SOCIAL RIGHTS FOR EUROPE: CAN THE EUROPEAN SOCIAL CHARTER FURTHER ALTERNATIVES TO AUSTERITY?

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UDK: 364:342.734:061.1EU
349.3:061.1EU

Abstract: *Collective bargaining as an instrument for wage determination at national level was one of the main targets for restrictions by EU anti-crisis measures. In the course of the ongoing economic crisis, the EU changed its approach: instead of refraining from interfering with national level systems, EU institutions massively demanded, by means of financial regulation, that states should decentralize collective bargaining and cut the protective tools strengthening the application and enforcement of collective agreements. The ESC-Collective Complaints Procedure, however, provides ways and means for social partners both at national and at EU level to contest national measures violating social rights. Most of the measures currently used for restricting the national industrial relations systems will not easily be justified against those standards. The EU therefore would be well advised to embrace collective bargaining much rather than limiting it.*

Key words: *social rights, European Social Charter, austerity measures, European Committee of Social Rights, European Union, right to collective bargaining*

SOCIALNE PRAVICE V EVROPI: ALI LAHKO EVROPSKA SOCIALNA LISTINA PONUDI ALTERNATIVE VARČEVANJU?

Povzetek: *Kolektivna pogajanja kot instrument, s katerim se določajo plače na nacionalni ravni so bila eden od glavnih ciljev proti kriznih varčevalnih ukrepov Evropske unije. V času sedanje ekonomske krize je EU*

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spremenila svoj pristop: namesto da bi se vzdržala vmešavanja v sisteme posameznih držav članic, njene inštitucije preko finančnih regulativ odločno zahtevajo, da države članice decentralizirajo kolektivna pogajanja in zmanjšajo zaščitne ukrepe, ki so omogočali uporabo in izvajanje kolektivnih pogodb. Vendar pa postopek kolektivne pritožbe v okviru Evropske socialne listine socialnim partnerjem na nacionalnem in na evropskem nivoju nudi načine in sredstva za izpodbijanje ukrepov, ki kršijo socialne pravice. Večine ukrepov, ki se trenutno uporabljajo za omejevanje nacionalnih sistemov, ki urejajo industrijske odnose glede teh standardov ne bo enostavno utemeljiti. Dober nasvet Evropski uniji bi bil, da raje sprejme kolektivna pogajanja kot pa da jih omejuje.

Keywords: *socialne pravice, Evropska socialna listina, varčevalni ukrepi, Evropski odbor za socialne pravice, EU, pravica do kolektivnega pogajanja*

1. INTRODUCTION

At a first glance, Europe deems to be a place protecting social and economic rights of citizens comparatively well. This follows from a political culture which – at least rhetorically – embraces a specific "European Social Modell" including the idea of a states' responsibility for the social support of citizens in need[1]. This widely invoked model gained relevance also in the legal sphere, even though social rights are still not regularly acknowledged as providing subjective entitlements for individuals against a state[2]. Such approach became prominent at the international level, too: The European Court of Human Rights deducted from Article 3 ECHR that the failure to take adequate steps to prevent asylum seekers from sinking into a state of extreme poverty (such as "living in the streets, with no access to sanitary facilities and without any means providing for essential needs"[3]) violates the Convention. Also at EU level, the judiciary initially developed social objectives complementary to the originally prevailing economic ones

1 N. Countouris/M. Freedland (eds.): Resocialising Europe in a Time of Crisis, CUP, Cambridge (2013), Introduction.

2 C. O'Cinneide: Austerity and the Faded Dream of a "Social Europe", in: A. Nolan (ed.), Economic and Social Rights after the Global Financial Crisis, CUP, Cambridge (2014), p. 169.

3 ECtHR, 21 January 2011, No. 30696/09, MSS v. Belgium and Greece.

for ensuring "the constant improvement of the living and working conditions".[4] Meanwhile, the EU Charter of Fundamental Rights (CFREU) states an extensive list of social rights, primarily significant for reviewing legislative or executive acts by EU institutions or – to a lesser degree – by Member States. Domestic social policy and labour market regulations can therefore be assessed against supranational standards. Practice, however, doesn't always reflect this approach,[5] especially concerning policies to overcome the current economic crisis. The aim of this paper is to examine the role of international social rights and their potential for invoking them against austerity measures intended to combat the economic crisis[6].

The economic discourse is currently redefining social policy in Europe: supposed inflexibility in labour law and social security systems at national level are being held responsible for financial imbalances between EU-Member States, thus materially contributing to the crisis. Therefore, the anti-crisis measures[7] of EU institutions included Memoranda of Understanding concluded by the "Troika" of European Commission, European Central Bank and International Monetary Fund and States needing financial aid. They obliged debtor States to reduce domestic wages and social entitlements as a return for financial assistance. The outcome, though, was not always convincing even in economic terms[8], let alone in terms of securing minimum standards of social rights. It will be argued below that the EU may have to move beyond the austerity agenda for restoring the promise of social dialogue for furthering the Unions' economic as well as social prospects. As human rights indeed are interrelated and indivisible, disregarding social rights might produce repercussions, initially on civil and political rights and finally even endanger the social fabric of the Union as such.

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4 CJEU, 8 April 1976, C-43/75, Defrenne v. Sabena (no. 2), para. 10.

5 C. O'Cinneide: Austerity and the Faded Dream of a "Social Europe", CUP, Cambridge (2014), p. 169.

6 C. Barnard, The Financial Crisis and the Euro-Plus-Pact: a labour lawyer's perspective, 41 Industrial Law Journal, OUP, Oxford (2012), 98-114.

7 Such measures later included Directives and Regulations known as the „Six-pack", the „Two-Pack", The „Euro-Plus-Pact", the European Stability Mechanism Treaty (ESM) and the Treaty on Coordination, Stability and Governance.

8 S. Deakin: Social Policy, Economic Governance and EMU: Alternatives to Austerity, in: N. Bruun/K. Lörcher/I. Schömann (eds.), The Economic and Financial Crisis and Collective Labour Law in Europe, Oxford Hard Publishing (2014), p. 83-108.

