of class government ... an idea of justice, that is, equality of rights for all members of the community”.¹⁴⁵ For social democracy, then, democracy is a precondition and the main vehicle towards socialism.¹⁴⁶ This idea, as I will develop below, was fundamental in the success of the second countermovement.

A British variant of social democracy, referred to as Fabian socialism, had a strong influence on mid-20th century public governance not only in the United Kingdom, but all

¹⁴⁰ See Eduard Bernstein *The Preconditions of Socialism* (Henry Tudor (ed and translator), Cambridge University Press, Cambridge, 1993).

¹⁴¹ At 99.

¹⁴² At 102.

¹⁴³ At 107-109.

¹⁴⁴ At 139-140.

¹⁴⁵ At 140-141.

¹⁴⁶ At 142.

around the world. Fabian socialism was developed by the Fabian Society, a socialist group founded in London in 1884¹⁴⁷ with the purpose of creating a:¹⁴⁸

...society in which equality of opportunity will be assured and the economic power and privileges of individuals and classes abolished through the collective ownership and democratic control of the economic resources of the community ... through the methods of political democracy.

Thus, Fabian socialism had a strong democratic component from its inception. In his 1918 *History of the Fabian Society*, Edward R Pease – an early member of the society – explained that, perhaps due to a lack of translation of *Das Kapital* to English, none of the original Fabians were directly influenced by Marxism.¹⁴⁹ Additionally, some of the early members of the Fabian Society had a Christian background, so they responded to the principles of Christian socialism (see below).¹⁵⁰ Therefore, one of the attitudes that distinguished Fabian socialism from other forms of socialism was its exponents' conviction that socialism could be brought about patiently through gradual reforms – whichever ones were realistically possible at the time – and by permeating society and individuals in key positions with socialist views. This approach stood in contrast with the tendency of some other socialist groups to “rush in” or create a violent class war.¹⁵¹

The Fabian Society's main objective was to spread its ideas. Its most significant publication, the *Fabian Essays in Socialism*, sold approximately 46,000 copies in England in the three decades following its publication and were also published in the United States, the Netherlands, Norway and Germany.¹⁵² Their success arose, according to Pease, from the plain and non-radical language they used to advocate for socialism, in contrast to the more revolutionary publications of Marxist groups. In his words, the essays' authors based socialism “not on the speculations of a German philosopher, but on the obvious evolution of society as we see it around us” – it was socialism adapted to the English spirit and social institutions.¹⁵³

¹⁴⁷ “Our History” (2019) Fabian Society <<https://fabians.org.uk/about-us/our-history/>>.

¹⁴⁸ Constitution of the Fabian Society as cited in GDH Cole *The Fabian Society: Past and Present* (Fabian Tracts Series No. 258, The Fabian Society, London, 1942) at 1.

¹⁴⁹ ER Pease *The History of the Fabian Society* (3rd ed, Barnes & Nobles, New York, 1963) at 23-25. Some Fabians would later sympathise with Bolshevism as seen in GDH Cole “The Webbs: Prophets of a New Order” (1932) 37 *Current History* 141 at 143; Beilharz, above n 115, at ix.

¹⁵⁰ Pease, above n 149, at 25-27; also see, for the continuation of this trend in later years of the Fabian Society: Richard Woolley *The Ethical Foundations of Socialism: The Influence of William Temple and RH Tawney on New Labour* (Edwin Mellen Press, New York, 2007).

¹⁵¹ Rappoport, above n 114, at 53-54; Cole, above n 148, at 2, 4-5. The Fabian Society's name was inspired by the Roman general Quintus Fabius Maximus Cunctator (‘the Delayer’), who defeated Hannibal with small guerrilla-like confrontations rather than a direct clash of the Roman and Carthaginian armies, as seen in Cole, above n 148, at 1-2; also see GB Shaw (ed) *Fabian Essays in Socialism* (The Fabian Society, London, 1889) at preface.

¹⁵² Pease, above n 149, at 88-89.

¹⁵³ At 89-90.

The Fabians' influence in British society, then, was already palpable within the first years of its creation.¹⁵⁴

Despite their academic inclinations, the Fabians also started getting involved in politics soon after their foundation. In 1889, the society made its first incursion into policy-making when it published its proposal for an eight-hour working day in support of that year's strike by the London Dockers.¹⁵⁵ In 1900, the Fabian Society participated in the foundation of the British Labour Party, formed as an alternative to the leftist Liberal Party.¹⁵⁶

One of the most prominent Fabians, Sidney Webb, drafted the Labour Party's first comprehensive policy programme in 1918, entitled *Labour and the New Social Order*.¹⁵⁷ In it, the Party expressed its belief that the First World War had delivered a death-blow to capitalism and proposed methods through which British society as a whole should be reformed after the end of the war.¹⁵⁸ The party committed to never lend a hand to the revival of capitalism, but to instead ensure that "it [was] buried with the millions whom it [had] done to death".¹⁵⁹ More specifically, the programme called for: a minimum wage and maximum working week; "employment for all"; social insurance against unemployment; public works on housing; education and infrastructure; the democratic control of industry (which included the nationalisation of mines, life insurance, electrical power, and communication and transport services); a progressive income tax; and using the resources appropriated from individuals, through nationalisation and gradual taxation, for the improvement of public services.¹⁶⁰ Interestingly, most of these proposals later became human rights under the ICESCR.

As I will soon show, the Fabian Society would achieve its intention of gradually influencing government and directing public policy through democratic means. The Labour Party came to power under Ramsay MacDonald in 1923 and 1929 and was part of the wartime coalition in the United Kingdom, but was not very successful during those periods. The biggest political breakthrough for the party and the Fabian Society would come later (see below) with the electoral victory of a Fabian, Clement Attlee, and the ensuing creation of the British welfare state, a pillar of the second countermovement.

¹⁵⁴ Pease, above n 149, at 77.

¹⁵⁵ The Fabian Society *An Eight Hours Bill: in the form of an Amendment of the Factory Acts, with further provisions for the improvement of the conditions of labor* (Fabian Tracts No.9, The Fabian Society, London, 1889).

¹⁵⁶ Cole, above n 148, at 1, 4.

¹⁵⁷ At 4.

¹⁵⁸ The Labour Party *Labour and the New Social Order* (The Labour Party, London, 1918) at 3-4.

¹⁵⁹ At 4.

¹⁶⁰ At 5-16.

(d) Christian socialism

Besides the utopians, Marxists and social democrats, the second countermovement was also inspired by Christianity. Two papal encyclicals, Pope Leo XIII's *Rerum Novarum* (1891) and Pope Pius XI's *Quadragesimo Anno* (1931), merged Catholic and socialist principles, providing socialism with backing from the masses that Marx could have never accomplished with his own writings.¹⁶¹ While the encyclicals included, like socialism, a harsh critique of multiple aspects of capitalism, they were not anti-capitalist and they endorsed private property.¹⁶² Hence, as seen above regarding the case of the Fabian Society, Christian socialism was very compatible with social democracy and gave the second countermovement significant backing.

In England, William Temple, the Archbishop of York, successfully campaigned for a social reconstruction of the country as the devastation of the Second World War was taking place.¹⁶³ In his monograph *Christianity and Social Order* (1942), Temple explained the Christian justification for a welfare state. He stated that “[b]efore the outbreak of war there were three main causes of widespread suffering—bad housing, malnutrition, and unemployment”.¹⁶⁴ Temple encouraged Christians at the time to demand the government carry out the necessary actions to ensure that: every family had decent housing; every child was educated until “years of maturity”; every citizen had sufficient income; every worker had the right to participate in the decisions of their business or industry; every worker had appropriate daily leisure, two days of rest per week and an annual paid holiday; and all citizens had freedom of worship, speech, assembly and association.¹⁶⁵

The second countermovement was shaped to a great extent by the four socialist traditions discussed above. Its actors, especially those who erected the welfare state, borrowed ideas from each of them to construct a new world order where the market was subjugated to social welfare. From the utopians, they adopted the idea that labour was at the core of society and therefore had to be guaranteed to all, as well as the belief that industry had to be managed according to the interests of the collective instead of the profit motive. Marxism contributed the concept of commodification, especially of labour, and a series of proposals – including a

¹⁶¹ JC Cort *Christian Socialism* (Orbis Books, New York, 1988) at 284-287.

¹⁶² At 286.

¹⁶³ Daniel Yergin and Joseph Stanislaw *The Commanding Heights: The Battle for the World Economy* (Touchstone, New York, 1998) at 3.

¹⁶⁴ William Temple *Christianity and Social Order* (Penguin Books, London, 1942) at 10.

¹⁶⁵ At 73-74.

progressive income tax, the centralisation of credit and of essential services in the hands of the state, the creation of state enterprises and free education – that became public demands during the second countermovement. Finally, the second countermovement’s agents adopted two premises from social democracy and Christian socialism: the toleration of private property when it does not concern essential goods or services, and their graduality and democratic spirit regarding the means to attain socialist objectives. As I will explore further along in this thesis, several of the individuals who participated in the drafting of the ICESCR shared a background as both Christians and social democrats, which explains why these socialist traditions were so influential in the treaty’s wording.

3 *The second countermovement in action: the welfare state*

Before the Truman Doctrine was cemented and the Cold War defined international politics, socialism was not associated with totalitarian regimes and revolution, and politicians were not afraid to express their views as being socialist.¹⁶⁶ In fact, the electoral victories of socialists all around the world in the mid-20th century were what allowed the actors of the second countermovement to swing the pendulum of the double movement from economic liberalism back to social protection. The widespread uncertainty created by the Second World produced a communal sense of solidarity and risk-sharing that was manifested in a broad public support towards welfare programmes.¹⁶⁷ This social environment created what Peacock and Wiseman referred to as a “displacement effect”, allowing governments to increase taxation levels and thus expand their expenditure on welfare programmes.¹⁶⁸ Other factors such as working class mobilisation, the structures of coalitions between parties and social classes, and the degree of the middle class’ institutionalised loyalty towards social provision also contributed to that support.¹⁶⁹

¹⁶⁶ President Truman, successor of President Franklin D Roosevelt, saw Soviet totalitarianism, and its expansion, as a threat to international peace and the United States’ security. He believed the world had two ways of life before it – liberal capitalist democracy or communist totalitarianism. The Truman Doctrine was the United States’ strategy to contain Soviet expansion in the aftermath of the Second World War. It set the ideological framework for the Cold War from 1947 onwards and its dichotomous representation of international politics led to a widespread view in the West that anything remotely related to communism, including socialism, was synonymous of tyranny and oppression. See EE Spalding “The Truman Doctrine” in DS Margolies (ed) *A Companion to Harry S. Truman* (Wiley-Blackwell, Oxford, 2012) 327.

¹⁶⁷ John Dryzek and RE Goodin “Risk-Sharing and Social Justice: The Motivational Foundations of the Post-War Welfare State” (1986) 16 B J Pol S 1 at 7-11.

¹⁶⁸ AT Peacock and Jack Wiseman *The Growth of Public Expenditure in the United Kingdom* (Princeton University Press and Oxford University Press, Princeton and London, 1961) at 27.

¹⁶⁹ Gøsta Esping-Andersen *Three Worlds of Welfare Capitalism* (Princeton University Press, New Jersey, 1990) at 29-32.

Thus, socialist parties all around the world gained the electoral backing they had lacked before the war. According to Harrington, approximately one third of the world was under the rule of a socialist government after the conflict.¹⁷⁰ Sassoon asserts that, in every country, socialist parties had at least one third of the vote – where it was less than that, it was because the communists had at least one fifth of the vote.¹⁷¹ Therefore, he claims, “[t]he spirit of the time was on the side of socialist reform.”¹⁷² Taking advantage of that popular support, socialist governments carried out a series of transformative social policy reforms, known as the welfare state, that defined the second countermovement and provided the basis for the elaboration of the ICESCR.

Before delving into the history of how the welfare state developed during the second countermovement, it is important to define that term. The welfare state is not a single rationality for governing that arose from a general deductive theory on how to conduct public affairs, but a “damage-limiting, problem-solving” reaction to specific problems in various countries and at different times.¹⁷³ That is why it never had a major theorist who can be called the “mother” or “father” of the welfare state,¹⁷⁴ and also why there are a multitude of welfare states instead of a single model.¹⁷⁵

However, overall, a welfare state is the model of public governance in which the government’s power is used deliberately to intervene with market forces in three main ways: insuring individuals against the loss of earnings through what normally consists of a nationwide compulsory scheme in which the insured must make regular contributions to a centralised pool managed by the state or a private fund (social insurance); establishing a security net for individuals and families, funded by taxes, to meet basic needs if they do not have an income (social assistance or what is commonly known as “the benefit”); and offering a range of social services to all independently of their social “class”.¹⁷⁶

¹⁷⁰ Harrington, above n 72, at 60.

¹⁷¹ Donald Sassoon *One Hundred Years of Socialism: The West European Left in the Twentieth Century* (IB Tauris, London and New York, 1996) at 117.

¹⁷² At 140.

¹⁷³ David Garland *The Welfare State: A Very Short Introduction* (Oxford University Press, Oxford, 2016) at 11; Garland, above n 102, at 328-329.

¹⁷⁴ Garland, above n 173, at 10.

¹⁷⁵ Esping-Andersen, above n 169, at 21-26; WA Arts and John Gelissen “Models of the Welfare State” in FG Castles and others (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, Oxford, 2010) 569 at 570.

¹⁷⁶ Asa Briggs “The Welfare State in Historical Perspective” (1961) 2 *European Journal of Sociology* 221 at 228, 341-342.

Social insurance, social assistance and social services are, then, the central institutions of the welfare state. Social insurance programmes have the effect of redistributing wealth between (i) economic classes, by providing lower income groups with benefits that are funded more by the higher income groups than by themselves, and (ii) generations, as the cost of pensions for older generations is covered by the work of the younger ones.¹⁷⁷ Welfare states insure individuals against loss of income for different causes – most commonly old-age, disability, sickness and work accidents, and unemployment.¹⁷⁸ Contrary to social insurance, social assistance programmes are not funded by beneficiaries' contributions, but by taxes.¹⁷⁹ Public services in a welfare state are also publicly funded, contributing to their decommodification.¹⁸⁰ The most common public services in a welfare state are health care, education, family benefits and services, and housing.¹⁸¹ The logic behind most of the substantive articles in the ICESCR, as will be seen in the next chapter of this thesis, is to decommodify those services.

Other features that define the welfare state are the recognition of social and economic rights and the management of the economy.¹⁸² A system of tax-benefit redistribution and, to a lesser extent, the expansion of the state's dominion over crucial resources and industries provide the welfare state with the resources to sustain an elaborate, often centralised, bureaucratic apparatus to manage this form of governance.¹⁸³ Overall, through the establishment of the aforementioned institutions, the welfare state attempts to alleviate economic instability and the lack of social provision caused by the failures of other actors of society – mainly the market but also the family.¹⁸⁴ In addition, it aims to correct structures of

¹⁷⁷ At 341.

¹⁷⁸ At 341-342.

¹⁷⁹ Garland, above n 175, at 342.

¹⁸⁰ At 343. *Decommodification* is generally understood as the use of alternative means of welfare other than market mechanisms for those circumstances in which individuals require to stop working (and therefore stop receiving an income) so they can continue to have adequate social interactions. This allows them to be independent from the market to satisfy their needs, as they diminish their dependence on income from that source, without being stigmatised for it or feeling pressure to return to the work force. Legal norms that regulate working conditions follow the same logic, by allowing workers to enjoy a good quality of life regardless of employers' or the market's interests. When decommodification takes place, inequalities caused by social class are diminished and forms of social provision can be considered social rights. See Gøsta Esping-Andersen "The three political economies of the welfare state" (1989) 26 *Canad Rev Soc & Anth* 10 at 21-23; Garland, above n 102, at 343.

¹⁸¹ See Castles and others (eds), above n 175, at chs 25, 32, 33 and 34.

¹⁸² Garland, above n 173, at 6; Garland, above n 102, at 340-345.

¹⁸³ Karen Yeung "The Regulatory State" in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 64 at 66; Deborah Mabbett "The regulatory rescue of the welfare state" in David Levi-Faur (ed) *Handbook on the Politics of Regulation* (Edward Elgar Publishing, Cheltenham, 2011) at 215; Garland, above n 175, at 344.

¹⁸⁴ Bent Greve *Welfare and the Welfare State: Present and future* (Routledge, London and New York, 2015) at 31; Garland, above n 173, at 10-11.

inequality and direct social relations towards national and inter-class solidarity.¹⁸⁵ Both the welfare state and socialism, then, respond to the failures of the market and seek material equality. Those two elements are, as I will define below, principles of the second countermovement.

For the purposes of this thesis, I will focus on how the welfare state developed in the years preceding the drafting of the ICESCR. Additionally, I will limit my study to the countries whose delegates at the Commission were most involved in the drafting of that instrument, so as to illuminate how that context might have influenced the treaty's object and purpose. Those countries and delegates are the United Kingdom (Marguerite Bowie), France (René Cassin), Chile (Hernán Santa Cruz and Carlos Valenzuela) and India (Hansa Mehta). I will then also explore how, even though socialism had a limited influence in the United States (Eleanor Roosevelt), the New Deal was a non-socialist variant of the welfare state. I will focus mostly on the British welfare state and the New Deal, as these were the two elements of the second countermovement that had the most influence over the elaboration of the ICESCR. However, the overall aim of this section is to show that the second countermovement was a vibrant movement in all those countries at the moment the ICESCR was being drafted.

(a) The British welfare state

As the Second World War came to an end, the United Kingdom's welfare state became one of the primary models for the second countermovement and, through it, the ICESCR. The British welfare state was the product of decades of socialist influence on British politics and decision makers and, more immediately, the project of the socialist government of Clement Attlee. I will begin by addressing the influence of the Fabian Society on two of the main architects of the British welfare state – John Maynard Keynes and William Beveridge. Although it was governmental reforms and political movements, not individuals, that constituted the second countermovement, these individuals are so intimately tied to its rise that it would be an oversight not to study their motivations first. Having done that, I will then describe the policies of Attlee's government that formed the British welfare state and became part of the second countermovement.

John Maynard Keynes laid the economic foundations for the second countermovement by elaborating an alternative to liberal economics. His monograph *General Theory of*

¹⁸⁵ Esping-Andersen, above n 169, at 25.

Employment, Interest and Money (1936) presented the principles of what would become the “Keynesian school of economics” – a theory of macroeconomics that arguably made him “the most influential economist of the twentieth century”.¹⁸⁶ He sought to replace the ideas of classical economics, which he believed were divorced from reality and therefore “disastrous” when applied to public governance.¹⁸⁷

In broad terms, the Keynesian school of economics postulates that people need to spend their savings so that all supply and all productive inputs – including labour – can be exhausted, thus stimulating the economy. This, in theory, would guarantee full employment. However, uncertainty and risk prevent investors from spending all their savings. This creates more unemployment because there is no effective demand for products and services, which in turn reduces savings and disincentivises the reduction of interest rates and investment. Therefore, government must interfere in the economy by spending its own resources to incentivise demand and consequently create more employment.¹⁸⁸ Thus, during periods of economic recession, the government should spend on public works and fund projects while, at the same time, incentivising private investment by adjusting interest rates. These ideas would become vital to the British welfare state’s capacity to fund its programmes, as confirmed in the 1944 white paper *Employment Policy*.¹⁸⁹ Keynes also believed that, in time, once an economy was sufficiently developed and standards of living were elevated, economic policy should shift away from increasing investment, and instead focus on reducing working hours and increasing consumption by redistributing wealth to lower income groups.¹⁹⁰

There is ample evidence that Keynes was an enthusiastic socialist.¹⁹¹ He became a member of the Fabian Society while at the University of Cambridge.¹⁹² He was in favour of the “confiscation of wealth”, supported the Bolshevik Revolution of 1917, founded the socialist anti-war *1917 Club* along with other Fabian socialists, and was an early supporter and advisor of the Labour Party.¹⁹³ Moreover, Keynes’ biographers agree that his socialist views inspired

¹⁸⁶ Chang, above n 77, at 146; Yergin and Stanislaw, above n 163, at 21.

¹⁸⁷ JM Keynes *The General Theory of Employment, Interest and Money* (Palgrave Macmillan, London, 1936) at 3.

¹⁸⁸ Chang, above n 77, at 146-149.

¹⁸⁹ Nicholas Timmins *The Five Giants: A Biography of the Welfare State* (Harper Collins, London, 1995) at 132-133.

¹⁹⁰ Chang, above n 77, at 149, n 18.

¹⁹¹ See EW Fuller “Was Keynes a socialist?” (2019) 43 *Camb J Econ* 1653; Rod O’Donnell “Keynes’s Socialism: Conception, strategy and espousal” in Claudio Sardonì and Peter Kriesler (eds) *Keynes, Keynesianism and Political Economy: Essays in Honour of Geoff Harcourt* (Taylor & Francis Group, Oxford, 1999) vol 3 at 151-178.

¹⁹² Fuller, above n 191, at 1655.

¹⁹³ At 1655-1656, 1663-1664.

his economic theory, not the other way around.¹⁹⁴ When he published *General Theory of Employment, Interest and Money*, Beatrice Webb (a Fabian socialist) considered the monograph advocated for “a modified socialism”.¹⁹⁵

The other main character of the British welfare state’s story who was linked to the Fabian Society was William Beveridge. In 1941, Beveridge – a 62-year-old civil servant, already well known in British society for his work in government, academia and mass media – was appointed by the Minister for Reconstruction as chair of the Social Insurance Committee, an interdepartmental committee tasked with submitting a report to re-organise social insurance in the country.¹⁹⁶ Before the Committee received the evidence necessary to propose changes, Beveridge presented the basis for his report in a 1941 paper entitled *Heads of a Scheme*. In it, he proposed unifying various existing insurance programmes under a single tripartite scheme, paying flat-rate benefits sufficient to cover basic needs. This scheme depended on a national health service, universal children’s allowances and full employment.¹⁹⁷ Beveridge directed the Committee in a rather one-way manner and was therefore asked by the government to release the final report under only his name. It was published on 1 December 1942 under the title *Social Insurance and Allied Services*. Between the full version (which was highly complicated and long) and the more digestible summary, it sold a total of 600,000 copies.¹⁹⁸

Although his report focused on social insurance, Beveridge saw it as part of a much broader and longer-term strategy to attack “five giant evils”: want, disease, ignorance, squalor and idleness.¹⁹⁹ These evils would be tackled through the five pillars of the post-war British welfare state: social security, health, education, urban planning and housing, and full employment.²⁰⁰ The Beveridge Report was extremely popular not only in the United Kingdom, but also abroad and among the troops. In Germany, it was presented to Hitler as a plan that was consistent, had “remarkable simplicity”, and was “superior to the current German social insurance in almost all points”.²⁰¹ In the United States, the report was described as “the first

¹⁹⁴ At 1654.

¹⁹⁵ At 1658.

¹⁹⁶ At 11-15.

¹⁹⁷ Timmins, above n 189, at 19-20.

¹⁹⁸ At 22-23.

¹⁹⁹ William Beveridge “Social Insurance and Allied Services” (The Beveridge Report) (November 1942) CMND 6404 at [456].

²⁰⁰ Timmins, above n 189, at 24.

²⁰¹ At 25.

attempt to translate the four freedoms into practical action” and Beveridge was treated almost as a celebrity during his visit to that country in 1943.²⁰²

Although he did not consider himself a socialist,²⁰³ Beveridge’s connection to the Fabian Society was a significant source of inspiration for his work. Beveridge’s attention was caught by Fabian socialism from his days as a student in Oxford.²⁰⁴ Later, he became a close friend of Beatrice and Sydney Webb (two leaders of the Fabian Society) after working with the former on the 1909 Poor Laws Report.²⁰⁵ Beveridge admired the non-revolutionary state socialism and reasoned progress of the Fabians, whom he saw recurrently after he joined the Fabian Society as an associate member in 1904 and as a recurrent lecturer at the Fabian summer schools.²⁰⁶ In these and other lectures, Beveridge defended socialism as a desirable social arrangement under which individual interests would be subordinate to those of the community, but through public control over production, and not through nationalisation of industries or the collectivisation of private property.²⁰⁷ Beveridge also contributed to the Fabian publication *Plan for Britain: A Collection of Essays prepared for the Fabian Society* (1943), writing a chapter on “Freedom from Idleness”.²⁰⁸

Beveridge’s ties to Fabianism extended beyond the confines of the society’s events and publications. He served as director of the London School of Economics, founded by members of the Fabian Society in 1895, between 1919 and 1937.²⁰⁹ There, he employed highly influential members of the Fabian Society, such as RH Tawney (who also was his brother-in-law) and Clement Attlee.²¹⁰ GDH Cole, one of the best-known Fabians, was part of Beveridge’s work group when he went back to the civil service in 1940 to chair the Manpower Requirements Committee of the Production Council.²¹¹ Cole also founded the Nuffield College Reconstruction Survey at Oxford during the war to explore policy options for post-war social

²⁰² Matthew Jones “Freedom from Want” in JA Engels (ed) *The Four Freedoms: Franklin D. Roosevelt and the Evolution of an American Idea* (Oxford University Press, Oxford, 2015) at 132.

²⁰³ GDH Cole and others *Plan for Britain: A Collection of Essays prepared for the Fabian Society* (George Routledge & Sons, London, 1943) at 86, 98, 99; Timmins, above n 189, at 16.

²⁰⁴ Janet Beveridge *Beveridge and his Plan* (Hodder and Stoughton, London, 1954) at 50.

²⁰⁵ See Ralf Dahrendorf *A History of the London School of Economics and Political Science 1895-1995* (Oxford University Press, Oxford, 1995) at 139-140; William Beveridge *Power and Influence* (Hodder and Stoughton, London, 1953) at 34-35; José Harris *William Beveridge: A Biography* (Oxford University Press, Oxford, 1997) at 105-106; Beveridge, above n 204, at 94, 155.

²⁰⁶ Harris, above n 205, at 119-120.

²⁰⁷ At 119.

²⁰⁸ Cole and others, above n 203, at ch 5.

²⁰⁹ Dahrendorf, above n 205, at 3-5; Harris, above n 205, at 138-139, 258, 327.

²¹⁰ Dahrendorf, above n 205, at 140, 233, 325.

²¹¹ At 325.

reform along with other Fabians.²¹² This group's proposals for social insurance largely matched those found in Beveridge's report.²¹³

After the publication of the Beveridge Report, the United Kingdom's coalition government introduced the first programmes of the British welfare state. The Education Act of 1944, also referred to as the *Butler Act*, reduced the role of religion in education; introduced free secondary education until the age of fifteen; enacted the provision of free school meals; transport and medical treatment; extended the power of local authorities to offer scholarships for higher education; and improved the mechanisms for school inspections.²¹⁴ Based on Keynes' ideas, full employment became a central aspect of the British welfare state in 1944 following the publication of the white paper *Employment Policy*. The paper stated that the government was committed to "the maintenance of a high and stable level of employment after the war" and that, to that effect, "total expenditure on goods and services [would] be prevented from falling to a level where general unemployment appears".²¹⁵

The welfare state continued to be expanded by the British government when the Labour Party, under Clement Attlee, achieved an overwhelming victory in the 1945 general election. Attlee was a socialist and a Fabian long before he became the longest-standing Labour Party leader in the history of that party.²¹⁶ Regarding his party's ideological position, Attlee said in a 1945 speech before the Commonwealth Club:²¹⁷

The Labour Party is a socialist party. The socialist movement in Great Britain began long before Karl Marx. It was derived from native thinkers. It has its economic basis but still more it has its ethical basis. The motive force... has been a longing for social justice derived from Christian principles ... the great Trade Union movement in Great Britain arose not from an economic theory but from the need of the worker for protection against exploitation, a protection which he could only achieve by united action with his fellow-workers.

It was under a socialist party, then, that most of the British welfare state was put into place. Attlee proposed a "mixed economy developing toward socialism" and a transformation of the government's role in social provision by nationalising key industries and assets. These included coal (the source of 90 per cent of Britain's energy at the time), iron and steel, railroads, utilities and telecommunications. The businesses in control of those industries had proven to be too small, inefficient and underinvested. The purpose of nationalisation was to augment

²¹² Harris, above n 205, at 367.

²¹³ At 2-4.

²¹⁴ At 65-93.

²¹⁵ At 132-133.

²¹⁶ JH Brookshire *Clement Attlee* (Manchester University Press, Manchester, 1995) at 3-5, 50-51; Trevor Burridge *Clement Attlee: A Political Biography* (Jonathan Cape, London, 1985) at 28-30; Cole, above n 148, at 13.

²¹⁷ Brookshire, above n 216, at 9.

their efficiency, scale and innovation, while contributing to the state's goals of full income redistribution and full employment. Instead of organising nationalised enterprises as departments of government ministries – as had been done with the Post Office – the government decided to create a series of public corporations (later known as state-owned corporations), following the model of the British Broadcasting Corporation (BBC). Ultimately, state corporations employed close to 20 per cent of the British workforce, which was conducive to an unemployment rate as low as 1.3 per cent by the late 1940s.²¹⁸

Public health and social insurance were also cornerstones of the British welfare state. Following extensive negotiation with the British Medical Association, Aneurin Bevan, Attlee's Minister of Health, established the National Health Service (NHS) in 1948, after it was approved by Parliament in 1946.²¹⁹ The free access health service was comprised of three branches: the hospitals; the "family practitioner services", which oversaw general medical issues; and the local health services, which covered maternity, child welfare, home nursing and after care services, preventive treatments, mental health and the ambulance service.²²⁰ Social insurance, as modelled by Beveridge four years earlier, was a contemporary of the NHS. Approved through the National Insurance Act of 1946, the scheme consisted of "state-run insurance, paid for by employers, employees and the general taxpayer, from cradle to grave flat-rate contributions in return for flat-rate benefits".²²¹

The Labour Government also addressed squalor, albeit with less efficiency than the other "giant evils". During the war, almost one quarter of the 12.5 million houses in Britain had been damaged and a third of the building labour force had died. In addition, the post-war rise in marriages and consequential baby boom increased the demand for housing. Housing had traditionally been the Ministry of Health's responsibility – Attlee did not transfer it to local government until 1951 – so it fell to Bevan to deal with both that problem and the implementation of the NHS, which decelerated progress. It took the government six years to build a million houses, although the three million promised in a 1945 white paper were eventually constructed in a 12-year span. A controversial aspect of Bevan's approach to the problem was his restriction of private house-building – he only allowed one of these for every four houses built by local authorities. Moreover, he ordered those authorities to requisition houses that were empty, to be stricter on rent control and to increase the square footage of

²¹⁸ Yergin and Stanislaw, above n 163, at 7-9.

²¹⁹ Timmins, above n 189, at 119-126.

²²⁰ RM Titmuss *Essays on 'The Welfare State'* (3rd ed, George Allen & Unwin, London, 1976) at 144-146.

²²¹ Timmins, above n 189, at 134-135.

public housing. It was also essential for Bevan that residential zones were mixed, so that different socioeconomic groups could inhabit the same areas and that way avoid ghettos.²²² By the end of Attlee's government in 1951, then, the foundations of the British welfare state had been built.

(b) Other socialist welfare states

The United Kingdom was not the only country where the electoral victory of a socialist party brought about the creation of a welfare state during the second countermovement. As stated before, for the purposes of this thesis, I will focus on countries with a greater impact on the ICESCR's elaboration. Those are, in addition to the United Kingdom, France, Chile and India.

The height of socialism in France during the second countermovement was the so-called *Front Populaire* (Popular Front), which governed France between 1936 and 1938.²²³ This front was composed of the French Communist Party, the *Section française de l'Internationale ouvrière* or SFIO (still the Socialist Party in France) and the Radical-Socialist Republican Party.²²⁴ This alliance grew as a response to the rise of fascism in France, the working-class' discontent with economic conditions after the Great Depression and the middle-class' opposition to the economic policies of Pierre Laval's government.²²⁵ Léon Blum led the coalition after the SFIO received more votes than its partners, becoming the first socialist prime minister of France.²²⁶

Blum was at first constrained by the political environment in France. Within the first days of the *Front Populaire's* government, widespread strikes erupted across the country. The strikes only ceased when the government signed the Matignon Agreement, a deal that recognised several workers' rights. These included the rights to form trade unions, negotiate collective agreements, receive paid holidays and reduce the working week to 40 hours, as well as an increase in wages.²²⁷ Beyond this agreement, Blum believed that the Great Depression

²²² At 139-144.

²²³ Julian Jackson *The Popular Front in France: Defending Democracy, 1934-1938* (Cambridge University Press, Cambridge, 1988) at 9-13.

²²⁴ See KG Harr *The Genesis and Effect of the Popular Front in France* (University Press of America, Boston, 1987) at ch 7.

²²⁵ Jackson, above n 223, at 42-46.

²²⁶ At 50-51.

²²⁷ DAL Levy "The French Popular Front, 1936-37" in Helen Graham and Paul Preston (eds) *The Popular Front in Europe* (Macmillan, London, 1987) 58 at 67-72

had been a consequence of capitalism's contradictions. Inspired by Roosevelt's New Deal and Keynesianism, his government pursued an increase in the French people's purchasing power via unemployment insurance, public works, agricultural marketing boards and a shorter working week.²²⁸ However, Blum also conducted significant budgetary cuts and accepted that his government had to operate within a capitalist system.²²⁹ The *Front Populaire* collapsed in 1938 after the socialists and communists refused to support the Munich Agreement, which ceded Czechoslovakia to Nazi Germany.²³⁰

In Chile, as in the rest of Latin America, socialism has always been closely associated with Marxism. Between 1928 and 1935, most Latin American socialist organisations followed directions from the USSR's Comintern and the Third International to exclude social-democrats and any other socialists who did not conform to their understanding of Marxism.²³¹ However, due to the radicalism and insurrection attempts that took place in this period, most Communist parties in Latin America were disbanded or violently persecuted.²³² This scenario shifted in the mid-1930s when the USSR took a more flexible approach to the inclusion of other socialist groups as a way of counterbalancing the growth of fascism and the Nazi threat. Marxist groups all over Latin America started to form alliances with other parties on the left – especially the social democrats – also in the form of “popular fronts”. They became less radical, more nationalistic and began supporting “Pan Americanism”, a movement against the influence of the United States in the region.²³³

Chile had consecutive socialist governments between 1938 and 1952. The *Frente Popular* (Popular Front) in Chile, formed by the Communists, the Socialists and the Radicals, won the presidential elections in 1938 with Pedro Aguirre Cerda.²³⁴ The Popular Front had been created, in part, under the objectives set by the Communist Party's *Program of Action for the Victory of the Chilean Popular Front*.²³⁵ Among the aims included in the programme were the intervention of national banks, the nationalisation of corrupt foreign enterprises, the continuity of the act that banned fascist leaders, and a presidential veto against attempts to ban

²²⁸ Jackson, above n 223, at 162.

²²⁹ At 169.

²³⁰ At 247-248.

²³¹ HJ Wiarda *The Soul of Latin America: The Cultural and Political Tradition* (Yale University Press, New Haven, 2001) at 224.

²³² LE Aguilar (ed) *Marxism in Latin America* (revised ed, Temple University Press, Philadelphia, 1978) at 21-25.

²³³ Wiarda, above n 231, at 225.

²³⁴ Aguilar, above n 232, at 31.

²³⁵ The Communist Party of Chile “A Program of Action for the Victory of the Chilean Popular Front” (1941) 20 *The Communist* 452 in Aguilar, above n 232, at , at 164-165.

the Communist Party.²³⁶ While the death of Aguirre Cerda in 1941 led to the disintegration of the *Frente Popular*, it resurged as the *Alianza Democrática de Chile* the next year and won the 1942 and 1946 elections.²³⁷

Chile's president from 1946 to 1952 was Gabriel González Videla of the Radical Party, in alliance with the Communist Party and the Liberal Party. This alliance ensured that, for the first time in Chile's history, the Communist Party held positions in cabinet.²³⁸ However, with the beginning of the Cold War, the United States pressured Latin American governments to control the expansion of communism within their countries. Several of them broke relations with the USSR and declared communism illegal. In 1948, González Videla banned the Communist Party in Chile through the *Law for the Permanent Defence of Democracy* and the *Alianza* collapsed.²³⁹

India became a socialist country when it achieved its independence, through the influence of its first Prime Minister, Jawaharlal Nehru. Nehru first came into contact with socialism, in the form of Fabianism, at the London School of Economics, where he had enrolled to study Law.²⁴⁰ Nehru believed socialism was the only way of lifting Indians out of poverty but preferred to steer away from the authoritarianism of the Soviet model.²⁴¹ His socialism was a combination of Fabian idealism, a clear focus on the needs of the struggling masses, a distrust of Western capital, a search for scientific methods of public governance and the ideal of Indian self-sufficiency (which he adopted from Gandhi).²⁴²

For Nehru, Indian capitalism was too weak to provide welfare to the Indian people, so he pushed for a strong state. Soon after achieving independence, the Indian government issued the Industrial Policy Resolution of 1948, which established a state monopoly over railways, coal, steel, atomic energy, defence manufacturing, shipbuilding and communications, among other key industries.²⁴³ When a new constitution was adopted in 1950, Part IV on the *Directive Principles of State Policy* set a series of socialist objectives, which:²⁴⁴

²³⁶ At 165.

²³⁷ Cristián Gazmuri *Historia de Chile 1891-1994: Política, economía, sociedad, cultura, vida privada, episodios* (Santiago, RIL editores, 2012) at 179-187.

²³⁸ At 187.

²³⁹ At 187-188; Aguilar, above n 232, at 35-36.

²⁴⁰ Shashi Tharoor *Nehru: The Invention of India* (3rd ed, Penguin Random House, India, 2018) at 13-14.

²⁴¹ At 165-166.

²⁴² At 166-167.

²⁴³ At 168.

²⁴⁴ Constitution of India 1949 (India), art 37.

shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Most of the principles referred to the same economic, social and cultural rights that had by then been incorporated into the UDHR.²⁴⁵

Also in 1950, Nehru began chairing a permanent Planning Commission, which oversaw the drafting and implementation of five-year plans, the first of which started in 1952. The government's principal objective became to establish a "socialistic pattern of society", placing the state on the "commanding heights" of macroeconomic planning.²⁴⁶ The second five-year plan set industrial self-sufficiency as the main goal of the Indian economy, based on a larger public sector, which was to be financed through increased taxes on income, wealth and sales.²⁴⁷

Nehru was passionate about foreign policy, personally directing India's external affairs. Thus, India's foreign policy consisted of Nehru's personal beliefs. India's diplomats would often learn of their country's policies through Nehru's speeches in Parliament, and conducted themselves in his image.²⁴⁸ Because throughout his time as prime minister, India was neutral in the Cold War, this gave the country a unique bargaining position in international affairs.²⁴⁹ Therefore, as seen in the next chapter of this thesis, positions taken by the Indian delegate to the Commission coincided with Nehru's socialist beliefs.

(c) The New Deal

So far, this chapter has examined the influence of socialism on the creation of welfare states during the second countermovement. However, it is important to recognise that that moment also involved policies and movements that did not stem from socialism, which defined the second countermovement as a combination of policies from different ideological backgrounds. In the United States, FDR's New Deal emerged from a very distinct political context from the welfare states discussed so far.

²⁴⁵ At arts 38-51.

²⁴⁶ Tharoor, above n 240, at 168-169.

²⁴⁷ At 169-170.

²⁴⁸ At 174.

²⁴⁹ At 177-180.

Socialism has never had a significant influence on the politics of the United States.²⁵⁰ The country had socialist experiments of many kinds in the 18th and 19th centuries, but none gathered much support.²⁵¹ The Fabian Society attempted to launch a chapter of the organisation across the Atlantic in 1895, but it was short-lived.²⁵² A communist party formed only until 1919, when a group that supported the Bolshevik revolution split from the Socialist Party.²⁵³ Although socialists gathered some support in the early 20th century, from an electoral point of view, their best accomplishment was receiving 3.41 per cent of the votes for the 1920 presidential elections.²⁵⁴

In the wake of the Great Depression, instead of turning to more radical options like the socialists or the communists, voters in the United States remained loyal to the two traditional parties in 1932, electing the Democrat FDR as president.²⁵⁵ This was explained, in part, by the support received by FDR from workers' associations like the American Federation of Labor.²⁵⁶ Nevertheless, the utopian socialist Upton Sinclair almost won the governorship of California based on the promise to convert the state into a cooperative commonwealth, a socialist bloc emerged within the Democratic Party, and Tammany Hall – a social democrat – became mayor of New York in 1933.²⁵⁷ Hamby argues that, if it had not been for FDR's popularity, voters would have likely turned left.²⁵⁸

Nonetheless, FDR's ambition in tackling the harmful effects of an unrestrained market economy was unprecedented in the United States. Before him, some collectivist measures had already been taken in the country. For example, towards the end of the First World War, Woodrow Wilson's government practically nationalised the railroad industry.²⁵⁹ However, as with most comparisons between the actions of the first and second countermovements, this

²⁵⁰ For an explanation of "American exceptionalism" regarding socialism, see Louis Hartz *The Liberal Tradition in America* (Harcourt, New York, 1955).

²⁵¹ See Morris Hillquit *History of Socialism in the United States* (5th ed, Dover Publications, New York, 1971) at chs 1-4, 279-287.

²⁵² At 293.

²⁵³ HW Laidler *Socialism in the United States: A Brief History* (League for Industrial Democracy, New York, 1952) at 12.

²⁵⁴ Hillquit, above n 251, at 308-311; "1904 Presidential General Election Results" and "1920 Presidential General Election Results" Dave Leip's Atlas of US Presidential Elections <<https://uselectionatlas.org/RESULTS/national.php?year=1904&f=0&off=0&elect=0>>.

²⁵⁵ Dexter Perkins *The New Age of Franklin Roosevelt, 1932-45* (University of Chicago Press, Chicago and London, 1957) at 73-74.

²⁵⁶ At 55.

²⁵⁷ AL Hamby *For the Survival of Democracy: Franklin Roosevelt and the World Crisis of the 1930s* (Free Press, New York, 2004) at 175, 270, 330.

²⁵⁸ At 175.

²⁵⁹ HW Brands *Traitor to His Class* (Doubleday, New York, 2008) at 112.

type of isolated measure did not compare to FDR's determination. As a response to the Great Depression, FDR introduced his New Deal, a series of programmes aimed at restoring the United States economy and increasing prosperity.²⁶⁰ Within his first month as president, he created the Civilian Conservation Corps to employ young men in national parks. Soon after, the National Industrial Recovery Act of 1933 and other laws introduced several schemes aimed at assisting farmers, workers, homeowners and small businesses. These included the Federal Emergency Relief Administration to provide financial assistance to state relief agencies, the Civil Works and the Public Works Administrations, and federal bureaus for the creation of jobs.²⁶¹

Two of the New Deal's main programmes were enacted in 1935. The first was the Works Progress Administration (WPA), which funded public infrastructure projects (schools, hospitals, airports, roads, theatres, hotels in national parks and post offices, among others) all over the country as a way of creating jobs.²⁶² The second was the Social Security Act, which introduced nation-wide universal contributory social insurance for the first time in the country, covering old-age pensions and unemployment. Moreover, it granted financial assistance to the disabled, the elderly and dependent children. A significant breakthrough of this law was that it gave control of the scheme to the federal government instead of individual states. It is the New Deal's longest surviving programme, still in force today, and has been called "the single most important piece of social legislation in American history".²⁶³ The New Deal also included the Housing Act of 1937, which provided public housing, and the Fair Labor Standards Act of 1938, which set a national minimum wage in several industries.²⁶⁴ All of these programmes were financed, to a great extent, through a tax plan introduced in 1935 by the Wealth Tax Act. Besides gathering revenues for social insurance and assistance, this law was a strong personal commitment of FDR's towards reducing inequality and combating the excesses of business.²⁶⁵

²⁶⁰ Alan Brinkley "The New Deal Experiments" in WH Chafe (ed) *The Achievement of American Liberalism* (Columbia University Press, New York, 2003) at 2; for more on the Great Depression, see KK Patel *The New Deal: A Global History* (Princeton University Press, Princeton, 2016) at 24-44.

²⁶¹ Brinkley, above n 260, at 5, 11.

²⁶² At 6.

²⁶³ At 6-7; Theda Skocpol *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Harvard University Press, Cambridge (Mass), 1992) at 5; Christopher Howard "The Welfare State" in Richard Vallely, Suzanne Mettler and Robert Lieberman (eds) *The Oxford Handbook of American Political Development* (Oxford University Press, Oxford, 2016) 625 at 626; DT Rodgers *Atlantic Crossings: Social Politics in a Progressive Age* (Harvard University Press, Cambridge (Mass), 2000) at 428.

²⁶⁴ Howard, above n 263.

²⁶⁵ AL Hamby "High Tide: Roosevelt, Truman, and the Democratic Party, 1932-1952" in Chafe (ed), above n 260, at 32-33; Moyn, above n 2, at 71.

The New Deal left a significant legacy but it was not sturdy enough to swing the pendulum of the double movement in the United States as far towards social protection as elsewhere. After FDR's death, social programmes continued expanding with subsidised school lunches in 1945, the Disability Insurance Act of 1956, Medicare and Medicaid in 1965, and the formation of various social assistance schemes, such as food stamps.²⁶⁶ However, the New Deal faced multiple constitutional challenges in the United States Supreme Court, several of which were successful.²⁶⁷ Moreover, overall, it failed to end the Great Depression (the war effort was responsible for that) and to transform the capitalist system significantly.²⁶⁸ Despite FDR's efforts domestically and his influence on the formation of the post-war world order, it is questionable whether the United States ever fully developed a welfare state. Some authors attribute this to the weakness of the country's trade unions, the lack of a labour-focused party, and the dominance of capitalist interests.²⁶⁹ Nonetheless, the New Deal institutionalised federal social provision in that country, almost doubling the number of federal civil service employees and amount of public spending.²⁷⁰ The New Deal has thus been described by its critics as "illogical, inconsistent, and turbid" but also as "the defining moment of twentieth-century American progressive politics".²⁷¹

Additionally, FDR reinforced the concept of economic and social rights both domestically and globally.²⁷² In his 1941 State of the Union Address, the President indicated that the "foundations of a healthy and strong democracy" consisted of a series of public policies that included "equality of opportunity for youth and for others", "jobs for those who can work", "the ending of special privilege for the few", "the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living", "bring[ing] more citizens under the coverage of old-age pensions and unemployment insurance", "widen[ing] the opportunities for adequate medical care", "a better system by which persons deserving or needing gainful employment may obtain it", and more taxes.²⁷³ These types of policies would lead, according to FDR, to a "world founded upon four essential human freedoms": freedom of speech,

²⁶⁶ Howard, above n 263.

²⁶⁷ See Laura Kalman "The Constitution, the Supreme Court, and the New Deal" (2005) 110 AHR 1052.

²⁶⁸ Brinkley, above n 260, at 16-17.

²⁶⁹ Skocpol, above n 263, at 23-24. Some authors argue that the United States' New Deal constituted a form of welfare state – Garland, above n 102, at 348; Esping-Andersen, above n 169, at 28.

²⁷⁰ Brinkley, above n 260, at 17; Ira Katznelson *Fear Itself: The New Deal and the Origins of Our Time* (Liveright, New York, 2013) at 36.

²⁷¹ Rodgers, above n 263, at 409-410; also see Brinkley, above n 260, at 1-2.

²⁷² See Elizabeth Borgwardt *A New Deal for the World* (Harvard University Press, Cambridge (Mass), 2005).

²⁷³ FD Roosevelt, President of the United States of America "1941 State of the Union Address" (United States Capitol, Washington DC, 6 January 1941) at [67-78].

freedom of worship, freedom from want and freedom from fear. The third of these, freedom from want, was described by FDR as the “economic understanding which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world”.²⁷⁴

Three years later, delivering his 1944 State of the Union Address, FDR went one step further and proposed a “Second Bill of Rights” for the United States.²⁷⁵ He stated that the Allied leaders held the common belief that a “basic essential to peace is a decent standard of living for all individual men and women and children in all Nations”, as “people who are hungry and out of a job are the stuff of what dictatorships are made”. Thus, “[f]reedom from fear is eternally linked with freedom from want”.²⁷⁶ The president also claimed that a tax on “all unreasonable profits” was necessary to guarantee the stable economy that would allow for victory, and that with victory came an opportunity to augment the standard of living in the country.²⁷⁷ He argued that political rights by themselves had failed to secure equality and, for that reason, a second bill of rights was necessary.²⁷⁸

FDR’s proposed bill included several rights that would later become part of the ICESCR. Some of them were: a useful and remunerative employment; an income that can “provide adequate food and clothing and recreation”; an adequate income for farmers, that can guarantee a “decent living”; fair market competition; a “decent home”; adequate medical care and good health; social insurance in regards to “old age, sickness, accident, and unemployment”; and a good education.²⁷⁹ In this proposal, FDR brought together the two main goals of his presidencies – the New Deal and winning the war. He understood that a lasting peace depended on economic and social stability both domestically and internationally.²⁸⁰ Although the Second Bill of Rights was envisioned at a time when the New Deal was already collapsing and it was never incorporated into the Constitution – as, perhaps, it was never meant to be – it was an important leap forward in the recognition of social rights and equality, as well as an acknowledgement that freedom is not secured as a consequence of the absence of government interference.²⁸¹

²⁷⁴ At [82, 85].

²⁷⁵ FD Roosevelt, President of the United States of America “1944 State of the Union Address” (United States Capitol, Washington DC, 11 January 1941).

²⁷⁶ At [16, 63].

²⁷⁷ At [35, 60].

²⁷⁸ At [61-64].

