



A Legal Analysis of the Possibilities and Impediments for Citizens Seeking to Enforce their Social Rights

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EXECUTIVE SUMMARY

This is a legal study of the arrangements made in eight European countries to secure the enforcement of social rights. It is a study carried out as a response to the overall bEUcitizen research interest in potential barriers to a EU-citizenship. The aim of the study is to investigate the possibilities and impediments for EU-citizens in Denmark, Estonia, Germany, Poland, the Netherlands, Spain, Sweden and the United Kingdom to enforce their (moral and/or legal) social rights in the fields of education, health care, housing and social assistance. Our focus is on redress mechanisms. It is a study that is comparative in several dimensions (between rights, between citizens, between countries and potentially also between different legal levels). Results indicate that *if* rights are provided and *if* redress is offered, we have in the countries studied found no formal hindrances that discriminate against mobile EU-citizens. This said, we also learn that extra-procedural hindrances are a reality and that they create barriers especially problematic to mobile EU-citizens but also to EU-citizens living in their native countries. We conclude that the EU-citizenship project would gain from an exploration of new and innovative means of creating systems and institutions for the provision of basic, fundamental, social protection to secure life, dignity and means of social inclusion to all its citizens, no matter where in Europe they live or work. Europe is a region of welfare states and it is a barrier to the fulfilment of a well-functioning EU-citizenship not to fully recognise this fact.



1. INTRODUCTION

This is a legal study of the arrangements made in eight European countries to secure the enforcement of social rights. It is a study carried out as a response to the overall bEUcitizen research interest in potential barriers to a EU-citizenship. The countries included are: Denmark, Estonia, Germany, the Netherlands, Poland, Spain, Sweden and the United Kingdom. The social rights of relevance are: the right to education, the right to health care, the right to housing and the right to social assistance. Our focus is on redress mechanisms. It is a study that is comparative in several dimensions (between rights, between citizens, between countries and potentially also between different legal levels).

1.1 Background

The study has three focal points: social rights, redress mechanisms and citizenship. As a point of departure these three phenomena are discussed with the ambition to create a theoretical and methodological framework for the comparative analysis. The analysis is based on *eight* country-reports that all address the possibilities for individuals to enforce their social rights on the national level.

That the notion of “social rights” is an ambiguous concept is a fact identified by Jeff King who contributes with valuable distinctions.¹ King makes a primary division between social rights in a *moral sense* and social rights in a *legal sense* and continues with an identification of sub-categories within both of these main categories of rights. Social rights in a moral sense is divided by King in two subdivisions: “social human rights” and “social citizenship rights”, while social rights in a legal sense is divided in three subdivisions: “international social rights”, “legislative social rights” and “constitutional social rights”. In the present study interest is primarily in social rights in a legal sense but still, as they are interlinked with social rights in a moral sense, we will adopt King’s distinctions in full and make them ours. These are the different senses of social rights identified by King:²

Moral senses:

Social human rights: These are the human rights the philosophers speak about, rights we enjoy as matter of political morality and whose existence is not dependent on any legal recognition. Because they are human rights, they are considered global baseline standards, and they therefore have a minimalist character.

¹ King, Jeff (2012) p. 18 f. King’s book on the topic of “Judging social rights” is a valuable contribution to the broad and multidisciplinary field on rights in general and on social rights in particular. For the purpose of the present study his legal point of departure is helpful in setting a conceptual framework that is in dialogue with the material analysed. For more on the social construction of social rights see Dean, Hartley (2015), Report D6:3, for the bEUcitizen project.

² King, Jeff (2012) pp. 8-19.



Social citizenship rights: These are the social rights generated by some account of distributive justice but which may be limited to particular communities, and which thus typically go beyond the minimalism of social human rights. They specify the requirements of a more egalitarian vision of social citizenship. These rights can be quite specific and seem generous when specified in a legal form, and may include entitlements such as four-week holidays with pay, extensive protection for collective bargaining, paid maternity and paternity leave, and legal protection against unjustified dismissal.

Legal senses:

International social rights: These are the social rights recognised in international law, which are chiefly designed to mirror our social human rights but which may extend beyond or fall short of them in elements of detail. They may also include social citizenship rights, as do the revised European Social Charter and elements of the EU Charter of fundamental rights, and the bulk of the International Labour Organisation's many labour and social security conventions.

Legislative social rights: These are the rights embedded in legislation and enforceable in ordinary public law before courts and tribunals. The expression is used this way by sociologists such as T.H. Marshall and Gøsta Esping-Andersen.

Constitutional social rights: These are rights enacted in constitutions and may be justiciable or non-justiciable, and may include social human rights, social citizenship rights, and references to relevant international social rights.

In light of the above, it should be acknowledged that it is less than clear to what extent the EU-citizenship, in its own right, does provide a legal (or moral) basis for individual social rights claims in the areas of interest.³ In addition we should be aware that if there are no legal claims to be made there are no redress mechanisms available either; rights can only be legally enforced if they are legally acknowledged (at some level). Still, one could argue that although it is unclear to what extent the European citizenship provide *social citizenship rights*, it could never the less be argued that European states have acknowledged the value of *social human rights* not only in a moral but also, in varying degree, a legal sense.⁴ Thus, when European citizens explore their right to freedom of movement their social rights claims might be grounded in one or several of the legal foundations for social rights identified by King and cited above (international social rights, legislative social rights or constitutional

³ In general, see van Eijken, H., 2014, pp 123 ff. More specifically (on the rights to housing, health care, social assistance and education) and in relation to the actual legal effects of the implementation of the Residence Directive on national level, see Heeger & Pennings (2016, forthcoming, a parallel comparative study within the bEUcitizen-project.)

⁴ The core human rights instrument for the protection of social human rights is the (revised) European Social Charter. However there is an acknowledged interdependence between the Charter and the European Convention on Human Rights as well the Charter of Fundamental Rights of the European Union. This interdependence is visible for instance in Gijsbert Vonk's critical comment in relation to the Dano case: Vonk criticises the ECJ for not taking the EU Charter of fundamental rights into account in the Dano case and concludes: "According to the ESRC [the European Committee on Social Rights] the Netherlands violates several articles of the European Social Charter [collective complaint 90/2013 and 86/2013]. So this is ironically the current state of affairs under European law when it comes to the right to protection for non-nationals offered by social assistance schemes. EU citizens cannot invoke their EU charter rights before the CJEU, but must rely on NGOs using the complaint procedure adopted by the Council of Europe under the European Social Charter." Gijsbert Vonk, "EU-freedom of movement: No protection for the stranded poor", November 2014, europeanlawblog.eu/?p=2599



social rights).⁵ Further one could argue, with reference to either the European Convention on Human Rights, the European Social Charter or the EU Charter of Fundamental rights, or all three in combination, that all European countries have acknowledged a state responsibility to legally secure some level of social rights to all individuals within their territory.

In King's distinctions above the aspect of whether social rights are made enforceable or justiciable is a core factor in determining their character as rights in a legal sense. The present study, focusing on redress mechanisms, is based on an elaboration of how social rights (in a legal sense) are made stronger or weaker on sliding scale. In a Swedish study published in 1995 in the field of social- and disability law Anna Hollander (elaborating on work performed by Håkan Stoor), presents a set of seven parameters that arguably allow for an assessment of whether or not a piece of legislation could be defined as a "legal-rights-law" or not.⁶ Hollander's assessment model was later criticised by Håkan Gustafsson, who suggested that that the Stoor/Hollander parameters, rather than defining the nature of legislation (as rights-legislation or not), are better used to assess the relative legal strength of social rights on scale from weaker to stronger.⁷ The Stoor/Hollander parameters read as follows:⁸

1. Is the benefit formulated as an individual right, or is it a general regulation?
2. Are the conditions (the criteria) stated in law?
3. Is the content of the benefit stated in law?
4. Is the benefit made dependant on budget allocations?
5. Is there a right to appeal?
6. Does the law state forms for state supervision and control?
7. Does the law state possibilities to sanction state authorities to access individual rights?

The present study is focused on the fifth parameter, the right to appeal. However, we have chosen to explore this parameter in more detail taking an interest in how justiciable social rights can be legally constructed in order to be able to discuss legal weaknesses and strengths within this isolated parameter. A model for a comparative assessment of redress mechanisms is presented below (1.3).

While this study, at its core, consists of a hands-on comparison of national welfare state legislation, we should be aware that the notion of social rights, in which it is embedded, has an intrinsic complexity. This is true not least from a legal perspective as one topical debate

⁵ For an updated overview of the constant controversies surrounding the welfare aspect of human rights see Arosemena, Gustavo (2014) p. 1 ff who in his study on "how the welfare aspects of human rights can be best addressed in a judicial setting" chose to frame it as a study on duties (rather than on rights), see *ibid*, p. 4.

⁶ Hollander, Anna (1995) pp. 34-35.

⁷ Gustafsson, Håkan (2002) p. 252.

⁸ Hollander, Anna (1995) p. 35. *Translation made by authors of the report.*



concern to what extent an enactment of individual social rights indeed does promote social justice or not.⁹ Thus, while the ambition of the present study is to investigate the redress mechanisms linked to social rights in the included countries, it is not evident that the choice of using a legal rights language as such is always the best way to promote social justice. As long as we remain within the legal rational it is possible to talk about social rights as weaker and stronger, and we will do that.¹⁰ Still, we should keep the counter-arguments in mind and be aware that there are other possible legal strategies, apart from the individual rights language, that could be used to promote social justice. The distinctions made by Lotta Westerhäll between social rights as 1) actual rights 2) quasi- or service rights and 3) goal-oriented rights (based on their enforceability) points in this direction.¹¹ As did her analysis of the Swedish welfare state as a strong welfare state that secured social rights through a legislation that, along with actual rights, to a large extent also created quasi- or service and goal-oriented rights.¹²

The link between social rights and citizenship is visible in King's distinctions above and has been explicit in the overall understanding of citizenship in Europe at least since the publication of T.H Marshall's "Citizenship and Social Class".¹³ While Marshall, as well as other classic welfare state scholars such as Richard Titmuss or Gøsta Esping-Andersen, could take the borders of the nation state as a pre-requisite for their theories, this has become more problematic. The porous internal borders of the European Union, made visible not least through the expanded ambitions of the EU-citizenship, is one distinct challenge to the welfare state expression of social solidarity.¹⁴ If the welfare state was a giant step in the evolution of the human capacity to act in solidarity with strangers, showing solidarity with abstract unknown co-citizens within the nation state, it seems as if another step is necessary in order to expand the inclusive "we" to all humans who are territorially present, be they EU-citizens, migrants, asylum-seekers or irregular migrants.¹⁵

⁹ See for instance Gearty, Connor & Mantouvalou, Virginia (2011).

¹⁰ Hollander, Anna (1995); Gustafsson, Håkan (2002).

¹¹ Westerhäll, Lotta (1994). A prerequisite for the first category of rights "actual rights" to be fulfilled is that there are means for the individual to claim and enforce her or his rights. The second category of rights "quasi- or service rights" is present if there is a legal obligation for an actor (usually a public actor) to secure and provide the right, although no mechanism for the individual to enforce the right if it is not fulfilled. The third category of rights, the goal-oriented rights, is present when goals are manifested in law but without any manifestation of either obligations or enforcement mechanisms.

¹² On the legal construction of the Swedish welfare state see for instance Vahlne-Westerhäll, Lotta (2002). In the original outline of the present study we had included a comparison of social service rights and/or goal-oriented rights (rights where enforceability is legally protected by other means than individual redress mechanisms). However, given the number of countries involved and the complexity of such an approach the study was eventually narrowed down and focused on the comparison of the enforcement of social rights through legal complaints and traditional redress mechanisms.

¹³ Marshall, T. H., (1950).

¹⁴ Stendahl, Sara (2014); Stendahl, Sara (2016 , forthcoming).

¹⁵ On a philosophical note see: Benhabib, Seyla (2002) [2004]; and on a legal: Erhag, Thomas (ed) forthcoming (2016).



To summarise: in order to handle the complexity indicated above the study has been framed in three different ways:

- 1) With a point of departure in the European Social Charter, the present study preconditions the existence of legitimate claims to substantive social rights in the fields of housing, education, social assistance and health care.¹⁶ All countries included in the study have ratified the original version of the Social Charter and some have also ratified the revised 1996 version.¹⁷ In addition the signatories of the Charter have given the institutions of the Council of Europe a mandate to elaborate and define the content of these rights as well as to supervise state performance. This said, the signing, sovereign, states have the full responsibility to secure the protection of these rights in the manner they consider most appropriate in a national setting.
- 2) On a theoretical level, and for comparative purposes, the present study applies a model where different redress (enforcement) mechanisms are classified and assessed. Influenced by the work of the legal scholars Stoor/Hollander and Gustafsson we are interested in studying the legal characteristics of the implementation of social rights arguing that the way implementation is carried out can make rights legally weaker or stronger. The present study elaborates in more detail the character of redress mechanisms, one of the Stoor/Hollander key parameters.
- 3) Modern citizenship is intrinsically interlinked with the provision of social rights.

The comparative scheme (point 2 above) is elaborated in more depth below (1.3). The introductory chapter also include aim and research questions (1.2), a description of the work process (1.4) and an account of the disposition of the report in full (1.5).

1.2 Aim and research questions

The aim of the study is to investigate the possibilities and impediments for EU-citizens in Denmark, Estonia, Germany, Poland, the Netherlands, Spain, Sweden and the United Kingdom to enforce their (moral and/or legal) social rights in the fields of education, health care, housing and social assistance.¹⁸

¹⁶ Rights in the Charter are to some extent overlapping but core Articles in relation to the contingencies and risks dealt with in the present project are: Article 11 (the right to protection of health), Article 13 and 30 (the right to social and medical assistance and the right to social inclusion), Article 14 (the right to benefit from social welfare services), Article 17:2 (the right of children and young people to education, Article 31 (the right to housing) and Article 30 (the right to protection against poverty and social exclusion).

¹⁷ The revised Social Charter has been ratified by in total 33 countries. Of the countries in the present study Estonia, The Netherlands and Sweden have ratified the revised 1996 Social Charter while the remaining countries in the study are signatories of the original 1961 Social Charter: Denmark, Germany, Poland, Spain and the United Kingdom. The three countries in the study that have ratified the revised Social Charter have also ratified the Collective Complaint Procedure. In total, in March 2016, 43 European Countries have ratified the Social Charter and 15 countries have ratified the Collective Complaint Procedure (<http://www.coe.int/en/web/turin-european-social-charter/signatures-ratifications>).

¹⁸ To what extent EU-citizens have legitimate social rights claims based on EU-law is a question dealt with in a parallel study (Pennings, 2016). The present study looks into the scope of social rights on a national level.



The core research questions are:

1. What is the character of the redress mechanisms developed in the eight countries to secure the enforcement of the selected social rights?
2. In relation to the response to the first question, do redress mechanisms available for EU-citizens differ from the redress mechanisms available for national citizens (in relation to different social rights and different aspects of these rights)?
3. Are there other – extra-legal – circumstances that create hindrances for EU-citizens to enforce their social rights in spite of established redress mechanisms?

1.3 The enforcement of social rights through redress mechanisms

Law can be used in different ways to implement social policy. Regulations can be adopted that promote the effectuation of social rights in the moral sense by creating goal-oriented legislation or service rights but laws can also be enacted in a way that provide individuals with legislative social rights. The legal strength of social rights increase if they are turned into legislative rights and are made enforceable through a right to appeal.¹⁹

From a procedural law perspective it is non-controversial to state that a right to appeal can be executed in manners that include more or less safeguards to secure a fair trial. The international legal principle on the right to a fair trial is based on an awareness of the risks involved in an arbitrary exercise of power. Room for arbitrariness involves an increased risk of illegitimate interests influencing the execution of law which, in turn, is a threat to a state governed by law. Behind the principle of fair trial as it has evolved in international law, there is a strict principle of division of power separating the state's executive power from the state's judicial power. Support for the principle of fair trial is to be found in the UN Declaration of Human Rights as well as in several international and regional conventions. The demands on court proceedings that are a consequence of the right to a fair trial are evident in several aspects of a legal assessment. In a European context the case law built up by the European Court of Human Rights is the main judicial source for the manifestation of the principle of fair trial.

According to the ECHR, Art 6, courts should be competent, independent, impartial and established according to law. Court proceedings should be fair, public, and carried out within a reasonable period of time. The principle of non-discrimination should be applied, which means that the parties involved should have equal treatment, equal recourse to appeal, and equal possibilities to argue their case ("equality of arms"). The principle of fair trial is applicable generally in all areas of legal assessment.

For decision-making in the field of social security the development of the case-law of the European Court of Human Rights has meant that the whole area of decision-making related

¹⁹ See above: King, Jeff (2012), Westerhäll, Lotta (1995), Hollander, Anna (1994) and Gustafsson, Håkan (2002).



to social security remunerations has become included in the conception of a “civil right”. The fact that decisions on social security, through the case-law of European Court on Human rights, has been defined as decisions on civil rights, determine the framing of these decisions and push towards a fair procedure in line with Art 6 in the Convention.²⁰

There are different ways in which safeguards for fairness can be installed in the decision-making procedure linked to social rights. For instance, it is common with procedural safeguards that secure: access to court, quality of court, equality of arms and safeguards to secure that decisions are substantively correct.

In line with this, and using the notion of *fair trial* as a normative platform, we have constructed a simple model for categorising redress mechanisms as full, fair, moderate, weak or non-existent depending on the number of formal procedural safeguards linked to different social rights:

Full	Court procedure (three instances) and a Constitutional court
Fair	Court or tribunal (but not fulfilling all of the criteria above)
Moderate	External assessment, ombudsmen, mediation
Weak	Internal assessment, pre-trial
Non-existent	Non-existent, redress not possible

1.4 Description of work process

This study is part of the multinational and multidisciplinary bEUCitizen research project.²¹ The research conducted for the project is coordinated in groups of researchers called “work packages”. These work packages are divided in clusters and this study is one delivery (task 6.4) out of four (tasks 6.1-6.4) prepared within Work Package 6 – *Social Rights*.²²

The base of this comparative study is the country reports prepared by participants in Work Package 6, thereby delimiting our analysis to the countries represented in this group namely: Denmark, Estonia, Germany, Netherlands, Poland, Spain, Sweden and the UK.

²⁰ The method of interpretation that has led to a case law manifesting how closely intertwined social rights and civil and political rights can be is sometimes labelled the “integrated approach”, see Mantouvalou, V. in Gearty C. and Mantouvalou V. (2014), p. 114 f. See also: Koch, Ida Elisabeth (2015).

²¹ For more information on the bEUCitizen research project, please see: www.beucitizen.eu

²² For more information on bEUCitizen, WP6, please see: <http://beucitizen.eu/rights-of-citizenship/workpackage-6/>



The comparative study has been carried out in nine steps:

1. The analytical framework with examples was presented in Istanbul (July 2014). Valuable input from the participants of the research group led to clarifications and elaborations of key concepts.
2. Based on the Istanbul-proposition a questionnaire (appendix 1) with instructions was created and distributed to the members of research group (September 2014).
3. The received Country-reports were studied and results broken down right by right using the categories “cash” and “kind” as one systematising factor (see appendix 2 for this material).
4. In Zagreb (July 2015) a first preliminary analysis of the three delivered country reports was presented and discussed in relation to the analytical framework of the present study.
5. The scope of the project was narrowed down (see above footnote 12).
6. After Zagreb followed a period with continued work in line with point 3 above.
7. In the fall (October 2015) the participants in the research group were asked to respond to some complementary questions. A draft analysis of the country reports was presented graphically and distributed to members of the team for comments.
8. For comparative purposes followed an analysis where, for each country, main character of available redress mechanisms were identified (for each social right and in the two categories kind and cash). The compilation of this material is presented graphically and commented in this report (chapter 3 and 4).
9. The final report was drafted and concluded during early spring 2016.

