THE ROLE OF THE EUROPEAN COMMITTEE FOR SOCIAL RIGHTS (ECSR) IN THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS. INTERACTIONS WITH ECHR JURISPRUDENCE

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Abstract

Upon its foundation in 1961, the European Committee for Social Rights (ECSR) was meant to be a counterpart of the European Court of Human Rights (ECHR) in the field of economic, social and cultural rights, i.e. an international body of control regarding the manner in which states understand to respect human rights. But, given the fastidious contents of ESCR and for political reasons, ECSR has never enjoyed the same guarantee mechanisms or level of accessibility that have characterized ECHR. The aim of this study is to show that, in spite of such flaws, the ECSR has proven its efficiency in the European system for the protection of human rights. The analysis of its decisions, as well as their interactions with the ECHR jurisprudence proves that the flexible and protectionist decisions of this jurisdictional body command authority and their coercive nature is recognized at national level. Moreover, this body has an important influence on ECHR. The jurisprudential interpretations of ECSR may also serve as reference points for national users (lawyers, magistrates, organizations), which makes it even more necessary to know and understand it at this level.

Keywords: *economic, social and cultural rights (ESCR), European Court of Human Rights (ECtHR), European Committee of Social Rights (ECSR), European Social Charter (revised) (ESC (r)), collective claims (CC).*

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I. The European system of human rights

The European system of human rights gives rise, on a regional scale, to the UN dual and asymmetric mechanism for human rights protection (different legal treatments of civil and political rights – CPR – and ESCR, the first benefitting from enhanced warranties) in its specific manner, yet characterised by an increased degree of judicial effectiveness and through a more coagulated political will of the Member States to comply with their obligations[2]. Signed in Torino on 18 October 1961, the European Social Charter (ESC) was intended to be a social replica of the European Convention of Human Rights. The latter, that had been entered into more than a decade before[3], is the first treaty agreed upon within the Council of Europe and had been conceived – in the same spirit as the Universal Declaration of Human Rights – as a reply to war experience and as an antidote to totalitarianism; protected rights have a civil and a political nature, and although they do not come out in large numbers, the warranty system is however really impressive: for the first time natural persons may have recourse to a genuine international jurisdictional instance to complain against their own state for the breach of the obligations undertaken by the Convention and, furthermore, in view of obtaining a "fair satisfaction"[4] for the incurred prejudice. Moreover, the

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[2]Space pattern and the subject hereof do not allow a thorough analysis of the efectivness of the onusian mechanisms of protection of human rights. It is worth mentioning, however, that the duties of the two committees do not have a jurisdictional nature, their decisions are not binding, and their enforcement is ensured rather by political leverages (please see also Raluca Miga-Beşteliu, *Drept Internaţional. Introducere în dreptul internaţional public,* ALL Beck, Bucharest, 2003, p. 202, 224). For a more detailed analysis, please see also Eliette Gondoin, *"L'efficacité du Pacte International relatif aux Droits Civils et Politiques en droit interne face aux mécanismes de droit international et au régionalisme de la protection des Droits de l'Homme",* available on: http://m2bde.u-paris10.fr/content/l%E2%80%99efficacit%C3%A9-du-pacte-international-relatif-aux-droits-civils-et-politiques-en-droit-interne (accessed: 25.10.2013)

[3]*Convention for the Protection of Human Rights and Fundamental Freedoms* was signed at Rome, on 4 November 1950, and entered into force on 3 September 1953 (13 years prior to the enacting of ICPCR and ICESCR!)

[4] Art. 41 of the Covenant.

court decision is binding and has a direct effect on the internal order of the Member State[5], while its enforcement is supervised by the Ministries Council[6].

The European Social Charter lacks such warranties and it was not even adopted as easily and quickly. It required almost ten years[7] to complete and, symmetrically opposite to ECHR, it distinguishes itself especially through the number of the protected rights (economic and social), and less through the control mechanism. A sole mechanism of control was established initially, through the system of the *reports*[8] submitted by each State to the European Committee of Social Rights (hereinafter ECSR), which, based on the reports, issues *conclusions* on the *degree of compliance* of national circumstances with the provisions of the Charter. ECSR's *interpretation* is binding for the respective State – the Charter itself, despite its name, is not a mere declaration of principle, but an *international convention mandatory* for the states which ratified it – yet there are no *specific legal leverages* for the control of state compliance with the conclusions of ECSR.

