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# European Social Charter and Austerity Measures: the Effective Respect of Human Rights

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## 1. Introduction

A fundamental distinction that has come to the foreground with the onset of the economic crisis has been between the European Union (EU) rules and those of the Council of Europe. Indeed, the study of human social rights at the European level must include this dual perspective

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(Belorgey, 2007). That is because the European Social Charter Treaty (“the Charter” or “the ESC”), adopted within the Council of Europe, allows individuals to demand rights that are being violated by quite restrictive tax, labor, commercial and other legislative reforms and measures being imposed as a requirement by some European community institutions. These are, in particular, those that are part of the *troika* (which comprises the International Monetary Fund, the European Commission and the European Central Bank) (Salcedo Beltrán, 2013). The measures come attached to financial assistance being received by some countries in order to overcome the situation of bankruptcy in which they find themselves, or are the consequence of some rulings by the Court of Justice of the European Union.

Unfortunately, this dual perspective is rarely the one followed, so much of the scientific and judicial doctrine is limited to the first one causing, oftentimes, the Charter work to be unknown, confused and even wrongly framed within the regulatory framework of the European Community institutions. Therefore, it is important from the outset to have clear that, at the European level, there are two international organizations each with their own differentiated normative instruments, both internally and in the countries that are part of them.

Time has shown that austerity measures have been ineffective and failed in terms of achieving their goal, further impoverishing the most vulnerable groups and triggering opposition and rejection of the European Union. The latest example of this is Brexit, unprecedented situation that may be the beginning of the countdown of the European project.

In short, one could say “two Europes” are facing each other (Schöman, 2014). On the one side is the European Union, which priori-



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tizes economic freedoms and austerity measures, relegating human rights to the background. On the other is the Council of Europe, acting inversely and holding that maintenance and guarantee of those rights is basic, more in times of recession, elevating the European Social Charter as the legal instrument to be used, and a true *“Social Constitution of Europe”*.

## **2. The European Social Charter: a social model to the European continent**

The European Social Charter is, as noted, an international treaty that must be linked to the Council of Europe, international organization that is larger and older than the European Union. Created on May 5<sup>th</sup>, 1949, it has 47 Member States, of which 43 have ratified the European Social Charter, adopted originally in Turin on October 18<sup>th</sup>, 1961, to complement the European Convention on Human Rights (Akandji-Kombé, 2006). (Unless otherwise noted in the text, citations of the Charter refer to this version, not to the revised one, adopted in 1996 and which has already entered into force for a number of countries).

The Charter’s Preamble states as its aim to ensure the enjoyment of social rights without discrimination of race, color, sex, religion, political opinion, national extraction or social origin in the States Parties to the Charter.

Structured into five parts, the first one includes the objectives undertaken by Contracting Parties when drawing up their policies and lists 19 points. It literally states that *“The Parties accept as the aim of their policy, to*



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*be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realized. . . .* " Part II establishes as "undertakings" of the Contracting Parties, that they will be considered "bound by the obligations set out in the following articles and paragraphs (...)." It then reiterates all the above points as subsections where their content is developed. Specifically, they contemplate a commitment to guarantee the effective right to work (art. 1), equal conditions of work (art. 2), health and safety at work (art. 3), equitable remuneration (art. 4), promoting freedom of association of workers and employers (art. 5), collective bargaining (art. 6), the protection of children and adolescents (art. 7), the protection of female workers (art. 8), vocational guidance and training (arts. 9 and 10), protection of health (art. 11), social security (art. 12), social and medical assistance (art. 13), social service benefits (art. 14), vocational training and vocational and social rehabilitation of the physically or mentally handicapped (art. 15), social, legal and economic protection of the family, mothers and children (arts. 16 and 17), the exercise of a gainful occupation in the territory (art. 18) and, finally, protection and assistance for migrant workers and their families (art. 19).

Summing up, there are two parts distinct in their location in the text and, most importantly, in their relationship: they have different wordings and effects, making it unquestionable that they have programmatic ones in the first case, and binding and mandatory ones in the second.

Two additional arguments further confirm this thesis. First, Part III of the Charter explains the peculiar system of ratification, which makes it possible for States Parties to not be all bound by the same provisions. Each of these commit, according to the wording of art. 20.1 a) and b) "to



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*consider Part I . . . as a declaration of the aims which it will pursue by all appropriate means . . . [and] to consider itself bound by at least five of the following articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19.” Thus, States must choose to ratify at least five items from a list naming the right to work (art. 1), the right to organize (art. 5), the right to collective bargaining (art. 6), the right to social security (art. 12), the right to social and medical assistance (art. 13), the right of the family to social, legal and economic protection (art. 16) and the right of migrant workers and their families to protection and assistance (art. 19) (Jimena Quesada, 2004). On the other hand, States must additionally subscribe to “a number of articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs” (art. 20.1 c) of the Charter).*

The second argument flows from the Annex to the ESC which, in relation to Part III, clearly states that the Charter contains legal obligations of an international character whose application is subject only to the control established in Part IV.