1.5 Disposition

The report is structured as follows: After the present introduction (1) follows a contextual background chapter on social human rights (2). Chapters (3) and (4) are an account of the results from the comparative study. In chapter (3) focus is on the availability of core redress mechanisms using the model presented above and in Chapter (4) we broaden the perspective and include in the comparison other types of barriers to enforcement of rights (such as language or costs). In the final chapter (5) we approach the research questions elaborated above and results are analysed.



2. SOCIAL RIGHTS

In order to analyse the enforcement mechanisms linked to social rights on national level it is clarifying, as a first step, to identify what might be considered the basic content and character of these rights. The aim of the present chapter is to provide a background context to the study on redress mechanisms, the topic of the two forthcoming chapters (3 and 4). Below, each of the four rights studied in this project is presented separately from the perspective of the (revised) European Social Charter. The European Social Charter has been described as “the [arguably] most comprehensive and extensive international instrument of protection of social rights”²³ and it provides a useful and resourceful point of departure. It should be noted that many of the selected rights, as for example the right to housing, when scrutinised, is better understood as a conglomerate of rights in a functional field. Thus, it is necessary to acknowledge a plurality of rights in each field. It should also be noted that the social right to subsistence include a basic right to housing, education and health care, thus a functional overlap. Emphasis below is on the aspects of these rights that secure basic social standards for individuals with no other basis for claims than their national citizenship in one of the EU-member states. This means that we primarily take interest in social rights for poor EU-citizens (rather than in rights acquired through work).

The Collective Complaints Protocol of the revised European Social Charter (ESC) came into force in 1998 and according to Hullen this in part explains the step-by-step strengthening of the ESCR as “quasi-judicial body”.²⁴ A position affirmed by for instance the committee’s accomplishment in articulating core basic values of the ESC as well as establishing principles of reasoning. The basic values, as stated by the Committee, are four: autonomy, dignity, equality and solidarity and the principles of reasoning are to a large extent drawn from the European Court of Human Rights.²⁵ In the same spirit, pointing also to the activism of the Committee, Panzera has suggested that the Charter’s Guardian, the ECSR (the European Committee on Social Rights), might best be described in terms of being “not only a Committee but not yet a Court”.²⁶

An overarching and topical issue in the application of the Charter is to determine the personal scope of application: How far does the responsibility of the member states stretch? Who is given rights and who might be excluded? In the first paragraph of the appendix to the revised Charter (1) there is a delimitation of state responsibility:

²³ Katrougalos, George (2015) p. 84.

²⁴ Hullen, Holly (2009), p. 62.

²⁵ Ibid.

²⁶ Panzera, Claudio (2014), p. 11.



Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of articles 18 and 19.

Still, in spite of the fairly distinct wording in the paragraph above, the question of how to determine the personal scope of the Charter has proven to be complex and dynamic.²⁷ It is reasonable to assume that this is a development pushed by the fact that mobility within Europe has greatly increased since the 1960s and state borders have become more porous. Based on theoretical arguments put forward by authors within the human rights doctrine as well as through case-law from the Committee, it seems safe to conclude that on a rudimentary emergency level, and in spite of the wording of the appendix, states have obligations based on the Charter that include all those present within their territory.²⁸ Thus difference in treatment between lawfully and unlawfully residing foreigners within the territory are accepted, but in so doing, “human dignity, which is a recognised fundamental value at the core of positive European human rights law, must be respected”.²⁹ The discussion is relevant for this introduction as it concerns the social rights of EU-citizens, independently of whether or not they are assessed to be law-fully residing, regularly working or just being present on the territory of another member state.³⁰ In particular, given the case-law of the Committee, the Charter provides direction on how to address the situation and rights of ethnic minorities such as the Roma and Sinti populations in Europe.³¹ The following citation from Collective Complaint 67/2011, *Medicine de Mondes International v. France* is typical for how the ESCR is reasoning around the personal scope of application in relation to the (health) rights of migrant Roma:

The Committee also reiterates that those who do not fall within the definition in the Appendix cannot be deprived of their rights linked to life and dignity under the Charter (International Federation of Human Rights Leagues, FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 32; Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, decision on the merits of 20 October 2009, §37, and Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, decision on the merits

²⁷ Panzera, Claudio (2014); Quesada, Luis Jimena (2015); Mikkola, Matti (2010) in particular pp. 71-75; Katrougalos, George (2015) with reference to Mikkola’s “persuasive teleological interpretation”, *ibid*, p. 93.

²⁸ Panzera, Claudio (2014), p. 5 ff.

²⁹ Complaint no. 47/2008, decision on the merits of 20 October 2009, §73.

³⁰ We have in this study made the European Social Charter our prime legal context as this is the Human Rights Convention that has as its core purpose to protect and thus also to explore the content and meaning of “social rights”. However, in terms of relevant legal sources, and in terms of number countries that are formally committed, it is (relatively) clear that these are rights also legally protected in EU-law. Through the TEU (Treaty on European Union) reference is made to the EU Charter of Fundamental Rights (Art 6:1) as well as to the Convention on Human Rights (6:3) and to the European Social Charter (in the TEU preamble and in 153:1 TFEU). To cite Mikkola: “... at least in the meaning of minimum standards, these treaties, the ESC among them, constitute the upper echelon in the hierarchy of the Union’s norm system”, see Mikkola, Matti (2010) p. 95. However, also note critical comment in footnote 4 above.

³¹ See Quesada, Luis Jimena (2015) pp. 260 ff and Complaints no:s 27/2004; 58/2009; 63/2010.



of 25 June 2010, §33). In fact, it reiterates that the restriction in paragraph 1 of the Appendix attaches to a wide variety of social rights and impacts on them differently and that such a restriction should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake (*Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009, §37).³²

This said, one should not expect all states to agree or sympathise with a development where state obligations increase beyond what would be expected if a method of more strict textual interpretation of legal treaties was applied. However, in this regard, treating the Charter as “living instrument”, the Committee has situated itself firmly in a well-established tradition of European Courts and in close ranks with the European Court of Human Rights.

2.1 The right to health care

Core legal international human rights sources providing a right to health care are: The Universal Declaration of Human Rights (Article 25), the UN International Covenant on Economic, Social and Cultural Rights (Article 12), the Convention on the Elimination of all sorts of Discrimination against Women (Article 12), and Convention on the Rights of the Child (Articles 3, 17, 23, 24). On a European level the rights to health care is mainly developed through the European Social Charter (Articles 11, 13 but also 3,7,8, and 12:1). In the EU Charter of Fundamental rights, the right to health care is protected in Article 35. The European Convention on Human Rights (Articles 2 and 3) as well as the EU Charter on Fundamental rights (Articles 2, 3 and 4) set out to guarantee human dignity, rights that are interlinked with access to health care.³³

Article 13 –The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

- 1 *to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;*

The right to health care include, like many of the social rights, a conglomerate of different aspects where policies are directed to the promotion or maintenance of health as well as care of illness and disease. On an individual level a right to health care can secure access to care (including costs), access to consultation as well as safeguards to secure quality of care. In the Social Charter a number of different articles can be linked to the right to health care,

³² Complaint no. 67/2011, decision on the merits of 11 September 2012.

³³ Mikkola, Matti (2010) p. 341.



some of which are focused on services (Art 3, 7, 8, 11) and others are focused on health care benefits (Art 12§1, 13).³⁴ In the ECHR articles such as the right to life (Art. 2), the prohibition of inhumane treatment (Art. 3) and respect for integrity and privacy (Art. 8) are all of potential relevance when discussing a right to health care.³⁵ Article 11 is the core article on health in the Charter and aim to secure a state responsibility to build systems that safeguard health and combat disease. Thus, based on Article 11 §1 and Article E (discrimination), states are required to have effective health systems and the Committee has in some detail delineated what is demanded of such systems and also underlined the universal character of this right: “the requirement is that the (...) whole population is covered by the services, regardless of place of residence, ethnic or social group, or other such factor.”³⁶

Rather than describing the full scope of the systematic obligations to maintain health that Article 11 put on states, some attention will be given to Article 13, one of the articles that are framed to secure access to health care to specific vulnerable population groups. In Article 13 (§ 1 and § 4 in combination with Article 30, see below) it is protection of citizens and legal residents with inadequate resources that are in focus. While Article 11, on the maintenance of health, read in conjunction with Article 2 and 3 of the European Convention on Human Rights, is universal in character and should cover the whole population within state territory, it has been argued that Article 13 is more limited in scope.³⁷ The right to access to health care services with reference to 13 § 1 is restricted to persons legally resident or permanently working in the country although art 13 § 4 expand the scope by also including visitors who are nationals of any of the state parties (ie EU-citizens). Still, the case law the ECSR (see above) has expanded the right to Charter based health care to groups such as children (all children), irregular migrants and third country citizens. All children should be provided with adequate health care and all adults, whatever status, have a right to care in emergency situations.³⁸

Case law on Article 11 and Article 13 § 1 is limited. On Article 13 § 1 we find three cases, all related to the Roma minority, either in a local setting or as migrants.³⁹ On Article 11 we find in total eight complaint cases and there is in relation to this Article a broader set of issues tried.⁴⁰ The by far most common result of these complaints is that the Committee finds that

³⁴ Mikkola, Matti (2010) p. 411.

³⁵ A couple of the articles listed above are clearly linked to work (Art. 3 and Art. 7) these rights are of less interest here, due to the overall design of the bEUcitizen project where the analysis of social rights and economic rights (the right to work) were split between two research groups.

³⁶ Mikkola, Matti (2010) p. 417. On the question of access to care Mikkola states, with reference to Digest 12/2008, p. 82, that “health care systems must be accessible to everyone”, *ibid.* p. 419.

³⁷ Mikkola, Matti (2010) p. 427.

³⁸ Complaint no. 14/2003, decision on the merits of 8 September 2004. See also Mikkola, Matti (2010) p. 427.

³⁹ Complaint no. 46/2007, decision on the merits of 3 December 2008; Complaint no. 48/2008, decision on the merits of 18 February 2009; Complaint no. 67/2011, decision on the merits of 11 September 2012.

⁴⁰ Complaint no 99/2013, decision on the merits of 17 March 2015; Complaint no 87/2012, decision on the merits of 10 September 2013; Complaint no 72/2011, decision on the merits of 23 January 2013; Complaint no. 69/2011, decision on



states have violated the Charter. If we study doctrine it is clear that the right to health care has been developed by the ESCR in case law but also to a large extent in the Conclusions that form part of the report system.⁴¹ Complaint nr 67/2011 (cited above) is important for the development of the personal scope of application but also for the substantial scope of Article 13 and the right to health:

The Committee recalls that Article 13 §4 confers on foreign nationals the right to emergency social and medical assistance. States are required to provide appropriate short-term assistance to those in immediate and urgent need (such assistance may involve the provision of accommodation, food, emergency medical care and clothing). The beneficiaries of this right to emergency social and medical assistance include foreign nationals who are lawfully present within the territory of a given state but do not have resident status, as well as foreign nationals unlawfully present in the country (Conclusions 2009, Andorra, Article 13 §4).⁴²

2.2 The right to housing

Legal sources on an international level providing a right to housing are the Universal Declaration on Human Rights (Article 25), the UN International Covenant on Economic, Social and Cultural Rights (Art 11§1). On the European level we find the European Social Charter (Art 31 and xxx). In addition the European Convention on Human Rights set out to guarantee human dignity (Art 2 and 3) and privacy and family life (Art 8), rights that are interlinked with access to shelter and housing.⁴³ The main article in the European Social Charter that concern the right to housing is Art 31:

Article 31 –The right to housing

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- 1 to promote access to housing of an adequate standard;*
- 2 to prevent and reduce homelessness with a view to its gradual elimination;*
- 3 to make the price of housing accessible to those without adequate resources.*

The ECSR has clarified the content of Art 31 in a number of Collective Complaints decisions and has thus in its quasi-judicial function begun to form a jurisprudence on housing rights. The majority of complaints related to housing have concerned homelessness (Article 31 § 2) and complaints have often been linked to groups of individuals living in very harsh conditions: Roma or migrants (regular and irregular). The aspect of discrimination (Art E) has

the merits of 23 October 2012; Complaint no. 67/2011, decision on the merits of 11 September 2012; Complaint no. 45/2007, decision on the merits of 30 March 2009; Complaint no 46/2007, decision on the merits of 3 December 2008; Complaint no. 30/2005, decision on the merits of 6 December 2006.

⁴¹ See for instance Mikkola, Matti (2010) pp. 401-438.

⁴² Complaint no 67/2011, decision on the merits of 11 September 2011, paragraph 178.

⁴³ Mikkola, Matti (2010) p. 341.



fairly regularly been raised in conjunction with the provisions in Art 31. States have, more than once, responded that the complaint is unfounded with arguments related to the personal scope of the Charter (see above). The Committee has also had reason to “recall” that even if the wording of Article 31 does not impose an obligation on states to deliver “results”, the rights recognised in the Charter must take a practical and effective, rather than purely theoretical, form.⁴⁴

Art 31 § 1 deals with access to housing of adequate standard and based on the Decisions made by the Committee it has been clarified that:

- persons, including children, unlawfully present on the territory of a state party do not come within the personal scope of Article 31§1.⁴⁵
- persons legally residing or regularly working in the territory of the Party concerned who do not have housing of an adequate standard must be offered such housing within a reasonable time.⁴⁶
- housing of an adequate standard under Article 31§1 means a dwelling which is safe from the point of view of sanitation and health, i.e. it must possess all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity and must also be structurally secure, not overcrowded and with secure tenure supported by the law”.⁴⁷

Art 31 § 2 deals with homelessness and the right to shelter. The Committee has had reasons to develop its case law on this paragraph in a number of cases. According to the Committee:

- illegal occupation of a site may justify the eviction of the occupants.⁴⁸
- (but) the criteria of illegal occupation may not be understood in an unduly wide manner.⁴⁹
- persons or groups of persons who cannot effectively benefit from the rights enshrined in national legislation such as the right to housing may be forced to take up reprehensible behaviour in order to satisfy their needs. Such a circumstance alone cannot be held to justify any sanction or measure of execution directed towards these persons, neither a continued deprivation of rights that have been ascertained to them⁵⁰
- in order to comply with the Charter, legal protection for persons threatened with

⁴⁴ Complaint no. 33/2006, decision on the merits of 5 December 2007, paragraph 59.

⁴⁵ Complaint no. 47/2008, decision on the merits of 20 October 2008 and Complaint no. 64/2011, decision on the merits of 24 January 2012.

⁴⁶ Conclusions 2003 and 2011, France, Article 31§1; Complaint no. 64/2011, decision on the merits of 24 January 2012, paragraph 112.

⁴⁷ See Conclusions 2003, Article 31§1, France; Complaint no. 39/2006, decision on the merits of 5 December 2007, paragraph 76.

⁴⁸ Complaint no. 62/2010, decision on the merits of 21 March 2012, paragraphs 161 and paragraphs 163-165.

⁴⁹ Complaint no. 15/2003, decision on the merits of 8 December 2004, paragraph 51.

⁵⁰ Complaint no. 31/2005, decision on the merits of 18 October 2006, paragraph 53.



eviction must be prescribed by law and include:⁵¹ i) an obligation to consult the affected parties in order to find alternative solutions to eviction ii) an obligation to fix a reasonable notice period before eviction iii) a prohibition to carry out evictions at night or during winter iv) access to legal remedies v) access to legal aid and vi) compensation in case of illegal evictions.

- When evictions do take place, they must be: ⁵² i) carried out under conditions respecting the dignity of the persons concerned ii) governed by rules sufficiently protective of the rights of the persons iii) accompanied by proposals for alternative accommodation iv) the eviction procedure described above apply to all migrants, irrespective of their legal situation since these are rights linked to life and dignity v) evictions must not render the persons concerned homeless⁵³ and vi) the principle of equal treatment implies that the state should take measures that are appropriate in the particular circumstances of the Roma in order to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless.⁵⁴

Housing policies in different countries are constructed according to different logics but tend to include a mix of private housing and a rental market. This is a fact noticeable in the country reports that constitute the basis of the present analysis and also an aspect housing rights discussed by Mikkola: Depending on dominating social policy in the specific country the character of public interventions to secure the social right to housing will differ. Public interventions in countries with owner-occupied markets usually provide consumer protection as well as elements of low-interest mortgages, interest rate subsidies, tax relief, financing or subsidies linked to construction, reconstruction of housing and direct help to first-time buyers. Public interventions in countries with a rental market provide protection for the tenant (quality, cost, security), housing allowances and overall safeguards to secure a sufficient stock of housing for the rental market are other examples.⁵⁵

2.3 The right to education

The right to education is protected in the Universal Declaration of Human Rights (Article 26), in the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14), in the Convention against all Discrimination against Women (Articles 2 and 10) as well as in the Convention of the Rights of the Child (Art 2, 28, 29). The right to education is included in the

⁵¹ Complaint no. 27/2004, decision on the merits of 7 December 2005, paragraph 41, see also Conclusions 2011, Turkey, Article 31§2.

⁵² Ibid.

⁵³ Complaint no. 31/2005, decision on the merits of 18 October 2006, paragraph 57.

⁵⁴ Complaint no. 27/2004, decision on the merits of 7 December 2005, paragraph 21.

⁵⁵ Mikkola, Matti (2010) pp. 339 f. See also Appendix where the initial analysis of country reports reveal the internal complexity of the different rights studied (housing rights included) as well as the differences between countries.



European Convention on Human Rights (Article 2 of the First Protocol, added to the Convention in 1952), although the right is formulated in a fairly defensive manner: “No person shall be denied the rights to education”. Less hesitant is EU Charter of Fundamental rights (Article 14): “Everyone has the right to Education and to have access to vocational and continuing training”. The 1961 Social Charter (ESC) included protection for the right to vocational guiding and training and arguable some minimum protection of a right to child day care (Articles 9, 10 and 16). In the revised European Social Charter (1996) however, the right to education was elaborated in more detail: The 1996 Charter identifies the value of child day care and pre-school education (Article 27:1) as well as primary and secondary education (Article 17:1-2, cited below). The Charter also highlights rights to education in relation to vulnerable groups or situations (Articles 15:1, 19:11-12).

Article 17 – The right of children and young persons to social, legal and economic protection

17:1 With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

- a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing the establishment or maintenance of institutions and services sufficient and adequate for this purpose;*
- b) to protect children and young persons against negligence, violence and exploitation;*
- c) to provide protection and special aid from the state for children and young persons temporarily or definitely deprived of their family's support.*

17:2 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

According to the ECSR the right to education as protected by Art 17:1-2 requires that compulsory education (at least to the age of 15) and the right to education should be prescribed by law and made available to all children. Compulsory education should be in place at least to the age when it is legally possible for the child to enter into work.

The Committee has had the opportunity to elaborate on the content of the right to free primary and secondary education (Article 17:2) in a number of complaints, and twice the Committee has come to the conclusion that the article in question has been violated.⁵⁶ Complaint 67/2011 concerns the right to education for Roma children “mostly from countries of the European Union” living in France. Complaint 41/2007 concerned the situation for intellectually disabled children in Bulgaria. Complaints based on Article 17:1, have more often led to the assessment that states have been violating their obligations, mainly on the topic of corporal punishment, as in a recent case involving Belgium.⁵⁷ Apart from the absolute

⁵⁶ Complaint no. 67/2011, decision on the merits of 11 September 2012; Complaint no. 41/2007, decisions on the merits of 3 June 2008.

⁵⁷ Complaint no. 98/2013, decision on the merits of 20 January 2015.



standard of non-discriminatory, compulsory and free education to all children below the age of 15, there are some other aspects to note: In order for all children to benefit from compulsory school positive action might be needed to secure the education of children in vulnerable positions to ensure school attendance. After compulsory education there is a remaining right to education to encourage full and non-discriminatory development of the students' potential and thus a state responsibility to ensure sufficient quantity of places and quality of tuition also in education after compulsory school.