2. INITIAL POLICY RESPONSE FOR COMBATTING THE CRISIS

The economic crisis in Europe was part of the global financial crisis originating in the US finance sector. An interrelated global economy transmitted the recession to the EU, resulting in falling economic output. The related rise of unemployment led to increased state expenditure on social security at times when tax receipts were shrinking and consequentially to growing public sector deficits. In essence, the deficit in most countries (with the notable exception of Greece) was not caused by excessive public spending prior to the crisis but by low-cost private credit debts, property speculation and the costs of government bail-out for troubled financial institutions. To overcome such deficit, debtor states turned to the "Troika" for financial support. Receiving financial aid was made conditional upon restoring competitiveness internally, as an alternative to currency devaluation which is no longer available to members of the Euro as a single common currency. The effect, however, affected low-income groups hardest, as they more frequently rely on public support. As these groups usually spend the largest part of their income on consumption they are part of stabilizing domestic demand; for economies not driven by export, the consequence of simultaneously losing domestic demand may include additional business failures and increasing unemployment.

From a social rights perspective, the results of austerity measures were by and large negative[9]: since the onset of the crisis, economic inequality in Europe was on the rise. Whereas many European citizens still have access to decent health care, pensions and protection of their employment rights, the gap between the comparably well-off and socially vulnerable "losers" continues to widen where social protection for vulnerable groups is in decline. This effect is influenced by cuts in minimum rates of pay/ the amount of minimum wages or income replacement benefits. Conditions to qualify for such benefits became tighter and time periods of entitlements shorter. Traditional employment was destabilized to further "flexible employment" such as fixed term contracts, temporary agency work or independent contracting; in the UK, employment on the basis of zero-hour contracts became common place.

[9] B. Nyström: The European Welfare State and the European Social Charter, in: Julia Iliopoulos-Strangas (ed.), Societas Iuris Public Europaei (SIPE) series, Vol. 10, Nomos, Baden-Baden (2015).

To secure the outcome, collective bargaining was stripped of its former power to provide alternative means of protection for workers[10]. While initially refraining from intervening in labour relations due to the explicit exclusion of the topics of pay, freedom of association and collective action from the EU's regulatory competency, Article 153 (5) TFEU[11], European fiscal policy later aimed at restraining directly or indirectly national industrial relations systems. For this purpose states changed the patterns for wage bargaining from formerly national level or sectoral arrangements to company level[12]. Declining union density allowed for displacing unions as principal bargaining actors by local employee representatives without union-affiliation. The competence to conclude enterprise level collective agreements was conferred on "workplace representatives", occasionally (in Greece) even on any type of association of persons. The scope for individual bargaining for pay and working conditions was widened, diminishing the influence of collective bargaining even further. A statutory abandonment of the "favourability principle" adds to this outcome by allowing for derogation *in pejus* (= downward) from entitlements set in collective agreements. By weakening or even abandoning the principle of inderogability, collective agreements lost much of their protective function to reduce downward competition amongst workers.

Trade unions and civil society groups were not quietly accepting policy decisions as being beyond alternatives. Increasingly they try challenging such measures before national courts or international institutions, using human rights guarantees for attempting to define the relevance and legal status of social rights[13]. The matter may, however, not be dealt with primarily at national level[14]. EU Member States may not be competent to organize their labour markets according their respective choices but have to abide to superior EU level prerogatives. As EU

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[10] European Commission, DG for Economic and Financial Affairs, Labour Market Developments in Europe, European Economy 5/12, p. 104: employment-friendly reforms of labour markets should include: decreasing the bargaining coverage or the use of extension of collective agreements, removing the favourability principle, extending the possibility of derogating from higher level agreements, overall reducing the wage-setting power of unions.

[11] N. Bruun: The Autonomy of Collective Agreements, in: R. Blanpain (ed.): Collective Bargaining, Discrimination, Social Security and European Integration, Kluwer, The Hague (2003), p. 23.

[12] M. Biasi/I. Katsaroumpas: The Age of "Europeanized - Decentralisation": Mapping the convergent crisis regulatory trajectories on collective bargaining structures in eight EU Member States, Paper presented at the LLRN international conference in Amsterdam, June 2015.

[13] C. O'Cinneide, Austerity and the Faded Dream of a `Social Europe` in: A. Nolan (ed.) Economic and Social Rights after the Global Financial Crisis, CUP, Cambridge (2014), p. 169.

[14] Ibd., p. 169.

institutions opted for treating labour law as a mere component of fiscal policy, the earlier approach towards social dialogue as a means of creating the social fabric of the Union was set aside. It remains therefore indispensable to explore potential limitations to public policy choices originating from EU austerity measures, too.

3. LEGAL LIMITATIONS TO LABOUR RELATED AUSTERITY MEASURES?

Whether or not legal actions could provide limits to austerity measures endangering social rights depends on the availability of judicial control. In principle, controlling social policy decisions could be part of alternative mechanisms: (1) Trade unions might challenge EU institutions directly by holding them responsible for social rights –violations resulting from national austerity measures. (2) EU Member States might argue that the Union should not have obliged them to disregard constitutional or international obligations to protect social rights. (3) Trade unions might challenge violations of international social rights by state policies implementing EU standards.

The first option, directly challenging EU institutions for their taking part in austerity measures violating social rights, could base itself on the CFREU. This Charter contains the Union's acknowledgment of "solidarity" norms' constitutional value in the EU legal order. Even though social rights gained a higher normative status through constitutionalisation, potential consequences thereof are restricted by limitations to their applicability. While collective bargaining rights guaranteed by Article 28 CFREU have been among the main targets of EU anti-crisis policy, the implementation measures directly responsible for social rights infringements have been conducted at national level. The question therefore remains whether any form of split action is able to effectively insulate both actors, but especially the EU level, against CFREU-standards. The case-law of the CJEU seems to follow this direction: Measures introduced by national governments for fulfilling their commitment to monetary stability[15] are held to fall outside the scope of EU law altogether[16]. Likewise, the Charter of Fundamental Rights is not applicable[17] to

[15] Stability and Growth Pact, Reg. 1466/97 and 1476/97.
[16] CJEU, 4 May 2013, C-128/12, Sindicato dos Bancarios do Norte; 26 June 2014, C-265/12, Sindicato Nacional dos Profissionais de Seguros.
[17] CJEU, 27 November 2012, C-370/12, Pringle, para. 179.

the establishment of a European Stability Mechanism (ESM), as Member States in doing so do not implement Union law in the meaning of Article 51 (1) of the CFREU. As a consequence of this interpretation, the CFREU might remain without much relevance for the operation of financial stability programs in the EU[18].