It was only half a century later (November 1995) that an additional Protocol[9] established the procedure of the *collective claims*[10], a quasi-judicial system which mitigates the Charter's mechanism of control and entitles NGOs, trade unions or employers organizations with consultative status with the Council of Europe, as well as trade unions and employers organizations that are representative at national level, according to the legislation of the respective State, to claim potential non-compliance by the Member States with the obligations undertaken by the Charter. However, the claims may not refer to singular cases as, as may be noted, they cannot be submitted by national non-governmental organizations (other than representative trade unions and employers organizations).[11] As regards ECSR decisions, they are binding for the State concerned, but similarly with the reports, no mechanism to impose the enforcement is established.

These structural imperfections (the conditioning of the access procedure, together with the weakeness of the control mechanism of the execution) do not, however, cast away the *jurisdictional* trait of ECSR[12]. The Charter is a legal text, the duties which derive from it are 'legal commitments'[13], and as long as its role is to analyze the compliance of the states' behaviour along with the duties which are given to them by the text of the treaty, ECSR remains a jurisdictional body (in the compelling precise *'juris dictio'* manner – to interpret the law, to explain it and, finally, to impose it)[14].

The collective complaints settlement procedure itself features the criteria of a jurisdictional procedure: its premise is a conflict, it is contradictory, with the possibility of the hearing of the representatives of the parties[15] or expressing a separated opinion[16] and it ends with a decision. And

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[5]*Vermeire v. Belgium,* claim no. 12849/87

[6]Significant differences compared to *reccomendations* of onusian Committe of Human Rights (CHR). For a detailed analysis of the CHR effectivness please see also și Proff. Yuval Shany, *The Effectiveness of the Human Rights Committee and the Treaty Body Reform,* available on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223298 (accessed: 25.10.2013).

[7] Nicolae Voiculescu, *Drept comunitar al muncii,* Ed. Wolters Kluwer, 2009, p. 82 and subseq.

[8] This system was nuanced during time. At present, the reports are elaborated depending on 4 topics categories. For details, please see Nicolae Voiculescu, *op. cit.,* p. 93-94, as well as http://www.coe.int/t/dghl/monitoring/socialcharter/ReportCalendar/CalendarNRS_fr.asp (accessed: 25.10.2013)

[9] During time, the Charter was completed by three additional protocols (1988, 1991, 1995). Therefore, on 3 May 1996, Revised European Social Charter (hereinafter referred to as RESC) was enacted, replacing the 1961 Charter and including the amendments thereto, as well as new rights. The Charter set forth an unusual ratification system, which allows a certain margin of option for the signatory States by accepting a core of mandatory rights to which a set of other rights is added. This ratification mechanism reflects, in its turn, political sensitivities arising from ESR. Under Law 74/1999, Romania ratified 17 articles, namely 65 numbered paragraphs. For details please see Voiculescu Nicolae, *ibidem,* p. 84.

[10] A system similar to the one existing within the International Labor Organization.

[11] The opportunity to allow the access of national NGOs to the procedure of collective claims is ensured by the Charter, but only to the extent that the States which ratified the additional Protocol dated 1995, execute an explicit statement in this respect. So far, only Finland expresses the political will to allow the Finish non-governmental organizations to submit ECSR collective claims.

[12] See also the speech of ECSR's President, Luis Jimena Quesada, at the *Collective Reports Colloquy* held at Robert Schuman Strasbourg University, in 26-27 sept. 2008.

[13]See also art. C from ESC(r), or the third (3rd) part of ESC(r) Annex / Addendum (*"…The Charter includes legal commitments with international color"*).

[14] As a matter of fact, all ECSR members own a higher juridical training (a list with their names is attainable online at: http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/members_EN.asp, last access: 25.10.2013).

[15]Art. 7.4 from The Additional Protocol from 1995.

the interpretation methodology applied by ECSR systematically relies upon *the specific rules and techniques of the juridical exegesis*[17], but also upon the *specific interpretation from the subject of fundamental rights* – the Charter equally represents a treaty of protection of the human rights – namely: the effectiveness of the protected rights (*'l'effet utile'*), the most advantageous implementation (*favour libertatis*), evolution (as opposed to regressiveness), the progressive and dynamic interpretation, conditioning of the national margin of appreciation etc. [18]

It should also be noted that the differences between international mechanisms for monitoring the enforcement of decisions taken by the two bodies (ECtHR and ECSR) - resultants, in fact, of a political choice - is not reflected on the national level in an equivalent manner. Because the *compulsoriness of interpretations and resolutions* provided by the ECtHR and ECSR imposes itself *with the same authority* in front of the national judge, of the state and its authorities, beyond the diversity of *enforcement* procedures (more consistent in the case of ECHR)[19].

