The Social Constitution of Europe (*European Social Charter*): reality and effect of rights

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Many European countries have enshrined their status as social and democratic states, subject to the rule of law, in their Constitutions. A primary example is Spain, defining itself in these terms under Art. 1 of the Constitution, a precept which is bolstered throughout the text with other articles referring to social progress (Art. 40)) and the commitment to maintain "*a public Social Security system for all citizens, guaranteeing assistance and sufficient social benefits in situations of need*." (Art. 41).

In similar terms, other countries mention the term "*social"* as a cornerstone of their existence and functioning. In this vein, France defines itself as an "*indivisible, secular, democratic, and social Republic* (…)." (Art. 1). This declaration is preceded by a Preamble containing the solemn adhesion to human rights. Similarly, the constitution of Italy "*recognises and guarantees human rights* (…) *and demands the compliance with the inexcusable duties of political, economic and social solidarity*" (Art. 2), expressly recognising the right to "*social dignity*" (Art. 3) of all citizens and, *inter alia*, the right to maintenance and social assistance for any citizens who are unfit to work, and deprived of the necessary means to live on (Art. 38). Similar provisions can be found in Art. 13 of Portugal's Constitution, which has a Chapter III dedicated to social rights and responsibilities, including social security and protection from situations with deprivation of livelihoods.

These texts demonstrate commitments to the achievement of landmark historical and institutional accomplishments, such as the responsibility of public institutions and the State with respect to the needs of citizens[2], so that no-one is left unprotected in meeting his or her basic vital needs.

Unfortunately, today, much of these aspirations have remained at a rhetorical level, without practical effect, and indeed, we are witnessing a breakdown of these foundations. Supiot[3] suggests that this former 'grandeur' has turned into "*misery"*, with dwindling dedicated State and in some cases a complete breakdown. Significant parts of the population live below the poverty line, a situation which deteriorated since the crisis, and

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[2] Supiot, A., *Grandeur et misère de l'Etat Social,* [Grandeur and misery of the Welfare State] Paris, 2013, Fayard, pages 5 and 6.

[3] *Op. cit*, pages 8 and 9.

the subsequent austerity measures which were adopted with the primary target of reducing and/or suppressing social rights. Indeed, these rights are often characterised as secondary entitlements in respect of non-fundamental civil and social rights,[4] or portrayed as being cost-intensive and, therefore, solely associated with economic booms[5], and disenfranchised from any appraisal as human rights.

International organisations have consistently confirmed these developments. In particular, the United Nations, through the report of the Independent Expert on "*the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*" (20 December 2017)[6], has highlighted that fiscal consolidation measures have directly impacted on the fulfilment of human rights. These measures have contributed to prolonging the economic crisis, and compounded the threat to human rights beyond that posed by the crisis alone, increasing social exclusion, homelessness and long-term unemployment.

Meanwhile, the Council of Europe and, specifically - I stress the reference - the European Committee of Social Rights (hereinafter, ECSR) has been drawing attention to this for some time[7]. Most recently, in the Conclusions XXI-2 (2017), published on 24 January 2018, the ECSR warned States that the poverty levels among them were far too high and, additionally, that the measures taken to remedy this situation were insufficient[8].

The ECSR, which has been described as the "*European guardian of the social State model*"[9] oversees observance and compliance with the European Social Charter

[4] As far as this shortfall is concerned, Jimena Quesada suggests reforming the Constitution to "*make it clear that fundamental rights are indivisible, including social rights* (…)", in *Devaluación y blindaje del Estado Social y Democrático de Derecho*, [Devaluation and shielding the Social and democratic State of Law] Valencia, 2017, Tirant lo Blanch, page 179 et seq.

[5] Nivard, C., « Comité européen des droits sociaux (CEDS) : Violation de la Charte sociale européenne par les mesures «anti-crise» grecques » [European Committee of Social Rights: Violation of the European Social Charter due to "anti-crisis" Greek measures]. *Lettre Actualités-Droits-Libertes du CREDOF*, 15 November 2012, pages 1 to 3 (https://revdh.files.wordpress.com/2012/11/lettre-adl-du-credof-15-novembre-20121.pdf) (last accessed on 16/2/2018).