²⁷⁹ At [66-73].

²⁸⁰ CR Sunstein *The second bill of rights: FDR’s unfinished revolution and why we need it more than ever* (Basic Books, New York, 2004) at 14-15.

²⁸¹ At 16, 180; Moyn, above n 2, at 76-77.

Therefore, FDR and his New Deal had a notable imprint on the second countermovement, despite not being socialist in origin or inspiration. Many socialists at the time actually believed that the New Deal was carrying out the socialist agenda.²⁸² Moreover, some of FDR's opponents considered he showed "intimations of socialistic radicalism", and even possible ties to Soviet communism, especially due to his affinity for central planning.²⁸³ Nevertheless, the only sector in which the government competed with private industry during the New Deal was electric power. All other industries remained in private hands exclusively.²⁸⁴ Even banks, which socialists and progressives had hoped would be nationalised as a solution to the Great Depression, given the unique opportunity to do so, remained private.²⁸⁵ This was so despite FDR's distrust and dislike of bankers.²⁸⁶ Although the New Deal included "fringe collectivist endeavours that smacked of utopian socialism", it cannot be categorised as such. Rather, it was a melting pot of different economic currents and ideologies.²⁸⁷ In defence of the bill that divided public utility companies dedicated to the production of electric power, FDR stated: "I am against private socialism of concentrated private power as thoroughly as I am against governmental socialism ... Destruction of private socialism is utterly essential to avoid governmental socialism".²⁸⁸ Therefore, although he shared some socialist goals, FDR and his policies were definitely not socialist.

As explained above, this lack of coincidence with other political movements that formed part of the second countermovement is what defines the period following the Great Depression as a true Polanyian countermovement. The New Deal demonstrates that the mid-20th century was defined by a political reaction, from diverse sectors and ideological backgrounds, against the market economy. As argued by Polanyi in *The Great Transformation*, if even in such a liberal country as the United States social protection was employed as an antidote to the market economy, then that was strong evidence that the countermovement was real.²⁸⁹ Moreover, while that country's political background did not allow for FDR's full vision of the New Deal to be executed, the programme was certainly one of the biggest influences on

²⁸² JE Smith *FDR* (Random House, New York, 2007) at 374.

²⁸³ Hamby, above n 257, at 106, 281, 319-320; Brands, above n 259, at 276, 288, 416, 425, 451.

²⁸⁴ At 74-75.

²⁸⁵ Hamby, above n 257, at 125.

²⁸⁶ Robert Dallek *Franklin D. Roosevelt: A Political Life* (Allen Lane, London, 2017) at 139.

²⁸⁷ Hamby, above n 257, at 147.

²⁸⁸ At 285.

²⁸⁹ Polanyi, above n 19, at 201-202.

the recognition of economic, social and cultural rights, as I will demonstrate in the next chapter of this thesis.

C The Principles of the Second Countermovement

The different political movements and policies described above defined the second countermovement as a reaction against the market economy. The political classes of countries with backgrounds as distinct as those of Chile, India, France, the United Kingdom and the United States all responded to the electoral demand for a new order based on social protection. That common imperative from diverse sectors is what, I argue, created a true Polanyian countermovement against economic liberalism. The commonalities between socialist welfare states and the New Deal can be arranged into six broad principles that I will identify at the end of this section. Those principles will act as the framework to locate the ICESCR within the logic of the second countermovement in the next chapter of this thesis.

As a model of governance established mostly by socialist governments, the welfare state adopted many of the premises of the socialist traditions I have described in this thesis. Keynes' focus on full employment, which was translated into the macroeconomic policies of welfare states all around the world, coincides with the utopian socialist emphasis on the centrality of labour for the individual and society. Moreover, the protection of workers from the excessive commodification of their labour, done through the recognition of a new wave of working rights, has its roots in Marx's concept of labour commodification. Other welfare state techniques, like a progressive income tax, the creation of state corporations, the centralisation of credit, the nationalisation of essential industries and free education are objectives that could be found in the *Communist Manifesto* decades before they were institutionalised by socialist governments as elements of the welfare state. From the social democrats and the Christian socialists, those governments adopted the idea that socialism was best achieved through democratic processes and that those industries or resources that are not directly tied to social welfare could be left in the hands of private owners.

However, it is important to understand that welfare states also had some elements of capitalism. While inspired by some forms of socialism, they were also a response to the capitalist necessity to increase consumption. Facing the risk that new technologies would lead to a massive increase in productivity in most industries, creating more output than consumption, governments were pressured to provide everyone with a minimum income to

guarantee mass consumption.²⁹⁰ That is why Berki argues that the welfare state is socialism adapted to a hyper-liberal advanced industrial society with a developed capitalist structure and established bourgeoisie cultural traditions.²⁹¹

Indeed, some contend that the welfare state became an ally to capitalism. Despite being a counterbalance to the excesses of laissez-faire economics, the welfare state enabled capitalism to survive by keeping it from self-destructing or from being replaced by more radical economic systems like communism.²⁹² In exchange, the welfare state persevered through the assistance of the private sector in providing income security, services and the resources (mainly taxes) required to maintain its structure and programmes.²⁹³ This symbiotic, but equally dialectic, relationship is what Garland refers to as the “contradictory unit” of the welfare state.²⁹⁴

This contradiction can be attributed to the political moment in which the British welfare state, which served as a model to other welfare states, was formed. As argued by GDH Cole (a Fabian socialist writing during the establishment of the British welfare state under Attlee’s 1945 Labour Government), Attlee’s government had a clear mandate to introduce significant change in the United Kingdom – through more and better social services, nationalisation of some industries and full employment. It did not, however, have the support it needed to carry out a full socialist reform that abolished private property and taxed “unearned income”. Most voters, Cole argued, did not have a clear position regarding the ideals of socialism and preferred a gradual change that solved their immediate needs rather than a revolution. If the Labour Party had campaigned under the proposal to socialise all property, it would have lost the support of “marginal voters”. Moreover, once nationalisation was introduced, politicians and individuals lost their appetite for more industries run by bureaucratic public boards and public officials who earned as much as they would have in the private sector. Also, the image of totalitarian states was too fresh for voters to be comfortable with ceding much more power to the state.²⁹⁵ For Cole, therefore, while the welfare state incorporated many of socialism’s essential objectives and succeeded at reducing poverty and inequality, as well as securing a better

²⁹⁰ Harrington, above n 72, at 12-13.

²⁹¹ Berki, above n 114, at 34.

²⁹² Garland, above n 102, at 357-360; Garland, above n 173, at 9.

²⁹³ Esping-Andersen, above n 169, at 26-29.

²⁹⁴ Garland, above n 102, at 359.

²⁹⁵ GDH Cole “Socialism and the Welfare State” in Irving Howe (ed) *A Handbook of Socialist Thought* (Victor Gollancz, London, 1972) 768 at 768-773.

bargaining position for the worker under full employment, Attlee's welfare state had to conserve some elements of capitalism. It was at most "socialistic", not socialist.²⁹⁶

Nevertheless, this does not mean that the second countermovement was incompatible with socialism. As seen above, some socialist traditions did accomplish many of their objectives. While private property was not abolished, as the utopians or the Marxists would have preferred, the social democratic tradition – especially in the form of Fabianism – was the foundation of the mid-20th century welfare state. Through that model of public governance, social democrats achieved a compromise that restrained economic liberalism to avoid the detrimental impacts of the full-blown market economy that Polanyi described in *The Great Transformation* and simultaneously gave socialists important conquests. Governments did not hand complete control of society to the proletariat, but gave workers minimum work standards, more participation in public matters and an improved quality of life. They did not abolish all forms of private property but at least transferred the ownership of key industries and resources to the public. They did not ensure complete liberation from the market but did decommodify essential products and services. And although they did not achieve complete equality of property and income, they did set mechanisms of redistribution that pursued a more egalitarian society in terms of income.

Although not based on socialist ideology, the New Deal followed a similar logic to the welfare state. FDR sought to limit the power of the market economy by not only establishing strict restrictions on private enterprises, but by expanding the federal government's economic activity, introducing social security and social assistance programmes, and decommodifying some resources and services. The principle of social protection against economic liberalism was very much present in the New Deal.

Hence, despite their different geographical and ideological backgrounds, the political movements and individuals who inspired the mid-20th century wave of social protection, which I refer to as the second countermovement, all had analogous approaches to the limitation of the market economy. Those similarities allow me to extract six principles the diverse manifestations of the second countermovement have in common, as follows:

Principle 1. Governments should intervene when markets fail to provide social welfare: socialism, the welfare state and the New Deal were reactions to the perceived failures of the

²⁹⁶ At 774, 781-782; also see HM Pachter "Three Economic Models: Capitalism, the Welfare State, and Socialism" in Howe, above n 295, 787 at 787-788.

mid-20th century market economy to ensure all human beings had an adequate standard of living. Those failures were caused mainly by the unrestrained accumulation of capital by the owners of the means of production, to the detriment of the working class.

Principle 2. Governments should promote material equality: during the second countermovement, governments sought to diminish or eliminate socioeconomic disparity by, among other techniques, instituting a progressive income tax, decommodifying certain essential resources and services, and improving working conditions. Even the non-socialist New Deal incorporated techniques that promoted material equality, such as social security and a wealth tax.

Principle 3. Property with a strong social purpose should be nationalised: as a means of promoting material equality, the institution of private property was reformed by most governments during the second countermovement. Following the proposals of democratic socialists in the United Kingdom, governments established the common ownership of some property and industries – establishing state corporations in sectors like energy, transportation and telecommunications – as a means of guaranteeing an adequate standard of life to all, leaving all other property in private hands. FDR's New Deal followed this principle to a lesser extent, with the state participating only in the electricity industry. However, one of the pillars of the New Deal, the WPA, entailed destining hundreds of properties to major public infrastructure projects that served a social purpose.

Principle 4. Key services should be decommodified: during the second countermovement, governments significantly reduced the market's participation in some essential services – like education, health and housing – by offering themselves. This ensured those services could no longer be treated as a commodity to sell by capitalists, guaranteeing everyone's access to them in equal terms. Other services remained subject to market forces, but under regulations that inhibited the detrimental effects of economic liberalism, thus maintaining a mixed economy.

Principle 5. Everyone should have an adequate income, ideally through employment: as a movement that defended the interests of the working class, socialism has always given labour a central role in society. The welfare state was founded on Keynes' idea that full employment was fundamental for post-war economic recovery. The New Deal was FDR's solution to the high levels of unemployment caused by the Great Depression. Thus, the idea of providing sufficient labour for everyone was at the core of the second countermovement. At the same time, this countermovement sought to decommodify labour by introducing a series of working rights and, for those who could not work, the right to receive an adequate income through social insurance or social assistance.

Principle 6. International conflict can be averted through social protection: a highly popular concept among the actors of the second countermovement was FDR's "freedom from want", which established that international conflict could only be prevented if people's basic needs were fulfilled and they did not resort, in desperation, to radical or totalitarian alternatives of governance.

Although many other ideas formed part of the second countermovement, these six were the most prevalent. In this thesis, they will act as a framework to analyse the depth of the bond between the second countermovement and the ICESCR. Approaching an interpretation of the treaty under the lens of the second countermovement shines a clearer light on its object and purpose: to limit the market's power.

D Conclusion

This chapter has told the story of the second countermovement, a series of actions taken by governments to increase social protection against the harmful effects of the market economy in the years before, during and after the Second World War. In contrast to the first countermovement, in the second one governments were able to harness the public's support for transformational reforms and reached a compromise with economic liberalism that ensured the sustainability (at least for three decades, as we will later see) of the mechanisms of social protection. The consolidation of social insurance schemes, the creation of free and universal public services, and the nationalisation of essential industries, for instance, are all actions that represented a paradigm shift in public governance.

A neo-Polanyian approach to the history of that shift goes beyond a mere account of welfare reforms or the New Deal, which has limited the arguments found in previous historical studies of the ICESCR. As a story of the second countermovement as a whole, this chapter identifies a lesson that the existing literature has missed: that the ICESCR's background was defined by a clear intention, coming from different backgrounds and ideologies, to limit the market in favour of social protection. Despite having been manifested during the mid-20th century, that intention is not contingent on that period. It still holds today and should therefore continue to be seen as the driving force behind the ICESCR.

However, that intention can be translated into policy in very different forms, depending on what political movements and ideas are most prevalent at a certain point in time. The mid-

20th century policies of social protection were moulded by the six principles of the second countermovement that were, in turn, mostly inspired by the four socialist traditions I have identified. Therefore, it is not surprising that the ICESCR's content is bound by those influences. As I will explore later in this thesis, that limitation presents significant challenges when those in charge of implementing the treaty are obliged to make it fit into a socio-political context where social protection is guided by challenges that are distinct to those of the second countermovement.

III *The ICESCR: An Instrument of the Second Countermovement*

Having delineated the second countermovement, this chapter will now show how the principles and political projects of that historical moment, such as the British welfare state and the New Deal, were taken as the basis for the treaty's content. To do so, I will provide some contextual background to the treaty's negotiation, demonstrating that the individuals who had the greatest influence on its drafting process were all active participants in the political projects that defined the second countermovement. Additionally, I will carry out a careful examination of the treaty's *travaux préparatoires*, finding references to the rationality and practices of the second countermovement within those documents. Lastly, I will examine how the discussions found in those working documents were embedded in the treaty's text. These three exercises combined will allow me to determine that the ICESCR's drafters intended the treaty to be a tool of social protection against economic liberalism, more than a mere copy of welfare state policies.

This methodology supplements the research conducted by other scholars in the field of the history of economic and social rights. Their work focuses mostly on the historical coincidences between the ICESCR's drafting and the political environment of the mid-20th century to reach the conclusion that both elements were linked. My thesis is able to confirm that conclusion more definitively, by analysing the backgrounds and statements of the treaty's drafters to get an even clearer picture of their intentions and, consequently, the treaty's purpose.

Moreover, my neo-Polanyian approach to this study shines a light on the role that law – and, more specifically, the ICESCR as the second countermovement's leading treaty – can play in promoting social protection against the harmful effects of the market. Law, in fact, has always played a central part in Karl Polanyi's description of the double movement, partly because he was a lawyer by training.²⁹⁷ In his account, law worked in favour of both economic liberalism and social protection. Regarding the former, he claimed that because trade became a synonym of peace in the 19th century – as liberals had created the myth that states would not engage in international conflicts that would represent an obstacle to international trade – international law was designed to protect merchants and the economic system. National sovereignty became subservient to currency and credit, and the balance of power was kept in the name of the international organisation of the economy.²⁹⁸ When the pendulum of the double

²⁹⁷ Dale, above n 19, at 41.

²⁹⁸ Polanyi, above n 19, at 10-18.

movement swung back, “legislative interference and direction” also played an important part in social protection and the decommodification of labour, land and money.²⁹⁹ Some of the most effective actions of the first countermovement consisted of domestic social legislation, such as factory laws and unemployment insurance.³⁰⁰

Overall, neo-Polanyian legal scholarship follows his idea that law is ambivalent within the double movement. It is “subject to the talents, ingenuities, whims and frailties of its human (ab)users and avoiders, whether state or non-state actors, movers or counter-movers”.³⁰¹ This antagonistic picture of the two sides of the law – one being a commodity that serves private interests and the other being an institution that promotes social wellbeing; one aiding economic liberalism and the other as social protection – is what Frerichs refers to as the “law of market society”.³⁰²

This chapter establishes that the ICESCR fits into the band of legal instruments that aim to protect society against the harmful effects of the market economy, as the treaty was moulded by actors who closely followed the six principles of the second countermovement. More than that, it will demonstrate that the ICESCR is inexorably tied to the second countermovement.

A *The ICESCR’s Background*

This section will outline the antecedents to the ICESCR’s negotiation and adoption, with the purpose of providing an adequate context to my analysis of the *travaux*. I will first provide an overview of the key events leading to the formation of the Commission, the recognition of economic and social rights in the UDHR and the subsequent timeline of the ICESCR’s drafting. Then, I will conduct a biographical account of the delegates who had the greatest impact on the ICESCR’s drafting and content, who came from the countries and political backgrounds that I have already discussed above (see Chapter II.B.3). It will start to become evident, based on this brief contextualisation, that the ICESCR was moulded as a tool of the second countermovement.

²⁹⁹ At 225-226.

³⁰⁰ At 174-177.

³⁰¹ Perry-Kessaris, above n 52, at 413.

³⁰² Sabine Frerichs “Karl Polanyi and the Law of Market Society” (2019) 44 OZS 197 at 201, 205-206.

1. Events leading to the ICESCR's drafting

The protection of economic, social and cultural rights on the international plane precedes the UDHR and the ICESCR. The “welfare internationalism” movement, which sought to avoid international conflict through the provision of domestic social welfare, pushed for the recognition of those rights at the start of the 20th century.³⁰³ This movement ultimately led to the foundation of the International Labour Organization (ILO) in 1919, which promoted social insurance schemes in European countries during its first decades of existence and later in the rest of the world.³⁰⁴ In 1944, the ILO contributed to the second countermovement when it adopted the Declaration of Philadelphia, later integrated into the ILO's constitution in 1946.³⁰⁵ Article 2(a) of the Declaration stated that:³⁰⁶

all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity...

The Declaration of Philadelphia also assigned to the ILO the “examin[ation of] all international economic and financial policies and measures” related to the satisfaction of social rights.³⁰⁷ In theory, this widened the organisation's scope of action significantly. However, the Allies were uneasy with giving the ILO such a central role in the assessment of domestic social policies, so they eventually restricted its functions in this regard.³⁰⁸ Nonetheless, the ILO contributed to the diffusion of social provision schemes with a series of model legislations and conventions, and began compiling domestic social provisions from its member states to facilitate comparative studies.³⁰⁹

The Atlantic Charter marked another stage in the international recognition of economic, social and cultural rights. In 1941, FDR and Winston Churchill had a wartime meeting which resulted in the Anglo-American Eight Point declaration, better known as the Atlantic Charter. In it, President Roosevelt contributed one of the most popular notions of the second

³⁰³ See Franz Nullmeier and Franz-Xaver Kaufmann “Post-War Welfare State Development” in Castles and others (eds), above n 175, at 85; Steffek and Holthaus, above n 9, at 109;

³⁰⁴ See GF Sinclair *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, Oxford, 2017) at 32-35, 48-68, 97-102.

³⁰⁵ Nullmeier and Kaufmann, above n 303, at 85; Steffek and Holthaus, above n 9, at 120.

³⁰⁶ Constitution of the International Labour Organization 15 UNTS 40 (opened for signature 1 April 1919, entered into force 28 June 1919), Annex, art 2(a).

³⁰⁷ At art 2(d).

³⁰⁸ Steffek and Holthaus, above n 9, at 120.

³⁰⁹ Stein Kuhnle and Anne Sander “The Emergence of the Western Welfare State” in Castles and others (eds), above n 175, at 78.

countermovement – “freedom from want”.³¹⁰ Additionally, points 5 and 6 of the Charter expressed the leaders’ intention of “securing, for all, improved labour standards, economic advancement and social security” and their understanding that the state of peace after the war ended should lead to “freedom from fear and want” in all nations.³¹¹

The concept of freedom from want and the Atlantic Charter had an impact on both domestic reform and the formation of new international organisations and agreements. Beveridge, for example, stated that his 1942 report was a contribution towards the objectives set in the Atlantic Charter.³¹² Moreover, notions similar to the ones in the Charter, regarding the interrelation between economic prosperity and social welfare, were embedded in the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD, 1944) and in the General Agreement on Tariffs and Trade (GATT, 1947).³¹³

A series of international initiatives that promoted the notion of economic, social and cultural rights were also launched by diverse organisations and individuals during the second countermovement. In 1944, the American Law Institute elaborated the *Statement of Essential Rights* (the “ALI Statement”).³¹⁴ This document had the intention of implementing FDR’s four freedoms. Its two concrete goals were to determine the extent to which all countries had similar views on individual rights and how those rights could be expressed in a way that was acceptable to those countries’ different cultures. The document was drafted by a group of experts (including non-lawyers) from multiple cultures and backgrounds, who were divided into committees in charge of a series of sub-topics, including one on social rights (understood as those related to “economic opportunity and security”). The group included Charles Merriam, who had been actively involved in Roosevelt’s National Resources Planning Board, a central piece of the New Deal. There was a consensus among the experts that the bill of rights that was being prepared should include rights that required positive action from the state, supported by efforts from the market and civil society. The economic and social rights included in the ALI

³¹⁰ See United States Department of State *Making the Peace Treaties 1941-1947: A history of the making of the peace beginning with the Atlantic Charter, the Yalta and Potsdam Conferences, and culminating in the drafting of peace treaties with Italy, Bulgaria, Hungary, Rumania, and Finland* (Department of State, European Series 24, 1947) at 1.

³¹¹ FD Roosevelt and Winston Churchill *The Atlantic Charter: Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom* (United States Office of War, OWI Poster No 50, 14 August 1941), at [5, 6].

³¹² The Beveridge Report, above n 199, at [459].

³¹³ Articles of Agreement of the International Bank for Reconstruction and Development 2 UNTS 134 (opened for signature 27 December 1945, entered into force 27 December 1945), art 1(iii); General Agreement on Tariffs and Trade 1867 UNTS 187 (opened for signature 30 October 1947, entered into force 1 January 1948), preamble.

³¹⁴ James, above n 9, at 74-75.

Statement were the rights to property, education, work, conditions of work, food and housing, and social security. All these rights, except for the right to property, were later included in the UDHR and in the ICESCR.³¹⁵

In 1949, TS Marshall (a Fabian socialist) published his influential essay *Citizenship and Social Class*. In it, Marshall described the three stages of citizenship: from civil, to political, to social. The civil referred to “the rights necessary for individual freedom” such as liberty of the person, freedom of speech, freedom of religion, the right to property and the right to justice. The political element of citizenship was “the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such body”. In third place, the social aspect corresponded to:³¹⁶

the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.

Despite these important contributions to the advancement of economic and social rights, it is safe to argue that the UN was responsible for their institutionalisation as international human rights. The organisation’s intention to do so was apparent from the start. The UN Charter (1945) indicates in its preamble that one of the organisation’s aims is “to promote social progress and better standards of life in larger freedom”, in part through the “employ[ment of] international machinery for the promotion of the economic and social advancement of all peoples”.³¹⁷ Article 1(3) invites “international cooperation in solving international problems of an economic, social, cultural, or humanitarian character”. Articles 13 and 22 empower the General Assembly to make recommendations to that end, including the creation of human rights “subsidiary organs”.³¹⁸ The United States and various Latin American countries proposed including an international bill of rights in the Charter itself, including economic and social rights, but were unsuccessful.³¹⁹ Article 55 signalled the organisation’s intentions more vaguely, with references to the promotion of “conditions of stability and well-

³¹⁵ Whelan, above n 9, at 13-18; Christian Tomuschat *Human Rights: Between Idealism and Realism* (2nd ed, Oxford University Press, Oxford, 2008).

³¹⁶ TH Marshall “Citizenship and Social Class” in *Class, Citizenship, and Social Development* (The University of Chicago Press, Chicago, 1977) 71 at 78.

³¹⁷ Charter of the United Nations, preamble.

³¹⁸ At 1(3), 13, 22.

³¹⁹ Ben Saul “Introduction: The Drafting of the International Covenant on Economic, Social and Cultural Rights, 1948–1966” in Ben Saul (ed) *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires* (Oxford University Press, Oxford, 2016) vol 1 at xcvi–xcviii; also see LB Sohn “How American International Lawyers Prepared for the San Francisco Bill of Rights” (1995) 89 AJIL 540.

being” through “higher standards of living, full employment, and conditions of economic and social progress and development”, health, education and human rights.³²⁰

The subsequent articles emphasised the members’ agreement to cooperate in the fulfilment of these objectives and tasked the United Nations’ structure with addressing them. That structure was composed of specialised agencies coordinated by the ECOSOC, all under the General Assembly’s authority.³²¹ The ECOSOC began its work in 1946 and, as mandated by article 68 of the Charter,³²² established the Commission that same year, instructing it to “[submit] proposals, recommendations and reports to the Council regarding ... an International bill of rights”.³²³

Before the Commission began its work, the United Nations Educational, Scientific and Cultural Organization (UNESCO) had already started studying the possibility of identifying truly universal basic rights and values in 1947. Julian Huxley, director of UNESCO, created a committee to carry out that task, chaired by EH Carr and including Richard McKeon and Jacques Maritain.³²⁴ During the war, Carr had advocated for the adoption of a mix of “the secular ideals of Christianity and those of communism” as the only way to prevent another global conflict.³²⁵ Similarly, McKeon believed in finding a middle ground between different cultures through the approach of intellectual pluralism.³²⁶ Maritain, a Catholic philosopher, had sent books and radio messages from the United States to occupied France arguing in favour of social rights in a communitarian society from the perspective of natural law.³²⁷ After consulting with scholars and statesmen from around the world, the committee managed to find, to their surprise, a list of common rights.³²⁸ Therefore, by the time the Commission started its work, it already had a basis to work on.

The Commission was composed of 18 delegates from Egypt (for Africa); China, India, Iran, Lebanon, Pakistan and Philippines (for Asia); Byelorussia, Poland, Ukraine, the USSR

³²⁰ At art 55.

³²¹ At arts 56-60.

³²² At art 68.

³²³ *Resolution adopted by ECOSOC on the establishment of a Commission on Human Rights with a Sub-Commission on the Status of Women* ECOSOC Res 5(I) (1946) at [2(a)].

³²⁴ Nick Youngson “Distinguished world thinkers study bases of human rights” *The UNESCO Courier* (Paris, August 1948).

³²⁵ See EH Carr *Conditions of Peace* (Macmillan, London, 1944) at 116-117.

³²⁶ See “Richard McKeon (1900-1985)” Richard McKeon <<https://richardmckeon.org>>.

³²⁷ Jacques Maritain *Les droits de l’homme et la loi naturelle* (EMF, New York, 1942) in Moyn, above n 2, at 46.

³²⁸ MA Glendon “The First Lady and the Philosopher” in MA Glendon *The Forum and the Tower: How Scholars and Politicians Have Imagined the World, from Plato to Eleanor Roosevelt* (Oxford University Press, Oxford, 2011) at 203.

and Yugoslavia (for Eastern Europe); Chile, Guatemala, Panama and Uruguay (for Latin America); and Australia, Belgium, France, Greece, Norway, Turkey, the United Kingdom and the United States (for Western Europe and others).³²⁹ As already discussed and as will be seen below in my analysis of the ICESCR's *travaux*, despite the large number of representatives, only a handful of them had significant influence over the Commission's work. Importantly, most of the individuals in that select group had a background in the second countermovement in their home countries.

The Commission's first session in 1947 received a wide range of proposals regarding the content of the international bill on human rights. These included an adaption of the ALI Statement and draft resolutions from India, the United States and the American Federation of Labor – all of which contained economic and social rights. A drafting committee was created in March 1947 and the ECOSOC requested the UN Secretariat to produce the outline of a draft declaration that could serve as the basis for the debate in that committee. This document, elaborated by John Humphrey – the Canadian director of the Division of Human Rights in the Department of Social Affairs of the United Nations – was presented to the committee in June 1947 and became the first draft of the UDHR when that body decided to defer a binding covenant and instead work first on a general declaration.³³⁰ Humphrey's draft (often misreferred to as the "Secretariat Outline") contained a section on economic, social and cultural rights, comprising the following rights (articles 35–44):³³¹

- medical care, public health and security;
- education (free primary education and the promotion of higher education);
- to perform socially useful work;
- good working conditions;
- "such a share of the national income as the need for an individual's work and the increment it makes to the common welfare may justify";
- public help to support the family;
- social security ("against the risks of unemployment, accident, disability, sickness, old age and other involuntary or undeserved loss of livelihood");
- good food and housing and "surroundings that are pleasant and healthy";
- a fair share of rest and leisure; and

³²⁹ Howard Tolley *The U.N. Commission on Human Rights* (Westview Press, London, 1987) at 15.

³³⁰ Saul, above n 319, at xcic-c.

³³¹ *Draft Outline of International Bill of Rights* UN Doc E/CN.4/AC.1/3 (4 June 1947) at [35-44].

- participation in cultural life, enjoyment of the arts and sharing the benefits of science.

Humphrey's memoirs on the UDHR's drafting process shine a light on his intentions. He was given the task of preparing a draft due to the ideological chasm between two out of the three members (before it was expanded to eight members) of the drafting committee: Charles Malik, the Lebanese representative, who was philosophically inclined towards natural law (as a Christian) and was anti-communist; and PC Chang, the Chinese delegate who considered himself a pluralist or pragmatist but was heavily influenced by Confucianism.³³² Humphrey recalled that he prepared his own draft by taking other drafts that had been presented to the Commission. These included a wide range of proposals elaborated by several individuals and associations including, among others, Gustavo Gutiérrez y Sánchez from Cuba (an influential professor of international law at the University of Habana), Professor Hersch Lauterpacht, HG Wells, the American Law Institute, the American Jewish Congress and the *Institut de droit international*. Of these, Humphrey admitted that he borrowed the most from the ALI Statement. The UN Secretariat also prepared a compilation of constitutional texts that supported the draft's content, but only after Humphrey had finished his work.³³³

In relation to economic and social rights, Humphrey asserted in his recollection of the UDHR's drafting that his commitment to include those norms was present since the moment he began working on the draft declaration. He recalled that:³³⁴

A socialist of the old school, he [Jan Stancyck, principal director of the UN Department of Social Affairs] wanted to be sure that economic and social rights would be included. He need not have worried; I had already decided to include them. Human rights without economic and social rights have little meaning for most people, particularly on empty bellies.

Humphrey's role in the inclusion of economic, social and cultural rights in the UDHR and then the ICESCR is often overlooked. He was a socialist himself, "to the left of the New Deal without a trace of communist sympathies".³³⁵ He referred to his draft of the UDHR as a mix of "humanitarian liberalism and social democracy".³³⁶ Thus, he was very much aligned with the second countermovement. Humphrey also stated in his memoirs that "it is by no

³³² JP Humphrey *Human Rights & the United Nations: a great adventure* (Transnational Publishers, New York, 1984) at 24, 29; Sam McFarland "The Universal Declaration of Human Rights: A Tribute to its Architects" (2017) 19 Public Integrity 108 at 111-112.

³³³ Humphrey, above n 332, at 31-32; JB Lockey "Es la Guerra Susceptible de Represión? by Gustavo Gutiérrez and Sánchez Habana" (1927) 21 AJIL 197 at 197.

³³⁴ Humphrey, above n 332, at 2.

³³⁵ Morsink, above n 12, at 157, 192-194; Jay Winter and Antoine Prost *René Cassin and Human Rights: From the Great War to the Universal Declaration* (2nd ed, Cambridge University Press, Cambridge, 2002) at 235.

³³⁶ Humphrey, above n 332, at 40.

means certain that economic and social rights would have been included in the final text if [he] had not included them in [his draft]”, due to the “considerable opposition” they faced within the drafting committee.³³⁷ For example, when the inclusion of economic, social and cultural rights in a binding convention was being discussed, the United Kingdom presented strong opposition. It sided with the ILO, which felt that its mandate was being threatened and therefore preferred a vague wording for those rights.³³⁸

Despite this resistance, Humphrey also recalled that there was a strong opposition to liberal principles, in line with the second countermovement. During the first session of the Commission, the United Kingdom (represented by Charles Duke, a trade unionist and member of Attlee’s Labour government) and France (represented by René Cassin, who, as seen below, was also a trade unionist and a socialist) opposed a set of liberal principles brought forward by Charles Malik. Their reasoning was that individual liberty needed to be somewhat limited in an organised modern society and that there was a “closely knit interdependence of the state and the individual”. Cassin added that humans were essentially social beings and that social rights should be given adequate attention by the Commission.³³⁹ Therefore, although the position of the Allied powers was equivocal, it is no exaggeration to state that “choosing John Humphrey to prepare the first draft [of the UDHR] had epochal consequences”.³⁴⁰

After receiving the UN’s draft outline, René Cassin reviewed the document and, in his own draft, preserved the 10 economic, social and cultural rights initially proposed by Humphrey. He also included provisions for the protection of mothers and children, trade union rights, authors’ moral rights, and vocational and technical training.³⁴¹ As a trade unionist, Cassin not only supported, but strengthened, the content of the articles relating to economic and social rights, especially those related to work.³⁴² Moreover, his draft was better structured and included a preamble explaining the philosophical grounds for the Declaration, including its universality.³⁴³

The drafting of a binding covenant on human rights began in parallel with the drafting of the UDHR, but only gained momentum once the latter instrument had been approved. While the United Kingdom led an initial attempt to omit economic, social and cultural rights, small

³³⁷ Humphrey, above n 332, at 32, 69.

³³⁸ At 141-143.

³³⁹ At 25.

³⁴⁰ McFarland, above n 332, at 113.

³⁴¹ Saul, above n 319, at cviii, cxv.

³⁴² Morsink, above n 12, at 157.

³⁴³ McFarland, above n 332, at 114-115.

states – mainly from Latin America and Eastern Europe – pushed back against that proposal.³⁴⁴ The Commission decided to incorporate those rights in the treaty following a clear mandate from the General Assembly towards the end of 1950 to include “a clear expression of economic, social and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant”.³⁴⁵ Therefore, during the Commission’s seventh session in 1951, several proposals were debated and 14 articles on economic, social and cultural rights were adopted. Nonetheless, the Commission also included a separate and frailer supervision mechanism for those rights. Concerned with the possibility of a treaty with two distinct mechanisms of supervision, the ECOSOC requested the General Assembly to revert its decision and allow the Commission to draft two separate covenants, which the Assembly did in February 1952. The Commission then resumed its work on two separate instruments.³⁴⁶

Drafts of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR were referred jointly to the General Assembly in 1954,³⁴⁷ which decided to submit them to its Third Committee to discuss the draft articles one by one. This body carried out its task by approving the draft covenants in parts (only a few articles at a time) through a series of votes that spanned from the General Assembly’s 10th session (1955) to its 21st session (1966).³⁴⁸ In 1966, the two covenants were finally submitted to the General Assembly, where they were adopted (in the ICESCR’s case, by 105 votes to 0) and opened for signature on 16 December of that year.³⁴⁹ However, the ICESCR did not enter into force until 3 January 1976, when it received the 35 ratifications it required to do so.³⁵⁰

³⁴⁴ Some scholars suggest that large Western countries with welfare states in the mid-20th century were opposed to the international recognition of economic, social and cultural rights, and that if it hadn’t been for the efforts of those smaller states, those rights would have never been included in a binding treaty. See Davy, above n 12, at 45-46; Whyte, above n 3, at 120-128; Åshild Samnøy *Human Rights as International Consensus: The Making of the Universal Declaration of Human Rights 1945-1948* (CMI Reports Series, Chr Michelsen Institute, Bergen, 1991) at 22; AWB Simpson *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, Oxford, 2001) at 173; Manisuli Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2nd ed, Hart Publishing, Portland, 2016) at 37-38; Kathryn Sikkink “Latin American Countries as Norm Protagonists of the Idea of International Human Rights” (2014) 20 *Global Governance* 389; Susan Waltz “Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights” (2001) 23 *HRQ* 44.

³⁴⁵ *Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights* GA Res 421(V) (1950), art 7(b).

³⁴⁶ Saul, above n 319, at cxv-cxvii; Craven, above n 9, at 16-20.

³⁴⁷ *Draft international covenants on human rights* GA Res 833 (IX) Sect 4 (1954).

³⁴⁸ Saul, above n 319, at cxvii-cxviii; Craven, above n 9, at 20-22.

³⁴⁹ *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights* GA Res 2200 (XXI) (1966).

³⁵⁰ ICESCR, above n 1, art 27.

The influence of the second countermovement on the recognition of economic, social and cultural rights in the ICESCR is already visible just from this brief overview of their history in international law. The effort to include economic, social and cultural rights in the UDHR, and then in a binding international treaty, began during the second countermovement and was led by individuals – such as Humphrey and Cassin – and organisations that were heavily influenced by that moment. The next section will expand on the extent to which the main actors of the Commission were also actors of the second countermovement.

2. The counter-movers who shaped the ICESCR

In addition to the background that has already been provided in relation to the ICESCR's history, it is important to take into account the personal background of the Commission's delegates – at least those who had a significant role in the discussions – and how that context might have influenced the treaty's content. Some other delegates, like Noriega (Mexico) and Gough Whitlam (Australia) had relevant interventions, but it is not possible to study every single delegate's background within the confines of this thesis. Additionally, as I have already discussed, even though Soviet delegates participated very actively in the debates surrounding the adoption of the ICESCR, they are not part of my analysis as their views did not reflect the principles of the second countermovement and were only minimally reflected in the treaty itself (see Chapter II).

Some of the Commission's delegates had a transparent background in the second countermovement. The Commission's first chair, Eleanor Roosevelt (United States), had been a close witness to that moment. Overall, while Roosevelt did not shy away from publicly criticising her husband's policies when she disagreed with them, she was an enthusiastic supporter of FDR's New Deal, even advocating for more progressive measures. This attitude shaped her presence at the UN and her approach to economic and social rights.³⁵¹ Early in her husband's presidency, she began supporting the project of an international New Deal, led by Vice-president Henry Wallace, which sought to empower people to start a "revolution" to "run their own affairs" instead of "delegate[ing] them to a few people and become slaves to those

³⁵¹ Glendon, above n 328, at 22, 42-43, 45, 186; JP Lash *Eleanor and Franklin: The story of their relationship, based on Eleanor Roosevelt's private papers* (WW Norton & Company, New York, 1971) at 469.

few”.³⁵² In a 1943 column called *My Day*, she advocated for the need to address world hunger, but warned that this would happen only with:³⁵³

...a basic change in the old type of economy where power was maintained in the hands of a comparatively small number of people who were influential in world finance and world business. The different cartel groups are illustrative of an international type of cooperation which we undoubtedly want to wipe out if we are to achieve a new type of economic freedom for the people of the world as a whole.

Moreover, on Victory in Europe Day in 1945, she wrote: “Freedom without bread ... has little meaning. My husband always said that freedom from want and freedom from aggression were twin freedoms which had to go hand in hand”.³⁵⁴ Thus, Eleanor Roosevelt was a strong supporter of her husband’s role in the second countermovement.

Additionally, as a keen Christian, Roosevelt was committed to equality. She believed religion was “the spirit of social cooperation” and that citizens should model themselves after Christ.³⁵⁵ Therefore, her principles were close to those of Christian socialism. Additionally, two of her closest friends, Nancy Cook and Marion Dickerman, were considered political radicals at the time, and had introduced her to feminist, trade unionist, and socialist groups.³⁵⁶ She was also deeply convinced of the importance of individual liberty, which is why she had a distaste for communism (which in her writings she did not distinguish from socialism).³⁵⁷ Nevertheless, she sympathised with and was impressed by the way the USSR had advanced in modernisation through central planning and public ownership of property, and she defended the communists’ right to advocate peacefully – even criticising those who exploited anti-Communism discourse to prevent economic reform – but opposed Stalin’s dictatorship and distrusted communists both in the United States and abroad.³⁵⁸

Roosevelt cooperated with the American Communist Party in shared causes, like civil rights and refugee aid, but denounced its lack of independence from the Kremlin.³⁵⁹ While she considered “the rights of all people to some property are inviolate”, she also thought that some individuals had abused that “rule of the sacredness of property to retain in the hands of a limited

³⁵² Jason Berger *A New Deal for the World: Eleanor Roosevelt and American Foreign Policy* (Social Science Monographs, Columbia University Press, New York, 1981) at 33-38.

³⁵³ At 37.

³⁵⁴ Glendon, above n 328, at 43.

³⁵⁵ Eleanor Roosevelt *The Moral Basis of Democracy* (Open Road Integrated Media, New York, 2016) at 25-27.

³⁵⁶ Brands, above n 259, at 168.

³⁵⁷ Roosevelt, above n 355, at 10.

³⁵⁸ Berger, above n 352, at 41, 46; Lash, above n 351, at 585.

³⁵⁹ Berger, above n 352, at 42.

number the fruits of the labor of many”.³⁶⁰ Therefore, in her opinion, an ideal democracy found a balance between equality and freedom. As she wrote in a 1940 monograph:³⁶¹

It would seem clear that in a Democracy a minimum standard of security must at least be possible for a child in order to achieve the equality of opportunity which is one of the basic principles set forth as a fundamental of Democracy. This means achieving an economic level below which no one is permitted to fall, and keeping a fairly stable balance between that level and the cost of living. No one as yet seems to know just how to do this without an amount of planning which will be considered too restrictive for freedom. The line between domination and voluntary acquiescence in certain controls is a very difficult one to establish.

Although Roosevelt spoke of “equality of opportunity”, her idea of equality was closer to the concept of solidarity or philanthropy, rather than to that of material equality as developed in socialist theory. She spoke of an “interest in the welfare of our neighbors” and the “submerged people”, of “social responsibility”, and of the more privileged making a “contribution to society”.³⁶² Her projects as first lady were philanthropic interventions in favour of marginalised or discriminated groups, like persons with disabilities, women and African Americans.³⁶³ In addition to her religious motivations, she also believed that improving people’s standard of living, not the Truman Doctrine, was the best deterrent against communism in the United States and globally.³⁶⁴ Thus, while Roosevelt disliked communism and was not a socialist herself, she showed a great deal of tolerance towards the forms of socialism that had most impact on the second countermovement.

Other delegates had a clear background in the socialist thread of the second countermovement. René Cassin’s (France) experiences as a soldier on the Western Front of the First World War, with fellow combatants from diverse socioeconomic backgrounds, cemented the feelings of comradeship and solidarity he would have for the rest of his life.³⁶⁵ After the war, he actively participated in the movement of “associations of wounded veterans and ex-soldiers”, becoming the president of one of the largest associations, the Union Fédérale (UF), in 1922, and played an important part in securing pensions – one of the first manifestations of social security in France – for veterans.³⁶⁶ As a result, he also led the international veterans’

³⁶⁰ Roosevelt, above n 355, at 21.

³⁶¹ At 24.

³⁶² At 23, 24, 30, 35.

³⁶³ At 41.

³⁶⁴ Berger, above n 352, at 59-62.

³⁶⁵ Winter and Prost, above n 335, at 21.

³⁶⁶ At 25-33.

movement, formed with the aid of the ILO in the early 1920s, and became a member of the French delegation to the League of Nations between 1924 and 1938.³⁶⁷

In 1924, Cassin was appointed French delegate by Édouard Herriot, the three-times prime minister from the Radical Republican and Radical-Socialist Party (‘the Radical Party’), on the recommendation of Léon Bourgeois, the 1920 Nobel Peace Prize laureate, “spiritual father” of the League of Nations and renowned member of the same socialist political party.³⁶⁸ In 1928 and again in 1932, Cassin unsuccessfully ran for parliament for the Radical Party.³⁶⁹ Cassin’s biographers write that when Herriot returned to power in 1932 after being briefly out of office, Cassin “was in entire sympathy with the political outlook of those representing France at the [international disarmament] conference”.³⁷⁰ Furthermore, during his time in the League of Nations, Cassin launched and directed the *Conférence Internationale des Associations de Mutilés et Anciens Combattants* (CIAMAC), a centre-left organisation composed in good part by “socialists, radical socialists or social democrats” that promoted pacifism.³⁷¹ By the time the Second World War broke out, Cassin was considered a “veteran of ‘the left’”.³⁷² Therefore, Cassin was a pacifist unionist who, despite affirming that he was representing veterans “outside of all political parties”, was a socialist acting on behalf of a socialist government.³⁷³

When discussions regarding the post-war order began in Europe, Cassin sensed the support towards the Beveridge Report in the United Kingdom, and was convinced that governance after the war would have to be based on “liberty and economic and social security”.³⁷⁴ As Minister of Justice and Education in the Free France administration, Cassin was inspired by the popularity of the Beveridge Report and the idea that economic and social rights were universal, so he headed the French effort to establish a new legal regime of human rights.³⁷⁵ He was assisted by Henri Laugier, who would later be named deputy secretary of the United Nations, in charge of social affairs and the chair of ECOSOC.³⁷⁶ By the time the Commission was inaugurated, then, Cassin had already spent years working on the topic of

³⁶⁷ At 51.

³⁶⁸ At 65; The Editors of the Encyclopaedia Britannica “Édouard Herriot: French statesman” (1 July 2020) Encyclopaedia Britannica <www.britannica.com/biography/Edouard-Herriot>; “Léon Bourgeois: Biographical” The Nobel Prize <www.nobelprize.org/prizes/peace/1920/bourgeois/biographical/>.

³⁶⁹ Winter and Prost, above n 335, at 73-75.

³⁷⁰ At 76.

³⁷¹ At 59, 62.

³⁷² At 94.

³⁷³ At 91; Morsink, above n 12, at 157.

³⁷⁴ Winter and Prost, above n 12, at 144.

³⁷⁵ At 163-165.

³⁷⁶ At 233, 240.

human rights. However, although Cassin's commitment to human rights is undeniable, it was "not shared by a series of French governments, including those formed during the presidency of Charles de Gaulle"; mainly due to the issue of granting rights to people in the French colonies.³⁷⁷

Pierre Juvigny, France's deputy delegate at the Commission, was also a socialist, having been a member of the SFIO since his adolescence.³⁷⁸ He held several positions within that party, participated in the foundation of the *Parti Socialiste Unifié* (PSU), and was a member of the Club Jean-Moulin, a left-wing think tank created in 1958 to oppose the policies of Charles de Gaulle.³⁷⁹ Before being appointed to the *Conseil d'État*, Juvigny was a member of cabinet in several administrations during the Fourth Republic, including serving as the first director of the *Direction Générale du Travail et de la Main d'Oeuvre* (Department of Labour) in 1956.³⁸⁰ In this role, he negotiated the social section of the Treaty of Rome, which established the European Economic Community.³⁸¹ Juvigny also had an established background in human rights.³⁸²

Hernán Santa Cruz (Chile) started participating in Chilean politics and public service in the context of that country's socialist popular fronts, which were part of the second countermovement. During Aguirre Cerda's administration (see Chapter II.B.3.b), Santa Cruz collaborated in the formulation of important social reforms regarding social insurance under the Minister of Health (and future socialist president) Salvador Allende, with whom he had a "brotherly friendship".³⁸³ In this role, Santa Cruz became a close friend of not only Allende, but two other future Chilean socialist presidents: Gabriel González Videla and Eduardo Frei Montalva.³⁸⁴ Santa Cruz and González Videla, in particular, had a close connection, as the former contributed to the latter's work at the Chilean Embassy in Brazil and to the campaign

³⁷⁷ At 251-252.

³⁷⁸ Gilles Morin "Juvigny Pierre" (31 March 2010) Dictionnaire Bibliographique Le Maitron: Mouvement Ouvrier Mouvement Social <https://maitron.fr/spip.php?article87175&id_mot=3> at [3].

³⁷⁹ At [8]; "Club Jean Moulin" Sciences Po Centre d'Histoire <<http://chsp.sciences-po.fr/en/fond-archives/club-jean-moulin>>.

³⁸⁰ Morin, above n 378, at [1, 3]; "Création d'une direction générale du travail et de la main d'oeuvre" (28 March 1956) *Le Monde* <https://www.lemonde.fr/archives/article/1956/03/28/creation-d-une-direction-generale-du-travail-et-de-la-main-d-uvre_2239700_1819218.html>.

³⁸¹ Morin, above n 378, at [3].

³⁸² At [4]; Pierre Juvigny and Marie-Pierre Herzog "UNESCO and the struggle for human rights" (1973) 9 *The UNESCO Courier* 4 at 4; Morin, above n 378, at [9].

³⁸³ César Ross Orellana "Hernán Santa Cruz: del pensamiento a la acción" (2014) 2 *Horizontes Latinoamericanos* 79 at 83; Hernán Santa Cruz *Cooperar o Perecer: El dilema de la comunidad mundial* (Buenos Aires, Grupo Editor Latinoamericano, 1984) vol 1 at 40.

³⁸⁴ Ross Orellana, above n 383, at 83-84.

that took González Videla to Chile's presidency.³⁸⁵ In 1947, to the surprise of the Chilean political circle, González Videla named the relatively inexperienced Santa Cruz as Chilean delegate to the UN.³⁸⁶ It was González Videla's vision – albeit, communicated with rather vague instructions – that Santa Cruz took to the UN.³⁸⁷

Other delegates' association with the second countermovement is less clear-cut, but can still be derived from their historical context and activities. Carlos Valenzuela, Chile's deputy delegate at the Commission, also entered his country's politics during the Popular Front era, under González Videla's administration. Despite being involved in that president's repression of communist groups, Valenzuela had openly been a communist in his student days and had been a journalist for the socialist papers *Frente Popular* and *Qué Hubo*.³⁸⁸

Marguerite Bowie (United Kingdom) also had a past in socialist politics. Before she was a delegate of Clement Attlee's government at the Commission, she was a civil servant in the British Ministry of Labour from 1917 to 1926. During this time, she was in charge of implementing the first minimum wage in the United Kingdom and was a trade inspector. She returned to the civil service during the Second World War, working for the Ministry of Home Security on the evacuation of children to the United States and Canada, and on public welfare in the London underground air raid shelters.³⁸⁹

Hansa Mehta (India) was an educator and a writer, as well as a public official under Jawaharlal Nehru's administration in India. As explained above (see Chapter II.B.3.b), Mehta followed Nehru's socialist vision, as he had personal control over the foreign affairs portfolio.³⁹⁰ Mehta was a member of the Constituent Assembly that drafted the Indian Constitution and was responsible, during that process, for incorporating content of the UN Charter and the UDHR into the Constitution. She has also been accredited with ensuring a more gender-sensitive language in the UDHR.³⁹¹

³⁸⁵ Santa Cruz, above n 383, at 37.