This outcome, however, would be all the more problematic as the precondition for operations at national level are set in accordance with the ECB and the European Commission, both of whose conduct should in principle be governed by the CFREU. The applicability of the CFREU to measures of the Troika is far from being established, though: in *Pringle,* the Court strongly emphasized that both EU institutions must perform their function in concordance with the Unions' economic and monetary policy[19] whereas concordance with social policy goals, let alone citizens' social rights, were not mentioned at all. That Troika measures indeed had an impact on social rights is nevertheless undeniable: Since the outbreak of the crisis, EU- institutions promoted restrictions to collective bargaining at a level in principle not foreseen by primary law. Therefore, the usual policy instruments of directives (or regulations) could not be used, but were effectively replaced by financial policy instruments such as Memoranda of Understanding, country specific recommendations to Member States or public policy statements[20]. If EU policy as a matter of fact is capable of steering Member States' decisions in a specific direction, responsibility for the consequences thereof should not be denied. Anyway, there may be currently no effective means of invoking the CFREU against such policy decisions.

The second option referred to above relies on the initiative of EU Member States arguing that the Union is not entitled to give directions that would violate states' social rights obligations. Neither when transposing directives into national law nor when implementing EU financial policy should states be legally obliged to disregard existing commitments[21]. Article 53 CFREU establishing the level of

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[18] S. Deakin, Social Policy, Economic Governance and EMU: Alternatives to Austerity, in: N. Bruun/K. Lörcher/I. Schömann (eds.), The Economic and Financial Crisis and Collective Labour Law in Europe, Oxford Hard Publishing (2014), p. 100, gives a different interpretation to the Pringle-case.

[19] CJEU, 27 November 2012, C-370/12, Pringle, paras. 155-169.

[20] The Euro-Plus-Pact in 2011 obliged Member States explicitly to review "the wage setting arrangements and, where necessary, the degree of centralization in the bargaining process", Annex 1 to European Council Conclusions, 24/25 March 2011, p. 16.

[21] Membership in international organizations (such as the EU) cannot exempt states from their obligations under the ECHR: ECtHR, 30 June 2005, No. 45036/98 (Bosphorus vs. Ireland).

protection guaranteed by the Charter provides the Unions' acceptance of more far reaching guarantees represented elsewhere in EU-law, international human rights treaties or national constitutions[22]. Concerning the right to collective bargaining, a higher level of protection could be provided by national constitutions so that the domestic court could declare the respective austerity measures unconstitutional[23] once they represent autonomous domestic decisions in the margin of discretion left by EU prerogatives[24]. Where, however, measures established were based on rather specific obligations set by supreme EU policy, national constitutional standards could no longer be invoked[25].

Alternatively, a higher level of protection could be provided by the European Social Charter (ESC)[26], the Council of Europe's social and economic rights treaty[27]. It may, however, not be necessarily the case that both instruments contain different levels of protection[28]: at least on the substance of the protected rights, a close link between CFREU and the Social Charter exists, as the Council of Europe and the EU both have drafted or refurbished[29] their legal instruments deliberating the content of the respective other body's social standards.[30] Examples include Article 15 CFREU, right to engage in work; Article 23, equal treatment for women and men; Article 25 CFREU, rights of the elderly; Article 27 CFREU, workers' right to information and consultation; Article 28 CFREU, right to collective bargaining; Article 31 CFREU, right to fair and just working conditions, including holidays with pay.

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[22] B. de Witte, Commentary to Article 53 CFREU in: S. Peers/T. Hervey/J. Kenner/A. Wards (eds.), The EU Charter of Fundamental Rights - Commentary (Hart Publishing 2014), paras. 53.07 to 53.12.

[23] Compare: Constitutional Court of Portugal, Decision no. 187/3013 of 5 April 2013.

[24] B. de Witte, Commentary to Article 53 CFREU in: S. Peers/T. Hervey/J. Kenner/A. Wards (eds.), The EU Charter of Fundamental Rights - Commentary (Hart Publishing 2014), para. 53.31.

[25] CJEU, 26 February 2013, C-399/11, Melloni, para. 60.

[26] European Social Charter, 18 October 1961/Revised European Social Charter, 3 May 1996.

[27] M. Schlachter: The European Social Charter: could it contribute to a more social Europe? In: N. Countouris/ M. Freedland (eds.), Resocialising Europe in a Time of Crisis, CUP, Cambridge (2013), p. 105.

[28] Explanations relating to the Charter of Fundamental Rights, OJ 2007, C-303/17.

[29] The 1961 ESC was updated by an Additional Protocol in 1988 and revised in 1996. The EU started with the adoption of the Community Charter of Fundamental Social Rights of Workers in 1989 before agreeing to the CFREU in 2000.

[30] O. de Schutter: Anchoring the European Union to the European Social Charter: The Case for Accession, in: G. de Burca/B. de Witte (eds.), Social Rights in Europe, OUP, Oxford (2005), p. 111-152, 116 ff.