2.4 The right to social assistance

When discussing the right to social assistance we come close to poverty issues and to the very core of the human rights discourse on the fundamental value of human dignity. The Universal Declaration of Human Rights, Article 22, states the right to social security as well as everyone's entitlement to the realization of the economic, social and cultural rights indispensable for his/her dignity. If we use a terminology where social security encompasses on the one hand social insurance protection linked to a dynamic but yet fairly established notion of social contingencies, and on the other hand non-contributory social assistance that provide a basic social standard, we put ordinary, welfare state, social assistance within the scope of social security. Outside of both these categories we find in human rights instruments a state obligation to provide emergency level support to human beings in destitute poverty and deep social distress, regardless of whether these groups or individuals are included in the more established systems created to provide for social security. In the Convention on Elimination of all forms of Discrimination against Women we find the right to social security in articles 11 and 14, and in the Convention of the Rights of the Child the right to help in case of poverty or need is approached in article 26.

On a European level we find protection for human dignity in the European Convention on Human Rights (articles 2 and 3) and in the EU Charter of Fundamental Rights (article 34) we find a more specific and elaborated version of the rights to social security and social assistance. In article 34:3 we also find a state obligation to combat social exclusion a value that is also reflected in Article 30 of the revised European Social Charter (see below). In the European Social Charter several articles are relevant for the protection of social income or social benefits. In Article 12 the primary focus is social security and social insurance (including traditional contingencies such as illness, work-injuries, incapacity to work, disability, pensions and unemployment). Thus, the rights formulated in Article 12 meet the aim to secure a decent living standard if income from employment for some reason is temporarily interrupted. In Article 13 focus is on social assistance and minimum income (Article 13 §1) as well as on temporary emergency aid (Article 13 §4). In Article 30 the targeted risks are poverty and social exclusion. In the case law of the Committee it is fairly common that several of these Articles are discussed together. For instance it can be hard to



distinguish between rights in Article 12 and 13⁵⁸ and in many cases we find an assessment of both Article 13 and 30. Article 30 is interesting as it was a novelty in the creation of the revised Social Charter and reflects an understanding of poverty that is more progressive than the original approach.

Article 30 – The right to protection against poverty and social exclusion

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

a to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

In the project we have taken an interest in “social assistance” and for that purpose it could be argued that both Article 13 and Article 30 is of relevance. According to Mikkola the main purpose of Article 30 is “to reach self-sufficiency with mainstream measures and positive actions for increased capacity and employment”,⁵⁹ thus the scope of Article 30 is more ambitious than providing a last resort in case of poverty and this is also how it differed from the approach in the original Charter. For both these articles (13 and 30) it could be concluded that the question of personal scope of application has been raised in the case law of the Committee (see above). In Hudoc, the Council of Europe database, we find eight Complaints where the Committee have found states to be in breach of Article 30, and some of those cases have already been referred to above. Several of these eight complaints raises issues on discrimination, (62/2010; 67/2011; 64/2011, 61/2010, 58/2009, 51/2008, 33/2006); several include claims on housing or shelter (62/2010, 67/2011, 64/2011, 61/2010, 58/2009, 51/2008, 33/2006) and one include a breach related to social assistance, Article 13:4 (86/2012).⁶⁰

2.5 Summary

The aim of the present chapter is to provide a contextual background to the chapters to follow where focus shifts to redress mechanisms linked to social rights. From the above account of how social rights to health care, housing, education and social assistance are perceived from the perspective of a (legal) European human rights discourse we can conclude that in each of the four sectors studied, we find a conglomerate of overlapping rights, in kind and cash. We also find an evolving European human rights’ doctrine where legal sources emanating from the Council of Europe as well as the European Union (as well as human rights conventions on an

⁵⁸ See for instance Complaint no. 88/2012, decision on the merits of 9 September 2014, paragraph 33 with reference to Statements of interpretation on Articles 12 and 13, Conclusions XIII-4.

⁵⁹ Mikkola, Matti (2010) p. 593.

⁶⁰ Complaint no 62/2010, decision on the merits of 21 March 2010; Complaint no. 64/2011, decision on the merits of 24 January 2012; Complaint no. 67/2011, decision on the merits of 11 September 2011; Complaint no. 86/2012, decision on the merits of 2 July 2014; Complaint no. 61/2010, decision on the merits of 30 June 2011, Complaint no. 58/2009, decision on the merits of 25 June 2009; Complaint no. 51/2008, decision on the merits of 19 October 2009; Complaint no. 33/2006, decision on the merits of 5 December 2007.



international level) are used as a common sounding board for legal assessments in the different distinct institutions. In the field of social human rights we find an interaction between the European “jurisdictions” and the ECtHR, the ECJ and the ECSR are all relevant actors. However, it is clear that the ECSR as the “Guardian” of the ESC has been a core force in the development of a case law in the relevant areas (education, health care, housing and social assistance). This is true not least with respect to the question on the personal scope of application and in the formulation of a state responsibility for an emergency level of social responsibility emphasising the social rights of minorities such as Roma, Sinti and Travellers but also the rights of migrants, regardless of legal status.

Given the development of the Committee as a quasi-judicial body, and the establishment of the Collective Complaint Procedure, it should be noted that the European Social Charter also provides for a redress mechanism on social rights, in addition to possible redress on a national level. In countries that have adopted the additional protocol, the procedure provides a recourse to complaint on a collective level but arguably it also has an indirect impact on states that has not ratified the additional protocol. It is clear that the interdependence between the European human rights instruments – spills over. The assessments made by the Committee, in its case law, are of relevance also for the interpretation of the EU Fundamental Charter and the European Convention on Human Rights.



3. REDRESS MECHANISMS — A COMPARISON

3.1 Introduction

In the following sections we will review the results from the country reports using the comparative scheme presented in section 1.3, with the aim of determining the character of redress mechanisms in the eight countries included in this study.

Each of the fields of interest will be discussed separately (health care 3.2, education 3.3, social assistance 3.4 and housing 3.5) with a figure presenting the character of redress mechanisms available in the member states for both benefits in kind and benefits in cash. In this section, only redress mechanisms on a national level are discussed.⁶¹ In some countries different redress mechanisms are available for different benefits within the same category of social rights. For example, some of the health care benefits in cash in Netherlands are protected to redress mechanisms deemed as “fair” while others are deemed “moderate”. For more detailed information on the character of redress mechanisms for different benefits in the member states, please see the figures attached in the appendix.⁶²

As a way of investigating the possibility for EU-citizens to make use of redress mechanisms when claiming benefits in a host member state, legal barriers to redress for EU-citizens will, if existing, be highlighted in the figures presented below.

If no link has been marked in the figures below for any of the member states, that is due to the fact that no benefits (in kind/in cash) seems to be available in that specific country and we therefore have no results regarding the character of redress mechanisms.⁶³ In the summary figures for all the countries presented below, the results are based on the country reports provided by the rapporteurs. Following the figure is a short overview of the redress mechanisms in each of the countries.

3.2 Redress mechanisms health care

The first field of interest to be discussed in this setting is *health care*. Even though the construction of both procedural and substantive rights relating to health care differs among the countries, the general protection of health care as a social right seems to be strong. The construction of health care rights varies; from “*the right to health protection*” (Article 43 of

⁶¹ This part of the comparative study is delimited to national redress mechanisms in the respective countries. Redress mechanisms available on a supranational level will, to some extent, be discussed in chapter 5.

⁶² Please see appendix, section A.

⁶³ See for example the enforcement of right to housing in Spain, no benefits in cash seems to be available. Cueto Perez et al (2015) p. 27-28.



the Spanish Constitution) to the “*access to free health care*” (as stated in the Danish Health Care Act), and in the figure below, the materialisation of these rights in benefits (in kind/in cash) compose the basis for our analysis of redress mechanisms.

We find no indications that EU-citizens are being formally excluded from the possibility of redress.

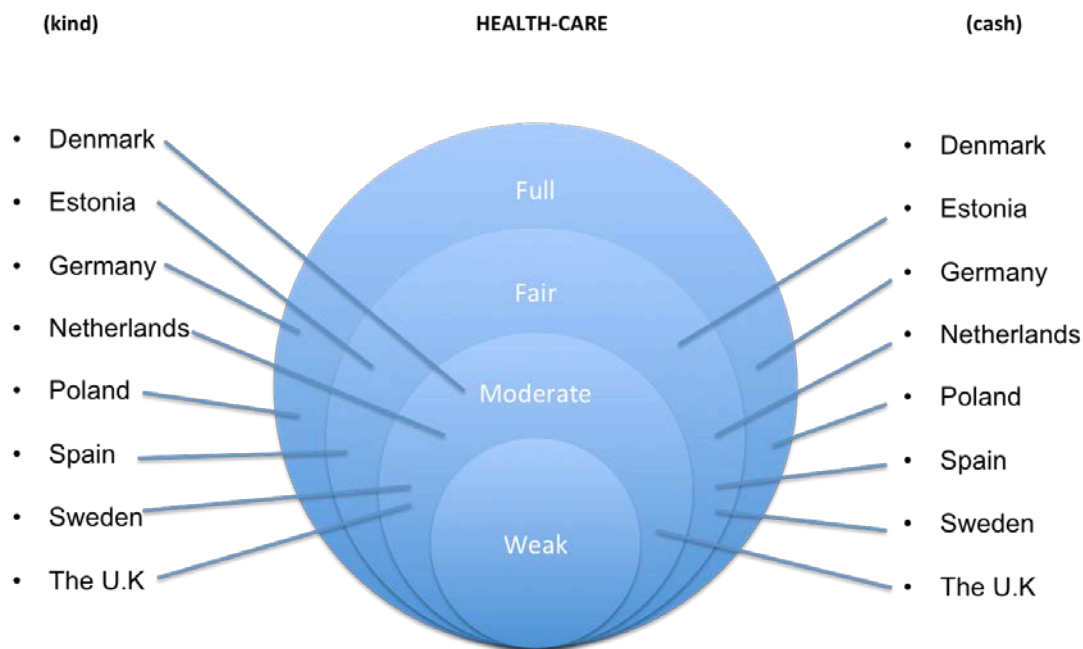


Figure 1. Redress mechanisms, health care

Denmark – Redress mechanisms relating to the right to health care are, in Denmark, considered *moderate*. No explicit health-benefits in cash are identified; redress mechanisms available are linked to claims for benefits in kind. The complaint system is made up of two, independent boards assessing claims. Decisions made by the Authority for Patient Safety cannot be appealed before a higher instance.⁶⁴

Estonia - The redress mechanisms linked to the right to health care in Estonia are considered *fair*. For both benefits in kind as well as benefits in cash, every individual has the legal right to a three-instance procedure in civil courts and administrative courts respectively. Unique for Estonia is the fact that disputes over benefits in kind are settled in civil law courts. As medical institutions are persons of private law, a special contract is created between the institution and the patient/individual. The contract falls under private law regulations, and claims are brought before a civil law court.⁶⁵

⁶⁴ Jacqueson, Catherine (2015) p. 12.

⁶⁵ Tavits, Gaabriel (2015) p. 4.



Germany - The redress mechanisms linked to the right to health care in Germany are considered *full*. The legal recourse for complaints regarding both benefits in kind as well as benefits in cash is appealing before the Social Courts, with the possibility for a three-instance review. Conflicts on the lawfulness of legislation regarding social right can be brought before the Federal Constitutional Court.⁶⁶

Netherlands - Only claims regarding two benefits (both benefits in cash) can be redressed through mechanisms considered as *fair*; benefits falling under the regulations regarding the health allowance and the personal care budget. Other health care benefits have redress mechanisms that we consider as *moderate*, mainly external mechanisms such as ombudsmen or arbitration committees.⁶⁷

Poland - With the possibility to seek redress and appeal decisions regarding health care benefits in both kind and cash through the court system and on to a constitutional tribunal if still contested, the redress mechanisms linked to health care in Poland are considered *full*.⁶⁸

There are extra-procedural hindrances, mainly language barriers that complicate court procedures and affect the accessibility to redress for EU-citizens.⁶⁹

Spain – In Spain, the *right to health care protection* (art. 47 of the Spanish Constitution 1978) is a “principle governing social and economic policy”. For both benefits in kind and cash, there is the possibility for a judicial review, administrative appeal as well as the possibility to appeal before an ordinary court that make the redress mechanisms for health care in Spain *fair*.⁷⁰

There are some extra-procedural hindrances that may create barriers, mainly legal fees and the requirement for legal aid assistance.⁷¹ These will be further discussed in chapter 4.

Sweden – In Sweden, redress mechanisms linked to health benefits in kind are considered *moderate* (external review board). For benefits in cash, the possibility for an appeal to public administrative courts is still available. Therefore, the redress mechanisms linked to health care benefits in cash are considered *fair*.⁷²

The U.K - For benefits in kind and cash, redress mechanisms linked to health care in the U.K are considered as *moderate*. The NHS (National Health Service) is the main provider of health care services in the U.K. In cases where an individual has been refused care or is

⁶⁶ Absenger, Nadine & Bank, Florian (2016) pp. 4 & 15.

⁶⁷ Heeger, Susanne & Pennings, Frans (2015) p. 15.

⁶⁸ Swiatkowski, Andrzej & Wujczyk, Marcin (2015) p. 7.

⁶⁹ Swiatkowski, Andrzej & Wujczyk, Marcin (2015) p. 10.

⁷⁰ Cueto Perez, Miriam. et. al (2015) pp.1, 7-8.

⁷¹ Cueto Perez, Miriam. et, al (2015) pp.15-16.

⁷² <http://www.vardanalys.se/Lamna-granskningstips/Vagledning-klagomal/>



unhappy with the services received from a NHS provider, the first action of redress would be to file a complaint through a standardised complaints procedure. The stages of the standardised complaints procedure include complaints to the provider in question, complaint to a Clinical Commissioning Group or NHS England (first stage complaints) and then, if the matter is still unresolved, take the case to the Parliamentary and Health Service Ombudsman (second stage complaint), an external and independent investigation but still no court investigation.⁷³

3.3 Redress mechanisms, education

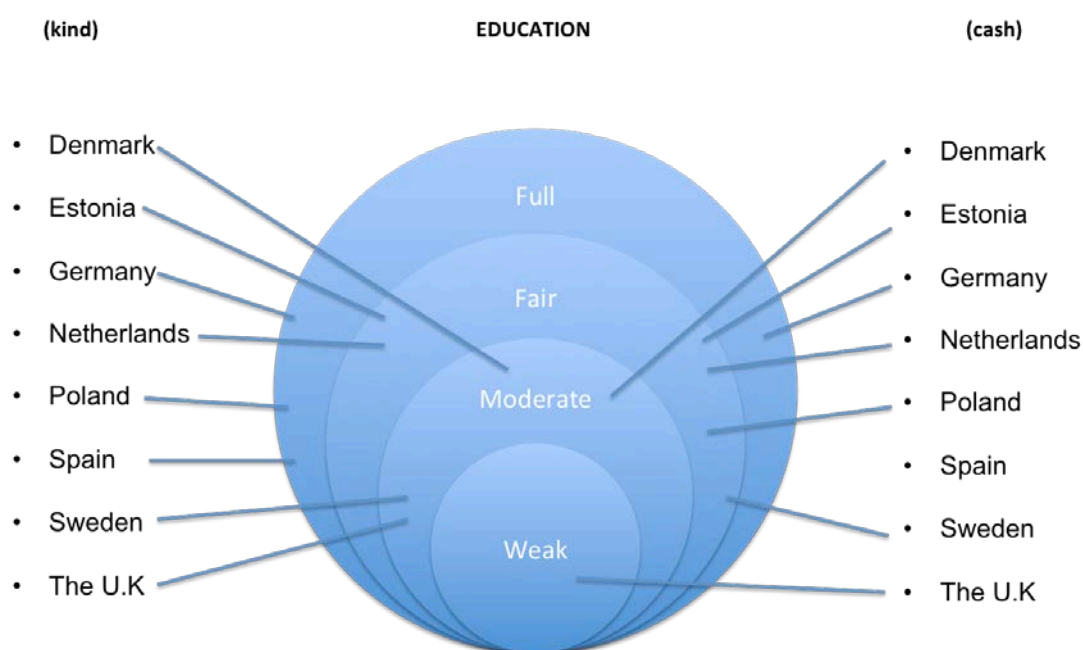


Figure 2. Redress mechanisms, education

In this section, the results on redress mechanism linked to the right to education are presented. We cover both benefits in kind (access to both preliminary and higher education) as well as benefits in cash (e.g. study loans/grants, financing school books). As previously seen in section 2.2, the right to education is widely protected through international conventions and in European legal instruments such as the ESC and ECHR, and that these values are protected in different ways in the countries (as identified through the country

⁷³ Chase, Elaine & Seeleib-Kaiser, Martin (2015) pp. 18-21.



reports). Concluding from the country reports, the right to education (implying access to primary education for children) enjoys wide protection and is seen as a strong right.⁷⁴

Though the access to and provision of free, primary education for children (under the age of 18) in most of the countries seem like an uncomplicated matter, children staying in a host member state without *right of residence* are in some cases excluded from the scope of protection.⁷⁵

We find no indications that EU-citizens are being formally excluded from the possibility of redress.

Denmark - Redress mechanisms relating to the right to education are, in Denmark, considered *moderate* both for benefits in cash and kind. Free compulsory education is provided for all children, and complaints regarding the legality of decisions refusing access to high school or higher education can be directed to the Ministry of Education. Decisions on benefits in cash (e.g. study grants and loans) can be appealed before an appeals board.⁷⁶

Estonia - The redress mechanisms linked to the right to education in Estonia are considered *fair*, both for benefits in kind and cash. Disputes over benefits in kind are resolved in administrative courts and disputes over benefits in cash (e.g. study loans) in civil courts, where there is the possibility (under certain conditions) to take a case through three instances.⁷⁷

Germany - The redress mechanisms linked to the right to education in Germany are considered *full*. The legal recourse for complaints regarding benefits in kind is appealing before the Administrative Courts. For benefits in cash (e.g. financing assistance for elementary school, high school and higher education) appealing before the Social Courts with the possibility for a three-instance review, is the redress mechanism available. Conflicts on the lawfulness of legislation regarding social right can be brought before the Federal Constitutional Court.⁷⁸

Netherlands - the redress mechanisms linked to the right to education in Netherlands are considered *fair*, both for benefits in kind and cash. Benefits covered by the GALA (The Dutch General Administrative Law Act) can be redressed through administrative appeal

⁷⁴ See for example Heeger, Susanne & Pennings, Frans (2015) p. 16 and also Cueto Perez, Miriam. et. al (2015) p. 1. The right to education is the only of the social rights in Spain that is considered as a "Fundamental right", as written in the Spanish Constitution 1978.

⁷⁵ This issue is being dealt with in different manners among the countries. Some countries acknowledge the right to education to include all children regardless of legal status and some don't. See for example Stendahl & Swedrup (2015) on the debate regarding the right to education for children of destitute, migrating EU-citizens in Sweden. <http://beucitizen.eu/if-there-is-a-will-there-is-a-way-a-heated-debate-about-access-to-education-for-children-of-migrating-eu-citizens-in-sweden/>

⁷⁶ Jacqueson, Catherine (2015) p. 17.

⁷⁷ Tavits, Gaabriel (2015) p. 5.

⁷⁸ Absenger, Nadine & Bank, Florian (2016) pp. 20-21.



proceedings before administrative courts and if the individual is unhappy with the court's decision, a higher appeal can be made to the Administrative High Court.

EU-citizens are able to access redress structures (such as civil and administrative courts) in the Netherlands.

Poland – In Poland, as seen with the case for health care, the redress mechanisms linked to educational benefits in kind are considered *full*. However, the redress mechanisms linked to the only benefit in cash related to education identified in the country report – financing of schoolbooks, is at the level *fair*.