³⁸⁶ Ross Orellana, above n 383, at 84-85.

³⁸⁷ At 85; Erna Ulloa Castillo and Cristian Medina Valverde "Outline of a Diplomatic Leader in the International Community: Hernán Santa Cruz and his Works at the United Nations" (2019) 41 HRQ 962 at 973-974.

³⁸⁸ Luis Enrique Délano *Diario de Estocolmo (1971-1974)* (LOM Ediciones, Santiago, 2010) at 1 June 1971.

³⁸⁹ Simpson, above n 344, at 437; Max Planck Institute for the History of Science "Jessie Marguerite Bowie-Menzler" University Women's International Networks Database <<http://uwind.mpiwg-berlin.mpg.de/en/fm13-dab-detail-en/127>>.

³⁹⁰ Tharoor, above n 240, at 174; also see Manu Bhagavan "A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights" (2010) 44 Modern Asian Studies 311.

³⁹¹ "UN Chief honours Indian reformer Hansa Mehta's role in shaping Universal Declaration of Human Rights" (7 December 2018) The Economic Times <<https://economictimes.indiatimes.com/news/politics-and-nation/un->

The only relevant delegate who did not have established connections with the second countermovement was Charles Malik (Lebanon and Chair as substitute for Eleanor Roosevelt). He carried significant weight during the first decades of the UN, having been the only person in the history of that organisation to hold the chairs for the ECOSOC, the Commission, and the General Assembly.³⁹² He was, like Roosevelt, a fervent Christian (Catholic) and was deeply opposed to communism.³⁹³ Early in the negotiations for the UDHR, he stated that “[t]he deepest danger of the age is posed by a collectivism which demands the extinction of the human person as such in his own individuality and ultimate inviolability.”³⁹⁴ While he could have been referring to Soviet socialism more than the type of democratic socialism that most influenced the second countermovement, Malik still stands out as one of the only delegates of significance who did not have a background in the second countermovement.

B *The ICESCR’s Travaux Préparatoires*

The ICESCR’s *travaux préparatoires* are comprised of thousands of documents that span from 1946, when the Commission began its work, to 1966, when the ICESCR was adopted. Earlier and later documents, such as the UN Charter, the UDHR and ICESCR ratification declarations, also provide insight into the formulation of those international instruments.³⁹⁵ Their analysis would be an ordeal of epic proportions if it were not for the work of Ben Saul, who completed a compilation of the ICESCR’s *travaux* in 2016. He presents those working papers in a chronological order, prioritising the documents and discussions related to the substantive nature of the rights, and their mechanisms of implementation and supervision.³⁹⁶

I have used these *travaux* to conduct my analysis of the extent and nature of the link between the second countermovement and the ICESCR, based on the six-principles framework I developed in Chapter II (see Chapter II.C). I have looked for coincidences (or lack thereof) between the justifications given by the members of the Commission for the ICESCR’s content

chief-honours-indian-reformer-hansa-mehtas-role-in-shaping-universal-declaration-of-human-rights/articleshow/66983960.cms>.

³⁹² Santa Cruz, above n 383, at 100-101.

³⁹³ Humphrey, above n 332.

³⁹⁴ Glendon, above n 328, at 205.

³⁹⁵ See WA Schabas (ed) *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press, Cambridge, 2013).

³⁹⁶ Ben Saul (ed) *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires* (Oxford University Press, Oxford, 2016).

and those principles, as well as for statements that reject the ideas of economic liberalism that the second countermovement was resisting at the time. The results of that analysis are presented in this section in three parts. First, I will elaborate on the delegates' general acknowledgement of the historical moment that I refer to as the second countermovement and how it brought about the international recognition of economic, social and cultural rights. I will then analyse the traces of each of the countermovement's principles in the *travaux*. Lastly, this section will address some authors' belief that governments that had promoted the second countermovement also tried to block the adoption of the ICESCR, showing that, while that claim is accurate, it does not disprove my thesis. Overall, as I will elaborate, there is overwhelming evidence in the *travaux* that the ICESCR's purpose was to codify and institutionalise the principles of the second countermovement.

1 *General acknowledgment of the second countermovement's relevance*

Among the political ideologies and movements comprised by the second countermovement – socialism, socialist welfare states and the New Deal – only socialism was expressly mentioned as a source of inspiration for the ICESCR. The term “welfare state” was not explicitly used by any of the delegates recorded in the *travaux*. Other terms such as “philanthropic State” or “progressive State” were preferred by them,³⁹⁷ even though in the *travaux* they already employed concepts like “welfare”, “social welfare” and “social wellbeing”.³⁹⁸ While, as seen below, many delegates did make reference to elements of the New Deal, the term “New Deal” itself is not in the *travaux*. The term “socialism”, on the other hand, was explicitly used by many delegates. The most transparent recognition of the socialist character of governments in the aftermath of the Second World War came from Bowie (United Kingdom), who stated that she “represented a State whose democratic and *socialist* Government had already guaranteed the right to work to all its citizens” (emphasis added).³⁹⁹ Two years later, months before the end of the Attlee government in the United Kingdom, Bowie asserted again that the United Kingdom had a “Socialist economy” in which “profits were taxed

³⁹⁷ UN Doc E/CN.4/SR/42 (16 December 1947) at [8]; UN Doc E/CN.4/AC.1/SR.29 (20 May 1948) at [7].

³⁹⁸ UN Doc E/CN.4/SR.221 (7 June 1951) at [2]; UN Doc E/CN.4/SR.236 (2 July 1951) at [47]; UN Doc E/CN.4/SR.295 (2 June 1952) at [66].

³⁹⁹ UN Doc E/CN.4/SR.131 (27 June 1949), at [14].

by the State and workers were required to make a direct contribution towards the social insurance to which they were entitled”, in support of the right to social security.⁴⁰⁰

Practices of the British welfare state were, in fact, mentioned on multiple occasions as an inspiration for the ICESCR’s elaboration. The Australians, who initially led the effort to include economic, social and cultural rights in the draft covenant, stated in 1951 that they “had been greatly influenced by the lead taken by the United Kingdom in securing those very [economic, social and cultural] rights to its own people”.⁴⁰¹ The Chilean delegate recognised that even if Western powers like the United States and the United Kingdom showed hesitance in including economic, social and cultural rights (as seen below in section 3), they “certainly could not be accused of opposing the interests of the workers by doing so” as “the constant concern of [their governments] was to improve labour conditions”.⁴⁰² In a discussion concerning the approach to the right to education, the Director-General of UNESCO referred to the United Kingdom’s recent Education Act of 1944 to illustrate free and compulsory education, as well as the ideal types of education that should be offered by the state.⁴⁰³ The Afghani delegate pointed to the “social and economic legislation” of the United Kingdom and the United States as evidence of “great progress in social and economic fields during rather dark periods of their history”.⁴⁰⁴

The United Kingdom’s delegation also invoked its country’s social provision techniques, in several instances, as a model for the ICESCR. On the issue of education, Bowie (United Kingdom) asserted that although, even in her country, education was limited by economic restraints, “the Education Act brought in in the United Kingdom in 1944 had made the most liberal provision for higher education”.⁴⁰⁵ In a separate meeting earlier that year, Bowie stated that, rather than limiting the treaty’s scope merely to “social welfare” and public services just for the “destitute”, the ICESCR should be modelled after the British social security system, which included “a considerable number of benefits, such as free meals to schoolchildren, family allowances and services to expectant mothers”, regardless of income.⁴⁰⁶ When one of her amendments concerning the right to health was criticised by the World Health Organization’s Director General as “err[ing] on the side of weakness”, Bowie immediately

⁴⁰⁰ UN Doc E/CN.4/SR.221, above n 398, at [12].

⁴⁰¹ UN Doc E/CN.4/SR.203 (24 April 1951) at [56].

⁴⁰² At [60].

⁴⁰³ UN Doc E/CN.4/SR.226 (27 June 1951) at [60].

⁴⁰⁴ UN Doc A/C.3/SR.362 (8 December 1951) at [24].

⁴⁰⁵ UN Doc E/CN.4/SR.227 (27 June 1951) at [56]; also see UN Doc E/CN.4/SR.285 (23 May 1952) at [5].

⁴⁰⁶ UN Doc E/CN.4/SR.221, above n 398, at [52].

accepted the changes, alluding to the recently formed NHS as an example of how the right to health could be practically expanded.⁴⁰⁷ At another opportunity, Hoare (United Kingdom) pointed out that, under the NHS and social security schemes in his country, “maternity benefits were far more elaborate and generous” than those suggested for the ICESCR by some delegates.⁴⁰⁸

Beyond the British welfare state, the *travaux* reveal that delegations were very aware that the ICESCR fit into the logic of a new wave of social protection that was dominating public governance and public opinion in the mid-20th century. Cassin (France), for example, indicated at the General Assembly’s Third Committee that many countries around the world already recognised personal and justiciable economic, social and cultural rights, such as “the limitation of the working week, guaranteed wages and assistance through social security systems”.⁴⁰⁹ Another French delegate approvingly mentioned the increasing practices of collective ownership in all countries, possibly alluding to efforts of nationalisation under the welfare state.⁴¹⁰ During the discussions related to social security, the ILO representative referred to social insurance as a “new concept” of the post-war period.⁴¹¹ The Danish delegate established a clear link between economic, social and cultural rights, and the augmented social provision after the Second World War, by stating:⁴¹²

The implementation of economic, social and cultural rights was not in itself a new problem. Certainly, since the end of the second world war, and in many cases for much longer periods, many governments had been attempting to raise standards of living, to improve economic and social conditions and to extend the scope of education; the aims of those governments were in fact identical with those laid down in the Universal Declaration of Human Rights, and the use of the words “human rights” to describe them should not be allowed to obscure the fact that the problems referred to were not new.

Despite not having close ties with the second countermovement (as seen above), Malik (Lebanon) recognised that the UDHR itself was an indication of “what, in the view of the organized family of nations, belonged to man as a man [*sic*] in the middle of the 20th century”, recognising the impact of that countermovement on society.⁴¹³ The American Federation of Labor stated that “[t]he Covenant must have the support of public opinion if it was to be effective, and public opinion at the present time was primarily interested in economic and social

⁴⁰⁷ UN Doc E/CN.4/SR.223 (13 June 1951) at [54, 60].

⁴⁰⁸ UN Doc E/CN.4/SR.296 (27 May 1952) at [60].

⁴⁰⁹ UN Doc A/C.3/SR.363 (10 December 1951) at [15].

⁴¹⁰ UN Doc E/CN.4/SR.302 (3 June 1952) at [54].

⁴¹¹ UN Doc E/CN.4/SR.282 (22 May 1952) at [5, 14].

⁴¹² UN Doc E/CN.4/SR.238 (4 July 1951) at [18].

⁴¹³ UN Doc E/CN.4/SR.131, above n 399, at [23].

rights”.⁴¹⁴ The United Kingdom’s delegation asserted, in relation to social security, that “[t]oday, the outlook of employers, workers and the man in the street was completely different from what it had been a century ago” so “everyone was determined that every member of the community should be enabled to enjoy a decent standard of living”.⁴¹⁵ As stated in a UNESCO report to the ECOSOC, commenting on the draft article on the right to education, by the end of the 1940s there was a “general movement towards State control” and an “increased financial assistance” towards the provision of public services.⁴¹⁶

The second countermovement’s impact in Latin America, in particular, is very palpable in the *travaux*. The Mexican delegate to the ECOSOC insisted that civil and political rights “were of little value to the man in the street if his children had neither shoes nor food”.⁴¹⁷ The Cuban representative asserted (in a position similar to those expressed by Brazil, Argentina and Guatemala) that “Cuban social legislation was one of the most advanced in the world”, so “his delegation found it difficult to understand why the inclusion of economic and social rights in the draft covenant should give rise to any difficulties”.⁴¹⁸ Chile’s position, supported by Peru, was that “economic and social were more important than any other rights”.⁴¹⁹ Uruguay argued that economic and social rights were “no less basic” than other human rights and that “neither civil nor political freedom could exist when confronted by the alternative of starvation”.⁴²⁰

Overall, then, the delegates who negotiated and drafted the ICESCR were very aware that the treaty was being elaborated as a way of legally embedding the ideas and techniques associated with the second countermovement. Below, I will present specific examples of how the principles of the second countermovement (identified above in Chapter II.C) were used by the Commission as a basis for the ICESCR.

⁴¹⁴ UN Doc E/CN.4/AC.1/SR.29, above n 397, at [2].

⁴¹⁵ UN Doc E/CN.4/SR.282, above n 411, at [22].

⁴¹⁶ UN Doc E/1752 (11 July 1950) at [23].

⁴¹⁷ UN Doc E/AC.7/SR.147 (24 July 1950) at [19]; UN Doc E/AC.7/SR.151 (10 August 1950) at [24].

⁴¹⁸ UN Doc A/C.3/SR.297 (30 October 1950) at [6, 23]; UN Doc A/C.3/SR.299 (31 October 1950) at [41]; UN Doc E/CN.4/SR.219 (30 April 1951) at [25].

⁴¹⁹ UN Doc E/AC.7/SR.151, above n 417, at [8, 30-32].

⁴²⁰ UN Doc A/C.3/ SR.291 (20 October 1950) at [34, 65].

2 *The principles of the second countermovement in the travaux préparatoires*

As discussed before, the second countermovement was a combination of political movements and reforms that originated from diverse ideologies and geographical locations. However, all the actors of the second countermovement followed at least six common principles to guide their actions. Many of the Commission's members, as actors of the second countermovement themselves or having been inspired by the movement for social protection, brought those principles to the ICESCR's negotiation table. While some principles influenced the treaty's drafters more than others, they are all present in the delegates' justifications for the instrument and its content.

Principle 1. Governments should intervene when markets fail to provide social welfare

As studied throughout this thesis, Polanyi attributed the harmful effects of economic liberalism in the 19th century to the state's lack of intervention to regulate the market economy. In his view, the international community's insistence on maintaining the gold standard after the First World War led to the Great Depression, the rise of totalitarianism and eventually the Second World War (see Chapter II.B.1). Delegates in the Commission were conscious of the abuses of the market that led to the dire economic situation most people found themselves in after the War, as well as their responsibility to address it. Santa Cruz (Chile), for example, stated that:⁴²¹

Three-quarters of the human race had too low a standard of living. That was an indisputable fact at variance with the objectives defined in the Charter, and the United Nations, as executor of the Charter, must take every opportunity of re-affirming the notion that free human beings were entitled not only to the enjoyment of civic, civil and political rights, but at the same time to the satisfaction of the minimum material and spiritual needs necessary for their life and development.

For the Australians, civil and political rights were no longer enough to protect workers against the exploitation that was common in "industrial society".⁴²² The United Kingdom's delegate also made reference to the "the gradual awakening of the social conscience" to "the abuses that had accompanied the early industrial revolution".⁴²³ The Mexican representative added that "the industrial revolution had brought forward into the world a new social force—

⁴²¹ UN Doc E/CN.4/SR.248 (18 May 1951), at 21.

⁴²² UN Doc E/CN.4/SR.131, above n 413, at [1]; UN Doc E/CN.4/353/Add.10 (22 March 1950) at [11].

⁴²³ UN Doc E/CN.4/SR.282, above n 411, at [23].

labour—and the leading thinkers of the nineteenth century had realized the need to guarantee economic and social rights to mankind”.⁴²⁴ It is very likely this reference to “leading thinkers” was an allusion to the theorists of the four socialist trends referenced in this thesis (see Chapter II.B.2).

During the second countermovement, those thinkers’ ideas were translated into a governmental response to excessive marketisation in the form of a strong interventionist state that could take control of the economy instead of surrendering it to the market. Along with nationalisation and tax-benefit redistribution – elements that I will explore below – welfare states implemented techniques of macro-economic governance that prevented the market from expanding in ways that harmed humanity. Those techniques were seen by delegates to the Commission as techniques for securing economic, social and cultural rights that should be incorporated into the ICESCR. Bowie (United Kingdom) set her country’s policies as a model for other representatives to follow once more, alluding to the use of large subsidies to control the price of basic food items.⁴²⁵ Hoare (United Kingdom) also defended the British government’s mechanisms of macro-economic governance:⁴²⁶

Like many other countries, the United Kingdom was suffering from an inflationary tendency. At the same time, the disequilibrium between its imports and exports was increasing. Consequently the Government was trying to curtail unnecessary imports and, as far as possible, to limit the volume of purchasing power, so as to increase the quantity of goods available for export and reduce both the demand for additional imports and the use for domestic needs of productive capacity which could be used for exports. If the Government were to raise the pay of women workers to the level of that of the men, a similar step would probably be taken in many other walks of life where the action of the Government was usually followed and there would be a sudden sharp increase in purchasing power within the country, which was just what had to be avoided. In the circumstances, the Government did not feel that it could take the responsibility of releasing that extra purchasing power.

These statements show that governments represented at the Commission, like the British, were willing to substantially intervene in the market – to the point of controlling prices, imports and exports – instead of allowing it to be guided by its own rules, as it would be under the doctrine of economic liberalism. They also confirm that the Commission was motivated to fill the gaps left by the market in terms of social welfare, by guaranteeing that everyone had access to nutrition and ensuring a sturdy national economy that would not be as prone to recessions.

⁴²⁴ At [13].

⁴²⁵ UN Doc E/CN.4/SR.220 (5 June 1951) at [2].

⁴²⁶ UN Doc E/CN.4/SR.280 (20 May 1952) at [7].

Principle 2. Governments should promote material equality

Promoting material equality was one of the main inspirations of the actors of the second countermovement, as it was for the delegates who drafted the ICESCR. When initially suggesting the inclusion of economic, social and cultural rights in a binding covenant, the Australian delegation justified its proposal by stating that:⁴²⁷

[t]he inequalities arising in human society from laissez-faire policies in relation to modern industrialization must be mastered speedily if the deepening tensions within society were to be stayed and allayed, or even if the coherence of present-day society were to be preserved. It was even more important to be conscious of the necessity of preventing avoidable inequalities from arising or increasing in those areas of the world to which industrial organization was extending or in which it was becoming intensified.

This passage is particularly evocative of the second countermovement, as the Australian delegate explicitly stated his distaste for economic liberalism and the effects of excessive marketisation on society. In a similar vein, the United Kingdom's delegation highlighted the effects of an untamed market economy, which resulted in a "minority in the world which enjoyed a very adequate, if not an excessively high, standard of living".⁴²⁸ Other delegates added that civil and political rights would be insufficient to "secure equality"⁴²⁹ and, therefore, their omission would imply a lack of willingness to correct "obvious inequalities".⁴³⁰ In discussions regarding the right to an adequate standard of living, Valenzuela (Chile) stated that he intended for the Commission to:⁴³¹

recommend a more equitable distribution of national incomes, with a view to ensuring that working people enjoyed a larger share in them, and were thereby enabled to raise their own standard of living.

Noriega (Mexico) argued that "if there were an equality of social, economic and financial conditions throughout the world, there would be no need for the covenant" and that equality could not be achieved under "the error of nineteenth century liberal thought" – in other words, the ideas of economic liberalism that the actors of the second countermovement aimed to resist.⁴³² He added that:⁴³³

In many parts of the world, people lived and laboured in such conditions of abject misery that no one who had human welfare at heart could deny that they should be granted economic and social rights which alone could give them true equality with others.

⁴²⁷ UN Doc E/CN.4/ SR.184 (19 May 1950) at [5] (emphasis added).

⁴²⁸ UN Doc E/CN.4/SR.222 (8 June 1951) at [69].

⁴²⁹ UN Doc A/C.3/SR.307 (8 November 1950) at [23].

⁴³⁰ UN Doc A/C.3/SR.297, above n 418, at [39].

⁴³¹ UN Doc E/CN.4/SR.222, above n 428, at [79].

⁴³² UN Doc A/C.3/SR.307, above n 429, at [21, 23].

⁴³³ At [22].

Among the governmental techniques to achieve material equality, a progressive income tax had been a common socialist demand since Marx and became the main source of funding for the welfare state during the second countermovement (see Chapter II.B.2–B.3). A progressive tax scheme was encouraged by several delegates during the ICESCR’s drafting. Bowie (United Kingdom) appreciatively explained that the British social security system depended on not only direct contributions from workers, but also on taxes on profit.⁴³⁴ She also highlighted the progressive nature of her country’s income tax, stating that “the taxpayer, if a married man with two children, would have to have an income of nearly £3,000 a year before he had to pay a third of it in income tax”, while “a man earning £5 a week, with a family to support, would not have to pay any income tax at all”.⁴³⁵ The Australian delegation attempted to include an obligation to have a progressive income tax in the ICESCR, arguing that a tax-benefit redistribution system should ensure social benefits to all regardless of the amount contributed to the state.⁴³⁶

Some ideas that were common during the second countermovement, but that would seem anachronistic today were also reflected in the debates surrounding the ICESCR’s content. As some neo-Polanyian authors have discussed, the second countermovement’s approach to gender equality favoured a male-breadwinner–female-care model.⁴³⁷ This logic can be seen in the *travaux*, with the clearest example being Hoare’s statement (mentioned above in relation to macro-economic governance) that the United Kingdom was unable to ensure equal pay for women as the country could not, at the time, curb inflation if women were given higher purchasing power.⁴³⁸ Bowie (United Kingdom) also opposed a proposal to establish an explicit reference to parity in working conditions between men and women, albeit with a more progressive intention as she believed such a differentiation would create a false perception of the disadvantages of hiring women over men and would also exclude non-industrial workers such as housewives.⁴³⁹ Additionally, when discussing social insurance, delegates to the Commission normally understood that a family would be covered by the death of only the male breadwinner.⁴⁴⁰

⁴³⁴ UN Doc E/CN.4/SR.221, above n 398, at [12].

⁴³⁵ UN Doc E/CN.4/SR.220, above n 425.

⁴³⁶ UN Doc E/CN.4/SR.184, above n 427, at [4].

⁴³⁷ See Nancy Fraser “A Triple Movement? Parsing the Politics of Crisis after Polanyi” (2013) 81 NLR 119.

⁴³⁸ UN Doc E/CN.4/SR.280, above n 426.

⁴³⁹ UN Doc E/CN.4/SR.224 (14 June 1951) at [5].

⁴⁴⁰ UN Doc E/CN.4/SR.282, above n 411, at [14].

Nevertheless, some delegations also sought to use the ICESCR as a way of bridging gender gaps in income distribution.⁴⁴¹ Upon the insistence of socialist Latin American countries like Guatemala and Chile,⁴⁴² the ICESCR did ultimately recognise the rights to “equal remuneration for work of equal value” as well as “guaranteed conditions of work not inferior to those enjoyed by men”.⁴⁴³ What the ICESCR did not expressly incorporate, however, was a right to material equality. As I will explain below, that aim was tacitly addressed through the restriction of private property and the decommodification of basic resources and services.

Principle 3. Property with a strong social purpose should be nationalised

The demand for common ownership of some means of production is at the centre of the second countermovement due to its socialist roots (see Chapter 2.B.2). The *travaux* show that some delegations did attempt to introduce a right to private property in the ICESCR. When discussing whether to incorporate economic, social and cultural rights in an international human rights covenant, several delegates held that the only right of that type that should be included was the right to property.⁴⁴⁴ The justification provided by the Netherlands’ delegate was that property “was so closely connected to the human person that it had to be considered indispensable for the full development of human personality”. Nonetheless, he conceded that the state should have the prerogative to guarantee that property was used in accordance with the “general interest”.⁴⁴⁵

The draft article on the right to property, introduced by the United States, read: “The States Parties to the present Covenant recognize the right of everyone to own property alone as well as in association with others and to be protected from the arbitrary deprivation of property”.⁴⁴⁶ Despite the simplicity of the draft’s wording, most delegates pointed out that property, in its different manifestations and uses, was regulated differently in each country according to its own “social structure”. Consequently, an effort to incorporate a right to private property that comprised all those legal traditions would be futile.⁴⁴⁷ Responding to this objection, the French delegation proposed the addition of a second paragraph indicating that

⁴⁴¹ UN Doc A/C.3/SR.370 (19 December 1951) at [3]; UN Doc E/CN.4/SR.285, above n 405, at [33].

⁴⁴² UN Doc E/CN.4/SR.230 (7 May 1951) at [47, 65]; UN Doc E/CN.4/SR.301 (3 June 1952) at [16].

⁴⁴³ Article 7(a)(i).

⁴⁴⁴ UN Doc E/CN.4/AC.1/SR.29, above n 397, at [9]; UN Doc A/C.3/SR.297, above n 418, at [27, 28].

⁴⁴⁵ UN Doc A/C.3/SR.297, above n 418, at [27].

⁴⁴⁶ UN Doc E/CN.4/SR.230, above n 442, at [81].

⁴⁴⁷ At [82-136].

the right to private property would be “subject to the laws of the country in which the property is situated”.⁴⁴⁸ The Chileans’ proposal was to protect only property that “meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”.⁴⁴⁹ Ultimately, however, none of the proposals were approved, mostly due to a lack of agreement on the scope of a right to private property.⁴⁵⁰

A statement by Santa Cruz (Chile) best summarises the motives behind that rejection. He stated that his delegation would vote against the covenant as a whole if an article on the right to private property was approved, because:⁴⁵¹

...[it] was unable to accept the principle that the right to own real or personal property anywhere without limitation should be recognized as a fundamental right of the individual to be safeguarded in an international covenant. [Chile] was not, however, opposed to the national legislation of countries recognizing such unlimited right to own property. It seemed out of place for a covenant that was designed to protect the rights of the individual and to promote his well-being and personal development to protect property rights, including the rights of monopolistic or foreign enterprises which controlled the natural resources of a country and thereby impeded the attainment of the objectives of the covenant.

The Chilean delegation was prepared to accept a provision limiting the right of the individual to own property to the property needed for a livelihood and for development of the individual in society. No further extension of the right to property could be regarded as a fundamental right of the individual. He stressed the fact that it was the prerogative of each State to accept or reject the principle of unlimited property rights and that in many cases the position of various governments in the matter was undergoing change.

This statement demonstrates, once more, the Commission’s pattern of resisting economic liberal theory – in this instance, the idea that private property is an absolute right. If the right to private property had been approved, it is evident from the *travaux* that most delegates would have supported strong limitations to that right through expropriation and nationalisation. Bowie (United Kingdom), for example, supported those practices because, otherwise, the right to private property would “enable a small group of businessmen and workers, engaged in the production of some essential commodity, to hold the community to ransom”.⁴⁵² The Yugoslavs acknowledged the British state’s nationalisation efforts as a solution for the attainment of resources to guarantee economic, social and cultural rights.⁴⁵³ This type of support came even if, as pointed out by Valenzuela (Chile), many of the public

⁴⁴⁸ UN Doc E/CN.4/669 (14 June 1952) at [144].

⁴⁴⁹ UN Doc E/CN.4/705 (16 April 1954) at [51].

⁴⁵⁰ See UN Doc A/C.3/SR.576 (8 November 1954) at [18]; UN Doc A/2929 (1 July 1955) at [56].

⁴⁵¹ UN Doc E/CN.4/SR.303 (4 June 1952) at 1-5.

⁴⁵² UN Doc E/CN.4/SR.219, above n 418, at [49]; also in relation to decommodification, see Cassin at UN Doc E/CN.4/SR.223, above n 407, at [20].

⁴⁵³ UN Doc E/CN.4/SR.206 (30 April 1951) at [42]; also see UN Doc E/CN.4/SR.225 (21 June 1951) at [21].

corporations that managed nationalised industries were “working at a loss” and were therefore unable to share their profits with workers.⁴⁵⁴ Commenting on the right to self-determination of economic satellites, Valenzuela also argued that:⁴⁵⁵

There was no question of authorizing States to denounce international agreements arbitrarily, rather was it a matter of settling relations between nations and foreign private undertakings, which made large profits by exploiting a country’s natural resources without, in most cases being affected by its legislation. The realization of the right of peoples to self-determination, in accordance with United Nations principles, should enable any State in a condition of economic subordination to recover full sovereignty by acquiring complete control of its own natural resources and should place that State in a position to apply its national legislation to any private industry, even if the legislation sanctioned the expulsion or nationalization of certain undertakings on fair conditions.

Regarding the expropriation necessary for nationalisation, there were two views in the Commission. On one side, Chile insisted that expropriation could be legally carried out without compensation.⁴⁵⁶ The French delegation agreed with nationalisation but argued that despite the Chilean assertion that the French constitution allowed for expropriation without compensation, in practice it did compensate and that practice was mandated by international decisions on the matter.⁴⁵⁷

One way or the other, delegates’ statements in the *travaux* show that the omission of a right to private property was purposeful. Nationalisation of private property was not promoted by delegates with the purpose of abolishing private property, but with the objective of ensuring that certain commodities were available to all. This aim coincides with the second countermovement’s principle (inspired by social democracy and Christian socialism) that private property does not need to be generally abolished, but that it should be decommodified and commonly owned when it serves a public interest.

Principle 4. Key services should be decommodified

During the ICESCR’s negotiation, two techniques were seen by delegates to the Commission as optimal mechanisms for decommodification and the realisation of economic, social and cultural rights. The first, nationalisation, has already been discussed above. The second mechanism of decommodification, popularised by the welfare state, was that of public services (see Chapter 2.B.3). These services include health care, housing, education and family

⁴⁵⁴ UN Doc E/CN.4/SR.219, above n 418, at [54].

⁴⁵⁵ UN Doc E/CN.4/SR.256 (1 May 1952) at [5].

⁴⁵⁶ UN Doc E/CN.4/SR.230, above n 442, at [130].

⁴⁵⁷ UN Doc E/CN.4/SR.303, above n 451, at [11-13].

services; each of these were discussed during the ICESCR's drafting process, as they led to the recognition of rights to each of them in the treaty.

Before the second countermovement, health services had to be acquired through private means. Aware of the monumental shift towards public health care in many countries, the delegates to the Commission showed ambition in the scope of a right to health. For example, following the recommendations of the WHO,⁴⁵⁸ delegates recognised that social and psychological welfare should be aspects of the right to health.⁴⁵⁹ Roosevelt (United States) proposed the wording “the enjoyment of the highest standard of health obtainable”, which, with minor changes, was eventually incorporated into the ICESCR.⁴⁶⁰ The United Kingdom's representative, backing this wide scope of application, stated that “certain measures of prevention and protection could only be taken by States”, and encouraged universal health care, providing the example of its NHS as good practice.⁴⁶¹ However, in line with the second countermovement's balance between state intervention and private entrepreneurship, the British delegate also pointed out that private health services “from health organizations, employers' services and voluntary initiative of various kinds” should also be allowed.⁴⁶² Eventually, a Chilean proposal that took all these considerations into account was approved by the Commission.⁴⁶³

Proposals on housing were more modest, but still followed the aim of removing such an essential item from the logic of the market economy. Some delegates, like Valenzuela (Chile) believed the right to housing should be established in its own separate article. This was because “housing was one of the more important rights, especially for the working class”.⁴⁶⁴ Roosevelt (United States), however, suggested that the term “adequate housing” should be associated with “improved standards of living” (along with food and clothing).⁴⁶⁵ She clarified that “by improved standards of living she meant standards better than those obtaining at the present time [1951]”.⁴⁶⁶ Cassin (France) supported the proposal, both because he believed that indeed housing and standard of living were “closely linked in the public mind” and because

⁴⁵⁸ See UN Doc E/CN.4/SR.207 (2 May 1951) at [5]; UN Doc E/CN.4/SR.223, above n 407, at [56].

⁴⁵⁹ UN Doc E/CN.4/SR.223, above n 407, at [54].

⁴⁶⁰ At [33]; UN Doc E/CN.4/SR.222, above n 428, at [3].

⁴⁶¹ UN Doc E/CN.4/SR.223, above n 407, at [62]; UN Doc E/CN.4/SR.221, above n 398, at [52].

⁴⁶² UN Doc E/CN.4/SR.221, above n 398, at [62].

⁴⁶³ UN Doc E/CN.4/SR.223, above n 407, at [67].

⁴⁶⁴ UN Doc E/CN.4/SR.222, above n 428, at [77].

⁴⁶⁵ At [3, 64].

⁴⁶⁶ At [68].

housing “had top priority in his country”.⁴⁶⁷ Regardless of the right’s location within the treaty, however, their statements show all agreed that housing should not be left to operate according to the rules of the market, but that it should be guaranteed by the state.

The extent of the state’s involvement in the decommodification of housing, however, was a matter that divided the Commission. As with the right to health, most delegates who had a background in the second countermovement agreed there was space for private efforts in the realisation of the right to housing. In response to a Soviet proposal to oblige states to provide public housing to all, Cassin (France) argued that “individual initiative” must not be ruled out, as putting all the burden of housing on the state “would create an impossible situation in many countries”.⁴⁶⁸ Roosevelt (United States) was of the same view and consequently preferred to give less emphasis to legislation as the main technique to secure the right to housing.⁴⁶⁹ Bowie (United Kingdom), on her part, was concerned with the possibility that a right to housing for “everyone” would be approved, since she believed public housing should be reserved for the segments of the population who were in need and not for those who already enjoyed more than adequate standards of living.⁴⁷⁰ Thus, all these delegates agreed that, while the state must guarantee quality housing for those who cannot afford it – therefore removing those houses from the market system and decommodifying them – it should allow housing to remain a commodity for those who have sufficient income to pay for it.

Public education, another of the second countermovement’s impactful reforms, was seen by delegates to the Commission as one of the most important aspects of the future covenant. They saw this service as the key to unlocking the full realisation of other human rights. As pointed out by the Australian delegation, “the individual was incapable of enjoying the other recognized rights if he was unable to read and to think in an orderly manner”.⁴⁷¹ For the French, “man could not think and act freely if he were undernourished or ignorant”.⁴⁷² The Swedish delegate held that “education was an essential prerequisite of the exercise of the other rights and of the training of public-spirited citizens”.⁴⁷³

The delegates to the Commission also showed the great extent to which they were willing to decommodify public education. Roosevelt (United States) followed UNESCO

⁴⁶⁷ At [65].

⁴⁶⁸ At [91].

⁴⁶⁹ UN Doc E/CN.4/SR.294 (27 May 1952) at [27].

⁴⁷⁰ UN Doc E/CN.4/SR.222, above n 428, at [69].

⁴⁷¹ UN Doc E/CN.4/SR.131, above n 413, at [10].

⁴⁷² At [21].

⁴⁷³ UN Doc E/CN.4/SR.288 (27 May 1952) at [20].

guidelines and proposed an amendment to have states cover not only primary and secondary education, but also tertiary and technical education.⁴⁷⁴ So did the Australians, who mentioned the founding of the Australian National University (in 1946, during the height of the second countermovement) as an example of actions taken in that direction, and claimed that education was the highest item of expenditure on its federal states' budgets.⁴⁷⁵ The French supported the United States' amendment, as they considered technical education was essential for the "rapid scientific progress" of "under-developed countries", and tertiary education "contributed to social stability and to the maintenance of an educated nucleus in a democratic society".⁴⁷⁶

Roosevelt also proposed that free access to higher education be granted on the basis of merit, but to favour those who "would be likely to benefit from it" the most, instead of those who had shown a strong performance in the past.⁴⁷⁷ The Belgian delegate supported this position because "[i]n the field of education, there could be no privileged group", but he also contradicted the aim of decommodification by stating that the real ideal was for everyone to be able to afford services like education instead of obtaining them for free.⁴⁷⁸

The Uruguayan delegation, however, did believe the ICESCR should provide for a "progressively free" higher education.⁴⁷⁹ It was of the opinion that, especially for the lower classes, scholarships would never be able to substitute the benefits of universal free education.⁴⁸⁰ Moreover, the Uruguayan representative proposed including free artistic and physical education, as well as the availability of public libraries, in the right to education.⁴⁸¹ Furthermore, Valenzuela (Chile) insisted on the state's obligation to eliminate illiteracy, and offered the example of new school programmes in Chile that provided free meals and medical and dental services to students, with the purpose of "rais[ing] the deplorably low standard of living".⁴⁸² Overall, then, delegations to the Commission showed a great deal of ambition regarding the decommodification of education.

Once more following the second countermovement's trend, delegates agreed that there was some space for the market in the education sector. Although some representatives pushed

⁴⁷⁴ UN Doc E/CN.4/SR.226, above n 403, at [56]; UN Doc E/CN.4/SR.286 (19 May 1952) at [23]. See UNESCO's guidelines at UN Doc E/1752, above n 416.

⁴⁷⁵ UN Doc E/CN.4/SR.229 (28 June 1951) at [16].

⁴⁷⁶ UN Doc E/CN.4/SR.286, above n 474.

⁴⁷⁷ UN Doc E/CN.4/SR.285, above n 405, at [3].

⁴⁷⁸ At [8-9].

⁴⁷⁹ UN Doc E/CN.4/SR.226, above n 403, at [89].

⁴⁸⁰ UN Doc E/CN.4/SR.228 (28 June 1951) at [48].

⁴⁸¹ UN Doc E/CN.4/SR.285, above n 405, at [2].

⁴⁸² At [35].

for a state monopoly over education, delegates who had a background in the second countermovement insisted on the benefits of allowing parents to send their children to schools that were run privately or with the assistance of public authorities.⁴⁸³ Aware of resource constraints, Roosevelt (United States) argued that “[i]t was questionable whether the higher education provided by certain private educational institutions should or could be made progressively free”.⁴⁸⁴ Bowie (United Kingdom) clarified, however, that the state should not be obligated to finance private education institutions.⁴⁸⁵ Additionally, the Australians and French insisted on prescribed or approved standards for private schools that “were consistent or exceeded the minimum standards for Government schools”.⁴⁸⁶

On the highly contested issue of social services in the colonies, Cassin (France) stated that France was prepared to extend public education in “territories under its administration” but did not expect other countries to do so.⁴⁸⁷ Bowie (United Kingdom) was more hesitant, arguing that while its 1944 Education Act was “the most liberal provision for higher education” and her country “intended to make up for time lost in the past” with educational plans for those territories, those actions “must fit in with the planned economy of [the United Kingdom] and it was impossible to go beyond practical possibilities”.⁴⁸⁸ This statement demonstrates, once more, that not all aspects of the second countermovement were compatible with the views of contemporary expectations.

Finally, the Commission encouraged family benefits and services as a way to decommodify essential goods. Bowie (United Kingdom) set the British system as an example in this field by promoting its “free meals for schoolchildren, family allowances and services [special medical care and financial assistance] for expectant mothers ... irrespective of income”.⁴⁸⁹ Roosevelt (United States) suggested including a clause mandating the state’s “special protection for mothers and children” in the right to an adequate standard of living.⁴⁹⁰ While she did not specify who or what mothers and children needed to be protected against, it is safe to argue from the context of the discussions that those groups needed protection against

⁴⁸³ UN Doc E/CN.4/SR.226, above n 403, at [104, 105]; UN Doc E/CN.4/SR.285, above n 405, at [11]; UN Doc E/CN.4/SR.286, above n 474, at [17, 27].

⁴⁸⁴ UN Doc E/CN.4/SR.229, above n 475, at [82].

⁴⁸⁵ UN Doc E/CN.4/SR.227, above n 405.

⁴⁸⁶ UN Doc E/CN.4/SR.285, above n 405, at [6]; UN Doc E/CN.4/SR.288, above n 473, at [26].

⁴⁸⁷ UN Doc E/CN.4/SR.184, above n 427, at [75].

⁴⁸⁸ UN Doc E/CN.4/SR.227, above n 405, at [52, 58].

⁴⁸⁹ UN Doc E/CN.4/SR.221, above n 398, at [52]; UN Doc E/CN.4/SR.224, above n 439, at [5]; also see Hoare referring to maternity benefits under the NHS at UN Doc E/CN.4/SR.296, above n 408, at [60].

⁴⁹⁰ UN Doc E/CN.4/SR.222, above n 428, at [3].

the excessive marketisation of the goods and services they required to have an adequate standard of living. Additionally, that protection would have prevented them from having to enter the labour market and commodify their work.

In that sense, Cassin (France) insisted that the protection should be given to the mother even after the pregnancy and nursing period. He used the example of French law, under which female civil servants with children were given “special leave”.⁴⁹¹ Roosevelt supported Cassin’s proposal to protect mothers beyond the nursing period.⁴⁹² The Swedish and Indian delegates believed that motherhood should be protected by social security and not by special benefits or services.⁴⁹³ Regardless of the technique, however, delegations aimed to protect children and mothers by decommodifying essential goods and services that could be expensive to attain if left under market rules.

In conclusion, there was a strong agreement among delegates to the Commission that certain essential services must be decommodified. Their differences, which were not of great magnitude, related to the extent to which that decommodification would be effected. In general, delegates agreed that even if they allowed for key services to be provided by the private sector, according to market rules, these services would also be provided by the state with the aim of decommodifying them for those who could not otherwise afford them. Thus, health, education, housing and family benefits would cease to be commodities that could be bought and sold in a liberalised economy. Instead, they would be left out of the logic of the market and become human rights.

Principle 5. Everyone should have an adequate income, ideally through employment

At the core of the second countermovement was the idea that society and the economy would benefit from providing everyone with work. Contrary to the treatment of labour as a fictitious commodity under the market economy, governments during the second countermovement granted workers with rights that would make them less vulnerable to the pressures of the labour market. In other words, by making workers less dependent on work (especially work that exploited them), governments broke away from the *laissez-faire* notion

⁴⁹¹ UN Doc E/CN.4/SR.224, above n 489, at [26].

⁴⁹² At [37, 55].

⁴⁹³ UN Doc E/CN.4/SR.296, above n 408, at [49, 58].

that the working class was just an asset for production and the accumulation of capital. This idea was very present in the Commission's discussions.

The aim of achieving full employment – a central aspect of Keynesianism and therefore the second countermovement (see Chapter II.3.a) – was reiterated constantly in the *travaux* by all delegations. Many of them simply restated the commitment to full employment that had already been established in the UN Charter.⁴⁹⁴ Others went further. Whitlam (Australia) set labour as “the cornerstone of all existing social systems”, considered full employment a necessity and criticised the Soviet proposal to conceptualise work as a means of merely avoiding starvation.⁴⁹⁵ Roosevelt (United States) encouraged other countries to follow the example of legislation in her own country, which “[undertook] to achieve full employment by all the means within [the federal government's] power”. She also argued that, in addition to legislation, other means such as public policy should be used to realise that objective.⁴⁹⁶ However, she was also concerned that only totalitarian states could achieve full employment, to which Santa Cruz (Chile) responded that a right to work in the ICESCR would not imply that the state would have to provide work for everyone immediately. What it meant, he indicated, was that states should take legislative measures to ensure that right gradually, especially in times of economic crisis, as the United States itself had done in the past.⁴⁹⁷ Delegates also recognised that full employment went hand in hand with labour rights. Cassin (France), for example, linked full employment to economic development and asserted that it excluded the possibility of forced labour.⁴⁹⁸

A wide range of policies to decommodify labour were discussed during the Commission's working sessions. Among these policies were collective agreements,⁴⁹⁹ the limitation of working hours⁵⁰⁰ and the regulation of trade union activities.⁵⁰¹ Noriega (Mexico) insisted on the importance of eliminating competition between low-paid workers.⁵⁰² When the clause on the right to work was being drafted, most aspects of that article – including the phrases “fair wages” and “equal remuneration for work of equal value” – were adopted almost

⁴⁹⁴ UN Doc E/CN.4/SR.131, above n 413, at [27]; UN Doc E/AC.7/SR.151, above n 417, at [15].

⁴⁹⁵ UN Doc E/CN.4/SR.277 (16 May 1952) at [29-31].

⁴⁹⁶ UN Doc E/CN.4/SR.276 (16 May 1952) at [5].

⁴⁹⁷ UN Doc E/CN.4/SR.275 (19 May 1952) at [41-42].

⁴⁹⁸ UN Doc E/CN.4/SR.279 (20 May 1952) at [12].

⁴⁹⁹ UN Doc E/CN.4/SR.219, above n 418, at [17].

⁵⁰⁰ See UN Doc E/CN.4/SR.218 (22 May 1951) at [89-91].

⁵⁰¹ See UN Doc E/CN.4/SR.225, above n 453.

⁵⁰² UN Doc A/C.3/SR.307, above n 429, at [22].

unanimously.⁵⁰³ In addition, when the draft articles on the rights to strike and form trade unions were being discussed, many representatives were adamant about protecting the workers' interests.⁵⁰⁴ The Uruguayan delegate, for example, proposed to make its domestic practice of profit-sharing with workers a universal obligation.⁵⁰⁵ He asserted that:⁵⁰⁶

...where labour shared the responsibility for an undertaking's production equally with capital, it was right that the workers should also share in any increase in profits. The minimum wage was fixed by law, or by collective agreement, but a worker's total remuneration depended on the profits made by the undertaking.

These statements reflect the utopian socialist idea that workers should be empowered to have an active role in the direction of the companies for which they work and in the management of the means of production (see Chapter II.B.2.a).

During the second countermovement, governments also sought to provide a steady source of income to those who could not work, through social insurance and social assistance. The Commission emulated the policies of the second countermovement, but they preferred to combine social insurance and social assistance under the concept of "social security".⁵⁰⁷ Bowie (United Kingdom), for example, argued that "the inclusion of children's allowances in any full scheme of social security could virtually be taken for granted".⁵⁰⁸ Roosevelt (United States) believed "social security meant the progressive raising of the standards and the security of a nation's life".⁵⁰⁹ Malik (Lebanon), who supported most of the practices applied by governments during the second countermovement despite not having had an active part in that countermovement, added that:⁵¹⁰

...the basic notion of social security was that man, being essentially a social being, had duties towards society, but that society also had duties towards him, when through no fault of his own, he was unable to play his full part in life.

Despite combining them into a single concept, delegates also agreed that, while social insurance was to be financed by individual contributions, social assistance should be financed entirely through taxes. As stated by the United Kingdom's representatives, their country had

⁵⁰³ UN Doc E/CN.4/SR.281 (20 May 1952) at [55-60, 69].

⁵⁰⁴ UN Doc E/CN.4/SR.298 (27 May 1952) at [39-45].

⁵⁰⁵ UN Doc E/CN.4/SR.219, above n 418, at [20].

⁵⁰⁶ At [49].

⁵⁰⁷ See UN Doc E/CN.4/SR.220, above n 425, at [58, 61]; UN Doc E/CN.4/SR.221, above n 398, at [55]; UN Doc E/CN.4/SR.284 (19 May 1952) at [15, 69-70].

⁵⁰⁸ UN Doc E/CN.4/SR.220, above n 425, at [59].

⁵⁰⁹ UN Doc E/CN.4/SR.221, above n 398, at [30].

⁵¹⁰ At [26].

already established a precedent in that regard, in relation to family and children's allowances,⁵¹¹ food rations,⁵¹² free meals for schoolchildren and services for "expectant mothers".⁵¹³

Notwithstanding, delegates expressed different views regarding the scope of social security. For Roosevelt (United States), "it was important to ensure that not only workers, but the entire population, would be included in social security schemes".⁵¹⁴ Hoare (United Kingdom) manifested his support towards equal coverage of both nationals and aliens.⁵¹⁵ Furthermore, the United Kingdom's delegate advocated for social security to be granted to all regardless of income.⁵¹⁶ However, other delegates pushed for a means-tested approach instead of universal access to social security. The French justification for this position was that "countries in early stages of economic evolution" would struggle to grant social security to all, especially without contributions from beneficiaries.⁵¹⁷ Therefore, while there was consensus on the need for social security, there was discordance regarding its scope. Ultimately, as Cassin (France) indicated, "an attempt to standardize the right to social security would imperil the structure of much domestic law" due to the variety of social security systems among countries, and an "elastic system" should be preferred over "rigid uniformity in the measures of implementation".⁵¹⁸ One way or the other, it is clear from the *travaux* that Commission resisted the laissez-faire approach to work and followed the second countermovement's trend to guarantee everyone an income that did not depend just on market forces.

Principle 6. International conflict can be averted through social protection

The second countermovement was fuelled in part by the understanding that the horrors of the Second World War could have been avoided if governments had steered away from economic liberalism and provided their people with better standards of living (see Chapter II.C). Echoing this feeling, the ICESCR's *travaux* show that the pursuit of a lasting peace was one of the delegates' recurrent justifications for the inclusion of economic, social and cultural rights in an international treaty.

⁵¹¹ UN Doc E/CN.4/SR.219, above n 418, at [6].

⁵¹² UN Doc E/CN.4/SR.220, above n 425, at [3].

⁵¹³ UN Doc E/CN.4/SR.221, above n 398, at [52].

⁵¹⁴ At [30].

⁵¹⁵ UN Doc E/CN.4/SR.274 (21 May 1952) at [5].

⁵¹⁶ At [52].

⁵¹⁷ UN Doc E/CN.4/SR.282, above n 411, at [1].

⁵¹⁸ UN Doc A/C.3/SR.371 (20 December 1951) at [21].