[6] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/364/96/PDF/G1736496.pdf?OpenElement (last accessed on 16/2/2018), pages 8 to 20.

[7] See, *inter alia*, the General Introduction to Conclusions XIX-2 (2009) on the application of the European Social Charter in the context of the global economic crisis. At the time of its issue it did not acquire the relevance its text deserved, probably due to its inclusion in an introductory section. It was later, following its reiteration and its transfer to legal arguments on substantive decisions appearing in the text of this analysis where it became widely accepted, a guideline that has lingered in all subsequent anti-crisis measure judgments.

[8] Drafted in the framework of the reporting system corresponding to theme group II. In general, in respect of the 33 countries examined, 175 non-conformities were found among 486 situations (228 situations of conformity and 83 cases postponed due to a lack of information to carry out the assessment property). In this connection, see https://rm.coe.int/press-briefing-highlights-conclusions-2017/168077fee0 and http://hudoc.esc.coe.int/fre/#{"ESCDateDec":["2017-08-02T00:00:00.0Z","2018-02-02T00:00:00.0Z"],"ESCDcLanguage":["FRE"],"ESCDcType":["Conclusion","Op"]} (last accessed on 2/2/2018) and the analysis conducted by Jimena Quesada, L., "Crónica de jurisprudencia del Comité Europeo de Derechos Sociales-2017" [Commentary of case law of the European Committee of Social Rights], *Revista Europea de Derechos Fundamentales*, 2017, no. 30 http://journals.sfu.ca/redf/index.php/redf/article/view/442 (last accessed on 5/3/2018), pages 1 to 41.

[9] Stangos, P., « La Charte Sociale Européenne et le Comité Européen des Droits Sociaux » [The European Social Charter and the European Committee of Social Rights], a Conference delivered at Les rencontres

(hereinafter, ESC), which is effectively the *Social Constitution of Europe*[10]. This is really the most important and "effective" international European Treaty currently available for the defence of social rights. This position emerges, *inter alia*, from its direct effect on a judicial level in many European States – as shown in the three examples provided below.

Firstly, the invocation of this Treaty in Spanish courts has been the main route used to recover the rights guaranteed under the ESC, is a situation of passiveness of governments concerning amendments and/or suppression in regulations or practices violating such rights. In 2013, the first judgment of the labour courts was issued ruling in favour of a claim (Labour Court [hereinafter, JS] no. 2 of Barcelona on 19 November 2013) based on a precept of the ESC Treaty (Art. 4.4), the case-law demarcating of its content[11], and the conventionality control legitimised under Art. 96.1 of the Spanish Constitution, specifically in connection with the one-year trial period provided in contracts to support entrepreneurs[12].

Far from being a one-off judgment, it was followed by others throughout 2014 and 2015, and not only in cases dealing with the same conflict (*inter alia*, SJS [*Labour Court Judgment*] no. 1 of Tarragona, of 2 April 2014; SJS of Mataró of 29 April 2014, SJS no. 3 of Barcelona, of 5 November 2014; SJS no. 9 of Gran Canaria, of 31 March 2015; SJS no. 2 of Fuerteventura, of 31 March 2015; SSJS [*Labour Court Judgments*] no. 1 of Las Palmas, of 11 May and 3 June 2015), but also in connection with other conflicts, namely, the removal of the revaluation of pensions in line with the consumer price index (SJS no. 31 of Barcelona, of 8 June 2015; no. 12 of 4 September 2015; and no. 3 of La Coruña of 23 November 2015) - a violation of Art. 12.3 of the ESC[13]-, and the classification of localised on-call service as work time (SJS no. 3 of Barcelona, of 27 October 2015) - a non-compliance with Art. 2.1 of the ESC[14]-.