The Charter was later completed with the adoption of three Protocols. The first, of May 1988 (Additional Protocol), follows the same structure of the ESC. There is a first part with “objectives” of legislative policy (“*The Parties accept as the aim of their policy to be pursued by all appropriate means. . . the attainment of conditions in which the following rights and principles may be effectively realized*”).

Then there is a second one where Parties consider themselves bound to ensure the rights in the Charter, in particular, equal opportunity and treatment on employment and occupation without discrimination on



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grounds of sex (art. 1), information and consultation within the company (art. 2), the right to take part in the determination and improvement of working conditions and working environment (art. 3) and the right to social protection of the elderly (art. 4).

The second Protocol, of October 1991 (Amending Protocol), amends some articles of the ESC to improve, as it states, *“the effectiveness of the Charter, and particularly the functioning of its supervisory machinery.”*

Finally, the third Protocol, of 1995, very important as it added to the ESC a major collective complaints procedure with the objective of improving the effective enforcement of the social rights guaranteed by the Charter, and strengthening the participation of management and labor, and of non-governmental organizations.

The need to order the described scenario led to adoption in May 1996 of the revised European Social Charter, which includes a total of 31 rights (19 from the original version, 4 from the first protocol of 1988 and 8 that were new additions). These are, specifically, the right to protection in case of termination of employment (art. 24), the right of workers to protection of their claims in the event of insolvency of their employer (art. 25), the right to dignity at work (art. 26), the right of workers with family responsibilities to equal opportunity and treatment (art. 27), the right of workers' representatives to protection in the undertaking and facilities to be accorded to them (art. 28), the right to information and consultation in collective redundancy procedures (art. 29), the right to protection against poverty and social exclusion (art. 30), and the right to housing (art. 31).

After the ratification of the ESC, original and / or revised version, as well as its protocols, its rules become a source of law, as a consequence



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recognizing rights to citizens and obligations of respect by States. The Treaty itself regulates the mechanisms for monitoring compliance, of which there are specifically two. One is the reporting system applicable to all States that have ratified the ESC, original and / or revised. The other is the collective complaints procedure, only operating for States that have ratified the 1995 Protocol, set up *ad hoc*, or that make a specific declaration at the time of signing the ESC, original and /or revised, accepting the supervision of their obligations according to the procedure laid down in the Protocol (art. D .2 part IV). There are currently 15 states that have accepted this supervision.

Both systems are handled and decided upon by the European Committee of Social Rights (ECSR), composed of fifteen independent members elected by the Committee of Ministers of the Council of Europe for a term of six years (renewable once). It constitutes the supreme authority for guaranteeing the ESC (Brillat, 2004), equivalent to the European Court of Human Rights regarding the European Convention on Human Rights (ECHR), and ensuring the authentic interpretation and binding character of the ESC, in the form of jurisprudence.

Externally, decisions receive the name of "conclusions" in the case of legal interpretation developed in the framework of the reporting system and "decisions on the merits" when the legal interpretation develops in the adversarial court procedure of collective complaints. It is important to emphasize such modern notion of "jurisprudence" of the ESCR (as it is officially called and can be found on the website of the European Social Charter [<http://hudoc.esc.coe.int/eng/#%20>] available in both official languages of the Council of Europe) and avoiding limiting the use of such expression only for pronouncements issued by a court.



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### **3. Role of the European Committee of Social Rights concerning austerity measures**

The aforementioned increased relevance of the Charter is evident in the abundant jurisprudence that the ECSR has been issuing for several years in which it has had to verify compliance of States Parties concerning reforms adopted as a result of austerity policies. These have materialized in numerous rulings of non-compliance that have, in the event of states that have not repealed or amended rules declared to be in violation of the ESC, given ground to judicial complaint by way of self-executing recognition of the right at the individual level. Spain is a clear example.