There was an acute awareness among the delegates that state-provided social welfare could have counteracted the rise of Fascism and Nazism in Europe, and thus helped to maintain international peace. The delegates claimed, just as Polanyi had in *The Great Transformation*, that the Great Depression had fomented those totalitarian movements and, thus, economic stability was necessary to avoid their resurgence. Therefore, many of the Commission's members pushed for full employment as the means to achieve that stability.⁵¹⁹ From the Australian delegation's perspective, for example, the lack of employment in the interwar period had been one of the main catalysts for the rise of totalitarianism.⁵²⁰ The representative of the World Federation of Trade Unions indicated in 1951 that "full employment of a peacetime character" was a deterrent for states to seek full employment through the creation of jobs in a "war economy".⁵²¹ The Mexican delegation indicated at the General Assembly that, besides military aggression, the covenant should be an instrument to prevent "social and economic aggression as well".⁵²² Thus, securing international peace was seen by the members of the Commission as an indirect effect of full employment.⁵²³

Public education could also have that indirect consequence in the minds of many delegates. The USSR and the Uruguay proposed the covenant should specify that science and education should serve democracy and peace, rather than the kind of despotism and war that had been brought about by Nazi Germany.⁵²⁴ The Australian delegation indicated that the founding of the Australian National University had the intention of contributing to international peace.⁵²⁵ Moreover, although Hoare (United Kingdom) believed ethics and "decent principles of national and international conduct" should be the primary aim of education, he also stated that:⁵²⁶

all those who had twice in their lifetime experienced the scourge of war could not fail to agree that a good system of education must necessarily teach the mischief of incitement to racial and other hatred and of any attempt to abridge human rights and fundamental freedoms.

FDR's notion of "freedom from want", a popular slogan of the second countermovement, was constantly used as validation for the ICESCR by both allies and

⁵¹⁹ UN Doc E/CN.4/SR.131, above n 413, at [6]; UN Doc E/CN.4/ SR.184, above n 427, at [14, 41]; UN Doc E/CN.4/SR.185 (22 May 1950) at [25].

⁵²⁰ UN Doc E/CN.4/SR.131, above n 413, at [6].

⁵²¹ UN Doc E/CN.4/SR.217 (23 May 1951) at [3].

⁵²² UN Doc A/C.3/SR.299, above n 418, [5-6]; UN Doc A/C.3/SR.307, above n 429, at [24].

⁵²³ See UN Doc E/CN.4/SR.276, above n 496, at [30].

⁵²⁴ UN Doc E/CN.4/SR.292 (27 May 1952) at [24].

⁵²⁵ UN Doc E/CN.4/SR.229, above n 475.

⁵²⁶ UN Doc E/CN.4/SR.285, above n 405, at [5].

enemies of the United States.⁵²⁷ It was employed as justification for the inclusion of economic and social rights in a binding covenant, but also as a way of differentiating the rights contained in the ICESCR from those in the ICCPR – which, to some representatives, were exclusively related to freedom from fear.⁵²⁸ Heywood (Australia), referring to his proposal to include economic, social and cultural rights in the covenant, stated early in the negotiations that:⁵²⁹

Freedom from want, the third of the Four Freedoms, had been widely accepted in the world. At the present stage in world history, people were especially interested in economic and social as well as political rights, and it was important to include them in order to give a complete and balanced statement in the Covenant. If they were omitted, the common man would regard the Covenant as a purely academic document ... The Covenant should represent a guarantee of rights which concerned the common man; it should not be drawn up on the basis of the denial of rights under Nazi persecution.

Moreover, the reference to the Nazis by the Australian delegate reinforces the idea that freedom from want, as stipulated by FDR during the war, was conceptualised as an antithesis and antidote to the Third Reich's totalitarian rationality of governance.⁵³⁰ Freedom from want was so widely supported that when, four years later, the Australian delegation (supported by the British and the United States) proposed to eliminate the reference to freedom from want from the ICCPR's preamble because they believed it did not apply to civil and political rights, there was a sturdy resistance from other delegations and it was preserved in both treaties' preambles.⁵³¹

3 Opposition to the second countermovement's principles

Until now, this chapter has presented evidence showing that the ICESCR was a product of the second countermovement. However, it is also important to point out that there were instances where some of the delegates to the Commission seemed content to limit the scope of the reforms that I have associated with the second countermovement to their own countries, instead of adopting an international instrument that recognised them as human rights. At the General Assembly's Third Committee, Lesage (Canada) explained that in his delegation's view, economic, social and cultural rights did not fulfil "the narrow, technical legal meaning

⁵²⁷ UN Doc E/CN.4/SR/42, above n 397, at [3].

⁵²⁸ See UN Doc A/C.3/ SR.298 (30 October 1950) at [9]; UN Doc E/CN.4/SR.331 (23 June 1952) at [12-15].

⁵²⁹ UN Doc E/CN.4/AC.1/SR.29, above n 397, at [1].

⁵³⁰ See also UN Doc E/CN.4/SR.184, above n 427, at [40, 49, 50, 53].

⁵³¹ See UN Doc E/CN.4/SR.331, above n 528, at [13-16]; UN Doc E/CN.4/SR.333 (27 June 1952) at [1,3,4]; ICESCR, above n 1, at preamble; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), preamble.

of the word [‘rights’]” but should instead be considered mere “advantages, either material or psychological, conferred upon the individual by a social system ... social aims which the public authorities should have in view”.⁵³² Towards the end of the negotiations, the United Kingdom’s government denied that the draft ICESCR reflected “legally defined rights creating specific obligations which would bear exactly the same interpretation in all parts of the world and be universally enforceable”. Instead, they considered them to be “in the nature of statements of aims or objectives for action”.⁵³³ At an ECOSOC meeting where the original draft covenant was being discussed, the United States’ delegation was of the view that, contrary to civil and political rights, economic, social and cultural rights were not recognised widely enough by domestic legal systems to be incorporated into international law even if “they were guaranteed in most civilized countries”.⁵³⁴

At other instances, some delegates to the Commission plainly contradicted the principles I have identified as underlying the second countermovement. For example, France and the United States dismissed the principle of material equality when they campaigned against wage benefits for workers who had larger family responsibilities. In the words of the United States’ delegate, “[w]ork actually done, not family responsibilities, should be the criterion of equal payment for equal work”.⁵³⁵ Also disregarding the second countermovement’s objective of decommodifying labour, the Australian delegation defended child labour under the argument that the shortage of manpower in their country demanded children worked at school maintenance and agriculture.⁵³⁶ Hoare (United Kingdom) tried to prevent the inclusion of a right to paid maternity leave in the ICESCR.⁵³⁷ These motions are more reminiscent of economic liberalism than they are of social protection.

As Valenzuela (Chile) put it at a meeting of the General Assembly’s Third Committee in 1951, it was “paradoxical” that countries that had carried out significant reforms for social protection domestically, like public education systems, were now blocking the inclusion of strong obligations regarding economic, social and cultural rights in an international covenant.⁵³⁸ This opposition, however, has several explanations that do not contradict my argument that the ICESCR was based on the principles of the second countermovement.

⁵³² UN Doc A/C.3/SR.297, above n 418, at [42-47].

⁵³³ UN Doc E/CN.4/654/Add.1 (26 March 1952) at [2-6].

⁵³⁴ UN Doc E/AC.7/SR.151, above n 417, at [2, 40].

⁵³⁵ UN Doc E/CN.4/SR.219, above n 418, at [10, 11].

⁵³⁶ UN Doc E/CN.4/SR.297, above n 418, at [29]; similar arguments by the United Kingdom at [32].

⁵³⁷ At [16].

⁵³⁸ UN Doc A/C.3/SR.362, above n 404, at [53].

The political context of each country throughout the period in which the negotiations took place must be taken into account. While at the start of the negotiations for the UDHR and the international covenant(s) most countries had a socialist or at least a progressive government, this was not necessarily the case after some years elapsed. For example, FDR's influence on United States' politics began to dwindle after his death in 1945, despite Eleanor Roosevelt's efforts,⁵³⁹ and in 1951 Clement Attlee's Labour government lost the general election to Winston Churchill's Conservative Party.⁵⁴⁰ However, as seen below (see Chapter IV.A), the policies enacted during the early years of the second countermovement transcended the governments that put them in place and were not retrenched by future governments until the 1970s at the earliest. Therefore, even though some later administrations did not support the ICESCR as wholeheartedly as their predecessors had, the treaty drafting had already been irretrievably tied to the second countermovement.

Furthermore, the United States and the United Kingdom were severely constrained in their international actions by their policies regarding racial segregation and colonialism, which explains why they preferred a treaty that did not interfere in their domestic affairs..⁵⁴¹ Additionally, as the years went by, the Commission could not escape the context of the Cold War. Consequently, just as Cole perceived in relation to the British welfare state (see Chapter II.C), many delegations would have been wary of trends of Soviet totalitarianism and would have pushed back against any wording that implied more government power than they or their voters back home would have been comfortable with.⁵⁴² This, however, is just another reason why they would have supported basing the ICESCR on the principles of the second countermovement, which represented a balance between the market and the state's power, rather than a Marxist-Leninist approach.

Finally, as indicated by Morsink, some governments genuinely believed that, from a legal theory perspective, rights that could not be legally enforced should not be actually considered rights but merely public policies.⁵⁴³ Nevertheless, this point is rendered moot by the fact that resisting governments did eventually sign the ICESCR – a legally binding agreement. Furthermore, the legal nature of the treaty's obligations is a separate matter from

⁵³⁹ See Berger, above n 352, at chs 5-11.

⁵⁴⁰ See Robert Crowcroft and Kevin Theakston "The fall of the Attlee Government, 1951" in Timothy Heppell and Kevin Theakston (eds) *How Labour Governments Fall: From Ramsay Macdonald to Gordon Brown* (Palgrave Macmillan, London, 2013) at 61-82.

⁵⁴¹ James, above n 9, at 84-86, 118-125; Samnøy, above n 344.

⁵⁴² See Cole, above n 295.

⁵⁴³ Morsink, above n 12, at 193.

the inspiration for their content. Thus, none of the justifications for some delegations' resistance is incompatible with this thesis.

C The ICESCR's Text

The principles of the second countermovement were not only discussed approvingly during the ICESCR's drafting process, as demonstrated above, but were also translated into concrete obligations in the ICESCR. However, as seen below, some principles were given more weight than others in the treaty's text.

The first principle of the second countermovement, that governments should intervene when markets fail to provide social welfare, is at the core of the treaty in article 2, which consists of an umbrella clause for all the substantive obligations found in Part III of the instrument. Article 2(1) sets the burden of fulfilling economic, social and cultural rights entirely on the state, without making any suggestion of reliance on the market to realise those rights. The clause establishes the States Parties' obligation "to undertake to take steps",⁵⁴⁴ considered by some authors as the as the ICESCR's "foundational obligation".⁵⁴⁵ These are the state's own "steps", not the market's. Moreover, those actions shall be taken "to the maximum of [the States Parties'] available resources",⁵⁴⁶ which implies allocating resources in the national budget to the realisation of ICESCR rights and introducing macroeconomic policies which favour the satisfaction of those rights.⁵⁴⁷ The availability of resources is defined by the state itself in its role as collector, direct applier and supervisor of the application of those resources.⁵⁴⁸ Additionally, article 2(1) establishes the obligation to realise ICESCR rights "by all appropriate means, including particularly the adoption of legislative measures", which are evidently a state action.⁵⁴⁹ Therefore, the ICESCR is based on the existence of a strong interventionist state which, as admitted tacitly in article 2(3), manages the "national economy".⁵⁵⁰ This already rules out the possibility that ICESCR obligations can be met under

⁵⁴⁴ Article 2(1).

⁵⁴⁵ Saul, Kinley and Mowbray, above n 65, at 137.

⁵⁴⁶ Article 2(1).

⁵⁴⁷ Jeff King *An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights* (Law & Society Trust, Colombo, 2003) at 50; Olivier De Schutter "Economic, social and cultural rights as Human Rights: an Introduction" (Working Paper 2013/2, CRIDHO Université catholique de Louvain, 2013); Asbjørn Eide "Economic, social and cultural rights as human rights" in Asbjørn Eide, Catatina Krause and Allan Rosas (eds) *Economic, social and cultural rights: A Textbook* (Martinus Nijhoff Publishers, Leiden, 2001) at 36.

⁵⁴⁸ Saul, Kinley and Mowbray, above n 65, at 144.

⁵⁴⁹ Article 2(1).

⁵⁵⁰ Article 2(3).

a laissez-faire economy, which completely rejects state intervention in the market, and puts into question whether over-relying on the market to fulfil economic, social and cultural rights is compatible with the treaty's object and purpose.

In relation to second principle, that societies should strive to achieve material equality, the ICESCR does not establish an explicit obligation in that regard. The closest it comes is by mandating “equal remuneration for work of equal value” in article 7(a)(i).⁵⁵¹ Additionally, in relation to gender equality, article 3 recognises the equality of men and women in the enjoyment of economic, social and cultural rights, and article 7(a)(i), referenced above, highlights that women should be “guaranteed conditions of work not inferior to those enjoyed by men”.⁵⁵²

Nonetheless, as also analysed in this chapter, the aim to drive back the inequality caused by market mechanisms was pursued through two decommodification techniques – the nationalisation of private property and social services. The former, based on the third principle of the second countermovement, was not clearly embedded in the ICESCR. My study of the *travaux* showed that some delegates to the Commission supported nationalisation efforts to transfer some private property to collective ownership when that property could be used to provide a key resource or service that could improve everyone's standard of life. Yet, the ICESCR did not establish an “obligation to nationalise key industries”.

However, the treaty did not recognise a right to private property either. Although some disagree,⁵⁵³ it could be argued that the ambition to limit private property for social purposes was entrenched in the ICESCR through an omission of that right, especially taking into account that it had been previously recognised in article 17 of the UDHR.⁵⁵⁴ Moreover, the delegates' perception of private property was enshrined in article 2(2) of the ICESCR, which prohibits discrimination on the basis of, among other grounds, “social origin, *property*, birth or other status”.⁵⁵⁵ The inclusion of property among those grounds coincides with the socialist idea – adopted by the second countermovement – that private property is the root cause of socioeconomic inequality, and that the concentration of property in the hands of a limited

⁵⁵¹ Article 7.

⁵⁵² Article 7(a)(i).

⁵⁵³ Schabas argues that the omission of the right to property in the ICESCR is inconsequential. See William Schabas “The Omission of the Right to Property in the International Covenants” (1991) 4 Hague YB Intl Law 135.

⁵⁵⁴ See Universal Declaration on Human Rights GA Res 217A (1948), art 17.

⁵⁵⁵ Article 2(2) (emphasis added).

number of individuals and families perpetuates class divisions and inequality (see Chapter II.B.2). Arguably, then, the socialist perception of private property did permeate the treaty.

Nevertheless, the provision of social services by the state, inspired by the fourth principle of the second countermovement, was unambiguously the delegates' favoured technique of decommodification. Articles 10 through 15 make the decommodification of the following services a state obligation: family benefits, especially the protection of mothers and children; nourishment, clothing, and housing (all part of an adequate standard of living); health, both physical and mental; education at all its levels and in every area under the state's jurisdiction; and cultural and scientific benefits and opportunities.⁵⁵⁶ Therefore, the ICESCR's main tool to pursue material equality – superseding an explicit recognition of a right to material equality and the nationalisation of private property – was the recognition of social services as human rights.

The fifth principle of the second countermovement, that everyone should have an adequate income (ideally through employment), is reflected in articles 6 through 9 of the ICESCR. The centrality of full employment in the second countermovement is evidenced in its positioning in the ICESCR, as the right to work is the substantive article of the treaty (article 6).⁵⁵⁷ However, as discussed in this chapter, in the second countermovement, the drive to achieve full employment was accompanied by the decommodification of labour through the promotion of better working conditions. That is why the ICESCR goes into the detail of what some of those conditions should be, including an adequate remuneration that provides workers with “fair wages and equal remuneration”; “a decent living for themselves and their families”; “safe and healthy working conditions”; “equal opportunity for everyone to be promoted”; “rest, leisure and reasonable limitation of working hours and periodic holidays with pay”; the liberty to form and join trade unions; and the right to strike.⁵⁵⁸ Finally, in accordance with the second countermovement, the ICESCR anticipates the possibility that some may not be able to receive an income through work, therefore ensuring that income through the right to social security (including social insurance) in article 9.⁵⁵⁹

The sixth and last principle of the second countermovement identified in this thesis, that international conflict can be averted through social protection, is found in the treaty's

⁵⁵⁶ Articles 10-15.

⁵⁵⁷ Article 6.

⁵⁵⁸ Articles 7, 8.

⁵⁵⁹ Article 9.

preamble. The preamble begins by establishing that the recognition of human rights is the “foundation of freedom, justice and *peace* in the world”.⁵⁶⁰ It then entrenches the idea of freedom from want, a cornerstone of the second countermovement, by stating:⁵⁶¹

...the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

Furthermore, as discussed above, education was seen by some delegations as a way of guaranteeing international peace. Thus, article 13(1) of the ICESCR states that education shall “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace”.⁵⁶²

Thus, while all the second countermovement’s principles were embedded in the ICESCR, the drafters favoured some of them more than others. Principles related to government intervention, adequate income through employment and the prevention of international conflicts via social protection were all explicitly addressed by the treaty. In the case of promotion of material equality, however, the ICESCR’s text demonstrates that drafters chose to pursue that goal almost exclusively through social services. They did not include a specific right to material equality and, although the principle of nationalising private property with a strong social purpose shone through, the practice of nationalising key industries was not reflected in the treaty. Additionally, it is important to stress that not all of the ICESCR’s text is necessarily a reflection of the second countermovement’s principles. The right to self-determination (article 1), for example, does not fit into the logic of those principles. Overall, however, it is safe to argue that the ICESCR’s text responds, with very few exceptions, to the logic of the second countermovement.

D Conclusion

This chapter has shown that the ICESCR’s drafters saw the treaty as an international manifestation of the principles that I have identified with the second countermovement. Starting with the background to the treaty’s drafting, the historical review conducted above shows that economic, social and cultural rights were a result of the wave of welfare

⁵⁶⁰ Preamble (emphasis added).

⁵⁶¹ Preamble.

⁵⁶² Article 13(1).

internationalism that gathered strength during the Second World War. Additionally, most of the individuals who had the greatest influence on the treaty's content had an important role in the different manifestations of the second countermovement. Humphrey, Cassin, Santa Cruz, and Valenzuela had strong socialist backgrounds. Eleanor Roosevelt, despite not being a socialist, was a firm believer in her husband's political project and sought to immortalise it in the ICESCR. Bowie proudly represented the British welfare state, one of the pillars of the countermovement.

Additionally, my analysis of the ICESCR's *travaux* has allowed me to expand on what other authors have previously contributed to the history of economic, social and cultural rights. Going beyond historical coincidences with the treaty's drafting, my argument directly draws on the statements and intentions of those who drafted it. Indeed, the ICESCR's *travaux* show how, from the very start of the drafting process at the Commission, political projects of the second countermovement, like the British welfare state and the New Deal, were taken as the basis for the treaty's content. The six main principles of the second countermovement can be found throughout the hundreds of documents that comprise the *travaux*. More importantly, although some principles were stressed more than others in the ICESCR's text, they were all embedded in the treaty.

Therefore, the ICESCR was a reflection of the second countermovement. That countermovement was its reason for being and set its purpose: to resist the detrimental effects of the market economy. In the mid-20th century, during the height of the second countermovement, that purpose was translated into rights that mirrored the public policies of the time. Those policies might not suit contemporary efforts to push back against economic liberalism, as I will discuss below.

However, this chapter has also shown that, contrary to what authors like Samuel Moyn and Jessica Whyte have argued,⁵⁶³ the ICESCR's purpose goes far beyond establishing a minimum standard for the satisfaction of economic, social and cultural rights. The right to material equality might not be explicitly stated in the text of the treaty, but it is certainly contained in the majority of its clauses pertaining to the decommodification of essential services. Additionally, beyond the specific content of the ICESCR's clauses, what the delegates were trying to transmit was a clear sense that the international human rights regime should fight back against an unrestrained market economy, the excessive commodification of the goods and

⁵⁶³ See Moyn, above n 2; Whyte, above n 2.

services that we need to have an adequate standard of living, and the material inequality caused by those circumstances. *That* is the ultimate purpose of the ICESCR, regardless of the time or place in which it is implemented.

IV *An Incipient Third Countermovement*

Despite the intentions and obligations embedded in the ICESCR between 1946 and 1954, the treaty was not adopted until 1966 and did not enter into force until 1976.⁵⁶⁴ The body in charge of its supervision, the Committee ESCR, did not start operating until 1989. A lot changed in the more than 30 years between the time the ICESCR was drafted and the moment it started to be implemented. FDR's New Deal was a distant memory, socialism had lost the ideological struggle of the Cold War and the welfare state had started to be retrenched to give way to neoliberalism – an economic system based on the 19th century principle of economic liberalism and that therefore stands diametrically opposite to the principle of social protection promoted by countermovements. Therefore, although the treaty was a product of the second countermovement and the delegates to the Commission intended for it to operate within that context, it never did.

This chapter describes the very different reality into which the ICESCR was thrown, and the efforts made by a wide range of actors to restore the principle of social protection in our societies today. Indeed, if we look at the world today, with its ever-expanding transnational corporations and billionaires, as well as its record levels of domestic and global inequality,⁵⁶⁵ Polanyi's assurance that economic liberalism had been undone in the first third of the 20th century seems naïve. He did not foresee that, even after the horrors displayed by the market economy in the 19th century and its significant share of responsibility in the most catastrophic events of the 20th century, the balance would tilt again towards economic liberalism. The first part of this chapter will give a brief overview of neoliberal theory, how it was put in practice by governments all around the world from the late 1970s onwards, and how it has affected society, noting how it stands in stark contrast with the principles of the second countermovement.

The second part of the chapter will describe the political movements and policies that have counteracted neoliberal practices, and propose that they have started to give shape to a third countermovement. The proposals of contemporary academics and governments within this countermovement are too many and varied to cover within this limited space, so, from a neo-Polanyian perspective, I will focus on three contemporary responses to the fictitious

⁵⁶⁴ ICESCR, above n 1.

⁵⁶⁵ See Branko Milanović *Global Inequality: A New Approach for the Age of Globalization* (Harvard University Press, Cambridge (Mass), 2016).

commodification of labour, land and money. Regarding labour, I will explore how actors and institutions of social protection are proposing a UBI as a way of providing individuals with autonomy from the control held over them by the labour market. Concerning land, I will focus on proposals for net zero emissions, as a response to the threat of climate change. Lastly, I will study contemporary efforts to address the commodification of money through the example of wellbeing economics, a model that seeks to measure the success of the economy by its impact on the wellbeing of humanity and nature instead of economic growth. These three responses to the neoliberal logic have visibly started to gather more support than others since the GFC, as I will demonstrate through specific examples of actions from governments and other actors.

This study of the present-day double movement will be the background for the next chapter of this thesis, in which I will analyse the way international human rights bodies perceive the role of the ICESCR in counteracting the harmful effects of neoliberal practices, including whether they promote the three policies I have identified as potential banners of a third countermovement. I will also note how those bodies attempt to reconcile the tensions arising from the implementation of a treaty that, despite being designed as an instrument of social protection against economic liberalism, falls short of adequately responding to the challenges posed by contemporary neoliberalism.

A *The Principle of Economic Liberalism Today: Neoliberalism*

In the aftermath of the Second World War, it seemed as if Polanyi's vision had been fulfilled and the double movement had truly come to an end with the principle of social protection permanently vanquishing economic liberalism. Although the New Deal had already started eroding with FDR's death, the welfare state underwent a phase of expansion from 1945 to 1973, in what Esping-Andersen refers to as the "golden age" of welfare capitalism or what French historians call "*les trente glorieuses*".⁵⁶⁶ That growth was facilitated by the post-war economic boom of most developed countries, as well as low levels of unemployment and inflation, which favoured the bargaining position of workers and elevated living standards.⁵⁶⁷

⁵⁶⁶ Gøsta Esping-Andersen (ed) *Welfare States in Transition: National Adaptations in Global Economies* (SAGE Publications, London, 1996) at 1; Nullmeier and Kaufmann, above n 303, at 81-82; Kaufmann, above n 11, at 95.

⁵⁶⁷ Andrew Glynn *Capitalism Unleashed: Finance, Globalization, and Welfare* (Oxford University Press, Oxford, 2006) at 1.

Nevertheless, the economic boom that allowed the welfare state to consolidate started dwindling in the early 1970s due to a series of economic crises.⁵⁶⁸ A declining rate of productivity growth and a prolonged period of stagflation caused by the rising prices of food and raw materials in the early years of the decade, the abandonment of the fixed exchange rate system in 1971, and the 1973 oil embargo by the Organization of the Petroleum Exporting Countries (OPEC) – which quadrupled the price of oil – all contributed to that scenario.⁵⁶⁹ In 1976, Britain underwent an economic recession (the pound sterling went from being worth \$2.30 to \$1.70 in one day) from which it had to be rescued by a £2.3 billion loan from the International Monetary Fund (IMF).⁵⁷⁰ Ironically, these economic conditions were shaped by the success of the welfare state in the previous decades. Full employment had led to such an increase in demand for energy, raw materials and food, that supply had become insufficient and prices had spiralled out of control.⁵⁷¹

Within this context, the effectiveness of the welfare state as a mechanism to control macroeconomic indicators like inflation and unemployment started to be questioned, not only by academics and politicians, but also by workers and business people who had grown accustomed to the economic prosperity of previous decades.⁵⁷² Especially strong criticisms came from the economic elites who had lost influence during the period of the second countermovement due to policies that limited the concentration of capital.⁵⁷³ These societal shifts created an environment that facilitated the rise of neoliberal ideas and practices.

1 Neoliberalism in theory

While the second countermovement was taking place, a small group of academic economists, philosophers and historians known as the Mont Pelerin Society (founded in 1947) – centred around Friedrich von Hayek, and including Milton Friedman and Karl Popper among its ranks – had been developing the theory of neoliberalism as a reaction to Keynesianism. In general terms, they believed in personal freedom and the free market principles of 19th century economic liberalism and were deeply opposed to state interventionism. Hayek and Friedman

⁵⁶⁸ JD Levy “Welfare Retrenchment” in Castles and others (eds), above n 175, 552 at 552-553.

⁵⁶⁹ Glynn, above n 567, at 1-23; David Harvey *A Brief History of Neoliberalism* (Oxford University Press, Oxford, 2005) at 12, 27.

⁵⁷⁰ Timmins, above n 189, at 314-315.

⁵⁷¹ Glynn, above n 567, at 2.

⁵⁷² JA Frieden *Global Capitalism: Its Fall and Rise in the Twentieth Century* (WW Norton & Company, New York, 2006) at 366-367.

⁵⁷³ Harvey, above n 569, at 15.

were awarded the Nobel Prize in economics in 1974 and 1976 respectively, legitimising their new iteration of economic liberalism.⁵⁷⁴

In many ways, neoliberal ideas represented “a time warp” back to the 19th century economic liberalism that Polanyi described and the second countermovement resisted.⁵⁷⁵ Both theories of economic liberalism followed the same fundamental principles of “freedom”: free trade and a free labour market. The main difference is that the gold standard has now been replaced, through the IMF’s implementation of the Washington Consensus, by competitive exchange rates and currency boards. However, the purpose of both of those systems – “disciplining domestic economic policy” – was achieved then and now.⁵⁷⁶ Another parallel between both theories is their promotion of the free movement of capital, loans and debts across borders within a financial system that punishes states that refuse to liberalise and deregulate.⁵⁷⁷ Moreover, just as in the 19th century, advocates of neoliberal theory seek to eliminate mechanisms of social protection, especially with the aim of reducing wages.⁵⁷⁸

As an attempt to re-establish the ideas and policies of economic liberalism, neoliberalism was conceived as an antithesis to the political reforms that had successfully obstructed that economic model during the mid-20th century. In other words, neoliberalism was an attack on the second countermovement. While, arguably, both the welfare state and neoliberalism are expressions of capitalism, they differ significantly in the fundamental issue of national control over capital. Under the welfare state, capital was forced to operate under rules (wage rates, interest rates, exchange rates) normally set by a tripartite negotiation of the state, capital and labour, to guarantee a more equitable distribution of economic benefits.⁵⁷⁹ The rationality of neoliberalism stands almost directly opposite – even “at war” with – that logic.⁵⁸⁰ It can be described as:⁵⁸¹

a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an

⁵⁷⁴ At 19-22.

⁵⁷⁵ Kunibert Raffer “Neoliberal Capitalism: A Time Warp Backwards to Capitalism’s Origins?” (2011) 40 FSE 41 at 42.

⁵⁷⁶ At 43-44.

⁵⁷⁷ At 44-47.

⁵⁷⁸ At 50-52.

⁵⁷⁹ Manfred Bienefeld “Suppressing the Double Movement to Secure the Dictatorship of Finance” in Buğra and Ağartan (eds), above n 109, 13 at 20.

⁵⁸⁰ Marius Pieterse “Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa” (2003) 14 Stellenbosch Law Review 3 at 13; Thomas Palley “Re-theorizing the welfare state and the political economy of neoliberalism’s war against it” (FMM Working Paper, Macroeconomic Policy Institute, 2018).

⁵⁸¹ Harvey, above n 569, at 2.

institutional framework characterized by strong private property rights, free markets, and free trade.

Thus, the role of the neoliberal state is reduced to ridding capitalism from the constraints placed upon it by the state, only guaranteeing the institutions that are necessary for the market to thrive.⁵⁸² Government activity revolves around monetary policy, the security of private property rights, deregulation, the promotion of competition, tax cuts in the top income brackets and the creation of new markets through privatisation – all to incentivise entrepreneurial activity and restore capital’s control over organised labour.⁵⁸³ Even criminal sanctions serve the purpose of preventing individuals from circumventing market efficiency.⁵⁸⁴ As suggested by the Coase Theorem, any other forms of market intervention and state activity are reduced to a minimum to avoid economic distortions and inefficiency.⁵⁸⁵ Therefore, contrary to the second countermovement, neoliberal practices seek to benefit private entrepreneurship without a counterbalancing state intervention to prevent the harmful effects of the market economy.

As Foucault argues, neoliberal theory was born out of a “state-phobia” and presents the power of the market as an alternative to the power of the state, thus challenging “statification” and interventionist forms of government that, for example, apply Keynesian economics to manage the economy.⁵⁸⁶ Whyte is of a similar view, arguing that, rather than a mere economic proposal, neoliberal doctrine presents the market as a moral alternative to politics. The despotism and violence of state politics are corrected by the morals of the market by “checking and dispersing power, facilitating social cooperation, pacifying conflict, and securing individual liberty and rights”.⁵⁸⁷ The sovereignty of the state is replaced by the sovereignty of the market, and individual freedom is subjected to the imperatives of the market.⁵⁸⁸

Overall, neoliberal theory stands against the principles of the second countermovement. Its advocates believe that the market rarely fails, so the state should only intervene when strictly necessary. They do not believe in redistribution of wealth to guarantee material equality through taxes. Instead, they endorse “trickle-down theory” and “supply-side economics”,

⁵⁸² At 10-11.

⁵⁸³ At 2-3, 160-165; Polanyi Levitt, above n 38, at 163-164.

⁵⁸⁴ See BE Harcourt *The Illusions of Free Markets* (Harvard University Press, Cambridge (Mass), 2012).

⁵⁸⁵ RH Coase “The Problem of Social Cost” (1960) 3 JLE 1-44; also see Terry Flew “Six theories of neoliberalism” (2014) 122 Thesis Eleven 49 at 64.

⁵⁸⁶ Michel Foucault *The Birth of Biopolitics: Lectures at the College de France 1978–1979* (Michel Senellart (ed), Graham Burchell (translator), Palgrave Macmillan, New York, 2004) at 76-79.

⁵⁸⁷ Whyte, above n 2, at 14.

⁵⁸⁸ At 23.

according to which the rich should be given incentives – such as tax cuts – to create more wealth, spend it and create more jobs for everyone else. In parallel, subsidies for the poor are cut and minimum wages are frozen, so that workers are incentivised to work harder.⁵⁸⁹ They ardently defend an absolute right to private property, even in cases where property could serve a public interest. They believe that a free market is more effective than social protection at deterring international conflict. As a response to the welfare state’s aim to decommodify certain essential services and labour, neoliberals seek to re Commodify those elements by submitting them to the pressures of the market again.⁵⁹⁰ Thus, neoliberalism is a “counter-revolution” to the second countermovement⁵⁹¹ and in some ways represents a “second great transformation”.⁵⁹²

Even human rights have been commodified to fit the purposes of the market during the neoliberal era.⁵⁹³ In the case of economic, social and cultural rights, instead of acting as tools that seek material equality and high standards of living for all (as the Commission intended), they have been presented and used by market actors and by human rights NGOs as rights that only guarantee basic conditions of subsistence without putting any significant pressure on the market.⁵⁹⁴ In Whyte’s words, under neoliberal ideas, “the right to liberty is the right to do anything that does not harm the market”; “the right to equality is a right of everyone to preserve their unequal wealth and power in the face of political demands for redistribution”; “the right to security is a right for states to beat into submission those who threaten the market order”; and “the right to property is the right to impose ‘good governance’ and the institutional structures that private investment requires across the globe”.⁵⁹⁵ Therefore, human rights are no longer what the Commission intended them to be.

⁵⁸⁹ Chang, above n 77, at 70, 91.

⁵⁹⁰ Damien Cahill and Martijn Konings *Neoliberalism* (Polity Press, Cambridge, 2017) at 54.

⁵⁹¹ Polanyi Levitt, above n 38, at 101-102.

⁵⁹² Fraser, above n 437, at 120, n 2; Howard-Hassmann, above n 55, at 3; Richard Sandbrook “Polanyi and Post-neoliberalism in the Global South: Dilemmas of Re-embedding the Economy” (2011) 16 *New Political Econ* 415 at 421.

⁵⁹³ See Slaughter, above n 2.

⁵⁹⁴ See Moyn, above n 2, at ch 7.

⁵⁹⁵ Whyte, above n 2, at 24-25; for a description of Friedrich Hayek’s position on human rights, see Quinn Slobodian *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, Cambridge (Mass), 2018) at ch 4.

2 *Neoliberalism in practice*

Taking advantage of the economic pressures of the 1970s, economic elites adopted the ideas of the Mont Pelerin Society and began pressuring governments to introduce neoliberal practices with the intention of re-establishing the dominance of the market and “capitalist class power” over the state.⁵⁹⁶ The first state to apply neoliberal theory to public policy was Chile, under Augusto Pinochet (1973–1990). Pinochet had risen to power after carrying out a coup d’état (backed by the United States) against President Salvador Allende, who was highly unpopular among the business elites due to his socialist policies. The dictatorship banned trade unions and other collective organisations and, under the influence of ‘the Chicago boys’ – a group of United States economists aligned with the neoliberal theories of Milton Friedman – restructured the Chilean economy so that it could gain access to IMF loans. This involved reverting the nationalisations carried out by Allende’s government, privatising public assets and social security, deregulating access to natural resources, and incentivising direct foreign investment and free trade. Although the Chilean economy grew in the immediate years after the introduction of these practices, it suffered under the Latin American debt crisis of 1982, which led to a more reserved application of neoliberal policies.⁵⁹⁷

Nevertheless, the apparent success of the Chilean experiment contributed to the consolidation of neoliberal practices in the United States and the United Kingdom, the two countries that had led the second countermovement just three decades before. Margaret Thatcher was elected prime minister of the United Kingdom (1979–1990) and immediately began to reform substantially the country’s social and fiscal policies. Under the guidance of her main economic adviser, Keith Joseph, she led the dismantlement of numerous social provision schemes, privatisation of industries that had been totally or mostly controlled by the state (the most relevant being oil and gas, ports and airports, telecommunications and housing), reduction of taxes, promotion of foreign investment and confrontation of trade unions, among other policies that aligned with neoliberal thought.⁵⁹⁸ Thatcher’s aggressive attempts to combat the United Kingdom’s budget deficit led to an economic recession in which unemployment rose from less than 5 per cent in 1979 to more than 11 per cent by 1983. Furthermore, government participation in its own companies, especially in the gas, electricity and water industries, started to reduce under Thatcher, going from 12 per cent in 1979 to less than 2 per

⁵⁹⁶ Henk Overbeek and Bastiaan Van Apeldoorn *Neoliberalism in Crisis* (Palgrave Macmillan, London, 2012) at 5.

⁵⁹⁷ Harvey, above n 569, at 7-9; Moyn, above n 2, at 173-174.

⁵⁹⁸ Harvey, above n 569, at 22-23; Yergin and Stanislaw, above n 163, at 74-87, 101.

cent at the beginning of this century.⁵⁹⁹ Thus, she negated the second countermovement's idea that the limitation of private property and the decommodification of essential goods and services promote equality.

A similar abandonment of the second countermovement's principles took place in the United States from the late 1970s onwards. In 1979, Paul Volcker – chairman of the Federal Bank – broke away from the Keynesian practices that had been established during the New Deal when, to reduce inflation, he raised the interest rate overnight. The interest rate suddenly went from being negative to more than 5 per cent, which unleashed an economic recession that caused unemployment levels to go from 5 per cent in 1979 to 10 per cent by 1982.⁶⁰⁰ This pushed the United States economy towards the neoliberal structural adjustment policies of Ronald Reagan's administration (1981–1989). Reagan was under pressure from private interests and corporations that had contributed financially to his campaign through political action committees (PACs).⁶⁰¹ With the Republican Party's electoral base starting to become more interested in advocating for the agenda of the Christian right and white cultural nationalism, their attention was diverted from neoliberal reform. Adjustment during Reagan's presidency included extensive deregulation (which led to extended practices of hostile takeovers, asset stripping and company downsizing), tax breaks (corporate tax was reduced from 70 per cent to 28 per cent), budget cuts and hostility towards trade unions.⁶⁰²

Many other governments started adopting neoliberal practices in the 1980s, especially after the United States' increase in interest rates led to a default of their foreign debts.⁶⁰³ In what is known as the Third World Debt Crisis, developing countries turned to the IMF and the World Bank, which began conditioning their development loans on structural adjustment programmes in borrowing countries (the first being Mexico in 1982) under the so-called Washington Consensus.⁶⁰⁴ Among the measures taken as part of those programmes were the stagnation (and in some cases reduction) of the share of the national income devoted to social spending and the systematic privatisation of state-owned assets and industries, with the

⁵⁹⁹ Glynn, above n 567, at 28, 38–40.

⁶⁰⁰ At 25–27; Harvey, above n 569, at 23–24.

⁶⁰¹ In 1976, the Supreme Court had decided that corporations could make unlimited donations to political parties as a manifestation of their freedom of speech in Harvey, above n above n 569, at 49.

⁶⁰² At 24–26, 48–50; Chang, above n 77, at 92.

⁶⁰³ Chang, above n 77, at 93.

⁶⁰⁴ Harvey, above n above n 569, at 29. The Washington Consensus was the name given to the views of the IMF, the World Bank and the US Treasury in the 1990s, according to which national economies should be directed at strengthening the market economy, being open to the world, and achieving macro-economic stability, as seen in Narcís Serra and JE Stiglitz (eds) *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press, Oxford, 2008) at 3.

expectation that they would be more aptly administered by the private sector. Many governments began to reduce the welfare benefits that had been introduced during the second countermovement, implement regressive taxation systems and reduce government employment.⁶⁰⁵ The IMF and the World Bank thus became the enforcers of principles contrary to the ones on which they were founded under during the second countermovement.⁶⁰⁶

Furthermore, governments imposed neoliberal policies conducive to the fragmentation of their centralised structure into units with different degrees of autonomy from the central administration, as well as regulatory supervision and judicial review. Consequently, the state lost significant terrain to market forces and a new model of governance – what some call the “regulatory state”, and others the “neoliberal state” – began dominating public governance.⁶⁰⁷ By the 1980s, it was clear that national governments had lost the ability to promote strong social agendas due to the constraints presented by the international financial system. The failure of even the most progressive governments – like François Mitterrand’s in France – to reignite the second countermovement’s aims and go against the neoliberal current were examples of the renewed domination of international finance over politics.⁶⁰⁸

Additionally, most governments started to reduce their tax rates to attract foreign investment in the 1980s. On average, OECD countries cut their corporate tax rate from 47.5 to 25.5 per cent between 1981 and 2013. Similarly, the top marginal rate for individual income tax in those countries was cut, in average, from 75 to 50 per cent between 1980 and 2007. Many OECD nations do not have a capital gains tax and, among those that do, the highest rate is only 20 per cent. Even Sweden, a country known for its interventionist government, eliminated its tax on wealth in 2007.⁶⁰⁹ Furthermore, tax havens, like Switzerland and Luxembourg, are largely tolerated by other countries nowadays.⁶¹⁰

It is not only political parties on the “right” that have endorsed neoliberal economics. Organisations with socialist roots, which had an active role in the second countermovement, have also adopted economically liberal agendas – a trend that began as early as the 1960s. Stephanie Mudge compared the political discourse of four traditionally socialist political parties – the Swedish Social Democratic Party, the Social Democratic Party and the Labour

⁶⁰⁵ Levy, above n 568, at 558-561.

⁶⁰⁶ Robert Kuttner *Can Democracy Save Capitalism?* (WW Norton & Company, New York, 2018) at 74.

⁶⁰⁷ Yeung, above n 183, at 66-67; Harvey, above n 569, at 64-86.

⁶⁰⁸ Kuttner, above n 606, at 76-78.

⁶⁰⁹ At 222.

⁶¹⁰ At 224-231.

Party in the United Kingdom, and the Democratic Party in the United States – in 1920, 1965 and 1995. She arrived at the conclusion that, while the Democratic Party was never truly socialist, the other three groups did have a clear socialist agenda around 1920. However, those European parties shifted from socialist to “economistic” by 1960. By the 1990s, they were aligned with the Democratic Party in what she calls a “neoliberalized leftism” or what is commonly known as the “third way”.⁶¹¹ This model of governance implied a move towards the liberalisation of markets and trade; the privatisation of industries that had been previously nationalised and deregulation of business; “work-centric and market-friendly welfare reforms”; a reduction in the size of the state; and monetary policies aimed at price stability. The third way was implemented in most cases by “socialist” governments and centre-left governments like those of Bill Clinton in the United States, Tony Blair in the United Kingdom, Gerhard Schröder in Germany, David Lange in New Zealand, and Bob Hawke and Paul Keating in Australia.⁶¹² As a consequence of these government’s reforms, many welfare state benefits and services are now based on private providers.⁶¹³

One of the clearest examples of the shift from an interventionist to a neoliberal state was in New Zealand, where Labour Party administrations conducted a major overhaul of the governmental apparatus between 1984 and 1990.⁶¹⁴ Government control over exchange rates, prices, wages, interest rates, credit and rent were all eliminated. Additionally, many state enterprises and assets were privatised, subsidies to farming exports were abolished, all tariffs were significantly reduced, price stability was given priority over full employment and collective bargaining was replaced by individual employment contracts. Public services were also defunded – schools began to supplement their budgets through commercial activities and ask parents for optional fees, and welfare benefits were distributed according to ambiguous economic categories of “low income”, “modest income” and “high income” earners.⁶¹⁵

Internationally, free trade and international finance are two of the main tools of neoliberal expansion in the age of globalisation. This does not represent a significant break from the 19th century form of economic liberalism that Polanyi described, except that the

⁶¹¹ SL Mudge *Leftism Reinvented: Western Parties from Socialism to Neoliberalism* (Harvard University Press, Cambridge (Mass), 2018) at ch 2.

⁶¹² At 44; Kuttner, above n 606, at ch 7; Jonathan Swartz *Constructing Neoliberalism: Economic Transformation in Anglo-American Democracies* (University of Toronto Press, Toronto, 2013) at 94-95.

⁶¹³ Cahill and Konings, above n 590, at 62.

⁶¹⁴ John Gray *False Dawn: The Delusions of Global Capitalism* (Granta Books, London, 1998) at 39-40.

⁶¹⁵ At 40-41; Jane Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) at ch 5.

United States has replaced the United Kingdom as the hegemonic power in charge of protecting the international financial system.⁶¹⁶ Free trade agreements bind national governments to strict rules concerning the national treatment of multinationals and investment-related disputes, putting the interests of foreign investors over domestic social protection laws.⁶¹⁷ Thus, globalisation and free trade constrain national democracies in at least five areas: labour standards, corporate tax competition, health and safety standards, regulatory takings (compensation to foreign investors as a consequence of regulatory changes) and industrial policies in developing nations (export subsidies or local supply of product inputs, for example).⁶¹⁸ All these constraints impede governments from readopting policies they had previously enacted during the second countermovement.

Additionally, due to the liberalisation of international capital from regulatory limitations, returns on financial enterprises started being higher than those from portfolios in non-financial enterprises. This led many corporations to move a good portion of their assets from the latter to the former, eliminating thousands of jobs and undermining the second countermovement's ideal of protecting people's income.⁶¹⁹ This phenomenon is what some authors refer to as "financialisation" – "the growing importance of financial activities as a source of profits in the economy" or "the ascendancy of 'shareholder value' as a mode of corporate governance".⁶²⁰ Some effects of financialisation have been an elevated level of indebtedness from households to governments, a slower economic growth rate in high-income countries and a steep rise in inequality.⁶²¹ These and other adverse effects of excessive marketisation under neoliberal practices, are examined in more detail below.

3 *The detrimental consequences of neoliberalism*

Neoliberal doctrine has deep roots in global and domestic governance, as discussed above, but also in academia, think tanks, the media, corporations, political parties and even in general society as an ethical lens through which many individuals perceive reality. Contrary to other concepts in economics, which require technical knowledge of the field, the basic ideas of

⁶¹⁶ Silver and Arrighi, above n 45, at 329.

⁶¹⁷ Raffer, above n 575, at 52.

⁶¹⁸ Dani Rodrik *The Globalization Paradox: Democracy and the Future of the World Economy* (WW Norton & Company, New York, 2011) at 190-200.

⁶¹⁹ Polanyi Levitt, above n 38, at 165.

⁶²⁰ GR Krippner *Capitalizing on Crisis* (Harvard University Press, Cambridge (Mass), 2011) at 27.

⁶²¹ Chadwick, above n 61, at 51.

neoliberal theory are easily understood by everyone, which has allowed it to spread more easily across most academic disciplines and society.⁶²² For many, neoliberalism has become a way of life, to the point they equate it with freedom, are antagonistic towards egalitarianism, and are indifferent to democratic political values.⁶²³

This mentality has influenced all levels of society. Globally, voters from middle- and high-income groups have shifted towards a negative stance on taxes and expenditure, which is reflected in the positions of political parties. Moreover, many countries have significantly reduced their tax rates as a signal to attract foreign direct investment, leading to a race to the bottom that negatively impacts social expenditure.⁶²⁴ As a consequence, societies now have a more intense market mentality, which assumes a higher role than all the social relations and institutions that normally hold society together (“kinship, religion, neighbourhood, etc”) and leads to less solidarity among society’s members and higher rates of crime and social disintegration.⁶²⁵ This scenario, which Polanyi referred to as a state of “anomie” – meaning “normlessness due to the absence, or weakness, of institutions and rules regulating social intercourse” – was his greatest concern regarding the influence of the market over society.⁶²⁶

Some basic aspects of social protection are the same today as they were before the neoliberal era, of course. People continue to find some level of protection in their families, civil society associations and the state.⁶²⁷ However, these forms of social protection contribute to the sense that acts of resistance are limited to the daily existence of communities, instead of structural transformation. This is what Buğra refers to as the “balkanization of politics”.⁶²⁸ The same can be said about social corporate responsibility initiatives, such as certifications, which not only contribute to that phenomenon, but also undermine state power.⁶²⁹

From a neo-Polanyian perspective, the market economy today has accomplished a deeper commodification of labour, land and money than it did under 19th century economic

⁶²² Flew, above n 585, at 50.

⁶²³ Harvey, above n 569, at 7, 40; Whyte, above n 587, at 8.

⁶²⁴ Herbert Obinger and Uwe Wagschal “Social Expenditure and Revenues” in Castles and others (eds), above n 175, 333 at 348, 350-352.

⁶²⁵ See Erik Ringmar *Surviving Capitalism: how we learned to live with the market and remained almost human* (Anthem Press, London, 2005); Boyer and Hollingsworth, above n 104, at 440; Palumbo and Scott, above n 42, at 20.

⁶²⁶ Palumbo and Scott, above n 42, at 20.

⁶²⁷ Ringmar, above n 625, at 24-326; regarding cooperative associations specifically, see Gregory Baum *Karl Polanyi on Ethics and Economics* (McGill-Queen’s University Press, Montréal, 1996) at 57-62.

⁶²⁸ Ayşe Buğra “Polanyi’s Concept of Double Movement and Politics in the Contemporary Society” in Buğra and Ağartan (eds), above n 109, 173 at 184.

⁶²⁹ Kuttner, above n 606, at 244.

liberalism. Burawoy notes how each of those fictitious commodities is, today, linked with a form of inequality: “precarity [income insecurity] (for labor), indebtedness (for money) and dispossession (for nature and knowledge)”.⁶³⁰ Fraser writes of a “tri-dimensional” crisis that encompasses three interwoven strands. The first is ecological, referring to the gradual destruction of the Earth’s biosphere and problems that Polanyi would have never imagined, such as climate change, privatisation of water, patenting of DNA and bioengineering of sterile seeds. The second corresponds to financialisation, as explained above, which has had devastating effects on the livelihoods of most people on the planet. Finally, the social reproduction strand is related to the deficit of “human capacities to create and maintain social bonds”, including raising the young, providing care, building communities and, overall, “reproducing the shared meanings, affective dispositions and horizons of value that underpin social co-operation”.⁶³¹

Additionally, new fictitious commodities that Polanyi could not have taken into account have appeared in the neoliberal era. Care of children and of the elderly – a key to sustaining social bonds and a previously uncommodified patriarchal requirement for the commodification of labour – now have their own market based on the work of poor migrants, who then need to delegate the care of their own children and elders to even poorer people.⁶³² In today’s post-industrial “information economy” or “knowledge-based economy”, knowledge can be sold for a price and is treated as a cumulative collective resource.⁶³³ Human experience, in the form of data about our behaviour or “behavioural data”, is the fictitious commodity that fuels some industries nowadays.⁶³⁴ Contrary to Polanyi’s original fictitious commodities, though, behavioural data has not been subjected to legal regulation yet.⁶³⁵

Neoliberal practices are also undermining democracy. In Germany, for instance, many of the grievances of right-wing populist supporters are linked to the feeling that the state is favouring others – mainly financial actors and refugees – and that, despite the economic growth

⁶³⁰ Burawoy, above n 44, at 28.