Spain – The right to education is the only right considered as a “fundamental right” according to the Spanish Constitution 1978. The redress mechanisms linked to educational benefits in kind in Spain are considered *full*. This is motivated by the possibility for an individual to lodge an appeal for protection of the fundamental right to the Spanish Constitutional Court.⁷⁹

Sweden – Decisions on educational benefits in kind (mainly access to primary education), where the right to education for EU-citizens are questioned, are appealed to The Board of Appeal for Education for an external review, and are therefore considered *moderate*.⁸⁰ For educational benefits in cash (study grants etc.), the redress mechanisms are considered *fair*.⁸¹

The U.K – Redress mechanisms linked to benefits in kind (both access to primary and secondary education as well as access to higher education) are considered *moderate* in the U.K. Complaints regarding access to education are reviewed by the local government ombudsman.

When it comes to benefits in cash, the redress mechanisms available for appealing a decision on study loans for higher education are considered *weak*. The appeal on such a decision is lodged with the government Student Finance and subject to an internal review.⁸²

⁷⁹ Cueto Perez, Miriam. et. al (2015) p.1.

⁸⁰ 28 kap. 12 § 1 st. 13 p. Skollag (2010:800) [Education Act]

⁸¹ 6 kap. 10 § Studiestödslag (1999:1395) [Study Grants Act]

⁸² Chase, Elaine & Seeleib-Kaiser, Martin (2015) p. 24-25.



3.4 Redress mechanisms, social assistance



Figure 3. Redress mechanisms, social assistance

As seen in figure 3, the redress mechanisms linked to social assistance could overall be considered strong. For both benefits in kind and benefits in cash, the redress mechanisms available in the countries included in this study, range from *fair* to *full*. Most common is a possibility to challenge a decision on social assistance in a three-instance court system, in administrative courts, as seen in e.g. Sweden, Poland, Netherlands and Estonia.

We find no indications that EU-citizens are formally excluded from redress mechanisms related to social assistance.

Denmark - Redress mechanisms relating to the right to social assistance are, in Denmark, considered *moderate* both for benefits in cash and kind. The main form of social assistance is the *kontanthjælp* – a benefit in cash provided by the municipalities. Since 2013, the National Social Appeals Board, composed by lay judges, is the only complaint organ available for redress in the field of social assistance.⁸³

⁸³ Jacqueson, Catherine (2015) p. 19.



Estonia - The redress mechanisms linked to the right to social assistance in Estonia are considered *fair*, both for benefits in kind and cash. Most cases are appealed to administrative courts.⁸⁴

Germany - The redress mechanisms linked to the right to social assistance in Germany are considered *full*. The legal recourse for complaints regarding both benefits in kind and in cash is appealing before the Social Courts, with the possibility for a three-instance review. Conflicts on the lawfulness of legislation regarding social right can be brought before the Federal Constitutional Court.⁸⁵

Netherlands - The redress mechanisms linked to the right to social assistance in the Netherlands are considered *fair*, both for benefits in kind and cash. With the possibility to appeal in accordance with the GALA, legal protection for the right to social assistance is available when an individual is faced with an unfavourable decision, both regarding benefits in kind as well as benefits in cash.⁸⁶

Poland - In Poland the redress mechanisms linked to the right to social assistance are considered *full*. Cases regarding social assistance benefits in kind and in cash are resolved in administrative courts, after administrative proceedings. With the possibility of a constitutional appeal to The Constitutional Tribunal (*Trybunał Konstytucyjny*), the redress mechanisms are considered *full*.⁸⁷

Spain - In Spain, the redress mechanisms linked to the right to social assistance are considered *fair*. Social assistance benefits in Spain are divided in benefits within the social security system and benefits outside the social security system. Redress mechanisms for both types of benefits are considered *fair*.⁸⁸

Sweden – The redress mechanisms linked to social assistance benefits; both benefits in kind and in cash, are considered *fair*. Decisions on social assistance benefits made by the social services in a municipality can be appealed through the public administrative courts.⁸⁹

The U.K – In the U.K, the same redress mechanisms are available for all decisions regarding social assistance benefits. After an internal review process with the responsible authority, there is the possibility for a three-stage appeals process. Therefore, redress mechanisms

⁸⁴ Tavits, Gaabriel (2015) p. 6.

⁸⁵ Absenger, Nadine & Blank, Florian et. al (2016) pp. 24-25.

⁸⁶ Heeger, Susanne & Pennings, Frans (2015) pp. 29-30.

⁸⁷ Swiatkowski, Andrzej & Wujczyk, Marcin (2015) p. 7.

⁸⁸ Cueto Perez, Miriam. et. al (2015) p.8.

⁸⁹ 16 kap. 3 § Socialtjänstlag (2001:453) [Social Services Act]



linked to the right to social assistance in the U.K are considered *fair* for both benefits in kind and cash.⁹⁰

3.5 Redress mechanisms, housing

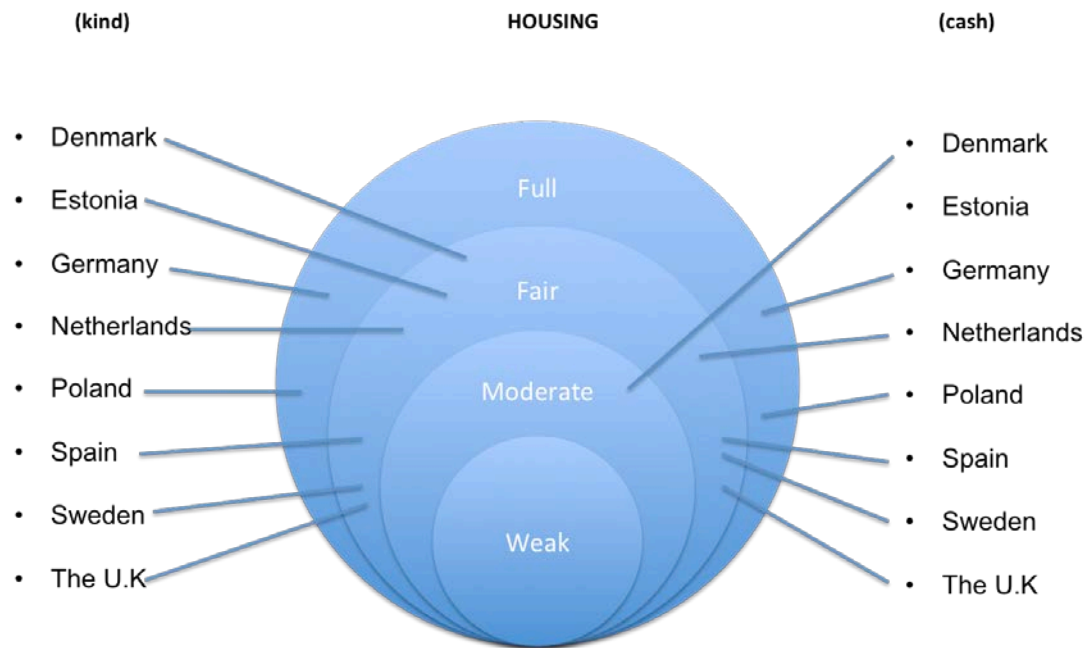


Figure 4. Redress mechanisms, housing

For housing benefits, we can identify that some of the countries lack specific housing benefits in cash.⁹¹ Financing for housing is instead often embedded in different social assistance benefits. The right to housing as a social right is, like e.g. health care, constructed and/or formulated in different ways across the countries. In some countries the right to housing is expressed in a more goal-oriented way, rather than a clear enforceable right. What we find to be almost unanimous among the countries, and characteristic for housing as a social right, is that the obligation to provide housing for individuals is put on municipal-level and not on state-level.

We find one case of EU-citizens being indirectly excluded from redress mechanisms, and that is in the U.K where EU-citizens from other countries are not eligible for access to social housing. Being legally restricted from accessing the housing benefit in the first place also

⁹⁰ Chase, Elaine & Seeleib-Kaiser, Martin (2015) pp. 27-28.

⁹¹ See for example Tavits, Gaabriel (2015) p. 7.



complicates the access to possible redress mechanisms linked to the particular benefit.⁹² Since EU-citizens are not directly formally excluded from the redress mechanism, no indication is made in the figure.

Denmark - Redress mechanisms relating to housing are, for benefits in kind, considered *fair* and for benefits in cash considered *moderate*. Complaints regarding benefits administered under the Social Housing Act are appealed to a special complaints board as a first step. Decisions from the board can be appealed before a special court. For benefits in cash, such as housing subsidies, the redress mechanism available is National Social Appeals Board, mentioned under section 3.4.⁹³

Estonia - The only housing benefits in kind available in Estonia are provided through social assistance schemes. Disputes over these benefits are reviewed by the county governor and, if still unresolved, by administrative courts. The redress mechanisms are considered *fair*. There are no housing benefits in cash available in Estonia, and therefore no redress mechanisms to be evaluated.⁹⁴

Germany - The redress mechanisms linked to the right to housing in Germany are considered *full*, for both benefits in kind and in cash. The Administrative Courts have jurisdiction over housing entitlement vouchers and other matters under the German Resident Act. Cash benefits are available in conjunction with unemployment benefits and other social security benefits under SGB II and SGB XII. Conflicts on the lawfulness of legislation regarding social right can be brought before the Federal Constitutional Court.⁹⁵

Netherlands - The redress mechanisms linked to housing benefits in the Netherlands are considered *fair*, both for benefits in kind and cash. With the possibility to appeal in accordance with the GALA, legal protection for the right to housing is available when an individual is faced with an unfavourable decision, both regarding benefits in kind as well as benefits in cash.⁹⁶

Poland - In Poland the redress mechanisms linked to the right to housing are considered *full*. Cases regarding housing benefits in kind and in cash are resolved in administrative courts, after administrative proceedings. With the possibility of a constitutional appeal to The Constitutional Tribunal (*Trybunał Konstytucyjny*), the redress mechanisms are considered *full*.⁹⁷

⁹² Chase, Elaine & Seeleib-Kaiser, Martin (2015) pp. 35-36.

⁹³ Jacqueson, Catherine (2015) p. 23-24.

⁹⁴ Tavits, Gaabriel (2015) p.7.

⁹⁵ Absenger, Nadine & Blank, Florian et. al (2016) p. 29.

⁹⁶ Heeger, Susanne & Pennings, Frans (2015), pp.33-34.

⁹⁷ Swiatkowski, Andrzej & Wujczyk, Marcin (2015) pp. 29-30.



Spain – In Spain, the right to housing is not constructed as “a real right”. Complaints are foremost made against mistakes made by administrative bodies dealing with housing benefits. For both benefits in kind and cash, there is the possibility for a judicial review, administrative appeal as well as the possibility to appeal before an ordinary court that make the redress mechanisms for housing benefits in kind *fair*. Benefits in cash are very rare, but redress mechanisms would be the same as for benefits in kind.⁹⁸

Sweden – Decisions regarding housing benefits in cash are appealed through the public administrative courts (after being internally reviewed with the Swedish Social Insurance Agency).⁹⁹ The same redress mechanisms are available for housing benefits in kind (provided through the municipal social services).¹⁰⁰ These redress mechanisms are, for both benefits in cash and kind, considered *fair*.

The U.K – Redress mechanisms linked to housing benefits in kind and cash are considered *fair*, in the U.K. As mentioned above, there is however some concern regarding the situation for EU-citizens being indirectly excluded from the possibility of redress, when not eligible for the housing benefits in the first place.

3.6 Summary

The aim of the present chapter is to determine the character of redress mechanisms in the eight countries included in this study by reviewing the results from the country reports using the comparative scheme presented in section 1.3.

From the results presented in figures 1-4, we can conclude that social rights, overall, in the countries studied, have a strong level of formal legal protection; the redress mechanisms offered are almost all in the span “moderate” to “full”. We only find one case where EU-citizens are (indirectly) excluded from the possibility of redress, by not being eligible for the benefit in the first place.

The results presented in this chapter will be further discussed in chapter 5.

⁹⁸ Cueto Perez, Miriam. et. al (2015) pp.1, 7-8, 27.

⁹⁹ 110 kap. 13 § Socialförsäkringsbalk (2010:110) [Social Insurance Code]

¹⁰⁰ 16 kap. 3 § Socialtjänstlag (2001:453) [Social Services Act]



4. EXTRA-PROCEDURAL HINDRANCES TO ENFORCEABILITY OF SUBSTANTIAL LEGAL RIGHTS

4.1 Introduction, extra-procedural hindrances

In this chapter, we will present some of the extra-procedural factors that create hindrances for realising individuals' right of redress and in some cases, barriers that might hinder the access to redress mechanisms in the first place. The extra-procedural hindrances are, to some extent, hindrances of a more practical nature.¹⁰¹ Acknowledging that access to justice might be hindered by societal, cultural, institutional barriers,¹⁰² in this section we have decided to focus on hindrances identified by the rapporteurs in the respective country reports. First, we will exemplify by using three types of extra-procedural hindrances that reoccur in the reports namely; *legal fees*, *legal representation/legal aid* and *language barriers/interpretation*. This is done in sections 4.2-4.4 with the use of examples from the country reports. After this, we give a short comparative overview in section 4.5, where we present the main extra-procedural hindrances identified in the eight countries separately.

As seen in the previous sections, EU-citizens often enjoy the same legal right to redress as the citizens of the host member state, dependant on lawful residence of the individual claiming benefits in the host member state.¹⁰³ Therefore, extra-procedural hindrances such as fees, knowledge of the host member state's judicial system and language barriers are valuable in providing a clearer picture of the situation for EU-citizens enforcing social rights in host member states.

4.2 Legal fees

What we understand by "legal fees" in this setting are fees paid in order to access or fully make use of redress mechanisms linked to the protection of an individual social right. E.g. court fees that have to be paid in order for a court to review a case. Costs associated with redress procedures are not only fees but also costs for legal representation. These are discussed in section 4.3.

The type of fees discussed in this section is the sort of entry-fees that create an initial barrier for the individual to taking the first step towards making use of redress mechanisms available. Let us look closer at some examples from the country reports.

¹⁰¹ In the questionnaire for the country reports prepared, we used the term "extra-legal hindrances" meaning barriers of a more practical nature to the enforceability of legal rights in general and to redress mechanisms in particular. We have narrowed down the term to "extra-procedural hindrances", meaning the same kind of hindrances as intended in the outline, but more focused on discussing barriers linked directly to redress mechanisms.

¹⁰² Begiraj, Julinda & McNamara, Lawrence (2014), p. 5-7.

¹⁰³ See sections 3.2-3.5.



In Netherlands, an administrative appeal proceeding before the administrative courts (regulated under the GALA) require court fees (45 euros for proceedings under administrative law) to be paid in advance. These court fees create barriers for people of low income and/or no assets to accessing redress mechanisms:

“Levy of the court fee, however, might make it impossible or excessively difficult for the claimant to make use of proceedings under administrative law. For those persons whose net income is lower than a certain amount, and who have no assets from which the court fee could be paid, (higher) appeal is admissible in case of non-payment of court fees.”¹⁰⁴

A similar fee is required for access to Estonian courts (15 euros), called a “state fee”. This is however, in contrast to the situation in the Netherlands, not considered as an obstacle:

“In order to start a lawsuit it is necessary to pay a state fee. In cases the administrative procedure that state fee is approx. 15 Euro and this is usually not an obstacle in order to start the lawsuit. Basic problem is the quality of legal assistance.”¹⁰⁵

The absence of court fees is something that has been identified as something that promotes accessibility to the court system. An example of this is the recent attachment of fees to tribunals in the U.K, making them less accessible:

“In theory, tribunals have several characteristics which make them easily accessible to everyone. (...) Secondly, until recently there were no fees attached to tribunals.”¹⁰⁶

These are some examples of a first, entry-level barrier to redress mechanisms created by fees, one of the categories of extra-procedural hindrances identified in the country reports. The existence of this type of court fees might work in a screening capacity not only for the volume of cases lodged in courts, but also for who is available to make use of the possibility to go to court. The very opposite, the absence of court fees, is identified as a factor promoting accessibility to courts in Germany:

“With respect to access to justice it should be mentioned from the outset that for the large majority of

¹⁰⁴ Heeger, Susanne & Pennings, Frans (2015) p.13.

¹⁰⁵ Tavits, Gaabriel (2015) p. 2.

¹⁰⁶ Chase, Elaine & Seeleib-Kaiser, Martin (2015) p. 7.



private claimants bringing a dispute in the field of social law before a social court is free of costs. There will no court fees be charged. (...) Compared with other jurisdictions the caseload of the social courts has remained on a high level even if the curve of incoming litigation numbers has been moderately declining since 2010.”¹⁰⁷

4.3 Legal representation / legal aid

In close connection to the issue of court fees, discussed in the previous section, is the question of requirement for legal representation in order to access redress mechanisms and in relation to this – the possibility to receive legal aid.

In most countries, there seems to be no formal requirement for an individual to have legal representation in order to access redress mechanisms. Exceptions are higher instance courts/tribunals in some countries that require legal representation. This is the case in, for example, both Germany:

“At local social courts and social courts of the Länder there is no requirement to be represented by a lawyer or by any other representative. This is different at the Federal Social Court, where there is a statutory requirement to be represented by a lawyer.”¹⁰⁸

...and Spain:

“The Supreme Court of Spain (Tribunal Supremo) is the highest judicial body in Spain. Composed of five chambers, it has cognizance of all jurisdictional orders and its rulings cannot be appealed, except to the Constitutional Court, when one of the parties claims that their constitutional rights have been infringed. In order to interpose a judicial appeal, legal-aid assistance is always needed: a lawyer/attorney at all times as well as a solicitor when acting before a collegiate tribunal (this solicitor is called procurador and is a lawyer who serves as a link between the attorney who has a client and the courts).”¹⁰⁹

The possibility of finding and acquiring professional legal representation is described in several country reports as a necessity and highly advisable in pursuing claims for social rights benefits through redress mechanisms. In this, the availability of legal aid for financing legal representation is important in terms of access for all.

¹⁰⁷ Absenger, Nadine & Blank, Florian et. al (2016) p. 2.

¹⁰⁸ Absenger, Nadine & Blank, Florian et. al (2016) p. 7.

¹⁰⁹ Cueto Perez, Miriam. et. al (2015) p. 5.



The issues regarding legal aid differ among the countries. In some, there is the issue of legal aid not being optional in the field of social rights and for claims regarding welfare benefits. This is the case for example in Sweden and the U.K (as seen below).

“ There are clear limitations to legal aid in the UK, the main one being a series of stringent cuts since 2006 resulting in its increasingly restricted access. The Legal Aid, Sentencing and Punishing Offenders Act (LAPSO, 2012) in particular resulted in major financial cuts and other restrictions to legal aid including the removal of certain categories of law from eligibility to legal aid (in particular family law, social welfare law, employment law, immigration law and clinical negligence).”¹¹⁰

In other countries, the issue is not so much regarding the availability of legal aid as it is an issue of lack of knowledge concerning the legal system as such and there, the possibility to apply for legal aid in particular. This concern is raised in connection to the issue of lack of economic resources as an extra-procedural hindrance in Spain:

“Lacking economic resources can be a potential extra-legal hindrance to face a judicial review, even an administrative appeal. Many people are not aware of the possibility of free legal assistance and some of them simply do not want to go to the courts to enforce their Social Rights.”¹¹¹

The Spanish example presented in the quote above, shows how several extra-procedural factors might play a part in creating hindrances to accessing redress mechanisms. We see this in many of the country reports, where the extra-procedural hindrances often seem to intertwine, and creating barriers especially high for foreigners, such as EU-citizens. Often times, the common denominator seems to be language barriers, which we will discuss in the coming section.