In the general introduction of the Conclusions XIX-2 (2009) on *"Implementation of the European Social Charter in the context of the global economic crisis"* the ECSR emphatically says that States that when they signed the ESC *"have agreed to pursue by all useful means the attainment of conditions suitable for the effective exercise of a number of rights"* that *"the economic crisis should not lead to a reduction in the protection of the rights recognized by the Charter [which means Governments must] take all measures necessary to ensure that these rights are effectively guaranteed at the time when the need for protection is most felt."*

It adds to these important references *"more flexibility at work to combat unemployment cannot lead to depriving broad categories of employees, singularly those who for a long time do not hold stable jobs, their fundamental rights in the workplace, against the arbitrariness of the employer or the vagaries of the situation. . . . Giving up such guarantees would . . . not only have the effect of imposing on employees an unduly excessive part of the consequences of the cri-*





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*sis, but also accepting pro-cyclical effects likely to aggravate the crisis and increase the burden of social schemes, in particular health care, unless that does not involve compensation for the loss of resources linked to the decline of activities, which would entail an attack on the social protection obligations in the Charter " and, in short, that "rights cannot depend on the economic juncture."*

Second, ESCR Decisions on the Merits from 2012 -made public on October 23 of that year and April 22, 2013 - addressed to Greece, deserve special attention (Nivard, 2012). They ruled that the legislative reforms adopted by that country starting in 2010, demanded by the *troika*, as a consequence of the serious economic situation the country was and is going through and the help it was receiving, violate the European Social Charter and must be removed and /or modified. In particular the Decisions on Merits of May 23 2012 (Collective Complaints No. 65 and 66/2011) or those of December 7 2012 (Collective Complaints No. 76 , 77, 78, 79 and 80), which establish the existence of violation of the ESC regarding, *inter alia*, art. 4.4 -- due to the establishment in labor contracts of a trial period of one year--; art. 7.7 --due to the exclusion of the right to holiday--; art. 10.2, due to the failure to regulate the training issues regarding contracts created to promote the insertion of young people--; art. 12.3 --due to setting a too limited social security coverage for young people--; art. 4.1 -- due to determination of a salary for young people below the poverty line--; or, finally, again, art. 12.3 for repeated modifications in pensions and social security, which have produced a "significant degradation of living standards and living conditions for pensioners," *forgetting that the rule being violated establishes the commitment of contracting*



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*parties to "endeavor to progressively raise the level of the social security system."*

Third, Greece has not been the only country which has been condemned. It is also worth noting the important Decision on the Merits of July 3 2013 (Collective Complaint No 85/2012), which communicated to Sweden the violation of the ESC regarding the right to collective bargaining and to strike (art. 6 paragraphs 2 and 4), and the right to equality and non-discrimination (art. 19) for workers displaced in the framework of a provision of services and freedom of movement due to adoption of *Lex Laval* (2010). Moreover, this law was adopted to comply with the judgment of the Court of Justice of the European Union of December 18 2007, but the argument that the rule had its origin in the need to meet a European Community ruling did not serve as defense plea by the country.

Fourth and finally, one should highlight the important Conclusions issued by the ECSR in recent years condemning various countries for violation of art. 11.1 for excluding undocumented immigrants from the right to free health care (Conclusions XX-2 (2013)). Likewise, a number of decisions have found countries in violation of arts. 2, 4, 5, 6, 21, 22, 26, 28 and 29 (Conclusions XX-3 (2014)) for the establishment of mandatory arbitration in the settlement of conflicts, deprivation of the right to strike to groups such as police personnel or military, the establishment of working conditions below minimum levels (regarding wage, social protection, working hours, etc.), limitation of collective bargaining or enterprise-level attribution of the non-application of a collective agreement and violation of the rights of refugees (Salcedo Beltrán, *Negociación colectiva, conflicto laboral y Carta Social Europea*, 2014).



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These are just some of the examples that demonstrate the effectiveness of the European Social Charter and the jurisprudence of the European Committee of Social Rights as a legal instrument for the protection of social rights that it is essential for any law professional (judges, lawyers, researchers ...) currently to know.

States parties that have signed the Charter should accept this reality and have it as a parameter to observe in the adoption of any standard or practice, as it is part of their legal system as a source of enforceable rights and obligations. Failure to do so should lead to, at the time that the supranational body responsible for overseeing the Treaty communicates to them the existence of an infringement, to adopt measures to adapt to the undertaken commitments.

This second situation sometimes does not occur. The national courts then acquire a key role in ensuring effectiveness of the rights through the implementation of conventionality control (in other words, their non-application of the rule which violates the higher-ranked international treaty). The Vienna Convention on the Law of Treaties is clear in this regard to determine, arts. 26 and 27, that "every treaty in force is binding upon the parties" (*pacta sunt servanda*) and that "a party may not invoke the provisions of its internal law as justification for its failure to comply with a treaty."

In Spain, this application of conventionality control on the basis of the European Social Charter has already taken place, since the end of 2013, on three subjects: the duration of the trial period of the contract to support entrepreneurs, the cancellation of the annual increase in pensions linked to the consumer price index and qualification as working time of



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the time a worker is available to the employer but not present in the workplace (Salcedo Beltrán, 2016).

This is how any State that self-defines as abiding by a rule of law system because otherwise such characterization would be empty of content. This requires, incidentally, the recognition that social rights also are human rights that must be protected and respected at any time but, especially, in times of economic crisis.



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