⁶³¹ Fraser, above n 437, at 541-542, 552-553.

⁶³² At 551; also see Nancy Fraser “Contradictions of Capital and Care” (2016) 100 NLR 99; Brigitte Aulenbacher and Michael Leiblfinger “The ‘fictitious commodity’ care and the reciprocity of caring: a Polanyian and neo-institutionalist perspective on the brokering of 24-hour care” in Atzmüller and others, above n 39, 245.

⁶³³ See Bob Jessop “Knowledge as a Fictitious Commodity: Insights and Limits of a Polanyian Perspective” in Buğra and Ağartan (eds), above n 109, 115; Antonino Palumbo and Alan Scott “Polanyi’s double movement and the making of the ‘knowledge economy’” in Atzmüller and others, above n 39, 274.

⁶³⁴ Shoshana Zuboff *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books, London, 2019) at 99-100.

⁶³⁵ At 514.

experienced in the aftermath of the GFC, the generated wealth has not been fairly distributed.⁶³⁶ However, right-wing populism is an “ambivalox” (ambivalent and paradoxical) phenomenon. It promises social protection against the detrimental effects of the market economy but ends up favouring the dominance of the market system to perpetuate the conditions under which populism thrives.⁶³⁷ Thus, right-wing populist blocs are nothing more than an “imaginary counter-movement”.⁶³⁸ However, as explained by Polanyi and now by Kuttner, the extent of market liberalisation at any given time goes hand in hand with the rise of right-wing populism. In the 1930s, when market excesses described by Polanyi led to the Great Depression, fascist political parties only came to power through a democratic process in Austria and in Germany. Today, when market liberalisation is even greater than then, “neofascism” has significant appeal in Western Europe.⁶³⁹

Furthermore, advocates of neoliberal ideas have failed to deliver their promises of prosperity under trickle-down economics. On the contrary, neoliberal policies failed to augment economic growth and gravely affected most people’s welfare around the world. Aggregate global growth rates went from 3.5 per cent in the 1960s to 1.4 per cent in the 1980s and 1.1 per cent in the 1990s.⁶⁴⁰ In Latin America, as a consequence of the IMF and World Bank’s structural adjustment programmes, income growth per capita went from 3.1 per cent in 1960–1980 to 0.3 per cent in 1980–2000. In Sub-Saharan Africa, it was 13 per cent lower in 2000 than it had been in 1980.⁶⁴¹

In the late 2000s and the 2010s, economic growth stagnated because of the GFC. This crisis, which took place mostly between 2007 and 2008, was initially caused by the United States’ federal government’s decision to raise interest rates after it identified the banking sector had accumulated too much risk due to subprime housing loans (mortgages that house owners were unable to pay). Large-scale defaults in housing loans, combined with a slowdown in economic growth and a crash of real estate prices, led to a financial crisis in the United States that quickly extended to the entire world and became the greatest economic calamity since the

⁶³⁶ Klaus Dörre “‘Take Back Control!’ Marx, Polanyi and Right-Wing Populist Revolt” (2019) 44 ÖZS 225 at 232–233.

⁶³⁷ At 226, 231; also see Rose Parfitt “Is this (Brazilian) Fascism? The Far-Right, the Third World and the Wrong Question” (2019) 6 TWAILR: Reflections.

⁶³⁸ At 240–241.

⁶³⁹ Kuttner, above n 606, at 271–272.

⁶⁴⁰ Harvey, above n 569, at 154.

⁶⁴¹ Chang, above n 77, at 93–94.

Great Depression.⁶⁴² After the GFC, even though 80 million more people were unemployed, the austerity budgets implemented in most countries meant that the 2010s also became a “lost decade” in terms of economic growth.⁶⁴³

Sandbrook summarises the “dislocations, new insecurities, and social costs” of neoliberal practices in six points: high and growing inequalities, meaning that economic growth does not lead to a substantial reduction of poverty and thus erodes the real significance of democracy; ecological disaster; a fall in real wages and the ruin of small enterprises as a consequence of free trade; periodic financial crises that cause the collapse of currencies and the growth of unemployment and poverty; the global influence of mass media, which manipulates consumer tastes, promotes individualism and dilutes culture; and the generation of conditions, especially through rapid social changes, that breed social instability, radical ideologies and internal conflicts.⁶⁴⁴ In sum, neoliberalism undermines every single one of the second countermovement’s principles.

For instance, the objective of ensuring material equality has been almost lost due to neoliberal policies. According to the World Inequality Report 2018, concentration of capital and inequality have increased significantly since the 1980s. Between 1980 and 2016, the top 1 per cent of the adult population has captured 27 per cent of total income growth in the last four decades, which is twice as much as the bottom 50 per cent, with the top 0.1 per cent having captured as much as the bottom 50 per cent.⁶⁴⁵ There is a strong correlation between the growth of inequality and the accumulation of private wealth during that time. While public wealth represented between 50- and 100 per cent of national income in the 1970s, today it stands at 10–20 per cent due to privatisation. This distribution limits the state’s capacity to intervene in the economy and redistribute income, and is what Piketty refers to as “the emergence of a new patrimonial capitalism”.⁶⁴⁶

This trend is global. In the United States, the top 1 per cent of income earners went from holding less than 8 per cent of the national income by the end of the Second World War

⁶⁴² See SS Nayak *Global Financial Crisis: Genesis, Policy Reaction and Road Ahead* (Springer, London, 2013) at 6; David Clark *The global financial crisis and austerity: an introduction* (Bristol University Press, 2016, Bristol) at 1.

⁶⁴³ Chang, above n 77, at 104–106.

⁶⁴⁴ Sandbrook, above n 592, at 422–423.

⁶⁴⁵ World Inequality Lab “World Inequality Report 2018” (2018) wid.world <<https://wir2018.wid.world/files/download/wir2018-full-report-english.pdf>> at 46, Table 2.1.2.

⁶⁴⁶ At 160; Piketty, above n 6, at 215.

to 15 per cent by the late 1990s, and 23 per cent by 2007.⁶⁴⁷ The richest man in the planet until 2021, Bill Gates, went from having a fortune of USD \$4 billion in 1990, to USD \$50 billion in 2010.⁶⁴⁸ In Britain, the share of national income held by the top 1 per cent went from 6.5 per cent in 1982 to 13 per cent at the turn of the century.⁶⁴⁹ A similar trend can be seen in OECD countries in general.⁶⁵⁰ Outside of the OECD, Russia became a quasi-oligarchy after the “neoliberal shock therapy” it underwent after the fall of the Berlin Wall.⁶⁵¹ The same can be said of China since it liberalised its market, despite a general rise in wellbeing. Eastern Europe and Latin America struggle with elevated levels of socioeconomic inequality as well.⁶⁵²

Today’s welfare state is only a shadow of the mid-20th century model the governments of the second countermovement put in place.⁶⁵³ It not only continues to face the challenges that brought about its retreat but additional obstacles presented by globalisation,⁶⁵⁴ digital technologies,⁶⁵⁵ the inversion of the population pyramid in many countries,⁶⁵⁶ climate change,⁶⁵⁷ financial crises⁶⁵⁸ and migration,⁶⁵⁹ among other societal changes. The economy is much more complex than it was during the second countermovement. Economic relationships are more diverse than the classic dilemma between “state/market” or “society/economy”, as states sometimes carry out their functions through market mechanisms, and some corporations have so much power that they resemble states. Additionally, while neoliberalism follows many of the trends of 19th-century economic liberalism, most governments still hold some control over the economy, interfere in the market through regulations and intervene to mitigate the

⁶⁴⁷ Harvey, above n 569, at 16; Chang, above n 77, at 333.

⁶⁴⁸ Piketty, above n 6, at 556.

⁶⁴⁹ Harvey, above n above n 569, at 17.

⁶⁵⁰ Glynn, above n 567, at 167-170.

⁶⁵¹ See Naomi Wolf *The Shock Doctrine: The Rise of Disaster Capitalism* (Metropolitan Books, New York, 2007).

⁶⁵² Harvey, above n above n 569, at 17-19.

⁶⁵³ See Piketty, above n 6, at 597-629; Garland, above n 102, at 356-357; Gøsta Esping-Andersen (ed) *Why we need a new welfare state* (Oxford University Press, Oxford, 2002); Kate Raworth *Doughnut Economics: 7 Ways to Think Like a 21st Century Economist* (Chelsea Green Publishing, Vermont, 2017); Paul Pierson “The New Politics of the Welfare State” (1996) 48 *World Politics* 143 at 143; Abram de Swaan “Perspectives for Transnational Social Policy” (1992) 27 *Government and Opposition* 33.

⁶⁵⁴ See Glynn, above n 567, at ch 4, ch 7.

⁶⁵⁵ See Philip Alston *Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/41/39/Add.1 (14 September 2018) at 7.

⁶⁵⁶ Karl Hinrichs and JF Lynch “Old-Age Pensions” in Castles and others, above n 175, 353 at 360-365; also see Tommy Bengtson and Kirk Scott “Population Aging and the Future of the Welfare State” (2011) 37 *Population and Development Review* 158.

⁶⁵⁷ Ian Gough and Göran Therborn “The Global Future of Welfare States” in Castles and others, above n 175, 703 at 716-718.

⁶⁵⁸ At 718-720.

⁶⁵⁹ See Amaud Chevalier and others “Immigrant Voters, Taxation and the Size of the Welfare State” (SOEP papers on Multidisciplinary Panel Data Research 994, The German Socio-Economic Panel, 2018).

damages caused by market failures.⁶⁶⁰ Capitalism is now managed by a hybrid of the state and the market.⁶⁶¹ These differences are forcing those who resist neoliberal trends to think beyond the model and ideas that served the second countermovement, and to launch a countermovement of their own.

B The Principle of Social Protection Today: An Incipient Third Countermovement

The emerging countermovement against neoliberal practices is just gathering support and is far from being as strong as the second countermovement was. While there have been some political movements that have opposed neoliberal policies in the last 50 years, none have had the success the socialist welfare states and the New Deal had in the mid-20th century. However, this thesis argues that the global shock caused by the GFC started tilting the balance of the double movement back towards the principle of social protection, with a young third countermovement starting to emerge.

1 Signs of a rising countermovement against neoliberalism

Some argue that the influence of neoliberal ideas on society peaked in the 1990s.⁶⁶² However, dazed by what was perhaps the most ambitious version of economic liberalism to date, disenfranchised groups have taken some time to respond to its dislocations. As seen above, even political movements that held the banner of the second countermovement in the mid-20th century, like the Labour Party in the United Kingdom, turned their back on the principles of that countermovement to instead promote economic liberalism.

Most states having a political elite that is implicitly or explicitly neoliberal. Moreover, the market operates both domestically and internationally without a global authority that can regulate it. Therefore, it will be difficult to expel the market economy from its “nest”.⁶⁶³ Despite seeing parallels between the 19th and the 21st centuries, we cannot speak of a modern double movement if we do not have a successful countermovement – “no counter-hegemonic project aimed at protecting society and nature from neoliberalism”.⁶⁶⁴

⁶⁶⁰ Holmes, above n 30, at 12.

⁶⁶¹ At 22-23.

⁶⁶² Flew, above n 585, at 67.

⁶⁶³ Boyer and Hollingsworth, above n 104, at 470-471.

⁶⁶⁴ Fraser, above n 437, at 120-121.

This is not to say there have been no social movements resisting neoliberal practices, especially since the 1990s when the effects of neoliberal globalisation started to become very apparent to groups and countries that were being marginalised by that trend. The series of resistance movements against globalisation in the late 1980s and beyond are often referred to as the “anti-globalisation movement”. For instance, in 1994, the Zapatistas in Mexico led an armed insurrection in protest against the North American Free Trade Agreement (NAFTA).⁶⁶⁵ In 1999, in Seattle, tens of thousands of activists against free trade and globalisation blockaded a meeting of the Third Ministerial Conference of the WTO. Using the slogan “No Globalization without Representation”, the protesters re-enacted the resistance of the Boston Tea Party in 1773 against the British by dumping goods that represented unfair trade practices into Seattle’s harbour. After two days of protest – later referred to as “the Battle of Seattle” – the WTO ministerial meeting took place. Nonetheless, the protesters had been successful in transmitting the idea that free trade and the interests of global corporations should not be prioritised over other societal values.⁶⁶⁶ This was the first of a series of anti-globalisation movements that took place at the turn of the millennium. These movements focused on re-establishing national political dominance over corporations and bringing globalisation (represented by international financial institutions like the WTO, the World Bank and the IMF) back into social control.⁶⁶⁷

From a governmental point of view, the clearest example of resistance against globalisation and international finance was the response of East Asian governments to the 1997 financial crisis, allegedly caused by an excessive liberalisation of the market in the region. In the aftermath of the crisis, instead of reenforcing the same neoliberal agenda promoted by international financial institutions as part of the Washington Consensus, states extensively intervened in the market. They provided credit and export subsidies to some favoured industries and producers and introduced import controls and high tariffs.⁶⁶⁸ The success of these policies became known as the “East Asian Miracle” due to a World Bank report that praised the approach taken by those governments.⁶⁶⁹ That “miracle”, along with the perceivable effects of other financial and social crises around the world, led the World Bank to shift from a “not just

⁶⁶⁵ Catherine Eschle and Bice Maiguashca *Critical Theories, IR and the ‘Anti-Globalization Movement’: The Politics of Global Resistance* (Routledge, London, 2005) at 2.

⁶⁶⁶ Frieden, above n 572, at 457-459.

⁶⁶⁷ At 468, 471.

⁶⁶⁸ Ray Kiely *The Clash of Globalizations: Neo-Liberalism, the Third Way and Anti-globalisation* (Brill, Leiden, 2005) at 89-90.

⁶⁶⁹ See The World Bank *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press, Oxford, 1993); also see Robert Wade “Japan, the World Bank, and the Art of Paradigm Maintenance: The East Asian Miracle in Political Perspective” (1996) 217 NLR 1.

less government but better government” approach and to focus on strengthening institutions,⁶⁷⁰ thus somewhat stepping back from its previous stringent neoliberal approach.

The last two decades of the 20th century also witnessed some important advances from the UN system in the area of international development that aimed to reinforce mechanisms of social protection. In 1987, UNICEF published a study on the negative effects the IMF and World Bank’s structural adjustment programmes were having on children in developing countries.⁶⁷¹ This report was seen as a major affront to those international financial institutions and is said to have led the World Bank to review its approach to adjustment programmes so they focused more on poverty and less on macro-economic indicators.⁶⁷² In 2000, the General Assembly adopted the *United Nations Millennium Declaration*, which was directed at “ensur[ing] that globalization becomes a positive force for all the world’s people”.⁶⁷³ Eight Millennium Development Goals (MDGs), ranging from cutting extreme poverty by half to providing universal primary education, were established as objectives to be accomplished by states and international development institutions by 2015.⁶⁷⁴ However, there is wide consensus that the MDGs were a failure and that their successor, the Sustainable Development Goals (2016), inherited many of the same problems.⁶⁷⁵

While the resistance movements and developments highlighted above are certainly counteractions against the influence of neoliberal ideas on society, they cannot be considered a countermovement by themselves. It is important to remember that, from a neo-Polanyian perspective, the double movement consists of a continuous struggle between the principle of economic liberalism and social protection. Therefore, the advocates of those actions will always be carrying out actions and counteractions to resist each other’s influence and gain ground.⁶⁷⁶ On the side of social protection, that does not mean that every counteraction forms a countermovement. An identifiable wave of social protection, also known as a countermovement, only emerges when it is effective in tilting the balance of the double movement from economic liberalism back to a dominance of social protection, or at least an

⁶⁷⁰ Sinclair, above n 304, at 272-273.

⁶⁷¹ See GA Cornia, Richard Jolly and Frances Stewart (eds) *Adjustment with a human face* (UNICEF, Paris, 1987).

⁶⁷² See Richard Jolly “Adjustment with a Human Face: A UNICEF Record and Perspective on the 1980s” (1991) 19 *World Development* 1807.

⁶⁷³ *United Nations Millennium Development Goals* GA Res 55/2 (2000), at [5].

⁶⁷⁴ “We Can End Poverty: Millennium Development Goals and Beyond 2015” *Millennium Goals* <www.un.org/millenniumgoals/bkgd.shtml>.

⁶⁷⁵ See JB Carant “Unheard voices: a critical discourse analysis of the Millennium Development Goals’ evolution into the Sustainable Development Goals” (2016) 38 *TWQ* 16.

⁶⁷⁶ Atzmüller and others, above n 39.

equilibrium between the two.⁶⁷⁷ That was the case of, for instance, the reforms taken by governments during the mid-20th century described in Chapter II.

Therefore, the efforts described above did not form a countermovement because they were not effective in subduing market forces under the state's control. In the scale between strong state interventionism and free markets, we are still much closer to the latter, despite efforts to resist economic liberalism. As argued by Raffer, the neoliberal dominance on public policy has represented "a time warp back to the 1930s, if not the 19th century".⁶⁷⁸ This is partially because social protection is no longer seen as a responsibility that belongs exclusively to the state, but is now shared with non-state actors such as businesses and charitable organisations.⁶⁷⁹ The state is not as active as it used to be because many people have adopted the neoliberal belief that the state causes more problems than it solves and consequently they do not trust it as much as they used to. Instead of demanding structural or transformative agendas through representative institutions, most people are satisfied with small community interventions.⁶⁸⁰ This liberal denial of state power, and the romantic ideas around altruism and civil initiatives that come with it, hides the extent to which most aspects of life are being commodified and the state is not as protective of society as it used to be.⁶⁸¹

The absence of a defined countermovement nowadays can be explained by several factors. One is a lack of leadership. In the United States, for example, Barack Obama was conscious of his electoral prospects in an economically liberal society and was therefore not nearly as progressive as FDR.⁶⁸² A second factor is the 1970s shift from Fordism to a post-Fordism regime. The former was a model of capitalism in which the accumulation of capital was based on industrial production and therefore relied on workers. The latter is a model of capitalism where accumulation is based on finance – transacting only with money instead of products. Consequently, the labour movement no longer occupies a central role in the economy, so it has less power and influence on politics. In Fraser's words, "labour cannot supply the backbone for the protective pole of a double movement in the 21st century" and no other section of the population has been able to fill that role.⁶⁸³

⁶⁷⁷ Block, above n 33, at 7.

⁶⁷⁸ Raffer, above n 575, at 42.

⁶⁷⁹ Buĝra, above n 628, at 176.

⁶⁸⁰ At 183-184.

⁶⁸¹ At 187.

⁶⁸² Fraser, above n 437, at 121-123.

⁶⁸³ At 123-125.

A third factor is that the national state has ceded sovereignty to international organisations and other non-state actors (like central banks). Therefore, contrary to the 1930s, when Polanyi was writing, the state is no longer an adequate frame for social protection. While advocates of neoliberal practices were able to organise at a global scale, the agents of social protection have not been able to reciprocate.⁶⁸⁴ Fraser suggests that a more plausible explanation is that the social movements that have risen during the neoliberal age – “anti-racism, anti-imperialism, anti-war, the New Left, second-wave feminism, LGBTI liberation, multiculturalism, and so on” – do not fit into the double movement. Instead, their causes fit into a third project of “emancipation”, which has its own tensions with both economic liberalism and social protection, forming a “triple movement” in the 21st century.⁶⁸⁵

Under the pendular logic of the double movement, however, that imbalance between economic liberalism and social protection cannot last. Although there is no consolidated countermovement taking place, there are signs that one might be starting to form. The resistance movements and small reforms that took place in the late-1980s, the 1990s and 2000s were early signs of that trend. However, it was the GFC that marked a break in neoliberal dominance in public policy. The crisis, caused by the excesses of financialisation in Wall Street, was the “dusk of the globalization process” under neoliberal practices.⁶⁸⁶

From a neo-Polanyian perspective, the GFC was the event that might have started tilting the balance of the double movement back towards social protection, possibly setting a third countermovement in motion.⁶⁸⁷ Just as the gold standard spread the effects of the Great Depression around the world, the modern international financial system led a United States mortgage market crash to cause a global economic recession. Although Keynesian stabilisers prevented the GFC from having the disastrous effects of the Great Depression, citizens all around the world became discontent with economic insecurity, wage stagnation, increasing inequality and austerity policies during and after the GFC. This led to a democratic backlash against the international political and economic order in the form of populism – the two clearest examples being Donald Trump’s presidency in the United States and Brexit in the United Kingdom – in a similar way to how fascism arose out of the strains caused by the 19th century

⁶⁸⁴ At 125-127.

⁶⁸⁵ At 127-131.

⁶⁸⁶ Hüseyin Özel “‘Neoliberal’ Violence’—An Attempt to Embed Society in the Market” in Michael Brie and Claus Thomasberger (eds) *Karl Polanyi’s Vision of a Socialist Transformation* (Black Rose Books, Montréal, 2018) 110 at 115.

⁶⁸⁷ Burawoy, above n 44, at 12-15; Holmes, above n 30, at 143.

market economy.⁶⁸⁸ Just as the Great Depression and the Second World War were the sparks that ignited the second countermovement, then, the GFC was the shock that may have jumpstarted a third countermovement.

When the GFC occurred, however, there was no single ideological framework, like socialism, that could guide the reforms that needed to be implemented. Recent successful political movements, with an anti-austerity socialist agenda, have demonstrated that socialism is still having some influence on politics.⁶⁸⁹ Perhaps the clearest example of that is Bernie Sanders' presidential campaigns in the United States, which had enough influence to introduce elements of democratic socialism back into that country's public governance.⁶⁹⁰ Additionally, influential academics, like Thomas Piketty, are making a case for a socialist model of both national and global governance.⁶⁹¹ Nevertheless, socialism has been discredited by the USSR's crimes against its own population and by the ideological campaign launched by the United States and its allies as part of the Cold War.⁶⁹² Therefore, the incipient third countermovement is not necessarily centred on socialism, as the second countermovement was.

In fact, at the time of the GFC, there were few economic alternatives to the "neo-classic, market-centric methodology" being taught at universities. Some renowned economists, like Joseph Stiglitz, Paul Krugman and Robert Skidelsky, attempted to read the crisis from a Keynesian perspective, but they had limited influence on government policies.⁶⁹³ The stimulus packages rolled out to contain the crisis were soon replaced by austerity measures and, instead of restructuring the financial system, governments opted to solve the crisis by "restoring profitability in the financial sector".⁶⁹⁴ However, that strategy was met by a global resistance.

Because, as seen above, neoliberal ideas expanded through globalisation, a third countermovement has also started to take form as a global effort. The resistance against neoliberal practices is increasingly being represented by "nationally driven but globally conscious" transnational networks of social activists.⁶⁹⁵ After the GFC, protests against

⁶⁸⁸ Holmes, above n 30, at 4-7.

⁶⁸⁹ See Chang, above n 77, at 102, 106.

⁶⁹⁰ See Nicolas Gachon *Bernie Sanders's Democratic Socialism: Holding Utopia Accountable* (Palgrave Macmillan, London, 2021); also see the influence of Jeremy Corbyn's campaigns in the United Kingdom in Liam Byrne "How Jeremy Corbyn brought labour back to the future: visions of the future and concrete utopia in labour's 2017 electoral campaign" (2019) 14 *British Politics* 250.

⁶⁹¹ Piketty, above n 7, at ch 17.

⁶⁹² Sandbrook, above n 592, at 425.

⁶⁹³ Holmes, above n 30, at 139-140.

⁶⁹⁴ At 140.

⁶⁹⁵ At 16; Chris Hann and Keith Hart *Market and Society: The Great Transformation Today* (Cambridge University Press, Cambridge, 2009) at 9.

austerity and other matters started to appear all over the world. Some examples are the *Occupy* movement and the *Indignados* in Spain and Greece against the concentration of wealth by the top 1 per cent, the anti-tuition fees marches in the United Kingdom, the Arab Spring, the anti-nuclear movement in Japan, anti-land grabs in India and China, protests against the privatisation of education and inequality in Chile, miners' strikes in South Africa, and numerous climate change movements.⁶⁹⁶ The Catholic Church, one of the most powerful organisations in the world, has added its voice to this incipient countermovement, just as it did back in the second countermovement. In his 2013 apostolic exhortation *Evangelii Gaudium*, Pope Francis condemned the exclusion of the Global South and minorities from the global economy, idolatry of money, the rule of the financial system, inequality and other challenges faced by humanity.⁶⁹⁷ All these movements share a common “sense of political dispossession” and of “separation of popular politics and power”.⁶⁹⁸ Moreover, as seen below, the pressure of these movements has begun to shift governmental action towards concrete actions in favour of social protection against neoliberal policies.

Due to the popular base of these resistance movements, the incipient third countermovement is being characterised by an advancement of public participation and democratic systems. As Rodrik states, “[d]emocracies have the right to protect their social arrangements, and when this right clashes with the requirements of the global economy, it is the latter that should give way.”⁶⁹⁹ Thus, he calls for a “capitalism 3.0” – a global economy subjected to the rules of global governance, similar to what the Bretton Woods compromise achieved in the mid-20th century.⁷⁰⁰ A “new globalization” would operate under the principles that “markets must be deeply embedded in systems of governance” and that international economic arrangements would only act as tools to coordinate national institutions that each democratic state is free to mould according to its own social arrangements.⁷⁰¹ Kuttner makes a call for a wave of “progressive populism” that can alter the current economic route and save democracy from global capitalism.⁷⁰²

⁶⁹⁶ Burawoy, above n 44, at 12-16, 24.

⁶⁹⁷ At 10-11; Francis *Apostolic Exhortation Evangelii Gaudium of the Holy Father Francis to the Bishops, Clergy, Consecrated Persons and the Lay Faithful on the Proclamation of the Gospel in Today's World* (Vatican Press, Rome, 2013) at 52-75.

⁶⁹⁸ Burawoy, above n 44, at 16.

⁶⁹⁹ Rodrik, above n 618, at xix.

⁷⁰⁰ At 235-236.

⁷⁰¹ At 236-247.

⁷⁰² Kuttner, above n 606, at 288.

We have seen the counterfactual to these proposals play out in the last decade. Economic liberalism has, just as it did during Polanyi's times, reignited far-right populism and fascism as a response to market excesses.⁷⁰³ As a consequence, (politically) liberal democracies are now under an existential threat that can only be addressed under an economic reform that prioritises society over capital once more.⁷⁰⁴ Those reforms, however, have started to take place and the economic aftermath of the Covid-19 pandemic has added even more fuel to the rise of a third countermovement.⁷⁰⁵

2 *Emerging policies of a third countermovement*

Below, I will provide an overview of three policies that seek to achieve the goal of prioritising social protection over the market once more and can therefore be considered part of the nascent third countermovement. Due to my neo-Polanyian theoretical framework, I have chosen to focus on policies that push back against the three fictitious commodities identified by Polanyi – labour, land, and money. There are multiple proposals to counteract each of these and, in the context of a countermovement that is still in the process of consolidating, it is difficult to establish which of them will become the most effective in resisting neoliberal doctrine. Nevertheless, I have selected three strategies – universal basic income, zero-carbon economies and wellbeing economics – that have been visibly gathering public and governmental support since the GFC and therefore show promise for transformative reform during a third countermovement. Moreover, because each of these policies significantly differ from those of the second countermovement, they have the added benefit of showing the contrast between techniques of social protection then and now. Those differences will highlight the challenges of adapting the ICESCR's second countermovement framework to the reality of an incipient third countermovement.

(a) Labour – universal basic income

As seen in *The Great Transformation*, one of the biggest successes of economic liberalism in the 19th century was the fictitious commodification of labour and the consequent

⁷⁰³ At ch 11.

⁷⁰⁴ At 283.

⁷⁰⁵ See “Money, machines and mayhem: What history tells you about post-pandemic booms” *The Economist* (online ed, London, 29 April 2021).

creation of the labour market (see Chapter I.B). Although the first and second countermovements attempted to decommodify labour through domestic and international social legislation that protected workers from the labour market, since the surge of neoliberal practices, the market has been constantly innovating in ways to reduce wages.⁷⁰⁶ For Polanyi, a decommodified form of labour would allow working conditions and wages to be set outside the market, and for income to be a secondary aspect of work compared to other motivations.⁷⁰⁷ As I will demonstrate below, that vision might be fulfilled by the amount of support shown by local and national governments towards UBI.

Broadly, UBI consists of “a periodic cash payment unconditionally delivered to all on an individual basis, without means test or work requirement”. Under this definition, UBI has five main characteristics: periodicity (paid at regular intervals instead of being a one-off payment); cash payment (it is paid in a medium of exchange, not in kind or with vouchers); individual (instead of, for example, families); universal (not means-tested and available to non-citizens); and unconditional (no requirement to work or willingness to work).⁷⁰⁸ The “basic” element of UBI is not linked to the concept of “basic needs”, but refers to the starting point upon which additional resources from other sources can be attained.⁷⁰⁹

UBI is not a new idea. It can be traced back to Thomas Moore’s *Utopia*, published in 1516.⁷¹⁰ In the last century, influential people of all backgrounds and ideologies have called for this policy – from theorists of the right, like Milton Friedman and Friedrich von Hayek, to socialists like Bertrand Russell, GDH Cole, JK Galbraith and James Meade; from politicians like Barack Obama to businesspeople like Mark Zuckerberg and Pierre Omidyar.⁷¹¹ In that, UBI recalls the logic of the first and second countermovements, where actions of social protection came from diverse backgrounds too. Of course, though, the visions those different thinkers have about UBI differ significantly, with progressive advocates conceiving UBI as a supplement to current social insurance and assistance programmes, and libertarians regarding it as a way of replacing the welfare state with a model that would favour a freer market.⁷¹²

⁷⁰⁶ Raffer, above n 575, at 50-52.

⁷⁰⁷ Polanyi, above n 19, at 251.

⁷⁰⁸ “About Basic Income” (2020) Basic Income Earth Network (BIEN) <<https://basicincome.org/about-basic-income/>>; Philippe Van Parijs “Basic income and social democracy” in Amy Downes and Stewart Lansley (eds) *It’s Basic Income: The Global Debate* (Policy Press, Bristol, 2018) 118 at 119.

⁷⁰⁹ Simon Birnbaum “Basic Income” in WR Thompson (ed) *Oxford Research Encyclopedia of Politics* (Oxford University Press, Oxford, 2016) at 2.

⁷¹⁰ See Thomas Moore *Utopia* (Verso, London, 2016) at 41.

⁷¹¹ Downes and Lansley, above n above n 708, at 2; Van Parijs, above n 708, at 118.

⁷¹² Downes and Lansley, above n 708, at 7-8.

In practice, UBI has been trialled in various countries during four “waves of interest” by governments; from the first that took place in the aftermath of the First World War, to a current fourth wave that began after the GFC.⁷¹³ From the trials that were carried out during the first three waves, only two – Alaska (1982) and Iran (2011) – resulted in a permanent implementation of UBI with modest sums that distributed revenues from the oil industry.⁷¹⁴ In other countries, like the United Kingdom, child benefits and pensions have been implemented in a similar way to UBI.⁷¹⁵

The contemporary fourth wave of interest in UBI is driven by several effects of the GFC. These include social and economic change, de-industrialisation, austerity, stagnation in living standards, in-work poverty, the impact of the robotic revolution on unemployment (labour automation) and the retrenchment of the welfare state.⁷¹⁶ These factors call for a reimagining of social protection in the 21st century, where the two previous models – public charity and social insurance – are reinforced by a third model: UBI.⁷¹⁷ In practice, the fourth wave consisted of trials in Finland, Canada, the Netherlands and Kenya, all of which began in 2017 and some of which are still ongoing.⁷¹⁸

More recently, the economic consequences of the Covid-19 pandemic led several governments to implement programmes that are close to UBI. For example, in Spain, the government (under a socialist coalition) introduced the *Ingreso mínimo vital* (“minimum vital income”) program in 2020, which consists of a permanent non-contributive benefit provided to the poorest Spanish families to cover the difference between their current incomes and an ideal “guaranteed income”.⁷¹⁹ The scheme was introduced as a “new citizens’ right” by the

⁷¹³ Downes and Lansley, above n 708, at 3-4; Philippe Van Parijs and Yannick Vanderborght *Basic Income: A Radical Proposal for a Free Society and a Sane Economy* (Harvard University Press, Cambridge (Mass), 2017) at 2-4, chs 4, 6; Rutger Bregman *Utopia for Realists: How We Can Build the Ideal World* (Elizabeth Manton translation, Little, Brown and Company, New York, 2017) at 25-30, 34-36; YN Harari *21 Lessons for the 21st Century* (Vintage, London, 2018) at 51; Abhijit Banerjee and others “Effects of a Universal Basic Income during the pandemic” (Research paper, Abdul Latif Jameel Poverty Action Lab, 2020); Sigal Samuel “Everywhere basic income has been trialled, in one map” (20 October 2020) Vox <<https://www.vox.com/future-perfect/2020/2/19/21112570/universal-basic-income-ubi-map>>

⁷¹⁴ Downes and Lansley, above n 708, at 3; Scott Goldsmith “The Alaska Permanent Fund Dividend: An Experiment in Wealth Distribution” (paper presented to the 9th International Congress of the Basic Income European Network, Geneva, September 2002) at 1; “Iran introduced a basic income scheme, and something strange happened” (31 May 2017) World Economic Forum <<https://www.weforum.org/agenda/2017/05/iran-introduced-a-basic-income-scheme-and-something-strange-happened/>>.

⁷¹⁵ At 3-4.

⁷¹⁶ At 4-5.

⁷¹⁷ Van Parijs, above n 708, at 121-122.

⁷¹⁸ Downes and Lansley, above n 708, at 4; Abhijit Banerjee and others, above n 708.

⁷¹⁹ Cristina Pérez “Ingreso mínimo vital: qué es, cómo se solicita y quién puede cobrarlo” *RVTE* (online ed, Madrid, 18 March 2021).

Spanish government.⁷²⁰ In India,⁷²¹ Canada,⁷²² and the United States,⁷²³ governments have made temporary direct cash transfers to the poor families and individuals as well, during 2020 and 2021. Although not UBI programs per se, these schemes might be a “roadmap to UBI”.⁷²⁴

UBI would give people more flexibility to choose between work, leisure, education, and caring (as domestic work would finally be remunerated).⁷²⁵ This is what Widerquist calls “freedom as effective control self-ownership” or ECSO freedom – “the effective power to accept or refuse effective cooperation with other willing people”, allowing individuals to live without being forced to serve the interests of others.⁷²⁶ In addition, by incentivising some to work fewer hours, others (particularly those who are unemployed) can fill those hours.⁷²⁷ Eventually, people could work as few as 15 hours per week and dedicate the rest of their time to leisure.⁷²⁸ This policy would also revitalise labour’s bargaining position by granting workers more options and forcing employers to improve working conditions and wages.⁷²⁹ Moreover, in the event that work becomes scarce due to the progress of artificial intelligence and the automation of most jobs, UBI could provide a safety net for the unemployed masses.⁷³⁰ While not its direct objective, a basic income could also enhance social cohesion and build citizenship.⁷³¹

⁷²⁰ Ministerio de Derechos Sociales y Agenda 2030 “Ingreso mínimo vital” <<https://www.msbs.gob.es/ssi/covid19/ingresoMinVital/home.htm>>.

⁷²¹ See Prem Kumar “Cash Transfers During Covid-19 Pandemic and Roadmap to Universal Basic Income” (2020) 10 *Journal of Governance and Public Policy* 81.

⁷²² Government of Canada “Canada Emergency Response Benefit (CERB)” <<https://www.canada.ca/en/services/benefits/ei/cerb-application.html>>.

⁷²³ “Two million more Economic Impact Payments disbursed under the American Rescue Plan; total reaches approximately 161 million as payments continue” (22 April 2021) Internal Revenue Service <www.irs.gov/newsroom/two-million-more-economic-impact-payments-disbursed-under-the-american-rescue-plan-total-reaches-approximately-161-million-as-payments-continue>; Tim Tankersley and Michael Crowley “Here are the highlights of Biden’s \$1.9 trillion ‘American Rescue Plan’” *The New York Times* (online ed, New York, 14 January 2021); Alicia Adamczyk “Trump calls for \$2,000 stimulus checks as \$600 payments start being deposited” *CNBC* (online ed, New Jersey, 30 December 2020).

⁷²⁴ Kumar, above n 721.

⁷²⁵ Downes and Lansley, above n 708, at 6; Daniel Raventós *Basic Income: The Material Conditions of Freedom* (Pluto Press, London, 2007) at 92.

⁷²⁶ Karl Widerquist “Why we demand an unconditional basic income: the ECSO freedom case” in Axel Grosser and Philippe Vanderborcht (eds) *Arguing About Justice: Essays for Philippe Van Parijs* (Presses Universitaires de Louvain, Louvain-la-Neuve, 2013) at 387-394.

⁷²⁷ Van Parijs, above n 708, at 120.

⁷²⁸ Bregman, above n 713, at ch 6; Keynes predicted that by 2030 people would have a 15-hour work week in JM Keynes “Economic Possibilities for our Grandchildren” in JM Keynes *Essays in Persuasion* (Macmillan and Co, London, 1931) 358; his friend, Bertrand Russell, suggested four hours per day in Bertrand Russell “In Praise of Idleness” in Bertrand Russell *In Praise of Idleness and other essays* (Routledge, London, 1935) 1.

⁷²⁹ Downes and Lansley, above n 708, at 6.

⁷³⁰ Harari, above n 713, at 50-56.

⁷³¹ Birnbaum, above n 709, at 18-19.

UBI opens the door to speak of a right to income as a supplement, or possibly an alternative, to the right to work.⁷³² Ultimately, it could decommodify labour by enabling people to refuse work that does not meet decent working conditions and, more importantly, by:⁷³³

... enabl[ing] all citizens to decide on an ongoing basis between the use-value of their time and its exchange-value: that is to say between the “utilities” they can acquire by selling their working time and those they can “selfprovide” by using that time themselves.

Thus, UBI would reconceptualise the right to work by allowing people to conduct labour for reasons other than its profitability or exchange-value. While the intention of UBI advocates is not to steer people away from work, but for work to be redefined as a way of socialising and developing capabilities,⁷³⁴ it would still represent a significant break from the logic of the second countermovement. While the socialist welfare state and the New Deal adopted the Keynesian ideal of full employment as the main mechanism to secure an adequate income for all, governments during the present rise of a third countermovement are experimenting with a model where income from labour is only a supplement to income provided by the state.

(b) Land – zero-carbon economies

For Polanyi, the fictitious commodification of land included nature and the environment. In *The Great Transformation*, he argued that an excessive commodification of land could only lead to the natural environment being “reduced to its elements, neighbourhoods and landscapes defiled, rivers polluted ... the power to produce food and raw materials destroyed”.⁷³⁵ Thus, from the first countermovement, society’s self-protection from the market economy has included resistance against the commodification of the natural environment. That resistance has transformed into the ecological causes that form part of today’s countermovement.⁷³⁶

The current commodification of nature goes beyond anything Polanyi could have imagined. The rate at which humans have exploited nature has led some scientists to speak of “the Great Acceleration” of human population, changes in natural processes and the

⁷³² Van Parijs, above n 708, at 120.

⁷³³ André Gorz “Beyond the Wage-Based Society” in Karl Widerquist and others (eds) *Basic Income: An Anthology of Contemporary Research* (Blackwell, Chichester (UK), 2013) 297 at 298.

⁷³⁴ At 299.

⁷³⁵ Polanyi, above n 19, at 73.

⁷³⁶ Baum, above n 627, at 15-19.

development of inorganic materials as the trigger for the Anthropocene – a new geological era characterised by human impact on the environment.⁷³⁷ Today, the privatisation of water, the bioengineering of sterile seeds and DNA patenting subsume nature into capitalist logic.⁷³⁸ From a neo-Polanyian perspective, international environmental policymakers have attempted to reach an impossible compromise between economic growth (“improvement”) and the protection of the environment (“habitation”) through market mechanisms like “cap-and-trade” of carbon emissions.⁷³⁹

Climate change is the most visible item on the agenda of environmental movements as a third countermovement emerges. Although people 200 years ago were not aware of the extent to which burning carbon could significantly alter the climate, the responsibility for climate change can be traced back to the Industrial Revolution that set off “the great transformation” described by Polanyi.⁷⁴⁰ Although he emphasised the harmful effects of the market economy as catastrophes that would change the human spirit forever, climate change is the first consequence of economic liberalism that actually poses an existential threat to humanity and – even more so – to most of nature.⁷⁴¹ More than half of the total emissions since the Industrial Revolution have been emitted in the last four decades, in the era of neoliberalism.⁷⁴² Therefore, although the origins of climate change can be found in the first wave of economic liberalism, most of its damage and its effects are an issue that has had to be addressed by governments during a third countermovement.

Humanity has now entered a phase of climate commitment, that is, a path in which the effects of climate change can be mitigated but not reversed. Even with a cessation of greenhouse gas emissions, the Earth will not return to pre-industrial surface temperatures for many centuries.⁷⁴³ However, under the 2015 Paris Agreement, states have committed to combat climate change by “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.⁷⁴⁴ According to the Intergovernmental Panel on Climate Change (IPCC),

⁷³⁷ SL Lewis and MA Maslin “Defining the Anthropocene” (2015) 519 *Nature* 171 at 176.

⁷³⁸ Fraser, above n 30, at 552.

⁷³⁹ Holmes, above n 30, at ch 7.

⁷⁴⁰ See UN Environment *Global Environment Outlook Geo-6: Healthy Planet, Healthy People* (Cambridge University Press, Cambridge, 2019) at 43.

⁷⁴¹ See David Frame and MR Allen “Climate change and global risk” in Nick Bostrom and MM Ćirković *Global Catastrophic Risks* (Oxford University Press, Oxford, 2008) 265.

⁷⁴² At 44.

⁷⁴³ At 43-44.

⁷⁴⁴ Paris Agreement to the United Nations Framework Convention on Climate Change TIAS 16-1104 (opened for signature 12 December 2015, entered into force 4 November 2016), art 2.1.a.

the 1.5°C mark will be reached between 2030 and 2052 at the current rate of emissions.⁷⁴⁵ If temperatures are to be kept lower than a 2°C increase, global emissions need to drop by 40–70 per cent between 2010 and 2050, and reach 0 per cent by 2100.⁷⁴⁶ Climate-related risks would significantly increase if the temperature increases further after that.⁷⁴⁷ Despite that forecast, current emission trends do not conform to the decrease needed to meet the goals set in the Paris Agreement.⁷⁴⁸

Some of the expected effects of climate change are hot extremes in most inhabited areas, heavy precipitation in many regions, drought or precipitation deficits in some other regions, sea level rise (leading to saltwater intrusion, flooding and damage to infrastructure), a change and loss of land and ocean ecosystems and the services they provide, a consequent detriment to biodiversity, water stress and a lower yield of essential crops.⁷⁴⁹ Some populations – including indigenous peoples, farmers, fishers, communities living in the Arctic, dryland regions, small island developing states and the least developed countries – will be disproportionately affected by climate change. Several hundred million humans will enter poverty, more people will die due to heat-related diseases (including vector-borne diseases like dengue or malaria) and global aggregated economic growth will drop.⁷⁵⁰

Hundreds of political activists and academics have proposed routes that governments should follow to avoid that catastrophe. Figueres and others, for instance, have proposed actions in six areas to meet the goals of the Paris Agreement and mitigate the risks associated with climate change. These are: energy (30 per cent of the world’s electricity coming from renewable sources by 2020); infrastructure (action plans set up to fully decarbonise infrastructure by 2050, with cities upgrading at least 3 per cent of their buildings to zero or near-zero carbon emissions each year); transport (at least 15 per cent of new vehicles to be sold by 2020 are electric and there is an increase in fuel efficiency across all means of transport); land (deforestation and land-use changes cut to zero in the 2020s, creating a carbon sink by

⁷⁴⁵ IPCC *Summary for Policymakers: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (IPCC, Geneva, 2018) at 4.

⁷⁴⁶ UN Environment, above n 740, at 48.

⁷⁴⁷ IPCC, above n 745, at 5.

⁷⁴⁸ UN Environment, above n 740, at 48.

⁷⁴⁹ IPCC, above n 745, at 5, 7-9.

⁷⁵⁰ At 9.

2030); industry (heavy industry to halve emissions well before 2050); and finance (financial sector to mobilise at least USD \$1 trillion per year for climate action).⁷⁵¹

Governments and corporations have already started taking some action in that direction. Between 1998 and 2010, national climate laws increased five-fold (more than 1,500 globally) and by 2012 those laws covered at least 67 per cent of all emissions.⁷⁵² In the private sector, for example, meat produced in laboratories (“clean meat”) is coming closer to replacing livestock meat, responsible for a large proportion of emissions. The price of a lab-produced hamburger went down from USD \$330,000 per unit in 2013 to USD \$11 in 2017 and is expected to become cheaper than traditional meat within the next decade.⁷⁵³ In the energy sector, more electricity is now being produced from renewable sources than from coal in some of the highest emitting regions, like the United States and Europe.⁷⁵⁴ Some countries, like Iceland and Costa Rica, are close to reaching a carbon-neutral or zero-carbon economy.⁷⁵⁵ Close to 2,000 jurisdictions across more than 30 countries, and covering over 820 million people, have declared a climate emergency to guide their economies in that direction.⁷⁵⁶

Thus, climate change might be the one issue that rallies societies against economic liberalism, especially as its effects start to be more and more evident in the next decades. The efforts to reach zero-emissions societies might be the fuel that feeds an emerging third countermovement. As I will discuss in the next chapter of this thesis, although the ICESCR does not contemplate the protection of the environment – because that was not an issue of the second countermovement – human rights bodies have made an effort to convey that the treaty can be useful in resisting the economic trends that worsen climate change.

⁷⁵¹ Christiana Figueres and others “Three years to safeguard our climate” (2017) 546 *Nature* 593 at 594-595.

⁷⁵² UN Environment *Summary for Policymakers: Global Environment Outlook Geo-6: Healthy Planet, Healthy People* (Cambridge University Press, Cambridge, 2019) at 8.

⁷⁵³ Harari, above n 713, at 141.

⁷⁵⁴ Brad Plumer “In a First, Renewable Energy Is Poised to Eclipse Coal in U.S.” *The New York Times* (online ed, New York, 13 May 2020); Jazmin Goodwin “History made: Renewable energy surpassed fossil fuels for European electricity in 2020” *CNN Business* (online ed, New York, 25 January 2021).

⁷⁵⁵ Lowana Veal “How Iceland is undoing carbon emissions for good” *BBC* (online ed, London, 17 June 2020); Roberto Dobles Mora “Costa Rica’s Commitment: On The Path to Becoming Carbon-Neutral” *UN Chronicle* (online ed, New York).

⁷⁵⁶ “Climate emergency declarations in 1,868 jurisdictions and local governments cover 820 million citizens” (14 May 2021) Climate Emergency Declaration <<https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>>.

(c) Money – wellbeing economics

Polanyi was mistaken when he predicted that money had been permanently decommodified with the fall of the gold standard. As seen above, today money is at the centre of almost every single human activity and international finance dominates the economy. Additionally, the rampant accumulation of capital facilitated by the global financial system has created the largest wealth gap ever recorded in human history. As signs of a third countermovement start to appear, governments, international organisations and academics have proposed counteracting the trends of global finance and inequality with a new economic model that breaks away from neoliberal economics.

Traditionally, the health of a national economy has been measured according to the growth of its GDP. In other words, it has been assessed on the basis of how many more goods and services were produced in comparison to the previous year, regardless of whether we need those products to have fulfilling lives and regardless of who benefited from the increase in production.⁷⁵⁷ Scholars and international institutions are attempting to replace that idea with a new economic model based on “sustainable, shared prosperity” that distributes wealth, instead of focusing on growth. According to this model, the only industries that should grow are those required for humanity to thrive through the satisfaction of human rights, and they should only grow to the point where they meet the planetary boundaries that should not be surpassed if the Earth is to conserve the Holocene-like conditions we enjoy today.⁷⁵⁸ Moreover, a key idea behind this new economic formulation is to stop current excessive marketisation from creating the type of social disintegration that is described in Polanyi’s *The Great Transformation*.⁷⁵⁹ Although there are many versions of this argument, they can be grouped together under the concept of “wellbeing economics”.⁷⁶⁰

The ideas behind wellbeing economics have been popularised in recent years, by Thomas Piketty’s study of historical inequality in *Capital in the Twenty-First Century* or Kate Raworth’s *Doughnut Economics*,⁷⁶¹ but they are certainly not new. The demand to distribute

⁷⁵⁷ Bregman, above n 713, at 103-108; also see, as an example of an alternative to GDP, the social welfare function in MD Adler *Measuring Social Welfare: An Introduction* (Oxford University Press, Oxford, 2019) at ch 1.

⁷⁵⁸ Raworth, above n 653, at 25-26, 39, 41-42; see also Stephen Quilley “System Innovation and a new ‘Great Transformation’: Re-Embedding Economic Life in the Context of De-Growth’ (2012) 3 *Journal of Social Entrepreneurship* 206.

⁷⁵⁹ Katherine Trebeck and Jeremy Williams *The Economics of Arrival: Ideas for a grown-up economy* (Policy Press, Bristol, 2019) at 87-88.