4.4 Language barriers / interpretation

Issues regarding language barriers have been identified in several of the member states included in this report. The issues concern both language barriers in the actual access to social rights (e.g. problems in fulfilling educational goals due to language barriers) and also when accessing redress mechanisms.

Language is identified as an extra-procedural barrier in several of the country reports. This is relevant for both oral and written communication between authorities, courts and the individual. Closely connected is the possibility of- or in some cases even the right to interpretation. In Poland, there is no general provision of interpretation for EU-citizens or TCNs, making it highly complicated to acquire information from court proceedings and handling of decisions with authorities.

¹¹⁰ Chase, Elaine & Seeleib-Kaiser, Martin (2015) p. 13.

¹¹¹ Cueto Perez, Miriam. et. al (2015) p. 20.



“When a foreigner, an EU citizen or a third-country national deals with official matters in Polish offices, he may encounter communication problems because of the lack of knowledge or very poor knowledge of the Polish language. The right to information is inherently connected to the right of a foreigner to understand the information provided to him. However, according to the Polish Constitution an official language is Polish (article 27). This is confirmed also by the provisions of the Polish Language Act which provides that Polish is an official language used by the constitutional authorities, regional and local authorities and their subordinate institutions to the extent that they perform public tasks, tasks of local administration, institutions appointed to perform certain public tasks, etc.”¹¹²

The same issues have been identified in Estonia, where translation is not guaranteed:

“The problem can also be the accessibility of translation. Usually the translation is granted in cases of criminal law and administrative law. In cases of civil law translation is not granted. The guaranteeing the translation might be a problem. Usually at the courts there are translators for Russian language. For other language there is a shortage of translators. This could be obstacle for the other EU citizens or third country nationals in order to access the protection of social rights.”¹¹³

Many of the countries raise the issue of a general lack of knowledge concerning citizens’ rights and the legal system as such and within this, the possibilities for redress. Language barriers are often an important factor in this, as discussed in the Danish country report:

“One hindrance which might be more accurately assessed as a legal one than as an extra-legal hindrance is information of the citizens’ rights. Indeed, most of the Appeals Boards under examination in this study have an internet site where useful information can be found. Yet, for most of them the information that is available in English or in other languages is very poor.”¹¹⁴

4.5 A short comparative overview

In the following section we will present a short comparative overview of potential extra-procedural hindrances to redress mechanisms that have been identified by the rapporteurs in the eight countries included in this study. We make no claim to a deep-going comparison since the hindrances presented here must be understood in their national setting, both with regards to legal system, societal and cultural context.

¹¹² Swiatkowski & Wujczyk (2015), p. 9-10.

¹¹³ Tavits, Gaabriel (2015), p. 2.

¹¹⁴ Jacqueson, Catherine (2015) p. 11.



The idea for this short comparative overview is instead to work as a background for our concluding discussions in chapter 5.¹¹⁵

Denmark – In the Danish country report, language is presented as the main extra-procedural barrier related to redress mechanisms.¹¹⁶ Although interpretation is provided, this is not relevant in the area of complaints regarding social rights since procedures are conducted in writing. The issue of language as a barrier is raised in relation to information on citizens' rights.¹¹⁷

Estonia – The two main extra-procedural hindrances presented in the Estonian country report are *language barriers* and *availability of legal representation*. In both cases, these barriers are discussed as issues of availability, rather than access. As discussed above, the availability of translators at courts in Estonia has been raised as an issue related to redress mechanisms. Usually, only translators with competence in the Russian language are available. The issue of finding and being able to finance legal representation is also raised as an extra-procedural hindrance.¹¹⁸

Germany – In the German country report, several potential extra-procedural hindrances to the enforceability of legal rights are presented such as discrimination, fear of stigmatization, inaccurate interpretation of legal rules by public employees and more. Hindrances more directly linked to redress mechanisms are for example; problems with communication (mainly language barriers), long duration of court procedures in cases relating to social rights and a general lack of knowledge regarding both social rights as well as redress mechanisms.¹¹⁹

Netherlands – In the Dutch country report, several potential extra-procedural hindrances to the enforceability of legal rights are presented, both specific hindrances relating to each of the social rights as well as more general hindrances. Focusing on redress mechanisms, language barriers, lack of knowledge and costs are highly relevant. The issue of insufficient knowledge in the Dutch language affects access to important information and, as of recent developments, access to legal aid consultation.¹²⁰

¹¹⁵ See section 5.3 for further analysis on the importance of extra-procedural hindrances.

¹¹⁶ Aside from the more practical hindrances discussed in this chapter, the issue regarding determining lawful residence and being registered in the civil register is described as a central issue in Denmark for EU-citizens accessing social rights. This additional requirement, to those conditions set up in the Citizenship directive, is problematic with regards to EU-law. See Jacqueson, Catherine (2015) p. 13. In the same way, this is a concern for EU-citizens in Sweden, where registration in the Population Register is central to accessing social rights benefits. For more on this issue in Denmark and Sweden, see for example Hyttén-Cavallius, Katarina (2015).

¹¹⁷ Jacqueson, Catherine (2015) pp. 11-12.

¹¹⁸ Tavits, Gaabriel (2015) p.2.

¹¹⁹ Absenger, Nadine & Blank, Florian et. al (2016) p. 12.

¹²⁰ Heeger, Susanne & Pennings, Frans (2015) pp. 20-21.



Poland – Extra-procedural hindrances linked to redress mechanisms in Poland, as presented in the Polish country report, are mainly language barriers and knowledge of the legal system. As discussed above, there is no right to translation or interpretation service for foreigners. Closely connected to this, are issues for foreigners (both EU-citizens and TCNs) of acquiring important information provided by public authorities and courts.¹²¹

Spain – Two main extra-procedural are identified in the Spanish country report: *language barriers* and *the lack of economic resources*. Since there is no comprehensive regulation on access to interpretation and/or translation services in Spain, the complete lack of knowledge of the Spanish language could to a large degree hinder the enforcement of social rights for these individuals. The lack of economic resources also creates an initial barrier for some people, since not all are aware of the possibility to obtain free legal assistance, meaning that redress mechanisms are not seen as a reasonably possible way of enforcing social rights.¹²²

Sweden – The main extra-procedural hindrances identified in relation to redress mechanisms in Sweden are lack of knowledge and insufficient information, no legal aid in administrative procedures and language barriers.¹²³ The right to access to interpretation can to some extent make it possible to overcome language barriers.¹²⁴ The issue of legal aid in administrative procedures are often debated, and under scrutiny.¹²⁵

The U.K – As presented in the U.K. country report, the political development over the last few years, with new imposed highly complex restrictions on EU-citizens seeking to enforce their social rights in the U.K. has brought about extra-procedural hindrances such as a greater need for expert legal assistance and language and knowledge barriers in obtaining information on welfare services and the redress mechanisms linked to them. The hierarchy of different “redress bodies” are also presented as a hindrance. Basic issues might be solved locally and in a lower instance, but complaints brought before higher instances become difficult, more formal and expensive, complicating the procedural options for individuals seeking redress.¹²⁶

¹²¹ Swiatkowski, Andrzej & Wujczyk, Marcin (2015) pp. 9-10.

¹²² Cueto Perez, Miriam. et. al (2015) p. 20.

¹²³ Transcript, interview with civil servant at NGO Crossroads 2014, part of task 6.3 integrated bEUcitizen project, p. 7.

¹²⁴ 8 § Förvaltningslag (1986:223) [Administrative Procedures Act].

¹²⁵ Domstolsverkets rapportserie 2009:2 s. 50.

¹²⁶ Chase, Elaine & Seeleib-Kaiser, Martin (2015) p. 16-18.



5. DISCUSSION AND CONCLUSIONS

The aim of this study is to investigate the possibilities and impediments for EU-citizens in Denmark, Estonia, Germany, Poland, the Netherlands, Spain, Sweden and the United Kingdom to enforce their social rights. For this purpose we have collected information on the presence and character of redress mechanisms in the fields of education, health care, housing and social assistance.

In the previous chapters we have provided an account of how social rights in the selected fields can be conceived as *social human rights* or *international social rights* (chapter 2) and we have described what (if any) type of redress mechanisms that have been linked to these rights in the different countries (chapter 3). In order to facilitate a comparison we have constructed a comparative scheme where different redress mechanisms are categorized on a scale indicating to what extent the manner of redress available weaken or strengthen the legal character of the right as such (chapter 1).

In the present chapter previous results (chapter 3 and 4) are summarised and discussed in relation to the enforceability of the social rights of EU-citizens. In the concluding remarks we reflect on how the results could contribute to the discussion on how to minimize barriers to a well-functioning EU-citizenship.

5.1 What (if any) is the character of the redress mechanisms developed in the eight countries to secure social rights to health care, education, social assistance and housing?

As noted above, the social rights, in all four fields of interest, consist in themselves of a conglomerate of different rights. In the comparison we simplified and only kept the distinction made between rights in kind and rights in cash. In each of the countries included we find a multitude of expressions of the specific rights within both of these categories. Different rights within the same category (cash or kind) can be protected differently within the same country, which explains why countries can have multiple indications (see appendix). The comparative scheme, making distinctions between redress mechanisms of different character, say little about the content or quality of rights as such. The results show that social rights in the eight countries are, overall, linked to legal redress mechanisms. Still, a right that has weak legal protection can be generous and a right given full protection can be sparse. We should also remember, as noted in the introduction, that the distribution of social goods can be secured without any individual legal rights-constructions at all.

We have constructed a table using the results in Chapter 3 to get an overview of the character of redress mechanisms used for the different types of social rights of interest in the present study:



<p style="text-align: center;">REDRESS MECHANISMS</p> <p style="text-align: center;"><i>Linked to health care, education, social assistance and housing</i></p> <p style="text-align: center;"><i>Denmark (Dk), Estonia (Est), Germany (Ger), the Netherlands (Nl), Poland (Pl), Spain (Sp), Sweden (Swe), the United Kingdom (UK)</i></p>						
	Non-existent	Weak	Moderate	Fair	Full	ESC-cpp
In cash			Health care (Dk, UK)	Health care (Est, Nl, Sp, Swe)	Health care (Ger, Pl)	Estonia, the Netherlands and Sweden
	Education (Sp)	Education (UK)	Education (Dk)	Education (Est, Nl, Pl, Swe)	Education (Ger)	
			Social Ass (Dk)	Social Ass (Est, Nl, Sp, Swe, UK)	Social Ass (Ger, Pl)	
	Housing (Est,)		Housing (Dk)	Housing (Nl, Sp, Swe, UK)	Housing (Ger, Pl)	
In kind			Health care (Dk, Nl, Swe, UK)	Health care (Est, Sp)	Health care (Ger, Pl)	Estonia, the Netherlands and Sweden
			Education (Dk, Swe, UK)	Education (Est, Nl)	Education (Ger, Pl, Sp)	
			Social Ass (Dk)	Social Ass (Est, Nl, Sp, Swe, UK)	Social Ass (Ger, Pl)	
				Housing (Dk, Est, Nl, Sp, Swe, UK)	Housing (Ger, Pl)	

Table 1. Compilation of results as presented in chapter 3.

From the results resented in Table 1 we can conclude that social rights, overall, in the countries studied, have a strong level of formal legal protection; The redress mechanisms offered are almost all in the span “moderate” to “full”. This might be a bit surprising given that social rights often are questioned in terms of their legal status and legal strength (see chapter 1). If we reiterate King’s scheme, we can conclude that these social rights, in general, have been given the status of rights in a *legal sense*. In addition, we can conclude that we find countries with patterns of redress mechanisms that have more or less consistent character, for example in Denmark and Germany the character of redress is the same regardless of whether the rights are in kind or cash and regardless of the substantive content (housing, education, social assistance or health care). Other countries also have rather consistent character of redress, but include exceptions (Estonia, the Netherlands and



Poland), while the character of redress mechanisms in Spain, Sweden and the United Kingdom is more scattered.

There are some differences between how different rights are protected in and between countries, but no marked differences. This said, the right to social assistance have an overall stronger legal protection than other rights. On the weaker side we find housing and education. It should be noted that emergency help to housing often is included in the right to social assistance. There is no big difference between benefits in kind and benefits in cash when comes to the legal character of the chosen redress mechanisms. If anything, benefits in kind seem to have a somewhat stronger legal protection, but in the case of Sweden, where an opposite pattern can be identified. Three countries of the eight included have a Constitutional Court (Germany, Poland and Spain), three countries have ratified the ESC Collective Complaint Procedure (Estonia, the Netherlands and Sweden).

5.2 In relation to the response to the first question (above), do redress mechanisms available for EU-citizens differ from the redress mechanisms available for national citizens?

The answer to this question is a fairly straightforward “no”. In none of the countries there is evidence of legal constraints that explicitly single-out EU-citizens (or “foreigners”) in relation to redress mechanisms. Barriers, and they do exist, can be found both at the primary level, i.e by not providing access to rights as such and at an extra-procedural level (see below).¹²⁷ To illustrate, we have found one example in our material where EU-citizens are distinctly singled out, legally, as an excluded group (the right to housing in the UK) and thus indirectly excluded from redress. There is also a Swedish case concerning the denial of the right to education for children of destitute EU-citizens.¹²⁸ Still, there is in this case a (weak) right to appeal open also to EU-citizens with the effect that discriminating practises are re-established in the complaint forum.¹²⁹ In general, exclusion seems to be less direct and rarely directed at EU-citizens.

5.3 Are there other – extra-procedural – circumstances that create hindrances for EU-citizens to enforce their social rights in spite of established redress mechanisms?

The topic of Chapter 4 is extra-procedural hindrances. In order to secure that rights are protected not only in theory but also in fact it is essential to be observant on any kind of hindrances to access to established redress mechanisms. Based on the country reports we can conclude that hindrances are a problem. The main obstacle is created by lack of language skills in the native language. But also knowledge about the systems and the

¹²⁷ Erhag, Thomas (ed) (2016) forthcoming.

¹²⁸ Stendahl, Sara & Swedrup, Otto (2015).

¹²⁹ Weijedal, Sebastian (2016).



existence of rights as well as affordability are distinctly acknowledged as obstacles to the access of justice. From the country reports we could also draw the conclusion that barriers of this kind, informal and indirect, often are complex and intertwined and although we made an effort to separate barriers created by lack of resources, lack of representation and lack of language knowledge all of these factors (along with others) often go hand in hand. One could also imagine that while these are barriers can be insurmountable for someone that is “foreign” they also create barriers to natives who are in lack of financial or educational resources. Thus, while barriers identified as extra-procedural hindrances do exist in all countries included in the study, their character is not necessarily discriminating against EU-citizens specifically.

5.4 Conclusions

The overarching focus of the bEUcitizen project is to identify barriers to the EU-citizenship and contribute with possible ideas to overcome such barriers. The present study should thus provide arguments and perspectives towards this overarching aim. The topic of social rights and their enforcement has not been at the core of the EU-citizenship project.¹³⁰ It could be argued that the radical idea of creating a “European citizen” has not taken into full account the intrinsic value and importance of social rights in modern welfare states and that this might well have added, in an unfortunate way, to the problems faced today. These days when, for many and complex reasons, one could fear that the European project as such is at risk; *nota bene* the developments in the UK, in Poland, in Hungary, in Greece and in relation to Turkey.¹³¹ There are indeed barriers to overcome.

To this end the present comparative study on redress mechanisms contributes insights on to what extent access to social rights, as an aspect of citizenship, can be claimed by native citizens and EU-citizens alike. We can conclude that *if* rights are provided and *if* redress is offered, we have in the countries studied found no formal hindrances that discriminate against mobile EU-citizens.

This said, we have also learnt that extra-procedural hindrances are a reality and that they create barriers especially problematic to mobile EU-citizens but also to EU-citizens living in their native countries. Within the heterogeneous group of mobile EU-citizens we find those who risk a loss of social rights on basis of lack of language skills, lack of knowledge of substantive- as well as of procedural rights and who will be hindered by procedural costs, all, thus, examples of concrete and existing barriers to a well-functioning EU-citizenship.

¹³⁰ See Kochenov, Dimitry & Plender, Richard (2012) pp. 369-396 for a fierce argument why this is problematic according to EU-law and thus why the ECJ should replace its “market integration paradigm” with a paradigm focused on citizen’s rights.

¹³¹ See for example: http://www.nytimes.com/2015/12/20/magazine/has-europe-reached-the-breaking-point.html?_r=0



Still, in terms of citizens-rights, maybe the major challenge is access to social rights as such. It is a fact that EU-law secures social protection to EU-citizens mainly through legislation that coordinates national welfare systems. EU-law protects the right to free movement and to equal treatment but there is no harmonisation of rights as such and no federal EU-welfare state to pay for health care, primary education, social assistance or housing. The emphasis on coordination as the European approach to social security has been developed over the years and by now works relatively well for the economically active. The EU-citizenship however secures freedom of movement to all citizens, also the unemployed and the job-seekers without past or present social security. Combined, this is a development that has stressed the solidarity of national systems and created or at least contributed to sharp tensions in several of the established welfare states included in the study.¹³² The European citizenship has extended the scope of social solidarity in Europe in the sense that social rights are now provided to all EU-citizens who are residing lawfully within the territory of another member state. Still, there are also limits to this transnational solidarity; EU-citizens who are not considered economically active can be excluded from the provision of social rights.¹³³

The core of our interest in identifying potential hindrances for the EU-citizenship has been directed towards revealing discriminating practises, thus an interest in identifying barriers towards EU-citizenship that are based on difference in treatment between EU-citizens and other groups in society. However, a challenge for this study on redress mechanisms has been to handle the lack of a core set of substantive social rights that one could claim that all EU-citizens are entitled to, regardless of geographical whereabouts. Are there any such rights? Our solution in this regard was to base the study in an overview how social rights (in the relevant areas) are conceived from the perspective of the Council of Europe and the European Social Charter in particular.

If EU-citizens are deprived of social rights on a national level and the legal basis for these rights are found in international law or EU-law the best arena for redress is probably supra-national (regional or international). Thus, EU-citizens might need access to redress mechanisms external to the state system (ECtHR, CESC, ECJ) or alternatively, to national Constitutional courts that have been given the jurisdiction to apply international law on a national level. One example of an arena where EU-citizens have been granted social rights (of relevance to this study) against the position of the state, is the Collective Complaint Procedure of the revised Social Charter. This is a “weak” procedure in legal terms, but still the Committee, in close dialogue with the ECtHR, has developed into a quasi-judicial body and its case-law is growing. The ECJ, on the other hand, seems to be unwilling to use its powers to extend the scope of social rights based on the EU-citizenship. Between the Committee and the Court could thus be noted a clash between the values that King

¹³² We have seen in other studies published within the framework of this project that there has been a rise in public concern in several countries regarding phenomena such as social tourism and Roma camps. See Seeleib-Kaiser et. al (2015).

¹³³ See Pennings, forthcoming report. See also van Eijken, Hanneke (2014), pp. 123-138 on the topic of social rights linked to European Citizenship.



identifies as *social human rights* (protected by the CESR) and national *citizenship rights* (protected by the ECJ).

As was emphasised in the introduction, social rights can be secured legally in different ways, this is a fact that is also reflected in the country-reports and in the results presented above. Welfare states known to be substantially generous can be restrictive in providing “real” legal rights, while more lenient welfare states can be more generous in provisions of “rights”. Thus, whether or not social rights (in the moral sense) are constructed as individual legal rights that can be claimed in court is not the sole measurement of their overall strength. Still, this said, in case of infringement or denial, access to a legal claim and to legal arenas indeed strengthens the position of the person or group who claim that their social rights are breached.

The function of arguing social rights are manifold and apart from being an essential aspect of a well-functioning labour-market these rights also aim to form a safety-net to protect from the indignity of destitute poverty. While barriers in terms of denied access to social rights seem to be few as long as we focus on economically active EU-citizens who has a direct or indirect connection to the labour-market, the situation differs for those who are economically inactive and who are not able to access work. And this might well be true for all EU-citizens, regardless of whether they decide to be mobile or not.