Nevertheless, this connection has hitherto not triggered significant mutual assimilation of interpretations.[31] Whereas the European Committee of Social Rights, the body responsible for interpreting the ESC, systematically considers developments under EU law, references to or consideration of the Social Charter by the CJEU when interpreting the CFREU or social rights related secondary Union law happen more or less at random. In the opinion of Advocate General Jacobs already the structure of the ESC is such "that the rights it enshrines are more political objectives than constraining rights"[32]. The CJEU's practice seems to underline this impression: the ESC has never been central to any human rights discussion at EU level.[33] According to Article 6 TEU, Charter rights shall be interpreted "with due regard to the explanations referred to in the Charter that set out the sources of the provisions", meaning that EU institutions including the CJEU must take relevant sources of fundamental rights into account when applying or interpreting them in practice. Total disregard of the Social Charter concerning provisions of the CFREU overlapping with ESC guarantees would therefore not be acceptable. Nonetheless, an obligation as to an interpretation converging with the ESC does not exist. This represents a much lower standard than what Article 52 (3) CFREU attributes to the Human Rights Convention whose level of protection has to be guaranteed as a minimum standard when interpreting the CFREU.[34] From this difference in acknowledgement follows the conclusion that the EU's general approach towards social rights is essentially less supportive than towards civil and political rights.[35] Only if the much better protected civil rights develop, through jurisprudence of the ECtHR, a social rights dimension drawn from the ESC, such understanding will be relevant also for CFREU– standards.[36]

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[31] M. Nicoletti: General Report on the High Level Conference on the European Social Charter (Turin, 17-18 October 2014), p. 22.

[32] Opinion of AG Jacobs in C-67/96, Albany International BV.

[33] O. de Schutter: Anchoring the European Union to the European Social Charter: The Case for Accession, in: G. de Burca/ B. de Witte (eds.), Social Rights in Europe, OUP, Oxford (2005), p. 111, 122.

[34] M. Schlachter: The European Social Charter: could it contribute to a more social Europe? , in: N. Countouris/ M. Freedland (eds.), Resocialising Europe in a Time of Crisis, CUP, Cambridge (2013), p. 105.

[35] P. Alston: Assessing the Strengths and Weaknesses of the European Social charter's supervisory system, in: G. de Burca/ B. de Witte (eds.), Social Rights in Europe, OUP, Oxford (2005), p. 45, 47.

[36] See note 34, p. 105.

But there are not too many civil rights enshrined in the Human Rights Convention that indeed are capable of developing such social dimension. Chances remain that indeed the level of protection for social rights by the CFREU on the one hand and the Social Charter on the other continues to be different. When international social rights standards are different from the CFREU's in legal situations that fall in the scope of application of both instruments, the conflict between obligations need to be solved.

According to Article 53 CFREU, human rights as recognized by international agreements to which all EU Member States are party are not to be restricted by EU law. This provision is meant to ensure that the Fundamental Rights Charter will not override relevant other international human rights norms by virtue of supremacy of EU law.[37] In respect of the ESC, the first question relates to whether it represents an international instrument to which "all EU Member States are party". Even at first glance, the answer is positive[38] but has nevertheless been questioned in legal doctrine by referring to the fact that Member states only accepted different versions of this treaty[39]: Four Member States accepted the 1961 Charter[40]; five accepted the 1988 Additional Protocol alongside the 1961 Charter[41], whereas 19 EU Member States are bound by the 1996 Revised ESC. This difference in adherence to the Charter should, anyway, not give reason to contest that all Member States are parties in the meaning of Article 53 CFREU.[42] The internal relationship of the different versions of the Charter may be special, but this is due to the very construction of providing contracting States the possi-

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37 CJEU, 26 February 2013, C- 399/11, Melloni, paras. 55-64.

38 K. Lörcher: Legal and Judicial International Avenues – The (Revised) European Social Charter, in: N. Bruun/K. Lörcher/I. Schömann: The Economic and Financial Crisis and Collective Labour Law in Europe, Oxford Hard Publishing (2014), p. 265, 276.

39 A. Fischer-Lescano: Human Rights in Times of Austerity Policy, Nomos, Baden-Baden (2014), p. 30.

40 Germany (signed but did not ratify also the 1988 Additional Protocol and the Revised Charter), Luxembourg (signed but did not ratify all other instruments), Poland (signed the 1991 Amending Protocol), United Kingdom.

41 Croatia, Czech Republic, Denmark, Greece and Spain.

42 Compare: Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 15 - Freedom to choose an occupation: "this paragraph also draws upon Article 1(2) of the European Social charter, which was signed on 18 October 1961 and has been ratified by all the Member States…"; CJEU, 20 September 2007, C-116/06 Kiiski, para. 48: Article 136 also refers to the European Social Charter…, to which in its original or revised version or both, all Member States are parties."

bility to selectively choose obligations they accept[43]; even if the ESC had come in one version only, the obligations undertaken by contracting parties would have not necessarily been completely identical. Nevertheless, the ESC in its different versions represents core social rights in Europe, a standard on the merits of what could be defining the "European Social Model". The purpose of Article 53 CFREU to safeguard those international standards from being overruled by the Fundamental Rights Charter calls for including the ESC in this mechanism.[44]

According to Article 351 (1) TFEU, states may invoke their commitment to international agreements if – and only if - they ratified such treaty before acceding to the EU. Applied to the ESC, Member States in principle could invoke Charter Rights in case of conflict. This is, however, conditional upon ratification prior to acceding to the Union of the one version of the ESC whose States are still bound by at the time of action[45]. Eventually, only two categories of States could potentially be in the position to rely on their ESC obligations against the EU: those who had been parties to the original ESC before entering the Union and not having after their accession ratified the Revised Charter; and those joining the Union at a later stage when they have already been party to the Revised Charter. Invocation of Article 351 TFEU seems hitherto not to have been taken place with respect to ESC rights, whereas it had been used to temporarily permit[46] Member States to comply with the ILO Convention No. 89.[47]

The third option referred to above depends on trade unions invoking social rights guarantees such as the ESC against austerity measures implemented by EU Member States.

Member states parties to international treaties can undertake obligations potentially conflicting with their obligations as EU members. EU law being directly

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[43] Upon ratification, State Parties need accept five out of nine core rights (original Charter), together with either 10 out of 19 Articles in total or 45 out of 72 numbered paragraphs. For the Revised Charter, at least six out of nine core rights must be accepted (all core rights of the original Charter are included in this list), together with 16 out of 31 Articles or 63 out of 98 numbered paragraphs.

[44] B. de Witte, Commentary to Article 53 CFREU in: S. Peers/T. Hervey/J. Kenner/A. Wards (eds.), The EU Charter of Fundamental Rights - Commentary (Hart Publishing 2014), para. 53.07 to 53.10.

[45] This precondition originally provided an option to invoke the 1961 Charter for the United Kingdom, Poland, Spain and Denmark, and to invoke the Revised ESC for Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Romania, Slovakia and Slovenia.