⁷⁶⁰ At 72, 99.

⁷⁶¹ Piketty, above n 6; Raworth, above n above n 653.

wealth, for example, can be attributed to late-19th to mid-20th century socialists, as seen throughout this thesis. The notion of “degrowth” is rooted in the environmental movements of the 1960s and 1970s.⁷⁶² Before that, the idea of attaining a balance, instead of always moving forward or up, was already contained in several cultures. The Māori notion of *takarangi*, for example, refers to the type of wellbeing that encompasses ecological, spiritual, kinship and economic prosperity.⁷⁶³

However, it is not until recently, in the aftermath of the GFC, that the principles behind wellbeing economics are starting to become the foundations of the economic models of some countries, cities and businesses, from Yunnan Province in China, to Amsterdam in the Netherlands, to Sainsbury’s supermarkets in the United Kingdom.⁷⁶⁴ Some governments (New Zealand, Scotland, Iceland, Wales and Finland) have come together under the banner of the Wellbeing Economy Alliance (WEAll) to form the Wellbeing Economy Governments partnership (WEGo) and have started adapting their economic policies to the type of logic proposed by wellbeing economics.⁷⁶⁵ To this effect, New Zealand, for example, has shifted from a traditional government budget to a “wellbeing budget” that seeks to put “the wellbeing of current and future generations of New Zealanders at the heart of everything [the government does]”.⁷⁶⁶

An international agreement to introduce a “global wealth tax” is now on some governments’ agenda as well. This idea was first suggested by Piketty (although even he believed it was a utopia) as a progressive annual tax on the net value of personal assets to then be redistributed globally.⁷⁶⁷ While still far from that proposal, the Biden administration in the United States has announced that it will seek to establish a minimum corporate tax rate among (at least) G20 countries to avoid the “race to the bottom” that usually takes place when some countries attract foreign investment by reducing their tax rates. Moreover, the proposed agreement would have the objective of ensuring that governments can “raise sufficient revenue to invest in essential public goods and respond to crises, and that all citizens fairly share the

⁷⁶² Giorgios Kallis *Degrowth* (Agenda Publishing, New York, 2018) at 2-5.

⁷⁶³ Raworth, above n 653, at 46.

⁷⁶⁴ At 48; Daniel Boffey “Amsterdam to embrace ‘doughnut’ model to mend post-coronavirus economy” *The Guardian* (online ed, London, 8 April 2020).

⁷⁶⁵ “Our Work / WEGo” Wellbeing Economy Alliance <<https://wellbeingeconomy.org/wego>>.

⁷⁶⁶ The Treasury New Zealand “Wellbeing Budget 2020: Rebuilding Together” (14 May 2020) B.2 at 5.

⁷⁶⁷ Piketty, above n 6, at 665.

burden of financing growth”.⁷⁶⁸ If successful, this global minimum corporate tax rate will reverse the neoliberal practice of cutting taxes to attract investment and benefit transnational corporations.

Advocates of wellbeing revive some aspects of the second countermovement but shed many others. For example, they emphasise the need to distribute wealth better, which is an idea that can be linked to the successes of governments in the mid-20th century to introduce wealth taxes and decommodify essential public services. However, contrary to the Keynesian ideal of achieving full employment so that consumption can increase and the economy can grow, wellbeing economics proposes focusing on quality of life rather than growth, suggesting countries should approach that goal by distributing the wealth that already exists more effectively, instead of continuing to seek a continuous expansion of wealth. Moreover, wellbeing economics takes into account issues of environmental protection and sustainable development that were absent during the second countermovement. Therefore, as with proposals regarding UBI and zero-carbon economies, wellbeing economics represents a break from the policies that inspired the ICESCR.

C Conclusion

The effects of neoliberal practices on society have extended beyond the wildest dreams of the first exponents of economic liberalism. Just as the welfare state was the most politically viable version of socialism, neoliberalism has become the most politically viable version of economic liberalism. While some authors claim that the apogee of neoliberal doctrine was the 1990s, its effects are still manifest in our society, from the largest mergers between transnational companies, to the way we choose to spend our leisure time or how we interact with each other. However, looking at our reality through a Polanyian lens, we can foresee a world where social protection is once more the prevailing principle of the double movement (or where it at least achieves a balance in that movement).

As more signs of a third countermovement continue to appear, individuals, activist groups and governments are imagining that world and tracing a path towards it. If they were to succeed, we might work significantly less but have the same income to engage in activities of

⁷⁶⁸ “Remarks by Secretary of the Treasury Janet L. Yellen on International Priorities to the Chicago Council on Global Affairs” (April 5, 2021) US Department of Treasury <<https://home.treasury.gov/news/press-releases/jy0101>>.

leisure that provide purpose. Some of the effects of climate change are irreparable, but the decommodification of our nature and land might mean that we still have a chance of mitigating some of those effects and of building more resilient societies. A successful third countermovement could also precipitate the redistribution of all the wealth made during the neoliberal era, leading to the eradication of poverty, equality of opportunity, and social cohesion and stability. Governments might stop striving for economic growth and instead focus on ensuring we have opportunities to be happier with less. In Polanyi's words, we could finally satisfy "the right to live".⁷⁶⁹

The policies highlighted in the second half of this chapter share the same goal as those of the second countermovement. They seek to mitigate the detrimental effects of the market economy and present an alternative to economic liberalism. However, they approach that goal differently, because they address the specific challenges of the neoliberal era. As a response to the retrenchment of the welfare state, labour automation and the effects of the Covid-19 pandemic on economic growth and unemployment (see section B.2.a), UBI not only reconceptualises the decommodification of labour, but might substitute the right to work with a right to income. The pursuit of zero-carbon economies is a proposal that could not have fit into the second countermovement, but has become especially relevant in the last decades as evidence of climate change and its harmful consequences – as well as the unparalleled levels of greenhouse gases emitted during the last 40 years – continues to capture the attention of societies and governments. Finally, wellbeing economics steps away from the pursuit of economic growth that guided governments during both the second countermovement and the neoliberal era, to instead suggest that it might be more appropriate for countries to focus on distributing the wealth that they have already created. This reality presents significant challenges and opportunities for the implementation of economic, social and cultural rights.

⁷⁶⁹ Polanyi, above n 19, at 78.

V *The ICESCR: An Instrument for a Third Countermovement?*

As seen until now, by the time the ICESCR entered into force and its monitoring system was put in place, the global political and economic setting was significantly different from what it had been when the instrument was drafted. The second countermovement had ended and, instead, a bolder form of economic liberalism – neoliberalism – had become installed in public governance around the world. While some scholars, advocacy groups and governments have started taking actions against neoliberal practices, a third countermovement has not yet crystallised. This chapter will study how that new reality has impacted the implementation of the ICESCR and will consider the ways in which the treaty can still be of (somewhat limited) use during a third countermovement.

The idea that the ICESCR still has a role to play in the struggle against neoliberalism has been rejected by influential contemporary scholarship on economic, social and cultural rights. Moyn and Whyte argue that the ICESCR has facilitated the rise of neoliberal ideas and practices, instead of being an obstacle for them, because of its weak obligations regarding material equality.⁷⁷⁰ To reach this conclusion, however, those authors focus on how some NGOs have utilised human rights in a way that makes them compatible with neoliberal theory. Their analysis has not taken into account the work of the international human rights bodies that, contrary to NGOs, have a legal mandate to interpret the ICESCR and monitor its implementation. This chapter fills that void by conducting an analysis of the work of the Committee ESCR and the Special Rapporteur. Examining the work of those bodies from a neo-Polanyian perspective reveals a very different reality in which the international human rights system has gradually but systematically resisted, instead of being complacent with, neoliberal trends for more than 30 years.

Most of my analysis will centre on the Committee ESCR's general comments, complemented with other statements and decisions from that body. Contrary to all other UN human rights treaties, the ICESCR did not foresee or create a body that would be in charge of monitoring States Parties' compliance with the treaty.⁷⁷¹ However, in 1978, the ECOSOC formed the *Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights* "for the purpose of assisting the Council in the

⁷⁷⁰ Moyn, above n 2, at 57-61, 67, ch 7; Whyte, above n 2, at 101-114.

⁷⁷¹ Marco Odello and Francesco Seatzu *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge, London, 2013) at 108-110.

consideration of reports submitted by States parties to the [ICESCR]”.⁷⁷² This working group did not carry out any interpretative analysis of the ICESCR’s clauses, which is why its output is not taken into account in this thesis. In 1985, the ECOSOC decided to change the working group’s name to Committee on Economic, Social and Cultural Rights, as it continues to be called today.⁷⁷³ The Committee held its first session in Geneva in March 1987.⁷⁷⁴

This Committee ESCR has four main functions: to examine periodic reports by States Parties, to elaborate general comments, to receive and consider inter-state complaints (of which none have been submitted so far), and to receive and consider individual communications (since 2013).⁷⁷⁵ In its general comments, the Committee ESCR “conveys to Contracting States its understanding of the meaning of the [economic, social and cultural rights]” contained in the ICESCR.⁷⁷⁶ These general comments are not academic works or legislative acts. Rather, they are a method of developing the Committee ESCR’s jurisprudence on ICESCR rights and obligations. Their main objective is to clarify the meaning of the rights and obligations established in the ICESCR, so that States Parties can adapt their conduct to the guidelines set in those documents.⁷⁷⁷ There are presently 25 general comments, ranging from 1989 to 2020.⁷⁷⁸

Odello and Seatzu indicate that, while the general comments have generally extended the jurisprudence and “promoted our understanding of [economic, social and cultural rights] protection in international law to a considerable extent”, it can also be said that:⁷⁷⁹

...there have been certain General Comments in which the clear lack of consensus [among the members of the Committee ESCR] has resulted in less than acceptable legal reasoning. Indeed, some General Comments have been rather laconic as to be almost entirely devoid of legal reasoning. Although the General Comments of the [Committee ESCR] are aimed at clarifying the meaning of the rights protected by the ICESCR, these too are of mutable quality and not always updated.

Therefore, while the Committee ESCR’s general comments have “practical force” regarding the ICESCR’s interpretation,⁷⁸⁰ they must be examined with caution. Some explanations for the lack of consistency in the quality of the general comments are that its 18

⁷⁷² *Composition of the Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights* ECOSOC Res 1978/10 (1978), at [a].

⁷⁷³ *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights* ECOSOC Res 1985/17 (1985), at [1].

⁷⁷⁴ *First session of the Committee on Economic, Social and Cultural Rights* ECOSOC Res 1986/123 (1986).

⁷⁷⁵ Odello and Seatzu, above n 771, at 25; “Committee on Economic, Social and Cultural Rights: Monitoring the economic, social and cultural rights” OHCHR <www.ohchr.org/EN/pages/home.aspx>.

⁷⁷⁶ Odello and Seatzu, above n 771, at 29.

⁷⁷⁷ At 29, 128.

⁷⁷⁸ See “UN Treaty Body Database” OHCHR <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11>.

⁷⁷⁹ Odello and Seatzu, above n 771, at 128.

⁷⁸⁰ At 29.

members are not necessarily all legal experts; that the Committee ESCR is under-resourced; that it favours voting by consensus; and that it has refused to take advantage of the jurisprudence of regional human rights courts to develop its own jurisprudence.⁷⁸¹ Despite these valid criticisms, the Committee ESCR is still the main interpreter of the ICESCR's content and therefore its general comments are authoritative (although not binding) in regards to that treaty. Additionally, it is to be expected that the Committee ESCR's three other functions will be informed by the general comments and, to a lesser extent, that States Parties' practice might also be guided by those documents.

I also analyse the totality of views on individual communications the Committee has produced to this day. The body began receiving individual communications in 2013, when the Optional Protocol to the ICESCR received its 10th instrument of ratification.⁷⁸² Because the procedure for individual communications is fairly recent and there are only 26 States Parties to the Optional Protocol at the moment,⁷⁸³ the Committee ESCR has not been able to develop a substantial body of jurisprudence yet. Since 2013, the Committee ESCR has taken 59 final decisions in relation to individual communications, of which only 10 have consisted of adoption of views (most of them involving Spain and the right to housing). The rest have resulted in the discontinuance of the communication (mainly due to an arrangement between the alleged victim and the State Party) or in a declaration of inadmissibility of the communication.⁷⁸⁴ However, as quasi-judicial decisions, the adoptions of views on individual communications are the most authoritative source regarding the ICESCR's interpretation.⁷⁸⁵ They are also helpful in assessing whether the Committee ESCR's approach changes when applying the ICESCR's obligations to concrete cases. While the hundreds of Committee ESCR's concluding observations on States Parties' reports might also be useful in that regard, analysis of these observations would extend beyond the scope of this dissertation.

Although the Committee ESCR is, by mandate, the only international body with the official capacity to monitor the implementation of the ICESCR, there are several other UN bodies whose mandates cover, directly or indirectly, the economic, social and cultural rights recognised in that treaty. While their statements and decisions do not carry as much authority

⁷⁸¹ At 129.

⁷⁸² "Chapter IV Human Rights: 3.a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (23 May 2021) United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4>.

⁷⁸³ "Status of Ratification Interactive Dashboard", above n 4, at Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

⁷⁸⁴ See "Jurisprudence" (2020) OHCHR <juris.ohchr.org>.

⁷⁸⁵ Odello and Seatzu, above n 771, at 30-31.

as those of the Committee ESCR, the comments found in those documents also shine a light on the relationship between the ICESCR and the countermovement.

Of these bodies, I have chosen to focus on the output of the Special Rapporteur for several reasons. In contrast with other special procedures of the UN Human Rights Council – like the Special Rapporteurs on the rights to food, education or development, or the Working Group on the issue of human rights and transnational corporations and other business enterprises – the Special Rapporteur has a wider mandate that encompasses all those issues by examining how they relate to extreme poverty. By focusing on questions of extreme poverty and inequality, the Special Rapporteur’s mandate covers the majority of the principles I have identified with the second countermovement. This allows me to analyse whether the Special Rapporteur has chosen to defend those principles in its interpretation of the ICESCR, or whether it has shifted its approach to adapt to the current trends of resistance against neoliberal practices. Moreover, because its mandate is not linked only to the ICESCR, but to human rights in general, the Special Rapporteur’s work illuminates how that treaty fits into wider efforts for social protection and where it is being excluded. Finally, I have chosen this mandate over others because it highlights the most detrimental effects of neoliberal policies on people’s wellbeing, which fits well with my neo-Polanyian approach.

The Special Rapporteur is also a fairly young body that was first established in 1998 under resolution 1998/25 of the Commission as an independent expert.⁷⁸⁶ The Special Rapporteur now reports to the Human Rights Council and has three main tasks: presenting two thematic reports per year, one to the Human Rights Council and another one to the UN General Assembly; reporting on country visits (two per year); and communicating concerns to governments regarding extreme poverty and human rights.⁷⁸⁷ So far, there have been five special rapporteurs with this mandate: Anne-Marie Lizin (1998–2004), Arjun Sengupta (2004–2008), Magdalena Sepúlveda Carmona (2008–2014), Philip Alston (2014–2020) and the current Special Rapporteur, Olivier De Schutter (2020–).⁷⁸⁸

For the purposes of this thesis, I will focus mostly on the Special Rapporteur’s thematic reports as these discuss issues that can be associated with a potential third countermovement

⁷⁸⁶ *Human Rights and extreme poverty* UN Doc E/CN.4/1998/25 (22 December 1997) at [6].

⁷⁸⁷ “Special Rapporteur on extreme poverty and human rights” OHCHR <www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx>; “Olivier De Schutter: UN Special Rapporteur on extreme poverty and human rights” UN Special Rapporteur on Extreme Poverty and Human Rights <www.srpoverity.org/about/the-mandate/>.

⁷⁸⁸ “Special Rapporteur on extreme poverty and human rights”, above n 787.

against neoliberal dominance. By doing so from a human rights perspective, they provide an insight into the role of the ICESCR regarding those issues. However, because the Special Rapporteur's mandate is not tied exclusively to the ICESCR, it has had more flexibility to resist neoliberal practices outside of the confines set by the principles of the second countermovement. This allows me to highlight the contrast between the Special Rapporteur's bolder efforts to resist the impact of neoliberal practices on human rights and the Committee ESCR's more reserved intimations.

The first section of this chapter will explore the Committee ESCR's reaction to the challenges presented by neoliberalism. Because, from a neo-Polanyian perspective, signs of a third movement only started to form after the GFC, the section will be divided into a before and after that economic crisis. The first part will concede that, at first, the Committee ESCR attempted to reconcile the ICESCR with neoliberal ideas by, for instance, claiming that the treaty did not favour one economic system over others. However, despite the few occasions in which the Committee has been complicit with neoliberal ideas and practices, I will also show that the majority of both the Committee ESCR's work before the GFC reflects a clear resistance to neoliberal practices, following the principles of the second countermovement. The second part will demonstrate that, in the aftermath of the GFC, the Committee ESCR's opposition to neoliberal practices has gradually become more adamant, possibly in acknowledgement of the rise of a third countermovement.

In that line, the latter section of this chapter will examine how the Committee ESCR and the Special Rapporteur have adapted to the awakening of a third countermovement against economic liberalism. I will demonstrate that, due to their different degree of affiliation to the ICESCR (and consequently the second countermovement), the two human rights bodies have taken divergent approaches regarding their resistance to neoliberal policies and their promotion of policies that I have linked to an incipient third countermovement (see Chapter IV.B.2). While the Committee ESCR is more hesitant to recommend practices that steer away from the principles of the second countermovement, the Special Rapporteur is attempting to move past them to more effectively address the unique challenges of neoliberalism.

A *The Committee ESCR's Opposition to Neoliberalism*

As seen in Chapter III, the ICESCR was designed to embed the ideas and policies of the second countermovement into a binding international treaty. However, as discussed above, the Committee ESCR only started operating in the late 1980s, when the second countermovement had already been eroded by the rise of neoliberal practices. That raises the question, then, of whether international human rights bodies might have been initially complacent with neoliberalism. It could be that, by the time they began operating, the principles of the second countermovement were already too distant – in terms of both time and of the political economic reality – for those bodies to recognise that the initial intent of the ICESCR was to resist the detrimental consequences of the market economy in accordance with those principles. As seen below, there is enough evidence in the Committee ESCR's work to conclude that, while there were passages where it negated the ICESCR's drafters' strong commitment to resist economic liberalism, the overwhelming majority of its output before the GFC (and to a lesser extent, after it as well) did adhere to the principles of the second countermovement. After the GFC, with signs of a new countermovement starting to form, the Committee not only continued to uphold those principles but began to do so in a way that was more explicitly critical of neoliberal practices.

1 *Before the GFC: upholding the principles of the second countermovement*

There have been some instances – especially before the GFC – in which the Committee ESCR has distanced itself from the ICESCR's purpose of suppressing economic liberalism. The clearest example that the Committee was uncomfortable with openly expressing that purpose can be found in paragraph 8 of General Comment No 3 (1990). In it, the body stated:⁷⁸⁹

...in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of *a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy*, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems...

In observing that the ICESCR could be implemented within the confines of a laissez-faire economy, the Committee appears to be contradicting the findings of this thesis. My research has shown that the ICESCR's drafters, inspired by the second countermovement, did

⁷⁸⁹ *General Comment No.3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* UN Doc E/1991/23 (1990) at [8] (emphasis added).

affirm they saw the “desirability” (to use the Committee’s words) of a type of economic system where a strong interventionist state could reduce excessive commodification and inequality through the decommodification of essential services, and secure work and an adequate income for everyone (see Chapter III.C). All these objectives are incompatible with a laissez-faire economy. Furthermore, as shown, the ICESCR’s drafters were explicitly against that economic model. Why, then, did the Committee ESCR claim the treaty was “neutral” in relation to the type of economy required to realise economic, social and cultural rights?

One explanation is that the Committee, having been recently formed, was still in the process of establishing its authority and therefore did not want to alienate any States Parties at such an early stage by favouring one economic model over others. Another explanation is that the Committee’s members had different ideological backgrounds and therefore decided to combine their views. However, a plausible justification for the statement is that the Committee genuinely perceived that economic liberalism and the ICESCR were compatible. This last argument fits with Moyn, Whyte and Slaughter’s view that the human rights regime was complicit in the neoliberal state’s stability by being accommodating to its logic.⁷⁹⁰ It also suggests that the ICESCR’s original purpose, to push back against economic liberalism, was lost on the Committee in 1990.

The only aspect of paragraph 8 of General Comment No 3 that appears compatible with my thesis is the assertion that the ICESCR is neutral towards a mixed or a centrally planned economy. As I have shown, the second countermovement did indeed make allowances for market operations in most industries and the Committee has done likewise. In General Comment No 12 (1999), on the right to adequate food, it encouraged States Parties to facilitate “market systems that can move food from the site of production to where it is needed in accordance with demand”.⁷⁹¹ It also encouraged international organisations to provide aid in ways that do not have a negative impact on local producers and local markets.⁷⁹² In the subsequent general comment, on the right to education, the Committee reminded governments that private education is permitted under article 13(4) of the ICESCR, as long as that liberty “does not lead to extreme disparities of educational opportunity for some groups in society”.⁷⁹³ Furthermore, the Committee indicated that, even if private education institutions are operating

⁷⁹⁰ See Moyn, above n 2, at 57-61, 67, ch 7; Whyte, above n 2, at 101-114; Slaughter, above n 2.

⁷⁹¹ *General Comment No.12: The right to adequate food (art.11)* UN Doc E/C.12/1999/5 (12 May 1999) at [12].

⁷⁹² At [38].

⁷⁹³ *General Comment No.13: The right to education (article 13 of the Covenant)* UN Doc E/C.12/1999/10 (8 December 1999) at [30].

in a country, the state still has the “principal responsibility for the direct provision of education in most circumstances”.⁷⁹⁴

Although the Committee has not expressly repudiated its above-cited statement in General Comment No 3, it has attempted to retract its position in the 30 years since that comment was published. In General Comment No 9, written eight years later, the Committee ESCR clarified that, although General Comment No 3 had indeed stated that the ICESCR “adopts a broad and flexible approach” to the measures taken by each state, according to their “legal and administrative systems ... as well as other relevant considerations”, a State Party does not have complete discretion in the application of the treaty.⁷⁹⁵ In exercising that flexibility, the Committee indicated, States Parties must “use all means at [their] disposal” and comply with “fundamental requirements of international human rights law”.⁷⁹⁶ For instance, States Parties would not be able to exercise that flexibility to avoid incorporating the ICESCR’s provisions into domestic law.⁷⁹⁷ Because most of the ICESCR’s provisions follow principles of the second countermovement and are therefore incompatible with economic liberalism (see Chapter III.C), that lack of flexibility could arguably be the Committee’s way of implicitly retracting its stance in General Comment No 3.

Nonetheless, there is further evidence of the Committee ESCR’s tolerance of the logic of economic liberalism during the first years of its mandate. In General Comment No 7 (1997), it stated that home evictions are lawful “in case of non-payment of rent or of damage to rented property without any reasonable cause”, without attaching any other conditions for the protection of the tenant.⁷⁹⁸ This claim is consistent with the economic liberal view that the right to property is inviolable and admits no restrictions.

Additionally, while many economic, social and cultural rights were conceived by the ICESCR’s drafters as a way of promoting material equality in accordance with the second countermovement, that objective was not reflected in the Committee ESCR’s language before the GFC. In the first two decades of its operation, the Committee presented a confusing position regarding the minimum threshold that States Parties needed to meet in order to comply with ICESCR obligations. On one side, it referred to “essential features” or “minimum

⁷⁹⁴ At [48].

⁷⁹⁵ *General Comment No. 9: The domestic application of the Covenant* UN Doc E/C.12/1998/24 (3 December 1998) at [1].

⁷⁹⁶ At [2].

⁷⁹⁷ At [2, 3, 7, 8, 14].

⁷⁹⁸ *General Comment No.7: The right to adequate housing (art.11 (1) of the Covenant): Forced evictions* UN Doc E/1998/22 (1998) at [11].

essential[s]”.⁷⁹⁹ Then, concerning the right to education, for example, it provided a narrower list of requirements to fulfil “minimum core obligations”.⁸⁰⁰ In the case of the right to health, although the list of “minimum core obligations” was longer and more detailed, the Committee still considered it necessary to have two separate lists – one with “essential elements”, and the other with “minimal essential levels”.⁸⁰¹ Concerning the right to water, the Committee distinguished between “factors which apply in all circumstances” and “core obligations”.⁸⁰² Similar distinctions can be found in other general comments up until 2006.⁸⁰³

These phrases support the argument posed by recent scholars that human rights have gone hand in hand with neoliberal policy. In one of the only two passages where Moyn alludes to the Committee’s work, he argues that this type of language facilitates the expansion of neoliberal thought. Instead of focusing on transformational actions that could present an actual resistance to that form of economic liberalism, the Committee ESCR chose to set a conservative standard for social protection according to which the market is free to operate as long as a floor of basic needs is satisfied.⁸⁰⁴ While that might not have been the Committee’s intention, the “minimums” approach indicates that, during its first years, the Committee did not strongly reaffirm the ICESCR’s role in combatting neoliberal trends.

However, these indications that the Committee ESCR might have tolerated neoliberal thought are trivial compared to evidence that shows its commitment to social protection over economic liberalism, even before the GFC triggered the first signs of a third countermovement. The Committee ESCR has implicitly acknowledged that there is a double movement between the principles of economic liberalism and social protection, in which the market can act in detriment of economic, social and cultural rights if the state does not intervene. In a 1994 statement related to the World Summit for Social Development, the Committee signalled that.⁸⁰⁵

Factors such as the reduced role being played by the State in a great many societies, an increasing emphasis on policies of deregulation and privatization, a markedly greater

⁷⁹⁹ *General Comment No.3*..., above n 789, at [10]; *General Comment 13*..., above n 793, at [50].

⁸⁰⁰ *General Comment No.12*..., above n 791, at [14]; *General Comment No. 13*..., above n 793, at [57].

⁸⁰¹ *General Comment No.14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2000/4 (11 August 2000) at [43-44].

⁸⁰² *General Comment No.15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2002/11 (20 January 2003) at [12, 37].

⁸⁰³ See *General Comment No.18: The right to work (article 6 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/18 (6 February 2006) at [31].

⁸⁰⁴ Moyn, above n 2, at 200.

⁸⁰⁵ *The World Summit for Social Development and the International Covenant on Economic, Social and Cultural Rights: Statement of the Committee on Economic, Social and Cultural Rights (tenth session)* UN Doc E/C.12/1994/20 Annex V (1994) at [5].

reliance on free market mechanisms, and the globalization of an ever larger part of all national economies, have all combined to challenge many of the assumptions on which social policy-makers have previously operated...

This passage shows that, already by the mid-1990s, the Committee indirectly acknowledged that neoliberalism represented a significant shift in public governance that undermined the progress made by socialist welfare states and the New Deal. Then, the Committee made it clear that the way to address that challenge was to “reaffirm the fundamental values of social justice” because:⁸⁰⁶

...while the fundamental norms to be reflected in the outcome of the Social Summit process can be expressed in relation to concepts such as ‘basic needs’, ‘extreme poverty’, or ‘human security’, it is surely counter-productive to continue the proliferation of such terms in the forlorn hope that yet another new label will create a new reality. Instead, it is time to return to basics, to reaffirm these fundamental values in a language which has clearly been accepted by the great majority of the world’s Governments and which has an empowering potential which is far greater than any of the ‘new’ terms... which are devoid of any power of mobilization or transformation.

Those “fundamental values”, considered the Committee, are enshrined in the norms of the ICESCR, which should be used as the basis for any development efforts.⁸⁰⁷ If those norms had been neglected until then, argued the international body, it was because of the political controversy that surrounded the implementation of human rights, especially as a consequence of the ideological confrontation of the Cold War.⁸⁰⁸ This statement is perhaps the closest the Committee ESCR has come to expressly recognising that the ICESCR is a product of the second countermovement. While not articulated in those terms, the Committee was not only upholding the principles of the second countermovement that informed the ICESCR’s content but resisting the idea that those principles could be substituted by new ways of resisting economic liberalism. It was almost clamouring for a return to a model of policymaking guided by the principles of the second countermovement, possibly recognising that there is no other way the ICESCR can thrive. That is why those principles have been constantly (although implicitly) indorsed by the Committee ESCR.

Principle 1. Governments should intervene when markets fail to provide social welfare

The Committee has made it clear that it believes markets fail in providing high levels of social welfare and therefore governments must intervene. In General Comment No 5 (1994),

⁸⁰⁶ At [5, 9].

⁸⁰⁷ At [6, 10].

⁸⁰⁸ At [7].

dedicated to the protection of persons with disabilities, the Committee interpreted article 2(2) of the ICESCR as including the obligation to take positive actions in relation to that section of the population.⁸⁰⁹ It believed those actions were necessary as:⁸¹⁰

In the absence of government intervention there will always be instances in which operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces.

In that same general comment, the Committee criticised “the increasing commitment of Governments around the world to market-based policies” and the turn towards privatisation of public services, relevant to the fourth principle of the second countermovement.⁸¹¹ In another general comment, the Committee indicated that States Parties can also violate ICESCR provisions by omission when they fail to sufficiently regulate non-state actors such as business enterprises.⁸¹² In a similar line, the Committee argued that the full realisation of the right to benefit from moral and material scientific, literary or artistic productions has to be balanced with the regulation of private enterprises and the control of prices, especially of scientific creations like medicine.⁸¹³

Other general comments recognise the principle that governments should intervene when economic liberalism does not lead to the general population’s wellbeing, by highlighting the negative impacts of neoliberal policy. For instance, in General Comment No 11 (1999), the Committee claimed that many countries’ governments had not been able to provide a plan of action to grant access to primary education to more than 130 million children because of the obstacles presented by the structural adjustment programmes that began in the 1970s, the debt crises of the 1980s and the financial crises of the 1990s.⁸¹⁴

In a more indirect way, the Committee has used a pessimistic tone to refer to the current state of affairs concerning some economic, social and cultural rights, as a consequence of governments’ negligence. For example, General Comment No 13 (1999) commented on the

⁸⁰⁹ *General Comment No.5: Persons with disabilities* UN Doc E/1995/22 (1994) at [5, 9].

⁸¹⁰ At [12].

⁸¹¹ *General Comment No.5...*, above n 809, at [11].

⁸¹² See, for example, *General Comment No.14...*, above n 801, at [48-49, 51].

⁸¹³ *General Comment No.17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1(c), of the Covenant)* UN Doc E/C.12/GC/17 (12 January 2006) at [35, 42, 48, 55].

⁸¹⁴ *General Comment No.11: Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/1999/4 (10 May 1999) at [3].

“unacceptably low levels” of teachers’ working conditions “in recent years”.⁸¹⁵ General Comment No 7 (1997) condemned “the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector”.⁸¹⁶ In General Comment No 14 (2000), the Committee claimed that enjoying the right to health “remains a distant goal” and, for the poor, it “is becoming increasingly remote”.⁸¹⁷ In General Comment No 12 (1999), on the right to adequate food, the Committee observed that, in both economically developing and developed countries, malnutrition and under-nutrition are not caused by a lack of food, but by a “lack of access to available food” by the poor.⁸¹⁸ Therefore, the Committee ESCR has acknowledged the detrimental effects of economic liberalism from the start, though not explicitly attributing them to neoliberal practices.

Principles 2, 3 and 4. Material equality and the decommodification of property and services

As previously discussed (see Chapter III.C), although the pursuit of material equality was one of the main principles of the second countermovement, the ICESCR did not establish a clear obligation in that regard. However, the treaty did reflect the way most governments sought material equality during the mid-20th century – by limiting private property that served a social purpose and by offering various essential services without cost. Consequently, before the GFC, the Committee ESCR’s work followed the same pattern of focusing on the means rather than on the end.

Before that financial crisis, material equality was only addressed briefly or indirectly by the Committee ESCR. In a 2001 statement on the interrelations between poverty and the ICESCR, the Committee indicated that equality, along with non-discrimination, are “integral elements of the international human rights normative framework, including the International Covenant on Economic, Social and Cultural Rights”.⁸¹⁹ Additionally, it insisted that international norms concerned with equality “have profound implications for anti-poverty

⁸¹⁵ *General Comment No.3...*, above n 789, at [6]; *General Comment No.7...*, above n 798, at [9]; *General Comment No.13...*, above n 793, at [27].

⁸¹⁶ *General Comment No.7...*, above n 798, at [9].

⁸¹⁷ *General Comment No.14...*, above n 801, at [5].

⁸¹⁸ *General Comment No.12...*, above n 791, at [5].

⁸¹⁹ *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights: Statement Adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001* UN Doc E/C.12/2001/10 (10 May 2001) at [9].

struggles”⁸²⁰ and that poverty “has always been one of the central concerns of the Committee”, even if the term is not explicitly contained in the ICESCR.⁸²¹

General Comment No 16 (2005), on parity between men and women, deals with the intersection between gender equality and material equality.⁸²² The Committee ESCR addresses the need for “equality in the allocation of resources” for the benefit of women, which can be accomplished through a series of policies such as: women’s incorporation into training programmes for work; the elimination of pay differentials and the underlying causes of this problem; guaranteeing women’s freedom to join workers’ associations; social security; free consenting and violent-free marriages; and access to housing, food, health, education, and opportunities for scientific research.⁸²³ The Committee ESCR’s emphasis on the promotion of material equality through labour opportunities also coincides with the second countermovement’s principle that governments should secure adequate income through employment. The Committee ESCR did not refer to material equality beyond these brief statements prior to the GFC.

Regarding private property, early on, in General Comment No 4 (1991), the Committee ESCR referred to it as an “entitlement”. Furthermore, it suggested that, if private property were to be maintained as an institution, “access to land by landless or impoverished segments of the society should constitute a central policy goal”.⁸²⁴ Therefore, the Committee shared the view, developed by socialists and applied in practice by welfare states during the second countermovement, that land is not an inviolable entitlement but can serve a public purpose (see Chapter II.B.2–3). That position constitutes a direct confrontation to economic liberalism.

A similar observation was made by the Committee ESCR in General Comment No 17 (2006), which deals with the protection of the moral and material interests resulting from scientific, literary and artistic production. In this document, the international body made allowances for private profit, but made it clear that the moral and material interests recognised in article 15(1.c) of the ICESCR – the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production – are different

⁸²⁰ At [11].

⁸²¹ At [1, 6].

⁸²² *General Comment No.16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art.3 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2005/4 (11 August 2005) at [9].

⁸²³ At [22-31]; also see *General Comment No.18...*, above n 803, at [13].

⁸²⁴ *General Comment No.4: The right to adequate housing (art. 11(1) of the Covenant)* UN Doc E/1992/23 (1992) at [8.e].

from intellectual property. The objectives of that article extend well beyond a mere protection of property, as they are aimed at incentivising inventiveness and creativity; disseminating creative productions; developing cultural identity and safeguarding cultural heritage; preserving the integrity of productions “for the benefit of society as a whole”; and protecting “the personal link between authors and their creations and between peoples”.⁸²⁵

Moreover, the ICESCR protects authors’ material interests to the extent that their adequate remuneration is a manifestation of their right to work and receive an income – another of the second countermovement’s pursuits.⁸²⁶ The Committee emphasised that those basic material interests are different from intellectual property regimes, which “primarily protect business and corporate interests and investments”.⁸²⁷ It also indicated that the material benefits acquired by a creator can be achieved by a one-time payment or during a limited period of time that does not extend over their entire lifespan, and that “the private interests of authors should not be duly favoured” as “the public interest in enjoying broad access to their productions should be given due consideration”.⁸²⁸ This way, States Parties can guarantee access at a reasonable price for essential goods like medicine, plant seeds and learning materials, as well as prevent the commercialisation of patents from violating the rights to life, health and privacy.⁸²⁹

Hence, the Committee ESCR has been consistent with the attitude of second countermovement governments regarding private property – to allow both private property and capital, but restrict their excessive accumulation and, wherever appropriate, limit them to satisfy an interest of social protection against the excesses of the market economy. Rather than recognising a right to profit from property, the Committee has emphasised property as “a social product [with] a social function”.⁸³⁰

Regarding the operation of decommodified public services, the Committee ESCR’s position coincides with the second countermovement’s principle that those services exist to guarantee material equality. For instance, in 2001, the Committee expressly stated that even though rights such as an adequate standard of living (which includes services related to housing

⁸²⁵ *General Comment No.17...*, above n 813, at [1-2].

⁸²⁶ At [4, 31].

⁸²⁷ At [2].

⁸²⁸ At [16, 35].

⁸²⁹ At [35].

⁸³⁰ At [35].

and food), health and education “are not a panacea”, they promote equality and contribute towards the eradication of poverty.⁸³¹

Overall, the Committee has issued six general comments that deal with rights to public services directly and has addressed those rights indirectly in most other general comments as well. General Comments No 4 (1991) and 7 (1997) discussed the right to adequate housing and presented guidelines for forced evictions. The Committee indicated that, when it comes to housing, “[p]olicies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others”.⁸³² Moreover, when the Committee ESCR pointed out that the shelter provided by housing should not be seen “exclusively as a commodity”, and that housing subsidies and rent control should be implemented, it confirmed the link between decommodification, equality and the rights to public services as conceived during the second countermovement and as later embedded in the ICESCR.⁸³³

Commenting on the legality of forced evictions, the Committee argued that evictions should never result in homelessness, which forces the state to provide “adequate alternative housing, resettlement or access to productive land” for evicted persons.⁸³⁴ Moreover, the Committee condemned evictions that are carried out to benefit already advantaged groups; for “urban renewal, housing renovation, city beautification programmes ... unbridled speculation in land”, among other reasons.⁸³⁵ In other words, housing should not depend on the rules of the market. Nevertheless, while the state can meet its obligations through direct actions such as public housing or housing subsidies,⁸³⁶ the Committee also encouraged the participation of private enterprise in a “mix of public and private measures” for housing, instead of placing the entire burden of the obligation on the state.⁸³⁷ Therefore, in line with the second countermovement, the Committee left some space for the market as long as it operates within the confines set by the state for social protection.

The Committee ESCR elaborated on the right to education, another public service that was decommodified during the second countermovement, in General Comments No 11 (1999)

⁸³¹ *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights...* above n 819, at [1, 6].

⁸³² At [11].

⁸³³ At [7, 8.c].

⁸³⁴ *General Comment No.7...*, above n 798, at [16].

⁸³⁵ At [7].

⁸³⁶ *General Comment No.4...*, above n 824, at [8, 14].

⁸³⁷ *General Comment No.7...*, above n 798, at [10, 14].

and 13 (1999). The aim to decommodify this service is evident in the Committee's warning that a free public education cannot entail additional fees or indirect costs, such as "voluntary" levies or expensive uniforms.⁸³⁸ Additionally, just as with the right to housing, the Committee emphasised that measures related to education should not disproportionately benefit sectors of the population that are already at an advantage, especially economically.⁸³⁹ The human rights body claimed that:⁸⁴⁰

As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.

Thus, for the Committee, just as for the ICESCR's drafters and the actors of the second countermovement, education is a service that should be available to everyone on equal terms, regardless of their families' income or social status – the purpose of the right is to disassociate education from monetary considerations.

Finally, General Comment No 14 (2000) dealt with the right to health. The Committee ESCR emphasised that, just as with housing and education, the objective of a public health system is to provide "equality of opportunity for people to enjoy the highest standard of health", especially considering the inequality in health standards between developed and developing countries – a status the Committee considered "politically, socially and economically unacceptable".⁸⁴¹ In that regard, those living in poverty should be prioritised by the health system and socioeconomic preconditions – including resource distribution and geographical location – should be taken into account as determinants of access to health services.⁸⁴² Investments in health services, according to the Committee, "should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefitting a far larger part of the population".⁸⁴³ For the Committee, "[e]quity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households".⁸⁴⁴ One of the principal objectives of the right to health, then, is to pursue equality through decommodification.

⁸³⁸ *General Comment No.11*..., above n 814, at [7].

⁸³⁹ *General Comment No.13*..., above n 793, at [35].

⁸⁴⁰ At [1].

⁸⁴¹ *General Comment No.14*..., above n 801, at [8, 38].

⁸⁴² At [5, 9, 10, 36].

⁸⁴³ At [19].

⁸⁴⁴ At [12.b.iii].

Other public services, in addition to those explicitly embedded in the ICESCR, also ensure equality from the perspective of Committee ESCR. For example, the Committee ESCR referred to the need for modes of transport that are accessible to workers with disabilities.⁸⁴⁵ Public and private “specialized services to assist and support individuals in order to enable them to identify and find available employment”, at both the national and local level, are another example.⁸⁴⁶

Because the ICESCR focuses on services more than on resources – except perhaps in regard to food, clothing and housing in article 11 – only a few of the Committee’s general comments have dealt with the nationalisation or decommodification of key resources (another technique associated with the second countermovement). However, in General Comment No 15, concerning the right to water, the Committee stated that the realisation of that right should be expeditious “since all States parties exercise control over a broad range of resources, including water”.⁸⁴⁷ Moreover, it argued that “[w]ater should be treated as a social and cultural good, and not primarily as an economic good”.⁸⁴⁸ These statements suggest that the Committee was encouraging the public ownership and decommodification of such a key resource as water. Moreover, tying that form of decommodification to the pursuit of equality, it established that farmers who are disadvantaged or marginalised should “have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology”.⁸⁴⁹

The Committee also warned governments that investments on water supply services and facilities should not disproportionately favour “a small, privileged fraction of the population” instead of benefiting a larger part of the population.⁸⁵⁰ Moreover, governments should take special measures to guarantee the right to water of particularly vulnerable groups, including pricing policies “based on the principle of equity” to guarantee the affordability of water regardless of whether water services are public or private.⁸⁵¹ As the Committee stated, “[e]quity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households”.⁸⁵² Even when an individual cannot pay for

⁸⁴⁵ *General Comment No.5...*, above n 809, at [23].

⁸⁴⁶ *General Comment No.18...*, above n 803, at [12.a, 26].

⁸⁴⁷ *General Comment No.15...*, above n 802, at [18].

⁸⁴⁸ At [11].

⁸⁴⁹ At [7].

⁸⁵⁰ At [14].

⁸⁵¹ At [16, 27, 44.a].

⁸⁵² At [27].

water, the government should ensure at least the “minimum essential level of water” to that person.⁸⁵³ Again, this is a clear indication that the Committee ESCR sees decommodification and resistance against the excesses of the market economy as essential purposes of the ICESCR.

Principle 5. Everyone should have an adequate income, ideally through employment

As seen previously in this thesis, one of the aspects that separates economic liberalism from economic models that favour social protection, like the welfare state, is their approach to labour. Under the logic of economic liberalism, employers have attempted to expand labour commodification to suit market interests. In contrast, under the principles of the second countermovement, governments sought to provide full employment while enhancing working conditions – a consideration embedded in the ICESCR (see Chapter III.C). In that line, in General Comment No 2 (1990) the Committee ESCR warned international organisations against getting involved in projects that use forced labour, involve discrimination against individuals or groups, or imply large-scale evictions that do not comply with international law.⁸⁵⁴ In General Comment No 5 (1994), it encouraged States Parties to ensure work to individuals with a disability. However, it also emphasised that those jobs should not be “low-paid jobs with little social and legal security [or] segregated from the mainstream of the labour market ... in so-called “sheltered” facilities under sub-standard conditions”.⁸⁵⁵ Migrant workers should also be guaranteed employment opportunities, according to the Committee.⁸⁵⁶

The Committee also commented on the obligation to guarantee adequate remuneration and working conditions throughout the 2000s. General Comment No 14 (2000), on the right to health, included a section on “the right to healthy [and natural] workplace environments”, referring to “the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment”.⁸⁵⁷ General Comment No 18 (2006) indicated that work in the ICESCR must be understood to mean “decent work”; that is, work that respects fundamental rights, is safe and provides enough remuneration for workers to “support themselves and their families”.⁸⁵⁸ The Committee did not shy away from warning private

⁸⁵³ At [57].

⁸⁵⁴ *General Comment No.2: International technical assistance measures (art. 22 of the Covenant)* UN Doc E/1990/23 (1990), at [6].

⁸⁵⁵ *General Comment No.5...*, above n 809, at [20, 21].

⁸⁵⁶ *General Comment No.18...*, above n 803, at [18].

⁸⁵⁷ *General Comment No.14...*, above n 801, at [15].

⁸⁵⁸ *A General Comment No.18...*, above n 803, at [7].

enterprises that, due to their “particular role in job creation”, they should base their activities on human rights standards.⁸⁵⁹

The importance placed on the role of the labour movement by the Committee ESCR confirms its identification with the ideals of the second countermovement. In General Comment No 10 (1998), the Committee placed the “labour movement” at an equal level of relevance for the satisfaction of economic, social and cultural rights as the judiciary, the public service and the private sector.⁸⁶⁰ In General Comment No 18 (2006), the Committee stated that “[c]ollective bargaining is a tool of fundamental importance in the formulation of employment policies” and indicated that trade unions are key in guaranteeing that the right to work is respected.⁸⁶¹

The right to social security, which stems from the aim to secure an income for everyone even when they cannot work, was also developed by the Committee ESCR in the period preceding the GFC. In General Comment No 19 (2008), the Committee ESCR perceived social security as a social justice initiative for “poverty reduction” and for “promoting social inclusion”.⁸⁶² Like the Commission, the Committee ESCR considered there are a wide range of causes that should be covered by social security. Although article 9 of the ICESCR does not enumerate those causes, the Committee ESCR included:⁸⁶³

(a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.

The Committee ESCR emphasised that, even if some forms of social security are policy options, non-contributory or universal schemes are required in almost every country to guarantee universal coverage. As the body explained, “it is unlikely that every person can be adequately covered through an insurance-based system”, especially taking into account persons working in the informal economy or in casual jobs, as well as indigenous peoples, non-nationals and internal migrants.⁸⁶⁴ Hence, the Committee ESCR upheld the objective of

⁸⁵⁹ At [52].

⁸⁶⁰ *General Comment No.10: The role of national human rights institutions in the protection of economic, social and cultural rights* UN Doc E/C.12/1998/25 (10 December 1998) at [3.a]; also see *General Comment No.23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/23 (27 April 2016) at [1].

⁸⁶¹ *General Comment No.18...*, above n 803, at [39].

⁸⁶² *General Comment No.19: The right to social security (art.9)* UN Doc E/C.12/GC/19 (4 February 2008) at [3].

⁸⁶³ At [2].

⁸⁶⁴ At [4.b, 23, 33-39, 50].

providing *everyone* with an adequate income, following the second countermovement's principles.

The only principle that is not widely reflected in the Committee ESCR's work pre-GFC is the last one – that international conflict can be avoided through social protection. While the Commission's members were acutely aware of the necessity of avoiding another international conflict, having recently suffered the horrors of the Second World War, perhaps that idea has dissipated in the more than 70 years since that conflict ended.

Overall, however, this section has shown that, without ever explicitly acknowledging that the origins of the ICESCR lie in the second countermovement, the Committee ESCR affirmed most principles of that countermovement in its body of work between 1989 and 2007. Nevertheless, while the Committee described many of the detrimental effects of an unchecked market under neoliberalism, it never explicitly mentioned "neoliberalism" or "economic liberalism" and its condemnation of their consequences was fairly weak even when it implicitly acknowledged that the ICESCR's purpose was to resist them.

2 After the GFC: a more vehement resistance against neoliberal practices

Following the GFC took place, the Committee ESCR began pointing out, with more vehemence than before, the negative effects of neoliberal policies on the enjoyment of economic, social and cultural rights. However, perhaps because a third countermovement has only slowly started to develop, the Committee ESCR did not change its tone towards neoliberalism until the mid 2010s.

In General Comment No 23 (2016), it expressed its discontent with the status quo "[a]lmost 50 years after the adoption of the [ICESCR]" by making reference to statistics concerning poor working conditions in most countries, especially in "special economic, free trade and export processing zones", and stating that "even in times of economic growth, many workers do not enjoy [just and favourable] conditions of work".⁸⁶⁵ Thus, the Committee implicitly acknowledged that the States Parties were not fulfilling the ICESCR's original intent to decommodify labour so workers could escape the oppressive logic of labour markets under economic liberalism.

⁸⁶⁵ *General Comment No.23...*, above n 860, at [2-3].

One year later, in General Comment No 24 (2017) on the relationship between business activities and the ICESCR, the Committee clearly communicated its stronger stance against the unchecked expansion of the market in the neoliberal era. The document started by acknowledging that, even if businesses contribute towards the realisation of economic, social and cultural rights by creating jobs and through private investment, the Committee was becoming increasingly aware of situations in which “corporate activities have negatively affected” those rights due to the lack of enforcement of human rights standards by states.⁸⁶⁶ This statement shows that the Committee was urging states to use the ICESCR as a tool against market excesses, the way its drafters intended it to be implemented.

The Committee then indicated that, while business activities can be harmful towards any individual, they tend to “disproportionately” affect vulnerable sectors of the population, such as women, children, indigenous peoples, workers in rural areas, ethnic and religious minorities, persons with disabilities, asylum seekers, refugees and undocumented migrants.⁸⁶⁷ While the state is normally not directly responsible for violations of the ICESCR by private actors, the Committee pointed out that it contributes to those breaches of international law when it “prioritize[s] the interests of business entities over Covenant rights without adequate justification, or when [it] pursue[s] policies that negatively affect such rights”.⁸⁶⁸ Some examples of this type of behaviour are: lowering the bar for the approval of new medicines; granting permits for exploration and exploitation of natural resources without free, prior and informed consent by the affected communities; or by “failing to regulate the real estate market and the financial actors operating on that market so as ensure access to affordable and adequate housing for all”.⁸⁶⁹

In addition, while before the GFC the Committee pointed out a trend towards privatisation without offering a concrete recommendation to stop it, in General Comment No 24 (2017) the Committee recognised the need to revert the systematic privatisation of public goods and services that has taken place in the age of neoliberalism. In one of the most transparently critical passages of neoliberal practices found in any of the Committee’s general comments, it indicated that, while privatisation “is not per se prohibited by the Covenant” even in industries and services “where the role of the public sector has traditionally been strong”,

⁸⁶⁶ *General Comment No.24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* UN Doc E/C.12/GC/24 (10 August 2017) at [1].