The ECJ has through its case-law following *Dano* made clear that EU-law is not a basis for legal arguments that link EU-citizenship as such with social rights to be claimed irrespective of where in Europe the claimant is staying.¹³⁴ Europeans outside the labour market, who have not managed to acquire an established social-security position in their country of origin, are in this perspective land-stuck; or at least their choice to be mobile is carried out on their own risk, as the duty of public authorities to respond to the risks of poverty stays with the native country. In this way it could be argued, that we have a solution where a balance is struck between the value of free movement and the value of social protection and states keep their full sovereignty as to the social standard of their country.

However, as the consequences of destitute poverty call upon core fundamental values such as human dignity and the right to life, and as the states of the European Union are legally bound by their ratification of the European Convention of Human Rights, there is a counter argument. At present the legal forum for individuals or groups who live on territory where they are not provided with any legal social rights, is found on the supra-national human rights arena. An arena that the ECJ seems to have abandoned at present in cases of relevance to this study, in spite of the status of the EU Charter of Fundamental Rights and the clear inter-linkage with the Conventions of the Council of Europe.¹³⁵ Instead the relevant arenas for social rights claims are the European Court of Human Rights as well as (depending

¹³⁴ C-333/13 *Elisabeta Dano v Jobcenter Leipzig*.

¹³⁵ See above footnote 4.



on ratification) the Committee of Social and Economic Rights and the international Committees linked to the ICCPR and ICESCR. One concrete suggestion in this direction, as a way of lowering barriers, would be to cherish the institutions and arenas already in place and follow up on Matti Mikkola's proposition to strengthen the legal status of the European Social Charter as well as the supra-national redress mechanism at present provided through the ESCR.¹³⁶

Europe is a region of welfare states. It is a characteristic of citizenship in welfare states that the inhabitants, based on a combination of solidarity and reciprocity, are provided with some level of social protection. It is a barrier to the fulfilment of a well-functioning EU-citizenship not to fully recognise this fact. That the welfare states of Europe are not forced by EU-law to provide social protection to all EU-citizens who use their freedom of movement, does not itself constitute a protection against "the erosion of welfare on national level".¹³⁷ It is not (only) the welfare systems in themselves, in terms of sustainable systems for benefits and services that need protection, but just as important, the welfare state project as such. Thus, a political idea where poverty and social exclusion are approached as common social, structural and political problems (not only as individual problems).

Poverty and social exclusion is in the welfare state a social (shared) concern as these are phenomena understood to create social problems, economic inefficiency, lack of legitimacy for political structures, an increase in crime, social instability and violence; non of which Europe need more of.

The EU-citizenship project would, we think, gain from an exploration of new and innovative means of creating systems and institutions for the provision of basic, fundamental, social protection to secure life, dignity and means of social inclusion to all its citizens, no matter where in Europe they live or work. In this pursuit it is strongly recommended that the acknowledged value of enforceable social rights, as a means to promote solidarity and social justice, is recognised.

¹³⁶ Mikkola, Matti (2010) pp. 669-677, chapter on "Future prospects".

¹³⁷ Making a reference to van Eijken who describes an EU strategy where fear of social tourism in Member states are met by limiting state responsibility, she writes: "Hence, the transnational form of solidarity is not unlimited and should not result in the erosion of welfare on national level", see van Eijken, Hanneke (2015), p. 129.



REFERENCES

Literature

- Arosemena, Gustavo (2014) *Rights, Scarcity, and Justice. An Analytical Inquiry into the Adjudication of the Welfare Aspects of Human Rights*. Cambridge: Intersentia.
- Benhabib, Seyla (2002) [2004] *Jämlikhet och mångfald. Demokrati och medborgarskap i en global tidsålder*. (In original: *The Claims of Culture. Equality and Diversity in the Global Era*. Princeton University Press). Göteborg: Daidalos.
- Bruzelius, Cecilia, Chase, Elaine & Seeleib-Kaiser, Martin (2015), *Social rights of EU migrant citizens: A comparative perspective*. Deliverable WP 6.1 of the bEUcitizen project.
- Cullen, Holly (2009) *The Collective Complaints System of the European Social Charter: Interpretive Methods of the European Committee of Social rights*, Human Rights Law Review 9:1, pp 61-93.
- Dean, Hartley (2015) *The Social Construction of Social Rights across Europe*. Deliverable WP 6.3 of the bEUcitizen project.
- Erhag, Thomas (2010) Country report on Sweden (chapter), *Security: A General Principle of Social Security Law in Europe*, Becker, Ulrich, Pieters, Ross, Friso & Schoukens, Paul (ed.), Groningen: Europa Law Publishing.
- Erhag, Thomas (ed) (2016) *EU-citizenship: free-movement and residence-based social security schemes*: special issue European Journal of Social Security (EJSS, 2016:2). Forthcoming.
- Gearty, Conor & Mantovalou, Virginia (2011) *Debating Social Rights*, Oxford and Portland: Hart Publishing.
- Gustafsson, Håkan (2002) *Rättens polyvalens. En rättsvetenskaplig studie av sociala rättigheter och rättssäkerhet*, dissertation, Lund Studies of Law, Sociologiska institutionen, Lunds universitet.
- Heeger, Susanne & Pennings, Frans (2016) *EU Citizenship and Social Rights, a Comparative Report*. Deliverable WP 6.2 of the bEUcitizen project. Forthcoming.
- Hollander, Anna (1995) *Rättighetslag i teori och praxis – en studie av lagstiftning inom social- och handikappområdet*, Uppsala:ustus.
- Hyltén-Cavallius, Katarina (2015) *The Use of Personal Identity Numbers in Sweden and Denmark : A Barrier to Union Citizens' Enjoyment of Free Movement Rights?*, Being a Citizen in Europe: Insights and Lessons from the Open Conference, Zagreb 2015. ed. / Sandra Seubert; Frans van Waarden. 1.0. ed. Utrecht : bEUcitizen, 2015. p. 86-98.



Katrourgalos, George (2015) "Social Security - in the "case-law" of the Social Rights Committee", pp 84-102 in Pennings, Frans and Vonk Gijsbert (eds) *Research Handbook on European Social Security Law*. Cheltenham and Northampton: Edward Elgar.

King, Jeff (2012) *Judging Social Rights*, Cambridge Studies in Constitutional Law, Cambridge: Cambridge University Press.

Koch, Ida Elisabeth (2015) "The integration between human rights case law: Convergence or competition" in Pennings och Vonk", pp. 103-120 in Pennings, Frans and Vonk Gijsbert (eds) *Research Handbook on European Social Security Law*. Cheltenham and Northampton: Edward Elgar.

Kochenov, Dimitry & Plender Richard (2012) EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery or the Treaty Text, in 37 *European Law Review*. pp. 369-396.

Marshall, T. H., and Tom Bottomore (1950) [1992] *Citizenship and Social Class*, London: Pluto Press.

Mikkola, Matti (2010) *Social Human Rights of Europe*, Helsinki: Legisactio.

Panzer, Claudio (2014) *The Personal Scope of the European Social Charter: Questioning Equality*. Paper presented at High-level Conference on the European Social Charter, 17-18 October 2014 available at: <https://racseanesc.files.wordpress.com/2014/10/claudio-panzer-the-personal-scope-of-the-european-social-charter-questioning-equality.pdf> [2016-03-24].

Quesada, Luis Jemena (2015) Protection of Refugees and Other Vulnerable Persons under the European Social Charter in *Revista de Derecho Politico*, (92) 1, pp. 245-272.

Stendahl, Sara (2014) "Welfare state borders: On local initiatives to cater to the needs of destitute EU migrants in Swedish cities", in Van Oorshot, Wim (et al.) (ed.) *Invisible Social Security Revisited. Essays in Honour of Jos Berghman*, Leuven: Lanno Campus, pp. 161-174.

Stendahl, Sara (2016) "To reside: To live, stay, be present, belong" in Erhag, Thomas (ed) (2016) *EU-citizenship: free-movement and residence-based social security schemes*: special issue *European Journal of Social Security* (EJSS, 2016:2). Forthcoming.

Stoor, Håkan (1990) *Rättslig reglering av den kommunala socialvården*, Helsingfors universitet.

Van Eijken, Hanneke (2014) *European Citizenship and the Constitutionalisation of the European Union*, doctoral dissertation, Utrecht University.

Vahlne-Westerhäll, Lotta (2002) *Den starka statens fall. En rättsvetenskaplig studie av svensk social trygghet 1950-2000*, Stockholm: Norstedts Juridik.

Vonk, Gijsbert (2014) "EU-freedom of movement: No protection for the stranded poor", November 2014, europeanlawblog.eu/?p=2599



Wejedal, Sebastian (2015) *The right to education - procedural options under Swedish law*, report prepared for internal project at the Department of Law, University of Gothenburg.

Westerhäll, Lotta (1994) *Patienträttigheter*, Stockholm: Nerenius & Santerus.

Country reports

Absenger, Nadine & Blank Florian (2016) Enforcement of rights – Upholding of obligations. Country report Germany. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Chase, Elaine & Seeleib-Kaiser, Martin (2015) Redress structures in the U.K. Enforcement of rights – Upholding of obligations. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Cueto Perez, Miriam (Coordinator), Argüelles Blanco, Ana Rosa, Boto Alvarez, Alejandra, Fernández Villazón, Luis & Tolivar Alas, Lepoldo. (2015). BEUCITIZEN. WP 6 TASK 6.4 SPAIN REPORT. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Heeger, Susanne & Pennings, Frans (2015) Redress structures, Enforcement of rights – Upholding of obligations. Dutch country report. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Jacqueson, Catherine. (2015) Enforcement of social rights – Upholding of obligations in Denmark. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Swiatkowski, Andrzej M. & Wujczyk, Marcin (2015) Redress structures, Enforcement of rights – Upholding of obligations. Poland. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Tavits, Gaabriel (2015) Estonia: Enforcement of rights – Upholding of obligations. *Report prepared for Task 6.4 of the bEUcitizen (Barriers Towards EU citizenship) integrated project.*

Case Law

C-333/13 Elisabeta Dano v Jobcenter Leipzig.

Complaint No. 14/2003, FIDH v France, decision on the merits of 8 September 2004.

Complaint No. 15/2003, European Roma Rights Centre (ERRC) v. Greece, decision on the merits of 8 December 2004.

Complaint No. 27/2004, European Roma Rights Centre (ERRC) v. Italy, decision on the merits of 7 December 2005.

Complaint No. 30/2005, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, decision on the merits of 6 December 2006.



Complaint No. 31/2005, European Roma Rights Centre (ERRC) v. Bulgaria, decision on the merits of 18 October 2006.

Complaint No. 33/2006, International Movement ATD Fourth World v. France, decision on the merits of 5 December 2007.

Complaint No. 39/2006, European Federation of National Organisations Working with the Homeless (FEANTSA) v. France, decision on the merits of 5 December 2007.

Complaint No. 41/2007, the Mental Disability Advocacy Center (MDAC) against Bulgaria, decision on the merits of 3 June 2008.

Complaint No. 45/2007, International Centre for the Legal Protection of Human Rights (INTERRIGHTS) v. Croatia, decision on the merits of 30 March 2009.

Complaint No. 46/2007, European Roma Rights Centre (ERRC) v. Bulgaria, decision on the merits of 3 December 2008.

Complaint No. 47/2008, Defence for Children International (DCI) v. the Netherlands, decision on the merits of 20 October 2009.

Complaint No. 48/2008, European Roma Rights Centre (ERRC) v. Bulgaria, decision on the merits of 18 February 2009.

Complaint No. 51/2008, European Roma Rights Centre (ERRC) v. France, decision on the merits of 19 October 2009.

Complaint No. 58/2009, Center of Housing Rights and Evictions (COHRE) v. Italy, decision on the merits of 25 June 2010.

Complaint No. 61/2010, European Roma Rights Centre v. Portugal, Complaint No. 61/2010, decision on the merits of 30 June 2011.

Complaint No. 62/2010, International Federation of Human Rights Leagues (FIDH) v. Belgium, decision on the merits of 21 March 2010.

Complaint No. 63/2010, Centre on Housing Rights and Evictions (COHRE) v. France, decision on the merits of 28 June 2011.

Complaint No. 64/2011, European Roma and Travellers Forum (ERTF) v. France, decision on the merits of 24 January 2012.

Complaint No. 67/2011, Médecins du Monde – International v. France, decision on the merits of 11 September 2012.

Complaint No. 69/2011, Defence for Children International v. Belgium, decision on the merits of 23 October 2012.

Complaint No. 72/2011, International Federation of Human Rights Leagues (FIDH) v. Greece, decision on the merits of 23 January 2013.



Complaint No. 86/2012, European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, decision on the merits of 2 July 2014.

Complaint No. 87/2012, International Planned Parenthood Federation – European Network (IPPF EN) v. Italy, decision on the merits of 10 September 2013.

Complaint No. 88/2012, Finnish Society of Social Rights v. Finland, decision on the merits of 9 September 2014.

Complaint No. 98/2013, Association for the Protection of All Children (APPROACH) Ltd. v. Belgium, decision on the merits of 20 January 2015.

Complaint No. 99/2013, Federation of Catholic Families in Europe (FAFCE) v. Sweden, decision on the merits of 17 March 2015.

Swedish legislation

Förvaltningslag (1986:223) [Administrative Procedures Act]

Skollag (2010:800) [Education Act]

Socialförsäkringsbalk (2010:110) [Social Insurance Code]

Socialtjänstlag (2001:453) [Social Services Act]

Studiestödslag (1999:1395) [Study Grants Act]

Other

Domstolsverkets rapportserie. 2009:2

Transcript, interview with civil servant at NGO Crossroads 2014, part of task 6.3 integrated bEUCitizen project

<http://www.vardanalyt.se/Lamna-granskningstips/Vagledning-klagomal/>

http://www.nytimes.com/2015/12/20/magazine/has-europe-reached-the-breaking-point.html?_r=0



APPENDIX

A. Country-specific comparative schemes

Denmark, comparative schemes 1-4



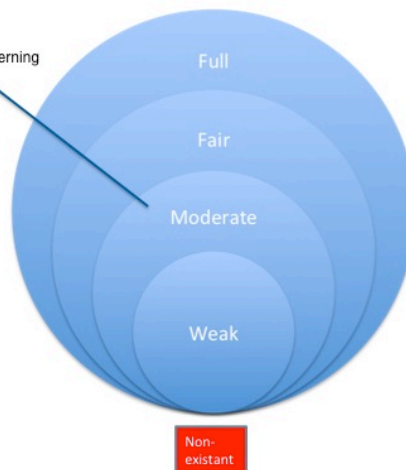
BEUCITIZEN TASK 6.4 DENMARK

(kind)

HEALTH-CARE

(cash)

- Health-care services (including claims concerning given treatments)



- None -



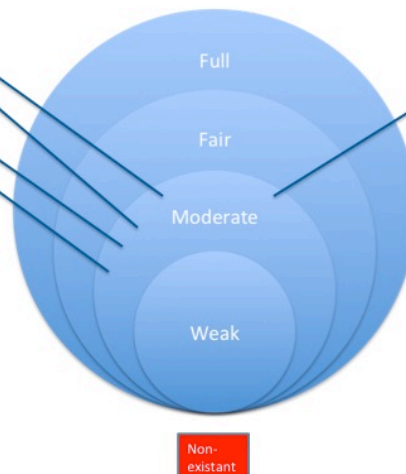
BEUCITIZEN TASK 6.4 DENMARK

(kind)

EDUCATION

(cash)

- Free compulsory education for children
- Special Needs Teaching
- Access to high school
- Access to professional schools and universities



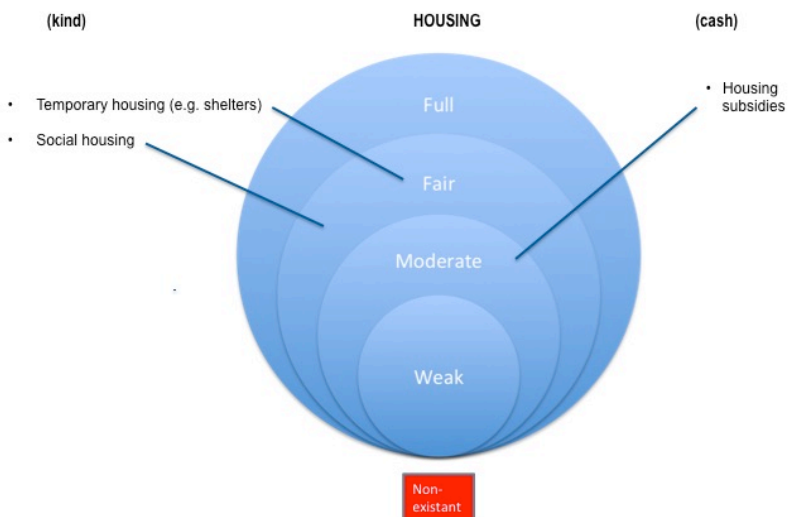
- Maintenance grants (SU)