[46] CJEU, C-158/91, Levy.

[47] ILO Convention of 9 July 1948 concerning night work of women employed in industry.

enforceable provides major incentives to comply with its standards even if this results in disregarding international treaties. States may anyway prefer to deny the existence of conflicting levels of protection over revoking an international obligation; whether or not such approach is successful depends on the exact scope of the conflict concerned. The source of conflict may comprise two dimensions: EU law could provide either more far-reaching or less protective levels for a specific social right than the corresponding ESC norm. The first alternative might prove realistic specifically concerning some outdated wording in the 1961 version of the ESC setting a legal frame which is no longer consistent with today's working life. One relevant example comprises the total prohibition of night work for women. This first scenario would, however, not pose severe difficulties to Member States bound by both obligations simultaneously: As the Social Charter aims at protecting social rights not only in law, but in practice, a State party is principally free to apply higher levels of protection than the Charter. Even where different protective concepts develop, such as aiming at reducing the risk of dangerous or unhealthy working conditions instead of providing reduced working hours to workers engaged in such task (Article 2 (4) of the 1961 Charter)[48], any interpretation of what represents adequate protection for specific working situations can under the ESC eventually be adapted to the technical and medical standards of the time being. In any case the European Committee of Social Rights doesn't interpret the ESC in the sense of obliging States to lower a level of protection guaranteed.

The second scenario, according to which EU law prescribes a level of protection for specific social rights which is lower than that of the ESC, poses more problems. The parallel solution of accepting a higher protective standard does not automatically solve discrepancies here. It indeed can be relevant for EU directives prescribing minimum requirements which, for transposing the directive into national law, don't hinder keeping or even extending the respective level of protection.[49] In that case, Member States could, and indeed are legally obliged to do so[50], implement the higher standard they undertook to guarantee when accepting a provision of the ESC. This happened to be at stake in a complaint against

[48] European Committee of Social Rights, Collective Complaint No. 10/2000, Tehyry and STTK vs. Finland.

[49] O. de Schutter: Anchoring the European Union to the European Social Charter: The Case for Accession, in: G. de Burca/B. de Witte, Social Rights in Europe, OUP, Oxford (2005), p. 111, 124.

[50] European Committee of Social Rights, Collective Complaint No. 55/2009, CGT vs. France.

France concerning the collective expulsion of Roma to Bulgaria and Romania[51] which was undertaken under circumstances violating the Social Charter despite the governments' argument that it did not violate the EU Citizenship Directive 2004/38[52]. Even if EU law was indeed not infringed, the mere fact of being in conformity with one international obligation does not translate automatically into conformity with another, distinct set of social rights. Differences concerning obligations under the two legal instruments' level of protection do not depend on conflicting legal standards but on the governments' practice: Conformity with EU minimum standards may be presented as an objective justification for lowering previously established social rights for cost reduction purposes. The respective EU directive is invoked as providing a level playing field for all Member States on an equal footing that could not be extended without detriment to national competitiveness. In such case, EU law serves as a pretext even though it does not actually prescribe lowering the previously existing level of social protection. From the ESC point of view, such justification would not be valid.

However, where EU-law contains not only minimum requirements but harmonization measures aimed at developing the Union's internal market, setting standards going beyond EU- level protection poses a problem. A measure protecting fundamental social rights beyond EU requirements could then represent an infringement of economic freedoms of undertakings, acceptable only if objectively justified. States parties to a more protective provision of the ESC find themselves in a legally questionable situation, as they stand accused of infringing their obligations under EU law when complying with international standards.[53] In case of conflicting obligations, Member States of the EU tend to argue that they have to implement EU standards and that there is no competence for the European Committee of Social Rights to legally assess the conformity of an EU directive with the ESC. Therefore, when a national situation is in compliance with EU law, as a result, it must also be seen as complying with the Charter.[54] The Committee has confirmed that assessing the conformity of EU directives with the Social Charter

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[51] European Committee of Social Rights, Collective Complaint No. 63/2010, Centre on Housing Rights and Evictions (COHRE) vs. France.

[52] European Committee of Social Rights, Collective Complaint No. 63/2010, COHRE vs. France, paras. 69-79.

[53] CJEU, 26 February 2013, C- 617/10 Akerberg Fransson, paras. 29, 36.

[54] I. Hachez: Le Comité européen des droits sociaux confronté à la crise financière grecque: des décisions osées mais inégalement motivées, Revue de Droit Social, Jurisquare Bruxelles, 2014/3, p. 245, 251.

would be beyond its mandate[55]. However, that cannot hinder the Committee to assess the compliance of national law, even when it was designed to transpose an EU directive, with the State's commitments taken upon ratification of the ESC[56]. Obligations under EU law, such as the duty to transpose directives (or: to honour Memoranda of Understanding), can therefore not provide in itself an objective justification for setting aside ESC obligations the State had previously undertaken.[57]

In this perspective, the European Committee of Social Rights follows a stricter approach than the ECtHR which, in the Bosphorus- case[58], accepted a rebuttable presumption of EU law complying with the ECHR. Under the Social Charter, there is currently no such presumption of conformity of EU law[59]. This is the natural consequence of the different status EU law gives to fundamental civil and political rights on the one hand, and fundamental social rights on the other. Not even the entering into force of the CFREU changed this distinction between levels of protection for rights enshrined in the ECHR and those in the ESC. More specifically, the EU is not for the relevant future considering accession to the European Social Charter[60], whereas it is still, despite the critical opinion of the CJEU on the content of the draft accession treaty, under the obligation to accede to the ECHR.[61] It should then not come as a surprise that the different status the EU assigns to the Council of Europe instruments translates into a comparable difference of weight ascribed to the rights guaranteed: the EU legal order simply does not pay as much attention to the ESC that compliance with its norms could

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55 European Committee of Social Rights, Collective Complaint No. 55/2009, CGT vs. France, para. 33.