Although some of these judgments have been overturned by higher courts, which are more averse to recognising the "*self-executing*" effects of such Treaties (and, quite frankly, even more so in the case of the ESC), in 2016 and early 2017, some Higher Courts of Justice (hereinafter, HCJ) have continued to deliver this interpretation. They have

d'automne AFDT sur *Les périmètres de l'Europe Sociale*, on 8-9 September 2017. Université de Strasbourg, p. 5, taken from https://rm.coe.int/intervention-petros-stangos-cedh-8-9-09-2017/1680743837 (last accessed on 16/2/2018).

[10] This reference became the fundamental axis of the Turin Process, launched by the Secretary General of the Council of Europe at the High-Level Conference held in this city on 17 and 18 October 2014. See *Rapport général de la Conférence à haut-niveau sur la Charte sociale européenne*, *L'Europe repart à Turin*, https://rm.coe.int/168048acf9 (last accessed on 4/2/2018), pages 43 and 168, among others.

[11] Decision on the merits of 23 May 2012 (Complaint no. 65/2011), *the General Federation of Employees of the National Electric Power Corporation (GENOP–DEI) and Civil Servants' Confederation (ADEDY) (ADEDY)* v. Greece.

[12] Art. 4.3 of Law 3/2012, of 6 July on urgent measures to reform the labour market.

[13] Supplemented by the interpretation issued in decisions on the merits of 7 December (Complaint nos. 76, 77, 78, 79 and 80, *Federation of employed pensioners of Greece (IKA-ETAM), Panhellenic Federation of Public Service Pensioners (POPS), Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.), Panhellenic the Federation of pensioners of the Public Electricity Corporation (POS-DEI), Pensioners' Union of the Agricultural Bank of Greece (ATE), General Federation of Employees of the National Electric Power Corporation (GENOP–DEI) and the Confederation of Public Officials* v. Greece.

[14] And the binding case law of the decisions of ECSR of 8 December 2004 (Complaints no. 16 and 22/2003), and 23 June 2010 (Complaint no. 55/2009), *Confédération générale du travail (CGT) and Confédération française de l'Encadrement (CFE-CGC)* v. France.

categorically ruled in favour of the binding nature of the Treaty and its direct effect, as well as deeming that decisions of the ECSR are "*case law*". By way of example, some instances of judgments are those the High Court of Justice of the Autonomous Community of the Canary Islands (Las Palmas de Gran Canaria) of 28 January 2016 (Rec. [Appeal] 581/2015), 30 March 2016 (Rec. 989/201); and of Castilla y León (Valladolid), of 19 December 2016 (Rec. 2099/2016). The most recent judgment, again rendered by the High Court of Justice of the Autonomous Community of the Canary Islands (Las Palmas de Gran Canaria), on 31 January 2017 (Rec. 1300/2016), literally states that, by virtue of Art. 96 of the Spanish Constitution, the ESC cannot be prevented from being "*internally and directly applied*" in our national law, because it "*is national law and the self-executing provisions contained therein are immediately applicable to its beneficiaries and binding for court and administrative bodies of the State, in the same way as other internally-produced legal regulations.*"

As for the more disputed fact of the binding nature of the judgments of the ECSR and their value, they provide that they "(…) *constitute case law that should be applied by national jurisdictional bodies*", being fully applicable "*as far as they interpret and delimit the meaning of the rules and precepts contained in the Charter and are, in short, the true interpretation of the Treaty,*" and this means that it is necessary "*to analyse the legality* [of the contentious issue submitted] *in light of the rules and Treaties mentioned.*"

However, so far this evolution has not been accompanied by judgments of the Supreme Court, with its somewhat "*outdated notion of jurisprudence*"[15]. It has rejected cassation appeals for the unification of doctrine in two of the cases mentioned (Case File of 4 November 2015, 30 November 2016, and 20 April 2017) where it ruled that there is an "*inadequacy"* of the decisions on the merits, and the conclusions reached by the ECSR, as concerns the requirements enforceable under Art. 219 of Law 36/2011, of 10 October, regulating labour courts. Neither these judgments nor the ones rendered (before and after) by the Constitutional Court (judgment on the "*constitutionality"* of the legislation giving rise to the litigation[16]) have prevented the perseverance of the exemplary court doctrine choosing to apply the principle of "*favor libertatis"* and the conventionality control[17].