As to the case law activity of ECSR, it is defined by *two main directions:* first, the willpower of strengthening the economic, social and cultural rights (ESCR) by means of the case law and extending their protective span as much as possible[20] and, on the other hand, a constant reference to ECtHR's case law, which reflects not only ECSR's concern for maintaining the harmony and coordination of both jurisprudences, together with avoidance of conflicting solutions[21], but also the need of optimisation of its own techniques, through exploiting the rich elder sister's experience and – last, but not least – the consolidation of its own credibility and persuasion through the usage of certified and established methods.

Under this second aspect (the reference to ECtHR's practice[22]), some points are to be noted:

- the Strasbourg Court is a constant source of inspiration for ECSR – fact which can be seen both in the large number of ECtHR's case law references[23] and in the constant usage of common legal terminology specific to the fundamental rights subject[24];
- 'the reverence' towards ECtHR does not, however, have as an effect a simple case law mimetism and does not deter ECSR, when the case asks for it, to also pronounce solutions which are not always in accordance with ECtHR's[25] decisional orientation;

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[16] Art. 34 from ECSR Regulation.

[17] the traditional ways of legal interpretation (see also Art. 31-33 from The Vienna Convention on the Law of Treaties, 1969): logical, grammatical, theological, historical, systematic and authentic interpretation (the will of the legislator).

[18] Some of these can also be clearly found in the Charter's text – for instance, the useful effect (the majority of the articles begin with the phrase *'with the view to ensuring the effective exercise of the rihrt to…'*) or the more favourable treatment (art. H ESCr).

[19] See also *La charte sociale a 50 ans. Réflexions de l'intérieur autour d'un anniversaire…",* interview with the Chairman of ECSR, prof. Luis Jimena Quesada, available at http://www.raison-publique.fr/article501.html (last accessed on 25.10.2013).

[20] sometimes even beyond the literal boundaries of the Charter – see *infra*, note 34.

[21] These interferences are always possible taking into account that, although invested with ensuring the civil and political rights's protection, many times the economic, social and cultural rights (ESCRs) have been, in their turn, driven under the jurisdictional control of ECtHR. This seeming extension of competence can take place in many ways. On one hand, *via* the principle of *the indivisibility of human rights*; on the other hand, through direct control, *ratione materiae*: some of the rights protected by the Convention, also having social connotations, their legal protection is doubled. E.g.: art. 4 from ECHR meets art. 1 paragraph. 2 from ESC(r) (forbidding forced labour); art. 8 ECHR (the right to privacy)/ art. 7, 15-17, art. 31 ESC(r) (the right for protection of family, children, people with disabilities, the right of dwelling); art. 11 ECHR/art. 5, 6 ESC(r) (union rights); art. 2 PA 1 from ECHR/art. 17 ESC(r) (right to education) etc.

[22]Here we consider the collective claims case law.

[23]References to ECtHR jurisprudence are nearly ubiquitous in the resolutions of ECSR. For ex.*: QCEA v. Greece* (CC 24, paragraph 22), *AIAE v. France* (CC 47, paragraph 52), *ERRC v. Greece* (CC 50, paragraph. 20), *CFE-CGC c. Franței* (CC 16, pgf. 30), *OMCT c. Irlandei* (CC 41, pgf. 63) and many others ... References of ECHR to the jurisprudence of ECSR / ESCr (examples): *Zielinski et al. v. France, Stec et al. v. United Kingdom,Vitiello v. Italy*, *Campagnano v. Italy* etc.. ECtHR is not an exclusive case law guiding mark though, other control bodies –regional or interregional- serving also as benchmarks for ECSR's decisions. Ex.: the Interamerican Court, The African Board of human and nations rights, Luxembourg Court (the decision / 6th of Feb. 2007 on CC 30/2005, pgf. 196, or the decision / 5th of Dec. 2007 on CC 39/2006, pg. 65-68).

[24]"living instrument", "effective rights", "evolutionary interpretation", "margin of appreciation" etc.

[25]ECSR aims to realize an *autonomous synergie* with ECtHR's jurisprudence, and not an *automatical* one (according to President CEDS, Luis Jimena Quesada, the report presented at the Colloquium on Collective Complaints submitted to Robert Schuman University of Strasbourg in September 26 to 27. 2008).