⁸⁶⁷ At [8].

⁸⁶⁸ At [12].

⁸⁶⁹ At [18].

private providers of public services should follow strict regulations regarding “public service obligations”.⁸⁷⁰ The Committee was “particularly concerned” that:⁸⁷¹

...goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation.

The Committee referred to private education as an example of an area where either only the “wealthiest segments of society” could have access to the highest standards of that service or the service was provided without meeting “minimum education standards”. As a consequence, those who cannot afford private education or have been historically marginalised do not have access to adequate services.⁸⁷² Therefore, the Committee indicated that, in certain cases, the only way for States Parties to the ICESCR to comply with their obligations is to “directly provide goods and services essential to [the] enjoyment [of economic, social and cultural rights]”.⁸⁷³ This was consistent with most of the Commission’s delegates’ position that public and private services can coexist, but that excessive marketisation can have perverse effects on those services. Without explicitly using the term “decommodification”, the Committee established a strong relationship of causality between violations of economic, social and cultural rights and the excessive commodification of key services and resources.

That link between decommodification and material equality, pertinent for an incipient third countermovement as much as it was for the second, has been stressed by the Committee on several occasions. Commenting on the 2030 Agenda for Sustainable Development, the Committee emphasised the need to ensure that all people, especially those who are socially marginalised or victims of discrimination, have “access to resources and services they need to live a life of dignity”. This, in its opinion, is conducive to the elimination of “conditions that perpetuate systematic patterns of inequality”.⁸⁷⁴ In its statement on the Covid-19 pandemic, the human rights body underscored the importance of decommodification in times of crisis:⁸⁷⁵

⁸⁷⁰ At [21].

⁸⁷¹ At [22].

⁸⁷² At [22].

⁸⁷³ At [23].

⁸⁷⁴ *The pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development: Statement by the Committee on Economic, Social and Cultural Rights* UN Doc E/C.12/2019/1 (5 April 2019) at [9].

⁸⁷⁵ *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights: Statement by the Committee on Economic, Social and Cultural Rights* UN Doc E/C.12/2020/1 (17 April 2020) at [6].

Inadequate public goods and social programmes also deepen global income and wealth inequalities. Those living in poverty cannot afford to purchase [essential] goods and services in the private market, and they bear the disproportionate burden of the economic consequences of quarantines, lockdowns and the adverse national and international economic situation.

Therefore, the Committee recommended States Parties to strengthen health-care systems and social programmes that had been “weakened by decades of underinvestment” (presumably due to neoliberal trends), an issue that, it said, only worsened with the GFC. Only by reinvesting in those services, claimed the Committee ESCR, could states avoid the “multiple, intersecting forms of inequality, including deep inequalities of income and wealth both within and between countries”.⁸⁷⁶ Additionally, the Committee emphasised the need to avoid “profiteering” on essential foodstuffs and medical supplies, and recommended that states reassess intellectual property regimes that present obstacles to universal access to the benefits of scientific advancements.⁸⁷⁷ Thus, the body was still upholding the second countermovement’s principle that one of the best tools to fight back against economic liberalism and promoting equality is the decommodification of key services and resources.

In General Comment No 24 (2017), the Committee ESCR held that the state’s obligation to protect individuals from violations to economic, social and cultural rights by corporate actors has both preventive and reactive elements. Regarding the former, the international human rights body called upon governments to adopt a legal framework that: requires businesses to carry out human rights due diligence (especially within extractive industries like mining and oil drilling); restricts marketing and advertising of goods that are harmful for public health; abstains from awarding public contracts to companies that cannot guarantee they will respect economic, social and cultural rights; carries out rent control in the private housing market; implements effective anti-corruption mechanisms; and institutes minimum legal wages that cover living costs.⁸⁷⁸ Reactively, states should guarantee “corporate accountability” by imposing criminal and administrative sanctions on businesses that violate economic, social and cultural rights, including lifting the corporate veil and revoking business licenses when necessary.⁸⁷⁹ All these actions exemplify the type of measures sought by the Committee ESCR to tilt back the balance of the double movement towards the principle of social protection.

⁸⁷⁶ At [4, 24].

⁸⁷⁷ At [21].

⁸⁷⁸ *General Comment No.24...*, above n 866, at [16, 19, 20, 32, 50].

⁸⁷⁹ At [15, 39, 42].

Moreover, the Committee is aware that the market economy has expanded more than ever before due to neoliberal policies. Also in General Comment No 24, it observed that States Parties' extraterritorial obligations were particularly significant because "[t]he past thirty years have witnessed a significant increase of activities of transnational companies, growing investment and trade flows between countries, and the emergence of global supply chains", as well as foreign private investments in public-private partnerships.⁸⁸⁰ The Committee's allusion to "the past thirty years" is a veiled reference to neoliberal policies. Moreover, the passage coincides with the neo-Polanyian argument that the current form of economic liberalism, aided by the phenomenon of globalisation, presents challenges that the second countermovement, and therefore the ICESCR's drafters, could not have predicted.

Indeed, since the GFC, the Committee has consistently warned States Parties about the pernicious effects of combining neoliberalism with globalisation. It has argued that privatisation has worse outcomes for the enjoyment of economic, social and cultural rights when it is combined with globalisation, deregulation and excessive protection of intellectual property.⁸⁸¹ Also in the context of globalisation, the Committee has warned states to refrain from violating economic, social and cultural rights when they enter into bilateral or multilateral agreements with other states, international organisations or multinational corporations; especially free trade agreements.⁸⁸² Furthermore, the Committee has encouraged states to ensure that the multinational companies that are registered in their own territory respect human rights when operating abroad, as part of their extraterritorial obligations under the ICESCR and international law generally.⁸⁸³

Due to the effects of the GFC, the Committee ESCR has been particularly critical of neoliberal practices in the context of economic recessions. In 2012, the Chairperson of the Committee – at the time, Ariranga G Pillay – sent a letter to the States Parties to the ICESCR reminding them that austerity measures in times of economic and financial crisis of the type

⁸⁸⁰ At [25].

⁸⁸¹ *General Comment No.21: right of everyone to take part in cultural life (art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/21 (21 December 2009) at [50.b]; *General Comment No.25 on science and economic, social and cultural rights (article 15(1)(b), (2), (3), and (4) of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/25 (30 April 2020) at [58-60].

⁸⁸² See, for example, *General Comment No.19...*, above n 862, at [57]; *General Comment No.22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/22 (2 May 2016) at [51]; *General Comment No.23...*, above n 860, at [72-73, 79]; *General Comment No.24...*, above n 866, at [13, 29]; also see *The World Food Crisis: Statement* UN Doc E/C.12/2008/1 (20 May 2008) at [11].

⁸⁸³ *General Comment No.23...*, above n 860, at [69-70]; *General Comment No.25...*, above n 881, at [84].

caused by the GFC cannot lead to the negation of economic, social and cultural rights.⁸⁸⁴ He made the observation that the infringement of those rights “can lead to social insecurity and political instability and have significant negative impacts, in particular, on disadvantaged and marginalized individuals and groups”.⁸⁸⁵ Therefore, he advised that any austerity measure in the context of an economic recession should, at least be temporary, “covering only the period of the crisis”; be necessary and proportionate; be non-discriminatory and take into account all measures possible, “including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis”; ensure that the minimum core content of economic, social and cultural rights, or the “social protection floor” they entail, is protected; and contemplate international cooperation mechanisms, especially through international financial institutions like the World Bank and the IMF.⁸⁸⁶ As I will discuss further below, the term “social protection floor” does not necessarily coincide with Polanyi’s principle of social protection, but it still brings the ICESCR closer to the idea of a countermovement against economic liberalism.

Although Pillay’s letter is not as authoritative as documents produced by the entire Committee ESCR, its spirit is replicated in some of the Committee’s views on individual communications. In its views on communications No 2/2014, No 5/2015, No 37/2018, No 52/2018, No 85/2018, No 54/2018 and No 48/2018 – all related to evictions that took place during the GFC – the human rights body reminded the Spanish state of its obligation to realise the right to adequate housing even during an economic recession by, among other measures, interfering in the private market and avoiding the privatisation of public services and infrastructure, unless all other options to guarantee the general wellbeing of the population had been exhausted.⁸⁸⁷

⁸⁸⁴ AG Pillay *Letter Dated 30 November 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights* CESCR/49th/AP/MAB (2012) at 1.

⁸⁸⁵ At [1].

⁸⁸⁶ At [2].

⁸⁸⁷ *Communication No.2/2014: Views adopted by the Committee at its fifty-fifth session (1-19 June 2015)* UN Doc E/C.12/55/D/2/2014 (13 October 2015) at [3, 10.2]; *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No.5/2015* UN Doc E/C.12/61/D/5/2015 (21 July 2017) at [3, 10]; *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No.37/2018* UN Doc E/C.12/66/D/37/2018 (29 November 2019) at [10.2]; *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No.52/2018* UN Doc E/C.12/67/D/52/2018 (14 April 2020) at [8.1]; *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No.85/2018* UN Doc E/C.12/69/D/85/2018 (16 March 2021) at [8.1]; *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with regard to communication No.54/2018* UN Doc E/C.12/69/D/54/2018 (23 March 2021) at [12.2]; *Dictamen adoptado por el Comité en virtud del Protocolo Facultativo del Pacto Internacional de Derechos*

In those views, the Committee also recalled that all persons, regardless of their income or access to economic resources, have the right to housing that complies with “standards of dignity and safety and security”.⁸⁸⁸ The body stressed that even though, in many cases, controversies around the right to housing emerge from a private agreement, states have the obligation to interfere in that private relationship and protect the right to housing by guaranteeing that an eviction complies with international human rights requirements.⁸⁸⁹ States must develop a normative framework that takes into the account the proportionality of an eviction in relation to the interests of the person seeking the eviction and the availability of alternative housing and the personal circumstances of the person being evicted.⁸⁹⁰ Moreover, states have the obligation to “ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available” for those persons who have been evicted and do not have the financial means to find another house.⁸⁹¹ A lack of housing, claimed the Committee, is normally caused by “structural problems, such as high unemployment or systemic patterns of social exclusion”, all of which fall within the state’s responsibility.⁸⁹²

The Committee ESCR added that other structural problems related to lack of access to housing are “growing inequality and housing market speculation”, which the state must resolve to the extent of its available resources.⁸⁹³ Furthermore, the Committee ESCR argued that, while it might be proportional to protect the domestic right to property of an individual, it is not proportional to do so when the property is owned by a financial institution and an eviction will entail a situation of homelessness.⁸⁹⁴

Under this logic, the Committee condemned the Spanish state’s privatisation of almost 3,000 public houses (sold to private companies and investment funds) in 2012 and 2013, without demonstrating that such a retrogressive measure was necessary in consideration of all other rights in the ICESCR and that all other available resources to deal with the country’s financial instability had been exhausted.⁸⁹⁵ The Committee ESCR considered there was a

Económicos, Sociales y Culturales, respecto a la comunicación núm. 48/2018 UN Doc E/C.12/69/D/48/2018 (12 April 2021) at [10.1].

⁸⁸⁸ *Communication No.2/2014...*, above n 887, at [11.1]; *Views adopted... with regard to communication No.5/2015...*, above n 887, at [13.1]; *Views adopted... concerning communication No.37/2018*, a above n 887; at [8.1]; *Views adopted... with regard to communication 85/2018*, above n 887, at [11.1].

⁸⁸⁹ *Views adopted... with regard to communication No.5/2015*, above n 887, at [14].

⁸⁹⁰ *Views adopted... with regard to communication 52/2018*, above n 887, at [9.5].

⁸⁹¹ *Views adopted... with regard to communication 37/2018*, above n 887, at [9.1].

⁸⁹² *Views adopted... with regard to communication No.5/2015*, above n 887, at [17.2].

⁸⁹³ *Views adopted... concerning communication 37/2018*, above n 887, at [10.2]; *Views adopted... with regard to communication 54/2018*, above n 887, at [13.2].

⁸⁹⁴ At [11.5].

⁸⁹⁵ *Views adopted... with regard to communication No.5/2015*, above n 887, at [17.5-17.6].

violation of the right to housing because, even though the complainant had been occupying an apartment without legal title, her eviction, along with her children's, constituted a disproportionate measure in relation to the protection of the bank's need to recover possession of private property.⁸⁹⁶ These conclusions coincide with five out of the six principles of the second countermovement – state intervention, material equality, limitation of private property, decommodification of public services and adequate income – adjusted to the context of the struggle against neoliberal trends in the 21st century.

The Committee ESCR also addressed the detrimental effects of neoliberal practices and the GFC in its 2016 statement on *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights*. In it, the Committee analysed the repercussions of fiscal consolidation measures, such as structural adjustment and austerity programmes, indicating that “[l]ow-income families, especially those with children, and workers with the lowest qualifications are disproportionately affected” by austerity measures such as “job cuts, minimum wage freezes and cutbacks in social assistance benefits, which potentially result in discrimination on the grounds of social origin or property”.⁸⁹⁷ As discussed above, all these measures are typical of neoliberal states seeking to balance their budgets even during a financial crisis.

Responding to the detrimental consequences of structural adjustment programmes, the Committee also indicated that borrowing states have to ensure that the conditions attached to a loan do not circumvent their obligations under the ICESCR.⁸⁹⁸ In the case of lenders, the Committee disputed the legal interpretation of many international organisations according to which they are not obliged to comply with international human rights standards, and reminded specialised agencies of the UN – such as the IMF and the IBRD – and their States Members that they are bound by the principles of the UN Charter.⁸⁹⁹ Therefore, the Committee recommended that both borrowing and lending states, as well as international organisations, conduct “human rights impact assessments” prior to accepting or extending a loan to prevent violations of economic, social and cultural rights.⁹⁰⁰

⁸⁹⁶ *Views adopted... concerning communication 37/2018*, above n 887, at [11.5, 14].

⁸⁹⁷ *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights* UN Doc E/C.12/2016/1 (22 July 2016) at [1, 2].

⁸⁹⁸ At [4,5].

⁸⁹⁹ At [7-9].

⁹⁰⁰ At [11].

Another relevant indication in the Committee ESCR's statement on public debt and austerity measures was that, once the fiscal crisis that arguably merit the consolidation measures is over, states have an obligation to "enhance the effective protection" of economic, social and cultural rights in proportion to the economic gains of the "post-crisis economic recovery".⁹⁰¹ While the Committee's position on austerity measures is certainly not new,⁹⁰² it has been boosted in recent years after witnessing the effects of the GFC.

Regarding income redistribution, which under the second countermovement was meant to happen mainly through a progressive tax system, the Committee ESCR has only recently started to encourage states to discharge their duties through "the mobilization of resources by the State, including by enforcing progressive taxation schemes".⁹⁰³ In addition, it has asked governments to revise their tax codes to protect individuals against abusive business activities, and has condemned "tax evasion or tax avoidance strategies", especially by transnational corporations.⁹⁰⁴ In the Committee's words:⁹⁰⁵

Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant. Providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.

Moreover, the Committee has stated that governments have a duty to "mitigate inequalities" through social transfers funded by taxes.⁹⁰⁶ Even in the case of the poorest countries, the Committee argues, there are often opportunities "for Governments to expand the fiscal space for social protection" by, among other options:⁹⁰⁷

⁹⁰¹ At [6].

⁹⁰² See, for example, *General Comment No.2...*, above n 854, at [9]; *General Comment No.3...*, above n 789, at [12]; *General Comment No.4...*, above n 824, at [19]; *General Comment No.11...*, above n 814, at [3]; *General Comment No.12...*, above n 791, at [41]; *General Comment No.13...*, above n 793, at [60]; *General Comment No.14...*, above n 801, at [39, 64]; *General Comment No.15...*, above n 802, at [36, 60]; *General Comment No.18...*, above n 803, at [30, 53]; *General Comment No.19...*, above n 862, at [58, 83].

⁹⁰³ *General Comment No.24...*, above n 866, at [23].

⁹⁰⁴ At [15, 37].

⁹⁰⁵ At [37].

⁹⁰⁶ AG Pillay *Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights* UN Doc CESCR/48th/SP/MAB/SW (16 May 2012) at 2.

⁹⁰⁷ *Social protection floors: an essential element of the right to social security and of the sustainable development goals: Statement by the Committee on Economic, Social and Cultural Rights* UN Doc E/C.12/2015/1 (15 April 2015) at [13].

reallocating public expenditure with a renewed focus on social spending, increasing tax revenues, reducing debt or debt servicing, adapting the macroeconomic framework, fighting illicit financial flows and increasing social security revenues.

Thus, the Committee ESCR has attempted to reverse the neoliberal trend of cutting taxes under the belief that those cuts will bring about more investment and jobs, causing a “trickle-down” effect that benefits all society. As a third countermovement gathers strength, the Committee has joined the multiple advocacy groups, academics and governments that condemn that kind of practice and demand wealth distribution.

In conclusion, the Committee ESCR has acknowledged the role of the double movement in the contemporary implementation of the ICESCR and has been highly critical of the effects of neoliberal ideas on the enjoyment of economic, social and cultural rights. In its direct and harsh criticisms, it shows that, although it has been more than 70 years since the ICESCR began to be drafted, it continues to uphold the tendencies of the second countermovement that inspired and gave content to the treaty.

Nevertheless, the Committee has also shown they are conscious of a new wave of social protection that is tilting the balance of the double movement back towards social protection. It has demonstrated this awareness through the shift in its attitude towards neoliberal practices. Although it has consistently condemned neoliberalism (with a few exceptions from its first years), it is evident that its tone became much more vehement after the GFC as it has begun to push States Parties away from neoliberal practices. More importantly, the Committee ESCR has repositioned human rights – and the ICESCR more specifically – as an instrument for social protection against economic liberalism.

B Adjusting to the Challenges of Neoliberalism

There are issues around the protection of economic, social and cultural rights in the neoliberal era that do not fit into the logic of the second countermovement. New technologies that might lead to a job crisis, the protection of the environment, or a new economic model that shifts the focus away from economic growth all go beyond the realms of mid-20th century political economy. While it is true that questions of equality and state intervention (present during the second countermovement) will always underlie those problems, society is constantly shifting into areas that were not and could have not been understood by theoreticians of the second countermovement. This section will analyse how the Committee ESCR and the Special

Rapporteur have reacted to those challenges, emphasising how their distinct association with the ICESCR has led them to take different approaches to the promotion of policies that could lead to a third countermovement. Indeed, as I will demonstrate below, the Special Rapporteur has unwaveringly opposed neoliberalism from the start of its mandate and therefore has not had to adjust significantly to the post-GFC political climate.

1 The Special Rapporteur: a consistent opponent of neoliberal practices

The Special Rapporteur has been in the vanguard of the resistance against neoliberalism, even before the GFC. Contrary to the Committee ESCR, which shifted from a descriptive tone to a much more critical one years after the GFC had taken place, the Special Rapporteur has been actively admonishing neoliberal practices for more than two decades. However, it is important to recognise that the Special Rapporteur's mandate goes beyond applying the ICESCR, which means it is not tied to mid-20th century practices of the second countermovement. This has given the Special Rapporteur a wider scope of action than the Committee's when advancing its views on neoliberalism.

While the initial report of Anne-Marie Lizin, first Special Rapporteur (1998–2004), did not address market failures or the privatisation of resources and services,⁹⁰⁸ she quickly amended that stance. In 1999, she recommended that all agreements between the IMF and states “should include a social clause spelling out the social policies which must be kept safe from budget cuts: education, health, basic hygiene, and housing”.⁹⁰⁹ The following year, she argued that a democracy that is undermined by corruption threatens the collection of taxes necessary for an adequate redistribution of wealth.⁹¹⁰ Then, in her 2002 report, Lizin expressed the need for states to give priority to their international human rights obligations when dealing with international financial institutions, so as to avoid the regressions in the fight against poverty that resulted from past structural adjustment programmes.⁹¹¹ In her last report of 2004,

⁹⁰⁸ See Anne-Marie Lizin *Human Rights and extreme poverty: Report submitted by Ms A-M Lizin, independent expert, pursuant to Commission resolution 1998/25 E/CN.4/1999/48* (29 January 1999).

⁹⁰⁹ Anne-Marie Lizin *Human Rights and extreme poverty: Report submitted by Ms A-M Lizin, independent expert, pursuant to Commission resolution 1999/26 UN Doc E/CN.4/2000/52* (25 February 2000) at [87].

⁹¹⁰ At [92].

⁹¹¹ Anne Marie-Lizin *Rapport soumis par Mme A-M Lizin, experte indépendante, conformément à la résolution 2000/12 de la Commission des droits de l'homme UN Doc E/CN.4/2002/55* (15 March 2002) at [2].

she stated that, in opposition to popular views, “open markets, free trade and growth” were not “essential components of the fight against poverty”.⁹¹²

Lizin’s successor, Arjun Sengupta (2004–2008), was even more direct in his criticisms of the free market, focusing on the link between human rights, equality and poverty. He examined equality “with respect to growth, structure and distribution of resources in the economy, as well as equitable distribution of income and benefits accruing from the exercise of rights”.⁹¹³ He argued that social policies that address poverty ultimately seek to protect the most vulnerable people from the insecurity caused by unequal distribution of income.⁹¹⁴ In a similar way to the Committee ESCR, he believed there is a close link between human rights and poverty, whether it is because a violation of the former causes the latter, or because poverty is in itself a violation of human rights, although he preferred the second approach.⁹¹⁵

According to Sengupta, public policies designed from a human rights perspective (especially that of economic, social and cultural rights) can be “most important” in addressing poverty in its three forms: income poverty, human development poverty and social exclusion.⁹¹⁶ He indicated that a first step to fulfil the obligation to eradicate poverty was to simply realise the rights recognised in the ICESCR (as well as the ICCPR) because “[i]f, in a social arrangement, these rights are fulfilled, it is difficult to imagine that there will be any poverty in that society”.⁹¹⁷ In other words, a society that prioritises social protection over economic liberalism should be able to ensure enough equality and eliminate poverty.

Sengupta defended the principles of the second countermovement when it came to employment. He considered that “[i]f there is one programme of action that can be taken as the most effective way of dealing with extreme poverty, it is the creation of sustainable employment opportunities”.⁹¹⁸ In a subsequent report, however, he also indicated that employment by itself does not necessarily eradicate poverty. He alluded to the example of the European Union where, despite “fairly well developed” social security systems, the quality and conditions of some jobs were so deplorable that 7 per cent of workers in the region were in a

⁹¹² Anne-Marie Lizin *Human rights and extreme poverty: Report submitted by Ms A-M Lizin, independent expert* E/CN.4/2004/43 (20 April 2004) at [22].

⁹¹³ Arjun Sengupta *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* UN Doc A/HRC/8/L.2/Rev.1 (28 February 2008) at [71].

⁹¹⁴ At [72].

⁹¹⁵ Arjun Sengupta *Human rights: Report of the independent expert on the question of human rights and extreme poverty, Arjun Sengupta* UN Doc E/CN.4/2005/49 (11 February 2005) at [27].

⁹¹⁶ At [35, 36].

⁹¹⁷ Sengupta, above n 913, at [43].

⁹¹⁸ Sengupta, above n 915, at [42].

state of “working poverty”.⁹¹⁹ This statement resembles the second countermovement’s principle that work is only an instrument to achieve a more substantial goal, which is to ensure adequate income.

The Special Rapporteur’s condemnation of neoliberal practices continued in the aftermath of the GFC. Magdalena Sepúlveda Carmona (2008–2014) had a fresh awareness of the consequences of applying neoliberal economics during an economic recession, having started her mandate as the consequences of the GFC were unfolding. In her 2009 report, she described how millions of people fell into poverty and how every one of their economic and social rights was affected as a consequence of that financial crisis.⁹²⁰ She insisted on the need for governments to expand the coverage of social protection mechanisms in response, and introduce interventions like the recapitalisation of banks, the nationalisation of financial institutions, fiscal stimulus plans, national recovery packages, cash payments to low and middle income families, and the enhancement of welfare grants, child grants, school food programmes, pensions and unemployment benefits.⁹²¹ However, she also stressed that those and other measures of social protection should not be temporary, as they could leave beneficiaries vulnerable to future crises and, from a legal perspective, they responded to long-term human rights commitments that had not been met so far.⁹²²

Sepúlveda Carmona also argued that because economically vulnerable groups already tend to have restricted access to “social protection” and public services – which mitigate the effects of an economic crisis – they are left at an even greater disadvantage when an economic recession occurs.⁹²³ Although human rights do not impose specific policy prescriptions in times of economic crisis, she argued, “[h]uman rights [themselves] are not a policy option, dispensable during times of economic hardship”.⁹²⁴ Thus, there is “no space in human rights for a trickle-down approach” and instead governments should pursue a “human rights-based recovery”.⁹²⁵ In other words, the Special Rapporteur not only viewed human rights as

⁹¹⁹ Arjun Sengupta *Implementation of General Assembly resolution 60/251 of 15 March 2006 entitled “Human Rights Council”: Report of the independent expert on the question of human rights and extreme poverty*, Arjun Sengupta UN Doc A/HRC/5/3 (31 May 2007) at [49, 52]. Sengupta uses the United States Bureau of Labor Statistics’ definition of working poverty: “those persons who have devoted at least half of the year to labour market efforts, being either employed or in search of a job during that period, but who still live in poor families”.

⁹²⁰ Magdalena Sepúlveda Carmona *Report of the independent expert on the question of human rights and extreme poverty* UN Doc A/64/279 (11 August 2009) at [5-9, 22-45].

⁹²¹ At [10, 82].

⁹²² At [11-12, 83, 84].

⁹²³ Magdalena Sepúlveda Carmona *Report of the Independent Expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona UN Doc A/HRC/17/34 (17 March 2011) at [32].

⁹²⁴ At [37].

⁹²⁵ At [57-58].

completely incompatible with economic liberalism, but perceived them as an instrument to reverse neoliberal policies.

Under that same logic, Sepúlveda Carmona frowned upon austerity measures taken by many states in the aftermath of the GFC, such as reducing the levels of coverage and benefits of social security schemes, reducing the public sector workforce or freezing their wages, regressive taxation measures and limiting food subsidies.⁹²⁶ She insisted that, on the contrary, economic crises like the GFC present an opportunity for transformative policies, meaning:⁹²⁷

ambitious approaches to reducing inequality, eliminating poverty and creating stable societies and economies that will withstand future shocks. A human rights approach is the best way for States to rectify the persistent inequalities, exacerbated by successive crises, which have diminished social cohesion and increased feelings of insecurity and exclusion. Should these inequalities persevere, the result could be increasing social unrest and conflict, a reality that has been vividly illustrated across North Africa and the Middle East in recent months.

This reference to the connection between the GFC, transformative policies and social unrest is a sign that the Special Rapporteur also perceived the signs that a new countermovement might be emerging. Sepúlveda Carmona recommended that in times of economic recession, governments should carry out public policies that, among other measures, strengthen the “social protection floor”, reform taxation systems to make them more progressive and protect individuals against abuses by private actors like banking and financial institutions.⁹²⁸

Sepúlveda Carmona also criticised the trend towards privatising and outsourcing “activities traditionally undertaken by the State” to “evade their human rights responsibilities”.⁹²⁹ She argued that the privatisation of welfare systems, health systems, housing facilities and detention centres has the risk of diminishing access to essential services by vulnerable groups. Moreover, “[w]ithout mechanisms to ensure accountability and transparency, private entities may prioritize profit over people and are not responsible for their failures”.⁹³⁰ The prioritisation of the private interests of investors and developers in zoning plans, she claimed, also has a negative influence on poor people’s right to housing, and leads to their segregation and social exclusion.⁹³¹ She explained how it is often people living in

⁹²⁶ At V.

⁹²⁷ At [58].

⁹²⁸ At VII.

⁹²⁹ Magdalena Sepúlveda Carmona *Extreme poverty and human rights* UN Doc A/66/265 (4 August 2011) at [26, 27].

⁹³⁰ At [26].

⁹³¹ At [45-48].

extreme poverty who are exposed to underlying causes of bad health, have multiple obstacles in accessing government services and political opportunities, and pay proportionally more for essential services like electricity and water.⁹³² She succinctly argued that public services “mitigate the impact of skewed income distribution and directly contribute to mitigating inequality”.⁹³³ Therefore, despite not being tied to the constraints of the ICESCR’s historical roots, the Special Rapporteur also upheld the second countermovement’s principle that decommodification of key resources and services contributes to material equality.

Borrowing another mechanism of the second countermovement that contributes to equality, Sepúlveda Carmona dedicated her last report (2014) to the topic of taxation. In her opinion, taxes have three main purposes: “(a) the generation of revenue for the realization of rights; (b) achieving equality and tackling discrimination; and (c) strengthening governance and accountability.”⁹³⁴ That first purpose is reached by dedicating the revenue created through taxes to the financing of public goods and services, such as education and health.⁹³⁵

The ideal revenue system, she argued, is a “progressive tax system with real distributive capacity that preserves, and progressively increases, the income of poorer households”, with well-designed tax exemptions and subsidies, as well as a tax threshold.⁹³⁶ In her opinion, direct taxes – such as personal income tax – tend to be more progressive than indirect ones – like value-added or sales taxes – as consumption of taxed goods normally represents the largest proportion of expenditure for people living in poverty.⁹³⁷ She also considered that allowing transnational companies or “high-net-worth individuals” to evade taxes through “tax havens” would constitute a breach of obligations of international cooperation and assistance, as the lack of tax revenue in countries with those havens could lead to a lower satisfaction of economic, social and cultural rights.⁹³⁸ Furthermore, austerity measures would only be lawful under the ICESCR if governments have previously sought new revenues, including new taxes, before making budget cuts.⁹³⁹ Thus, in the field of fiscal policy, Sepúlveda Carmona recommended states to: widen their tax bases and improve the efficiency of their tax collection; tackle tax

⁹³² Magdalena Sepúlveda Carmona *Report of the independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, on the draft guiding principles on extreme poverty and human rights UN Doc A/HRC/15/41 (6 August 2010) at [22-33].

⁹³³ Magdalena Sepúlveda Carmona *Report of the Special Rapporteur on extreme poverty and human rights*, Magdalena Sepúlveda Carmona UN Doc A/HRC/26/28 (22 May 2014) at [39].

⁹³⁴ At [36].

⁹³⁵ At [42].

⁹³⁶ At [16, 48].

⁹³⁷ At [46].

⁹³⁸ At [32].

⁹³⁹ At [28].

abuse (for example, tax evasion and fraud); reassess the taxation rates of corporations and the financial sector; and ensure natural resources that produce tax revenue are exploited sustainably and in accordance with human rights obligations.⁹⁴⁰ These recommendations aim, as do many others from the Special Rapporteur, to revert neoliberal policies and, in this case, return to a logic similar to the one adopted by most governments during the second countermovement.

Sepúlveda Carmona's successor to the mandate of Special Rapporteur was Phillip Alston (2014–2020). Alston dedicated his first report to “the implementation of the right to social protection through the adoption by all States of social protection floors”, a concept that, as indicated above, has also been used by other Special Rapporteurs and by the Committee ESCR,⁹⁴¹ but is not necessarily related to Polanyi's concept of social protection. Alston recalled how, after decades of being neglected, the right to social security came to the forefront of human rights again after the consequences of the neoliberal adjustment policies inspired by the Washington Consensus.⁹⁴² Moreover, in a separate report, he condemned the appalling growth of inequality in the last three decades and argued that, among other consequences, high levels of inequality leads to a political capture of the elite, which puts the poor in poverty traps. He provided the example of Chile, which had higher levels of inequality under the dictatorship of Augusto Pinochet – the first national leader to experiment with neoliberal ideas (see Chapter IV.A.2).⁹⁴³

Alston was also highly critical of international development efforts that followed neoliberal trends, especially those of the World Bank and the IMF. Regarding the first of those international financial organisations, Alston suggested that the World Bank has put human rights on a “very short blacklist” of issues that it considers political and therefore refuses to fund.⁹⁴⁴ He credited this position to, among other things, the institutional culture the institution developed during the Cold War of not getting involved in politics, avoiding imposing Western values (of which the Bank considers human rights to be a part) on non-Western countries and not becoming the global police or enforcer of human rights obligations.⁹⁴⁵ Overall, argued

⁹⁴⁰ At IV.

⁹⁴¹ See Philip Alston *Extreme poverty and human rights* UN Doc A/69/297 (11 August 2014) at 2; see also Olivier De Schutter's use of the concept in Olivier De Schutter *Looking back to look ahead: A rights-based approach to social protection in the post-Covid-19 economic recovery* UN Doc A/HRC/44/13 (11 September 2020) at [10].

⁹⁴² At [13, 21].

⁹⁴³ Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights, Phillip Alston* UN Doc A/HRC/29/31 (27 May 2015) at [21]. Alston provides the same example, along with that of Margaret Thatcher in the United Kingdom, in reference to privatisation, in Philip Alston *Extreme poverty and human rights* UN Doc A/73/396 (26 September 2018) at [6].

⁹⁴⁴ Philip Alston *Extreme poverty and human rights* UN Doc A/70/274 (4 August 2015) at [12].

⁹⁴⁵ At III.

Alston, the Bank's actions and policies "need to reflect the current status of international human rights law, rather than the situation in the 1960s or the 1980s, when its existing policies were frozen into place".⁹⁴⁶

In the case of the IMF, one of Alston's findings was that, while the IMF indirectly contributes to the enjoyment of economic, social and cultural rights, it is not bound by the ICESCR and applying that treaty to the organisation would contravene its Articles of Agreement.⁹⁴⁷ Alston recognised that, since the GFC and the global backlash against neoliberalism, the IMF has become gradually more involved in issues of social protection. For example, since 2009, approximately 90 per cent of its interventions in low-income countries have included the aim of maintaining or increasing expenditure on health, education and social security.⁹⁴⁸ However, it has also focused on ill-recommended strategies such as targeting of social programmes instead of universal programmes.⁹⁴⁹

Alston expressly condemned economic liberalism and neoliberalism. In 2016, he addressed the threat of overemphasising civil and political rights over economic, social and cultural ones, because:⁹⁵⁰

The thoroughly documented increases in global wealth and income inequality threaten to undermine the social fabric, to turn civil and political rights into a tool that will be used predominantly to protect the rights and interests of the wealthy and to entrench *forms of economic and political liberalism* that ignore the needs and deny the rights of those living in poverty.

This way, Alston is reaffirming what I have identified as the core purpose of economic, social and cultural rights under the ICESCR: to resist the detrimental effects of economic liberalism, regardless of the time those effects take place and regardless of which form of economic liberalism has caused them. Alston also claimed that the perceived weakness of the economic, social and cultural rights regime has opened the path for some critics to argue in favour of free markets and private enterprises (both NGOs and businesses) as the more efficient actors to deliver those rights, instead of governments.⁹⁵¹

⁹⁴⁶ At [55].

⁹⁴⁷ Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/38/33 (8 May 2018) at [18].

⁹⁴⁸ At [31].

⁹⁴⁹ At IV.

⁹⁵⁰ Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/32/31 (26 April 2016) at [15] (emphasis added).

⁹⁵¹ At [18].

A year later, Alston described the effects of neoliberal economics on public governance and human rights in detail. He argued that the effects of the neoliberal policies “encapsulated in the 1980s-era Washington Consensus”, and promoted by the World Bank and the IMF, led to a transformation of social security and social protection. That transformation led to a “minimalist notion of ‘social safety nets’ designed to avoid the very worst outcomes”. Ultimately, he claimed:⁹⁵²

The objectives of promoting tax reform and prudent fiscal policies turned into a race to the bottom to set the lowest individual and corporate tax rates, attracting businesses through expensive exemptions, turning a blind eye to illegal or unconscionably evasive tax practices, and eliminating estate taxes and other measures that would bring about even minimal redistribution. Privatization was promoted even in relation to what were once seen as basic State functions, such as prisons, education and security. In some States, even the justice system has been partly privatized, whether through onerous court fees for the poor or the channelling of consumer and other complaints into private arbitration.

As seen, Alston was very transparent in his condemnation of neoliberalism. As other Special Rapporteur’s before him, he did not consider that neoliberal practices could be compatible with human rights obligations. In 2018, he published two more reports that were equally transparent in their criticism of neoliberalism. In the first, pertaining to the role of the IMF in the suppression of poverty, one of Alston’s conclusions was that:⁹⁵³

If IMF is to respond effectively in the years ahead to the challenges in a world in which both globalization and liberal democracy are increasingly under attack, *it will need a different mindset from the modified neoliberalism that currently sets the parameters of its thinking*, even as it talks about gender, inequality and social protection. Those concerns will not be truly integrated within its mission unless they are embraced as matters of principle and not just pragmatically-driven sideshows.

In reference to the digitalisation of the welfare state, Alston indicated that the application of new technologies in this field is often a “Trojan Horse” for “neoliberal economic policies [that] are seamlessly blended into what are presented as cutting edge welfare reforms”.⁹⁵⁴

Alston’s second report of 2018 concerned privatisation. He pointed out how “[n]eoliberal economic policies are aimed at shrinking the role of the State, especially through privatization”.⁹⁵⁵ This is why, in Alston’s opinion, privatisation became an “ideology of

⁹⁵² Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/35/26 (22 March 2017) at [4, 8.e].

⁹⁵³ Alston, above n 947, at [58] (emphasis added).

⁹⁵⁴ Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/74/48037 (11 October 2019) at [6, 32].

⁹⁵⁵ Alston, above n 943, at [81].

governance” since the 1970s, which cannot be reformed by mere procedural fixes or mitigation.⁹⁵⁶ Human rights and privatisation are incompatible, he argued, because:⁹⁵⁷

Whereas human rights law is premised upon the existence of a competent and benign State, privatization advocates assume the State to be incompetent and/or malign, while casting the private sector as efficient and socially responsible.

Alston observed that the privatisation of social protection has implied that essential services have been commodified and are now guided more by private profit than by the maximisation of rights satisfaction, equality and dignity.⁹⁵⁸ Therefore, he suggested that human rights actors must respond by: acknowledging the past inadequacies of privatisation; reasserting basic values and concepts such as “[substantive] equality, society, the public interest and shared responsibilities”, as well as human rights; relegitimising taxation, which “neoliberals have undertaken highly successful effort to delegitimize” since the 1980s; reclaiming the moral high ground by reaffirming human rights language; reversing the assumption that privatisation is the “default setting” in public governance; when privatisation occurs, ensuring that it is conducted under human rights standards; and creating an effective system for both private and public sector human rights accountability.⁹⁵⁹ Hence, Alston positioned the Special Rapporteur as a direct opponent of neoliberal practices, potentially making that UN mandate one of the leading figures of the nascent third countermovement.

The current Special Rapporteur, Olivier De Schutter (2020–), has adopted a similar stance towards neoliberalism. In his first report, which focused on state’s responses to the Covid-19 pandemic, he condemned the IMF and the World Bank’s current conditioning of loans for Covid-19 economic recovery, indicating they are attached to privatisation of state-owned companies, the lifting of some forms of regulation, trade liberalisation, fiscal balancing, and foreign direct investment, among other policies reminiscent of the organisations’ 1980s structural adjustment programmes.⁹⁶⁰

De Schutter has also showed he is aware that we are living in a new era of social protection, possibly heightened by the economic crisis caused by the Covid-19 pandemic, which he referred to as “the worst... since the Great Depression”.⁹⁶¹ De Schutter congratulated some states on their approach to social protection during this crisis, especially in comparison

⁹⁵⁶ At [2].

⁹⁵⁷ At [69].

⁹⁵⁸ At [34-35, 82].

⁹⁵⁹ At VII.

⁹⁶⁰ De Schutter, above n 941, at [70-73].

⁹⁶¹ At [51].

to their response to the GFC,⁹⁶² which indicates the Special Rapporteur recognises that an emerging third countermovement has begun to have an effect on public governance throughout the world. Yet, he also argued that “[t]he new wave of social protection hype is maladapted, short-term, reactive, and inattentive to the reality of people in poverty.”⁹⁶³ The response to economic liberalism must be more ambitious and transformative, he explained, because, when the pandemic began, governments were already limited by the reality left by their previous reaction to the GFC. This had consisted of “the dilapidation [of] public services ... with public health systems underfunded and increasingly privatized, care work devalued and precarious, and extreme levels of inequality due to extreme wealth concentration”.⁹⁶⁴ Thus, the Special Rapporteur is, to this day, emphasising the effects of neoliberal policies enacted more than 10 years ago.

2 Endorsing policies that address the challenges of neoliberalism

As discussed in Chapter IV, the neoliberal era presents unique challenges that the second countermovement did not address, either because governments in the mid-20th did not consider them to be significant issues or because they simply did not exist. Before exploring the ways in which the Committee ESCR and the Special Rapporteur have started addressing those specific challenges with policies that have only recently started gathering strength in the wake of the GFC, it is important to state those international bodies still uphold many of the second countermovement’s principles. As seen above, they still advocate for state intervention, material equality, the limitation of property rights, the decommodification of key services and resources, adequate incomes and jobs.

However, as I will outline below, the Committee ESCR and the Special Rapporteur have started considering policies that are outside the second countermovement’s scope and have started to emerge as references of an incipient third countermovement. In addition, contemporary efforts against neoliberalism take into consideration causes that developed after the second countermovement’s apogee, including anti-racism, LGBTIA+ rights, multi-

⁹⁶² At [2-3, 11-18].

⁹⁶³ At [6], [20-50].

⁹⁶⁴ At [7, 52-56].

culturalism and feminism.⁹⁶⁵ As shown by theories of intersectionality,⁹⁶⁶ many of the minorities defended by these causes are disproportionately affected by neoliberalism.⁹⁶⁷

In this line, the Committee ESCR dedicated General Comment No 20 (2009) to the topic of non-discrimination. The Committee stated that some groups face socioeconomic inequality today “often because of entrenched historical and contemporary forms of discrimination”.⁹⁶⁸ The adequate response from States Parties to that reality, indicated the international human rights body, is the adoption of “the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination”.⁹⁶⁹ In the case of gender and sexual discrimination, for example, the Committee has been more forcefully pressuring governments to protect women’s sexual and reproductive health. General Comment No 22 (2016) focused on this topic exclusively. In it, the Committee indicated that “patterns of sexual and reproductive health generally reflect social inequalities in society and unequal distributions of power ... [making] poverty, income inequality, systemic discrimination and marginalization” all determinants of sexual and reproductive health.⁹⁷⁰ Addressing a separate form of gender discrimination, Sepúlveda Carmona deemed that care (of children) should be a public service in order to grant more women the opportunity to work for remuneration, instead of performing unpaid care work at home.⁹⁷¹

In relation to multi-culturalism, the Committee ESCR has said that cultural activities, goods and services “must not be treated as having solely a commercial value” and should not be “taken out of context for the sole purpose of marketing or exploitation by the mass media”.⁹⁷² Accordingly, the body encouraged states to invest in public institutions and infrastructure that facilitate access to cultural opportunities, such as public broadcasting networks in minority languages.⁹⁷³ Interestingly, then, the Committee is addressing an issue of

⁹⁶⁵ Fraser, above n 437, at 127-131.

⁹⁶⁶ See Anna Carastathis, KJ Leong and Andrea Smith *Intersectionality: Origins, Contestations, Horizons* (University of Nebraska Press, Lincoln, 2016).

⁹⁶⁷ See Elizabeth Evans *The Politics of Third Wave Feminisms: Neoliberalism, Intersectionality, and the State in Britain and the US* (Palgrave Macmillan, London, 2015); PR Grzanka and JR Miles “The Problem with the Phrase ‘Intersecting Identities’: LGBT Affirmative Theory, Intersectionality, and Neoliberalism” (2016) 13 *Sexuality Research and Sexual Policy* 371.

⁹⁶⁸ *General Comment No.20: non-discrimination in economic, social and cultural rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/20 (2 July 2009) at [1, 8].

⁹⁶⁹ At [8].

⁹⁷⁰ *General Comment No.22...*, above n 882, at [8].

⁹⁷¹ Magdalena Sepúlveda Carmona *Extreme poverty and human rights* UN Doc A/68/293 (9 August 2013) at IV.

⁹⁷² *General Comment No.21...*, above n 881, at [43].

⁹⁷³ At [52.a].

the contemporary struggle against economic liberalism through mechanisms of the second countermovement.

Because the movements that propelled the first actions of a third countermovement after the GFC had a strong popular base (see Chapter IV.B.1), public participation and democracy are highly relevant to that movement. Special Rapporteur Sepúlveda Carmona understood the principle of participation to entail, rather than sporadic participation in top-down processes, a significant degree of influence on the decision-making process and access to information by the beneficiaries of public policies.⁹⁷⁴ Moreover, she saw public participation as a mechanism to prevent corruption, which “not only reduces the net income of those living in poverty but it also distorts policies, programmes and strategies that aim to meet their basic needs”.⁹⁷⁵ In social assistance programmes, like cash transfers, meaningful and effective participation is especially important for an adequate design and implementation of such policies.⁹⁷⁶ The need for a balance between democracy and hunger for change in the incipient third countermovement can be seen in her 2013 report, which explained that the “the main aim of human rights is transforming power dynamics between individuals in society, in order to challenge oppression” and marginalisation, among other objectives. With the intention of preventing some actors from imposing their interests over others, public participation from a human rights perspective is based on “the premise that power differentials must be eliminated and seek to explicitly recognize and challenge inequality”, including the type of material inequality that results in poverty.⁹⁷⁷

Democracy, then, is another means of achieving “substantive equality” and “empowerment” according to Sepúlveda Carmona.⁹⁷⁸ However, democratic processes are not immune to “elite capture” by economically powerful or dominant members of society, which is why those processes must directly reach marginalised groups.⁹⁷⁹ As Alston added, the underrepresentation of poor people in elections only leads to a detriment in the satisfaction of

⁹⁷⁴ Sengupta, above n 913, at [23, 24].

⁹⁷⁵ At [24].

⁹⁷⁶ Magdalena Sepúlveda Carmona *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona UN Doc A/HRC/11/9 (27 March 2009) at [51-54].

⁹⁷⁷ Magdalena Sepúlveda Carmona *Report of the Special Rapporteur on extreme poverty and human rights*, Magdalena Sepúlveda Carmona UN Doc A/HRC/23/36 (11 March 2013) at [15-16, 71].

⁹⁷⁸ At [44].

⁹⁷⁹ At [47].

economic and social rights, as it facilitates the elite's capture of the democratic system and diminution or stagnation of economic redistribution.⁹⁸⁰

In Chapter IV, I offered UBI, zero-carbon economies, and wellbeing economics as examples of policies that are being endorsed by current movements and governments to address the unique ways in which neoliberal practices have resulted in the excessive commodification of labour, land and money (see Chapter IV.B.2). While the Special Rapporteur has actively promoted those policies and their objectives in recent work given its broad mandate, the Committee ESCR is still somewhat constrained by the ICESCR's historical rooting in the second countermovement.

(a) UBI

UBI is part of a broader effort to guarantee an adequate income to all, without tying that income to labour. This idea is contrary to the intentions of governments during the second countermovement as, based on notions about labour inherited from utopian socialism, they pursued full employment (see Chapter II.B.2). As an indication of that barrier, one of its most recent general comments, General Comment No 23 (2016), was dedicated to the topic of “just and favourable conditions of work” and discussed wages. For instance, the Committee claimed that a “fair wage” should be above the minimum wage for “the clear majority of workers” and that adequate remuneration should take into account a number of external factors such as the cost of living.⁹⁸¹ Thus, the Committee's recommendations concerning adequate income are confined to the right to work as understood in the mid-20th century. Even in times of a crisis like the Covid-19 pandemic and the consequent economic crisis, instead of suggesting a policy that could represent a shift in the approach to income (like the UBI programmes that some governments implemented), the Committee called for States Parties to “take immediate actions to protect the jobs, pensions and other social benefits of workers” and made a vague reference to supplementary social security plans.⁹⁸²

Nevertheless, the Committee has introduced new forms of decommodifying labour that adjust to contemporary challenges. For example, it recommended that governments adopt national policies on flexibility in the workplace, including mechanisms such as compressed

⁹⁸⁰ Philip Alston *Extreme poverty and human rights* UN Doc A/72/502 (4 October 2017) at [29].

⁹⁸¹ *General Comment No.23...*, above n 860, at [10, 18].