Secondly, Greece must be mentioned as an example of the direct effect of rights guaranteed under the ESC. This is a country that has often been the subject of ECSR

[15] As stated critically by Jimena Quesada, with this interpretation the TS [Supreme Court] reminisces "*the obsolete approach to jurisprudence of the Spanish Civil Code* (…), [setting itself apart] *from the most recent European jurisprudential standards* (…) [thereby giving rise to] *an anomaly in the system of sources of Labour Law* (…)". In *Devaluación y blindaje del Estado social y democrático* [Devaluation and shielding the Social and democratic State] *…op. cit.,* p. 68.

[16] *Inter alia*, Judgments SSTC 119/2014, of 16 July, 8/2015, of 22 January, and 140/2015, of 22 June.

[17] A full study of the application of international rules by these instances can be found in González de Rivera i Serra, X., "Conversaciones entre la norma internacional y la norma interna: la aplicación por los órganos judiciales" [Dialogues between international and internal rules: their application by court bodies], pages 85 to 117 and Jimena Quesada, L., "La protección internacional de los derechos sociales y laborales: sinergias y voluntades del principio del *favor libertatis*" [The international protection of social and labour rights: synergies and intents of the *favor libertatis* principle], pages 59 to 84, both of which are included in the collective work coordinated by Fargas Fernández, J., "*Los derechos laborales desde la perspectiva de la teoría general del contrato y de la normativa internacional"* [Labour rights from the viewpoint of general contract theory and international law], Barcelona, 2016, Huygens.

assessments, in the framework of the collective complaints procedure, due to the violation of human rights in the wake of economic adjustment programmes. Some well-known decisions on the merits, widely reported in the media, are those of 23 May 2012, Complaints no. 65/2011 and no. 66/2011, *the General Federation of Employees of the National Electric Power Corporation (GENOP–DEI)* and the *Civil Servants' Confederation (ADEDY) v. Greece*, in addition to the decisions on the merits of 7 December, Complaint nos. 76, 77, 78, 79 and 80, *Federation of employed pensioners of Greece (IKA-ETAM), the Panhellenic Federation of Public Service Pensioners (POPS), the Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.), the Panhellenic the Federation of pensioners of the Public Electricity Corporation (POS-DEI), the Pensioners' Union of the Agricultural Bank of Greece (ATE), the General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Civil Servants' Confederation (ADEDY)*, concluding that there had been violations of a series of articles (including but not limited to 4.1, 4.3, 7.7, 10.2, and 12.3) of the ESC, as well as of 3.1 of the 1988 Protocol, underlining that the package of reforms of pensions and social security benefits gives rise to a "(…) *significant deterioration of the living standard and living conditions of pensioners* (…)," with the risk of significantly impoverishing the majority of the population.

These decisions are followed by the most recent one rendered in connection with the legislation adopted in Greece from 2010 to 2014, the decision on the merits of 23 March 2017, *Greek General Confederation of Labour (GSEE)*, Complaint no. 111/2014, ruling that the violation of Arts. 1.2, 2.1, 4.1, 4.4, 7.5 and 7.7 of the ESC and Art. 3 of the 1988 Protocol exists and/or subsists. As for the implementation of the procedure, noteworthy is that, unlike the preceding ones, the European Commission registered observations backing the Government. A further highlight is the respondent's failure to avert the judgment based on Art. 31 of the ESC (Art. G of the Revised version), i.e. by alleging that the legislation was needed to preserve public order in a democratic society.

Although there have been no further legislative changes following the violations observed, finally the reflection of the ESC and its level of protection can again be found in the courts. After the ratification of the revised version of 18 March 2016 and, thereby, the addition of Art. 24 of the ESC to the Greek legal system, it has acquired relevance and effectiveness through judgment no. 3220/2017 of the Court of First Instance of the Piraeus. This pioneer judgment, based on Art. 28.1 of the Constitution, characterises international treaties, ratified as an integral part of Hellenic law, with a pre-eminence over any contrary rule or provision laid down in national law. It has ruled that regulations in the country allowing unfair dismissals are incompatible with the hierarchically superior rule and, considering this, courts are required to verify that there are grounds for every dismissal considered.. Should there be no such motive, dismissals are to be considered null and void.