56 CC No. 55/2009, CGT vs. France, para 32.

57 European Committee of Social Rights, Conclusions XIX – 2 (2009), General Introduction para. 16.

58 ECtHR, 30 June 2005, No. 45036/98, Bosphorus vs. Ireland, para. 147, 148, 155 et sequ.

59 Collective Complaint No. 55/2009, CGT vs. France, para. 35.

60 See: Report of the Expert Group on Fundamental Rights (Luxembourg, European Communities): Affirming Fundamental Rights in the European Union, Time to Act (1999) p. 21, suggesting already then that the EU accede to the ESC. Compare also: R. Birk; The European Social Charter and the European Union, in: R. Blanpain (ed.), the Council of Europe and the Social Challenges of the XXIst Century, Kluwer, The Hague (2001), p. 41; O. de Schutter: Anchoring the European Union to the European Social Charter: the Case for Accession, in: G. de Burca/B. de Witte (eds.), Social Rights in Europe, OUP, Oxford (2005), p. 111; European Parliament Resolution of 19 May 2010 on the institutional aspects of the accession of the EU to the ECHR, European Parliament Document (2009/2241(INI)), para. 30.

61 J. Callewaert: To accede or not to accede: European protection of fundamental rights at the crossroads, Journal européen des droits de l'homme, 2014, 496.

be presumed. Without such presumption, the European Committee of Social Rights will continue to assess situations where States justify their shortcomings under the Social Charter by referring to obligations under EU law on a case- by-case basis. Some austerity measures may indeed amount to a violation of ESC rights independent from their being part of Memoranda of Understandings[62] or CJEU judgements[63].

Such consequence, however, is dependent on the lack of objective justifications to the national measures concerned. Under the Social Charter, states in principle accepted to provide specific levels of social rights, which – depending on the respective economic situation – may vary but have to respect some minimum standards; some Articles (e.g.: Article 2 (1); Article 12 (3)) even provide for gradually raising entitlements to a higher level[64]. However, this approach does not represent a general non- regression clause.[65] States parties indeed maintain the necessary margin of discretion for adapting their respective policies and social systems to changing circumstances and economic developments[66]. But such discretion cannot allow protective standards to drop below a minimum level necessary to secure basic needs of the population; systems introduced for better adapting to critical economic situations have to include alternative safeguards against the respective risk.

The Social Charter, as other human rights treaties, combines guarantees with specific limitations already in the scope of several rights; especially for collective bargaining rights, such limitations will be dealt with in more detail below. Additionally, the Charter implements general preconditions for government measures restricting social rights: Articles 31 (1) ESC and G (1) RESC equally provide that rights and principles shall not be subject to any restrictions or limitations not

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[62] See the Collective Complaints No. 76/2012-80/2012 (challenging Greece's austerity measures implementing Troika agreements), all decisions of the ECSR delivered on 7 December 2012.

[63] See Collective Complaint No. 85/2012, Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) vs. Sweden, challenging the statute transposing the CJEU's Laval case into national law.; B. Nyström: The European Welfare State and the European Social Charter, in: Julia Iliopoulos-Strangas (ed.), Societas Iuris Public Europaei (SIPE) series, Vol. 10, Nomos, Baden-Baden (2015).

[64] M. Schlachter: The European Social Charter: could it contribute to a more social Europe?, in: N. Countouris/ M. Freedland, Resocialising Europe in a Time of Crisis, CUP, Cambridge (2013), p. 105.

[65] As suggested by I. Hachez, TSR-RDS 2014, 245, 254.

[66] European Committee of Social Rights, Conclusions XVI- 1, Luxembourg, p. 408.

already specified in the concrete Articles except when prescribed by law and necessary in a democratic society for the protection of rights and freedoms of others or for public interest, national security, public health or morals. The first such precondition, that restrictions should be prescribed by law, usually does not pose any difficulties concerning austerity measures. All such restrictions are usually laid out in greatest details for allowing the creditor institutions to assess their conformity with the conditions imposed on the debtor state. Therefore, the necessary level of legal certainty is usually automatically provided by the respective statute. The second precondition relates to the existence of a legitimate aim for the restriction which must be one included in the exhaustive list set up by the Charter. Where it is rather obvious that specific austerity measures do not aim at furthering national security, public health, or morals it might be argued that they aim at protecting the rights and freedoms of others. This would, nevertheless, represent a rather imprecise interpretation of the relevant clause: Austerity measures are usually set up for the purpose of reducing the state's external debts and furthering the economy's competitiveness. These goals equal public policy much rather than rights or freedoms of individual citizens.

Out of the list set up under the ESC, primarily the aim of "public interest" might be relevant for restricting social rights. As public policy choices are central to the competence of governments it could be argued that this might include also discretion for defining all public interests. On the other hand, it is generally accepted that the notion of "public interest" equals the International Conflict of Law's standard of "ordre public", representing decisions functional to a states' legal or economic system as a whole. Not just any financial aim could qualify under such test, but whether EU – induced austerity measures could, remains debatable. Governments might argue that indeed they can because a severe enough financial crisis might endanger the states' economic system in totality.

For pursuing a legitimate aim, the means used need be applied in a manner "necessary in a democratic society", i.e. honouring the proportionality principle[67]: measures taken must not go beyond what is necessary to achieve the respective aim by opting for the lowest available level of infringement to social rights. This part of deliberation is usually crucial to the acceptance or otherwise to any justification for restrictions. A government invoking their measures' necessity in a democratic society will therefore have to prove that no less intrusive alternatives

[67] Council of Europe (ed.), Digest of the Case Law of the European Committee of Social Rights (2008), p. 177.

to severe restrictions are available, such as eliminating fraud and inefficiency in tax collection, stopping any waste of public funds, strengthening the law enforcement system or other potential means to actively generate additional revenue. As the economic crisis is not in itself a justification for measures infringing social rights, nor is political pressure to conform to one of the financial instruments of the EU, also the reference to the availability of too little public money for meeting the current expenditure on social measures will not suffice. Prior to reducing social rights, states will have to consider reallocation of public revenues to guarantee at least basic levels of social rights for citizens worst affected by the crisis.