- in those situations defined by contextual similarity, it can be noted the ECSR's tendency towards the most favorable solutions regarding the protection of the economic, social and cultural rights, together with – a truly remarkable fact – ECtHR's availability of inspiring from the friendlier case law of ECSR. And this availability may transform, in some cases, the initial discrepancies into gathering points[26];
- there are also situations in which ECSR complements ECtHR's activity, by delivering solutions in those cases in which the latter choses to adopt a judiciary *self-restraint*.[27]

As for ECSR's asserted predilection to actively maximize the protection of economic, social and cultural rights (ESCR), this can be accomplished by two means:

- on one hand, through the increasing of the *collective complaints procedure*'s efficiency, in the sense of broadening the degree of *accessibility.* ECSR has constantly proved, for instance, that *'it is not the Protocol* (from 1995 – o.n.), *nor ECSR Regulations that impose the depletion of internal ways of appeal'* with the aim of accessing the collective claims procedure. [28] This type of approach automatically allures the relativization of both *res judicata* and *non bis in idem* principles: the existence of a previous national decision of abuse sanctioning does not preclude ECSR from performing its own duties in the same matter[29], just like the previous analysis by the ECSR – within the boundaries of reports procedure – of a situation does not preclude the acceptance of a collective claim having the same goal and being intented against the same High Contractant Party. [30]
- The second manner of action targets *the core of protected rights*, together with their *protection area.* The legal specific human rights interpretation techniques are being boldy and creatively used by the ECSR, aiming to give maximum of consistency to the principle of the *effet utile* of the rights protected by the Chart. This is how, for instance, *the margin of appreciation* (of which the states benefit in regard to certain rights) is being evaluated in a restricted manner, with the close observation of the *proportionality* and the *oportunity* of state's intervention.[31] Terms like *living instrument, dignity, equality, solidarity*[32] doubled by the enforcement of the *favor libertatis* principle and wisely administered through the *teleological* interpretation technique are becoming strong reasoning levers in supporting (sometimes) extremely bold[33] solutions favouring a strong assertion of rights.

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[26] Some examples: the Court of Strasbourg has confirmed in *Glasenapp* and *Koziek*, the practice of German authorities of dismissing some persons from their position as teachers on the ground of Nazi(ie communist) beliefs which they had, invoking the obligation of loyalty to the State and the Constitution - even in cases where the plaintiffs did not understand to express their beliefs during exercising their job. However, ECSR deemed that such practice harms the right to freely exercise a profession. Subsequently, the Court, inspired by the ECSR, revised its position in the case *Vogt v. Germany* through a highly controversial decision (but with only one dissenting opinion). Or: in relation to trade union freedoms, the Court admitted, in an initial phase, the "closed-shop" clause (*Sibson v. the United Kingdom* case no. 14327/88, *Young, James and Webster v. UK* cases no. 7601/76, 7806/77) which, instead, in the case *SN v. Sweden* (RC 12/2002), ECSR considered as unacceptable. Subsequently, the Court incorporated this approach in its jurisprudence, in the case *Sørensen et Rasmussen v. Denmark* (cases no. 52562, 52620/99) and in *Demir and Baykara v. Turkey* (cases no. 34503/97) where the Court expressly refers to ECSR jurisprudence.

[27]For instance, ECtHR found inadmissible, *rationae materiae,* a complaint reasoned upon Art. 8 of the Convention (the right to privacy) regarding the lack of special architectural handrails made for enabling the access of disabled people (*Botta c. Itally* 1998). ECSR has pronounced, in return, an important decision on the matter (in particular, the protection of autistic persons) in CC 13/2012.

[28] The decision from 10th of Oct 2005 on the admissibility of CC 31/2005 see also the decision from 7th of Dec. 2004 regarding the admissibility of CC 26/2004).

[29] The Decision pronounced in CC 6/1999.

[30]The Decision from 10th of March 1999 on the admissibility of CC 1/1998.

[31] For instance, in the decision from the 16th of Oct 2006 on CC 32/2005, ECSR states that the ban of the right to strike, forced by the Bulgarian law upon the civil servants, although being thought of as justified out of public order reasons –and, therefore, rightful under Art. 31 ESC and G of ESCr – is not proportional, in return, as long as it is applicable to *every* civil servant, regardless of responsibility or mission (p. 46-47).

[32] The so-called *'jurisprudence of values'*, according to ECSR's President, prof. Luis Jimena-Quesada (*supra*, note 12).

[33] A relevant example is an extremely debatable solution (the decision from 7th of Sept. 2004, pronounced in CC 14/2003 – *The International Federation of Human Rights Leagues c. France*) where ECSR found the violation of Art. 17 of the Charter, being given the exclusion of the illegal immigrant's children (*'les sans-papiers')* from the advantages of the social insurance system (their protection being ensured only after a certain period of presence in the territory). In fact, this solution conflicts with the Charter's text which, in paragraph 1 of the Annex, specifically mentions, *inter alia*, that art. 17's protection does not include illegal immigrants.