BEUCITIZEN TASK 6.4 DENMARK



BEUCITIZEN TASK 6.4 DENMARK

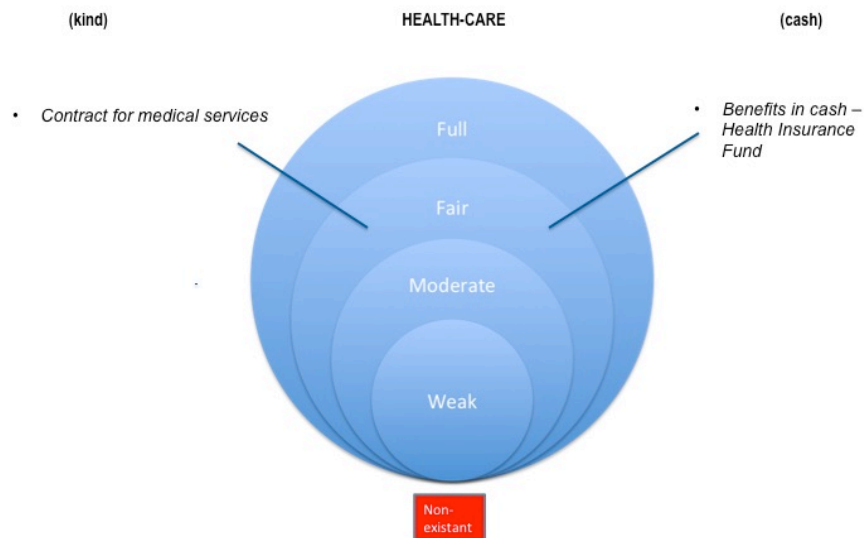




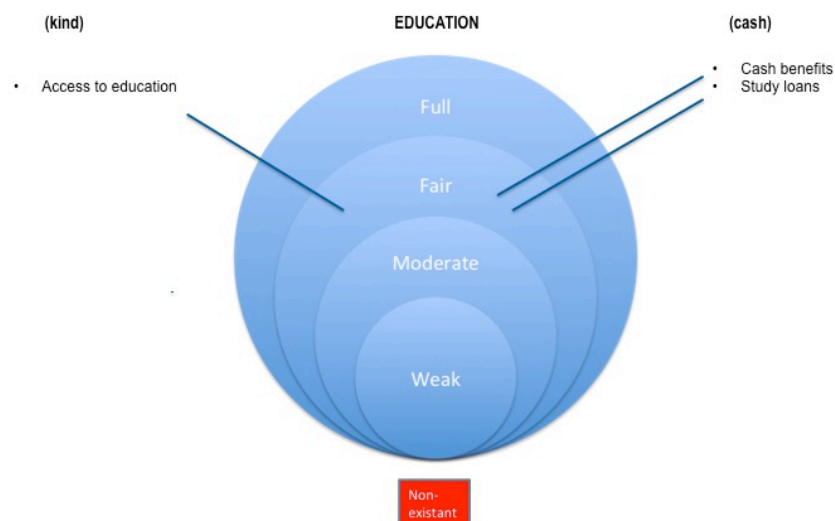
Estonia, comparative schemes 5-8



BEUCITIZEN TASK 6.4 ESTONIA



BEUCITIZEN TASK 6.4 ESTONIA

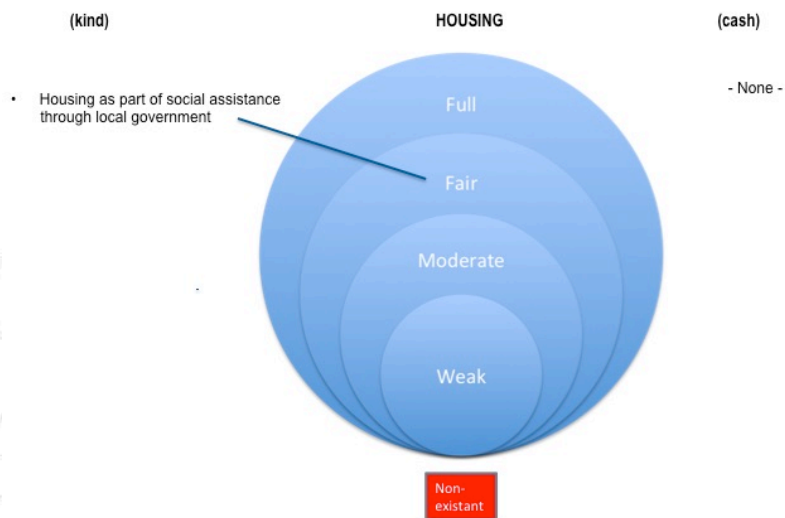




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BEUCITIZEN TASK 6.4 ESTONIA

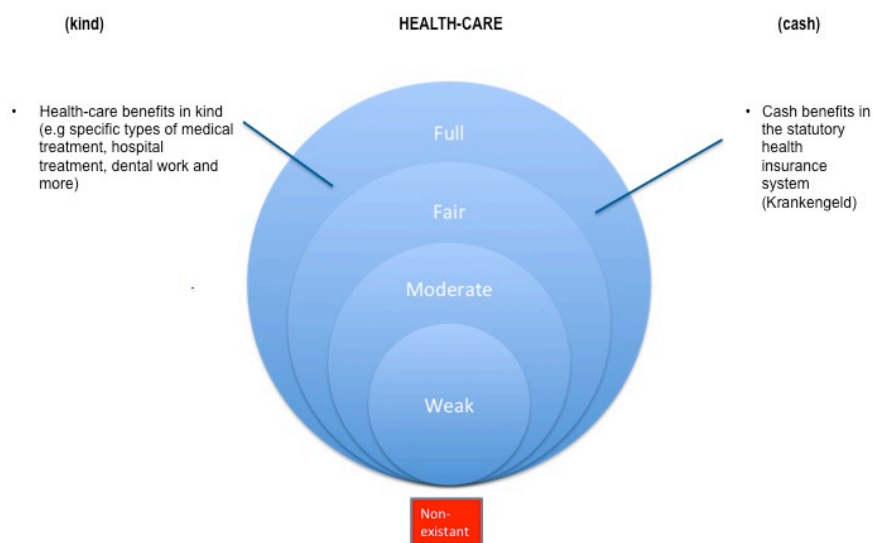




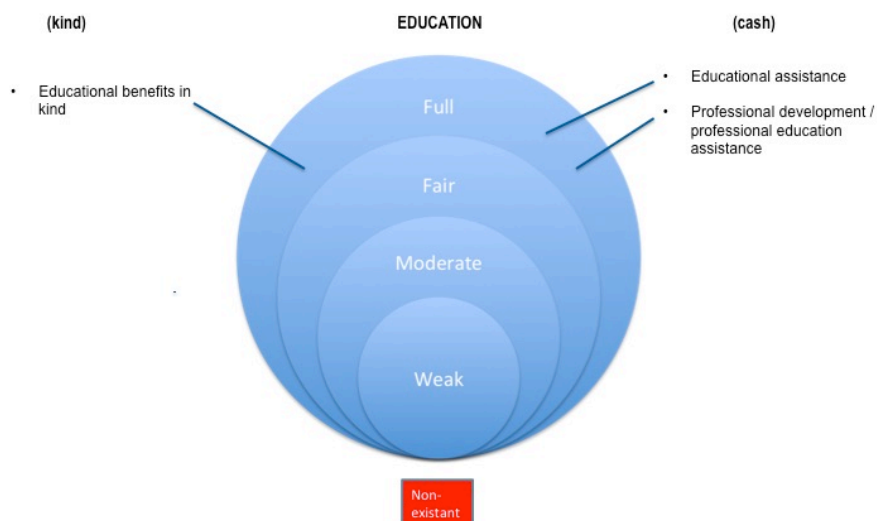
Germany, comparative schemes 9-12

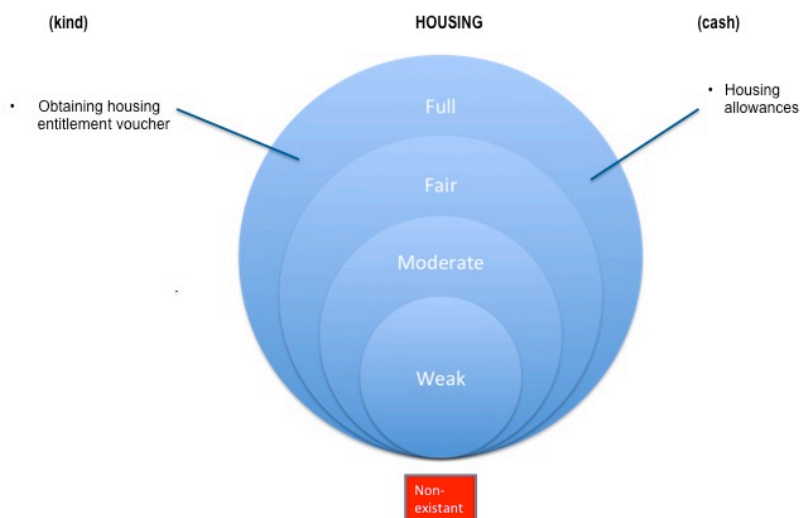


BEUCITIZEN TASK 6.4 GERMANY



BEUCITIZEN TASK 6.4 GERMANY



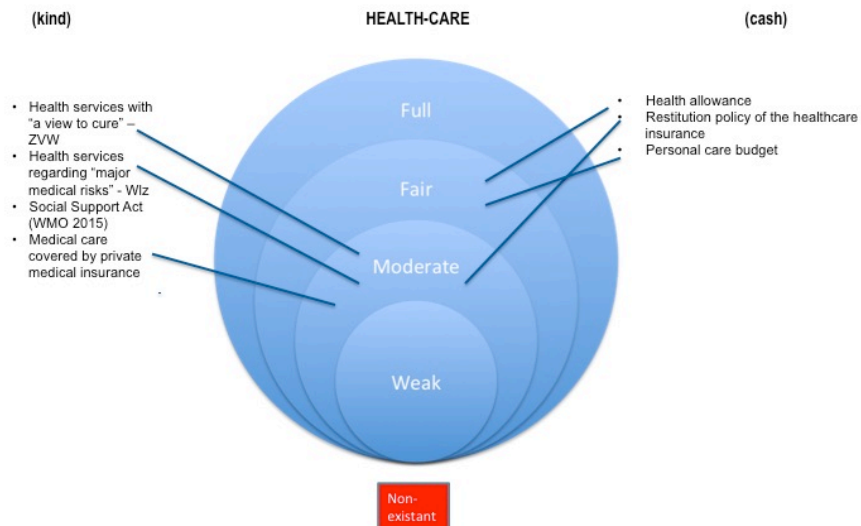




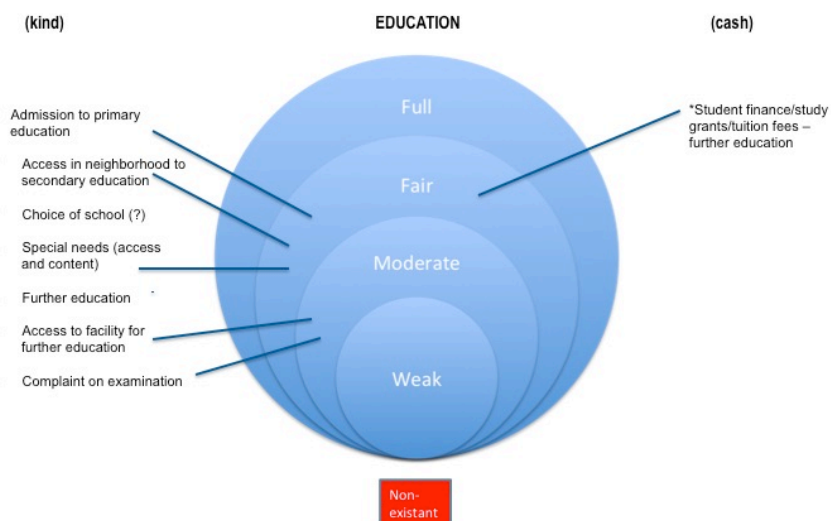
Netherlands, comparative schemes 13-16



BEUCITIZEN TASK 6.4 NETHERLANDS

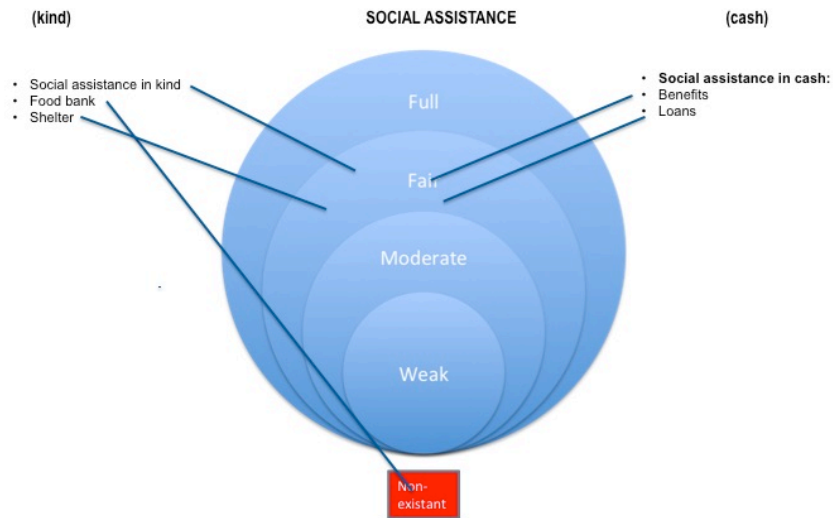


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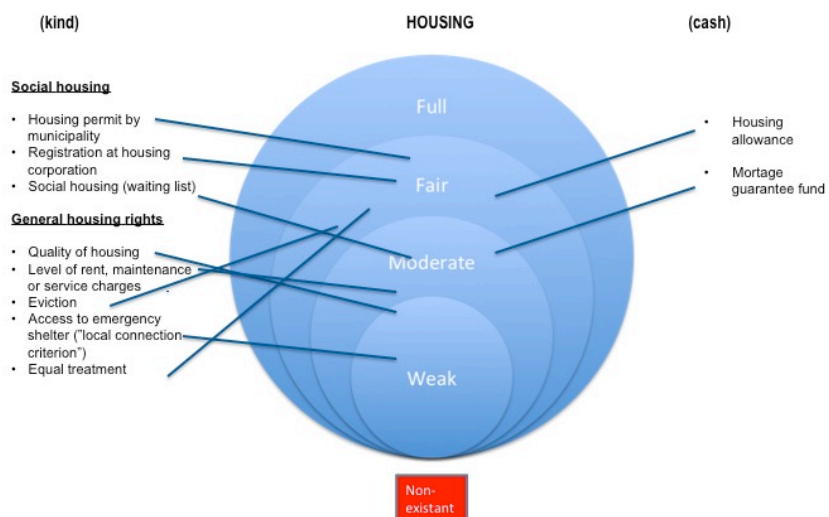




BEUCITIZEN TASK 6.4 NETHERLANDS



BEUCITIZEN TASK 6.4 NETHERLANDS

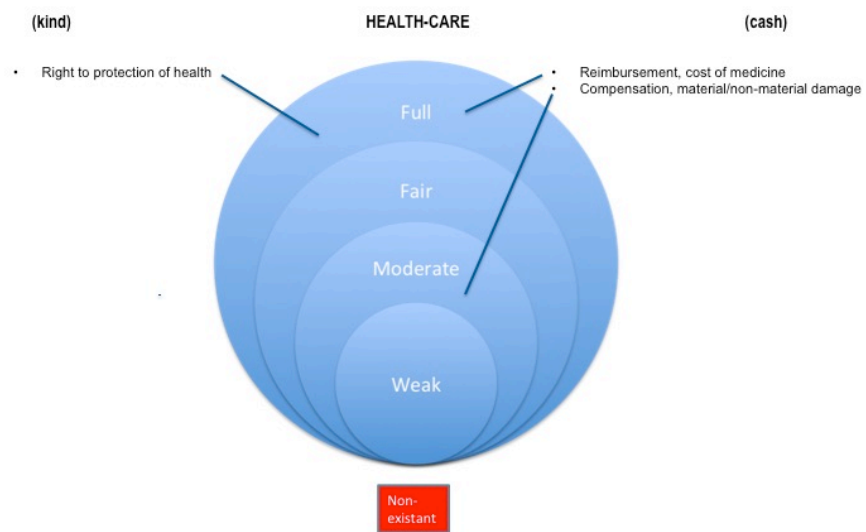




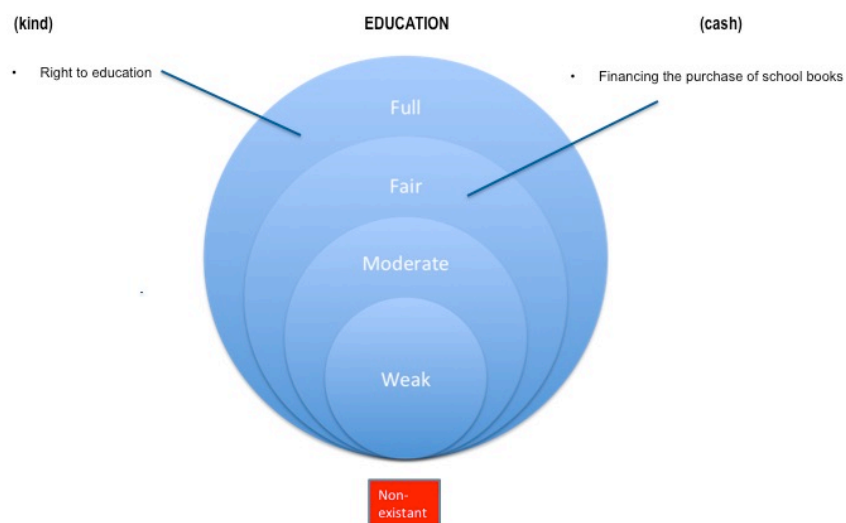
Poland, comparative schemes 17-20



BEUCITIZEN TASK 6.4 POLAND

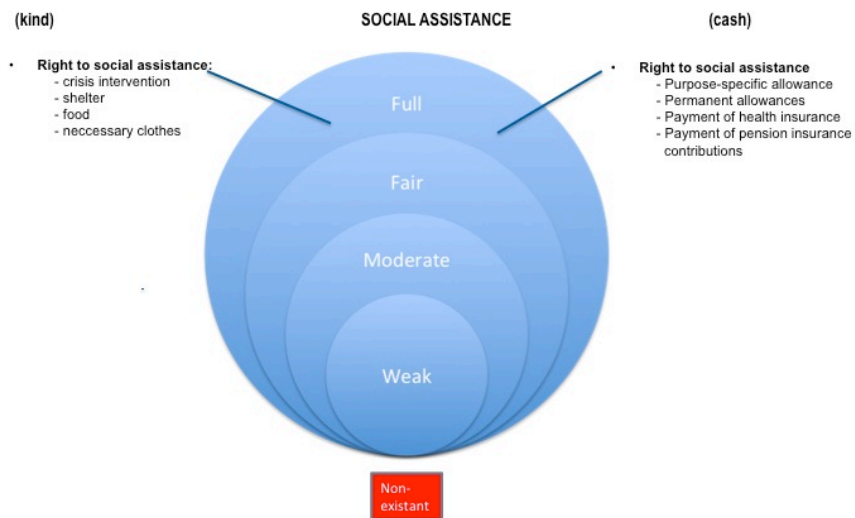


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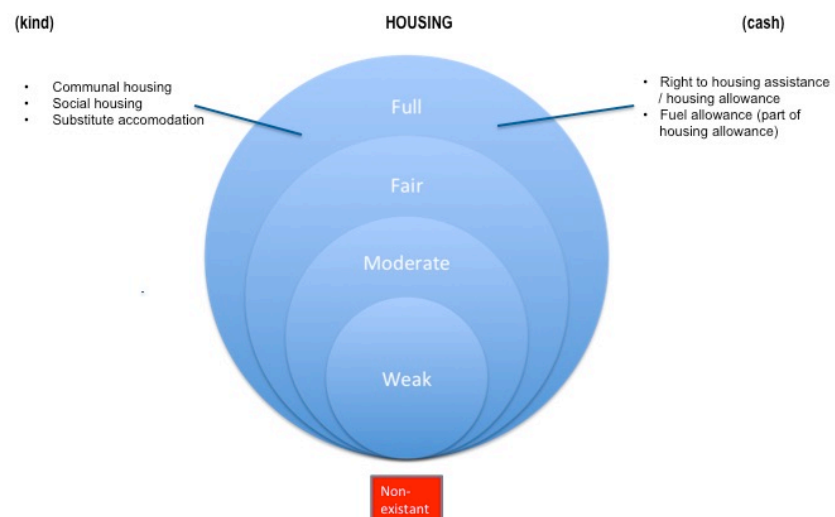