Additionally to questions on the merits of a justification, there are procedural requirements to be met[68]. In a democratic society, measures cannot be taken without an informed, transparent decision making process involving all groups concerned. Interest groups and trade unions representing the relevant stake holders must therefore be heard for giving them the chance of negotiating in their constituents' interest. At least before deciding that reductions to social standards are unavoidable, governments must assess the future impact of such restrictions especially on the most vulnerable groups of society, and all serious options for exempting those groups from severe restrictions must be properly addressed. Consequences of decisions to alter the current level of a social right must be followed by survey measures in order to be corrected once they prove unsustainable; this may argue for introducing measures of limited duration first instead of permanent alterations.

4. RESTRICTING THE RIGHT TO COLLECTIVE BARGAINING (ARTICLE 6 (2) ESC)

As already indicated, labour related austerity measures regularly comprise restrictions to collective bargaining. As a consequence, its protective function has lost much of its ability for counteracting state-imposed reductions to wages and social entitlements. The resulting conflict with ESC guarantees was wide-spread due to the fact that most contracting parties indeed have accepted Article 6 (2)[69]

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[68] European Committee of Social Rights, Collective Complaint No.76/2012, Federation of Employed Pensioners of Greece (IKA-ETAM) vs. Greece, para. 73.

[69] Greece, Andorra and Turkey have not accepted any paragraph of Article 6 ESC; Liechtenstein, Monaco, San Marino and Switzerland have not ratified the ESC at all. Apart from those, the

obliging them not only to respect but specifically to promote collective bargaining. This includes the obligation of states to take positive measures to facilitate and encourage the conclusion of collective agreements once collective bargaining is not developing spontaneously.[70] Consequentially, any development at EU-level aiming at weakening collective bargaining could, in principle, contradict a state's obligations under the Social Charter. Some measures for combating the financial crisis include restricting union coverage, decentralizing collective bargaining, reducing the wage setting power of unions and their competence to protect wage earners from reductions to their contractual entitlements. Up to now, the European Committee of Social Rights did not specifically deal with such aspects under Article 6 (2) ESC.[71] From the general approach followed under the reporting procedure, however, some conclusions may be drawn.

Any direct interference with the existing scope, structure and principles of collective bargaining is contesting social partners' competence to regulate their mutual relations autonomously and their members' terms and conditions of employment free and voluntary. Which level to choose for collective bargaining and the potential conclusion of collective agreements must remain the choice of bargaining partners. Therefore collective agreements at central level could – without violating Article 6 (2) ESC - create "opening clauses" or accept lower level collective agreements to deviate from their content as their autonomous decision to accept a certain level of decentralization in specific situations or for specific topics[72]; state intervention, though, is not likely to pass such test. Where decentralization of collective bargaining is statutorily prescribed through replacing the national or sectoral level for bargaining and conclusion of agreements by company level this might represent direct interference with the free and voluntary process of collective bargaining.

The option of deviating downwards from statutory rules and/or higher level collective agreements via company agreements is closely related to this decentralization program. It is in essence a change of principles: once a labour relations system builds on the paradigm of worker protection, entitlements established by

remaining of the (altogether 47) Council of Europe Member States are bound by Article 6 (2) of the Charter.

70 Digest of the Case Law of the European Committee of Social Rights (2008), p. 54.

71 However, in the follow-up to the Laval-case, the Committee found a violation not only of Article 6 (4) but also of Article 6 (2): European Committee of Social Rights, Collective Complaint No. 85/2012, LO and TCO vs. Sweden, para. 72-74.

72 European Committee of Social Rights, Conclusions 2010, Italy, Article 6 (2).

collective agreements will principally be inalienable; only derogations in favour of the worker may be acknowledged. Lower level agreements or even individual contracts, when providing more favourable terms and conditions for workers, may indicate the existence of a bargaining process at an almost equal footing; therefore, any protective intervention of higher level agreements may be unnecessary or even inappropriate. However, where labour relations are treated as a component of monetary policy, the paradigm will shift from worker protection to enterprise flexibility; downward derogations from statutory rules/centralized collective agreements deem not only acceptable but actually preferable as they allow representatives of the company to define the economically most suitable scope of entitlements. In essence, the "favourability" principle will be replaced by some "specialty principle" pre-empting the lower level agreements more closely adapted to the condition of a specific undertaking over the higher level rules.

Generally, Article 6 (2) ESC is not about policy choices between potential principles for organizing labour relations in states parties. However, it clearly establishes the preference for regulating terms and conditions of employment by means of collective agreements. Additionally, Article 6 explicitly obliges states to ensure the effective exercise of the right to collective bargaining. In essence, this means that collective regulations need specific conditions for effective operation in practice, so that a state may not aim at weakening the application of agreements. Where the political decision is taken to facilitate the adaption of collective agreements to the economic circumstances of an individual company, the European Committee of Social Rights may not challenge this kind of decision as such[73]. States nevertheless must guarantee that collective agreements remain able to regulate terms and conditions of employment. Once they do this by following the protective approach to collective bargaining by establishing a prevailing competence of higher level collective agreements, usually no additional safeguards will be necessary[74]. Where, however, central entitlements such as wages and working time established by higher level agreements can be subject to downgrading by lower level agreements, procedural safeguards will be necessary for guarding against abuse. The mere fact that lower level agreements establish less favourable employment conditions may indicate an insufficient bargaining power of the lower level unions. Article 6 (2) ESC would then demand establishing regulations to prevent any abuse of the collective bargaining me-

[73] European Committee of Social Rights, Conclusions XIV, Spain, Article 6 (2).
[74] European Committee of Social Rights, Conclusions 2010, Slovenia, Article 6 (2).

chanism by playing off the weaker against the stronger level. States will have to demonstrate that safeguards are operating effectively to ensure that bargaining partners operate on equal footing.

Similar concerns apply to regulations replacing trade unions in collective bargaining by alternative workers' representatives, usually at company level. Even though Article 6 (2) ESC does not explicitly refer to trade unions as the workers representatives in collective bargaining, the very structure of Article 6 shows that collective bargaining shall take place in the shadow of potential collective actions where labour disputes cannot be solved by other means. Actors of collective bargaining as established under Article 6 should therefore be workers' representatives competent to initiate a strike in case the bargaining process fails. This, again, relates to the protective function of collective bargaining: a works council or let alone an association of persons at company level will not be taken seriously in a bargaining process when lacking means of pressure in case the employers' side is not ready to arrive at a compromise. Therefore the very purpose of a right to collective bargaining, replacing the weak bargaining power of an individual worker vis-à-vis his employer by the stronger bargaining power of a collective representation, is endangered by vesting such power to representatives with no means of enforcing their constituency's demands[75]. Even though Article 6 (2) ESC is in principle neutral to a states' way of regulating collective labour relations, replacing trade unions in the bargaining process with institutions not functionally equivalent in effectively representing workers' interests would be considered highly questionable.