II. Conclusions

The ECSR's case law indicates that we are in the presence of a human rights' protection body which has understood to take its prerogatives very seriously, despite of its lack of authority which has placed him from the very beginning in an unfavorable position compared to ECtHR.

Far from abandoning itself to 'inferiority complexes' ECSR has known, on the contrary, how to turn its weaknesses into strengths: far from political tensions, apparently powerless as of control capacity and enforceability, ECSR has developed a bold and professional jurisprudence mainly oriented towards getting the most out of economic, social and cultural rights[34]. This case law has its roots not only in the creative managing of the legal and judicial tools of interpretation of the Chart, but also in a rich dialogue with the much more experienced Strasbourg Court. Regarding the latter, ECSR displays a well-suited blend of respect and autonomy, which concluded in the progressive ECSR assertion as an equal interlocutor of ECtHR. Furthermore, ECtHR, in its turn, has understood to take itself inspiration from the Committee's case law.

The apparent weakness of ECSR control mechanisms must not be misleading. The international law of human rights is, in fact, a branch of the public international law. However, in the complex and delicate equation of the relationships of public international law, the effective enforcement of decisions taken by an international court is less dependent on the existence of a sophisticated control system, but rather on the *political will* of the State concerned to submit, or that of states interested in exercising political pressures within international bodies upon the guilty state. Nevertheless, in the European regional system, this common political will really exists and maybe it explains to a greater extent the success of ECtHR than any other argument. And the same political will is the one to ultimately determine the imposing force of ECSR decisions[35].

Other important advantages of ECSR's case law reside in its rather *preventive* character, unlike ECtHR decisions'[36] predilect *reparatory* character, as well as in the possibility of *compensating,* in certain situations, the *self-restraintment* of the Strasbourg Court.

All these elements draw an encouraging for ESCR's beneficiaries, collective complaints becoming a generous option, always handy and more inviting as it is not subject to the limitation of domestic remedies and, in addition, it addresses to a qualified and benevolent "ear" (ECSR). Things obviously are less reassuring for the state, as a debtor of ESCR, which, on the supposition of some contradictory resolutions, it may certainly find itself in a disagreeable situation.[37] In these cases, applying the *favor libertatis* principle should be a legitimate option for the national Judge. It is needless to say that EU's accession to the European Social Charter is the most desirable alternative.

Beyond the subsistence of a certain lack of authority, ECSR's case law stands, foremost, for an educative source of inspiration both for international human rights protection courts and for the lawyer and national Judge. Through the dissemination effect of the praetorian dialogue between these courts and through its inherent vigour, this jurisprudence brings a notable tribute to raising the standards in ESCRs area as well as polishing the European social model.

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[34] which does not prevent ECSR from choosing the judiciary *self-restraint* in some cases (see RC 25/2004 or RC 37/2006).

[35] An example: as a result of an ECSR report since 1990 (Committee of Independent Experts at that time), Spain changed immediately its poor legislation on compulsory education period. The Committee had noted a gap in the Spanish law, between the minimum age for employment (16 years) and the maximum age for compulsory education (14 years). It remained an uncovered interval of 2 years, where young people could not attend school, nor could employ themselves. Spain has complied immediately and amended the law in order to establish compulsory education up to the age of 16. Instead, Belgium needed 11 years to comply with a decision of the ECtHR concerning the abolition of discrimination existing in the Belgian legislation on children born out of wedlock (*Marckx v. Belgium*, case no. 6833/74). In case of certain collective complaints, partial enforcement occurred even during the course of proceedings (collective complaints no. 33/2006, *Mouvement International ATD-Quart Monde v. France* and no. 39/2006, *FEANTSA v. France*) (see interview cited at the previous footnote). Of course, things are not always equally promising, but such examples show that, in spite of the lack of control ECSR is, however, taken seriously.

[36] See also Luis Jimena-Quesada in the Report presented at the Colloquium on Collective Complaints submitted to Robert Schuman University of Strasbourg in September 26 to 27, 2008.

[37] Interferences between ECtHR, CEDS and CJUE's jurisprudence are almost unavoidable. It is easy to imagine collisions in common areas such as social taxes and benefits, health care, the right to work - areas available to CJUE *via* non-discrimination on the basis of nationality, to ECtHR *via* Art.1 from the Additional Protocol 1/ECHR, or to CEDS on the basis of several provisions from CSEr (Art. 2, 12, and 13).

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