⁹⁸² *Statement on the coronavirus disease (COVID-19) pandemic...*, above n 875, at [16].

working weeks, job-sharing and work from home, so as to achieve “a better balance between work and family responsibilities”.⁹⁸³ In the case of migrant workers, governments should prevent situations in which the employer has control over the workers’ residence status and can therefore tie them to a particular position or practice abusive labour practices.⁹⁸⁴ The Committee also emphasised the role of social security in preventing social exclusion in its views on Communication No 1/2013, indicating that mechanisms of social assistance such as benefits are aimed at covering “at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education”.⁹⁸⁵

The Committee ESCR missed a significant opportunity to recommend UBI as a mechanism to guarantee the right to social security (article 9 of the ICESCR) in its views on Communication No 10/2015. This individual communication revolved around the appropriateness of social security systems for those persons who are not part of the formal economy and, therefore, cannot make contributions towards an old-age pension. In the particular case, the victim was an unpaid domestic worker whose access to a pension was negated after the competent Ecuadorian institution deemed that she had not made enough lawful voluntary contributions.⁹⁸⁶ In its views on this communication, the Committee observed that while States Parties have “a certain margin of discretion” on the policies they implement to provide social security, their systems must be “efficient, sustainable and accessible for everyone”, and the conditions for access to social security must be “reasonable, proportionate and transparent”, regardless of whether the institutions in charge are public or private.⁹⁸⁷ The Committee found there had been a violation of the ICESCR because, among other things, the Ecuadorian state had denied the victim access to a contributory pension and, at the same time, failed to provide any form of alternative non-contributory pension, effectively leaving the woman without income in her old age.⁹⁸⁸ Therefore, in its general recommendations, the Committee indicated that the Ecuadorian state should, within the limit of its available resources, formulate a “comprehensive and complete non-contributory benefits plan”.⁹⁸⁹ Therefore, while UBI could have solved the issue of lack of adequate income for informal

⁹⁸³ *General Comment No.23...*, above n 860, at [46].

⁹⁸⁴ At [47.e].

⁹⁸⁵ *Communication No.1/2013: Views adopted by the Committee at its fifty-seventh session (22 February-4 March 2016)* UN Doc E/C.12/57/D/1/2013 (20 April 2016) at [10.1, 10.3].

⁹⁸⁶ *Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. 10/2015* UN Doc E/C.12/63/D/10/2015 (14 November 2018) at [10.2].

⁹⁸⁷ At [12.1, 12.2].

⁹⁸⁸ At [18].

⁹⁸⁹ At [23.f].

workers, the Committee was constrained by the ICESCR's ties to the second countermovement. Even though article 9 only makes a broad reference to social security without specifying the means through which that right should be realised, therefore allowing for an interpretation that considers UBI, the Committee ESCR decided to simply confirmed its stance on the compulsory nature of non-contributory and universal social security schemes.

Until recently, the Special Rapporteur followed a similar line. In 2009, Sepúlveda Carmona argued that cash transfer programmes could only be a complement to the universal access to a “stable national social security system”.⁹⁹⁰ In 2014, Alston observed that although a new right to social protection might be emerging from the practice of many countries, that right is “no more than a combination of the right to social security and the right to an adequate standard of life”, both found in the ICESCR.⁹⁹¹ Therefore, the Special Rapporteur was also hesitant to recommend that the right to work, as inspired by the second countermovement, could be substituted by a right to income, as some advocates for UBI suggest.

In 2017, however, Alston explicitly suggested that countries should consider adopting UBI schemes.⁹⁹² Although the idea of UBI has been proposed by multiple scholars since the 16th century, he acknowledged that “[i]n recent months, this proposal has drawn increased attention from governments, scholars, and practitioners in a range of different fields...”.⁹⁹³ This renewed interest in UBI, according to Alston, can be explained by the “rapidly growing sense of insecurity affecting large segments of many societies” due to, among other reasons, the shared services industry, the gap between labour market regulation and new challenges like global supply chains, automation and robotisation, inequality, and “[t]he ascent of a new neoliberal agenda” which undermined social security programmes.⁹⁹⁴ He accused the human rights community of failing to respond to that economic insecurity, possibly because of the misconception that human rights should not mix with economics.⁹⁹⁵

According to Alston, UBI would represent a break from the welfare state's mechanisms of social security in that, because it would be a totally non-contributory scheme, it would be universal, unconditional and would “go well beyond a floor, by compensating in part or in full for lost earnings”.⁹⁹⁶ Moreover, UBI would be a way of achieving the UN's goal for social

⁹⁹⁰ Sepúlveda Carmona, above n 976, at [18-24]; Sepúlveda Carmona, above n 920, at [70].

⁹⁹¹ Alston, above n 941, at [34].

⁹⁹² Alston, above n 952.

⁹⁹³ At [2, 17-30].

⁹⁹⁴ At [3, 8].

⁹⁹⁵ At [5].

⁹⁹⁶ At [38].

protection floors.⁹⁹⁷ Alston warned that, before adopting a UBI program, governments have to be careful to sufficiently trial them beforehand.⁹⁹⁸ Additionally, the question of UBI's affordability is still unclear.⁹⁹⁹

Alston concluded his report on UBI claiming that, although it might be dangerous if it is not properly studied and implemented, that mechanism of social protection is a:¹⁰⁰⁰

utopian vision [that] may also provide the much-needed impetus to rethink the optimal shape of social protection explicitly designed to achieve universal realization of the human right to an adequate standard of living in the twenty-first century.

Therefore, he claimed, UBI is comparable to the Beveridge Report in that it would fill the gaps left by previous “traditional approaches” and it would represent the next step in the evolution of social protection.¹⁰⁰¹ While, as seen above, Alston did not explicitly comment on the relationship between the ICESCR's right to social security and UBI, his successor, Olivier De Schutter, has now interpreted article 9 of the treaty (the right to social security) as a form of “ensur[ing] all individuals enjoy basic income security throughout their lives”, steering the discussion away from welfare state models exclusively and more towards UBI.¹⁰⁰² Although the Special Rapporteur interprets the ICESCR in accordance to the wider scope of its mandate, this is an example of how the ICESCR could still have an active role in today's efforts to address the challenges presented by neoliberalism.

(b) Zero-carbon economies

As examined previously, as a third countermovement continues to develop, the idea of zero-carbon economies gathers more support as well. The Committee ESCR has tackled the impact of climate change on the enjoyment of economic, social and cultural rights in recent years. According to the Committee, climate change is already affecting the rights to health, food, water and sanitation.¹⁰⁰³ Therefore, States Parties to the ICESCR must “take into account their human rights duties in the design of their nationally determined contributions”, as per the

⁹⁹⁷ At [47].

⁹⁹⁸ At IV.

⁹⁹⁹ At V.

¹⁰⁰⁰ At [60].

¹⁰⁰¹ At [60, 64].

¹⁰⁰² De Schutter, above n 941, at [9].

¹⁰⁰³ *Climate change and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights* UN Doc E/C.12/2018/1 (31 October 2018) at [4].

Paris Agreement.¹⁰⁰⁴ Among those duties, states are to refrain from adopting measures that could worsen climate change and must effectively regulate private actors that contribute to climate change, thus “channel[ing] modes of production and consumption towards a more environmentally sustainable pathway”.¹⁰⁰⁵ Moreover, in a 2020 joint statement, the UN human rights treaty bodies (including the Committee ESCR) indicated that, to fulfil their human rights obligations, states must adopt policies aimed at reducing emissions that “reflect the highest possible ambition”, including “phasing out fossil fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation”, as well as regulating private actors’ emissions. Additionally, in the process of achieving these goals, “States must seek to address all forms of discrimination and inequality”.¹⁰⁰⁶ Thus, the Committee ESCR has shown that it is deeply committed to efforts against climate change.

The Special Rapporteur, in its path towards positioning itself as one of the leaders of the emerging third countermovement, has also dealt with the topic of climate change. In a 2019 report exclusively dedicated to climate change and poverty, Alston acknowledged that climate change had a significant impact on ICESCR rights, referring to the Committee ESCR’s above-cited statement on the matter as “the most extensive and focused response to date by a treaty body”. He also observed that, in 2018, 42 per cent of the Committee’s concluding observations on States Parties’ reports alluded to climate change.¹⁰⁰⁷

With this framework informing his report, Alston referred to the impact of climate change on human rights as a “market failure”.¹⁰⁰⁸ Moreover, he located climate change issues within the logic of a third countermovement (although not using those terms) by indicating that those problems were a consequence of deregulation under the “dominant neoliberal economic orthodoxy” promoted by international organisations like the World Bank, the IMF and the UN.¹⁰⁰⁹

De Schutter has also contributed to the mandate’s push-back against greenhouse gas emissions. In his first report, he condemned the financial support given to high-emitting industries, like airlines, in the context of the Covid-19 recovery, indicating that any such

¹⁰⁰⁴ At [6].

¹⁰⁰⁵ At [10].

¹⁰⁰⁶ At [11-13, 15].

¹⁰⁰⁷ Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/41/39 (25 June 2019) at [21].

¹⁰⁰⁸ At [47].

¹⁰⁰⁹ At [68].

assistance “must be conditional on clear plans for a transition towards zero emissions”.¹⁰¹⁰ Shortly after, his second report focused on the intersection between economic recovery from the Covid-19 pandemic and the climate crisis – what he refers to as the “the just transition”.¹⁰¹¹ He pointed out how the fulfilment of Paris Agreement objectives could lead to the creation of approximately 24 million jobs, overshadowing the six million jobs that would be lost in the fossil fuel industry.¹⁰¹²

Thus, the Special Rapporteur claims that action against climate change can have a “triple dividend”.¹⁰¹³ In the energy sector, for example, higher energy efficiency can lead to a reduction of energy bills, therefore reducing both energy poverty and households’ environmental footprint.¹⁰¹⁴ Among other examples, new social housing projects can be built with low-emissions materials, agroecology can produce a more balanced diet for local communities, and new territorial planning to reduce distances between home, work and education to avoid motorised transport can prevent social segregation.¹⁰¹⁵ Another factor that could contribute to the just transition, according to De Schutter, is the improvement of our consumption and waste practices.¹⁰¹⁶ Governments could, for instance, regulate the intentional limitation of product lifetimes by manufacturers and introduce circular economy initiatives to recover, recycle and reuse certain items.¹⁰¹⁷ In a “once-in-a-generation opportunity” as the one presented by the Covid-19 pandemic,¹⁰¹⁸ measures like these could avoid the worst scenario.¹⁰¹⁹

...one in which people living in poverty would be paying three times – as sufferers of the [Covid-19] economic crisis, as victims of an ecological transformation that has direct impacts on them, and finally as taxpayers, consumers or public service users financing the recovery.

While making general references to matters associated with the ICESCR, like employment, housing, health and public services, it is important to note that De Schutter did not explicitly refer to the treaty in his analysis. This is a potential sign that the current Special

¹⁰¹⁰ De Schutter, above n 941, at [61-62].

¹⁰¹¹ Olivier De Schutter *Interim report of the Special rapporteur on extreme poverty and human rights, Olivier De Schutter: The “just transition” in the economic recovery: eradicating poverty within planetary boundaries* UN Doc A/75/181/Rev.1 (7 October 2020) at [8].

¹⁰¹² At [10].

¹⁰¹³ At [20].

¹⁰¹⁴ At [29].

¹⁰¹⁵ At [33, 38, 41].

¹⁰¹⁶ At [43].

¹⁰¹⁷ At [52].

¹⁰¹⁸ At [55].

¹⁰¹⁹ At [53].

Rapporteur might perceive that some issues of a third countermovement, like climate change, escape the scope of the ICESCR.

(c) Wellbeing economics

Finally, regarding the incipient third countermovement's aim of shifting towards an economic model of wellbeing, the Committee ESCR and the Special Rapporteur have been criticising the traditional economic focus on growth, and the rampant inequality it has caused, for decades. Because economic “degrowth” is an idea that was formulated before the GFC but acquired more support from civil society and governments in the aftermath of that economic crisis, it is not surprising then that wellbeing economics have been addressed by both human rights bodies for such a long time. The Committee has argued that “[e]conomic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality”.¹⁰²⁰

The issue of inequality is not one that pertains exclusively to a third countermovement. In fact, as shown throughout this thesis, it was one of the major concerns of governments during the second countermovement. Nevertheless, the rampant inequality of the neoliberal era, exposed by Piketty in *Capital in the Twenty-First Century* in 2014, augmented civil society's resistance against neoliberal practices and became a central feature of wellbeing economics (see Chapter IV.B.2.c). The Committee was aware of this matter when it stated in 2020 that “the widening gap between rich and poor” is a “global structural proble[m]” that even undermines the rule of law.¹⁰²¹

Moreover, when the 2030 Agenda for Sustainable Development started to be developed by the United Nations in the early 2010s, the Committee emphasised the need for that agenda to address the “deprivation and inequality” that affected ICESCR rights and had led to mass protests in recent years and to the loss of many development gains.¹⁰²² Once the sustainable development goals had been concluded, the Committee restated its position, indicating that:¹⁰²³

The inclusion of rising inequalities as a global concern was a major achievement of the 2030 Agenda. In the context of the periodic reporting system, the Committee requires States parties to provide information on the impact of income and wealth inequalities on the enjoyment of economic, social, and cultural rights. This reflects the common

¹⁰²⁰ *General Comment No.20*..., above n 968, at [1].

¹⁰²¹ *General Comment No.25*..., above n 881, at [21, 36].

¹⁰²² Pillay, above n 884, at 1.

¹⁰²³ *The pledge to leave no one behind*..., above n 874, at [5].

understanding that the eradication of poverty will not be achieved in the context of widening gulfs between rich and poor both within and among counties.

A similar link between ICESCR rights, inequality and poverty has also been established by the Special Rapporteur on multiple occasions. Although material equality and the eradication of poverty are not synonyms,¹⁰²⁴ the Special Rapporteur has made it clear that the latter can only be achieved through the measures that seek to accomplish the former; many of these are found in the ICESCR. In a 2006 report, Sengupta argued that changing patterns of unequal distribution of income and human development, which cause poverty, necessarily requires state intervention to reallocate resources. That is why many countries that had achieved significant GDP growth in recent years through market liberalisation strategies had also seen an increase of domestic inequality and poverty.¹⁰²⁵ In 2008, Sepúlveda Carmona opened her first report by stating that, despite the economic growth of the “last 60 years”, a widening inequality gap had led to poverty and the violation of human rights.¹⁰²⁶ In a subsequent report, she criticised governmental responses that prioritise long-term growth over social protection, by stating that:¹⁰²⁷

From a human rights perspective, Government policies to stimulate growth based only on macroeconomic concerns do not necessarily help the poor and most vulnerable to recover from crises. A more systematic strategy which actively promotes the realization of human rights is needed to respond to this crisis and ensure social protection for all people at all times ... In the past, economic literature has asserted that there is a trade-off between the reinforcement of social protection systems to protect the poorest on the one hand, and bolstering economic recovery after a crisis on the other. This assumption has been increasingly questioned in recent years...

Thus, the Special Rapporteur pushed for a human rights approach to economic policy, implicitly suggesting she favours the ICESCR’s stance against the economic liberal view that governments should prioritise economic growth and the accumulation of capital. In the same regard, in a 2010 report on the question of human rights and extreme poverty, Sepúlveda Carmona claimed that poverty is often transmitted from one generation to another because of “structural – often unaddressed – social, political, economic and cultural inequalities”.¹⁰²⁸

Phillip Alston dedicated a 2015 report to the topic of inequality. For Alston, inequality can refer to “the distribution of income (from labour or capital) or wealth (such as financial

¹⁰²⁴ See Sengupta, above n 915, at [29].

¹⁰²⁵ Arjun Sengupta *Human rights and extreme poverty: Report of the independent expert, Arjun Sengupta* UN Doc E/CN.4/2006/43 (2 March 2006) at [24, 25].

¹⁰²⁶ Sengupta, above n 913, at [2].

¹⁰²⁷ Sepúlveda Carmona, above n 920, at [79-81].

¹⁰²⁸ Sepúlveda Carmona, above n 932, at [21]; also see Alston, above n 950.

assets or land)).¹⁰²⁹ It can also refer to “social inequalities”, in regard to “distribution of, for instance, political power, health, education or housing”.¹⁰³⁰ Inequality has multiple negative impacts on the enjoyment of all human rights. Among those listed by Alston are threats to the life, liberty and security of people; social unrest and conflict; and detriments in access to health, education and water.¹⁰³¹ Additionally, he showed that inequality and climate change feed off each other,¹⁰³² and commented on how new technologies have enhanced inequality and created a “vast digital underclass”.¹⁰³³ Thus, Alston also shows that potential issues of a third counter-movement are tightly knit together.

In his last report as Special Rapporteur (2020), Alston criticised the discourse, often used by advocates of neoliberal ideas, that poverty has significantly diminished in the last decades. Alston showed that, if more rights-based poverty lines are used instead of the World Bank’s international poverty line, poverty has barely declined in rate and is actually nearly stagnant.¹⁰³⁴ He argued that, because governments had favoured fiscal consolidation and the wealth of the elite in the last decades, rather than establishing social protection floors, “the extent and depth of global poverty will be even more politically unsustainable and explosive” in the aftermath of the Covid-19 pandemic.¹⁰³⁵ Therefore, he called for an economy that would “tackle inequality and embrace redistribution”, “move beyond the aid debate and promote tax justice”, “implement universal social protection”, “center the role of the government”, “embrace participatory governance” and “adapt international poverty measure[s]” so they focus on the satisfaction of basic needs and capabilities.¹⁰³⁶ In other words, he called for wellbeing economics.

C Conclusion

This chapter has shown that, despite some equivocation in its early years, the Committee ESCR largely perceives that the ICESCR is an instrument for social protection against the market economy. The overwhelming majority of the Committee’s observations

¹⁰²⁹ Alston, above n 950, at [5].

¹⁰³⁰ At [6].

¹⁰³¹ At [26-32].

¹⁰³² *Report of the Special Rapporteur on extreme poverty and human rights...* (2019), above n 1007, at [14-15].

¹⁰³³ At [44-49].

¹⁰³⁴ Philip Alston *Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/44/40 (2 July 2020) at [28].

¹⁰³⁵ At [36].

¹⁰³⁶ At IV.B-IV.G.

have confirmed that the ICESCR is a product of the second countermovement. In line with that countermovement's principles, the Committee has fought back, with more vigour after the GFC, against the influence of neoliberalism on the public policies that are meant to satisfy economic, social and cultural rights. Assertions like the one made in General Comment No 3 regarding the ICESCR's neutrality towards different economic systems (including laissez-faire economics) would be completely out of the question in the Committee's current work.

However, this chapter also evidenced how the Committee ESCR, in particular, has tended to reinforce the mechanisms of the second countermovement instead of contributing new ideas that could more adequately address the new challenges posed by neoliberalism. Of the proposals set out in Chapter IV of this thesis, the Committee ESCR has endorsed some aspects of wellbeing economics, but only broadly referred to human rights obligations related to climate change, and it has not even come close to endorsing UBI as a mechanism that could fully realise economic, social and cultural rights. While these policies are not an exhaustive list of the mechanisms that might arise as a third countermovement continues to develop, the way the Committee ESCR has partially overlooked them could be indicative of a trend in its future work.

The Special Rapporteur, possibly due to its wider mandate and its autonomy, has been bolder. Its stance against neoliberal practices has been clear from the start of its mandate. Additionally, it has delivered reports on UBI, poverty and climate change, the reform of the international financial system, extreme inequality and wellbeing economics, among other topics. Furthermore, it has evidenced how issues of the rising third countermovement are closely intertwined. Nevertheless, this progressive stance has not always involved an application of ICESCR obligations to these issues. Perhaps recognising that the treaty is rooted in mid-20th century principles that do not always fit contemporary issues brought about by neoliberal practices, the Special Rapporteur has treated the ICESCR as an afterthought when it has pushed forward policies that pertain to a third countermovement.

This attitude is, to a certain extent, understandable. The Committee ESCR and the Special Rapporteur's hands are tied by the tools they are working with. The ICESCR, which the Committee ESCR is strictly bound by and the Special Rapporteur uses as a guide, was created for a different reality, where many of the challenges set by neoliberalism and the market economy today were not even fathomable. Even if neoliberal ideas were completely banished from public governance, however, the ICESCR might be unfit for the next episode of the

double movement. It seems to be destined to keep falling into the depths of an unfamiliar cave, trying to hang on to slivers of the second countermovement that become thinner and thinner with time. The problem of the ICESCR's implementation, then, might lie more with the instrument itself than with those who monitor its implementation. The next and final chapter of this thesis will explore whether the treaty can be rescued from its long fall into obsolescence.

VI *The Narrative of the ICESCR*

“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic...”, wrote Professor Robert Cover in his review of the United States’ Supreme Court’s 1982 term.¹⁰³⁷ Through a careful study of historical settings, biographies, *travaux préparatoires* and the output of international human rights bodies, this thesis has provided a narrative of the ICESCR that casts light on its meaning. Through the lens of Karl Polanyi’s theory of the double movement, I have shown that the ICESCR’s meaning and purpose is to counter the influence of economic liberalism on public governance and therefore mitigate the detrimental consequences of excessive marketisation through mechanisms of social protection. Moreover, I have demonstrated that this purpose guides the ICESCR’s interpretation and implementation to this day, albeit with some obstacles. Below, I will review the findings that led to these conclusions. Then, I will provide an overview of three paths we could expect the ICESCR to follow in the near and far future, based on those findings.

A *Summary of Findings*

The ICESCR’s purpose was moulded by the second countermovement, a series of actions taken by governments around the world in the mid-20th century to counteract the harmful effects of the laissez-faire economics (also known as economic liberalism) which had guided public policy during the 19th century and again in the aftermath of the First World War. Aware that economic liberalism can lead to devastating events like the Great Depression and the Second World War, governments responded to those crises with a wave of new programmes and institutions aimed at decommodifying labour, property and certain essential resources and services. The rationale behind those measures was to reduce the influence of the market over society, allowing individuals and groups to fully develop without having to rely on market mechanisms, which, under economic liberalism, are designed with the fundamental purpose of maximising profit, regardless of the social consequences of that pursuit.

Not all the second countermovement’s policies and practices had the same ideological inspiration. In the United States, the second countermovement was based on the policies of

¹⁰³⁷ Robert Cover “The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative” (1983) 97 Harv L Rev 4 at 4.

FDR's New Deal – a set of policies that sought to distribute wealth and provide the people of the United States with decent jobs and social security in the aftermath of the Great Depression. While progressive, these policies were not inspired by socialism. However, in most other countries (like the United Kingdom, France, Chile and India) the welfare states developed during the mid-20th century as part of the second countermovement were justified by the four socialist traditions of utopian socialism, Marxism, social democracy and Christian socialism. Although all these influences were reflected in one way or another in welfare state institutions, the ones that had the greatest impact on the actions of the individuals and governments that constructed the welfare state were social democracy and Christian socialism. Under these traditions, governments pursued socialist goals within the framework of a democratic system and tolerated the existence of private property that did not have a clear social purpose. The Fabian Society – whose ideas had a major influence on architects of the welfare state like William Beveridge, John Maynard Keynes and Clement Attlee – was the main exponent of that gradual and tolerant socialist approach that allowed governments during the second countermovement to effectively bring the market under the state's control.

Despite their diverse ideological and geographical backgrounds, the policies and practices that defined the second countermovement were guided by six common principles. Those principles were that: i) governments should intervene when markets fail to provide social welfare; ii) governments should promote material equality; (iii) property with a strong social purpose should be nationalised; (iv) key services should be decommodified; (v) everyone should have an adequate income, ideally through employment; and (vi) international conflict can be avoided through social protection. All these principles constituted a reaction against the doctrine of economic liberalism, which has blind faith in the market economy, leads to the unrestrained accumulation of capital by a few individuals or families, holds that private property is an absolute and inviolable right, subjects every resource and service to the rules of the market, commodifies labour as much as possible to maximise capital, and suggests that international conflicts can be avoided if countries are interdependent due to free trade. The effective opposition against these ideas, from both socialist and non-socialist elements, is what demarcated the mid-20th century response to economic liberalism as a complete countermovement.

The ICESCR was an international manifestation of the second countermovement and manifested each of its six principles to a greater or lesser extent. There were earlier signs of an international commitment towards those principles, including the Atlantic Charter and the UN

Charter – both of which made reference to FDR’s “freedom from want”, one of the central concepts of the second countermovement. It was not, however, until the Commission started drafting an international covenant on human rights in 1947 that the protection of economic, social and cultural rights was contemplated. It was John Humphrey, a socialist inspired by the reforms of the second countermovement, who introduced those rights into a draft covenant and it was another socialist, René Cassin, who ratified that decision. Once they were incorporated into the UDHR, it was clear the Commission had a strong commitment to the principles of the second countermovement.

However, it was the ICESCR that embedded the six principles into obligations of a binding nature. The treaty’s *travaux préparatoires* reveal that the Commission’s delegations – many of whom had strong ties to the second countermovement – had a clear intention of pushing back against the doctrine of economic liberalism and building a new global order that prioritised social wellbeing over economic profit. They demonstrated a strong preference for an interventionist state that could fill the voids in social welfare left by market failures, which was reflected in clauses 2.1 and 2.3 of the ICESCR. Moreover, while they adopted the second countermovement’s trend of seeking full employment, they were also aware it had to be complemented by a series of rights that protected workers from poor working conditions and therefore contributed to decommodifying labour (articles 6–9 of the ICESCR).

Scholars like Moyn and Whyte have argued, without analysing the drafters’ intentions, that the delegates to the Commission failed to imprint a strong enough commitment towards material equality in the UDHR and then the ICESCR by omitting an explicit obligation in that regard. My examination of the *travaux* shows that, to the contrary, the Commission manifested an ambition to guarantee material equality in several ways. First, several delegates explicitly indicated that the main justification behind economic, social and cultural rights was the promotion of equality. Second, the drafters omitted a right to private property, which, under the socialist rationale many of them shared, was also conducive to equality. Moreover, several delegates showed commitment towards the nationalisation of industries and property that served a public interest.

Those commitments were not translated into concrete obligations in the ICESCR because its drafters favoured the decommodification of essential services as the main technique to promote material equality. As seen, the majority of the ICESCR’s substantive obligations (articles 10–15 of the ICESCR) decommodify services like health, education, family services,

nourishment, clothing and housing. The *travaux* show that, even though most Commission members accepted the legitimacy of private enterprises supplying these services, their ambition was for states to establish universal and free services that could remove those areas of life from the logic of the market economy so they could be available to all individuals regardless of their socioeconomic status. The drafters also understood that many of these services contributed to building just societies that would not as easily succumb to fascist leaders, thus avoiding another international conflict like the Second World War. The consistent pattern in all these views, as well as the way those views were codified in the ICESCR, is that the treaty is meant to be a legal instrument of social protection against the doctrine of economic liberalism and its harmful consequences. As long as economic liberalism has an influence on public governance, that general purpose should be carefully considered by those in charge of interpreting and implementing the ICESCR.

That assertion, however, has been tested during the neoliberal era. From the 1980s onwards, advocates of neoliberal ideas have been successful at reintroducing the doctrine of economic liberalism back into public governance. As an attack on the principles of the second countermovement, neoliberal practices reverted or significantly weakened many of the social protection policies that governments had put in place in the aftermath of the Great Depression and the Second World War. In the last 40 years or so, the adoption of neoliberal practices by most governments – either through their own initiative or through the influence of international financial institutions – has led to societies that are once more dominated by the rules of the market economy. Some consequences of neoliberalism have been unparalleled levels of inequality, the rise of populist governments, ecological crises and a loss of connection among humans.

In view of the social damage caused by this new version of economic liberalism, the Committee ESCR and the Special Rapporteur have, each in its own way, attempted to use the ICESCR as a tool of resistance against neoliberalism. Some passages of the Committee ESCR's work have tolerated a neoliberal approach to economic, social and cultural rights, supporting some authors' views that the treaty has been appropriated by neoliberals for their own purposes. Nevertheless, the vast majority of the Committee ESCR's output in its first years of its operations was directed at reinforcing the principles of the second countermovement that underlie the ICESCR's rights and at signalling the negative effects of neoliberal policies on the enjoyment of those rights. The Committee ESCR's tone was mostly descriptive, though – it

did not seem confident enough during this period to openly request States Parties to revert those policies.

That stance changed after the detrimental effects of neoliberal policies became apparent during the GFC. Although there had been an undercurrent of resistance movements against neoliberalism and neoliberal globalisation before then, the GFC triggered a new wave of social protection that I have identified as an emerging third countermovement. While still coalescing, and far from yet reaching the heights of the second countermovement, today's countermovement is composed of a series of ideas and policy reforms that promise to tilt the balance of the double movement back towards social protection. Among the policies currently defining a third countermovement, I have chosen to highlight UBI, zero-carbon economies and wellbeing economics due to their significant impact on governments' agendas, their transformative potential and their direct confrontation of challenges that are unique to the neoliberal era.

Inspired by an incipient third countermovement, the Committee ESCR has begun to more vehemently resist neoliberal policies and demand that States Parties replace them with more robust social protection policies. The Covid-19 pandemic, which put in evidence decades of underinvestment in institutions for social protection meant to protect societies from this type of event, has only reinforced the Committee ESCR's attitude.

This vigorous resistance, however, has also been constrained by the ICESCR's historic bond with the second countermovement. As a product of that moment, the treaty embedded practices that do not always fit into current efforts to diminish the influence of neoliberal thought over society. Some of those practices, like a progressive tax system and public services, are as pertinent to this countermovement as they were to the previous one. However, policies like UBI, zero-carbon economies, and some aspects of wellbeing economics extend beyond the logic of the mid-20th century second countermovement – in some cases, they even contradict it. This dissonance presents a real challenge for the Committee ESCR, which is strictly bound by the limits of the ICESCR's content. It also explains why the Committee has only vaguely addressed mechanisms uniquely associated with the neoliberal era and an incipient third countermovement, choosing instead to reinforce those of the second countermovement.

In contrast, the Special Rapporteur, taking advantage of a mandate that is not strictly bound to the confines of the ICESCR's historical roots, has actively criticised neoliberalism from the beginning of its mandate. It has been more vocal than the Committee ESCR about the

necessity of pushing back against neoliberal trends to protect the most economically vulnerable members of society. Furthermore, it has recently started to actively endorse policies of a rising third countermovement. However, those endorsements have not always been based on ICESCR obligations, which might be a sign the treaty is starting to become obsolete. In short, the ICESCR's dilemma is that it is a treaty meant to resist economic liberalism that may struggle to adapt to current (or future) resistance movements against that economic doctrine.

B Pathways for the ICESCR's Future Role in the Countermovement(s) against Economic Liberalism

In view of the dilemma posed above, I will conclude this thesis by presenting some potential pathways for the ICESCR as it continues to operate within Polanyi's double movement. The first pathway is somewhat gloomy, foreseeing a future where the ICESCR loses all relevance, whereas the other two are more optimistic – proposing reforms to the treaty or an evolutionary interpretation. While each of these paths has its own advantages, they all have significant limitations as well, some of which present opportunities for further research.

1 Forsaking the ICESCR

Most advocates of human rights would consider forsaking the ICESCR a deplorable idea. From an “old orthodoxy” or naturalistic view of human rights, the rights recognised by ICESCR are a “given”.¹⁰³⁸ They are inalienable and intrinsic to our nature as human beings, regardless of where or when we are born. Human rights not only preceded legal instruments like the ICESCR but are meant to last as long as humans exist.¹⁰³⁹ From the perspective of agreement theories – which picture human rights standards as a progressive convergence of cultural, moral and political values –¹⁰⁴⁰ abandoning the ICESCR would mean squandering the potential of a treaty that has been ratified by a large number of states (currently 171),¹⁰⁴¹ representing a vast majority of the global population. Therefore, the ICESCR represents a significant opportunity to improve people's lives that should not be lightly disregarded,

¹⁰³⁸ MB Dembour “Critiques” in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (2nd ed, Oxford University Press, Oxford, 2014) 53 at 57.

¹⁰³⁹ CR Beitz *The Idea of Human Rights* (Oxford University Press, Oxford, 2012) at 149-159.

¹⁰⁴⁰ At 74-94.

¹⁰⁴¹ “Status of Ratification Interactive Dashboard” ..., above n 4.

especially if states continue to internalise its standards into their domestic legal systems.¹⁰⁴² Efforts to improve both its content and its mechanisms of implementation should be carefully examined before discarding such a vital instrument.

Nevertheless, there are compounding reasons to opt for a future where the ICESCR does not have a role in a third countermovement as it continues to grow, or in future countermovements against economic liberalism. Despite the Commission's intention to create an international treaty to protect society against the harmful effects of economic liberalism, and despite the Committee ESCR and the Special Rapporteur's efforts to give effect to that objective, the ICESCR no longer operates as an effective shield against the market economy. Even if Moyn's argument that economic, social and cultural rights were "unambitious in theory" is incorrect, as this dissertation has shown, it is still arguably true that they have been "ineffectual in practice in the face of market fundamentalism's success".¹⁰⁴³ Despite suggestions that a third countermovement cannot succeed unless it takes the form of a human rights-based global effort,¹⁰⁴⁴ the present countermovement, as described in this thesis, is not based on, or necessarily linked to, the ICESCR. If anything, as I have shown, the treaty might be an obstacle for current advocates of social protection if its framework does not evolve beyond mid-20th century mechanisms of social protection. Therefore, as also claimed by Moyn, if a welfare movement (perhaps a third countermovement) were to be successful in reverting neoliberal policies, "it will not look like our human rights movement". Those rights, he insists, "are [not] the only or even the main keys to unlock the portal to the world's future".¹⁰⁴⁵

Multiple challenges explain why the ICESCR has not been especially effective in resisting neoliberalism. For example, the obligation to achieve progressively the full realisation of ICESCR rights (article 2) has often been misunderstood by states as an excuse to delay taking immediate steps toward the protection of those rights.¹⁰⁴⁶ Most of the ICESCR's challenges, however, are shared by the wider UN human rights regime and, even more

¹⁰⁴² See HH Koh "Why Do Nations Obey International Law?" (1997) 106 Yale LJ 2599; Varun Gauri and DM Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, Cambridge, 2008).

¹⁰⁴³ Moyn, above n 2, at 216.

¹⁰⁴⁴ Burawoy, above n 44, at 12-16, 24.

¹⁰⁴⁵ Moyn, above n 2, at 219, 220.

¹⁰⁴⁶ ICESCR, above n 1, art 2(1); Andrew Byrnes "Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation" (2010) 33 UNSWLJ 193 at 199; Inter-American Institute of Human Rights (IHR) *Protección internacional de los derechos económicos sociales y culturales: Sistema Universal y Sistema Interamericano* (IHR, San José (CR), 2008) at 138.

generally, by public international law. Some obstacles faced by the UN human rights system are procedural, such as the significant backlog in state reporting under the mechanisms established by human rights treaties (with no provisions to sanction noncompliant states), delays in processing reports and communications and faulty mechanisms to elect members of human rights committees. Other challenges are more substantial, such as resource constraints and limited political support from states.¹⁰⁴⁷ While states are content to adopt human rights treaties, they are not consistently enforced by domestic courts.¹⁰⁴⁸ Additionally, to this day, international law in general continues to be regarded by some as a primitive form of law that relies on self-help, as it is not enforced through sovereign command.¹⁰⁴⁹

If, for all of these reasons, the ICESCR is not an effective tool against the harmful consequences of economic liberalism, then perhaps we should focus our resources and time on mechanisms that can offer better, more tractable, results for social welfare.¹⁰⁵⁰ Following Edmund Burke's criticism of human rights, it is unrealistic to believe that human rights, consisting of "theoretical speculation" about human nature, can influence political practice, which relies on compromises, exceptions and calculations.¹⁰⁵¹ On the contrary, as a Marxist critique would suggest, human rights have been following political economic trends since their genesis.¹⁰⁵² This thesis and other studies of the ICESCR have validated that argument by demonstrating that the treaty was a product of the political economic trends set during the second countermovement but has been rendered ineffective by advocates of neoliberal ideas and practices from the 1980s onwards. Even if a third countermovement were successful and economic liberalism restrained by society once more, possibly facilitating the ICESCR's implementation, it would still be accurate to state that the treaty's effectiveness depends on aspects of political economy. Instead of moulding the economy, as its drafters intended, the ICESCR has always and will likely continue to be defined by it. Hence, even if a third countermovement makes the ICESCR relevant again, some of its challenges would not disappear.

¹⁰⁴⁷ James Crawford "The UN Human Rights Treaty System: A System in Crisis?" in Philip Alston and James Crawford *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000) 1 at 4-11.

¹⁰⁴⁸ See Lorenzo Zucca "The Fragility of International Human Rights Law" (2016) 30 *Ethics and International Affairs* 491.

¹⁰⁴⁹ Koh, above n 1042, at 2616.

¹⁰⁵⁰ See William MacAskill *Doing Good Better: How effective altruism can help you make a difference* (Gotham Books, New York, 2015).

¹⁰⁵¹ Xostas Douzinas *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, Oxford, 2000) at 148-152.

¹⁰⁵² For a Marxist perspective on this idea see Chimni, above n 51, at 82-84.

An outcome that would comply with the ICESCR's purpose, as imagined by its drafters, is one in which the treaty successfully prevents a next wave of economic liberalism. The last time that economic doctrine resurfaced, with the rise of neoliberalism, the ICESCR was just coming into force and the main body in charge of its implementation, the Committee ESCR, had not even been created. When it happens again, however, the expectation set by this thesis is that the actors in charge of implementing the ICESCR, a tool designed to resist economic liberalism, can hold their ground instead of becoming submissive to the new wave of marketisation. The ICESCR should not be complied with by States Parties only if the political environment is suitable; it should become an instrument that obliges governments, international organisations and non-state actors to sustain or create political conditions in which its obligations can be met. In Polanyian terms, the ICESCR needs to ensure the market remains embedded in norms of social protection.

Those norms, however, need to be adapted to the circumstances of the moment. While the challenges and criticisms described above are certainly immense obstacles for the ICESCR's continued relevance, an even greater impediment would be its inertia. As explained in Chapter V, the Committee ESCR has found it increasingly difficult to adapt the ICESCR's normative framework to the policies starting to emerge as banners of a potential third countermovement. The Special Rapporteur has had to rely less and less on the treaty as it seeks to lead that countermovement. Therefore, the next two sections present pathways that might ensure the ICESCR remains a dynamic instrument in the double movement as it continues to unfold.

2 *Amending the ICESCR*

While some of the second countermovement's mechanisms and ideas contained in the ICESCR can be useful to address the negative impacts of neoliberal practices, and possibly future versions of economic liberalism as well, there are aspects of the treaty that are manifestly outdated. Some of its terms are now considered unacceptable, like "race" in article 2(2),¹⁰⁵³ which is now commonly accepted to be a social construct not grounded on biological factors and should therefore be disregarded.¹⁰⁵⁴ The Committee ESCR itself has established that its

¹⁰⁵³ Article 2(2).

¹⁰⁵⁴ See RS Chang "Critiquing 'Race' and Its Uses: Critical Race's Theory's Uncompleted Argument" in Francisco Valdes, Jerome McCristal Culp and AP Harris (eds) *Crossroads, Directions and A New Critical Race Theory* (Temple University Press, Philadelphia, 2002) 87.

use of the term “does not imply the acceptance of theories which attempt to determine the existence of separate human races”.¹⁰⁵⁵ The reference in article 10(1) to the family as “the natural and fundamental group unit of society”, and subsequent allusion to marriage,¹⁰⁵⁶ reflects several cultural and moral biases about the role of family in society (specifically, some forms of family) that are currently seen as invalid.¹⁰⁵⁷ While some forms of “metropolitan territories” still exist (although not usually referred to that way), all 11 of the “trust territories”¹⁰⁵⁸ under the UN’s International Trusteeship System are now independent states or have joined an independent state. The last trust territory was Palau, which became independent in 1994.¹⁰⁵⁹ Thus, there are concepts in the ICESCR that should be eliminated from its text.

Furthermore, as highlighted in the last part of this thesis, the ICESCR also falls short of adequately protecting society against neoliberal doctrine because it does not include mechanisms that directly address unique challenges of the neoliberal era. As stated before, UBI might lead to the reconfiguration of the right to work as a right to income.¹⁰⁶⁰ The imperative to reduce the harmful consequences of climate change and achieve zero-carbon economies is leading to the recognition of a “right to a good environment”.¹⁰⁶¹ In the context of wellbeing economics and the decades-long struggle to move to a model of growth that distributes wealth, focuses on expanding only industries that satisfy human rights and does not overpass our planet’s environmental boundaries, some academics and activists are promoting the “right to sustainable development”, building on the already recognised right to development.¹⁰⁶² While the ICESCR might contribute towards the satisfaction of these rights under an evolving interpretation of the treaty, as I will discuss in the next section of this conclusion, their absence from the treaty detracts from its usefulness as an instrument of a third countermovement.

Eliminating manifestly obsolete terms and clauses from the ICESCR and adding new rights would require its amendment. Under article 29 of the ICESCR, an amendment may be

¹⁰⁵⁵ *General Comment No 20...*, above n 968, at [19].

¹⁰⁵⁶ Article 10(1).

¹⁰⁵⁷ Saul, Kinley and Mowbray, above n 65, at 728; Magdalena Sepúlveda Carmona “A Contemporary View of ‘Family’ in International Human Rights Law and Implications for the Sustainable Development Goals (SDGs)” (UN Women Discussion Papers No 21, UN Women, 2017) at 7.

¹⁰⁵⁸ Articles 1(3), 14.

¹⁰⁵⁹ “International Trusteeship System” United Nations <www.un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories>.

¹⁰⁶⁰ Van Parijs, above n 708, at 120.

¹⁰⁶¹ Bridget Lewis *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, London, 2018) at ch 4.

¹⁰⁶² See Joyeeta Gupta and Karin Arts “Achieving the 1.5°C objective: just implementation through a right to (sustainable) development approach” (2018) 18 *Int Environ Agreements* 11; Darrell Moellendorf “A right to sustainable development” 94 *The Monist* 433.

proposed by any State Party. Subsequently, if agreed by at least one third of the States Parties, the UN Secretary-General shall convene a conference to vote on the proposal. If the amendment is adopted by a majority of the States Parties, that decision must be approved by the UN General Assembly. If approved by the General Assembly, the amendment would come into force once a two-thirds majority of States Parties have ratified the amendment according to their domestic system. Even then, the amendment would only be binding on the States Parties that ratified it.¹⁰⁶³ Thus, the number of hurdles in this procedure and the two-third majority required for an amendment to enter into force makes the possibility of reforming the treaty to fit a third countermovement politically inviable.

Even if this pathway were viable, it would still be inefficient. Under a neo-Polanyian understanding of the double movement, a third countermovement is likely not going to be the last. It can be expected that a new version of economic liberalism will surface, just as neoliberalism did in the 1980s. Therefore, even if the ICESCR were amended to adopt mechanisms of an emerging third countermovement, it would be outdated by the time a fourth or subsequent countermovements emerge to address the effects of economic liberalism as it continues to manifest in the future. Nevertheless, the further we get from the mid-20th century second countermovement, chronologically but also in terms of our political reality, the higher the pressure will be on States Parties to amend the treaty (that is, assuming that in the mid- or long-term future, the global order is still based on the UN and the notion of states).

More broadly, the ICESCR case study presents a larger problem regarding the way international treaties – and even more generally, laws – are drafted. As shown in this thesis, the ICESCR embedded principles and practices of the very specific socio-political moment I have referred to as the second countermovement. That resulted in detailed standards that can be more easily applied by courts.¹⁰⁶⁴ However, it also led to the theoretical conflicts I have discussed so far. That dilemma raises the question of whether international human rights treaties, which are meant to codify *atemporal* social values and intrinsic aspects of our humanity, should be based on the *temporary* political circumstances in which they are drafted. As suggested by Koskeniemi, there might not be an alternative, as international law and human rights can only be manifestations of politics.¹⁰⁶⁵ Nevertheless, one of the lessons of this

¹⁰⁶³ ICESCR, above n 1, art 29.

¹⁰⁶⁴ For a law and economics perspective of this issue, see Daragh McGreal “Drafter decision-making in international human rights treaties” in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar, Cheltenham, 2012).

¹⁰⁶⁵ Koskeniemi, above n 67.

thesis – highlighted by its neo-Polanyian approach – is that international law-making could benefit from looking beyond immediate circumstances and creating norms that can survive social, economic or political dislocations.

3 *An evolutionary interpretation of the ICESCR*

Amending the ICESCR might be unnecessary if the international and national bodies in charge of its implementation were to conduct an evolutionary interpretation of the treaty that adapts it to present and future countermovements. An evolutionary interpretation of a treaty, facilitated by the contemporary dynamic development of international law,¹⁰⁶⁶ consists of understanding treaty terms not necessarily as they were originally adopted but in accordance with developments in international law and the “meaning acquired by [those terms] when the treaty is applied”.¹⁰⁶⁷ This type of interpretation allows the parties’ intentions, found in the treaty’s “object and purpose” (article 31(a) of the VCLT), to be followed.¹⁰⁶⁸ In the human rights regime, evolutionary interpretation has become a “hallmark” of judicial decisions, which often depict human rights treaties as “living instruments”.¹⁰⁶⁹ The Committee ESCR has consistently conducted an evolutionary interpretation of the ICESCR.¹⁰⁷⁰ At points, however, it has preferred to use the term “teleological interpretation” to refer to a reading of the treaty that goes beyond its specific wording and therefore presents an alternative to a “restrictive interpretation”.¹⁰⁷¹

As this thesis has shown, the general intention of the ICESCR’s parties was to enact rights that could protect individuals and societies from the detrimental effects of economic liberalism. As also discussed, that purpose holds regardless of the time or place in which the treaty is applied. Therefore, in theory, it is viable to carry out an evolutionary interpretation of the ICESCR that continues to adapt the treaty to the circumstances of the double movement in which it is applied. For example, the Committee ESCR and the Special Rapporteur have

¹⁰⁶⁶ Campbell McLachlan “The Evolution of Treaty Obligations in International Law” in Georg Nolte *Treaties and Subsequent Practice* (Oxford University Press, Oxford, 2013) at 72-73.

¹⁰⁶⁷ Bjorge, above n 64, at 59.

¹⁰⁶⁸ At 119.

¹⁰⁶⁹ See Gloria Gaggioli “The Strength of Evolutionary Interpretation in International Human Rights Law” in Georges Abi-Saab, Kenneth Keith and Clément Marquet (eds) *Evolutionary Interpretation and International Law* (Hart Publishing, London, 2019) 103.

¹⁰⁷⁰ See *General Comment No. 4...*, above n 824, at [6, 11, 13]; *General Comment No.6: The economic, social and cultural rights of older people* UN Doc E/1996/22 (1995) at [10]; *General Comment No.19...*, above n 862, at [19, 20]; *General Comment No.23...*, above n 860, at [4].

¹⁰⁷¹ *General Comment No.25...*, above n 881, at [19].

established that climate change results in the violation of several economic, social and cultural rights, imposing an obligation on States Parties to the ICESCR to minimise greenhouse gas emissions.¹⁰⁷²

An evolutionary interpretation of the ICESCR can also, in some cases, lead to the recognition of new rights. In General Comment No 15 (2003), the Committee recognised the “right to water” as one of the rights that derived from the non-exhaustive list of elements that leads to an adequate standard of living (article 11) and as a corollary of the right to health (article 12).¹⁰⁷³ Following the same logic, the Committee ESCR could recognise the rights to a good environment and to sustainable development as elements of the right to an adequate standard of living, thus reaffirming its support of issues of the incipient third countermovement, such as climate change and inequality.

Without having to recognise new rights, the Committee ESCR could also use an evolutionary interpretation to endorse potential practices of a third countermovement as means to satisfy ICESCR rights. For example, it could recommend UBI as a mechanism to realise the right to social security (article 9). This position would align with its previous suggestion that the right to social security cannot be fully realised unless states adopt a universal and non-contributory social assistance programme.¹⁰⁷⁴ Therefore, it is not impossible for the ICESCR to have a weighty role in a potential third countermovement.

An evolutionary interpretation of the ICESCR, however, also has some limitations. International law has generally struggled to address issues of neoliberal globalisation¹⁰⁷⁵ and the ICESCR is not an exception. As the double movement continues to unfold, there will almost undoubtedly be issues (especially in the mid- and long-term future)¹⁰⁷⁶ that might be simply too detached from the logic of the second countermovement that was embedded into the treaty. For instance, an automation of most (if not all) jobs could lead to a future where humans do not work and therefore labour rights become obsolete.¹⁰⁷⁷ This and other issues will play into the logic of the second countermovement, with social groups campaigning for a larger

¹⁰⁷² *Climate change and the International Covenant on Economic, Social and Cultural Rights...*, above n 1003; Alston, above n 1007.

¹⁰⁷³ *General Comment No.15...*, above n 802, at [3].

¹⁰⁷⁴ *Views adopted... concerning communication No. 10/2015*, above n 986, at [23.f].

¹⁰⁷⁵ See Andrew Byrnes, Mika Hayashi and Cristopher Michaelsen (eds) *International Law in the New Age of Globalization* (Brill | Nijhoff, 2013).

¹⁰⁷⁶ See Hilary Greaves and William MacAskill “The case for strong longtermism” (Working Paper No 7-2019, Global Priorities Institute, 2019).

¹⁰⁷⁷ YN Harari *Homo Deus: A Brief History of Tomorrow* (Vintage, London, 2017) at 370-382.

involvement of the market in each of them. A countermovement will rise to face that pressure, but it might not rely on the ICESCR (at least not in its current form) to do so.

Regardless of the pathway chosen by those in charge of interpreting and applying the ICESCR, it is imperative that we remember why that treaty exists. In the mid-20th century, governments and individuals were acutely aware of the consequences of ignoring the consequences of an unchecked market economy. The Great Depression, the consequent rise of totalitarianism and the Second World War were very fresh in their memories. Three quarters of a century later, we are slipping into similar patterns. The GFC led to the surge of populist governments and dictatorships all around the world, and the recent Covid-19 pandemic has been added to the brew of a potential global catastrophic event. The purpose of the ICESCR's drafters was to give us an instrument that could counteract the market forces that increase the risk of such an event, so we did not have to go through the same devastation and suffering they experienced. There is still a chance the ICESCR might fulfil that purpose, but the cost of over-relying on it is too high to not consider alternatives.

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