5. CONCLUSIONS

Collective bargaining as an instrument for wage determination at national level was one of the main targets for restrictions by EU anti-crisis measures. The effect of such interventions is questionable even in economic terms, let alone

[75] Compare likewise the highly critical remarks of the mission of ILO-Experts concerning implementation measure to the Greek follow-up MoU, in: ILO, Report on the High Level Mission to Greece (Athens, 19-23 September 2011) para. 304: "the High Level Mission understands that associations of persons are not trade unions, nor are they regulated by any of the guarantees necessary for their independence. The High Level Mission is deeply concerned that the conclusion of "collective agreements" in such conditions would have detrimental impact on collective bargaining…".

when seen from a social rights perspective: the EU is currently unable to actively protect collective bargaining due to the lack of competencies enshrined in the TFEU. In earlier years this was partly compensated by competencies at national level, allowing each Member State to effectively pursue their respective national labour relations system. In the course of the ongoing economic crisis, the EU changed its approach: instead of refraining from interfering with national level systems, EU institutions massively demanded, by means of financial regulation, that states should decentralize collective bargaining and cut the protective tools strengthening the application and enforcement of collective agreements. In the understanding of the CJEU, however, the resulting implementation measures at national level remain by and large outside the scope of the Fundamental Rights Charter. The potential for effectively controlling possible violations of social rights under such circumstances deems weak.

The ESC-Collective Complaints Procedure, however, provides ways and means for social partners both at national and at EU level to contest national measures violating social rights. States having accepted the Complaints Protocol and the relevant ESC provisions, the latter of which indeed is true for most EU member states concerning collective bargaining, may be held responsible for infringements. Obligations for Member States resulting from EU regulatory instruments represent no automatic justification for violating obligations states have accepted under the Social Charter, – and the same applies to obligations resulting from CJEU decisions. It is for the states to actively ensure that they are able to fulfil their respective international obligations effectively and in parallel, unless the rather narrow preconditions for exemptions from applying the ESC can be met. Even though there are currently no concrete decisions under the collective complaints procedure available on national anti-crisis measures restricting collective bargaining systems, the interpretation of the Social Charter as developed under the reporting procedure allows for extracting general principles which will be applicable during a collective complaint, as well. Most of the measures currently used for restricting the national industrial relations systems will not easily be justified against those standards. The EU therefore would be well advised to embrace collective bargaining much rather than limiting it.

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SOCIALNE PRAVICE V EVROPI: ALI LAHKO EVROPSKA SOCIALNA LISTINA PONUDI ALTERNATIVE VARČEVANJU?

Monika Schlachter*

POVZETEK

Kolektivna pogajanja kot instrument, s katerim se določajo plače na nacionalni ravni so bila eden od glavnih ciljev proti kriznih omejitvenih ukrepov Evropske unije. Njihov učinek je vprašljiv celo na gospodarskem področju, še bolj pa z vidika socialnih pravic: trenutno EU zaradi pomanjkljivih kompetenc določenih v PDEU ni v stanju aktivno zaščititi kolektivnih pogajanj. V preteklosti se je to deloma kompenziralo s pristojnostmi na nacionalni ravni; države članice so smele samostojno urejati svoj nacionalni sistem urejanja delovnih razmerjih. V času sedanje ekonomske krize je EU spremenila svoj pristop: namesto da bi se vzdržala vmešavanja v sisteme posameznih držav članic, njene inštitucije preko finančnih regulativ odločno zahtevajo, da države članice decentralizirajo kolektivna pogajanja in zmanjšajo zaščitne ukrepe, ki so omogočali uporabo in izvajanje kolektivnih pogodb. Po razumevanju Sodišča Evropske unije pa iz tega izhajajoče izvajanje ukrepov na nacionalni ravni na splošno ostaja izven domene Listine o temeljnih pravicah. Potencial za učinkovito nadzorovanje morebitnih kršitev socialnih pravic je v takšnih pogojih slab.

Vendar pa postopek kolektivne pritožbe v okviru Evropske socialne listine socialnim partnerjem na nacionalnem in na evropskem nivoju nudi načine in sredstva za izpodbijanje ukrepov, ki kršijo socialne pravice. Države, ki so sprejele protokol pritožb in ustrezne določbe Evropske socialne listine glede kolektivnih pogajanj – slednje je storila večina držav članic – so tako lahko tudi odgovorne za morebitne kršitve. Obveznosti držav članic, ki izhajajo iz zakonskih instrumentov EU ne predstavljajo avtomatične upravičenosti do kršenja obveznosti, ki so

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jih države sprejele v zvezi s socialno listino; enako velja za obveznosti, ki izhajajo iz odločitev Sodišča Evropske unije. Države članice EU morajo same aktivno zagotavljati učinkovito izpolnjevanje svojih mednarodnih obveznosti, razen če je možno zadostiti precej ozko določenim predpogojem za izjeme glede upoštevanja Evropske socialne listine. Čeprav trenutno na nacionalni ravni v zvezi s proti kriznimi ukrepi, ki omejujejo sisteme kolektivnih pogajanj še ni nobenih konkretnih odločitev v okviru kolektivnega pritožbenega postopka, pa je iz razlage socialne listine, kot je bila oblikovana v postopku poročanja, možno razbrati splošna načela, ki se bodo uporabljala tudi v primerih kolektivnih pritožb. Večine ukrepov, ki se trenutno uporabljajo za omejevanje nacionalnih sistemov, ki urejajo industrijske odnose glede teh standardov ne bo enostavno utemeljiti. Dober nasvet Evropski uniji bi bil, da raje sprejme kolektivna pogajanja kot pa da jih omejuje.