Finally, France can be viewed as a third example of effectiveness. In this country, on the one hand, the Council of State is increasingly in favour of recognition, and the effect of precepts can be invoked among private individuals (see the judgment of 10 February 2014, no. 358992) and, on the other hand, as far as the Court of Cassation is concerned, the terms of its rulings are in line with, *inter alia*, the judgments of 14 April 2010 (09-60.426 09-60.429), and of 8 December 2010, 10-60.223.

This context has given rise to challenges of recent changes of regulations by internal court instances (*Ordonnance* of the Council of State of 7 December 2017[18]), and to complaints lodged with the ECSR, with a noteworthy case being the Collective Complaint no. 149/2017, of 12 April 2017, *Confédération générale du travail (CGT) and Confédération française de l'encadrement-CGC (CFE-CGC) v. France*, supporting the three previous ones mentioned before with favourable rulings, soon to be followed by the complaint lodged for the calculation of compensation for dismissal (*Ordonnance* no. 2017-1387, of 22 September 2017) due to the violation of Art. 24 ESC, ruled by ECSR in the decision on the merits of 8 September 2016 (Complaint no. 106/2014, *Finnish Society of Social Rights* v. Finland).

The instances analysed are proof of the effect of the ESC Treaty of protection of social rights with the highest standard of protection. However, the other Council of Europe human rights adjudication body – the European Court of Human Rights has not distinguished itself in its protection of social rights. In the cases submitted to it on the judgment of austerity measures, it has adopted a firm interpretation resulting in the inadmissibility and rejection of any complaints, classed as "*manifestly ill-founded*", given the apparent lack of any violations (Decisions of 7 May 2013, *Ioanna Koufaki, and the Civil Servants' Confederation (ADEDY) v. Greece*; 8 October 2013, *Conceição Mateus and Santos Januário v. Portugal*; 1 September 2015, *Da Silva Carvalho Rico v. Portugal;* or the most recent one of 7 December 2017, *P. Plaisier B.V. v. The Netherlands*).

To conclude, this direct invocation of effects can be applied to all rights embodying the precepts of the ESC (both versions) ratified by a State, including the right to housing. Art. 31 of the revised ESC (although it has not been ratified by Spain) sets forth an overlapping, cross-cutting, and principles-consistent interpretation[19] of Art. 16, meaning a commitment, by virtue of ECSR case law (as reviewed in the most recent decision on the merits of 12 May 2017, Complaint no. 110/2014, *International Federation for Human Rights v Ireland*[20]) to provide sufficient housing, not only consisting of a dwelling "*which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence,"* and - furthermore - this is extensive to the security from unlawful eviction.

Moreover, the scope applies to setting in motion the means (regulatory, financial, operational, etc.) truly allowing progress towards the targets set by the ESC, to maintain objective statistics reflecting reality with the goal of comparing needs, means and results, regularly verifying the effectiveness of the strategies adopted, delimiting and specifying stages, and not indefinitely postponing the term of planned or intended schemes. This further means paying special attention to the impact of decisions reached for all categories of affected persons and, especially, the most vulnerable ones.

[18] In principle, no incompatibility was found.

[19] The ECSR expressly stresses the real and effective nature of ESC rights, which are not merely theoretical *inter alia* in the decision on the merits of 9 September 1999, Complaint no. 1/1998, *International Commission of Jurists v. Portugal*.

[20] In this connection, see the decisions on the merits of 18 October 2006, Complaint no. 31/2005, *European Roma Rights Centre v. Bulgaria*, and 2 July 2014, Complaint no. 86/2012, *European Federation of National Organisations working with the Homeless (FEANTSA) v. The Netherlands*.

This analysis concludes here after clearly and patently evincing the relevance of the ESC and ECSR case law, and its true operational effects. The spotlight on the "other" Europe, i.e. that of the Council of Europe, is more than obvious, and the indispensable and imperious road ahead involves demanding the reinstatement of these significant social and human rights.