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BEUCITIZEN TASK 6.4 POLAND

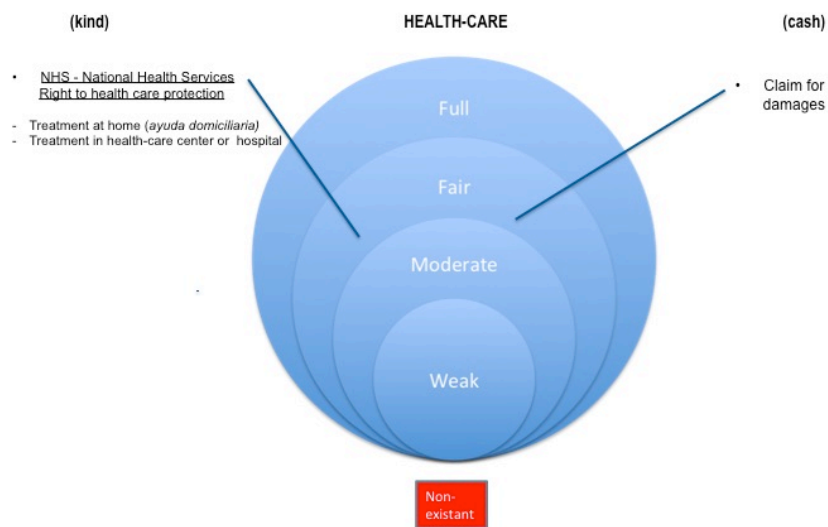




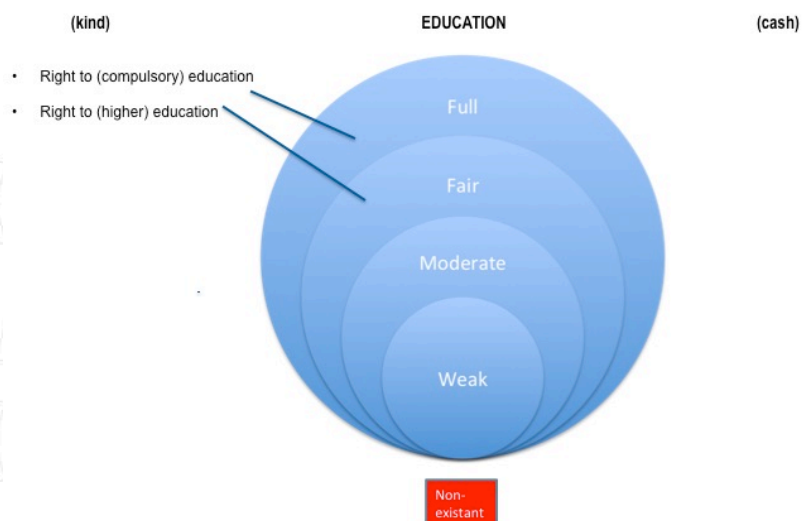
Spain, comparative schemes 21-24



BEUCITIZEN TASK 6.4 SPAIN



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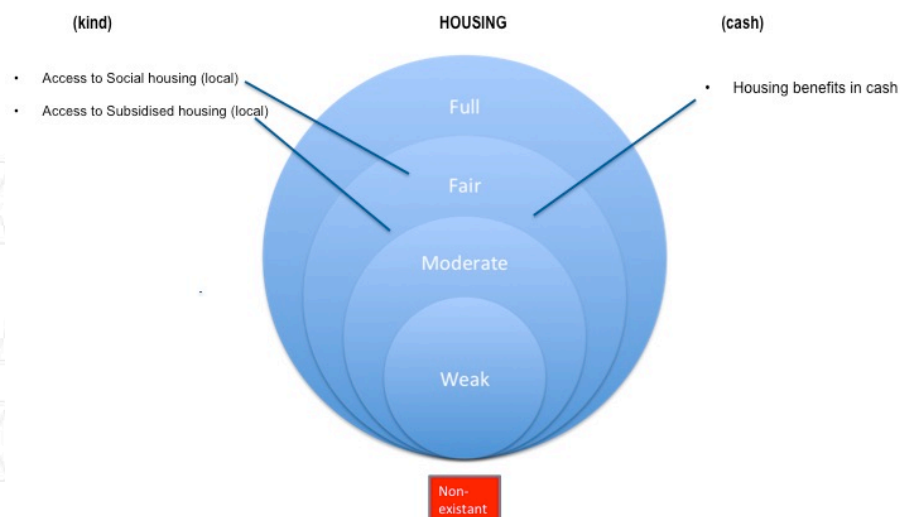




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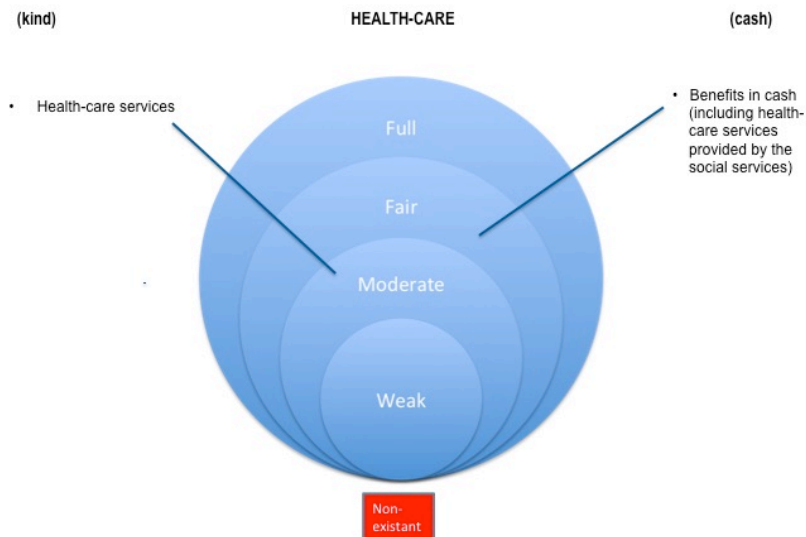




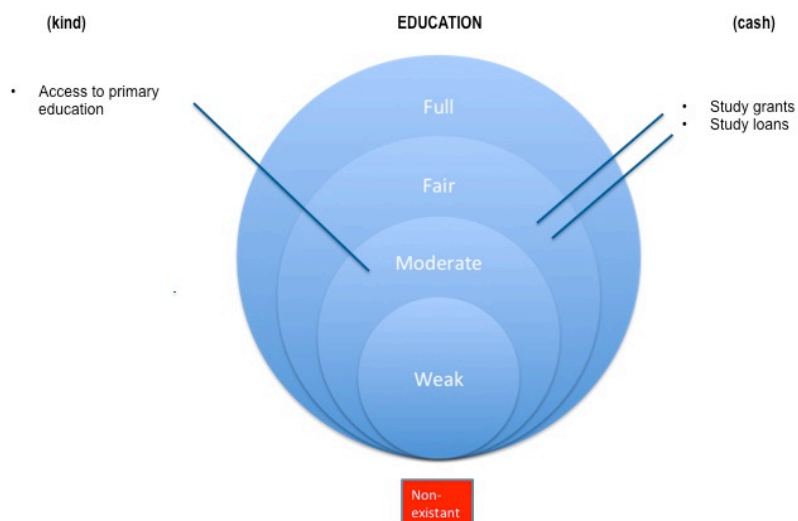
Sweden, comparative schemes 25-28



BEUCITIZEN TASK 6.4 SWEDEN



BEUCITIZEN TASK 6.4 SWEDEN

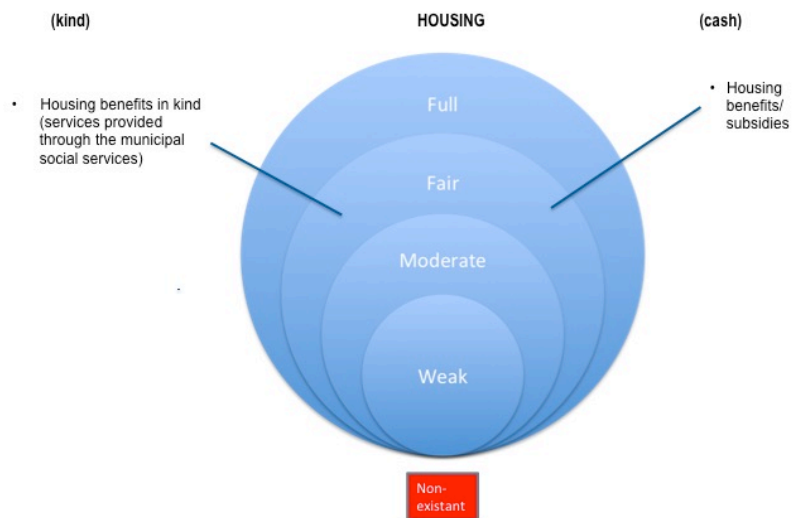




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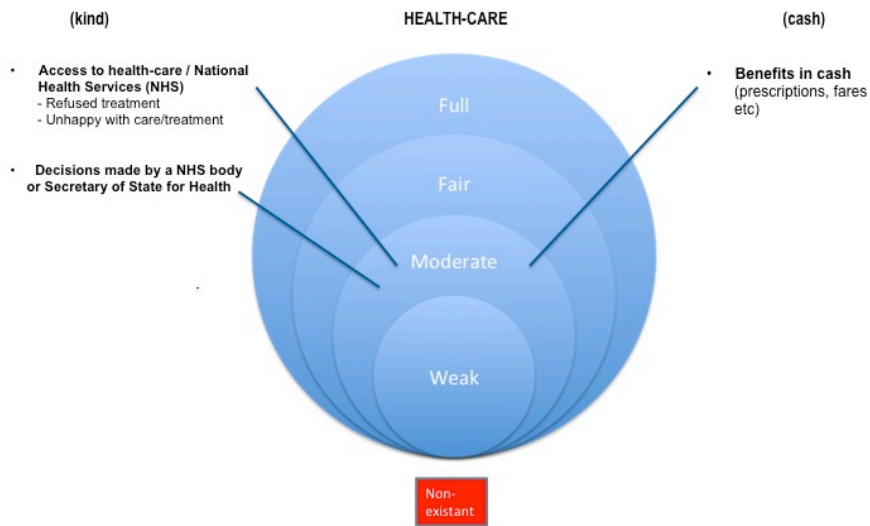




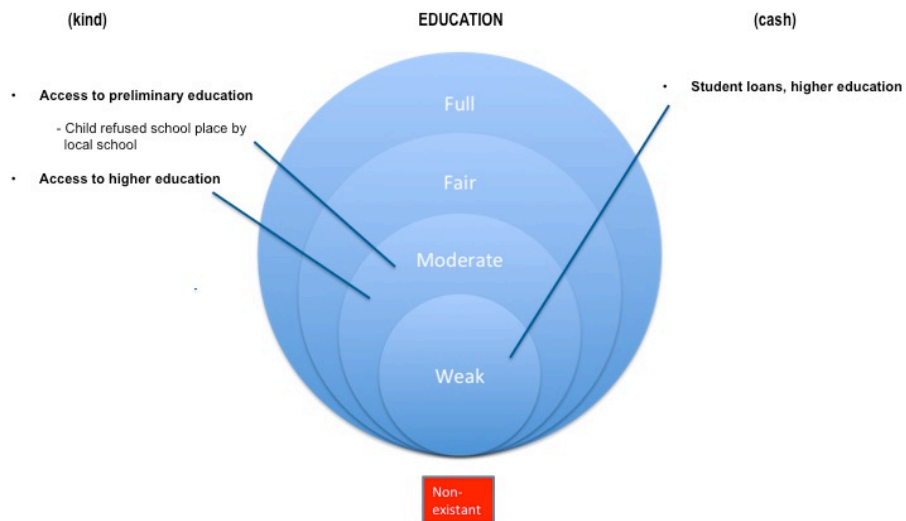
The UK, comparative schemes 29-32



BEUCITIZEN TASK 6.4 THE UK



BEUCITIZEN TASK 6.4 THE UK

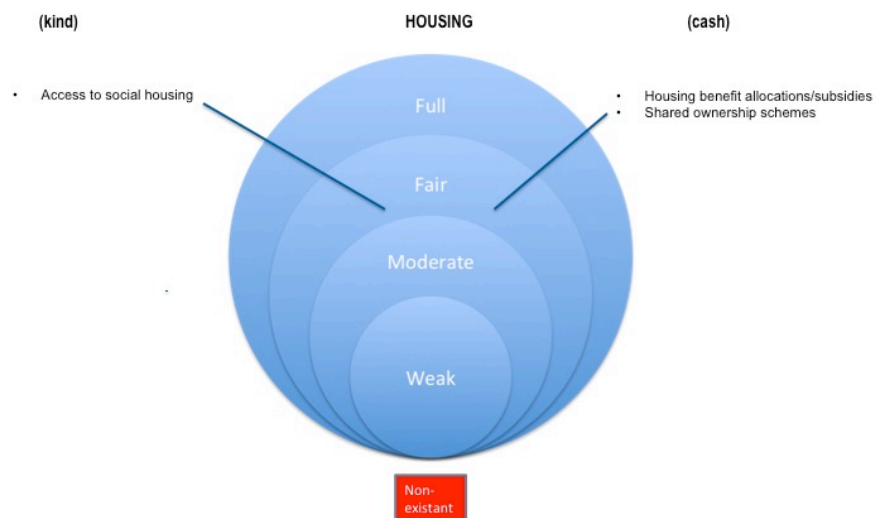




BEUCITIZEN TASK 6.4 THE UK



BEUCITIZEN TASK 6.4 THE UK





B. Questionnaire

bEUCitizen

WP6, task 6.4

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REDRESS STRUCTURES

Enforcement of rights – Upholding of obligations

With the help of the questions below we strive to collect knowledge about different redress structures used to secure the implementation of the social aspects of the EU-citizenship on nation state level. We use an inclusive understanding of the concept of “redress structures” for example; we include processes for individual social legal rights claims (enforcement of individual legal rights) as well as different systems that secure external or internal supervision and control (upholding legal duties).

We are interested in redress structures linked to social rights in the areas of housing, education, social assistance and health care in the following countries: Denmark, Estonia, Germany, the Netherlands, Poland, Spain, Sweden and the United Kingdom. We foresee the possibility that redress structures can look different between these functional sectors and also within them (to the extent that one could identify multiple rights within the same sector linked to different redress structures). At the same time, we anticipate that an analysis of the potential diversity in specific constructions of redress structures will be systematic given the overall redress system in the given countries. Thus, questions below are constructed to provide input on redress structures on an overall systematic level as well as on the specific sectorial level. We are interested in the upholding of procedural rights as well as of substantial rights.

Legal rights can be constructed in ways that make them “strong” or “weak” on a scale (Hollander, Gustafsson). The existence of redress structures is one aspect in the determination of whether “rights” are considered to be strong or weak. In this study, we are interested in the dichotomy and there are aspects of the questions below that are formulated to respond to this interest. For further understanding of the concept of “strong” / “weak” legal rights and criteria for determining the strength or weakness of legal rights, please see the attached PowerPoint presentation.

Law can be used in different ways to implement policy. We are interested in to what extent different actors (public/collective/private) have been given legal duties in the field of social rights, and what kind of enforcement structures that have been used to secure that duties are met. Strong presence of the state in the fulfilment of social rights is an aspect of



different typologies that use dichotomies such as big/small; thick/thin; social-democratic/liberal ... the questionnaire will reveal an interest in this kind of dichotomies. Thus, if social rights are secured through putting responsibility (duties) on different actors, we have an interest in knowing if redress structures are geared towards supervision of public actors or non-public actors.

Finally, we are interested in comparing to what extent the redress structures available for EU-citizens differ from the redress structures available for national citizens (in relation to different social rights and different aspects of these rights). We would like to be able to discuss this both in terms of rights being strong or weak and, to the extent obligations are recognized, to what extent actors carrying responsibility are public or private.

For all sections of questions we have indicated a number of pages to give an idea of the level of scope and detail that we are interested in. If you have any questions regarding this or anything else in the questionnaire, do not hesitate to contact us.

A. Description of overall system (institutions and actors) of redress structures in the field of social rights,

Under this heading we would like to collect facts that provide general information about the court-system(s) (structure, composition, institutions, procedures, levels); the legal-aid system (content, structure, actors, limitations); the administrative complaints system (institutions, procedures, delimitations, functions); systems for supervision of public decision-making.

We have no specific questions but would like you to include a reflection on the following institutions/ functions in your description: role of lay-judges, role of experts, role of ombudsmen, role of constitutional court, link between different systems of tribunals/courts.

In this part we foresee a descriptive overview of 2-3 pages.

B. Description of how social rights in general are protected through the constructions of procedural rights and substantial rights (with specific interest in the distinction strong/weak rights). In this section we foresee descriptions on general / system level.

Procedural rights

Are they weak or strong, i.e. clear, well-defined, put in statutory law, in constitutional law, in decrees, with or without conditions? Are procedures... oral, written, with/without counsellor, is there leave of appeal, access to interpretation, are there costs involved, compensation for travelling, are hearings open to public or not, possibility for mediation, etc.

Substantial rights

Are they weak or strong, i.e. clear, well defined, put in statutory law, in constitutional law, in decrees, with or without conditions, made dependent on budgetary constraints/or not, wide or narrow room for discretion etc.

In this part we foresee an analytical description of in total 3-4 pages.



C. Description of redress structures in relation to relevant actors (with specific interest in the distinction “big/small” public involvement). As above we foresee in this section descriptions on a general / system level.

In this section we would like a reflective description of redress structures available in the field of social rights. The list below should be seen as a point of departure for such a description. In this section it is welcome that the response include a description of actors that have legal duties in the field of social rights (and link redress structures to relevant actors).

- Independent governmental supervision, complaints to ombudsmen, state monitoring of public agencies and local authorities, ...
- Individual complaints, access to external legal courts, system dominated by professional lawyers, ...
- Collective demand, workers rights, union claims, expert tribunals, ...
- Case-review, internal review by decision making bodies, case-by-case, ...
- Possibility of mediation, possibility of compensation for damages, ...

In this part we foresee an analytical description of in total 3-4 pages.

D. Description on general level of potential extra-legal hindrances to enforceability of substantial legal rights (language, economic resources, knowledge, prejudice, etc.).

In this part we foresee a descriptive overview giving examples of maximum 2 pages.

E. In this section questions are specifically related to distinct social rights where the situation for EU-citizens and third country nationals (TCN's) is focused on (in order to make comparison possible). Concrete examples are welcome, especially in questions e) and f), relating to EU-citizens and TCN's.

E1. Redress structures - health care

E1a Redress structures related to health benefits in kind (services)

E1b Redress structures related to health benefits in cash

E1c Extra-legal hindrances to enforcements of rights to health benefits

E1d Possible legal/administrative hindrances to fulfilment of rights

E1e Accessibility to rights & redress structures for EU-citizens

E1f Accessibility to rights & redress structures for TCN's (third country nationals)

E2. Enforcement of rights to Education

E2a Redress structures related to education in kind (services)

E2b Redress structures related to education benefits in cash

E2c Possible legal/administrative hindrances to fulfilment of rights

E2d Extra-legal hindrances to enforcements of rights to education

E2e Accessibility to rights & redress structures for EU-citizens

E2f Accessibility to rights & redress structures for TCN's (third country nationals)



E3. Enforcement of rights to Social Assistance

E3a Redress structures related to social assistance benefits in kind (services)

E3b Redress structures related to social assistance benefits in cash

E3c Possible legal/administrative hindrances to fulfilment of right

E3d Extra-legal hindrances to enforcements of rights to social assistance benefits

E3e Accessibility to rights & redress structures for EU-citizens

E3f Accessibility to rights & redress structures for TCN's (third country nationals)

E4. Enforcement of rights to Housing

E4a Redress structures related to housing in kind (services)

E4b Redress structures related to housing benefits in cash

E4c Possible legal/administrative hindrances to fulfilment of rights

E4d Extra-legal hindrances to redress of rights to housing benefits

E4e Accessibility to rights & redress structures for EU-citizens

E4f Accessibility to rights & redress structures for TCN's (third country nationals)

In this part we foresee a higher degree of detail and ask for specific and illustrative examples. We think that it might take 3-4 pages to respond to the questions related to each of the social rights. It could also be that a more lengthy and detailed response to one of the rights will be a point of reference making the descriptions regarding the other rights shorter. However we welcome reasoned examples illustrating redress structures in action related to all of the rights above (if available).

All in all, your report should add up to a maximum of around 28-30 pages. If possible, we would like all of the partners from participating institutions to return their reports to us by 18 May 2015, six weeks ahead of the Zagreb Conference.

Please feel free to contact us with any questions you might have regarding the task.

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Dictionary

Appeal

Petition for a new trial or judgment

Complaint

Act of expressing displeasure; pleading entered by a plaintiff

Revision

Act of changing, alteration, act of making corrections

Rectification



Act of fixing, correction, reparation; calibration, adjustment

Reconsideration

Renewed discussion; act of rethinking, act of re-contemplating

Remedy

Correct, something that corrects

Review

Inspect, examine; reconsider, rethink

Redress

Correct a wrong, remedy an injustice; compensate, pay damages for an injustice or injury

Second opinion

Additional advice

Settlement

Resolution, reconciliation

Pre-ruling

Verdict, decree, something that has been determined

Supersession

Replacement, displacement; act of setting aside, act of making void or useless

Court

Court of law, court of justice, place where legal trials take place

Tribunal

Court of justice; place of judgement

Ombudsmen

Public official who investigates citizens' complaints against the government

Mediation

Arbitration; intervention; reconciliation; act of mediating between two parties

